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## Excuses in Exile

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## EXCUSES IN EXILE

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Anders Kaye\*

### INTRODUCTION

Suppose that I have intentionally killed another person and that I have done so without any justification. At first glance, it appears that I am guilty of murder, a very serious crime. Since I am guilty of this very serious crime, the state may inflict a very serious punishment on me—at least many years in prison, if not my whole life or the death penalty.

But suppose that one of the following is also true in my case:

- (A) At the time that I killed my victim, I suffered from a mental disease and, as a result, lacked the substantial capacity to appreciate the wrongfulness of my conduct.
- (B) Throughout my childhood and into my adolescent years, my father physically and sexually abused me, leaving me significantly more prone to violence than I would otherwise have been.

Both A and B are ethically and interpersonally important facts. Both are likely to inspire some combination of sympathy, empathy, and compassion. Both suggest that my story is not *just* the story of a murderer and that there is a complicated explanation for my crime.

Nevertheless, A and B have very different implications for my case. Because A shows that I am legally insane (in some jurisdictions) and insanity is an excuse, A blocks criminal conviction. B shows that I have been exposed to criminogenic formative influences,<sup>1</sup> and exposure to criminogenic formative influences is not (in itself) excusing on traditional accounts of excuse, so B will not bar my conviction. B may still play some role in my case: after I am convicted, I may have the opportunity to tell the sentencer about B,

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1. "Criminogenic formative influences" means experiences that influence the developing psychology, character, values, beliefs, attitudes, or desires of the person who experiences them in such a way that that person becomes more likely to engage in criminal conduct. For the sake of the example, this Article assumes that extended physical and sexual abuse during childhood has this sort of influence.

and the sentencer may determine that B is a mitigating fact and reduce the punishment in my case.<sup>2</sup> B will not, however, have any bearing on my guilt or on the range of punishments the law authorizes my sentencer to impose.

In the universe of sympathetic and explanatory facts about wrongdoers, then, some are excusing and others are only mitigating, and the law treats the former differently than the latter. But how do we tell which facts are which? Why is insanity an excuse, while criminogenic formative influences are only mitigation?

On a common view, the answer is straightforward. We excuse those who cannot fairly be held responsible for what they have done.<sup>3</sup> So long as we have a theory of responsibility, then, we can distinguish excusing facts from mitigating ones. Facts that make it unfair to hold a person responsible for his wrong are excusing facts. Facts that do not are, at most, mitigating.

Unfortunately, this seemingly straightforward answer glosses over a hard problem in the relationship between excuse and mitigation. Excuses and mitigations trigger many of the same reactions in us: sympathy, empathy, and compassion. They help us understand why a wrongdoer did what she did. They induce us to stand imaginatively in her shoes and to identify more deeply with a wrongdoer who we might otherwise see as alien and inexplicable.<sup>4</sup> Not surprisingly, then, some things regularly classified as mitigations can look and feel a lot like excuses. (One persistently debated example is “Rotten Social Background”<sup>5</sup>). Some switch from excuse to mitigation depending on who is picking. For example, some legal systems treat provocation as a partial excuse, others as mitigation.<sup>6</sup> Likewise,

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2. For example, the American Law Institute’s 2006 draft Model Penal Code indicates that “the personal characteristics of offenders” may be mitigating “when indicative of circumstances of hardship, deprivation[,] [or] vulnerability.” MODEL PENAL CODE § 6B.06(4) (a) (Proposed Official Draft 2006). See Allan Manson, *The Search for Principles of Mitigation: Integrating Cultural Demands*, in MITIGATION AND AGGRAVATION AT SENTENCING 40, 47–48 (Julian Roberts ed., 2011).

3. See, e.g., J.L. Austin, *A Plea for Excuses*, 57 PROCEEDINGS ARISTOTELIAN SOC’Y 1, 2–3 (1956–57) (“[W]e admit that it was bad but don’t accept full, or even any, responsibility.”); 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 91 (1984); GEORGE FLETCHER, RETHINKING CRIMINAL LAW 798 (1978); MICHAEL MOORE, PLACING BLAME 548 (1997).

4. Some theorists hold that excuse and identification are opposed, rather than linked, but see, Anders Kaye, *Objectifying and Identifying in the Theory of Excuse*, 39 AM. J. CRIM. L. 175 (2012), for an argument supporting a deep connection between excuse and identification.

5. Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985).

6. The provocation defense reduces murder to manslaughter when the killer acted in the heat of passion due to adequate provocation. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 524 (5th ed. 2012). While scholars persistently debate the nature of the provocation defense, the most common view is that the defense is a partial excuse as passions triggered in certain ways can diminish—but not entirely defeat—the actor’s responsibility.

duress is normally an excuse, but may be treated as mitigation in some trials under international criminal law.<sup>7</sup> Still other mitigating facts seem to live on the same continuum as an excuse, making categorical characterizations seem artificial. Examples include youth not qualifying as legal infancy, mental illness not rising to the level of legal insanity, and passion-inducing provocations not adequate for the partial excuse of provocation.<sup>8</sup>

So what, then, is the relationship between excuse and mitigation? Are mitigations weak, partial, incomplete, or near-miss excuses? Are they facts that elicit compassionate or empathetic<sup>9</sup> reactions for reasons having nothing to do with excusing?<sup>10</sup> Are they something else entirely? To date, mitigation has not been well theorized,<sup>11</sup> and, as a

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Arie Freiberg & Felicity Stewart, *Beyond the Partial Excuse: Australasian Approaches to Provocation as a Sentencing Factor*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 102, 104 (Julian Roberts ed., 2011). Theorists often conceptualize provocation as a mitigating fact. For example, many discussions that explicitly grant provocation the status of a defense nevertheless also refer to it as mitigating. See, e.g., DRESSLER, *supra*. Indeed, the conceptual ambiguity is so difficult that while American jurisdictions and England treat provocation as a partial defense, a number of other legal systems rooted in the same traditions have recently stripped provocation of its status as a defense and have decided to treat provocation as a mitigating factor only at sentencing. Freiberg & Stewart, *supra*, at 103; Warren Young & Andrea King, *Addressing Problematic Sentencing Factors in the Development of Guidelines*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 208, 220–21 (Julian Roberts ed., 2011) (discussing New Zealand’s approach to provocation, which treats provocation as a mitigating factor).

7. See Olaoluwa Olusanya, *Excuse and Mitigation Under International Criminal Law: Redrawing Conceptual Boundaries*, 13 *NEW CRIM. L. REV.* 23, 52–58 (2010) (reviewing cases in which courts struggled with whether duress was (even) mitigating where defendants participated in mass murders under pressure or threats from superiors).

8. Regarding the potential mitigating significance of such facts, see William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 247 (Julian Roberts ed., 2011) (“The youth of the offender in certain cases can mitigate a retributive sentence based on a determination that a juvenile possesses a decreased level of culpability”) (emphasis added); Stephen Morse, *Diminished Rationality, Diminished Responsibility*, 1 *OHIO ST. J. CRIM. L.* 289, 296 (2003) (“Lesser rationality or control problems . . . may be considered . . . as a matter of discretion at sentencing.”); E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 *J. Crim. L. & Criminology* 147, 152, n.21 (treating vulnerability to harm in prison due to mental illness not qualifying for insanity defense as mitigating factor).

9. Lovegrove notes that the general public may be more willing to mitigate sentences for offenders when they “see offenders as fellow beings, rather than as, in effect, different and less” and that society may be more inclined to see offenders in this way than popular wisdom has recognized. Austin Lovegrove, *The Pernicious Impact of Perceived Public Opinion on Sentencing: Findings from an Empirical Study of the Public’s Approach to Personal Mitigation*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 188, 199 (Julian Roberts ed., 2011).

10. Manson, *supra* note 2, at 42 (arguing that the “legitimate sympathy” of the sentencer may drive at least some mitigations).

11. This is a common lament in recent work on mitigation. See, e.g., *id.* at 40; ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 156 (5th ed. 2010); see also Young & King, *supra* note 6, at 225. Indeed, as Jacobson and Hough point out, two recent and substantial English legislative efforts to provide a framework for consideration of sentencing factors noticeably failed to offer systematic principles regarding mitigation. Jessica Jacobson & Mike Hough, *Personal Mitigation: An Empirical Analysis in England and Wales*, in *MITIGATION AND*

result, there is no easy or obvious account of its relationship to excuses.<sup>12</sup>

This Article suggests that scrutinizing the relationship between excuse and mitigation reveals that the distinctions are less sharp than currently supposed. Indeed, the category “mitigation” sometimes plays an illegitimate role in accounts of responsibility and excuse, serving as a catch-basin for facts that elicit excusing intuitions but do not fit harmoniously into those accounts of responsibility and excuse. In this light, such mitigations appear as the remainders of the unbalanced equations<sup>13</sup> of responsibility theory, and the realm of mitigation becomes the unconscious of the criminal law—the hidden and anarchical place to which we exile unwanted but inescapable truths about criminality.

Part II of this Article begins with a basic taxonomy of the facts at issue, giving examples of facts that traditional law and theory treat as excusing and those they treat as mitigating. It shows why categorizing facts as excusing or mitigating matters in the legal setting, laying out the very different ways the criminal law handles excuses

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AGGRAVATION AT SENTENCING 146, 163 (Julian Roberts ed., 2011). Likewise, a recent effort in New Zealand to specify aggravating and mitigating factors “[p]rovides no guidance as to why a factor aggravates or mitigates.” Young & King, *supra* note 6, at 212. See also Olusanya, *supra* note 7, at 52–58 (2010) (exploring the uncertain boundary between duress and coercion in international criminal law).

Jacobson and Hough make the related observation that sentencers may not theorize about mitigation either. The authors interviewed forty sentencers about the factors considered during sentencing. They were “surprised” to find that “many of [their] respondents were hesitant or reluctant to generalize about the kinds of personal mitigation that influence their sentences. Their answers indicated that they had not previously considered the concept of mitigation in terms of theory or general principal.” Jacobson & Hough, *supra*, at 152.

12. Recent developments in the law of provocation highlight the urgent need for a theoretical account of the relationship between mitigation and excuse. While American and English law treat provocation as a partial excuse (reducing murder to manslaughter in some cases in which the offender acted in the heat of passion), a number of Australasian jurisdictions have recently abolished the provocation defense and have made provocation a matter of mitigation. Freiberg & Stewart, *supra* note 6, at 104. If there is a clear boundary between excuse and mitigation and if provocation is properly located on the excuse side of this boundary, the Australasian shift is problematic. Of course, saying whether there is such a boundary and where provocation sits in relation to that boundary, without a theory of the relationship between mitigation and excuse, is difficult.

13. As The Architect says to Neo in *THE MATRIX RELOADED* (Warner Brothers, 2003), “Your life is the sum of a remainder of an unbalanced equation inherent to the programming of the matrix.” The Architect’s feeling about this leftover quantity captures perfectly the attitude the criminal law seems to manifest in its handling of the leftover excuses shunted into the mitigation catchbasin: “You are the eventuality of an anomaly, which despite my sincerest efforts I have been unable to eliminate from what is otherwise a harmony of mathematical precision.” Just as Neo—the leftover piece in *The Matrix*—ultimately brings down the otherwise perfect “harmony of mathematical precision,” so too the leftover excuses labeled mitigations have the potential to bring down seemingly harmonious accounts of responsibility and excuse.

and mitigations, and highlighting the comparably anarchical character of the domain of mitigation. With this foundation in place, Part III develops a schema for distinguishing excusing facts from mitigating facts. The crux of this schema is that facts diminishing a person's responsibility are excusing, while facts that favor reducing punishment for other reasons are mitigating. Applying this schema to various facts traditionally treated as either excusing or mitigating, Part IV resorts these facts into three categories: uncontroversially excusing, uncontroversially mitigating, and the "exiles"—a cohort of facts that might plausibly be treated as excusing but have traditionally been relegated to the domain of mitigation.

These potential exiles raise deep questions about the traditional division between excusing and mitigating facts. Part V surveys several possible reasons for exiling these potential excuses. Though this Part considers some pragmatic explanations, it highlights the possibility that less practical and perhaps unsavory reasons motivate exiling some excuses, including anxiety over their implications for comfortable and cherished visions of the criminal law and society more broadly. It is on this view that some mitigations appear as the unbalanced remainders of responsibility theory, and that mitigation emerges as the unconscious to which the criminal law has banished them. Because banishing excuses for these sorts of reasons undercuts both the justice and the legitimacy of the criminal law, Part VI suggests some therapies—some ways to bring the conflicts buried in the criminal law's unconscious closer to the surface so that we can grapple with them more meaningfully.

Ultimately, this Article hopes to cast light on the boundary between excuse and mitigation, to suggest that current practice exiles unwanted excuses to the realm of mitigation, and to show how this practice marginalizes a wealth of rich and important information about criminals and crime.

## II. EXCUSES, MITIGATIONS, AND THE DIFFERENT WAYS WE HANDLE THEM

Some facts are normally considered excusing while others are normally considered mitigating. This Part lays out a basic descriptive taxonomy of excusing and mitigating facts and shows that, in the criminal justice system, a great deal rides on the categorization. Building on this foundation, subsequent Parts will explore whether it makes sense to distinguish between excuses and mitigations the way we do.

*A. A Conventional Taxonomy of Excusing and Mitigating Facts*

Legal doctrine and practice categorize some facts as excusing and others as potentially mitigating. The universe of excusing facts is not hard to map: the excuses are usually codified or well-established in case-law, and set out straightforwardly in treatises, and law school casebooks usually codify the list of excuses. Mitigations, in contrast, are harder to catalog. Some criminal codes and sentencing guidelines provide partial lists of potential mitigations, but these lists do not line up especially well with the universe of facts that attorneys, juries, and judges treat as mitigating in criminal practice. Indeed, because the law generally does not formulate mitigations in concrete ways and because mitigations are often invoked in quasi-formal proceedings that do not produce clear records or reports of the claims and arguments made or credited, creating a comprehensive catalog of the mitigations that attorneys advance and that juries and courts credit in the sentencing process may not be possible. Still, it is possible to get at least a sense of the the universe of potentially mitigating facts from codes and guidelines, discussion in the case-law, empirical research regarding sentencing process, and the accounts of practitioners and judges.

Facts normally considered excusing in the criminal law include the offender's infancy,<sup>14</sup> subnormal intelligence,<sup>15</sup> legal insanity,<sup>16</sup> intoxication,<sup>17</sup> diminished capacity,<sup>18</sup> duress,<sup>19</sup> entrapment,<sup>20</sup> and even provocation.<sup>21</sup> A handful of other facts are sometimes treated as excusing, but the list of excusing facts is not very long.

The universe of potentially mitigating facts is much larger and quite diverse. Under contemporary convention some are "offense-related," others are "offender-related," and still others are tied to the administration of criminal justice.

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14. See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW § 9.6 (5th ed. 2010).

15. See, e.g., 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 174 (1984).

16. See, e.g., LAFAVE, *supra* note 14, at Chapter 7.

17. See, e.g., *id.* at § 9.5(h) (involuntary intoxication).

18. See, e.g., DRESSLER, *supra* note 6, at § 26.03.

19. See, e.g., LAFAVE, *supra* note 14, at § 9.7 (explaining that the duress defense excuses a person who does something normally a crime if a threat of imminent deadly harm coerced her to commit the crime).

20. See, e.g., 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 209 (1984) (explaining that entrapment defense excuses an offender the police induced to engage in uncharacteristic criminal conduct).

21. See, e.g., DRESSLER, *supra* note 6, at § 31.07[C][2][b] ("[M]ost modern courts" view provocation as a partial excuse).

Offense-related mitigating facts are facts about the offense itself. Often, they are facts about how the offender committed the offense: the offender played a minor role,<sup>22</sup> limited the damage,<sup>23</sup> or had an unusually sympathetic motive.<sup>24</sup> Sometimes, they are about the circumstances under which the offense was committed:<sup>25</sup> the offender was under non-excusing duress, provoked by a legally inadequate provocation, non-excusingly intoxicated, responding to the victim's wrongful conduct,<sup>26</sup> or experiencing a stressful personal crisis or emergency.

Offender-related mitigations are facts about the offender that go beyond the facts of the offense. Some are positive facts about the wrongdoer's personal history:<sup>27</sup> having no prior criminal record or unusual, past good deeds; a personal history showing the offense

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22. See Julian V. Roberts & Mike Hough, *Exploring Public Attitudes to Sentencing Factors in England and Wales*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 168, 177 (Julian Roberts ed., 2011) (finding that the general public considers it mitigating that the offender "played a minor role in [the] crime"). See also Young & King, *supra* note 6, at 211 (discussing New Zealand's Sentencing Act treatment of offender's "limited involvement" as mitigating factor).

23. Jacobson & Hough, *supra* note 11, at 149 (showing that sentencers treat a "low level of impact," "no violence/low level of violence," or "poorly executed/unsophisticated" as mitigating); Julian V. Roberts, *Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 1 (Julian Roberts ed., 2011); Manson, *supra* note 2, at 43–44.

24. For example, the offender may have killed a loved one in order to spare them continued suffering during the last stage of a terminal illness or battered a perceived criminal while participating in a neighborhood watch. See Stephan Terblanche, *The Discretionary Effect of Mitigating and Aggravating Factors: A South African Case Study*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 261, 273 (Julian Roberts ed., 2011) (describing a case in which preventing crime in the community was a mitigating factor); Manson, *supra* note 2, at 44. These good-motive mitigations raise the possibility that some mitigations are partial justifications (insofar as good motives may be significant because they reduce the wrongfulness of the offender's conduct). While this Article explores the relationship between mitigation and excuse, exploring the relationship between mitigation and justification may also reveal a similar dynamic.

25. Jacobson & Hough, *supra* note 11, at 149; Roberts & Hough, *supra* note 22, at 177 (finding that the general public in England and Wales places the greatest mitigating weight on the fact that the "crime was committed in an emergency."); *id.* at 181 (finding that the "victim provoked the offender" was mitigating). See Berry, *supra* note 8, at 250; Kate Warner, *Equality Before the Law: Racial and Social Background Factors as Sources of Mitigation at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 124, 139 (Julian Roberts ed., 2011) (treating "emotional stress" at the time of the offense as a mitigating factor); Lovegrove, *supra* note 9, at 199 (suggesting that people would "make allowance[s]" in sentencing for "challenging personal circumstances").

26. See Young & King, *supra* note 6, at 211.

27. See, e.g., Roberts, *supra* note 23, at 11–12 (discussing "positive actions by the offender which speak to his or her good character but which are unrelated to the offense" and "performan[ce of] some commendable action for the community" or an "act of exceptional bravery"); Roberts & Hough, *supra* note 22, at 175–76; Manson, *supra* note 2, at 45; Jacobson & Hough, *supra* note 11, at 149; Young & King, *supra* note 6, at 211; Andrew Ashworth, *Re-Evaluating the Justifications for Aggravation and Mitigation at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 21, 27, 28 (Julian Roberts ed., 2011); Berry, *supra* note 8, at 250.



was aberrant behavior; a record of military service; sacrifice for the community; religious devotion; or being a devoted and loving parent.<sup>28</sup> Sometimes, they are facts showing the wrongdoer had been exposed to criminogenic formative influences prior to the offense:<sup>29</sup> being raised in grinding poverty, subjected to brutal oppression, physically or sexually abused by a relative,<sup>30</sup> or corrupted by bad role models, peer pressure, group indoctrination, or hate propaganda and rhetoric.<sup>31</sup> Sometimes, they show the offender was handicapped or impaired in a way not rising to the level of an excuse:<sup>32</sup> she was non-excusingly young,<sup>33</sup> intellectually impaired or mentally ill,<sup>34</sup> or she was impaired by age-related disability. Along a different line, some offender-related mitigating facts go to the offender's likely future, suggesting that she is less dangerous than others who commit similar offenses<sup>35</sup> or more likely

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28. Some have opposed treating this sort of good-record evidence as mitigating. *See, e.g.*, Olusanya, *supra* note 7, at 47 (arguing that international criminal courts have treated serious offenders leniently because of good-record evidence at the expense "of justice for victims"); Ashworth, *supra* note 27, at 28–29; *see also* Roberts, *supra* note 23, at 12. Along the same lines, the United States Sentencing Guidelines suggest that "prior good works" are not typically considered as mitigation. U.S. Sentencing Guidelines Manual § 5H1.11 (2005).

29. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 368 (1996) ("[D]uring the sentencing process, the law has traditionally permitted the story of the defendant's character-formation to come before the judge or jury in all its narrative complexity."); Warner, *supra* note 25, at 125, 127, 128–29, 133–34, 135–36; Berry, *supra* note 8, at 247; Jacobson & Hough, *supra* note 11, at 149, 156–57.

Jacobson and Hough go on to note that "sentencers appear to be somewhat deaf to claims of disadvantage," perhaps because "the vast majority of defendants are disadvantaged in some way or another . . . which effectively rules out special treatment on these grounds." *Id.* at 157. Other research suggests that even if judges place less weight on common social disadvantage, popular intuitions may consider social disadvantage a significant mitigator. *See, e.g.*, Lovegrove, *supra* note 9, at 202.

30. *See, e.g.*, GARY WATSON, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in AGENCY AND ANSWERABILITY 219, 235–42 (2004); Roberts & Hough, *supra* note 22, at 176–77. *But see* Jacobson & Hough, *supra* note 11, at 154–55 (finding sentencers not greatly weighting offender's history of childhood abuse, perhaps, because they found it so common among offenders as to make it "unremarkable").

31. Recent debate in the context of international criminal law and prosecutions for hate crimes has discussed the mitigating significance of corruption due to hate propaganda and rhetoric. *See* Olusanya, *supra* note 7, at 35–38.

32. Jacobson & Hough, *supra* note 11, at 148–49; Lovegrove, *supra* note 9, at 200–01 (finding that subjects were inclined to mitigate sentence for a wide array of more and less concrete impairments, including "low intellectual capacity," lack of "life skills," and "low self-esteem"); Young & King, *supra* note 6, at 211.

33. Berry, *supra* note 8, at 250; Young & King, *supra* note 6, at 211.

34. Johnston, *supra* note 8, at 158–59, n. 49–51.

35. Jacobson & Hough, *supra* note 10, at 149 (Julian Roberts ed. 2011) (suggesting that sentencers treat as mitigating the offender's "physical illness or old age").

to do good: due to unusual personality traits, values, skills, or education, she is unusually susceptible to rehabilitation<sup>36</sup> or unusually likely to make positive contributions to her community.<sup>37</sup> Sometimes, they are redeeming facts about the offender's reactions to her own offense: feeling remorse,<sup>38</sup> repairing damage done,<sup>39</sup> or becoming a better or less dangerous person. Sometimes, they show that normal punishments will have abnormal impact on the offender:<sup>40</sup> due to physical illness, mental illness, age, cultural background,<sup>41</sup> vulnerability to physical or sexual assault,<sup>42</sup> or other personal characteristics, she will lose or suffer more than most offenders would.<sup>43</sup> Other offender-related mitigating facts suggest the offender has already suffered as a result of her offense<sup>44</sup> or has suffered more than others in the past (e.g., from bereavement,

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36. See Ashworth, *supra* note 26, at 25 (noting significance of willingness to undergo drug addiction treatment); Jacobson & Hough, *supra* note 10, at 149; Berry, *supra* note 8, at 256; Joanna Shapland, *Personal Mitigation and Assumptions About Offending and Desistance*, in *MITIGATION AND AGGRAVATION AT SENTENCING*, 60, 76 (Julian Roberts ed., 2011).

One perhaps unexpected consequence of mitigating intuitions here is that an offender's "advantaged" background can become a mitigating factor. Offenders from more privileged backgrounds are more likely to appear good candidates for reintegration, as they are more likely to have strong educational backgrounds, strong vocational skills, a record of good deeds, and strong family support. They are also more likely to avail themselves of opportunities for treatment of drug, alcohol, and psychiatric problems. Thus, sentencers may think they are less likely to be dangerous in the future than other offenders. Their advantaged background becomes a mitigating factor. See Jacobson & Hough, *supra* note 11, at 157–58.

37. See Manson, *supra* note 2, at 56; Roberts, *supra* note 23, at 15; Ashworth, *supra* note 27, at 30; Berry, *supra* note 8, at 256; Jacobson & Hough, *supra* note 11, at 149.

38. Jacobson & Hough, *supra* note 10, at 149; Roberts & Hough, *supra* note 21 at 176–77; Roberts, *supra* note 22, at 15–16; Ashworth, *supra* note 27, at 34; Young & King, *supra* note 6, at 211.

39. Ashworth, *supra* note 27, at 25.

40. See, e.g., Johnston, *supra* note 8, at 181–82.

41. Warner, *supra* note 25, at 131, 137–38.

42. See *id.* at 138.

43. See, e.g., Roberts, *supra* note 23, at 6; Ashworth, *supra* note 27, at 25–26; Manson, *supra* note 2, at 57.

Regarding old age in particular, see Jacobson & Hough, *supra* note 11, at 149; Warner, *supra* note 25, at 138; Roberts & Hough, *supra* note 22, at 176–77. Regarding illness, see Jacobson & Hough, *supra* note 11, at 149; Warner, *supra* note 25, at 138. At least some jurisdictions treat as mitigating an offender's mental illness (where it does not qualify for the insanity defense) because this vulnerability may cause the offender excessive hardship. Among other things, such offenders may be at higher risk of physical or sexual assault, may be more likely to incur prison sanctions, and may be more vulnerable to psychological deterioration. Johnston, *supra* note 8, at 150–52, n.21. Johnston also notes that courts have reduced sentences where offenders appeared to be at heightened risk of physical or sexual assault due to youth, size, perceived sexuality, sexual offender status, and for other similar reasons. *Id.* at 181, n.169.

44. See Shapland, *supra* note 36, at 65; Roberts, *supra* note 23, at 12; Ashworth, *supra* note 27, at 31; Manson, *supra* note 2, at 55; Jacobson & Hough, *supra* note 11, at 149.

depression, or disease).<sup>45</sup> Still other mitigating factors look beyond the offender to third parties the punishment will impact, as where punishing the offender in the normal way will have abnormally harmful impact on the wrongdoer's family or community.<sup>46</sup>

Concerns for judicial economy, effective prosecution, and other systemic considerations animate additional mitigating facts.<sup>47</sup> Thus, judicial economy may favor treating an offender's guilty plea as mitigating. Likewise, assistance to the prosecution of others may be mitigating because it facilitates effective prosecution.<sup>48</sup>

As this taxonomy suggests, the universe of potentially mitigating facts is enormously diverse. Not surprisingly, there is no consensus about either its membership or its boundaries.

This taxonomy also highlights the uncertain relationship between excuse and mitigation. While the list of excuses is short and exclusive and the list of mitigations is long and amorphous, the boundary between the two categories is obscure. This is apparent from the many facts that can be either mitigating or excusing depending on their magnitude: for example, youth, intellectual impairment, mental disturbance, intoxication, provocation, and duress are each excusing in some cases but only mitigating in others. Because these sorts of impairments and difficult circumstances exist on continua, it is not obvious that there is a non-controversial boundary between instances that are excusing and those that are merely mitigating.

Likewise, showing non-controversial, principled distinctions between the circumstantial excuses and the circumstantial mitigations can be difficult. For example, some circumstances that pressure people to commit offenses are considered duress (and therefore excusing) while others that do the same thing are considered hardship or deprivation (and therefore merely mitigating). Some circumstances that seem to induce wrongdoing are excusing, like entrapment, or partially excusing, like provocation, while others are at most mitigating, like hardship and deprivation. While legal

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45. Jacobson & Hough, *supra* note 11, at 155, 157; Roberts & Hough, *supra* note 22, at 177.

46. Lovegrove, *supra* note 9, at 201; Manson, *supra* note 2, at 57; Ashworth, *supra* note 27, at 29, 32.

47. Roberts, *supra* note 23, at 8 (“[This serves] the wider objective of constraining the costs of justice, enhancing the crime control function of the criminal justice system and sparing victims and witnesses from having to testify.”). *See also* Ashworth, *supra* note 27, at 33.

48. Roberts, *supra* note 23, at 8. *See also* Ashworth, *supra* note 27, at 33 (noting that the practice of mitigating sentence in return for a guilty plea or cooperation with authorities reflects the “state’s interest in economy and efficiency” in the administration of criminal justice); Young & King, *supra* note 6, at 211.

doctrine uses well-known criteria to distinguish excusing circumstances from the merely mitigating, it is not obvious that those factual criteria adequately explain or justify the categorizations.

The blurriness of the boundary between excusing facts and mitigating facts may flow from important characteristics they have in common. For the most part, both excusing and mitigating facts are about the wrongdoer's character, constitution, or personal history, or about the circumstances in which she acted.<sup>49</sup> Excusing facts and mitigating facts both tend to elicit sympathy, empathy, and compassion from others. Both normally help us understand more about why the alleged wrongdoer did what she did. As a result, both excusing facts and mitigating facts normally induce identification with the wrongdoer. Because understanding, sympathy, empathy, and identification are central to excuse,<sup>50</sup> the difficulty in segregating such facts into distinct camps is not surprising.

### *B. Differences In Treatment*

Excuses and mitigations have a lot in common and may be very closely related. Given this close kinship, does the categorization of particular facts matter?

In the context of the criminal law, categorization matters a great deal since it will have very significant substantive and procedural consequences. The categorization determines whether the wrongdoer is spared from conviction for his wrongdoing. It will also have other important consequences, for there are important differences in the way the law conceptualizes excuses and mitigations, in the extent to which the law mandates that excuses and mitigations have particular ramifications for wrongdoers, and in the procedural safeguards that apply to the litigation of excuses and mitigations. On each of these fronts, criminal law takes excuses much more seriously than mitigations.

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49. Although mitigations serving the administration of criminal justice do not seem closely related to excuses, they may be related to some of the non-exculpatory defenses, such as statutes of limitations or diplomatic immunity.

50. See Anders Kaye, *Objectifying and Identifying in the Theory of Excuse*, 39 AM. J. CRIM. L. 175 (2012) (arguing that excuse theory has failed to appreciate the central role that identification plays in the excuses).

### 1. Impact on the Legal Consequences of the Wrongdoing

The most obvious way the criminal law privileges excuses over mitigations is in their very different consequences for the defendant. Normally, excuses relieve offenders from conviction and punishment while mitigations do not.

An excuse blocks conviction and punishment for the crime for which the wrongdoer would normally have been convicted. A person who kills intentionally is normally guilty of murder, but if she is excused due to insanity, then she is not guilty after all. The consequence of the excuse is that the defendant cannot be convicted of or punished for her wrong. Of course, some excuses are only partial. If the killer killed in a heat of passion and had an adequate provocation for that passion, she is excused with respect to murder but not voluntary manslaughter. Even here, however, the excuse blocks conviction for a crime for which the defendant would normally have been convicted.

In contrast, mitigations do not block the normal consequences of wrongdoing. If the defendant committed an armed robbery, and there are facts the jury and judge consider mitigating in his case—e.g., he is seriously but non-excusingly mentally ill, he is a decorated war hero, or he was brutally abused as a child—such mitigating facts do not preclude his conviction or punishment.<sup>51</sup> These facts may play a role during sentencing, where, if the sentencer is sufficiently impressed, she may reduce the sentence within the range legally authorized for the defendant's crime. They do not alter the range of punishments the sentencer may legally impose for the crime. Thus, mitigating facts may reduce punishment but do not block conviction or alter the range of punishments available.<sup>52</sup>

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51. Such facts might induce the fact-finder to nullify the conviction, but the law does not dictate (or even approve) such nullification.

52. In some cases, these two kinds of consequences may appear to collapse together—functionally, if not formally. For example, one way to characterize the consequence of a partial excuse is to say that it reduces the punishment the defendant faces. If the defendant kills intentionally but does so in an adequately provoked heat of passion, she has the partial excuse of provocation. The formal consequence of this partial excuse is that she cannot be convicted of murder but still can be convicted of voluntary manslaughter. The functional result is that she will still be punished, but the legally authorized punishment range is reduced. It may appear that partial excuses are functionally similar to mitigations, insofar as neither precludes conviction per se and each reduces a defendant's punishment. Indeed, commentators sometimes seem to equate them with mitigations. *See, e.g.,* DRESSLER, *supra* note 6, at § 31.07[A]. The differences between consequences for partial excuses and mitigations are significant. Partial excuses prevent the wrongdoer from being convicted of a crime for which she would have otherwise been convictable, while mitigations do not. In this way,

In short, excuses block conviction for all or some crimes, exempting wrongdoers from the usual consequences of their wrongdoings, while mitigations do not. Here, then, the criminal justice system takes excuses more seriously than mitigations.

## 2. Formal Conceptualization in the Law

The criminal justice system privileges excuses over mitigations in several other important ways. One involves conceptualization: the criminal law formally conceptualizes the excuses, but does not similarly conceptualize the mitigations.<sup>53</sup>

The law formally conceptualizes excuses in the sense that it labels each excuse and defines each excuse with specific and concrete elements. For example, in the New York Penal Code, Article Thirty sets out the infancy excuse,<sup>54</sup> and Article Forty sets out excuses of duress, entrapment, and mental disease or defect.<sup>55</sup> These provisions serve as both a catalog of recognized excuses and a list of specific and concrete elements for each. Mental disease or defect, for example, requires a “mental disease or defect” and a substantial impairment of the “capacity to appreciate or know” the “nature and consequences of such conduct” or “that such conduct was wrong.”<sup>56</sup>

In contrast, mitigations are generally not formally conceptualized. In most jurisdictions, no list sets out what should count as mitigating and no authoritative source establishes the definitions or schema for the mitigations. Parental abuse may be mitigating, for example, but no authority establishes this or sets out the facts or

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partial excuses reduce both the maximum and the minimum legally authorized punishments; mitigations do not. Thus, partial excuses restructure the consequences of the wrongdoer’s action in ways wholly different from mitigations.

53. As discussed below, formal conceptualization is important. Litigants are more likely to seek, recognize, investigate, and advance potential claims that the law formally conceptualizes. Formal conceptualization should result in more careful, rigorous, and accurate assessment of claims.

54. N. Y. PENAL CODE § 30.

55. N. Y. PENAL CODE § 40.

56. N.Y. PENAL CODE §§ 40, 40.05, 40.15. Regarding the mental disease or defect excuse, for example, Article 40.15 provides:

§ 40.15 Mental disease or defect.

In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:

1. The nature and consequences of such conduct; or
2. That such conduct was wrong.

circumstances that the defendant must prove to establish this potentially mitigating fact. While she must show some sort of abuse, no authority specifies what counts as abuse, how much abuse there must be, or what sort of evidence suffices to prove the abuse.<sup>57</sup>

Jurisdictions that have adopted sentencing guidelines do sometimes formally recognize some mitigations.<sup>58</sup> Their sentencing guidelines may identify certain facts or factors as potentially mitigating and may provide detailed or elemental definitions. Such jurisdictions, however, normally do not attempt to comprehensively catalog mitigating factors. Instead, they typically identify and define a small number of mitigating facts. For the rest of the universe of potentially mitigating facts, such jurisdictions rely on default or catchall provisions authorizing consideration of “other” mitigating factors, without labels or definitions.<sup>59</sup> As a result, the catalog of formally recognized mitigations typically does not reach many of the mitigating factors actually asserted and argued in sentencing proceedings.

This difference in formal conceptualization is important. Litigants are more likely to look for, recognize, investigate, and advance potential claims that the law formally recognizes and defines. Cataloging and labeling signal the importance of these claims. Formal definition provides a schema to facilitate recognition of fact patterns establishing the claim, investigation for evidence supporting the claim, and organized presentation of that evidence to the judge or jury.<sup>60</sup> It also provides an accessible and shared vocabulary for articulating and making argument regarding the claim.<sup>61</sup> Formal conceptualization may also impact how judges

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57. No commonly used label exists for the mitigating significance of the fact that the defendant was a war hero before he engaged in wrongdoing, that a parent sexually abused him during his childhood, that he had recently lost a beloved life-long friend, or that he was under intense pressure from his peer group. A reservoir of fairly amorphous terms are sometimes invoked for some facts like these. The court might say that his “traumatic experience” should be mitigating or that his “rotten social background” or “deprived upbringing” should be mitigating. But these are broad, amorphous terms that can easily sweep enormously different sorts of mitigations under a single umbrella and there is not any sort of consensus as to what exactly they refer.

58. See, e.g., USSG § 5K1.1 (federal sentencing guidelines provision authorizing downward departures in sentencing for substantial assistance to authorities).

59. See, e.g., USSG § 5K2(a)(2)(B) (federal sentencing guidelines providing that “A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.”).

60. Litigants can easily build their investigations and presentations around the specific and discrete elements of the claim at issue.

61. In contrast, where the law does not formally recognize potential claims, litigants may be less likely to look for, recognize, investigate, and advance those claims. The absence of formal recognition signals that the claim is a low status or unimportant one. Since such

and juries process such claims, supplying a schema of specific and discrete elements they can use to structure their assessments of the evidence offered in support of such claims.<sup>62</sup> This should result in more careful, rigorous, and accurate assessment.<sup>63</sup>

In formally conceptualizing excuses but not mitigations, then, the law makes it more likely that excuses will be recognized, investigated, and advanced, and that courts and juries will assess those excuse claims more carefully, rigorously, and accurately.

### 3. Mandatory and Discretionary

The law also privileges excuses over mitigations procedurally. The most important determinations regarding excuse claims are mandatory, while nearly all the important determinations regarding mitigations are discretionary.

The law mandates that certain facts are excusing and that excuses have a specified legal effect when proven. When a defendant establishes an excuse, the finder of fact must give the excuse effect and acquit the defendant of the crime. If an intentional killer shows that she was legally insane at the time of the killing, she is excused and cannot be convicted of murder. These consequences follow automatically and do not depend on a decision-maker's judgment about the propriety of the consequence in the case at hand. In this sense, excuses are mandatory.

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claims are not cataloged, litigants are less likely to look for or recognize such claims. It may also be more difficult to conceptualize and implement investigation of such claims. And, without an accessible and shared vocabulary for such claims, it may be more difficult for litigants to articulate them effectively to opponents, judges, fact-finders, and sentencers.

62. Such a schema should make it easier for them to determine whether the defendant proved the claim (by comparing the evidence presented to the discrete and specific elements of the claim).

63. Indeed, the experience of several Australasian jurisdictions with provocation suggests that categorization of a consideration as a mitigation may steer us away from clear conceptualization even when clear conceptualization is readily at hand. Several Australasian jurisdictions have recently amended provocation law such that provocation is no longer a partial defense and is instead a sentencing factor. In the wake of this change, some courts have used the traditional elements of the provocation defense to measure claims of provocation in the sentencing context, whereas in others "provocation has been assessed less formally," as though characterization of provocation as mitigation rather than defense has a corrosive impact on its previously clear conceptualization. See Freiberg & Stewart, *supra* note 6, at 112. Perhaps more fundamentally, popular conceptions of mitigations appear amorphous or imprecise. As the authors of one empirical study of social attitudes toward mitigation observe, "for the public . . . aggravating factors have a clarity which mitigating factors lack; the significance of the latter depends heavily on personal and case characteristics which cannot be specified in advance by legislatures or guidelines authorities." Roberts & Hough, *supra* note 22, at 184.



In contrast, mitigations are discretionary.<sup>64</sup> Sentencers have nearly unfettered discretion to determine (a) whether a fact is mitigating at all, (b) whether to give mitigating facts any effect in sentencing, and (c) how much effect to give mitigating facts.

*a. Discretion in Determining Whether a Fact Mitigates*

Because most jurisdictions do not adopt exhaustive catalogs of formally recognized mitigations, sentencers normally have unfettered discretion in determining whether a fact is mitigating at all. Thus, in a case where the defendant argues that the sentencer should treat the abuse he suffered as a child as a mitigating fact, the sentencer is entirely free to agree or disagree. No authority mandates a conclusion one way or the other. Whether the court decides “yes” or “no,” no appellate court will find error. Indeed, the sentencer may conclude that childhood abuse is mitigating in one case, while not mitigating in another case, and may make a determination that is inconsistent with the determinations of other sentencers without error.

Predictably, this results in a highly subjective and unpredictable process. Empirical evidence shows that sentencers often disagree about whether particular facts are mitigating.<sup>65</sup> Indeed, some facts are sometimes treated as mitigating facts and other times treated as aggravating facts.<sup>66</sup> More fundamentally, sentencers evaluate claims

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64. Manson, *supra* note 2, at 41 (calling the administration of mitigating and aggravating factors in sentencing “an unfettered zone of judicial discretion”).

65. Roberts, *supra* note 23, at 16 (discussing research showing that “many different personal mitigating factors were taken into account by sentencers, and that . . . participants disagreed on many . . .”). Research on the attitudes of the general public also shows significant individual variation in evaluations of mitigating factors. Roberts & Hough, *supra* note 22, at 183 (empirical research showing a higher degree of consensus in the public about which factors should be deemed aggravating than about which factors should be deemed mitigating and noting that none of the possible mitigations studied were universally recognized as mitigating).

66. Terblanche, *supra* note 24, at 262 (“A large number of factors have at times been described as either mitigating or aggravating, or even both . . .”). Intoxication, for example, is sometimes treated as mitigating and sometimes treated as aggravating. “In Australia, Canada, and the United Kingdom, intoxication and substance abuse are generally regarded as aggravating rather than mitigating,” but are sometimes seen as mitigating “when . . . linked with social disadvantage.” Warner, *supra* note 25, at 139.

Similar potential for inconsistency occurs with drug addiction. An Australian high court judge, for example, has recently “determined that drug addiction—when it is a motive for money—[should] no longer . . . be, of itself, mitigating.” Lovegrove, *supra* note 9, at 190.

English case law also suggests that the fact that the offender is seriously ill is sometimes treated as mitigating, but that it is not always treated as mitigating (either because it is treated separately as a possible grounds for mercy or because it is not given weight in the sentencing determination at all). Warner, *supra* note 25, at 138.

for mitigation in a highly subjective way.<sup>67</sup> Sentencers emphasize that sentencing is “terrifying because it’s a very subjective exercise,”<sup>68</sup> the process comes “down to what one person thinks about another,”<sup>69</sup> it is “about a personal and sometimes emotional response,”<sup>70</sup> “an art, not a science,”<sup>71</sup> and driven by “experience and feeling”<sup>72</sup> or by a “gut feeling rather than careful calculation.”<sup>73</sup> Observers emphasize that assessing mitigation is “inevitably subjective” and has an “intuitive, subjective dimension.”<sup>74</sup> Rather than advertent theories or principles of mitigation to explain their deliberative process, sentencers emphasize that “each case is different,” that the influence of a mitigating fact always “depends,” and that “we’re paid to listen.”<sup>75</sup> This suggests the process of screening mitigation claims is unstructured and highly idiosyncratic. In one study, sentencers reportedly “retreat[ed]” behind subjectivist platitudes like “no two cases are the same”<sup>76</sup> and “we judge each case on

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Social history and background are especially volatile in this respect. Consider the Australian experience with “disadvantaged social background.” Under Australian law, “disadvantaged social background can be regarded as a mitigating factor . . . particularly if there is a causal link between such a background and the offending behavior.” *Id.* at 128. Moreover, disadvantaged background was routinely treated as a mitigating factor from the 1970’s to the 1990’s. *Id.* More recently, however, Australian courts have changed course—citing the need to decry violence in disadvantaged communities—and have begun to treat membership in some disadvantaged communities as a neutral factor and even as an aggravating factor. *Id.* at 128, 130–32. Thus, relegated to the sentencing phase and process, “disadvantaged social background” has an ambiguous status, and a single legal system has treated it as both mitigating and aggravating.

Indeed, things are even more complicated, for despite the common intuition that disadvantaged status should be mitigating, some research suggests that sentencers may be more likely to treat advantaged status as mitigating. Jacobson & Hough, *supra* note 11, at 157–58 (noting that while sentencers are ambivalent about treating disadvantaged status as mitigating, they often treat advantaged status as mitigating (presumably because they believe odds of reintegration are higher)). Observers have also noted the potential for flip-flopping with respect to privileged social background. Some empirical research appears to show that sentencers sometimes treat an offender’s privileged social background as a mitigating factor and sometimes treat it as an aggravating factor. *Id.* Sentencers may see it as a mitigating factor insofar as it suggests that the offender has heightened prospects for rehabilitation and reintegration. *Id.* at 158. Sentencers may see it as aggravating insofar as it suggests the defendant “should know better.” *Id.* There is also inconsistency regarding offender illness.

67. Jacobson & Hough, *supra* note 11, at 161.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Jacobson & Hough, *supra* note 11, at 161.

73. *Id.*

74. *Id.*; Terblanche, *supra* note 24, at 271 (South African system does not provide precise definitions of sentencing factors; “the vagueness of the general principles permits a sentencer to decide on a sentence instinctively or intuitively”).

75. Jacobson & Hough, *supra* note 11, at 152.

76. *Id.*, quoting ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 190 (5th ed. 2010).

its merits.”<sup>77</sup> The result is what we would expect from a highly subjective process: on many issues, sentencers show “marked inconsistency,” reaching very different judgments about whether and to what extent certain facts were mitigating.<sup>78</sup>

The approach taken by sentencing judges to . . . mitigation tends to be second-nature and instinctual . . . [T]hey can find it difficult to explain why they treat a factor as . . . mitigating . . . [V]iews about the relevance of particular factors will differ from judge to judge, depending on their respective background and experience.<sup>79</sup>

Thus, the sentencer’s discretion as to whether particular facts are mitigating plays a crucial role in sentencing.

*b. Discretion In Determining Whether To Give Mitigating Facts Any Effect*

In the same vein, because most jurisdictions do not mandate that sentencers give mitigating facts any particular effect in sentencing, they normally have unfettered discretion in deciding whether to give mitigating facts any effect at all. That is, even if a defendant establishes that a mitigating fact is present in his case and even if the sentencer agrees that the fact is mitigating, the sentencer need not adjust the sentence to reflect the mitigating fact.<sup>80</sup> So if the defendant shows that his parents abused him, that he was raised in desperate poverty, that he is a decorated war hero, or that he is suffering from lung cancer, the sentencer may impose the same sentence it would have imposed were the mitigating fact not proven. The law does not mandate the putative consequence of mitigation—ameliorated sentence—and that consequence therefore depends entirely on the sentencer’s judgment about its propriety in the case at hand.

Of course, if a mitigating fact is present, the sentencer should take this into account in setting the punishment. In fact, however,

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77. Jacobson & Hough, *supra* note 11, at 152.

78. *Id.* at 154–55 (noting, for example, that judges differed widely as to whether and to what extent willingness to receive drug treatment or evidence of a “moment of madness” at the time of offense should be mitigating).

79. Young & King, *supra* note 6, at 225.

80. Of course, this is not true in the rare cases where mitigations and their ramifications for sentence are codified and the mitigation at issue is one of the codified mitigations.

sentencers left to their own discretion may not always do so. Indeed, sentencers are more likely to give effect to certain mitigations in cases involving minor offenses as opposed to serious offenses<sup>81</sup> and in cases where the defendant pled guilty as compared to cases that went to trial,<sup>82</sup> thus exercising their discretion not to give mitigating effect to a factor that they would have recognized as mitigating in other cases.<sup>83</sup> It is not hard to imagine that this could happen in other ways too. The sentencer may believe that the range of punishments for the crime is already too low or may have residual doubts about the proof supporting the mitigating fact and therefore decline to give mitigations any effect.<sup>84</sup> More disturbingly, the sentencer may be biased against a defendant due to defendant's race, nationality, socioeconomic class, or sexual orientation, or because the defendant is unattractive,<sup>85</sup> lacks charisma, or is not sufficiently eloquent.<sup>86</sup> Of course, the law prohibits the sentencer from taking some of these things into account in sentencing (e.g., race), but there is little precedent regarding others (e.g., attractiveness). In either case, unless the sentencer gratuitously announces the impermissible animus behind the decision, any subsequent authority will have no basis to overturn it. Indeed, given how easily unconscious biases can influence decision-making in complex matters absent a structured decision-making process, sentencers may not even know that such biases are influencing their decisions. In

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81. Jacobson & Hough, *supra* note 11, at 158–59.

82. *Id.* at 160.

83. The sentencing process enables this. It grants the sentencer discretion to set the sentence he judges appropriate (within the range allowed for the crime), and the standards for review are extremely deferential. In most American jurisdictions, the sentencing court need not state any reasons for the sentence it gives, with the result that “the factual substratum of their decisions is unknown or cannot be documented.” Kevin R. Reitz, *Proof of Aggravating and Mitigating Facts at Sentencing*, in *MITIGATION AND AGGRAVATION IN SENTENCING* 228, 233 (Julian Roberts ed., 2011). Moreover, in most American jurisdictions, a defendant who appeals a sentence must normally show that “the factual basis for his sentence was ‘clearly erroneous’ or ‘lacking a minimal indicium of reliability,’” as well as showing “prejudice,” meaning that any “inaccurate information had an actual impact on the sentence.” *Id.*

Things are different in sentencing guidelines jurisdictions—a minority of American jurisdictions—where courts typically must put their reasons on the record and “explain the effect given to aggravating and mitigating factors.” *Id.*

84. As Roberts and Hough note, many claimed mitigations are difficult to prove and depend heavily on potentially self-serving claims by the wrongdoer. *See* Roberts & Hough, *supra* note 22, at 183.

85. *See, e.g.*, Megan Orciari, *Body Weight and Gender Influence Judgment in the Courtroom*, *YALE NEWS* (Jan. 8, 2013), <http://news.yale.edu/2013/01/08/body-weight-and-gender-influence-judgment-courtroom>.

86. Roberts, *supra* note 23, 3–4 (noting that social distance factors may play a role in sentencer judgments about mitigation).

this light the sentencer's discretion to give mitigations effect in sentencing is significant.

*c. Discretion in Determining How Much Weight to Give a Mitigating Fact*

Finally, suppose that the wrongdoer shows that she was the victim of brutal parental abuse, served heroically in the military, or is suffering from terminal lung cancer, and that the sentencer believes that these are mitigating facts that should have an impact on the sentence. How much should the sentencer diminish the sentence imposed?

Most jurisdictions do not give the sentencer any guidance here. They do not mandate that specific mitigations lead to specific adjustments in sentence. Indeed, most do not give even general guidance about the extent to which mitigations should influence sentence.<sup>87</sup> Thus, even if a sentencer believes that parental abuse, military service, or terminal lung cancer is a mitigating fact, no authority consistently mandates the extent to which the sentencer should modify the wrongdoer's sentence to reflect this mitigation.<sup>88</sup> As a result, sentencers have significant discretion to weigh the mitigating facts in sentencing. Indeed, it appears that for many sentencers the weight of a particular mitigation may vary significantly from crime to crime.<sup>89</sup>

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87. See NORA DEMLEITNER, ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 325 (Aspen 2004) ("Every U.S. jurisdiction allows judges at sentencing to consider various aspects of the defendant's life. . . . In unstructured sentencing systems, it is difficult to establish or measure just how much an offender's personal background and characteristics . . . influence the sentence . . . . Most structured systems do not directly integrate personal characteristics into the calculation . . . instead, they often allow . . . sentencing judges to depart from the guidelines").

88. Terblanche, *supra* note 24, at 262.

89. Roberts, *supra* note 23, at 3–4 (noting that sentencers often reach very different conclusions about the extent to which a particular mitigating fact should mitigate the offender's sentence). See also Warner, *supra* note 25, at 136 (while Canadian courts have held that disadvantaged background should have mitigating effect, "questions remain about what weight this factor can have . . . [and] research has shown that" the law treating disadvantaged background as mitigating has not "reduced the rate of Aboriginal over-representation in Canada's prison populations").

d. *The Significance of Discretion Regarding Mitigation*

There may be good reasons to make mitigation discretionary in these various ways.<sup>90</sup> One plausible reason is that a structured scheme of mandatory mitigation might not do justice to the our intuitions about mitigation. There are countless possible mitigations, and the law could not possibly catalog them all.<sup>91</sup> Furthermore, many of these mitigations come in varying degrees of strength. The law could not possibly calibrate punishment amelioration to the various strengths of these mitigations. Any criteria will be too rigid and crude to properly distinguish among the multitude of possible mitigations. Perhaps then, punting this task to the judgments and intuitions of the decision-makers in each case is better.<sup>92</sup> Empirical research suggests that there is “strong public support for a degree of individualization at sentencing,”<sup>93</sup> that the public rejects categorical rules about mitigating factors,<sup>94</sup> and that the public supports “a sentencing model which permits courts the discretion to make this determination.”<sup>95</sup>

Perhaps this is a good argument for making mitigation discretionary and excuses mandatory. Nevertheless, making mitigation discretionary means treating mitigations with less care than excuses. Even if we have a good reason for a discretionary system, leaving the application of mitigations to the sentencer’s discretion means running a much greater risk that she will not recognize those mitigations, will not give them effect even when recognized, and will not give them consistent weight, and that all of the usual problems associated with open-ended discretionary decisions, including carelessness, subjectivity, inconsistency, and explicit and implicit bias will infect these mitigation determinations.

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90. Roberts, *supra* note 23, at 5–6 (“[A] number of scholars . . . are of the view that additional guidance regarding mitigation . . . is unhelpful or unwise.”). *See also id.* at 10 (noting concern with preserving sufficient sentencer discretion to “craft an appropriate disposition,” rather than “box-ticking”); Jacobson & Hough, *supra* note 11, at 156 (“[It is] inevitable that sentencers exercise a considerable degree of discretion”). *But see id.* at 163–64 (arguing that legislatures should develop frameworks to better guide sentencing discretion).

91. Shapland, *supra* note 36, at 63–64; Jacobson & Hough, *supra* note 11, at 156 (“Sentencing . . . involves responding to the characteristics, circumstances and life history of the individual, which potentially brings into play any number of variables to be weighed up by the court.”).

92. *Cf.* Freiberg & Stewart, *supra* note 6, at 110 (arguing that courts should treat provocation as mitigation, not excuse, because the process for adjudicating mitigations is flexible enough to take into account nuances of provocation cases, in a way that the guilty phase cannot).

93. Roberts & Hough, *supra* note 22, at 176.

94. *Id.*

95. *Id.*

#### 4. Procedural Safeguards

Criminal law also privileges excuses over mitigations by significantly relaxing the rules and safeguards that apply when litigating mitigating facts. There is no right to a jury determination regarding sentence and, thus, no right to a jury regarding mitigating facts. Likewise, the rules of evidence that apply at the guilt phase do not apply in the sentencing phase, resulting in dramatically relaxed restrictions on the evidence offered for and against mitigations at sentencing.<sup>96</sup> Many constitutional protections that apply during the guilt phase do not apply at the sentencing phase, including exclusionary rules<sup>97</sup> and the right to confront witnesses.<sup>98</sup> Indeed, while it is well established that defendants have a constitutional right to present a defense, whether and to what extent they have a right to present any sentencing evidence at all remains unclear.

There may be good reasons not to carry over these requirements and safeguards. “[S]entencing facts tend to be more numerous and subjective than trial facts. Cumbersome rules of process are more expensive, and less workable, in an adjudicative milieu of complexities and shades of grey.”<sup>99</sup> In addition, such relaxed standards may facilitate a “wide-open factual inquiry” encouraging a “rehabilitative treatment model of sentencing” by developing the most complete information about the offender.<sup>100</sup>

Nevertheless, this arrangement has the practical consequence of privileging excuses. The sentencing phase is typically an informal adjunct to the guilt phase, where demanding formal requirements give way to a largely unstructured and open-ended review. The result, in contemporary American practice is that sentencing is usually an afterthought. Defendants rarely present extensive evidence in mitigation beyond their own allocutions, and the entire sentencing phase typically lasts less than thirty minutes.<sup>101</sup> The relaxed standards of the sentencing phase appear part-and-parcel

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96. See DEMLEITNER, ET AL., *supra* note 87, at 364 (“Most states allow sentencing judges to consider evidence inadmissible under the rules of evidence”).

97. See *id.* at 454 (“Most jurisdictions allow sentencing judges to consider evidence obtained in violation of a defendant’s constitutional rights, even when that evidence is suppressed at trial”).

98. See *id.* at 365 (“courts . . . have mostly concluded that the Confrontation Clause does not apply to the evidence presented during a sentencing hearing”).

99. Reitz, *supra* note 83, at 232.

100. *Id.* at 239.

101. See Reitz, *supra* note 83, at 231 (“In the United States, a typical sentencing was once reported to consume less than thirty minutes . . . an estimate that should probably be reduced for the busier court systems of the twenty-first century”); see also PAUL BERGMAN & SARA J. BERGMAN, *THE CRIMINAL LAW HANDBOOK: KNOW YOUR RIGHTS, SURVIVE THE SYSTEM*, 488 (13th ed. 2013) (“The sentencing portion of a criminal case often takes only moments”).

with a broader disinterest in claims made at sentencing compared to those made at the guilt phase.

### C. Facts A and B Revisited

Suppose, again,<sup>102</sup> that I have killed intentionally and would normally be guilty of murder and that either Fact A is true (as a result of a mental disease I do not substantially appreciate the wrongfulness of my conduct) or Fact B is true (my father physically and sexually abused me throughout my childhood).

My attorney will very likely consider, *sua sponte*, whether Fact A (insanity) is true in my case, for Fact A would straightforwardly trigger the insanity defense, and insanity is one of the items in the standard catalog of excuses. Every criminal defense attorney should consider whether the defendant might qualify for any of the items on this list shortly after taking on any case. Moreover, because the criminal code provides a readily available schema defining the excuse, my attorney is likely to recognize Fact A as potentially triggering the insanity excuse as soon as he compares the facts he knows about me with the elements of the excuse. He is also likely to seek supporting evidence more effectively, insofar as the schema's elements will guide him to search for particular sorts of facts. Of course, being more likely to look for, recognize, and effectively investigate this potential excuse, my attorney is more likely to advance it on my behalf. When he does so, the formal schema will provide him a ready-made vocabulary for articulating this claim to opposing counsel, judge, and jury

Should the case go to trial, my claim will enjoy the benefits of several important procedural protections. I will have the constitutional right to present my defense, to receive a jury determination, to confront witnesses who oppose my defense, and to suppress illegally acquired evidence against my defense. Furthermore, should I succeed in proving the existence of Fact A, the trial court must recognize my insanity defense and acquit me of murder.

Things are very different for Fact B (history of abuse). Although this is one of the better known potential grounds for mitigation, the law does not formally conceptualize it. As a result, my attorney is not as likely to look for evidence of my abuse *sua sponte* and is less likely to recognize its presence or its mitigating significance. Moreover, because the law does not provide an elemental schema for this

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102. See Introduction, *supra*, for hypothetical.



potential mitigation, my attorney will find it challenging to investigate this potential mitigation. As a result, my attorney is less likely to advance claims based on Fact B than those based on Fact A.

Should my attorney seek to advance a claim rooted in Fact B, he will likely find it more challenging to articulate those claims effectively because the law does not provide a ready-made vocabulary for doing so. Nor will I have a constitutional right to advance such claims, a right to a jury determination, a right to confront opposing witnesses, or a right to suppress illegally acquired evidence against Fact B.

Even if I do establish the existence of Fact B, doing so will not block my conviction for murder, for Fact B is at best a mitigation, and mitigations do not block conviction. Nor will it change either the maximum or minimum punishments possible in my case. At most, Fact B will lead the sentencer to reduce the sentence she would otherwise have imposed, but she will have nearly unfettered discretion to decide how much to reduce the sentence. Indeed, the sentencer will be free to decide that Fact B is not mitigating at all, or that, even though Fact B is mitigating, it should not impact my sentence.

Thus, the criminal law handles facts like Fact A very differently from Fact B. Fact A will change the outcome of the case; Fact B cannot. The law formally conceptualizes Fact A but not Fact B. Fact A has mandatory consequences; Fact B does not. And litigation regarding Fact A is subject to important procedural safeguards that do not apply to litigation about Fact B. In short, Fact A, as an excusing fact, is privileged. Fact B, a mere mitigation, is relegated to the margins of criminal process.

### III. A FRAMEWORK FOR CATEGORIZING EXCUSING AND MITIGATING FACTS

Given the profound differences in handling excusing and mitigating facts, treating a fact as mitigating or excusing matters a great deal. This Part sketches a framework for determining whether facts are excusing or mitigating, one that can be used to understand the excuses and mitigations currently available and to properly categorize new kinds of facts as they arise.

### A. *The Framework*

The foundation of this framework is that it scrupulously respects the relationship between responsibility and excuse. On this account, facts have excusing significance if they diminish the responsibility of the wrongdoer. This account entails a scalar model of responsibility, on which it is possible for excusing facts to diminish responsibility—and thus excuse—to different degrees.<sup>103</sup>

In contrast, mitigation is not a matter of responsibility. Facts have mitigating significance so long as they favor diminished punishment. Facts may do this in a variety of ways. Of course, excusing facts will normally also qualify as mitigating facts because facts that diminish responsibility will normally also favor diminished punishment. Many mitigating facts, however, will not qualify as excusing facts because many facts that favor diminished punishment do not diminish responsibility.

#### 1. What Makes a Fact Excusing?

On this account, a fact that diminishes the responsibility of a wrongdoer is an excusing fact.

Applying this account is easiest in conjunction with a theory of responsibility, for such an account shows what is required for a wrongdoer to be responsible and thus facilitates assessment of whether the fact at issue diminishes responsibility. On a theory of responsibility that makes “free will” a requirement (as some do), facts that defeat or diminish free will are excusing facts.<sup>104</sup> On a theory of responsibility requiring the capacity for rational thought, susceptibility to empathy, a particular degree of “responsiveness to

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103. As philosopher Tamler Sommers notes, while theories of responsibility must “offer a way to determine how much blame or punishment an agent deserves,” “this aspect of the debate does not receive as much attention,” Tamler Sommers, *Partial Desert*, in OXFORD STUDIES IN AGENCY AND RESPONSIBILITY (David Shoemaker ed., forthcoming) (manuscript at 3) (on file with author), and “it is surprisingly difficult to find discussions of the degrees of moral responsibility in the philosophical literature.” *Id.* at 3 n.4. Sommers suggests this may be because “theories of moral responsibility tend to be framed in terms of necessary and sufficient conditions.” *Id.*

104. Many traditional theories of responsibility make free will a prerequisite for responsibility. However, there is a long-standing debate about what exactly “free will” is, with some theories requiring what is sometimes called “contra-causal” free will, and other theories requiring something narrower, such as “freedom from constraint.” For an overview of this debate, see Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 U. KAN. L. REV. 365, 369–80 (2007).

reasons,”<sup>105</sup> or “identification” between desire and will,<sup>106</sup> facts that show the wrongdoer lacks these characteristics are excusing facts.<sup>107</sup> Thus, applying this schema requires two steps: consulting a theory of responsibility to identify its requirements and determining whether the fact at issue negates or diminishes any of those requirements. If it does, it is an excusing fact.

There is, however, a long-standing and on-going controversy about which theory of responsibility is best.<sup>108</sup> Fortunately, applying this framework is possible without an established account of responsibility in hand. This can be done by consulting our responsibility-related intuitions about the facts at issue in particular cases, considering whether potentially excusing facts trigger the intuition that the wrongdoer’s responsibility has been diminished. If, for example, the wrongdoer was so mentally ill that he could not tell right from wrong, does this elicit the intuition that his responsibility is therefore diminished or negated? Although it may initially seem strange to make such judgments in the absence of a worked-out theory of responsibility, this is not an illegitimate way to proceed. Theorists commonly derive accounts of responsibility by aggregating and synthesizing moral intuitions about specific cases.<sup>109</sup> This suggests that such intuitions are themselves important data for identifying the requirements of responsibility. So, even without a systematic theory of responsibility, determining whether particular facts diminish responsibility is possible.

On either approach, the critical question is whether the fact at issue diminishes the wrongdoer’s responsibility. A fact may do this either (a) by negating responsibility or (b) by reducing responsibility.

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105. See, e.g., JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL* (1998) (providing the seminal discussion of reasons-responsiveness account of responsibility).

106. See, e.g., Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, in *FREE WILL* (Gary Watson ed., 1982); Gary Watson, *Free Agency*, in *FREE WILL* (Gary Watson ed., 1982).

107. Peter Aranella and other theorists have suggested that the law cannot properly hold a person responsible unless that person has an array of capacities that include the capacity for empathy. Peter Aranella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 U.C.L.A. L. REV. 1151 (1992).

108. Michael McKenna, *Compatibilism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Summer 2004 Edition), available at <http://plato.stanford.edu/archives/sum2004/entries/compatibilism> (last visited September 1, 2013) (identifying at least six different families of responsibility theories with each family encompassing several variants).

109. For one interesting reflection on this approach, see Eddy Nahmias et al., *Surveying Freedom: Folk Intuitions about Free Will and Moral Responsibility*, 18 PHIL. PSYCH. 561, 561–62 (2005) (“Such intuitions play a conspicuous role in the free will debate, where philosophers often motivate their position by claiming that it is commonsensical, fits with ordinary intuitions, accounts for our practices of attributing moral responsibility, and captures a conception of freedom we value.”).

A fact negates responsibility if that fact either (i) entirely eliminates responsibility or a prerequisite of responsibility or (ii) reduces some prerequisite of responsibility below the minimum necessary threshold for responsibility.<sup>110</sup> If relying on untheorized intuitions, analyzing responsibility in terms of prerequisites will not come naturally, and this analysis will focus primarily on the first clause of prong (i). If adopting a theory of responsibility that identifies prerequisites for responsibility, the analysis can focus on the second clause of prong (i) and on prong (ii).

Thus, suppose we adopt a theory that requires a responsible person to be at least moderately responsive to reasons.<sup>111</sup> A fact showing the wrongdoer not at all responsive to reasons would entirely eliminate a prerequisite of responsibility. A fact showing the wrongdoer only weakly responsive to reasons would show that the wrongdoer's reasons-responsiveness did not meet the minimum threshold necessary for responsibility. In both cases, the fact at issue negates a prerequisite for responsibility, making the fact excusing.

Thus, so far, facts are excusing if they:

- (a) negate responsibility in that they either (i) entirely eliminate responsibility or a prerequisite of responsibility or (ii) reduce a prerequisite of responsibility below the minimum threshold necessary for responsibility.

Facts can also be excusing if they reduce responsibility or a prerequisite for responsibility. In these cases, the actor is responsible or meets the minimum prerequisites for responsibility, but the actor is subnormal with respect to responsibility or a prerequisite of responsibility. So, if we have a theory that identifies the prerequisites for responsibility and if such a prerequisite is scalar, we can compare the actor's level of that prerequisite with that prerequisite's "normal" level. For example, suppose responsibility requires at least moderate responsiveness to reasons, IQ is positively related to responsiveness to reasons, and a wrongdoer has an IQ of seventy-five (commonly characterized as borderline mental retardation). The wrongdoer's very low IQ will not eliminate his responsiveness to reasons or render the wrongdoer only weakly responsive to reasons. (A person with an IQ of seventy-five will make distinctions

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110. Like Hannah Tierney's model, this is a scalar model of responsibility, and, like Tierney's, this model assumes the most plausible version of a scalar model includes minimum thresholds. Hannah Tierney, *A Maneuver Around the Modified Manipulation Argument*, 165 *PHIL. STUDIES* 753 (2013).

111. This is an intentionally modified variant of Fischer and Ravizza's influential account of responsibility. See FISCHER & RAVIZZA, *supra* note 105.

among many sorts of reasons and will respond to a wide array of reasons, qualifying as at least “moderately” reasons-responsive.) As a result, this fact will not negate a prerequisite for responsibility, but it may reduce one because it may make the wrongdoer less responsive to reasons than a normal person.<sup>112</sup> Thus, an IQ of seventy-five would reduce a prerequisite for responsibility and qualify as an excusing fact.

Of course, facts that negate responsibility and those that merely reduce responsibility are distinguishable. The former plainly show that the wrongdoer is not responsible. The latter, in contrast, will not defeat responsibility. The actor meets the minimum requirements for responsibility and is therefore responsible.

Nevertheless, both are excusing facts. The former are completely excusing. The latter are partially excusing. When the former are true, the wrongdoer is not responsible for any wrong. When the latter are true, the wrongdoer may be responsible for a wrong, but the extent of his responsibility is less than the responsibility of a normal actor who has done the same thing.

Of course, this leaves open how to manifest such a partial excuse in responses to wrongdoing. It may seem implausible that partial excuses will entirely block blame or criminal conviction, at least when they do not come relatively close in magnitude to complete excuses. It may also seem implausible that we can construct a menu of offenses for which people can be convicted that will perfectly (or even loosely) track all the gradations of responsibility that a person might have, once responsibility is treated in this scalar fashion and takes into account partially excusing facts. The Parts that follow will explore the significance of characterizing a fact as partially excusing in more detail.

For now, though, we have a rubric for identifying excusing facts. Facts are excusing if they

- (a) [complete excuses] negate responsibility by either (i) entirely eliminating responsibility or a prerequisite of responsibility or (ii) reducing a prerequisite of responsibility below the minimum threshold for responsibility,

or if they

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112. Accept for the sake of argument that low IQ has a positive relationship to reasons-responsiveness.

- (b) [partial excuses] reduce responsibility or a prerequisite of responsibility (but not to the degree necessary to negate responsibility).

This framework accounts for the most widely recognized excuses. Some apply when the wrongdoer's responsibility is negated because something entirely eliminates a feature necessary for responsibility. For example, the common law version of the insanity defense excuses offenders who entirely lack the capacity to tell right from wrong. Most sophisticated accounts of responsibility posit that a person is not responsible unless she has at least some capacity to "recognize the True and the Good"<sup>113</sup>—minimal "moral competence."<sup>114</sup> A person who cannot tell right from wrong entirely lacks this essential feature and is therefore not responsible.

Other excuses apply to cases in which a condition or circumstance negates responsibility by reducing a feature necessary for responsibility so that the feature does not meet the minimum threshold for responsibility. The cognitive prong of the Model Penal Code's version of the insanity defense, for example, excuses offenders who lack the "substantial capacity" to appreciate the wrongfulness of their conduct.<sup>115</sup> Such actors may have some residual capacity to distinguish right from wrong, but it is so deeply impaired that they do not have even the minimal degree of normative competence necessary for responsibility. The control prong of the Code's insanity defense likewise excuses offenders who lack the substantial capacity to control their conduct—actors who may have some residual capacity for control but not enough to meet the minimum executive function necessary for responsibility.<sup>116</sup>

Finally, some excuses apply in cases where a condition or circumstance reduces (but does not negate) a capacity necessary for responsibility. For example, the provocation defense reduces murder to manslaughter in cases where the offender acted in an adequately provoked heat of passion. The offender's anger may impair the offender's capacity to reason effectively or his capacity to control his conduct, though not so far as to negate the minimum normative and executive capacities necessary for responsibility. Since the impairment does not negate those capacities, a full excuse is not appropriate, but a partial excuse recognizes the wrongdoer's diminished executive or cognitive capacities compared

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113. SUSAN WOLF, *FREEDOM WITHIN REASON* 71 (1990).

114. R.J. WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* (1994).

115. AM. L. INST., *MODEL PENAL CODE AND COMMENTARIES* [hereinafter the Code] § 4.01(1) (1980).

116. *Id.*

to non-provoked offenders committing otherwise similar offenses. Likewise, many jurisdictions hold that voluntary intoxication may be a defense to a specific intent crime but not to a general intent crime. The functional result is a partial excuse<sup>117</sup>: voluntary intoxication relieves the defendant of liability for a greater offense but leaves the defendant liable for a lesser one (insofar as most specific intent offenses have lesser included offenses with general intent elements). In these cases, intoxication may impair the offender's cognitive or executive capacities but not so far as to negate the minimum capacities necessary for responsibility. Thus, though a full excuse is not appropriate, a partial excuse recognizes the wrongdoer's diminished executive or cognitive capacities as compared to non-provoked offenders committing otherwise similar offenses.

## 2. What Makes a Fact Mitigating?

Under this framework, responsibility is not the touchstone for mitigation. Rather, facts are mitigating so long as they favor diminished punishment. It is true that, under these criteria, excusing facts will also be mitigating facts because negating or diminishing the responsibility of the wrongdoer also favors diminished punishment. The criterion for categorizing such facts as mitigating, however, is not that they diminish responsibility but that they favor diminished punishment. Conversely, mitigating facts will not necessarily qualify as excusing facts because many facts that favor diminished punishment do not diminish the wrongdoer's responsibility. Thus, the touchstone for mitigation is fundamentally different from that of excuse. It is not responsibility-reduction but punishment-reduction.

Here, again, theoretical criteria might assist the analysis.<sup>118</sup> For example, a retributive or utilitarian theory of punishment<sup>119</sup> might specify when punishment is justified and provide criteria for determining the appropriate amount.

Nevertheless, adopting a theory for these purposes is not essential.<sup>120</sup> Again, unsystemized intuitions about mitigation in particular

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117. For an illustration of the partial defense reading of the voluntary intoxication defense, see DRESSLER, *supra* note 6, at § 26.02[B][3].

118. See, e.g., Roberts, *supra* note 23, at 8 (considering and rejecting linking codified mitigation to "statutory purposes of sentencing"); Ashworth, *supra* note 27, at 24–25 (noting that some standard sentencing factors are not rooted in theories of desert and deterrence).

119. See, e.g., Roberts, *supra* note 23, at 8 (noting that sentencing factors are not always justifiable on a "retributive principle or utilitarian basis").

120. Indeed, some are skeptical that sentencing factors conform to a theory of punishment. See, e.g., Roberts, *supra* note 23, at 8, 12; Manson, *supra* note 2, at 41 (stating that "a

cases may be sufficient. Most people have robust intuitions about mitigation.<sup>121</sup> Indeed, even in this tough-on-crime era, empirical research shows that most people intuitively find a wide array of factors mitigating.<sup>122</sup> Such intuitions can be used to assess whether potentially mitigating facts trigger the intuition that the wrongdoer's punishment should be reduced. If the wrongdoer served heroically in a war, is suffering from terminal lung-cancer, or was abused by his father, do such facts elicit the intuition that his punishment should be reduced? If so, it is fair to call them mitigating facts.<sup>123</sup>

As the taxonomy of mitigating facts in Part II suggests, common intuitions appear to cast facts as mitigating for diverse reasons. Some seem associated with the offender's desert. For example, facts that diminish an actor's responsibility seem to favor diminished punishment—the robber with borderline subnormal intelligence should receive less punishment than the one with above-average intelligence, and the killer who acted under non-excusing duress should receive less punishment than one who did not—at least in part because these actors are not as responsible for their wrongdoings. Likewise, facts that diminish the wrongfulness of an offense also seem to favor reduced punishment. Though guilty of the same offense, the robber who takes care not to endanger his victims should receive less punishment than one who callously puts them at great risk, the conspirator who plays a minor role should receive less punishment than one who plays a central role, and the killer who reluctantly commits euthanasia at the request of the victim should receive less punishment than the one who kills out of greed. The former facts (diminishing responsibility) will also qualify as excusing facts under the schema developed here. The latter facts (diminishing wrongfulness) might, analogously, qualify as justifying

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search for principles" of mitigation in contemporary sentencing practice "leaves us with the recognition that there are some accepted factors which fit easily into a typology but others that are difficult to categorize" and arguing that "we shall not find a philosophical principle, or principles, that will define mitigating factors adequately"); Roberts & Hough, *supra* note 22, at 179 (noting that the general public gives significant mitigating weight to offender remorse and assistance to law enforcement though this appears inconsistent with the retributive account of punishment); Lovegrove, *supra* note 9, at 200–01 (study suggesting that the general public places significant mitigating weight on factors not relevant to culpability).

121. Lovegrove's research suggests that the "threshold for invoking mitigation [is] low," and facts are "not required to be exceptional to be deemed relevant" to mitigation. Lovegrove, *supra* note 9, at 202.

122. Roberts & Hough, *supra* note 22, at 176–77.

123. There may be reasons to be cautious about relying on intuitions to identify mitigating facts. See, e.g., Roberts, *supra* note 23, at 2 ("Intuition alone is often a poor guide to principled sentencing."). This Article, however, takes the view that there is a connection between mitigating practices and intuitive reactions to offenses and offenders, so this Article's descriptive account of mitigation will sometimes tie the former to the latter.



facts (though exploring this possibility is beyond the scope of this Article). In both cases, the desert-reducing character of these facts appears to trigger the intuition that punishment should be reduced.<sup>124</sup>

Facts may trigger these intuitions in other ways, too. Sometimes, utilitarian considerations are the catalyst. For example, it appears that facts diminishing the future dangerousness of the offender favor diminished punishment, perhaps because incapacitating the low-danger offender prevents less expected harm than incapacitating the high-danger offender. This may explain why it is mitigating that an offender is terminally ill, frail with age, or unusually susceptible to rehabilitation. Perhaps it also helps explain why the offender's remorse or voluntary restitution, or positive facts about his personal history, like his good criminal record or his service to the community, are sometimes seen as mitigating. These facts might imply that the offender is less likely to be dangerous or more likely to make positive contributions in the future than other offenders, making extended incapacitation less useful. Such utilitarian intuitions may also come into play with facts that increase the costs of inflicting punishment. At least sometimes, such facts seem to favor diminished punishment, as where the offender is unusually vulnerable to the punishment, where the offender's family or community will suffer to an unusual degree if he is punished, or where the offender is unusually likely to make positive contributions when not punished (e.g., where the offender has unusual education or skills). Utility may also help explain why sentencers are often inclined to diminish punishment for those who plead guilty or assist the prosecution of others; in these cases, using reduced punishment to incentivize assistance in the administration of criminal justice results in significant benefits

Still other facts are commonly seen as mitigating because they elicit sympathy or compassion for the offender. This may come into play with some of the mitigating facts already discussed, such as those that diminish responsibility (e.g., impairment and duress), those that show sympathetic motives (as in the euthanasia case), and those that suggest that punishment will cause the offender unusual suffering. This may also explain why reducing punishment appears appropriate where the offender has suffered in certain

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124. Desert-driven intuitions may also come into play where facts show that the offender has already suffered because of his crime. In such cases, one may feel that the offender has already paid some of the price his crime demands, such that he deserves less punishment than similarly situated offenders who have paid no price.

ways, as in cases of abuse, deprivation, poverty, or other sorts of involuntary suffering.

So far, then, it appears that facts are likely to trigger the intuition that punishment should be reduced where they (i) diminish the wrongdoer's responsibility, (ii) diminish the wrongfulness of his act, (iii) show that the wrongdoer has already paid some of the deserved price, (iv) diminish the benefits of inflicting punishment, (v) increase the costs of inflicting punishment, (vi) show that reducing punishment will produce a benefit, or (vii) elicit sympathy or compassion for the wrongdoer. Given the diversity of the universe of mitigating facts, it is unlikely that this is an exhaustive list of the ways in which facts might trigger the intuition that punishment should be diminished. For the purposes of this Article's assessment of the boundary between mitigation and excuse, however, the following expanded schema for excuse and mitigation will guide the analysis:

- (1) Facts are excusing if they (a) [complete excuses] negate responsibility by either (i) entirely eliminating a prerequisite of responsibility or (ii) reducing a prerequisite of responsibility below the minimum threshold for responsibility, or if they (b) [partial excuses] reduce a prerequisite of responsibility (but not to the degree necessary to negate responsibility).
- (2) Facts are mitigating if they favor reduction of punishment, for any of the diverse reasons that facts might favor reduced punishment, including, but not limited to:
  - (i) diminishing the wrongdoer's responsibility, (ii) diminishing the wrongfulness of his act, (iii) showing that the wrongdoer has already paid some of the deserved price, (iv) diminishing the benefits of inflicting punishment, (v) increasing the costs of inflicting punishment, (vi) showing that reducing punishment will produce a benefit, (vii) eliciting sympathy or compassion for the wrongdoer, or (viii) otherwise favoring reduction of punishment.

### *B. Revisiting the Differences in How We Treat Excuse and Mitigation*

Part II asked why the criminal law treats excusing and mitigating facts so differently. The schema for excusing and mitigating facts developed in this Part suggests a possible answer: excuses are more important.

Excuses are about criminal responsibility: they arise where responsibility has been negated or diminished. Mitigations are about calibrating individual punishment to fulfill the various purposes of punishment: they arise when reducing punishment will best fulfill the purpose of punishing the offender. Perhaps accurate determinations regarding criminal responsibility are more important than accurately calibrating individual punishments to the purposes of punishment. After all, the responsibility assessment is in some sense more fundamental than and preliminary to the calibration of punishment, for it determines whether there will be any punishment at all and, in the case of partial excuse, sets the parameters of the punishment to be calibrated. Likewise, the responsibility assessment seems like a more profound or more penetrating assessment of the wrongdoer, addressing his basic agency and even whether he qualifies for personhood at all. Much less is at stake at the time of the punishment calibration because the basic agency and personhood of the wrongdoer have already been established. On yet another dimension, the responsibility assessment seems like a more fundamental or profound assessment of the wrongdoer's relation to his wrong, for in asking whether the wrongdoer is responsible for his wrong, we are asking whether he has the sort of deep connection to that act that justifies calling him a criminal. By the time of the punishment calibration, we have already established that this deep connection exists, and the punishment calibration seems to occupy itself with the finer nuances of that connection. Perhaps, then, the responsibility assessment is more important—more fundamental, more profound, more penetrating, more revealing—than the punishment calibration. That is, excuse is more important than mitigation.

It is not obviously correct that excuse is more important than mitigation, and, even if this is correct, whether this justifies treating excuses differently. For the moment, however, this hierarchy might explain why excusing facts are treated so much more carefully and rigorously than mitigating facts.

But if excuse is more important than mitigation, this has a significant implication for the line between the two. Having developed a special framework for handling excuses and having done so because excuse is so important to criminal justice, the criminal law should be scrupulous when deciding whether any particular sort of fact is excusing or mitigating, and discovering categorization errors should be dismaying.

## IV. THE PROBLEM OF THE EXILES

Unfortunately, there is reason to think that conventional practice makes such categorization errors. Viewing the conventional taxonomy of excusing and mitigating facts in Part II through the schema for excuse and mitigation in Part III brings out problems in the taxonomy. While some of the categorizations in that taxonomy remain uncontroversial, the categorization of others now seems less secure. This is especially true of certain potentially mitigating facts that have plausible claims to excusing significance under the schema but which conventional taxonomy exiles to mitigation.

A. *Uncontroversially Excusing*

This Article's schema for excuse and mitigation does not upset everything in the conventional taxonomy. On the contrary, many of the categorizations remain uncontroversial. For example, the schema does not destabilize the categorization of conventional excuses. Facts that establish traditionally-defined infancy, subnormality, or insanity are easily understood to either eliminate a prerequisite for responsibility or reduce that prerequisite below the minimum threshold for responsibility. Facts that establish diminished capacity appear to reduce the extent to which a prerequisite for responsibility is present, even if not to the degree necessary to negate responsibility. Facts showing duress and provocation are also conventionally understood to reduce the responsibility of the wrongdoer. On one account, for example, they generate intense emotions of a sort that impairs the cognitive and executive capacities required for responsibility. On another, they present inducements to wrongful behavior that are so difficult to resist that they make it unfair to hold an inflicted person responsible for acting wrongfully. Either way, such circumstances diminish the responsibility of the wrongdoer and are therefore excusing.

Of course, the facts that trigger these excuses are also mitigating, in part because they diminish the responsibility of the wrongdoer, and this in turn favors reduced punishment. It is also true, however, that many conventional excuses appear to favor reduced punishment for other reasons. The fact that a person is an infant, for example, inspires sympathy and protective feelings, and these feelings may themselves favor reduced punishment. Similar responsibility-independent stories are available for many of the other traditional excuses. The important thing under the schema is

that these sorts of facts all qualify as excusing. Qualifying as excusing facts, they have a presumptive claim to the scrupulous protections afforded to excuses.

### B. Uncontroversially Mitigating

At the same time, the schema leaves some of the standard potential mitigations firmly in the mitigation camp. For example, it is difficult to see how an offender subsequently pleading guilty or assisting a prosecution can reduce the offender's responsibility for his prior wrong.<sup>125</sup> As a result, it is implausible that these facts favor reduced punishment because they negate or diminish responsibility. If that is correct, these facts can only be mitigating but not excusing. The same can be said if the offender is abnormally vulnerable to normal punishments (e.g., because of her illness or advanced age) or if punishing the offender will do abnormal damage to his family or community. Such forward-looking facts about the consequences of inflicting punishment say nothing about whether the offender was fully responsible for his offense. They do not show that he lacked any capacity associated with responsibility, did not identify with or own his conduct in a way that undercuts responsibility, or faced any challenge or circumstances making it unfair to hold him responsible. As a result, it is implausible that these facts favor reduced punishment because they negate or diminish responsibility. The same is likely true of facts showing the offender's post-crime suffering (such as recent bereavement) or post-crime non-state sanctions (such as loss of employment). Such facts are sometimes presented as mitigating, perhaps because the offender's past suffering can be seen as a kind of pre-payment on punishment or because there is less call for inflicting suffering

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125. Olusanya makes a similar observation. Olusanya, *supra* note 7, at 23 (“[V]oluntary surrender; a guilty plea . . . and the post-conflict conduct of the accused . . . constitute mitigating circumstances because they do not have the same intrinsic connection to moral blame as excuse defenses.” This is because they are “characteristics of the actor that are temporally and causally separate from the act . . . they are therefore only relevant to penalties.”).

It is still possible to imagine a responsibility-related explanation here. For example, if willingness to plead guilty or assist prosecution is indicative of good character, a responsibility-related explanation on the model of the good-character facts discussed in the next Part may be possible. Such stories seem strained, however, when applied to guilty pleas and assisting prosecution, not least because these behaviors seem best explained as self-interested, rather than indicia of good character. See also Terblanche, *supra* note 24, at 275 (flagging the question of whether a guilty plea reduces an offender's blameworthiness and noting that the issue has been debated extensively elsewhere).

where significant suffering has already occurred.<sup>126</sup> It does not appear, however, that such facts can have any bearing on the wrongdoer's responsibility for the crime. If this is so, they are not excusing and remain un-controversially mitigating.

*C. The Exiles: Traditional Mitigations That May Actually Be Excusing*

Though the schema does not put any pressure on the taxonomy's categorizations of the uncontroversially excusing and mitigating facts above, things are more complicated with some of the other traditional potentially mitigating facts. Upon closer review, it appears that several different kinds of traditionally mitigating facts have responsibility-related explanations in addition to their responsibility-independent ones. In this light, placing them in the camp of mitigation is problematic. They look like excuses in exile, stripped of excuse status and all it entails, without good reason.

1. Facts Suggesting Good Character

Several categories of conventionally mitigating facts seem to suggest that the offender has a better character than most people who commit his crime and that this is a reason to punish him less. One possible explanation for why such good-character facts favor diminished punishment is that they suggest that the offender is not as responsible for his offense as he might otherwise appear. If this is right, then good-character facts are excusing.

Perhaps the most common examples of good-character facts are those showing that the wrongdoer had no criminal record before the charged offense, that he had a history of good deeds or heroism, or that he had a record of service to his community. Such facts are often taken to favor diminished punishment and therefore characterized as mitigating. However, as the schema highlights, there is more than one possible reason why such facts favor diminished punishment, and some such reasons favor categorization as an excuse. Indeed, one plausible explanation takes these good-

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126. See, e.g., Ashworth, *supra* note 27, at 31 ("[I]n Sweden factors of this kind are rationalized as 'natural punishment': the burglar who is injured while committing the offense has inflicted some 'punishment' on himself, and therefore requires less state punishment"). Ashworth is skeptical about this sort of reasoning. *Id.* See also Jacobson & Hough, *supra* note 11, at 149.

character facts to show that the wrongdoer was not fully responsible for his wrongdoing.

On this explanation, such facts raise the possibility that the wrongdoer has a much better character than his wrongdoing suggests. His better-than-expected character raises the possibility that his wrongful act was “out of character” or aberrant. This, in turn, raises the possibility that his offense is not fully attributable to him—perhaps because some circumstance or condition has distorted the usual relationship between the actor and his action. While this analysis would likely carry little weight for theories of responsibility that focus solely on the wrongdoer’s capacities or freedom to choose at the time of the offense, it might resonate more strongly for character and identification accounts of responsibility and for those whose intuitions tie responsibility attribution to the offender’s “ownership” of his offense. According to such theories and intuitions, it is problematic to attribute responsibility for an act to a person if that person’s character is not connected to it in a sufficiently deep way. Good-character facts about wrongdoers suggest that the required deep connection is missing. In this way, they suggest that the wrongdoer was not (or was not fully) responsible for his bad act.

Similar analysis is possible for other traditional mitigations. Facts suggesting a more promising future than most offenders—e.g., unusual susceptibility to rehabilitation or reintegration, likelihood to do good deeds, or diminished dangerousness compared to other offenders—are often treated as mitigating. Such facts are normally presented as forward-looking, but perhaps they favor diminished punishment for backward-looking reasons. Maybe the real import of the facts that show the wrongdoer’s promising future is that they show he has a better character than his wrongdoing suggests, thus raising the possibility that his wrongful act was out of character and thus not really or fully attributable to him.

Similar analysis applies to redeeming facts about a wrongdoer, such as feeling remorse, repairing damage done, or seeking rehabilitation. Such facts are sometimes taken to favor reduced punishment and, therefore, characterized as mitigating facts, but it is also possible that these sorts of facts favor reduced punishment because they diminish the wrongdoer’s responsibility for his wrong. They might show that he has a much better character than his wrongdoing suggests. In showing his better-than-expected character, they raise the possibility that his wrongful act was out of character and that his offense is not really or fully attributable to him, making these too look like excusing facts.

There are other ways to explain why these sorts of facts favor reduced punishment, including ways that do not involve responsibility. For example, these facts suggest that the wrongdoer will not be as dangerous or destructive in the future as others who commit similar offenses.<sup>127</sup> If so, society benefits less from incapacitating these comparatively less dangerous offenders, and this may favor reduced punishment. Likewise, if these good-future offenders will contribute more to their families and communities after punishment, allowing them to return to society sooner is preferable. Perhaps inflicting punishment on an actually virtuous person will be destructive to her virtue, such that diminishing punishment would be preferable,<sup>128</sup> or perhaps rewarding virtue is an incentive to virtue and punishment-reduction is the reward. Alternatively, such facts may suggest that the wrongdoer has already paid something to the community through his prior constructive, supportive, or protective act. If punishment is considered restitution, such prepayment may reduce the appropriate amount of punishment. In other words, as each of these possibilities shows, such facts may favor reduced punishment for reasons having nothing to do with responsibility. If so, these facts do not have excusing significance and should remain squarely in the mitigation camp.

There is, then, more than one plausible way to explain why good-character facts favor reduced punishment. On one explanation, they undercut attribution of responsibility. If this is correct, good-character facts are excusing. On another, they favor diminished punishment for reasons unrelated to responsibility. If this is correct, good-character facts are merely mitigating. Unfortunately, there is little in the literature or the case law that helps resolve this uncertainty. Nevertheless, it is possible that these good-character facts have been mischaracterized and that they are excusing facts exiled to the realm of mitigation.

## 2. Non-Excusing Handicaps

Some other categories of facts traditionally treated as mitigating appear to be possible exiles too. One such category includes handicaps that are typically treated as mitigations rather than excuses.

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127. Berry, *supra* note 8, at 256; Manson, *supra* note 2, at 45.

128. Cf. Ashworth, *supra* note 27, at 29 (“[A] court’s failure to recognize positive contributions might be taken symbolically to downgrade those contributions, and to undermine their value.”).



Examples include non-excusing infancy,<sup>129</sup> non-excusing insanity,<sup>130</sup> and non-excusing intellectual impairment.<sup>131</sup> In such cases, the handicap is closely related to a handicap that is legally excusing, but does not rise to the level required to trigger that excuse. Although the handicap does not trigger the excuse, it still favors some reduction in punishment. All else being equal, the punishment for a robber with less than normal intelligence should be less than that for one who is intellectually average. As a result, such non-excusing handicaps are typically relegated to the domain of mitigation.<sup>132</sup>

As with good-character facts, there is more than one plausible explanation for why such handicaps favor reducing punishment. Some explanations keep these handicaps firmly in the mitigation camp. For example, the relative vulnerability or weakness of people with these handicaps may elicit a compassionate desire to protect them from suffering, and this compassionate response may alone account for the inclination to reduce their punishment. Alternatively, in the case of diminished intelligence or serious mental illness, the wrongdoers may have already suffered more than most wrongdoers, and this might justify diminishing their punishment. Suffering from non-excusing infancy may create a greater potential to change in positive ways—i.e., to mature—so that the ratio of costs to benefits favors reduced punishment.<sup>133</sup> On any of these explanations, these handicaps favor reduced punishment for reasons unrelated to responsibility and are, therefore, comfortably placed in the mitigation category.

However, other explanations raise the possibility that such handicaps reduce the wrongdoer's responsibility. After all, the most serious versions of these handicaps entirely negate responsibility. Profound mental illness, debilitating mental sub-normality, and

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129. Berry, *supra* note 8, at 247 (“The youth of the offender in certain cases can mitigate a retributive sentence based on a determination that a juvenile possesses a decreased level of culpability”) (emphasis added).

130. See Morse, *supra* note 8, at 296 (“Lesser rationality or control problems . . . may be considered only as a matter of discretion at sentencing.”); Johnston, *supra* note 8, at 152, n.21 (treating vulnerability to harm in prison due to mental illness not qualifying for insanity defense as mitigating factor).

131. See DEMLEITNER, ET AL., *supra* note 87, at 335 (discussing mental impairment as factor in sentencing).

132. Normally, this is left to the discretion of the sentencer, though the sentencing guidelines might also address it. See, e.g., U.S. SENTENCING GUIDELINES § 5K2.13 (2005) (providing for a downward departure at sentencing where the “defendant committed the offense while suffering from a significantly reduced mental capacity” under certain circumstances).

133. This does not seem true, however, for handicaps like non-excusing mental illness and sub-normality, which seem as likely to heighten future dangerousness and immunity to rehabilitation as to diminish them.

early infancy all seriously impair capacities essential to responsibility including basic cognitive and executive capacities. For these reasons, the law treats the extreme versions of these handicaps as excuses. Thinking that less serious versions of these handicaps diminish responsibility too, even if they do not entirely negate it, seems natural. Even if serious mental illness does not rise to the level of legal insanity, it may still significantly impact the cognitive and executive capacities associated with responsibility. The same can be said of serious intellectual impairment that does not rise to the level of legal sub-normality. Along similar lines, thinking that as an infant moves from age five to age twenty-five, he becomes gradually more responsible, such that the fifteen year-old is more responsible than the five year-old, but less responsible than the twenty-five year-old, seems natural. Indeed, the alternative—that responsibility turns on like a light at some particular point on the continuum from age five to age twenty-five—seems comparably “grotesque.”<sup>134</sup> Thus, it appears that such handicaps undercut capacities associated with responsibility. Even if they do not do so to the extent necessary to qualify for a legal excuse, they still may render the wrongdoer less responsible than a fully-capable wrongdoer.<sup>135</sup>

As with good-character facts, then, there is more than one plausible explanation for why these partial handicaps favor reduced punishment. On some explanations, these facts favor diminished punishment for reasons unrelated to responsibility and thus appear mitigating. On another, however, they undercut attribution of responsibility and look more like excusing facts.

As scholars have paid little attention to the nature of mitigation or to the rationales for these particular mitigations, no consensus exists to resolve this uncertainty. Nevertheless, the argument that these facts favor reduced punishment because they have some excusing force seems quite powerful. These handicaps are closely related to and exist on the same continuum as handicaps that fully excuse, and they obviously impact capacities commonly associated with responsibility. It is natural, then, to think that they favor reduced punishment in part because of their implications for the responsibility of the wrongdoer. These may well be excuses in exile.

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134. MICHAEL MOORE, *PLACING BLAME* 502 (1997).

135. The drafters of the Model Penal Code considered and rejected a diminished responsibility defense for mental illness and impairment. In so doing, however, they conceded that adopting such a defense would “undoubtedly achieve[ ] a closer relation between criminal liability and moral guilt” and that “diminished responsibility brings formal moral guilt more closely into line with moral blameworthiness.” *MODEL PENAL CODE AND COMMENTARIES*, Comment to § 210.3 at 71–72 (1980).

### 3. Non-Excusing Hard Circumstances

A similar dynamic emerges with certain hard circumstances<sup>136</sup> that are typically treated as mitigations, but appear to be closely related to excuses. For example, certain events are provoking but do not qualify as adequate provocation under the law—“mere words” (in a jurisdiction that does not recognize words alone as adequate provocation) or provocations that inflame the passions of the offender but would not inflame the passions of an ordinary person. Another example is duress that does not satisfy the duress doctrine, such as duress in a murder case, non-imminent duress, or duress that would not cause a person of reasonable firmness to yield. In each of these cases, circumstances closely related to fully or partially excusing circumstances fail to trigger legal excuses. Although they do not justify a legal excuse, they may still favor some reduction in punishment. Saying that a person who kills in response to a barrage of deeply insulting words or under intense pressure from a coercive gangster should be punished less than one who kills without such reasons does not seem strange.

As with good-character facts and partial handicaps, more than one explanation is possible for why these hard circumstances favor reduced punishment. One option is that sympathy for the wrongdoers in these cases, given the difficult situations and painful emotions with which they have struggled, favors sparing them some further suffering. Alternatively, perhaps they seem less likely to be dangerous in the future than individuals who commit similar crimes because they are unlikely to encounter such difficult circumstances again. If so, incapacitating or rehabilitating them is less beneficial, favoring reduced punishment. These explanations support keeping such facts in the mitigation camp.

A more likely explanation is that these sorts of hard circumstances diminish the wrongdoer’s responsibility even if they do not entirely negate it. After all, they closely resemble circumstances that are normally excusing under the law. Such legally excusing circumstances may be excusing because they trigger emotions so intense that they impair the cognitive and executive capacities necessary for responsibility or another feature necessary for responsible action. Perhaps they defeat responsibility because they create inducements to crime so powerful that normal people cannot fairly be held responsible for yielding. Either way, something similar presumably

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136. As used here, the term “hard circumstances” encompasses any circumstance that an actor may experience as difficult and that plausibly makes wrongdoing more likely. Duress, provocation, and deprivation are examples of such circumstances.

happens with hard circumstances that do not meet the requirements of the existing legal excuse doctrines. A barrage of profoundly insulting and hurtful words may not be adequate provocation under contemporary provocation doctrine, and a dangerous gangster's directive to commit murder may not meet the requirements of the duress doctrine, but both may well trigger intense emotion or present a powerful inducement to wrongful behavior. Given that the legally excusing hard circumstances significantly undercut responsibility, it makes sense to think that these non-qualifying hard circumstances diminish responsibility too. Even if they do not qualify for a recognized legal excuse, they may render the wrongdoer less responsible.

As with good-character facts and partial handicaps, there is more than one plausible explanation for why these hard circumstances favor reduced punishment. On some explanations, such circumstances favor diminished punishment for reasons unrelated to responsibility and, therefore, are best categorized as mitigating facts. On others, such circumstances undercut attribution of responsibility and are best categorized as excusing facts. As before, there is no consensus resolving this uncertainty. Nevertheless, the argument that these facts favor reduced punishment because they have some excusing force is quite powerful. These hard circumstances are closely related to and exist on the same continuum as hard circumstances that fully excuse. It is natural to think that they favor reduced punishment because of what they imply about the wrongdoer's responsibility. Thus, these too may be excuses in exile.

#### 4. Criminogenic Formative Influences

Consider again Fact B: "Throughout my childhood and into my adolescent years, my father physically and sexually abused me, leaving me significantly more prone to violence than I would otherwise have been." Consider, more generally, criminogenic formative influences: a parent physically or sexually abused the wrongdoer, she was raised in extreme deprivation and poverty, or corrupt role models or peer groups molded her. Theorists have observed that learning about such influences inclines us to reduce punishment,<sup>137</sup>

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137. Some have argued for embracing these inclinations. See, e.g., Delgado, *supra* note 5 (seminal article arguing for "rotten social background" defense); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 386-87 (1976). Others have acknowledged these inclinations but argued against their full embrace. See, e.g., WATSON, *supra* note 30, at 237-43; Kahan & Nussbaum, *supra* note 29, at 368-72. Still others have recognized these inclinations but characterized them as misguided illusions. MOORE, *supra* note 134, 544.

an inclination which increases the more we learn.<sup>138</sup> Typically, such facts are cast as mitigations, but it is possible these are actually excuses in exile too.

There has been extensive dispute about why criminogenic formative influences favor reduced punishment. Some characterize this inclination as a mistaken impulse, an instinct gone awry.<sup>139</sup> If this is correct, then such facts are neither excusing nor mitigating. A more common view is that sympathy for wrongdoers who have suffered drives the punishment-reduction intuition here.<sup>140</sup> After all, stories about criminogenic influences—especially those describing abuse or deprivation—often highlight both the past vulnerability and the past suffering of the wrongdoer and, thus, elicit protective and compassionate feelings.<sup>141</sup> A related idea is that such wrongdoers have already suffered more than their “fair share,” making it gratuitous to inflict further suffering on them.<sup>142</sup> Another suggestion is that we may lack standing to inflict punishment, perhaps because we are implicated in social conditions or social inequities that have disadvantaged the wrongdoer or pushed her to do wrong.<sup>143</sup> Although these explanations are quite diverse, they have something important in common: they explain punishment-reduction intuitions about criminogenic formative influences without reference to responsibility. They are consistent with the conventional view that such influences are no more than mitigating.

However, some commentators have argued that criminogenic formative influences negate or diminish the wrongdoer’s responsibility.<sup>144</sup> Especially where the wrongdoer was exposed to extreme criminogenic formative influences at a time when he could not escape or mitigate them, treating the wrongdoer as no less responsible than others never exposed to such influences may be problematic. (This might be true, for example, where the offender was the victim of long-term parental violence, starting in childhood). The most robust explanation for this is rooted in an originationist account of responsibility, according to which actors

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138. See WATSON, *supra* note 30, at 244; Anders Kaye, *Powerful Particulars: The Real Reason the Behavioral Sciences Threaten Criminal Responsibility*, 37 FLA. ST. L. REV. 539 (2010).

139. See, e.g., MOORE, *supra* note 134 548.

140. See, e.g., WATSON, *supra* note 30, at 244–45; DRESSLER, *supra* note 6.

141. See WATSON, *supra* note 30, at 237–43.

142. See MOORE, *supra* note 134, at 545 (noting that we may be inclined to excuse “disadvantaged” defendants due to “our sense that those who became criminals because of adverse circumstances have ‘already suffered enough’ ”).

143. For one discussion of this “standing” problem, see Delgado, *supra* note 5, at 68.

144. See Delgado, *supra* note 5; Bazelon, *supra* note 137; Kaye, *supra* note 104. See also Warner, *supra* note 25, at 127 (suggesting that “social and economic deprivation and disadvantage affects an offender’s culpability”).

should not be held responsible for acts that forces and circumstances beyond their control caused.<sup>145</sup> The originationist intuition has been the subject of persistent debate in the philosophy of responsibility.<sup>146</sup> It is sometimes expressed (more or less precisely) as the requirement that actors must have “true” or “contra-causal” free will to be held responsible for their acts.<sup>147</sup> More recently, it has also been associated with the view that responsibility attribution is not justifiable where luck plays a significant role in the acts for which people are held responsible.<sup>148</sup> Evidence that a wrongdoer’s act can be traced in a significant way to criminogenic formative influences raises serious questions about whether the wrongdoer originated his wrongful act in the way necessary for him to be held responsible. It is possible, then, that criminogenic formative influences favor diminished punishment because they call into question the wrongdoer’s responsibility. On this view, criminogenic formative influences are excusing.

As with the other categories of possible exiled excuses above, then, there is more than one plausible way to explain why criminogenic formative influences favor reduced punishment. On some explanations, these influences favor diminished punishment for reasons unrelated to responsibility and are, therefore, best categorized as mitigating facts. On others, they undercut attribution of responsibility and are best categorized as excusing facts. As before, no consensus exists to resolve this uncertainty. Nevertheless, the argument that these facts favor reduced punishment because they have some excusing force is a live one. Thus, while criminogenic formative influences are normally treated as (no more than) mitigations, they may actually be excuses in exile.

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Thus, assessing the conventional taxonomy of excuse and mitigation through the lens of the schema in Part III, it appears that several categories of potentially mitigating facts may be misclassified. For each category, there are competing explanations for why such facts favor reduced punishment. Some say nothing about the wrongdoer’s responsibility and thus support treating these facts as mitigations. Others, however, suggest such facts diminish the

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145. Kaye, *supra* note 104, 403–05.

146. *Id.* at 371–74.

147. For a fuller discussion of the development of the originationist view, see *id.*

148. See, e.g., NEIL LEVY, *HARD LUCK: HOW LUCK UNDERMINES FREE WILL AND MORAL RESPONSIBILITY* 1–2 (2011).

wrongdoer's responsibility. These explanations favor treating these facts as excusing. Treating them as mitigating miscategorizes them.

Such miscategorization has serious consequences. The law treats excuses far more carefully than it treats mitigations. Miscategorizing an excuse as a mitigation relegates that excuse to a marginalized, second-class status, one where it is rendered comparably invisible and treated in a comparably careless and unreliable way. For an excuse, then, relegation to the domain of mitigation is a kind of exile.<sup>149</sup>

## V. EXPLAINING THE EXILES

Suppose that some potentially excusing facts are exiled to the domain of mitigation. Why does this happen? This Part reviews some possible answers, beginning with some plausible pragmatic explanations and then highlighting that anxieties about excuse doctrines and their implications for comfortable and cherished visions of the criminal law and society more broadly may play an important role here too.

### A. *The Exiles are Not Really Excusing*

One way to defuse the exiled excuse problem is to say that the exiled excuses are not really excuses at all. After all, if they are not excuses, there is nothing noteworthy about relegating them to the domain of mitigation.

An argument that the exiled excuses are not really excuses at all might draw on theories of or intuitions about responsibility to show that these alleged excuses have no bearing on responsibility. This seems entirely plausible with respect to good-character facts. The argument that good-character facts are excusing is rooted in character or identification theories of responsibility, but many responsibility theorists reject character and identification theories

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149. Stephen Morse makes a related point in his argument for a generic partial excuse for diminished responsibility due to mental impairment. Morse, *supra* note 8, at 298–99 (“Although partial responsibility can in principle be fully considered at sentencing, this method suffers from substantial defects. First and most important, sentencing is a matter of discretion. Judges may refuse to give reduced rationality its just mitigating force, and there may be wide disparities [from judge to judge]. . . . [N]either current doctrines nor sentencing practices can guarantee generally principled, equal consideration of mitigating factors in most cases.”).

in favor of theories that tie responsibility to choice, capacity, or attitude.<sup>150</sup> Moreover, as previously discussed, it is not hard to come up with responsibility-independent reasons why good-character facts favor reduced punishment.

Similarly, there are readily available arguments that criminogenic formative influences have no bearing on responsibility. The most straightforward argument that such influences bear on responsibility is rooted in an originationist account of responsibility, and there are long-standing and robust alternatives to originationism in the philosophy of responsibility. In addition, as discussed above, it is not hard to come up with responsibility-independent reasons for the punishment reducing tendencies of criminogenic formative influences.

This is not to say that these arguments regarding good-character facts and criminogenic formative influences are obviously correct. Indeed, there may be very strong reasons to think that responsibility requires origination<sup>151</sup> and that evidence of criminogenic formative influences commonly trigger the intuition that the wrongdoer is not as responsible as he first appeared to be, especially where that evidence is particularized and voluminous.<sup>152</sup> Nevertheless, resources are available for arguing that good-character and criminogenic formative influences are merely mitigating.

Whether or not good-character facts and criminogenic formative influences are plausibly relegated to the domain of mitigation, partial handicaps and hard circumstances are not so easy to dismiss. Both these sorts of facts are very similar to and on the same continuum as facts that uncontroversially excuse. In some cases, the distinctions between these facts and their uncontroversially excusing brethren are whisper thin. Thus, making a plausible argument that these partial handicaps and hard circumstances favor reduced punishment for reasons unrelated to diminished responsibility is difficult.

This Article does not propose to resolve whether any of these potentially exiled excuses are *really* excuses. Rather, it raises the possibility that these are excuses in exile in order to explore more fully

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150. Seminal statements emphasizing choice or capacity include H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28–53 (1968) and MOORE, *supra* note 134, 548–92. Peter Westen suggests an attitude-oriented conception. Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289 (2006).

151. Kaye, *supra* note 104.

152. See, e.g., Lovegrove, *supra* note 9, at 204 (noting that subjects appear much more likely to find facts mitigating when presented in detailed case-studies than when presented in abstract form). See also Kaye, *supra* note 138 (contending that detailed narratives are more likely to elicit excusing intuitions than abstractly described facts).



some of the reasons why some excuses are treated as mitigations, and thus to discover new truths about the relationship between excuse and mitigation.

*B. The Exiles are Too Hard to Formally Conceptualize*

One potential explanation for exiling some excuses is ostensibly pragmatic: some excuses are too difficult to formally conceptualize and, thus, too difficult to operationalize in the law.

On this view, some potential excuses are more difficult to conceptualize than others, and, at a certain level of difficulty, excuses become too difficult to operationalize. That is, it becomes too difficult to provide a short, elemental definition of the excuse that adequately identifies the excusing facts or circumstances in terms conducive to proof at trial without being under- or over-inclusive. In such cases, the law does not offer an excuse, but it does not entirely ignore these important facts or circumstances either. Instead, it resorts to a second-best solution, shunting such excuses to a domain where formal conceptualization is not required, where short, elemental definitions are not necessary, and where open-ended, intuitive, case-by-case assessments are sufficient—the domain of mitigation. While this move does not do full justice to the excusing nature of the facts at issue, it does allow those facts to play a meaningful role in the wrongdoer's case.

This story seems entirely plausible in the case of good-character facts. It may be difficult, for example, to provide criteria for assessing the goodness of others' character or to provide such criteria in the form of a short, elemental definition conducive to proof at trial. After all, many different things might suggest that a person has good character—for example, a clean record, community service, good or heroic deeds, or honorable service in the military, on the police force, or in the clergy. Constructing such a list highlights several challenges. The list is woefully incomplete, and many other things might provide evidence of good character. At the same time, the listed items are far from dispositive of good character. A person with a clean record may be an awful person, people who do good deeds often also do horrible deeds, and honorable military service is perfectly compatible with corrupt character. These problems reflect something fundamental about potential good-character facts: character assessments are exceedingly complex. They take into account and weigh a multitude of facts about a person. As a result, these judgments are made intuitively rather than formulaically. It is unsurprising, then, that generating a formulaic definition for use in

the criminal law is difficult. These look like just the sorts of facts that fit the realm of mitigation, where nothing is formulized or mandatory, and everything is left to subjective, case-by-case judgments.

Similar problems arise in trying to formulate an excuse for criminogenic formative influences. One fundamental problem is that it is difficult to determine which formative influences are criminogenic. Many people intuit that growing up in poverty is criminogenic, but empirical research sometimes raises questions about this intuition and many people who grow up in poverty do not commit crimes.<sup>153</sup> Even putting aside these problems, defining poverty and the degree of exposure necessary is difficult. Likewise, it is commonly thought that physical or sexual abuse during childhood are criminogenic influences, but it is also well-known that most victims of such abuse do not go on to engage in criminal behavior.<sup>154</sup> Even putting aside this problem as well, defining abuse and the extent of abuse required to constitute an excuse is daunting. The ways in which formative experiences lead to criminal behavior are still unclear.

Without knowing which facts are criminogenic, developing a definition identifying such facts is impossible. Moreover, even if criminogenic facts were identifiable, reducing those facts to short, elemental definitions may pose insurmountable problems. Suppose that parental physical abuse can be criminogenic. Presumably, this depends in part on the intensity, frequency, duration, and tenor of the abuse, but quantifying these variables within a definition for an excuse would be difficult. In short, even if we adopt the view that criminogenic formative influences should be excusing, operationalizing such an excuse appears very difficult. Again, it seems much easier to relegate these considerations to the unstructured realm of

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153. See, e.g., David P. Farrington, *Longitudinal and Experimental Research in Criminology*, 42 CRIME & JUST. 453 (2013) (“Most studies . . . have reported that neighborhood and community factors have only indirect influences on offending through their influence on family factors.”).

154. See Cathy Spatz Widom, *The Cycle of Violence*, 244 SCIENCE 160 (1989) (“These findings indicate that abused and neglected children have significantly greater risk of becoming delinquents, criminals, and violent criminals. These findings do not show, however, that every abused or neglected child will become delinquent, criminal, or a violent criminal . . . Although early child abuse and neglect place one at increased risk for official recorded delinquency, adult criminality, and violent criminal behavior, a large portion of abused or neglected children do not succumb”).

mitigation, where the sentencer can judge the plausibility and significance of any alleged criminogenic formative influence in a holistic, open-ended way.<sup>155</sup>

Presumably these problems are not as pressing with the other exiles: partial handicaps and hard circumstances. These potential excuses are very closely related to established excuses. Since those established excuses already have conventional definitions, appropriately modifying those definitions to identify the relevant excusing facts and circumstances should not be too difficult. But, even here, problems persist. These excusing facts exist on continua. The relevant handicaps, for example, run from the barely perceptible to the catastrophic. It seems implausible that the law should treat any such handicap, no matter how trivial, as excusing. The established excuses have the virtue of using concrete criteria to mark off a region of the continuum in which these facts have undeniable excusing force. Turning to other regions of the continuum, it is not obvious that conveniently articulable criteria exist to mark other regions as clearly as the existing excuses. There is a real danger of sliding down a slippery slope. Perhaps it is better to leave these murky issues to the subjective, intuitive processes of the sentencing phase.

Thus, it may be that potentially excusing facts are exiled to the realm of mitigation because they do not fit the conventions of excuse. They are not susceptible to short, elemental definitions that satisfactorily capture the range of facts and circumstances that have excusing significance. Perhaps the best option is to handle these potentially excusing facts with the tools used for mitigations.

### *C. It is Too Difficult to Calibrate The Exiles' Excusing Value*

Another ostensibly pragmatic explanation echoes the first: some excuses have such variable and nuanced impact on responsibility that constructing a formal framework that properly tracks their excusing impact is too difficult. Thus, they are relegated to the domain of mitigation because capturing their variability in the terms of excuse is difficult.

The account offered here assumes responsibility is scalar, existing on a continuum, and not something that turns on and off like a light. Some facts entirely negate responsibility, but others only

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155. Kahan and Nussbaum suggest something like this reasoning in their argument that evidence about influences about character formation should not be considered during the guilt phase but should be considered during the sentencing phase. Kahan & Nussbaum, *supra* note 29, at 369.

diminish it. It follows that excuse is scalar too. In some cases the wrongdoer is completely excused. In others, responsibility is not entirely defeated, and the wrongdoer need not be entirely excused. In these cases, partial excuses might make sense, and the criminal law has made some forays in this direction, as in the doctrines of provocation, extreme mental or emotional disturbance, diminished capacity (in its diminished responsibility form),<sup>156</sup> imperfect duress, and imperfect self-defense, and perhaps also in doctrines recognizing that certain impairments might “negate” specific intent (leaving the defendant convictable for a lesser general intent offense) like voluntary intoxication and the mens rea version of the diminished capacity defense.<sup>157</sup>

Even so, tracking scalar excuses presents a challenge for the law. In order to do justice to scalar excuse, it might seem that the law should provide fully scalable excuses. Current doctrines do not do this, and doing so might not be possible. The law only provides for full excuses and a handful of partial excuses, and the partial excuses are far from fully scaled. Rather than providing different legal consequences for many different levels of responsibility, they recognize only one diminished level of responsibility, perhaps crudely characterized as three-quarters responsibility.<sup>158</sup> This obviously leaves most of the continuum of possible excuse unrecognized in formal law.

Perhaps this makes sense. Perhaps it is simply too difficult to construct a framework for fully recognizing scalar excuse in the criminal law. Articulating the criteria for distinguishing multiple different degrees of excuse would be an enormous task. Suppose that different degrees of youth diminish responsibility to differing degrees. The law would have to provide criteria distinguishing the cases where youth reduces responsibility by thirty percent from those where it reduces responsibility by thirty-five percent. Furthermore, it is unlikely that fact finders would be able to apply such criteria reliably. For example, juries would likely find it difficult to reliably distinguish diminished capacity that reduces responsibility

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156. DRESSLER, *supra* note 6, at § 26.03.

157. For an illustration of the partial defense reading of the voluntary intoxication defense, see DRESSLER, *supra* note 6, at § 26.02[B][3] (noting that some jurisdictions treat voluntary intoxication and abnormal mental conditions as lack of capacity defenses, which, as a practical matter, makes them only partial defenses, since they negate the mens rea for specific intent crimes, but there will almost always be a general intent crime to which neither is a defense).

158. They suggest existing partial excuses like provocation, diminished responsibility, and imperfect duress—formally manifested by knocking murder down to manslaughter—appear calibrated to a one-quarter reduction in the responsibility of the wrongdoer. This, obviously, only very crudely estimates what the reduction from murder to manslaughter suggests.

thirty percent from diminished capacity that reduces it thirty-five percent. Better, then, that the law paints in broad strokes and eschews efforts at fine-grained tracking of excuse.

This reasoning may seem more pertinent to some excuses than others. For example, some excusing facts are unlikely to fully excuse and unlikely even to rise to the level of the three-quarters excuses described above. In a broad-strokes regime, not recognizing such excuses at all may make more sense.

Perhaps this explains some of the exiled excuses. Perhaps good-character excuses, partial handicaps, difficult circumstances, or criminogenic formative influences will never rise to the complete or three-quarters level and will always lurk in the lower regions of the excuse continuum. Maybe the precise weight of such excuses will always be impossible to nail down given the multitude and diversity of facts that bear on them. If so, it might not be worth it to develop a framework formally recognizing such inevitably scalar and relatively minor excuses in the law, and it might make more sense to relegate excuses like these to the subjective, intuitive, and discretionary realm of mitigation.

*D. The Exiles are the Unbalanced Remainders in  
the Regime of Punishment*

While these ostensibly pragmatic explanations may have some value, another sort of explanation is possible: some excuses are exiled to the domain of mitigation out of a deep anxiety about excuses and the danger that they will overwhelm criminal liability and undermine or transform our system of criminal justice. Some potential excuses may seem to threaten to overflow the preferred limits of excuse, extending excuse to too many or to the wrong offenders. Conflicted about such inconvenient and unwanted excuses—torn between their importance to criminal justice and their threat to comfortable and cherished visions of how such justice should be administered—we exile them to invisibility and anarchy in the realm of mitigation,<sup>159</sup> intolerable conflicts banished to the criminal law's unconscious.

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159. For a similar observation, see SANFORD H. KADISH, STEVEN J. SCHULHOFER, & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES*, 911 (8th ed., 2007) ("In practical effect, the Model Penal Code leaves sentencing judges to decide what significance, if any, to attach to mental illness that neither establishes a defense of insanity nor negates a mens rea element of the offense . . . This reliance on sentencing discretion is a frequent move made by those who want to take account of diminished capacity without expanding excuse defenses.").

The discussion above has already suggested that some excuses are exiled to mitigation because they are hard to cabin. The pragmatic concern about the difficulty in creating functional definitions for some excuses raises the possibility that trying will lead to overbroad excuse. Likewise, the pragmatic concern about identifying the right stopping points for excusing conditions and circumstances that exist on continua raises the possibility of stopping too late. Together, these possibilities suggest caution in order to avoid excusing more broadly than desired.

There is another way in which excuses may present inconvenience. Even when properly defined, they may still apply to too many offenders. Good-character excuses might present this problem. If many bad acts are “out of character,” then good-character excuses may excuse more offenders than is desirable. This problem seems even more pressing with respect to criminogenic formative influences. Many, perhaps even most, offenders can point to such influences in their lives. A great many were raised in poverty, many violent offenders were victims of parental abuse, and many young violent offenders act under pressure from or because of the corrupting influence of violent role models, peers, or communities. If criminogenic formative influence has standing as an excuse, it may excuse many more offenders than we are comfortable excusing.

One response to this threat is to clamp down on excuse, forcefully limiting its reach and assuring it does not sweep too broadly. If partial handicaps are too hard to cabin, deny that they are excusing. If criminogenic formative influences will be present in too many cases, hold that they are not excusing.

Of course, stripping excuses of their significance might produce dissonance. If many people intuit that a fact is excusing, but the law refuses to treat it as such, the law may seem to diverge too much from widespread moral intuitions and, thus, appear unfair. The result is a conflict between the importance of these excuses to justice and the threat they pose to the criminal justice system.

Relegating such inconvenient excuses to the domain of mitigation helps pacify such potential dissonance. By characterizing these facts as mitigating, the law symbolically signals that it is not ignoring these considerations, and, thus, that justice can still be achieved. Of course, once they have been relegated to the domain of mitigation, these considerations are likely to be treated in a much sloppier and less regulated way. In an important sense, they will become invisible, easily overlooked, and completely at the mercy of unfettered discretion. Symbolically, though, the law maintains a formal place for these excusing facts in assessing wrongdoers and, thus, abates

the dissonance that entirely rejecting these potential excuses might generate.

Criminal law scholarship and ethical theory are peppered with examples that seem to fit this picture. James Stephen, fearing that recognizing duress as an excuse was a dangerous extension of the defenses, sought to accommodate duress in mitigation: "Compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most, though not all, cases."<sup>160</sup> The Model Penal Code's drafters recognized that partial handicaps bore directly on individual responsibility but saw danger in expanding the defenses to recognize this: "The most that it is feasible to do with lesser disabilities," they concluded, "is to accord them proper weight in sentencing."<sup>161</sup> R. Jay Wallace, in his seminal work on responsibility, acknowledges that serious childhood deprivation may diminish an adult's responsibility but maintains that "we may not wish to exempt such people . . . from accountability and for legal purposes there may be good reason to punish them for their crimes much as we would fully accountable offenders."<sup>162</sup> As for the "social and developmental circumstances" that diminish their responsibility, these should be "mitigating factors" in our moral assessments of the actors.<sup>163</sup> Kahan and Nussbaum, arguing that the criminal law should hold wrongdoers responsible for their emotions, acknowledge that wrongdoers are not always responsible for their characters and that it may be unjust to punish them as though they were.<sup>164</sup> Instead of taking account of this injustice during guilt determinations, they suggest doing so through "the practice of mercy in sentencing of offenders who cannot justly be held responsible."<sup>165</sup> In each of these cases, the authors nod at the intuition that the circumstance or condition at issue bears on responsibility and thus on justice but conclude that some other consideration favors relegating the issue to the domain of mitigation. Doing full justice to these excusing facts, they suggest, expands excuse too far.

There is good reason to think that the excusing doctrines reflect anxiety about overbroad excuse and a commitment to keeping excuses rare.<sup>166</sup> The evidence is visible throughout the literature on

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160. 2 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 108 (1883).

161. MODEL PENAL CODE AND COMMENTARIES, § 2.09 cmt. 2, (1980).

162. WALLACE, *supra* note 114, at 233.

163. *Id.*

164. Kahan & Nussbaum, *supra* note 29, 366-72.

165. *Id.* at 275.

166. *See generally* Kaye, *supra* note 104.

responsibility and excuse.<sup>167</sup> Theorists worry, for example, that properly tailoring excuse to responsibility will eviscerate the criminal law: “if we do that job right will there be anyone left to blame?”<sup>168</sup> This possibility provokes intense dismay—it is “pernicious and debilitating,”<sup>169</sup> “disturbing,”<sup>170</sup> “distressing,”<sup>171</sup> “startling,”<sup>172</sup> “troubling,”<sup>173</sup> “perilous,”<sup>174</sup> and even “tragic.”<sup>175</sup> In the same anxious vein, proponents of expanded excuse are portrayed as threatening, making “lifelong effort[s] to expand the categories of those who should be excused,”<sup>176</sup> scheming to “free the maximal number of defendants.”<sup>177</sup> In response to these threats of overbroad excuse, theorists often explicitly embrace the project of corralling excuse.<sup>178</sup> Daniel Dennett looks for “some elbow room for . . . sinners in between the saints [who never do wrong] and the monsters [whom we must excuse].”<sup>179</sup> Michael Moore argues “there is . . . no good reason to fear” that there is a “general moral excuse.”<sup>180</sup> Fischer and Ravizza are committed to “*protecting* our moral responsibility” from the overbroad excuse suggested by determinist ideas.<sup>181</sup>

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167. *Id.*

168. DANIEL C. DENNETT, *ELBOW ROOM* 99 (1984); *see id.* at 157 (“[S]ince we are all more or less imperfect, will there be anyone left to be responsible after we have excused all those with good excuses?”); *see also* P. F. Strawson, *Freedom and Resentment*, in *FREE WILL* 117, 117 (Derk Pereboom ed., 1997) (observing “that if [determinism] is true, then concepts of moral obligation and responsibility really have no application and the practices of punishing and blaming, of expressing moral condemnation and approval, are really unjustified?”); *id.* at 120 (finding some believe that “just punishment . . . impl[ies] moral guilt and guilt implies moral responsibility and moral responsibility implies freedom and freedom implies the falsity of determinism”); FISCHER & RAVIZZA, *supra* note 105, at 28 (noting that the possibility that originationism and determinism are both true leaves us “not clear that we can legitimately hold each other morally responsible for our behavior.”); MOORE, *supra* note 134, at 504 (arguing that if determinism and originationism are true, “it is hard to see why everyone is not excused for all actions”).

169. MOORE, *supra* note 134, at 490–91.

170. FISCHER & RAVIZZA, *supra* note 105, at 17.

171. *Id.* at 28.

172. *Id.*

173. WALLACE, *supra* note 114, at 3.

174. *See* Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 *HARV. L. REV.* 959, 960 (1992) (“concessions to determinism are as inevitable as they are perilous”).

175. MOORE, *supra* note 134, at 244. *See also* SUSAN WOLF, *FREEDOM WITHIN REASON* 12, 26 (1990) (warning of “drastic” and “highly undesirable” implications of expansive excuse).

176. Moore, *supra* note 134, at 916.

177. *Id.* There are other passages in Moore that give the impression of responsibility being eaten away, too. *See, e.g.*, MOORE, *supra* note 134, at 242–43 (using thought experiments about moral luck to illustrate how responsibility is consumed piece by piece).

178. Kaye, *supra* note 104, at 35–68.

179. DENNETT, *supra* note 168, at 157. *See also* Strawson, *supra* note 168, at 122 (arguing that we need not be pessimistic about blaming wrongdoers).

180. MOORE, *supra* note 134, at 547 (1997).

181. FISCHER & RAVIZZA, *supra* note 105, at 54 (emphasis added).



This discomfort about the prospect of overbroad excuse likely has multiple roots. In the current regime, most offenders are punished. Perhaps upending this familiar and comfortable regime creates anxiety. Anxiety about crime is a persistent feature of our political culture. Perhaps overbroad excuse will prevent effective management and prevention of crime, since overbroad excuse steals away opportunities to incapacitate or rehabilitate offenders, or to send deterrent or morally influential messages to prospective criminals, thereby squandering opportunities to reduce crime.<sup>182</sup>

Beyond these possibilities, there may be less savory motives for cabining excuse, including root political motives. A philosophical position favoring narrower excuse

residence in the criminal law. On the contrary . . . [it] is a nice fit for a particular vision of the state—one in which the state is static and striated. Such a criminal law disrupts popular scrutiny of the relationship between social conditions and crime, and thus makes it less likely that the suffering and costs inherent in the crime problem will lead us to criticize or challenge the existing status quo; and it gives the state extra leeway to use its coercive power against the disadvantaged—the very class with the most incentive to challenge the status quo. In short, [a] criminal law [that takes this position] contributes to the calcification of a hierarchical social order . . . .<sup>183</sup>

Some excuses, then, seem inconvenient. They threaten to overflow the boundaries of excuse, to extend excuse too broadly, to let too many offenders off the hook, and thus to subvert the administration of criminal justice. They undercut a familiar regime, impair crime control efforts, and threaten preferred social and political arrangements. This is the problem of the “unbalanced remainder”: excuses that do not fit the preferred vision of excuse threaten to disrupt or bring down the criminal justice system. Exiling difficult-to-cabin and widely-applicable excuses to the domain of mitigation

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182. The drafters of the Model Penal Code alluded to such concerns in rejecting some potential expansions of the excuse doctrines. See, e.g., MODEL PENAL CODE AND COMMENTARIES §210.3 at 71-72 (1980) (rejecting a broad diminished responsibility excuse for offenders suffering lesser mental incapacities in part because such an excuse would come “at the cost of driving a wedge between dangerousness and social control” and “undercuts the social purpose of condemnation.”) See also Clarence Thomas, *Crime and Punishment—And Personal Responsibility*, NAT'L TIMES (Sept. 1994), at 31, quoted in KADISH, SCHULHOFER, & STEIKER, *supra* note 159, at 929 (“An effective criminal justice system—one that holds people accountable for harmful conduct—simply cannot be sustained under conditions where there are boundless excuses for violent behavior and no moral authority for the state to punish.”).

183. Kaye, *supra* note 104.

avoids this unwanted result. It strips these unbalanced remainders of their threatening excusing status and relegates them to a place where they can do little harm, while at the same time minimizing the dissonance that refusing to credit a valid excuse would normally provoke.

In this sense, then, the domain of mitigation serves as the unconscious of the criminal law. It is a mechanism for managing deep conflicts in our thinking about criminal justice, a place to bury intuitions and insights about the nature and sources of criminality that threaten favored visions of how criminal justice should work.

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Excuses may be exiled to the realm of mitigation for a number of different reasons, then. They are hard to formally conceptualize, they are hard to calibrate, and they threaten to excuse too broadly. To the extent that these are purely pragmatic reasons for exiling excuses, they are plausible explanations.

But are they adequate? There is much at stake in the law of excuse. Excuses play an essential role in assuring that the criminal law does justice by giving wrongdoers what they deserve. When the law fails to credit an individual's excuse, it inflicts undeserved punishment and, thus, undercuts the justness of that punishment. To the extent that justice is an important value in the criminal law, this is disturbing. Its potential impact on the perceived legitimacy of the criminal justice system is also concerning. If citizens perceive that the state inflicts punishment unjustly and without recognizing valid excuses, they are likely to question the consonance between their own values and the values driving criminal justice. Their respect for and deference to the criminal law may diminish accordingly. Our commitments to justice and legitimacy in criminal justice may require us to grapple more effectively with these inconveniences.

To the extent that these are not just pragmatic reasons but manifestations of visceral anxiety about excusing too broadly, they seem particularly unsavory. Brute anxiety is a poor justification for failing to recognize excuses and accurately tally desert. In the short term, this failure undercuts justice. In the longer term, such unaddressed pathologies will spawn more problems. It would be better to repatriate the exiled excuses and bring these buried conflicts back into the consciousness of the criminal law. The next Part takes up this challenge and considers whether there are workable solutions to the exile problem.

## VI. WHAT TO DO ABOUT THE EXILES

There are several different possible solutions to the problem of exiled excuses. Two involve making room for the exiled excuses in the realm of excuse. The first of these is a large-scale, perpetual revisionary project that recasts the exiled excuses as formal, legally recognized excuses. The second seeks to accomplish something similar in a simpler way, by developing generic excuses that might accommodate the exiles. A third solution flips reform on its head. Instead of reinstating the exiled excuses, it makes the realm of mitigation a better place for them by assuring that the mitigations are treated with more care and rigor.

A. *Wholesale Revision*

The most obvious way to repatriate the exiled excuses is to fashion formal legal excuses for each of them. On this approach, one excuse or set of excuses is necessary for cases that involve good-character facts, another for partial-handicap cases, and so on. Fashioning these formal legal excuses would require labeling and cataloging them as excuses and generating short, elemental definitions for each of the conditions or circumstances deemed excusing. A mechanism for assuring that the consequences for the defendant accurately track the excusing value of the excuse at issue (complete or partial) would also be needed. With this formal structure in place, parties would litigate these excuses during the guilt phase of the trial, their application would be mandatory rather than discretionary, and the same procedural safeguards would protect them as protect traditional excuses.

Of course, this would be an enormous project, which would involve working out and articulating definitions for a large number of different excuses. The discussion above identified four broad categories, but drafting workable definitions might require several different excuses within each category. Moreover, this process might uncover additional exiled excuses or conditions and circumstances not currently treated as either excuses or mitigations to add to the list of excuses. Additionally, grappling with the pragmatic challenges described in the previous Part would be necessary to reduce complex, murky excusing conditions and circumstances to short, elemental definitions and to translate scalar excuses into formal law. To say the least, these are daunting tasks.

This is not to say it cannot be done. Workable legal definitions exist for other complex, murky excusing conditions (like insanity

and provocation), for other obviously scalar excusing conditions (like infancy), and for some excusing circumstances (like duress and entrapment). The same may be possible for the exiled excuses. Nevertheless recognizing the enormity of the task, considering other options would be prudent.

### *B. Generic Excuse and Generic Partial Excuse*

A more pragmatic and manageable alternative is to develop a generic or catch-all mechanism to accommodate known exiled excuses and any other potential exiled excuses.<sup>184</sup>

This approach would not specify the precise conditions and circumstances constituting the unrecognized excuses. Instead, it would adopt a simple and flexible doctrine of excuse and partial excuse that would reach all appropriate cases—that is, all cases in which some condition or circumstance diminishes the wrongdoer’s responsibility. This doctrine could accommodate potential complete excuses by modifying the relevant language from this Article’s schema for excuse and mitigation:

A person has a complete excuse where conditions or circumstances negate her responsibility in that they either (i) entirely eliminate responsibility or a prerequisite necessary for responsibility or (ii) reduce such a prerequisite so that it does not meet the minimum threshold for responsibility.

In litigating this generic complete excuse, a defendant would offer evidence and articulate her claim regarding any condition or circumstance in her case plausibly negating her responsibility. The fact finder would assess that evidence by considering whether (i) the evidence established the claimed condition or circumstance, (ii) the claimed condition or circumstance was the sort that might negate responsibility, and (iii) the claimed condition or circumstance actually did negate responsibility in this defendant’s case.

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184. Stephen Morse has also proposed the adoption of a generic partial excuse, but his proposed excuse is considerably narrower than the one proposed here. *See Morse, supra* note 8, at 299–300. His proposal would apply only in cases where the diminished capacity for rational thought impaired responsibility.

This generic approach would also have to accommodate potential partial excuses.<sup>185</sup> Again, this could be done by modifying language from the schema for excuse and mitigation:

A person has a partial excuse where conditions or circumstances reduce the extent to which that person is responsible or to which a prerequisite for responsibility is present (but not to the degree necessary to negate responsibility).

Here, a defendant would offer evidence regarding any condition or circumstance in her case plausibly diminishing her responsibility and articulate her claim that the condition or circumstance actually did diminish her responsibility. The finder of fact would assess that evidence by considering whether (i) the evidence established the claimed condition or circumstance, (ii) the claimed condition or circumstance was the sort that might diminish responsibility, and (iii) the claimed condition or circumstance actually diminished responsibility in this defendant's case.

The partial excuse doctrine would presumably require a mechanism for assuring that the consequences for the defendant properly reflect the partial excuse. Since the excuse is only partial, it should not be a complete defense to criminal liability. Instead, it should function similarly to other partial excuse doctrines—it should diminish liability and punishment in proportion to the wrongdoer's responsibility.

However, while having a mechanism for fully scalar consequences would be ideal, it would be difficult to achieve.<sup>186</sup> Even so, there would be value in a less perfectly scalar mechanism. Thus, for example, the fact finder might grade the partial excuse as "greater" or "lesser":

A person has a greater partial excuse if the conditions or circumstances reducing that person's responsibility have a great

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185. The proposed partial excuse is different in an important sense from the diminished responsibility doctrines some American case law and the German Criminal Code have recognized and from Stephen Morse's proposal to recognize a verdict of "guilty but partially responsible." (For a survey of these examples, see KADISH, SCHULHOFER, & STEIKER, *supra* note 159, at 910). The important difference is that each of these actual or proposed doctrines limits the potential partial excuse to cases in which the defendant suffers from a mental illness or mental abnormality.

186. See Morse, *supra* note 8, at 300, 301–02, 304 (2003) (arguing that less-than-substantial impairments need not excuse, even partially, that the system lacks the ability to make fine-grained assessments of responsibility, and that a more scalar approach might lead to "confusion and arbitrary decisions").

impact on the actor's responsibility but do not completely negate her responsibility.

A person has a lesser partial excuse if the conditions or circumstances reducing that person's responsibility have a lesser impact on the actor's responsibility, so long as they have a sufficient impact on her responsibility to warrant a reduction in criminal liability.

These grades, in turn, might diminish the consequences for the defendant in some mandatory fashion. For example, a greater excuse might reduce the level of an offender's felony by two classes or degrees, and the lesser excuse might reduce the level of an offender's felony by one class or degree. Alternatively, a greater excuse might reduce the maximum and minimum legally authorized punishments by fifty percent<sup>187</sup> while the lesser excuse might reduce the maximum and minimum legally authorized punishments by twenty-five percent.

As with the wholesale revision discussed in Part VI.A, the adoption of this formal framework would mean that the parties would litigate these excuses during the guilt phase of the trial, their application would be mandatory rather than discretionary, and the same procedural safeguards would protect these excuses as protect traditional excuses.

Of course, adopting these generic complete and partial excuses entails various potential problems. One pressing concern is that such doctrines would give fact finders tremendous discretion over excuses. The generic definitions above neither mandate that factfinders identify particular conditions as excusing nor prohibit them from doing so. As a result, there could be enormous variation from jury to jury and from case to case with respect to whether particular conditions or circumstances are treated as excusing. Moreover, this leeway could become a vehicle for bias and discrimination. Given this leeway, it would not be surprising to see that certain conditions excused more often in cases involving privileged defendants than in those involving disadvantaged defendants. Similar inconsistency and bias already arises in the application of mitigations, and the generic excuse and partial excuse doctrines might run the same risk.<sup>188</sup>

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187. *See id.* at 303 (arguing that a partial excuse should decrease the maximum and minimum punishments, but that the percentage of the decrease should depend on the seriousness of the crime, not on the degree of the excuse).

188. Morse discusses and rejects (on grounds that may not be fully applicable to this proposal) some other possible objections to his proposed generic partial excuse, including that (i) adoption of a generic partial excuse might invite "trumped up claims and weak or

Although these are potentially serious problems, they are less serious here than with mitigations because important safeguards apply, and would continue to apply, to the litigation of excuses that do not apply to the litigation of mitigations. Thus, even if these generic excuse doctrines risk inconsistency and bias, they would not pose as great a risk of inconsistency and bias as the current mechanism for handling exiled excuses.

### *C. Taking Mitigation More Seriously*

The first two solutions this Article proposes would require significant reform in the law of excuse. A third approach flips reform on its head. Instead of reinstating the exiled excuses, it makes the realm of mitigation a better place for exiled excuses, augmenting the care and rigor with which responsibility-related mitigations are processed.

Such a reform could be accomplished in a variety of ways. For example, it could formally conceptualize each of the responsibility-related mitigations to catalog, label, and define them. (Presumably, it would also retain a generic, catch-all standard to accommodate less frequently litigated or newly recognized responsibility-related mitigations). It could also diminish sentencer discretion regarding such mitigations by requiring sentencers to give mitigating weight to certain responsibility-related mitigations or by specifying that certain responsibility-related mitigations should have specified impacts on sentence. It might also apply some or all of the safeguards currently reserved for trial to the litigation of responsibility-related mitigations as well.

Taking steps like these would have a twofold benefit. First, it would ensure that, conceptually and procedurally, responsibility-related mitigations are treated more like excuses such that these mitigations are assured more careful and rigorous investigation, articulation, and assessment. Second, it would signal the elevated standing of responsibility-related mitigation in the criminal trial, encouraging a more careful and rigorous handling of such responsibility-related mitigation claims. As a result, the exiles would receive at least some of the scrupulous attention provided to excuses. Diminishing the gap between excuse and responsibility-related mitigation would make exiling disfavored excuses less problematic.

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misleading evidence” and (ii) generic partial excuse might undermine crime-control (and thus “threaten public safety”). *Id.* at 304–06.

A further step is to reconsider the dismissive treatment of mitigations generally. As previously discussed, the traditional assumption is that mitigation is less significant to criminal justice than excuse and that mitigation is generally a marginal issue. Is this assumption justified?

Because excuses are keyed to responsibility, they are relevant to desert and, thus, to justice. Justice, of course, is a central value of our criminal justice system. However, it is plausible that some mitigations are also keyed to responsibility and are, therefore, also relevant to justice. If this is correct, excuse may not be categorically more important than mitigation.

Moreover, even putting aside the ways in which some mitigations bear on responsibility and justice, mitigation, of whatever sort, may be more important than thus far recognized. Indeed, much of the information that comes into criminal justice as mitigation seems profoundly important to understanding offenses, offenders, the reasons why offenders commit offenses, and the value derived from inflicting punishment. It is normally only at the mitigation stage that information about the long-term and formative causes of criminal behavior is introduced—the parental abuse, deprivation, role models, peers, and community influences that set the stage for the crime. While excuse doctrines sometimes open the door to evidence about profound mental illness, in most cases it is only at the mitigation stage (if ever) that evidence of mental health problems, intoxication, drug addiction, depression, or social impairment is presented. Typically, it is only at this stage that the defendant can point to desperate poverty, homelessness, hunger, experiences of discrimination and prejudice, inability to find lawful means of subsistence, or futile searches for medical care.

All of these influences, conditions, and circumstances play a profound role in criminal conduct. It seems strange, then, that this information should play a less important role in the administration of criminal justice than the information that the law recognizes through the excuse doctrines. Whether or not the universe of mitigating information bears on individual justice, it is relevant on a systemic level to the project of criminal justice: the causes of criminal behavior; the role that environment, culture, and circumstance play; the levers to which crime control might most effectively attend; and the likely effect of punishment on the offender.

This highlights that while criminal justice has traditionally proceeded as though desert and justice were its most important



considerations, it is not obviously true that they should be. Considering the purposes and effects of punishment might be equally important.

Even if such a shift is not warranted, it might still be the case that a great deal of the information the criminal justice system currently relegates to the domain of mitigation, and thus to careless and sloppy handling, is of great importance to the project of criminal justice. That project might well benefit from paying this information better and closer attention. One way to accomplish this is to reform the handling of mitigation so as to treat mitigation more like excuse.

#### CONCLUSION

This Article has explored the boundary between excuse and mitigation, argued that some unwanted excuses are exiled to the realm of mitigation, and suggested that contemporary practice marginalizes a wealth of information about criminals and crime by calling it mitigation.

Offering a schema for excuse and mitigation that makes responsibility the crux of the distinction between them, this Article has argued that current practice exiles some excusing facts to the domain of mitigation. It has highlighted some of the undesirable consequences of doing so and suggested that the reasons for this practice may not be entirely good ones. Furthermore, it has argued that the realm of mitigation now serves as the unconscious of the criminal law—a place where unwanted insights and the conflicts they create are buried.

Finally, drawing further on the metaphor of unconscious conflict, this Article has suggested that it would be healthy to bring these buried insights and conflicts fully into the consciousness of the criminal law where they can be better appreciated, understood, and addressed. One way to do so is to repatriate the exiled excuses (through either wholesale revision or generic excuse doctrines). Another is to reform the realm of mitigation—either narrowly (by reforming the handling of responsibility-related mitigations) or more profoundly (by reforming the handling of mitigations generally).

On any of these approaches, responsibility-related considerations currently classified as mitigations would be treated more carefully and rigorously. Moreover, treating these considerations more carefully and rigorously would encourage more careful thinking about these underappreciated responsibility-related considerations and

their role in crime. This might, in turn, help make sense of some of the criminal justice system's perpetual pathologies, including its failure to effectively control crime and its persistent and egregious disparate impacts by race and class. It may be that some of the keys to these perpetual pathologies lie in facts currently exiled to the domain of mitigation. Moving them from mitigation to excuse—from the criminal law's unconscious to its consciousness—may force us to grapple more deeply with them, help us see why these perpetual problems have been so stubborn, and open the door to more productive solutions.