

## NOTES

# RACE, REASONABLENESS, AND THE RULE OF LAW

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### INTRODUCTION

In recognition of the fearsome powers faced by defendants, the criminal justice system has built into it a multitude of counterbalancing defendants' rights. There exists, however, a special breed of criminal trial involving a third and even weaker voice, a voice that may not even be heard during the trial. When a criminal defendant maims or kills another in the name of self-defense, by nature of his claim, he places his victim on trial—sometimes rightfully, sometimes to avoid well-deserved guilt. The wealth of protections afforded to the criminal defendant gives him wide latitude to attack the victim who does not enjoy such robust protections.

While a rich dialogue regarding victims' rights in general already exists, this Note focuses on a particular type of victim and a particular type of attack. This Note deals with the play of the race card by a criminal defendant to justify his decision to maim or kill, and argues that appeals to racial stereotypes ought to be excluded under the Rules of Evidence. Not only would this serve to protect the rights of the victim to a fair assessment of *the victim's* actions at trial, but it would also have positive reverberations among law enforcement and private citizens outside the court. Such evidentiary rules would put everyone on notice that race is no basis for taking life.

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Part I of this Note discusses particular instances where racial stereotypes have played a part in a claim of self-defense. Part II provides a normative argument for why evidence regarding a victim's race ought to be excluded. This Section also differentiates claims of self-defense that involve appeals to race from claims that do not rely on socially constructed generalizations regarding race, gender, and so on. Part III provides a legal basis and a formal proposal for a rule excluding evidence of the victim's race as well as suggestions for how such exclusions might be implemented.

#### I. THE SUBTLE PLAY OF THE RACE CARD IN CASES OF "SELF-DEFENSE"

[W]e have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation." Such terms encompass more than the physical movements of the potential assailant . . . [T]hese terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved . . . . Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.<sup>1</sup>

- *People v. Goetz*

In law school students are introduced to the law as a single coherent body of rules. One is introduced to the mythical "seamless web" conception of the law early in one's legal training. This view washes the law clean of its inconsistencies in an attempt to shoehorn a vast number of often-contradictory decisions into a single legal paradigm. This view is reinforced by the fact that the law is made up exclusively of judge-made decisions and legislative pronouncements. As a law student one is not exposed to trial records, one does not learn about legal tactics in the trenches, and one does not learn of the utterances at trial that are stricken from the record.

The blinding effect of this sort of jurisprudence becomes painfully apparent as soon as one looks to case law to evaluate the effects of racial stereotyping at trial. By looking only at the well-crafted decisions of judges and not the gritty details of trial level tactics, which often pander to the darker aspects of the jury's nature, it is easy to miss the serious

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1. *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986) (internal citations omitted).

implications of the race card in cases involving self-defense. It is consequently difficult to come to grips with issues of race and the law since “the law,” like Bismarck’s metaphorical sausage, is digested only in its neatly packaged form. A certain well-known case does, however, provide an example of a clever defense attorney who played the race card to powerful effect. Such a case provides a glimpse into many others, where issues of race and racism have fallen quietly outside the case reporters.

The above language quoted from *People v. Goetz* shows just how subtle the invitation to the jury to take into account the race of the victim can be. Nowhere in the quoted language is there any mention of race. There is only mention of “reasonableness” and “physical attributes.” Such language is no bar to the conclusion that race is a “reasonable” basis for killing or maiming another human being.

#### A. *PEOPLE V. GOETZ*: THE PARADIGM CASE

This case polarized those who followed it, creating one camp that saw Goetz as a heroic subway vigilante who defended himself when the police could not,<sup>2</sup> and an opposing camp that viewed Goetz as a bigot who unleashed his racial animus on four innocent youths.<sup>3</sup> The trial that ensued after Goetz shot and severely injured four African American youths is a vivid illustration of how the race card is powerfully played in a legal system that not only purports to be color blind, but also writes its legal decisions so as to maintain a veneer of racial irrelevance.

On December 22, 1984, Bernard Goetz boarded a subway in New York and took a seat near the back of the subway car.<sup>4</sup> “Goetz was carrying an unlicensed .38 caliber pistol loaded with five rounds of ammunition and concealed in a holster on his waistband.”<sup>5</sup> Also sitting at the back of the subway car were four African American youths.<sup>6</sup> Two of the African American youths, not displaying any weapons,<sup>7</sup> approached

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2. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 417 (1996) (“Complete strangers called Goetz a subway hero, an average man-on-the-street citizen who had courageously stood up to the bad guys.”)

3. See Kenneth W. Simmons, *Self-Defense, Mens Rea, and Bernhard Goetz*, 89 COLUM L. REV. 1179 (1989) (reviewing GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL*) (“The verdict was a victory for Bernard Goetz, but which Bernhard Goetz? . . . [T]he alleged white racist Goetz, who would not have shot the four black youths if they had been white?”).

4. Goetz, 497 N.E.2d at 43. See Lee, *supra* note 2, at 416.

5. Lee, *supra* note 2, at 416.

6. See *id.*

7. See *id.*

Goetz and said "give me five dollars."<sup>8</sup> Goetz then stood up, drew his pistol, and fired rapidly at the four youths.<sup>9</sup> Noticing that one of the youths was unharmed, Goetz approached him and said, "You seem to be all right, here's another," and fired at him, severing his spinal cord and permanently paralyzing him.<sup>10</sup> After fleeing the scene,<sup>11</sup> Goetz turned himself over to the police.<sup>12</sup> While admitting to the police that he was certain that none of the youths were armed,<sup>13</sup> Goetz told the police:

When I saw what they intended for me, my intention was worse than shooting. My intention was to do anything I could do to hurt them. My intention . . . I know this sounds horrible, but my intention was to murder them, to hurt them, to make them suffer as much as possible.<sup>14</sup>

The resulting verdict of not guilty may have served as vindication for many subway riders who experience fear from the constant threat of muggings, but from a legal standpoint, it seems incredible that Goetz's self-defense claim was sustained. Under New York law, in order to successfully invoke self-defense, the defendant must have honestly and reasonably believed that he was in imminent danger and that physical force was necessary to fend off the attack.<sup>15</sup> Goetz's claim is immediately suspect because he failed to use lesser means of defending himself, such as brandishing his gun or even firing a warning shot.<sup>16</sup> Furthermore, he shot Cabey, the youth who was ultimately paralyzed, even though Cabey was "cowering" and "grasping the subway bench" with a "frightened look on

<sup>17</sup> This was hardly an act that can be justified as averting an imminent threat.<sup>18</sup>

The explanation for this legally inexplicable decision lies in the defense's ability to pander to the fears of the jury. Regardless of whether race played the deciding factor in the jury's decision to acquit, the defense

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8. *Id.*

9. *See id.*

10. *Id.* at 417.

11. *Id.*

12. *Id.*

13. *Id.* at 418.

14. *Id.* *See also* Joseph R. Tybor, *Message of Fear: Goetz's Acquittal Reflects American Beliefs*, CHI. TRIB., June 21, 1987, at C1.

15. CRIMINAL JURY INSTRUCTIONS, NEW YORK § 35.15(2)(a) (1989), *cited in* Lee, *supra* note 2, at 419.

16. *Id.* at 418.

17. Tybor, *supra* note 14 (quoting Goetz's testimony).

18. Goetz's self-proclaimed motivations for shooting the youths also show that he was interested not only in protecting himself, but also in inflicting pain and suffering. In his own words, he was intent on "murdering" the youths. *See* Tybor, *supra* note 14 and accompanying text.

successfully convinced the jurors that Goetz's fear of imminent harm was reasonable.<sup>19</sup> The defense's presentation was so convincing that the jury was able to overlook the fact that Goetz's actions were clearly not covered by self-defense doctrine under New York law. Given U.S. legal conventions regarding the secrecy of jury deliberations, it is impossible to know for sure whether racial stereotyping played a decisive role in the jury's decision to acquit Bernard Goetz.

The tactics employed by the defense, however, strongly suggest an intent to play on the juror's racial stereotypes in order to make Goetz's actions seem more "reasonable." As Cynthia Lee points out in her Article, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, "Barry Slotnick, Goetz's attorney, appealed to the Black-as-criminal stereotype in a subtle, almost covert manner. In his opening statement, Slotnick referred to the victims as 'savages,' 'ators,' 'vultures,' and the 'gang of four.'"<sup>20</sup> Lee further points out that the defense openly appealed to racial bias in its re-creation of the subway shooting during Joseph Quirk's testimony.<sup>21</sup> For this re-creation, Slotnick asked the Guardian Angels to send him four young, muscular, Black men and then dressed them in tee shirts.<sup>22</sup> While the purported purpose of this re-creation was to show how each bullet entered the bodies of the victims, Lee concludes that the defense was "conjuring up images of gang members preying on society" and that the defense was self-consciously appealing to the Black as gang-member stereotype.<sup>23</sup>

At trial, nothing was done to mitigate the potential impact of the subtle (and sometimes not so subtle) playing of race cards.<sup>24</sup> While the judicial system simply assumed that jurors would be as color-blind as the language of the self-defense doctrine, the defense knew (or at least guessed) that the jurors, untrained in the law, would fall back on their preconceived notions of "reasonableness," especially when the courts gave no direction as to that

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19. Unless of course the jury simply ignored the law and decided that Goetz did the right thing in taking out ("taking out" seems to be a bit informal, but perhaps appropriate here) four young "thugs."

20. Lee, *supra* note 2, at 422. Lee's essay is one of the few articles dealing directly with the improper use of race in cases of self-defense.

21. GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL* 206-07 (1988), *quoted in* Lee, *supra* note 2, at 422.

22. FLETCHER, *supra* note 21, at 206-07.

23. See Lee, *supra* note 2, at 422.

24. See *id.* at 423 ("[t]he jury instructions, which did not mention race or racial stereotypes, did not reduce the chance that the race of the victims might prejudice the jurors in Goetz's favor. . . . [t]hey were allowed to rely on these stereotype-driven feelings.").

term's meaning.<sup>25</sup> Furthermore, the protections afforded to defendants by the rules of evidence shielded Goetz from prosecutorial accusations of racial motivations.<sup>26</sup>

#### B. *CABEY V. GOETZ*: FILLING IN THE BLANKS

Cabey, the young man whom Goetz shot while exclaiming, "here's  
<sup>27</sup> subsequently filed a private suit against Goetz. Although issues of race and racism were never directly argued at the criminal trial, they were explicitly explored in the civil case. The information regarding Goetz that came forward at this trial illustrates how limited the prosecution was during the criminal trial in ascertaining the defendant's motivations through extrinsic evidence. By allowing character evidence of racism, the attorneys in the civil trial successfully painted a picture of the racist motivations underlying the attack and thereby counterbalanced the defense's appeals to racial stereotypes.

Cabey's civil complaint for \$25,000,000 included the following language: "At all times relevant hereto, defendant acted with actual malice, to wit . . . on information and belief, defendant had previously and publicly expressed racial epithets and slurs concerning Black and Hispanic persons."<sup>28</sup> From the filing of the complaint, Cabey's attorneys made racial views held by Goetz an explicit issue in the case. In his closing arguments, Cabey's attorney asked the jury to "[a]ward enough in punitive damages that you bankrupt every other bigot with a gun . . ."<sup>29</sup> Goetz's own attorney admitted that his past use of racial slurs "'damned him

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25. For a discussion of the impact of jury instructions on jury behavior, see Peter Meijes Tiersma, *Reforming the Language of Jury Instructions* 22 HOFSTRA L. REV. 37, 38-44 (1993). [I]n a very real sense these studies call into question the legitimacy of the jury system itself. Fundamental to the Anglo-American process of trial by jury is the assumption that . . . the judge can instruct the jury on the applicable law, and the jury will apply those instructions to the facts of the case and return a reasoned verdict. Few lawyers and judges ever pause to contemplate just how woefully inadequate this "instruction" often is, especially in more complex cases. *Id.* at 39.

26. The Federal Rules of Evidence, like most states' evidence codes, do not allow character attacks on the defendant unless the defendant has called his own character into question. See FED. R. EVID. 404(a)(1). "Evidence of a person's character or trait of character is not admissible . . . [unless] [e]vidence of a pertinent trait of character [is] offered by an accused, or by the prosecution to rebut the same." *Id.*

27. *Lee*, *supra* note 2, at 417.

28. *Civil Complaint Against "Subway Vigilante" Bernhard Goetz Filed '85 and Tried '96*, Lectric Law Library's Stacks ¶ 12, § f, available at <http://www.lectlaw.com/files/cas91.htm>.

29. *Jury Awards \$43Million in Goetz Civil Trial*, CNN Interactive (Apr. 23, 1996), available at <http://www.cnn.com/US/9604/23/goetz>.

tremendously.”<sup>30</sup> The civil case thus was a character battle between Goetz’s attorney, who tried to paint Cabey as a violent Black gang member, and Cabey’s attorney, who portrayed Goetz as a bigot. The civil case painted a markedly different picture of the events surrounding the subway shooting compared to the one-sided character assassination that took place in the criminal case.

### C. LAW ENFORCEMENT AND SELF-DEFENSE

While legal commentators and the media followed the Goetz case closely, most self-defense cases involving a minority victim do not receive significant legal scrutiny. One of the most politically polarizing types of cases involves police who claim self-defense in shooting an African American victim. Typically only the outcomes of these cases receive media attention, and then, only in response to the resulting outrage and unrest in the Black community. High-profile incidents, such as the Rodney King beating, have led to a perception of injustice among many African Americans (witness the riots that broke out shortly after the verdict acquitting the police officer defendants in that case).<sup>31</sup>

The litany of cases involving police officers who shot unarmed African Americans, claimed self-defense, and then were later acquitted, give credence to a perception of bigotry among law enforcement and the legal system that often refuses to hold them accountable.

On April 7, 2001, Officer Stephen Roach shot to death nineteen year-old Timothy Thomas, after chasing the unarmed youth into an alley.<sup>32</sup> Thomas was facing fourteen outstanding warrants, all of which were misdemeanors carrying a total possible jail time of nine months.<sup>33</sup> According to Special Prosecutor Stephen McIntosh, “[i]f [Roach] had waited, if he had slowed down, Tim Thomas would have just come around the corner and the officers would have been waiting. But Tim did not have a chance.”<sup>34</sup> Within days of the shooting Officer Roach changed his story regarding what actually happened in the alley, first stating that Thomas had

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30. *Id.* (quoting defense attorney Darney Hoffman).

31. See Kathryn K. Russell, *The Racial Hoax as Crime: The Law As Affirmation*, 71 *IND. L.J.* 593, 595 (1996) (“[B]lacks are more likely to be victims of police harassment/brutality or know someone who has been a victim. Further, they are more likely to perceive that the criminal justice system treats members of their group unfairly because of their race.”).

32. Matt Bean, *Judge: Cincinnati Cop Not Guilty*, *Court TV* (Feb. 27, 2002), available at [http://www.courttv.com/trials/roach/092601\\_notguilty\\_ctv.html](http://www.courttv.com/trials/roach/092601_notguilty_ctv.html).

33. *Id.*

34. *Id.* (quoting Special Prosecutor Stephen McIntosh).

reached for his waist, then later admitting that the shooting was an “accident.”<sup>35</sup>

On October 28, 2000, thirty-nine year-old television actor Anthony Dwain Lee was shot three times in the back and once in the head by Los Angeles Officer Tarrel Hopper who was investigating a noise complaint made against an upscale Benedict Canyon Halloween party.<sup>36</sup> Hopper claimed that Lee pointed a fake .357 magnum handgun at him and threatened to shoot.<sup>37</sup> According to attorney Johnnie Cochran, Jr., retained by Lee’s family in a suit against the City of Los Angeles, Lee ““could not have had time to withdraw a gun and point it at an officer and then have been shot four times in the back.””<sup>38</sup>

Although many commentators suggest various reforms to the investigation process in such cases,<sup>39</sup> they usually do not consider the process by which juries acquit police officers for these shootings. The problem lies not only in the psyche and training of our police, but also in the psyche of every member of society who holds, consciously or not, a stereotyped view of minorities. The solution lies not only in prevention, but also in accountability. In the next Section, this Note explores the process by which a person who kills or maims in “self-defense” makes an appeal to a jury, and how that jury might acquit such a defendant on the basis of racial stereotypes.

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35. *Id.*

36. Sarah Tippit, *Preparing For Court Showdown: Actor’s Family Files Claim Against LAPD in Halloween Shooting*, Reuters (Dec. 11, 2000), available at [http://abcnews.go.com/sections/us/DailyNews/lee\\_shooting001211.html](http://abcnews.go.com/sections/us/DailyNews/lee_shooting001211.html).

37. *Id.*

38. *Id.*

39. An article by renowned New York police officer Frank Serpico condemns not only the shooting, but also the trial, characterizing it as “a mockery of justice.” See Frank Serpico, *Amadou’s Ghost*, Village Voice (Mar. 8–14, 2000), available at <http://www.villagevoice.com/issues/0010/serpico.php>. Officer Serpico characterizes Diallo as “another innocent victim, written off to the war on crime” and further stated that “unless we demand an independent prosecutor to review the Diallo case, his ghost cannot rest, and the credibility of our justice system and the credibility of every brave and honest police officer in America will be damaged beyond repair.” *Id.* Officer Serpico, in this article, goes on to suggest various reforms that might reduce the likelihood of “mistakes” being made that cost the lives of innocent African Americans. *Id.*

II. RACISM AND A CONCRETE NOTION OF REASONABLENESS<sup>40</sup>

Goetz's appeal to racial stereotypes relied on a legal system of adjudication that left it up to the jury to determine "reasonableness" with no guidance as to what that word means as a matter of law. No legal restrictions limited the jury, which otherwise would have prevented it from considering the race of the victims when deciding whether Goetz's actions were reasonable. Part II of this Note provides a moral and philosophical argument for taking the consideration of race out of the hands of jurors as a matter of law in cases where the defendant claims self-defense.

Imagine that somewhere in America a neo-Nazi mistakes an ambiguous bump from an African American as being a challenge of mortal combat and subsequently beats an innocent man within an inch of his life. At trial he claims that his conduct ought to be excused because it was influenced by a racist upbringing that brainwashed him into thinking that all minorities are threatening. Elsewhere, the victim of two past muggings at the hands of Latinos draws his gun to defend himself from a lighter, erroneously believing it to be a knife, and fatally shoots a Mexican father of two. At trial he claims that an uncontrollable terror of Latino men caused him to see what anyone else would have clearly recognized as a lighter as a deadly weapon. Nearby, a wife suffering from years of spousal abuse puts two bullets into the back of her husband's head as he sleeps. At trial the wife admits that the average person would have found it unnecessary to shoot their spouse under such circumstances, but that years of brutal abuse prevented her from conceiving of any other way out of the cycle of violence and constant threat of injury.

An important difference between the first two cases and the third is that the first two necessarily involve appeals to racial stereotypes in order to excuse conduct based on mistaken beliefs, while the third case does not. All three defendants are asking a jury to excuse them, not because their actions were entirely "rational" (i.e., justified, because their actions were the objectively correct thing to do at the time), and not because their actions were "reasonable" from the point of view of your average person.<sup>41</sup> In each case, the defendant is asking the jury to take his or her particular

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40. For a fascinating discussion of Black-as-criminal stereotypes and the criminal justice system, see generally Russell, *supra* note 31, which discusses the scapegoating of Blacks by White perpetrators, and gives a very good account of the social costs borne by Blacks because of commonly held stereotypes.

41. See generally Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798, 800-01 (1991) (providing a thorough account of "reasonableness").

mental characteristics into account in order to find that his or her actions were “reasonable” from such a point of view.

There are, however, very compelling reasons to distinguish claims of excuse based on racial stereotypes from claims that do not entail a marginalizing view of minority groups. When courts recognize mistaken beliefs based on racial stereotypes they imply that actions based on stereotypes are “reasonable.” Other claims of self-defense that rely on a mistaken sense of imminent harm do not necessarily carry such implications when recognized by the court.

The law can reject the reasonableness of racial stereotypes while preserving claims based on mistaken beliefs *per se* by accepting the following propositions: (1) the law can and ought to take a stand against views of the world that (a) are inherently disrespectful of certain groups within society and (b) impose great social and physical costs on these groups; (2) people should be held accountable for their racist beliefs and should be expected to engage in critical self-reflection as they form their view of the world. Embracing these propositions would remove the question regarding the reasonableness of actions motivated by racial stereotypes as a matter of law out of the hands of juries. Note that the law already rejects certain other honest, though mistaken, beliefs as legal excuses, such as in cases of rape where the defendant invokes gender stereotypes.<sup>42</sup>

In Part II.A of this Note, I make the argument that culpability judgments must appeal to objective notions of justice, and that definitions of reasonableness that rely exclusively on the consensus of a jury fail to comport with a satisfying account of culpability judgments. “Race-shield” laws would help define such a concrete notion of justice for the jury by declaring that racial stereotyping is unjust, regardless of the jurors’ personal views. In Part II.B, this Note argues that the battered woman defense does not necessarily ask the court to adopt a stereotype as a reasonable worldview, and thus is distinguishable from and avoids the resulting problems discussed in Part II.A. Part II.C provides some compelling reasons for rejecting the cultural relativist objection to the hypothetical claims described in Part I. Part II.D provides some compelling reasons for rejecting the social determinist view that even if concrete moral judgments are possible, one is not responsible for the moral (or immoral) views that one develops. Part II.E deals with culpability judgments regarding the defendant’s actual motivations for the defendant’s

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42. See the analogy to rape-shield laws, *infra* Part III.C.

act, as opposed to only those posited in their legal claim, concluding that such piercing culpability judgments are beyond the reach of the court, that is, until certain very difficult questions are settled.

#### A. CULPABILITY, MORAL OBJECTIVITY, AND THE LAW

Without concrete standards for what constitutes “reasonableness,” blame is reserved for the (statistically) deviant in cases of mistaken self-defense.<sup>43</sup> As Mark Kelman states, “[W]e are blamed only for those actions and errors in judgment that others would have avoided.”<sup>44</sup> Such jurisprudence relies on the jury alone to determine whether a person’s decision to severely injure or kill another was “reasonable.” Without a concrete standard, a jury is left to put it to a vote, armed only with twelve vague notions of what is “reasonable.” The fictional “average reasonable person,” who is the touchstone of all judgments of reasonableness, is thus born into the courtroom carrying all the prejudices of the twelve people who gave him life.

A satisfying account of culpability judgments must include an appeal to concrete notions of reasonableness. The very term “culpability” suggests a deontological theory of punishment. To say that one is “guilty” is to say that they acted wrongly. The “guilty” defendant ought to be punished according to her just desserts, not according to some amorphous standard of reasonableness that changes from jury to jury.

The criminal law reflects a deontological approach to punishment insofar as it punishes only voluntary actions committed with a guilty mind, regardless of the social utility of punishment.<sup>45</sup> Under a deontological theory of “culpability,” a defendant’s actions are wrong insofar as she has chosen to violate a maxim prohibiting such conduct. In other words, such

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43. See Kelman, *supra* note 41, at 801.

44. *Id.*

45. A person can pose a great danger to society, have already caused a good deal of harm, and still not considered “culpable” for their actions. The law contemplates this by requiring not only that the defendant consciously act (*actus reus*) but also with a guilty mind (*mens rea*). See discussion *infra* Part II.D. A person in the throws of an epileptic seizure cannot be held responsible for the harm she causes (at least during her first attack) because her actions cannot be considered in any way voluntary, and thus, there would be no *actus reus*. Even if she knew that she was subject to seizures and failed to take precautions, she could not be held culpable for murder because she would lack the level of intent, or *mens rea*, required for the high level of condemnation associated with a murder conviction. See MODEL PENAL CODE § 2.02, reprinted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 437–38 (6th ed. 1995) (discussing the varying levels of culpability or *mens rea* possible for various offenses). The crime of murder usually requires that the defendant act “knowingly” or “purposefully.” See *id.*

acts are in and of themselves wrong. The result is that the defendant's action is worthy of condemnation. In contrast, a theory of culpability that leaves it to the jury to decide whether or not to condone the defendant's view of the victim utterly fails to establish any sort of unchanging maxim of action. Rather, each defendant's claim is reviewed on a case-by-case basis in the light of that defendant's particular jury, yielding contradictory verdicts. Such a standard fails to establish any sort of legal standard for "reasonableness."

Defendants who appeal to racial stereotypes in order to excuse their actions ought to be held culpable because their claims rely on racial stereotypes, which do not proscribe just maxims of action. As such, their claims ask the court to adopt racial stereotypes as an excusable and potentially justifiable basis for violent action. Actions based on such stereotypes are wrong on their face because they treat members of minority groups as less worthy of care and consideration than others. In the words of Jody Armour: "Because the reasonable and the moral are flip sides of the same coin, an individual who shoots or screens others on racial grounds engages in blameworthy conduct."<sup>46</sup> The individual who invokes race-based generalizations and racial fear to justify an act of self-defense is implicitly claiming that it is not worthwhile to incur increased risks for even the most basic interests of minorities (namely bodily integrity).<sup>47</sup> Such a defendant is asking the court to adopt a socially constructed narrative of race that excuses stereotypical views of minorities, and at worst, treats such stereotypes as accurate depictions of minorities. When a criminal defendant raises racial stereotypes as a basis for action, he makes racial stereotypes a necessary part of his claim for excuse. Legal appeals to socially constructed generalizations regarding segments of society thus ask the court to give its imprimatur to such generalizations.<sup>48</sup>

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46. JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM* 57 (1997).

47. Prof. Armour makes this link between race-based generalizations and racism in the following excerpt from his book:

The racist is the person who says, "Yes, I appreciate the large risks of error and the grave social consequences of error that racial generalizations involve. And . . . everyday I willingly expose myself to many risks greater than those incremental risks posed by Blacks. . . . Nevertheless, I do not consider the interests of Black Americans worth incurring any incremental risks for."

*Id.* at 57-58. It is my assertion that the law ought to condemn such reasoning outright by prohibiting appeals to racial stereotypes in support of claims of imperfect self-defense.

48. *See id.* at 78-79 ("[G]ranting legal recognition [of such a] claim communicates the state's approval of racial bias regardless of what theory [the defendant] pursues; it sends the message that 'your dread of Blacks is a valid excuse for taking the life of an innocent Black person.' In conveying such messages, the court reinforces derogatory cultural stereotypes and stigmatizes all Americans of African descent.").

Aside from appeals to transcendent notions of right and wrong, culpability can be defined through a measure of social welfare or “the good.” Our criminal justice system recognizes consequentialist justifications for punishment when it looks to the deterrent value of imposing criminal sanctions. Although the purely deontological view of culpability looks only to whether a certain act violates objective maxims of action, consequentialism considers a law’s effect on the welfare of society. This view thus looks to the consequences of a given action or rule in determining its moral value. Consequentialism is as concrete a standard of moral judgment as a deontological view, so long as social welfare is assessed in a definite manner. A consequentialist, who accepts the dangerous and detrimental consequences of racial stereotyping, must reject notions of reasonableness that rely on the subjective and potentially racially prejudiced views of jurors; especially given the exacerbating effect of the court’s tacit approval of the defendant’s racial views by finding them to be

The social costs imposed on minorities due to the wide acceptance of racial stereotypes are indeed high. As Armour argues, “humiliation and stigmatization must be counted among the most painful costs of race-based suspicions.”<sup>49</sup> When the court sanctions a defendant’s view of African Americans as criminals, the court does more than offend the sensibilities of a single victim: It legally sanctions the stigmatization of an entire group by setting a poor example for society. As Armour further argues, “It is too easy for some to trivialize the severe psychological, emotional, and even spiritual costs to Blacks of being treated like criminals.”<sup>50</sup> The law must take the “chilling effect”<sup>51</sup> that stereotypes have on minority groups into account, especially when a defendant demands legal sanction for the taking of another’s life based on such stereotypes.<sup>52</sup>

There are also obvious physical costs to minorities when courts fail to punish those with racist assumptions. If racial stereotypes can form the basis of a defense, there is no deterrent to an individual acting on such stereotypes. In accordance with cases such as *People v. Goetz*, a would-be defendant can discount the potential of life in prison in his decision to react violently to ambiguous behavior. The court thus facilitates racial

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49. *Id.* at 53.

50. *Id.*

51. *Id.* at 51 (discussing in detail the “chilling effect” caused not only by the use of force against Blacks, but also the general humiliation felt by Blacks from being treated according to the criminal stereotype).

52. See generally Russell, *supra* note 31 (discussing the social costs of racism within society in general and the criminal justice system in particular).

stereotyping by allowing defendants to rely on it as a basis for violence against minorities.

Reasonableness determined by a mere showing of hands flies in the face of both a deontological and a consequentialist view of culpability. If a jury is left to its own devices regarding judgments of reasonableness, the defendant becomes subject to a standard of reasonableness that changes from jury to jury. Even worse, by throwing judgments of reasonableness to the jury, we encourage defendants to appeal to the very prejudices that justice demands they ignore. Only by creating concrete standards of “reasonableness” can the law aspire to meet the notions of culpability demanded by justice. Otherwise we are left with the uncomfortable conclusion that “an individual racist in a racist society cannot be condemned for an expression of human frailty as ubiquitous as racism,”<sup>53</sup> a statement that potentially excuses the slaver, the Nazi, and the ethnic cleanser.

#### B. DIFFERENTIATING THE BATTERED WOMAN’S CLAIM

On a formal level, the hypothetical claims of the racist and the battered woman appear to be identical. Both defendants hold a mistaken belief that they are in imminent danger of serious bodily harm or death, and respond with deadly force. Both ask the jury to consider their particular life’s experience in order to make their atypical view of the situation seem “reasonable” in light of those experiences.<sup>54</sup> Both rely on generalizations held by people who have had similar experiences to their own; the battered woman claiming that she developed a psychological inability to flee due to her abuse, and the racist claiming an overpowering fear of minorities.

There is a very important difference, however, between the views of the world that each defendant presents to the jury in order to excuse their conduct. While the Goetz-style defendant necessarily appeals to socially constructed generalizations of minorities, the battered woman *can* make her claim without reference to socially constructed generalizations about men, and can instead rely on her particular experience with her abuser as a basis for a justification or excuse defense.<sup>55</sup>

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53. ARMOUR, *supra* note 46 at 19 (quoting the “Reasonable Racist”).

54. *See infra* Part II.D (“The law allows a jury to find an atypical belief to be reasonable if, by extending the temporal frame backwards from the bad but potentially excusable event a juror can say to herself ‘there but for the grace of G-d go I.’”).

55. Mark Kelman, in his essay *Reasonable Evidence of Reasonableness*, focuses on the particular relationship between the victim and the defendant in differentiating the Goetz-type defendant from the battered woman. *See Kelman, supra* note 41, at 806. According to Kelman:

When a defendant asks the court to find her atypical belief to be reasonable, she is in essence asking the court to pass judgment on the worldview implicit in her legal claim, which she presents to the court as having motivated her decision to use deadly force.<sup>56</sup> As discussed in Part II.A, the Goetz type of self-defense claim asks the jury to recognize the reasonableness of racial stereotypes by presenting the race of the victim as a basis for excuse. While the racist who refers to Black stereotypes in claiming “self-defense” necessarily relies on a generalization regarding Blacks, the battered woman can claim that she developed her worldview through specific experiences with her abuser, and therefore only relied on her view of her abuser. The worldview implicit in the battered woman’s claim, properly formulated, involves only her abuser, and thus, the court is not asked to give its imprimatur to a socially constructed generalizations. The racist asks the court to suborn a stereotype, while the battered woman asks the court to excuse only her particular view of her abuser; at worst finding reasonable an inaccurate view that the abuser helped create.

Furthermore, the battered woman can ask the court to consider her particular experience to support a claim of self-defense while the racist cannot. The battered woman can claim that her prior experiences gave her better insight than the jury on the actual level of threat that her abuser posed. The racist cannot appeal to self-defense by claiming that his prior experience with minorities gave him a more accurate picture of “the way

<sup>57</sup> This distinction goes back to the fact that the battered woman has particularized knowledge of her abuser while the racist has no particularized knowledge of his victim. The battered woman can thus claim that she was reasonable (i.e., justified) in defending herself, even if a juror might not have sensed the same danger had she been in the defendant’s exact situation. The racist can only make such a claim if the

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[K]illing in situations in which people who are perceived to pose great and imminent danger but in fact are utterly innocent is markedly less acceptable than killing those who certainly were not innocent, and it is even more reprehensible to kill when the victims are selected on the basis of their membership in a historically subordinated racial group.

*Id.* While the racist’s claim relies on a generalization regarding minorities in justifying his actions, the battered woman’s claim can be formulated to rely on her particular experience with her abuser to show how she came to feel threatened. Thus, the battered woman’s claim would only be identical to the racist’s if she attacked a stranger on the basis of her experience with her abuser, thereby generalizing her experience with her abuser to men.

56. See *supra* Part I.A.

57. This strategy would work only if the racist wants to cite to statistics regarding crime among certain minority groups. For a discussion of the relevance of such statistics, see *infra* Part III.B. If the court accepts a defense based on racial stereotypes, even if those stereotypes are supported by correlative statistics, it essentially approves the application of those general statistical patterns to discrete and specific situations.

court accepts as true the proposition that Blacks are more prone to violent crime, thus providing a reasonable basis for action. When a defendant invokes racial stereotypes to support a justification based self-defense claim, he asks the court to find that racial stereotypes are not only “reasonable” (i.e., understandable) but also are factually accurate.

Even when a defendant appeals to racial stereotypes to excuse (as opposed to justify) his conduct, there is a danger that jurors will find his actions justifiable because they themselves hold such stereotypes. In other words, when the racist makes an appeal to human frailty (i.e., that his prior experiences have altered the objective reasonableness of his perceptions), there is the danger that jurors will see these stereotypes as factually accurate and reliable descriptions of minorities, rather than as inaccurate yet understandable given the defendant’s experiences. Assuming that stereotypes are indeed inaccurate, a greater level of risk exists in the case of a defendant presenting stereotype-based claims of excuse than in the battered woman’s claim.<sup>58</sup> With the battered woman there exists the real possibility that the defendant’s view of her abuser was not only understandable but also factually accurate. The disparity between the two claims again relates to the fact that the battered woman has particularized knowledge of her abuser, while the Goetz style defendant has no particularized knowledge of his victim.

The battered woman’s claim is further differentiated by the fact that it allocates social costs in a more just manner. By excusing the racist, the court places the costs of racial stereotypes<sup>59</sup> on innocent victims. In contrast, by excusing the battered woman, the court allows such costs to fall on abusers who are themselves at least partially responsible for the costs they incur. The social costs of domestic abuse are also mitigated by potential deterrent effects created by the court. When the court excuses the racist *on the basis of racial stereotypes*, it fails to put racists everywhere on notice that racial stereotypes are an improper basis for the decision to use deadly force, thus failing to deter racially motivated “self-defense” and potentially leading to more violence against minorities.<sup>60</sup> When the court excuses the battered woman, however, it tells the abuser to abuse at the abuser’s own risk. Thus any “chilling effect” created by the court

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58. This is true as long as she does not aver to socially constructed generalizations regarding men.

59. See *supra* notes 48–51 and accompanying text for a discussion of such social costs.

60. This is especially relevant to cases involving the use of “self-defense” by law enforcement. See *supra* Part I.

recognizing the battered woman's claim falls on abusers, amounting to a deterrent to abuse.

When the Goetz-style defendant invokes race as a basis for a generalization, he makes that generalization a necessary part of his claim. Thus a Goetz-style defendant could avoid such a problem by relating his narrative to the jury free of reference to race as a basis for action. Similarly, the battered woman can make her claim to the jury free of reference to gender relationships and focus solely on her specific interactions with her abuser as basis for her claims of excuse. Both parties can make claims of excuse based on claims that do not make generalizations regarding race, gender, and so on. Regardless of whether or not the defendants operated consciously on such socially constructed generalizations, when such generalizations are not a part of their legal claim, the defendant is not asking to be excused on the basis of such generalizations, and thus not asking the court to suborn a stereotype.

### C. CULTURAL RELATIVISM AND CULPABILITY

One type of legal claim that relies on racial stereotypes in order to excuse conduct that the defendant admits to be wrong but claims to be understandable requires an acceptance of racial stereotypes as an understandable expression of human frailty. This is the claim made by the neo-Nazi described in the beginning of Part I, who having been raised in a subculture of hate, believes that it is understandable that he came to embrace racial stereotypes. This claim is bolstered by the cultural relativist's view of culpability, a view that rejects any claim to absolute moral truth by arguing that moral judgments are only relevant to the culture in which they are made. According to this view no one can make a claim to transcendent, moral truth outside the context of her own culture.

It has come into vogue among many liberal-minded or "left-leaning" people to adopt what Mark Kelman calls the "hyperskeptical multiculturalist position,"<sup>61</sup> or what some others would term "hardcore cultural relativism." Kelman characterizes this view as attractive to many liberal-minded people because it insulates minority, underrepresented, and oppressed cultures from "the cultural imperialism of nonrelativistic observers of non-Western cultures"<sup>62</sup> (i.e., a dogmatic and unsophisticated view of moral judgments). Hardcore cultural relativism has the unfortunate consequence, however, of disarming those who hold this view from

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61. Kelman, *supra* note 41, at 806.

62. *See id.*

attacking racist or oppressive ideologies as morally reprehensible. As Kelman states, it allows one to excuse a group of defendants “because they alone are a product of circumstances that make it impermissible to judge them harshly for not living up to the standards most of us would be able to reach.”<sup>63</sup> According to such cultural relativism, no ideology or body of beliefs can be critiqued as “wrong” in any sense of the word, unless by “wrong” one simply means unacceptable to the dominant culture.<sup>64</sup>

This view cripples many well-intentioned thinkers in their efforts to differentiate certain kinds of legal excuses from others. Although such individuals are quite happy to excuse the battered woman who’s worldview was formed out of years of spousal abuse, they are less happy to excuse the neo-Nazi who grew up in a subculture of racism and hate (especially after he guns down an African American for an ambiguous bump while walking down the street). It is the inability to wrestle with difficult questions of right and wrong that keeps the cultural relativist from excusing the battered woman in the first case while condemning the neo-Nazi in the second case. Kelman rightly points out that “[Cultural relativism] is ultimately never sustained in its strong form, largely because it appears incompatible with taking a *critical* stance toward *any* subculture’s received understanding, including the racist killer’s.”<sup>65</sup> One is thus left with the unacceptable proposition that all inaccurate worldviews<sup>66</sup> are created equal, be they the learned helplessness of an abused woman or the dehumanized portrait of African Americans held by many white supremacists.

Excusing a defendant merely because there is a subculture that agrees with that defendant fails to examine the moral implications of her legal claim. Furthermore, this theory fails to distinguish the defendant’s legal claim from the neo-Nazi who lashes out in mistaken “self-defense,” and then appeals to hateful racial stereotypes to excuse his conduct. By holding criminal defendants liable, the court is passing judgment on the moral validity of their claim. Cultural relativism commits us to granting the neo-Nazi the same amnesty as all honestly mistaken defendants so long as he can show that his actions were “reasonable” as a member of his particular subculture. Such a dilemma should be unacceptable to all but the moral nihilist to whom the word justice has no meaning.

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63. *See id.* at 804.

64. Kelman characterizes hyperskeptical multiculturalism (one form of cultural relativism) as follows: “In this view, there are no transcendent claims to truth at all.” *Id.* at 806.

65. *Id.* (emphasis in original).

66. *See supra* Part I.E for a more detailed discussion of the term “worldview.”

## D. SOCIAL DETERMINISM, CHOICE, AND CULPABILITY

As argued in Part II.A, the very word “culpability” implies some appeal to a transcendent notion of right and wrong. To say that there are no transcendent truths<sup>67</sup> but only cultural norms is to say that people should not be culpable for their actions unless they act outside of their cultural proscriptions. A similar claim can be made however if one adheres to a strong version of social determinism. This argument excuses the defendant for acting on the basis of racial stereotypes by claiming that he had no control over the formation of his views.

A strong version of social determinism holds that one’s view of the world is determined by one’s experiences within a certain culture or sub-culture. If one’s culture determines one’s view of the world, and one makes choices based on one’s view of the world, how can one be culpable for one’s “choices”? While one might think one is making choices, the character (i.e., set of underlying beliefs and resulting motivational structure) that motivates those choices is merely handed to us through our experiences as members of a particular family, culture, and so on. This is the claim made by the mugging victim in the hypothetical at the beginning of Part I. Such a defendant claims that he was led inexorably to act because of, for instance, past traumatic experiences with minorities.<sup>68</sup>

This view is similar to cultural relativism in that it might initially be appealing in that it obviates us from judging others, but in the end it is unacceptable because it prevents us from condemning individuals, who our moral intuition demands that we condemn. Furthermore, this view ignores the social costs created by racial stereotypes and the court’s failure to condemn them, and discounts the example-setting and deterrence value of such legal condemnation. By removing individual agency from the formation of one’s worldview, social determinism prevents one from distinguishing between racist and non-racist views of the world.<sup>69</sup>

This is not to say that social determinism provides no insight into culpability judgments whatsoever. A weak deterministic view (i.e., that the environment influences one’s view of the world but does not dictate it)

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67. Kelman, *supra* note 41, at 806 (“In this view, there are no transcendent claims to truth at

68. Defendants who claim post-traumatic stress alone as the basis for their actions do not implicate racial stereotypes and thus would not be asking the court to sanction such stereotypes. Such post-traumatic stress claims, free of reference to socially constructed generalizations such as race and gender, are thus not implicated by this criticism.

69. That is, as discussed later in this section, so long as one holds choice to be relevant in determining culpability judgments.

helps explain how the law provides for a claim of excuse based on an atypical belief. Holding an individual culpable for her actions is to do more than simply evaluate the choice that she made at the instant she made it. The law recognizes this when it contemplates excuses based on beliefs that are atypical but are considered “reasonable.” The law allows a jury to find an atypical belief to be “reasonable” if, by extending the temporal frame far enough backwards from the bad but potentially excusable event, a juror can say to herself “there but for the grace of G-d go I.” For example, while a well-adjusted and happy juror would not have shot her husband in his sleep had she been in the defendant’s exact position, she might have done so had she spent years with an abusive spouse..

However, if social determinism was the entire basis for judging a legal excuse, the same claim could be made on behalf of the neo-Nazi. A liberal-minded, well-educated person with good parents and a happy childhood would not have blown away the innocent Black man because of an ambiguous bump; however, a person with virulently racist and abusive parents who was taught that all such bumps are an invitation to mortal combat might have engaged in the same sort of “self-defense.” If defendants are given carte blanche to explain how they came to be the way they are, and a juror is expected to not only put herself in defendants’ shoes, but also to assume that the juror would have developed similar traits as a result (similar to determinism, which holds that an individual can only develop the character that they have given their particular life experience), then all bad acts based on mistaken beliefs would be legally excusable. As Michael Moore states in his essay *Choice, Character, and Excuse*: “[I]f determinism turns out to be true, the choice conception is assumed to have the unhappy implication that no one is responsible for anything.”<sup>70</sup>

Moore describes the view that character determines choice and that one cannot choose one’s character in the following passage:

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70. Michael S. Moore, *Choice, Character, and Excuse*, SOC. PHIL. & POL’Y, Spring 1990, at 49. However, if we accept social determinism but reject choice as an essential element of culpability, we are left with the uncomfortable conclusion that those privileged with life experiences that align them with the dominant cultural ideology can hold those whose values do not reflect those in power, culpable for actions that reflect unfortunate accidents of birth. According to this view, a rich bon vivant, born into a life of opulence and ease, can comfortably judge by his own standards an abused woman, born into poverty, who kills her husband in his sleep in order to end a cycle of devastating abuse. Moore discusses and rejects this view explicitly: “[H]e can happily admit that responsible choices are caused by character, and that character in turn is caused by factors not themselves chosen by the actor.” *Id.* at 50. As suggested in Part II.E, both considerations of choice and character are relevant to notions of culpability, as the repugnance of the above hypothetical suggests.

Someone who lacks good character is poorly made, a defective being for a being of his or her kind . . . We shun those with bad characters, avoid their friendship, and disadvantage them in various ways. Moreover we feel entitled to so treat them because they deserve no better. To the extent that such persons did not choose their character, they are to that extent morally unlucky in being the defective creatures they are.<sup>71</sup>

To escape this quandary, Moore posits that there must indeed be a choosing agency that explains choice outside of character itself, i.e., that there is a will that is to some extent independent of one's character:

Characters, to be characters, can only typically cause some classes of actions, but not others. Character in this sense is inherently general, requiring typical causal connections to classes of actions; will and the choices that issue from it are in this sense particular, *being equally capable of causing any particular act not being tied to any general class of actions.*<sup>72</sup>

In the absence of final answers to timeless questions regarding free will, the law can, does, and ought to demand that all people engage in critical self-reflection to avoid endangering innocent people. "Race shield" laws would provide an impetus for such critical self-reflection by taking a firm stance against marginalizing views of minorities.<sup>73</sup> By forbidding the presentation of the victim's race as being relevant to the decision to use deadly force, the law puts people with racist worldviews on notice that they ought to take precautions against their own predilections. Just as a man prone to violent fits of rage is expected to avoid situations where his predilections will cause harm to innocent bystanders, the law ought to expect the racist, who is prone to lash out in "self-defense" based on his racist view of minorities, to take precaution against his own violent predilections. Peter Arenella, in *Character, Choice and Moral Agency*, allowed for culpability judgments to be based on a person's failure to engage in critical self-reflection:

[T]his character-based model would locate his moral culpability in his earlier failure to do something about a character defect that clearly could impair his ability to make the right moral choice in certain circumstances. We blame him for not acting like a reasonable person because we believe he is morally responsible for not doing something

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71. Moore, *supra* note 70, at 46.

72. *Id.* at 48. (emphasis added).

73. This is a consequentialist rationale. The rule is favored because of its positive effects on society. *See supra* Part II.A.

about those defective aspects of his character that prevent him acting like one.<sup>74</sup>

Part II.E argues that this is an incomplete explanation of why we excuse in certain contexts but hold culpable in others. We could just as easily ask the battered wife why she allowed herself to develop learned helplessness. As Arenella suggests, however, the law ought to encourage critical self-reflection, and at the very least, a “race shield” law would prevent a person who acted violently based on a racist worldview from taking refuge in similar views held by members of a jury (and thereby avoid critical self-reflection before a bad act, knowing that he could pander to a potentially racially-biased jury).

#### E. CONCLUSION REGARDING CHARACTER, CULPABILITY, AND LEGAL CLAIMS

“The Constitution cannot control [racial] prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect.”<sup>75</sup>

- Chief Justice Burger’s Unanimous Opinion in *Palmore v. Sidoti*

Whenever a defendant asks a jury to excuse his behavior based on an honest though atypical belief, he invites the jury to pass judgment on his character. As explained in Part III, a defendant may ask a jury to contextualize his atypical mistaken belief in order to find it reasonable. The defendant’s worldview or character is the context in which his beliefs, mistaken or otherwise, reside.

Our criminal justice system incorporates notions of motivation in the legal requirement of mens rea,<sup>76</sup> and notions of choice in the legal requirement of actus reus.<sup>77</sup> A person can be excused for a bad act because they did not have a guilty mind during the commission of the bad act.

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74. Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, SOC. PHIL. & POL’Y, Spring 1990, at 73.

75. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (Burger, C.J.).

76. See MODEL PENAL CODE § 2.02, reprinted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 437–38 (6th ed. 1995) (discussing the varying levels of culpability or *Mens Rea* possible for various offenses).

77. See *id.* at § 2.01(1), reprinted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 437–38 (6th ed. 1995) (“A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.”).

Imperfect self-defense is such a claim. When a person shoots someone that they honestly *and reasonably* believe to be a mortal threat to them, they lack the guilty mind of an intentional murderer. While they may be said to have chosen to commit the bad act (i.e., shooting an innocent person), they did so because of a mistaken belief, and were the world to be as they thought it was, the act would not have been bad at all. Culpability for one's worldview resides in the determination of reasonableness. The requirement of reasonableness in the mistaken belief involves a determination of whether the basis for action presented by the defendant is a reasonable one.

Throughout this Note I have used the term "worldview" to describe a person's set of beliefs and assumptions about the world. In the context of this Note I mean to use this term quite literally to encompass one's entire body of assumptions about the world, rather than in a narrower context (e.g., one's political views.) As such one's "worldview" is critical to the formation of one's perceptions. When one holds a mistaken belief, that belief is formed in reference to certain assumptions about the world. In a claim of imperfect self-defense, a defendant can ask the jury to see his mistaken and otherwise unreasonable belief of imminent bodily harm as reasonable, *by virtue of his atypical worldview*. In making the claim that his belief was atypical but reasonable, the defendant asks the jury to evaluate his mistaken belief, not in the light of the juror's own sense of reasonableness, but in the light of the defendant's view of the world which is implicit to his legal claim. By implicating his worldview, the defendant paints a picture of his character before the jury, which that jury must pass judgment on.

Moore makes the connection between a person's character and the acceptability of an excuse in light of that character. By comparing various hypothetical claims of excuse, Moore points out that the "self" that chooses to do the bad act includes more than a rational decision-making faculty, but also includes emotions as well. "On this view, the emotions are not invaders of our processes of reasoned deliberation, nor are they preemptors of such processes. Rather, our emotions are both products and causes of the judgments we make as we decide what to do."<sup>78</sup>

Instead, Moore suggests that when we make culpability judgments "we are ultimately judging [a person] for his bad character, and—only in light of that judgment—then judging the culpability of his choice."<sup>79</sup>

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78. Moore, *supra* note 70, at 38–39.

79. *Id.* at 38.

The decision to act in one's self-defense inevitably involves a generalization by the defendant about the victim that leads to a sense of imminent danger. Any assessment of threat involving a stranger inevitably relies on generalizations. A subway patron may notice skull tattoos and a strange bulge in another person's pocket and perceive a threat sooner than they would from a man in a business suit. These generalizations can and often do involve socially constructed generalizations or stereotypes regarding the victim.

The actual and entire basis of the defendant's decision to act is, however, beyond the reach of the criminal justice system. There are severe institutional problems with relying on courts to construct the defendant's motivational structure at the moment they decided to act.<sup>80</sup> The defendant herself may not know or have access to a complete description of what led her to act. This Note is concerned not with the defendant's actual motivational structure, but with the defendant's legal claim before the court and what that claim entails. This distinction between the defendant's actual motivations and the defendant's legal claim may, to a degree, undermine the law's appeal to ideal and moral culpability judgments. Until courts can accurately discover, understand, and evaluate the defendant's entire motivational structure, such piercing culpability judgments are not possible.<sup>81</sup> What courts *can* do is apply concrete notions of culpability to the defendant's basis for excuse.<sup>82</sup>

An ideal distinction between competing claims of excuses might involve differentiating various socially constructed generalizations. For example, the generalizations relied on by the "reasonable" racist, not at court but during his actual decision to act, may indeed be worthy of moral condemnation, while the generalizations relied on by a battered woman may not be.<sup>83</sup> An ideal account of culpability judgments would consider

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80. See *Palmore*, 466 U.S. at 433 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

81. See generally *Tiersma*, *supra* note 25 (discussing problems with jury instructions). If jury instructions as they are now employed are already problematic, imagine an attorney having to explain to a jury the complexities of motivational structures discussed in this Note. Or furthermore, imagine attorneys debating the finer points of feminist and race theories before a lay jury. Although there may be real answers to these questions, a trial would not be an effective forum for settling such debates.

82. Although this may put a large emphasis on the defendant's proper formulation of their claim, this view of legal culpability will indeed prevent stereotypes from being the basis on which juries make their decisions. Thus, whatever the defendant's motivational structure, the jury will not find the defendant's actions to be reasonable by virtue of such stereotypes.

83. Such a distinction might rely on feminist critiques of gender relationships to judge the accuracy of a given socially constructed generalization. There might be real gender dynamics at work

not only the defendant's basis for excuse, but also the defendant's actual character, specifically how the defendant viewed the world when she acted in "self defense" and how that view affected her choice to act. One possible basis for distinguishing between socially constructed generalizations involves the effects of a given generalization within society.<sup>84</sup> However, it would likely be unworkable to have juries evaluate competing theories regarding socially constructed generalizations, and until questions regarding their ultimate validity are definitively settled, this Note calls for such generalizations to be left out of the legal decision-making process. Furthermore, any rule that specifies exactly what *is* reasonable, as opposed to presenting a nonexhaustive list of what *is not* reasonable, places the defendant on a procrustean bed and thereby robs the law of any flexibility to consider unique cases not contemplated during the law-making process.

The negative consequence of the argument in Part II of this Note is that reference to gender as a basis for a claim of excuse is unavailable to the battered woman. Consequently, she is forced to limit her claim to a description of her particular relationship with her particular abuser and to very general evidence regarding the effects of abuse on the abused that does not include reference to gender, race, and so on. This has the positive consequence of opening up the battered woman claim to individuals in same-sex relationships and abused children as well as to heterosexual women. The battered woman's claim thus becomes generalized into a battered person's claim, and appeals to a notion of reasonableness that is not tied to socially constructed notions of race or gender. Such a claim would not be barred so long as it is made at a level of abstraction that does not implicate gender or any other socially constructed description of the victim.

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that influence abusive relationships between men and women. Those dynamics might be accurately reflected by generalizations regarding how men and women deal with given situations.

84. Since men have not been the targets of historical oppression and abuse through widely accepted stigmatization, the invocation of such generalizations in regards to men may have fewer negative social consequences than do such generalizations directed against minorities or women. The social costs of racial stereotypes, discussed by Armour and others, may not exist in reference to generalizations regarding men. Such a purely consequentialist distinction, however, might not sit well with those looking for an inherent distinction between the two types of claims that is not tied to the historical record regarding who has historically oppressed who. The author's intuition is that an appeal to a historical record of stigmatization and abuse is the basis by which most people intuitively distinguish between an abused woman, who acts according to socially constructed generalizations regarding men, and a racist, who acts according to racial stereotypes regarding minorities.

### III. RACE SHIELD IN THE REAL WORLD

While Part II provided an abstract ideological basis for a concrete legal definition of reasonableness in cases of self-defense, Part III provides a practical suggestion for how such a standard could be implemented. Even if one is convinced that keeping issues of race away from the jury in cases of self-defense is a good idea, formulating and applying such a rule, in the shady world of trial tactics, is itself a formidable challenge. What a lawyer cannot say directly, she can hint at. Instead of referring to the violent nature of African Americans, a lawyer can hint at the perceived violence of hip-hop culture. A young Black man in Nike shoes and warm-up pants becomes a “thug” or a “gang-banger.” Under the law as it currently stands, there is no legal bar to the defense’s hinting at issues of race to justify the actions of the defendant.<sup>85</sup>

An initial response to a problem that involves the definition of a legal term such as “reasonableness” might be to simply instruct juries as to that term’s meaning on a case-by-case basis.<sup>86</sup> Furthermore, a legal codification of the term “reasonableness” alone could provide a basis for arguing that evidence of race is irrelevant.<sup>87</sup> However, it is wishful thinking to assume that on the basis of jury instructions, juries will put aside all of the racial pandering and fear mongering that can occur in a case such as *People v. Goetz*.<sup>88</sup> A definition of reasonableness that avoids commonly held stereotypes must keep the jury from being prejudiced in this way. Objectivity must therefore be given teeth through the Federal Rules of Evidence by keeping irrelevant and dangerous insinuations from the jury.<sup>89</sup>

#### A. THE PROPOSED RULE

This Note suggests that the Federal Rules of Evidence adopt the following rule:

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85. See *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986). See also text accompanying *supra* note 1.

86. See Lee, *supra* note 2, at 468.

87. This, however, would be a very problematic solution as discussed in Part II.E.

88. See *supra* notes 20–23 and accompanying text.

89. Nothing in this Note’s proposal would prevent a judge from bringing possible issues of racial prejudice to the attention of the jury in an attempt to make jurors mindful of their own unconsciously held stereotypes. Rather, this proposal bars the appeal to such stereotypes by the defense in order to justify or excuse the actions of the defendant.

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- a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving claims of self-defense:
- (1) evidence suggesting that the alleged victim's race is relevant to determining whether the defendant's apprehension of imminent or severe bodily harm was reasonable;
  - (2) evidence suggesting that any racial group poses an increased danger to other citizens.
- b) Trial Tactics.
- (1) Insinuations by counsel, at any point in front of the jury, which are intended to suggest the types of conclusions barred under a(1)–(2) shall also be barred under this rule.
- c) Character Evidence of the Defendant
- (1) Should evidence or trial tactics barred under this section be presented to the jury, the presiding judge may:
    - (i) declare a mistrial or
    - (ii) allow the prosecution to submit character evidence regarding the defendant, but only as is relevant to a possible racial motivation for the defendant's actions.

This proposal suggests a two-pronged approach to the problem of race being used by the defense to excuse the use of deadly force against minorities.<sup>90</sup> First, the law ought to exclude such evidence altogether where it can. As argued below, evidence of a victim's race is rarely, if ever, relevant. Furthermore, even if such evidence is relevant, it should be excluded because of its prejudicial nature and because public policy demands that jurisprudence should not reinforce dangerous stereotypes. Second, if such stereotype-based insinuations reach the jury, the prosecution should be allowed to submit evidence regarding the defendant's character for racism. Under the current Federal Rules of Evidence, such an attack on the defendant would likely be barred by Rule

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90. Armour suggests that effects of racial stereotypes at trial can be minimized by bringing them to the jury's attention. See *ARMOUR supra* note 46 at 147–49. He cites, however, cases involving famed attorney Clarence Darrow among others. It is overly optimistic to assume that all attorneys will combat stereotypes at court with such skill, if at all. While one can always hope for an effective counter to racial stereotypes, the apparent necessity of race shield laws ought not to be undermined by an overly optimistic faith in the racial mindfulness of state prosecutors.

404, which prohibits character attacks against the defendant.<sup>91</sup> Our courts would be terribly backlogged if any racial insinuations resulted in an immediate mistrial. This Note therefore offers a remedial measure, short of a mistrial. Although it may be difficult to assess when race has been raised by the defense for such a purpose, Part III.B addresses how courts have already dealt with such difficult issues in to the context of rape-shield law. Similar to the rape-shield law, it would be necessary for the courts to determine the types of innuendoes that would actually contravene the proposed race-shield law.

### B. RACE AND THE FEDERAL RULES OF EVIDENCE

The solution proposed in this Note appeals to three well-recognized bases for excluding evidence under the Federal Rules of Evidence. Evidence, under the federal rules, can be excluded if it is (1) irrelevant, (2) prejudicial, or (3) if its admission would be against public policy.

#### 1. Race as Irrelevant

Rule 401 of the Federal Rules of Evidence defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>92</sup> Thus the question of whether race ought to be admissible at all under the Federal Rules of Evidence depends on whether the race of the victim makes it any more or less likely that the defendant reasonably believed he was in imminent danger. This is a very loaded and problematic question, which this Note has dealt with in detail in Part II.<sup>93</sup>

Part II of this Note argued that “reasonable” cannot mean whatever the twelve members of the jury say it means, and that especially in the context of racial stereotypes, the term “reasonable” must have some concrete meaning under the law.<sup>94</sup> Even granting this assertion, evidence of a

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91. In a case such as *People v. Goetz*, evidence of the defendant’s racist beliefs would be barred. See FED. R. EVID. 404(a) (“Evidence of a person’s character or a trait of his character is not admissible for the purpose of showing conformity therewith on a particular occasion.”); *infra* notes 129–130 and accompanying text. Rule 404(b) only allows character attacks on the defendant when the defendant has already raised the issue of the defendant’s own character. See FED. R. EVID. 404(b). The defendant’s character for racism is also unlikely to be admissible as a motive. See *infra* notes 139–142 and accompanying text.

92. FED. R. EVID. 401.

93. See *supra* Part II.

94. There exists a good deal of confusion regarding the definition of the word “objective” in discussions of standards of reasonableness regarding claims of self-defense. For example, in the article

victim's race may indeed be relevant if it can be shown that such evidence does raise the actual amount of risk the defendant faced when she mistakenly acted in self-defense. For instance, a defense attorney might cite statistics showing that African Americans commit a disproportionate number of crimes, as evidence that the victim's race indeed had some bearing on the level of risk faced by the defendant.<sup>95</sup>

Armour provides a powerful argument against the relevance of any statistical relationship between African Americans and crime.<sup>96</sup> Statistics can be made relevant or irrelevant depending on how specifically they are applied to a given situation and the resulting decision to act.<sup>97</sup> Take for instance the hypothetical statistic that one quarter of the members of a certain racial group either are or have been in the criminal justice system as compared to only 5% of the population as a whole.<sup>98</sup> One might argue that this fact provides a basis for the relevance of race in a decision to defend oneself against the ambiguous actions of a member of that racial group. This statistic, however, does not provide any information about the percentage of that racial group who has committed a violent crime.<sup>99</sup> Even if such a statistic were available, one would have to know what percentage of *that* statistic included the sort of violent crime of which the defendant felt he was about to be a victim.

In the language of the Federal Rules of Evidence, this is a problem of conditional relevance. According to the Advisory Committee's Note to Rule 401, "conditional relevancy" . . . [is the situation where] probative value depends upon not only satisfying the basic requirements of relevancy, but also upon the existence of some other fact."<sup>100</sup> In other words, conditional relevance is where a given piece of evidence is relevant, conditional on certain other things being true. A victim's race is only relevant if there is evidence showing a predilection among members of that

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*Race and Self-Defense: Toward a Normative Conception of Reasonableness*, Cynthia Kwei Yung Lee discusses how many states define "objective" as being a standard set by the jury while a "subjective" standard looks only to whether the defendant's belief that they were in imminent danger was honestly held. See Lee, *supra* note 2, at 381–91. For any standard to be truly "objective" it must be more than a tenuous consensus held by the jury of the hour, and instead appeal to a more concrete definition. See *supra* Part II.

95. This is the argument of the "intelligent Bayesian" described by Armour. See ARMOUR, *supra* note 46, at 36 ("The Bayesian relies on numbers that reflect not the prevalence of racist attitudes among Whites, but the statistical disproportionality with which Blacks commit crimes.").

96. *Id.* at 38–42.

97. *Id.*

98. See *id.* (presenting a similar argument against the use of statistics).

99. See *id.*

100. FED. R. EVID. 401 advisory committee's note.

race to act violently in the situation faced by the defendant. General statistics regarding crime or even violent crime are thus conditionally relevant on the obviously false assumption that a member of a given racial group is as likely to commit a crime against any one member of society as he is against any other.<sup>101</sup>

All of these examples do not even begin to deal with issues of unequal treatment under the criminal justice system, such as unfair drug enforcement policies, or disproportionate conviction rates among certain minority groups. These subjects, however, have already been dealt with in great detail by other authors.<sup>102</sup> It is important to note, however, that these factors create additional equally important conditional relevance problems for a statistical justification of the relevance of race in cases of self-defense.<sup>103</sup>

These factors also provide grounds for including within the Federal Rules of Evidence a provision specifically stating that the victim's race in claims of self-defense is inadmissible. The Federal Rules as they currently exist strongly militate against the usage of any of the sorts of general statistics that would be used to back up such a claim. The race card, however, continues to be played in cases such as those where police shoot first and ask questions later, as well as those where private citizens take law enforcement into their own hands.<sup>104</sup> In order to prevent any sort of appeal to "commonly accepted" statistics regarding any racial group's propensity towards criminal behavior, the Federal Rules of Evidence should reject such assertions outright, whether overt or implied.

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101. If, on the other hand, the vast majority of violent crimes committed by Blacks are against people who the offender knows, there is no rational basis for someone who does not know a particular Black individual to infer a higher level of risk. One could even demand statistics focusing on certain geographic locations. For instance, the percentage of violent crimes committed against strangers by a certain racial group nationwide may have little or no bearing on a particular encounter in a particular community that does not follow the national statistical averages. To show the ridiculousness of using such averages, imagine a defense attorney quoting worldwide statistics on Asian crime. Such statistics would include the entire population of China, and clearly would not be relevant to a claim of self-defense made in the U.S.

102. See generally ARMOUR, *supra* note 46 (touching upon the unequal treatment of Blacks in the criminal justice system).

103. See *id.* (discussing further the unequal conviction and enforcement against different racial groups by law enforcement).

104. See *supra* Part I (discussing the Bernard Goetz case and incidents of police "self-defense" excused by appeal to the victim's race).

## 2. Race As Prejudicial

Rule 403 of the Federal Rules of Evidence states “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .”<sup>105</sup> The Advisory Committee’s Note to Rule 403 states “‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one.”<sup>106</sup> Whether or not one finds the above reasoning regarding the relevance of race persuasive, evidence focusing on the victim’s race should be excluded because of the tendency of jurors to improperly infer negative connotations.

Evidence of the victim’s race, in cases where the defendant claims self-defense, is often presented in order to pander to the fears and prejudices of the jury. As discussed in Part I of this Note, the defense in the Goetz trial gestured boldly towards the race of the victims in order to invoke the stereotype of the dangerous young African American male.<sup>107</sup>

A key part of the battle that occurs between the defense counsel and the prosecutor involves wrestling for control over the images that jurors’ form in their mind regarding what happened between the victim and the defendant. It is as if each attorney is a movie director, fighting to get the camera angles and visual details that best support their case to be accepted as “the real story” by the jury. Lawyers fight as much or more over the narrative of a case as they do over points of law. This struggle over the narrative becomes improper when the defense attempts to emphasize certain details that may be true facts in a literal sense, but distort events by appealing to improper biases among the jury.

As much as we as a society would like to think of ourselves as having escaped the warping influence of racial stereotypes on our perceptions, numerous studies suggest that perceptions about race greatly influence the way we interpret an ambiguously dangerous situation. Birt Duncan tested the reactions of White undergraduate students at the University of California at Irvine to ambiguous bumps involving different combinations of White and African American strangers. According to the test, 75% of the subjects found that the bump constituted “violent” behavior when the person shoving was an African American and the person being bumped was White, and only 6% of the subjects perceived the ambiguous bump as

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105. FED. R. EVID. 403.

106. FED. R. EVID. 403 advisory committee’s note.

107. See *supra* Part I. See, e.g., Lee, *supra* note 2, at 422–23.

“playing around.”<sup>108</sup> Only 17% of the subjects considered the same ambiguous bump to be “violent” when a White individual shoved an African American, and 42% of the subjects considered the White on Black shove to be “playing around.”<sup>109</sup> Lee goes on to quote another study that suggests a tendency among White individuals to view the exact same action by an African American as violent.<sup>110</sup>

This tendency of people to drastically change their view of the exact same situation solely on the basis of race suggests that such evidence is extremely prejudicial in cases where a jury is asked to recreate a violent exchange between two people and to decide whether the defendant’s perception of the situation was “reasonable.” If randomly selected college students can be so swayed in the relatively innocuous case of an ambiguous bump which they themselves observe, imagine the prejudicial impact of race on jurors who themselves do not witness the event they are called on to judge. Even if one was able to definitively show that members of a certain racial group are incrementally more likely to be involved in violent crime, and even if one was to accept such a statistic as relevant in spite of the difficulties discussed above, scientific studies regarding the effects of race on perception of events strongly militates against allowing such information to reach the jury. Certainly the unconsciously (or consciously) held stereotypes of a juror are within the contemplation of the “improper basis” for arriving at a decision discussed by the Advisory Committee to the Federal Rules of Evidence.

If there is some probative value to be found in a victim’s race through any statistical average, that probative value is quite limited. As the checkered history of cases invoking the race of the victim in cases of self-defense<sup>111</sup> as well as numerous psychological studies demonstrate,<sup>112</sup> such evidence is indeed not only being used for an improper purpose by the jury, but is also being presented for those very improper purposes by the defense. The test for whether potentially prejudicial material should be admitted at trial is whether the probative value is outweighed by the prejudicial impact of the evidence.<sup>113</sup> Given the uncertain nature of any

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108. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595 (1976).

109. *Id.* at 596.

110. *Id.*

111. *See supra* Part I.

112. *See supra* notes 103–106 and accompanying text.

113. Rule 403 of the Federal Rules of Evidence holds that evidence ought to be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice . . .” FED. R. EVID. 403.

statistical evidence for the relevance of race<sup>114</sup> and the clear danger of prejudicial evidence discussed in this section, the race of the victim in cases of self-defense ought to be excluded in order to prevent prejudice of the jury, even if relevant.

### 3. Race, Privilege, and Public Policy

Rule 501 of the Federal Rules of Evidence codifies constitutional, legislative, and common law privileges into the rules of evidence.<sup>115</sup> Rather than give an enumerated list of privileges, the Federal Rules of Evidence remain flexible, deferring to the Constitution, the courts, and the legislatures to determine what types of evidence should be privileged because of policy concerns.<sup>116</sup> Thus there is little resistance built into the rules against developing new privileges as society determines their need. What most privileges share in common is the sacred protection of a relationship or an ideal. The Fifth Amendment to the Constitution declares that a person ought not to be made a witness against herself, and thus expounds an ideal.<sup>117</sup> Most jurisdictions recognize some sort of marital privilege because the relationship between two married people is held sacred by society.<sup>118</sup>

Public policy dictates that, even if race is logically relevant in determining whether a given stranger poses a threat, such a basis for acting violently towards another person must be discounted as a matter of law. The law ought to demand that people incur a small increase in risk rather than follow dubious statistical assessments based on race.<sup>119</sup>

Armour further points out, “Citizens are frequently called upon to incur additional risks for important principles and social values.”<sup>120</sup> For example we as a society allow the elderly to drive, even though they, as a group, indeed pose a much greater risk to others on the road. We as a

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114. See *supra* Part II.A.

115. According to the Report of House Committee on the Judiciary, the standard for determining privileges under Rule 501 is “derived from Rule 26 of the Federal Rules of Criminal Procedure, [and] mandates the application of the principles of the common law as interpreted by the courts of the United states in the light of reason and experience.” HOUSE COMM. ON THE JUDICIARY, 93D CONG., REPORT ON ARTICLE V (Comm. Print 1950).

116. See FED. R. EVID. 501.

117. U.S. CONST. amend. V.

118. The Federal Rules defer to each jurisdiction to determine specifically what sort of evidence is privileged. See FED. R. EVID. 501.

119. See ARMOUR, *supra* note 46, at 53–58 (discussing the social costs to minorities as a result of widely held racial stereotypes).

120. *Id.* at 55.

society have decided that the respect accorded to the elderly through the right to drive a vehicle outweighs the increased risk they as a group pose to all on the road.<sup>121</sup> When society takes into account not only the physical harm to minorities through the influence of violent stereotypes along with the “chilling effect” upon minorities who are subject to racial stereotypes, one has a potent counter to any additional risk that people who refuse to make race-based generalizations might incur.<sup>122</sup> The law operates outside the courtroom. Furthermore, high-profile cases that allow defendants to appeal to racial stereotypes in defense of their actions not only undermine the legitimacy of the courts, but also cause all minorities subject to such stereotypes to bear an increased fear of attack from law enforcement as well as private citizens.<sup>123</sup>

The law ought to recognize as sacred the ideal of respect for others regardless of race. By not only taking the victim’s race into account but demanding that the jury do so as well, the defendant asks the court to sign into law the reasonableness of shooting an African American in the same exact situation in which one would not shoot a Caucasian. The defendant is thus asking the jury to define a given racial stereotype as “reasonable” as a matter of law.<sup>124</sup> Even if one refuses to recognize the irrelevance of race in cases of self-defense and the prejudicial impact such information has on juries, the decision to take another’s life or bodily integrity ought not to be made on the basis of generalizations regarding another’s race. In vindication of this principle, the law should exclude evidence of the victim’s race in cases of self-defense.

#### 4. Excluding the Honest Belief

Even if the above three bases for excluding race in cases where the defendant claims self-defense is persuasive, the doctrinal requirements of a claim of self-defense provide an opportunity for the defendant to expound his honest belief that the victim, as a member of a minority group, posed an

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121. *See id.* at 55–56 (discussing similar examples).

122. It is the author’s assertion that there is no convincing statistical evidence for believing that acting towards others on the basis of racial stereotypes in any way makes a person safer. This public policy argument, however, is the author’s final attempt at convincing those who refuse to recognize problems with racial stereotypes on the basis of the arguments made in Part II.A–B.

123. The author recognizes the existence of theories of self-defense that claim that people have an absolute right to defend themselves from harm and that they have no responsibility to bare the social costs. As mentioned in Part II, however, an attitude that places any marginal increase in personal risk above any increase in social costs to minorities, regardless of their relative weights, amounts to racism. *See* ARMOUR, *supra* note 46, and accompanying text.

124. *See supra* Part II.

increased threat. Even in jurisdictions that adopt the so-called “objective” standard of reasonableness, in order to sustain a claim of self-defense the defendant must show that he had (1) an honest and (2) a reasonable belief that he faced imminent danger.<sup>125</sup> Even if the law contained a truly objective standard of reasonableness as discussed in Part II of this Note, the defendant would still be able to testify as to his honest beliefs that the victim, as an African American or Latino, posed an imminent threat of harm.<sup>126</sup>

In order to prevent this easy method of circumventing any bans on racial evidence, the Federal Rules of Evidence ought to allow the prosecution to stipulate to the veracity of the defendant and then attack the defendant solely on reasonableness grounds. Courts are already quite familiar with problems regarding prejudicial evidence and the ability of the opposing side in a case to stipulate to the facts that such evidence is submitted to prove. The Supreme Court established in *Old Chief v. United States*, that where evidence has no independent evidentiary value beyond the establishment of an element of a crime, that element might be stipulated to by the defendant, so as to avoid prejudicing the jury.<sup>127</sup> Although it is usually the defendant who stipulates to certain facts in order to prevent the details of certain evidence from reaching the jury, courts could apply the same prejudice prevention logic to race shield laws in favor of the prosecution. Thus, the defendant would not be hampered in his abilities to prove that he honestly believed he was in danger, while being prevented from slipping in evidence of reasonableness involving race under the pretext of proving veracity.<sup>128</sup>

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125. According to New York law, for instance, a person “may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such a person.” N.Y. PENAL LAW § 35.15. This language requires not only an honest belief but a reasonable belief. It appears as though the New York Penal Code incorporates having an honest belief into having a reasonable belief perhaps because it makes little sense to speak of a dishonestly held belief. One either believed something at a certain time or one did not.

126. N.Y. PENAL LAW § 35.15.

127. See *Myers v. United States*, 198 F.3d 615, 618 (6th Cir. 1999) (“[W]here the ‘name and nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to provide the element of the prior conviction,’ a district court abuses its discretion to stipulate . . .” (quoting *Old Chief v. United States*, 519 U.S. 172, 174 (1997))).

128. This appears to be a huge concession to the defense, especially if one continues the analogy between the self-defense and the rape contexts. Although issues of defendant veracity are often key in cases of alleged rape, many self-defense cases, such as the trial of Bernard Goetz, do not involve a large dispute over whether the defendant indeed felt threatened. In self-defense cases where the defendant invokes the victim’s race, it is likely that the battle lines will be drawn around issues of reasonableness,

### 5. Using Character Evidence to Level the Playing Field.

As mentioned previously, the real world of courtroom tactics does not lend itself to the easy application of rules. If any and all appeals to racial stereotypes were to lead to a mistrial, the courts would be hopelessly clogged with retrials. Also, certain appeals to racial stereotypes might not be blatant enough to warrant a mistrial. Consequently, the law ought to give the judge discretion to bring into issue the defendant's character for racism.

Under the current Federal Rules of Evidence, evidence of the defendant's character for racism is barred unless raised first by the defense.<sup>129</sup> Rule 404(a)(2) allows "[e]vidence of a pertinent trait of character of the victim of the crime offered by the accused, *or by the prosecution to rebut the same*" to be admitted.<sup>130</sup> According to the Advisory Committee's Note "an accused may introduce pertinent evidence of the character of the victim."<sup>131</sup> Introducing such evidence, however, opens up the defendant himself to character attacks by the prosecution. The idea is that defendant's have a right to aver to the violent character of the victim in order to show (1) that it is more likely that victim and not the defendant indeed precipitated the altercation<sup>132</sup> and (2) that the defendant was indeed fearful of the victim, regardless of whether the victim posed an actual threat.<sup>133</sup> The usage supports a claim of justification in self-defense where the defendant is claiming that the victim was actually threatening the defendant. This contrasts with the second usage, which supports a claim of excuse where the defendant admits that there was no actual threat but claims that he was "reasonable" in perceiving one.

The rule proposed by this Note relies on the principle that character attacks on the victim should open the door to similar character attacks on

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129. Therefore, the defense would rarely raise such an issue, as it is unimaginable that such a move would be in the defendant's interest.

130. FED. R. EVID. 404(a)(2) (emphasis added).

131. FED. R. EVID. 404(a) advisory committee's note.

132. *See id.* ("Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted . . . consistently with his character. . . . [A]n accused may introduce pertinent evidence of the character of the victim. . . .").

133. *See United States v. Burks*, 470 F.2d 432, 434-435 (D.C. Cir. 1972) (holding that evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily injury"); FED. R. EVID. 404 advisory committee's note (discussing 2000 Amendment).

the defendant.<sup>134</sup> According to the Advisory Committee Note to the 2000 Amendment to Rule 404, “the accused cannot attack the alleged victim’s character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused.”<sup>135</sup> By referring or hinting at the race of the victim to insinuate conformity with a violent racial stereotype, the defense is implicitly calling into question the victim’s character as a member of the group to whom the stereotype applies. In other words, by attacking the character of African Americans generally, the defendant attacks the character of an African American victim specifically. The implicit claim that all African Americans are inherently violent is an attack on the victim’s character as a member of that racial group.

This proposal gives the prosecution the power to bring racist insinuations to light where a judge feels that such references to racial stereotypes do not merit a mistrial. If the defense has the power to pander to the stereotypes embedded in the minds of jurors, the prosecution ought to have the power to confront those racist stereotypes head on by attacking the defendant for his believing and acting on those stereotypes on the occasion he did violence against the victim.<sup>136</sup> Without this rule or one like it, the defendant is allowed to benefit from the stereotypes held by the jury without being exposed to the jury for the fact that the defendant believes these stereotypes. Although this connection seems obvious given the nature of the claim, the gesturing towards racial stereotypes is the province of the clever lawyer who plays bad cop to the defendant who seems ignorant of racial motivations. This proposal thus allows the prosecution to link the stereotyped views that defendant’s attorneys hinted at to the defendant himself. Furthermore, it forces the defendant to reap the full harvest of averring to such racial stereotypes by granting the prosecution an equal chance to make the jury more conscious of other potential motivations besides honest fear.<sup>137</sup>

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134. Note that this type of attack on the defendant does not invoke any socially constructed generalization regarding the defendant, or any class that the defendant represents, and does not contradict the reasoning of Part II.

135. FED. R. EVID. 404 advisory committee’s note (discussing 2000 Amendment).

136. This is essentially allowing the prosecution to show a character trait in order to prove conformity with that trait. The prosecution can then argue that, rather than acting purely out of fear, the defendant may have been acting according to racial animus. Although this is indeed character evidence, it is similar to motive under Rule 404(b).

137. This particular proposal may seem to invite the type of race card-playing that this Note argues against. However, if a judge is going to allow the playing of such race cards, they should be available to the prosecution as well as the defense in the interest of determining what truly motivated the defendant to maim or kill.

Another potential basis for attacking the defendant as a racist involves alleging racism as an alternate motive to that of fear in the defendant's decision to maim or kill the victim. Under the Federal Rules of Evidence, prior acts can be submitted to the jury in order to prove the existence of a motive for the crime.<sup>138</sup> If racism was to fall under the definition of motive under the Federal Rules of Evidence, the prosecution would be able to submit evidence suggesting that the defendant is a racist even where the defendant had not averred to the race of the victim in order to justify or excuse his actions. This would be dangerous in that it would open up the defendant to such an attack in any case involving a victim of another race, gender, or any other socially constructed category of person. Allowing evidence of racism in under motive would allow minority defendant's as well as battered woman to be attacked by the prosecution in any case where their victim is a member of another race, gender, and so on.

Racism is more appropriately understood as a character trait as opposed to a specific motivation given its low level of specificity relative to the crime alleged in a self-defense case. Character evidence is generally excluded because its probative value is low relative to its prejudicial impact on the jury.<sup>139</sup> As a motive to commit murder, racism alone is unspecific. Even as an alternative motive to fear of bodily harm, racism does not go to prove that the defendant has violent tendencies.<sup>140</sup> Such evidence can influence the jury to punish the person because of that person's bad character, and not because of its evidentiary value alone, and is thus considered by courts to be prejudicial.<sup>141</sup>

A final hurdle in the vindication of minorities who have been the victims of violent assaults is the willingness of judges to implement and apply any modifications to the Federal Rules of Evidence. However this hurdle does not militate against the adoption of such a rule. As the Congressional Discussion of Rule 413 recognizes, "the practical efficacy of these rules will depend on faithful execution by judges of the will of

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138. FED. R. EVID. 404(b).

139. See, e.g., *Michelson v. United States*, 335 U.S. 469, 475–76 (1948); *People v. Hendricks*, 560 N.E.2d 611, 620 (Ill. 1990).

140. A general animus towards a minority group does not directly reflect a propensity of a given defendant to act violently towards that group. A person can at the same time have very hateful views towards African Americans and also be very meek and non-violent in their interactions with others. Evidence that a given defendant committed specific violent acts against minorities in the past would more appropriately fall under motive evidence because it is much more specific to the crime alleged by the prosecution.

141. See *Michelson*, 335 U.S. at 475–76; *Hendricks*, 560 N.E.2d at 620.

Congress in adopting this critical reform. To implement the legislative intent, the courts must liberally construe these rules. . . .”<sup>142</sup>

### C. THE ANALOGY TO RAPE-SHIELD LAW

While the implementation of race-shield laws may initially seem problematic, courts already have a good deal of experience implementing similar laws in the context of rape-shield law. Furthermore, the ideological underpinnings of rape-shield laws are quite similar to the justifications for race-shield laws discussed in Part II.<sup>143</sup> While the defendant in a race-shield case appeals to racial stereotypes to justify violence as “self-defense,” the accused rapist avers to a woman’s prior sexual history in order to invoke commonly held stereotypes regarding a woman’s sexual virtue. Thus, both appeal to socially constructed generalizations in order to excuse their conduct. Furthermore, rape-shield laws have been justified through relevance,<sup>144</sup> prejudice,<sup>145</sup> and policy<sup>146</sup> concerns similar to those discussed in Part III.A.

#### 1. Admissibility of Race and Prior Sexual History

The Federal Rules of Evidence have adopted a similar rule with regard to victims of sexual assaults. Rule 412 of the Federal Rules of Evidence makes evidence of a victim’s prior sexual behavior and evidence offered to demonstrate the victim’s sexual disposition inadmissible.<sup>147</sup> The Committee Note to Rule 412 states, “The rule aims to safeguard the alleged victim against the . . . sexual stereotyping that is associated with public

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142. CONG. REC. H8968 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari concerning the prior crimes evidence rules for sexual assault and child molestation cases).

143. FED. R. EVID. 412 advisory committee’s note (“The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”).

144. A willingness to engage in sexual activities with one person at one point in time does not have any bearing on a person’s willingness to engage in such activities with a different person at a different point in time. See *infra* note 147–150 and accompanying text. This appears to be the reasoning of the court in *Blackmon*. See *Blackmon v. Buckner*, 932 F. Supp. 1126, 1129 (S.D. Ind. 1996).

145. See *supra* Part II (indicating how an appeal to stereotypes immediately suggests that the jury is being asked to consider the evidence on an improper basis, as argued in Part II).

146. “[T]he rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.” FED. R. EVID. 412 advisory committee’s note.

147. FED. R. EVID. 412 (“The following evidence is not admissible. . . : (1) evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) evidence offered to prove any alleged victim’s sexual predisposition.”).

disclosure of intimate sexual details . . . .”<sup>148</sup> Although evidence of the victim’s prior sexual history may be relevant in determining whether the victim indeed consented during the incident in question, Rule 412 declares that the prejudicial impact of such information outweighs its probative value.<sup>149</sup> The Rule references the stereotypes facing women, which might cause jurors to give too much weight to the victim’s prior sexual acts.<sup>150</sup> Rule 412 calls into question the relevance of a woman’s prior sexual history, recognizes the prejudicial nature of such evidence, and recognizes the social consequences of such stigmatization being underwritten by the court. Similarly, a rule excluding evidence of the victim’s race in cases of self-defense could be based on the same recognitions and applied just as effectively.

Courts’ experiences in applying rape-shield laws could be applied to the race-shield rule presented in the beginning of Part III. In *Blackmon v. Buckner*, the court dealt effectively with problems of determining when evidence becomes suggestive enough as to be prohibited by Rule 412, the rape shield provision.<sup>151</sup> The court in *Blackmon* held that evidence of an inmate’s prior homosexual relationships that were not with the defendant were clearly barred under Rule 412, even though such evidence could go to the collateral issue of whether the defendant would ever consensually engage in homosexual sex.<sup>152</sup> Furthermore, the defendant was enjoined from introducing evidence of consensual homosexual relationships within the corrections facility where the alleged rape occurred.<sup>153</sup> The defendant was allowed, however, to introduce evidence that the victim sexually teased other inmates.<sup>154</sup> In order to determine whether past sexual activity occurred with the defendant, and whether such evidence would be admissible under Rule 412,<sup>155</sup> the trial court conducted an in camera review of the evidence. The court found that absent specific guarantees that the sexual activity was indeed between the defendant and the plaintiff, this evidence would not be admissible.<sup>156</sup> In *United States v. Nez*, the Tenth

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148. FED. R. EVID. 412 advisory committee’s note.

149. *See id.*

150. *See id.*

151. *Blackmon v. Buckner*, 932 F. Supp. 1126, 1127–30 (S.D. Ind. 1996).

152. *See id.* at 1128. It is also important to note that the court discussed the fact that the plaintiff did not dispute his homosexuality, thus making other evidence of his homosexuality unnecessary.

153. *Id.*

154. *Id.* at 1128–29.

155. FED. R. EVID. 412(b)(1)(B) (“[E]vidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution [is admissible]”).

156. *Blackmon*, 932 F. Supp. at 1130.

Circuit Court of Appeals faced a similar line-drawing problem where the defendant wished to admit evidence of prior rape complaints by the plaintiff.<sup>157</sup> Here again the court had to weigh the probative value of the evidence against the protections afforded victims in Rule 412,<sup>158</sup> and found that because the past intercourse did not involve the defendant, it was clearly excluded under the rape-shield rule.<sup>159</sup> The actual line that the courts drew regarding whether to admit evidence under Rule 412 is not as important as the fact the courts did indeed find the Rule workable. Thus, courts should apply similar methods to a rule affording similar protections to minorities in regards to the inflammatory use of race.

## 2. Admissibility of Defendant Character Evidence for Racism

This Note calls for the adoption of a rule that allows prosecutors to attack the defendant's character for racism when the defense raises the victim's race in a manner that insinuates violent stereotypes. The Federal Rules of Evidence have come to embrace a similar rule for sex offenders in Rules 413–415. Rules 413–415 circumvent the propensity rule or "character rule" under the Federal Rules.<sup>160</sup> Rule 404(a) states the general proposition that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith. . . ."<sup>161</sup> Although evidence of the defendant's character is thus generally inadmissible unless brought into issue by the defendant,<sup>162</sup> Rules 413–415 allow evidence of prior bad acts of the defendant in order to show that the defendant acted in conformity with the bad character that those prior acts evince.<sup>163</sup> In other words, the prosecutor is allowed to show acts that evince bad character that will then demonstrate the defendant acted in conformity with that character.<sup>164</sup> In cases of alleged sexual assault, the prosecutor can submit prior acts of sexual misconduct in order to show that

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157. *United States v. Nez*, 661 F.2d 1203, 1204 (10th Cir. 1981).

158. It is important to note that even though Rule 412 was new when this case was decided, the court had little trouble determining exactly what kind of evidence Rule 412 excludes. *See id.* at 1205–06.

159. *Id.*

160. *See* FED. R. EVID. 404(a).

161. *Id.*

162. *See* FED. R. EVID. 404(a)(1) ("Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same [is admissible]. . . .").

163. *See* CONG. REC. H8968 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari concerning the prior crimes evidence rules for sexual assault and child molestation cases).

164. *See id.*

the defendant has a propensity for such conduct.<sup>165</sup> One of the primary rationales for this rule involves the highly probative nature of such past conduct.<sup>166</sup>

Another important rationale involves the “distinctive” nature of sexual assault cases as turning upon “credibility determinations . . . .”<sup>167</sup> “Alleged consent by the victim is rarely an issue in prosecution for other violent crimes.”<sup>168</sup> Similarly, cases of self-defense turn on the credibility of the defendant, specifically on his ability to convince the jury that his particular account of events is the more accurate one. In the case of sexual assault and consent, the defendant asks the jury to understand that he perceived consent, even if there was no actual consent. Similarly, the defendant who argues self-defense asks the jury to understand that he perceived imminent danger, even if there was no actual danger.

Sherry F. Colb, in her article “*Whodunit*” Versus “*What Was Done*”: *When to Admit Character Evidence in Criminal Cases*, fleshes out this distinction between cases where guilt turns upon whether the jury accepts the defendant’s characterization of the relevant events, as opposed to whether the defendant was even involved in the relevant events.<sup>169</sup> Colb argues that character evidence of the defendant, in such cases, ought to be admitted because issues of prejudice to the jury are greatly reduced.<sup>170</sup> She uses self-defense as a paradigmatic example of a case where character evidence regarding the defendant is highly probative and the prejudicial impact is low.<sup>171</sup> In such cases there is no danger that the jury will finger the wrong person. Thus, character evidence against the defendant in cases

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165. FED. R. EVID. 413(a) (“[E]vidence of the defendant’s commission of another offense or offenses of sexual assault is admissible.”). This includes conduct for which the defendant has not been arrested or convicted. See FED. R. EVID. 413(c)–(d).

166. See CONG. REC. H8968 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari concerning the prior crimes evidence rules for sexual assault and child molestation cases).

167. *Id.* (“[A]dult-victim sexual assault cases are distinctive, and often turn on difficult credibility determinations.”).

168. *Id.*

169. Sherry F. Colb, “*Whodunit*” Versus “*What Was Done*”: *When to Admit Character Evidence in Criminal Cases*, 79 N.C.L. REV. 939, 940–44 (2001).

170. See *id.* at 951.

171. *Id.* at 951–52. Professor Colb gives the following example of a “*What Was Done*” case: Consider the case of a defendant involved in a barroom fight with a man sitting on a neighboring barstool. Assume that the defendant concedes that he injured the victim but claims that he was acting in self-defense. Under these circumstances, learning that the defendant is predisposed to behaving violently does not misleadingly divert attention away from an invisible class of potential culprits who share the defendant’s predisposition. In this setting, knowing of the defendant’s predisposition makes the prosecutor’s version of what occurred when the defendant injured the victim more plausible.  
*Id.*

of self-defense has even less of a prejudicial impact than in cases of sexual assault alleging stranger rape where the defendant claims to not even have been involved in the alleged crime.<sup>172</sup> In Colb's language, cases of self-defense are always cases of "what was done" while sexual assault cases can be of either type.<sup>173</sup>

The Federal Rules of Evidence suggest that rebuttals to character attacks must match the form of the attack. Under Rule 608, character attacks against a witness for veracity can only be met with evidence supporting that witness's character for truthfulness.<sup>174</sup> Furthermore, in cases of self-defense, Rule 404 requires that rebuttal character attacks against the defendant match the form of the attack that was made against the victim,<sup>175</sup> specifically that the victim or defendant has a violent predisposition.<sup>176</sup> When the defendant elicits violent racial stereotypes, the defendant implicitly attacks the victim in regards to his character as violent. Instead of opening up the defendant to the character attacks that Part II of this Note has condemned in principle,<sup>177</sup> such stereotype-based character attacks ought to open the defendant up to character attacks regarding his character as a racist. When the defendant implies a violent stereotype-based characterization of the victim, he implicitly attacks the character of the victim as violent. An appropriate "in kind" response would involve attacking the defendant's character for violence as a racist.

The Goetz case serves as a prime example of a case where the prosecution's ability to attack Goetz for his racist views would have been extremely helpful to the prosecution, and would have given the jury a more informed picture of Goetz's motivations for the attack.<sup>178</sup> Just as it would be ludicrous to expect a sexual assault victim to respond in kind when the defendant makes some allusion to the victim's promiscuous character, the law cannot expect a racial stereotype-based character attack to be met with a similar counter-attack.

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172. See *id.* at 963–65.

173. See *id.* at 948–55. The proposal to allow character attacks against the defendant in cases of self-defense (1) where the defendant has raised issues regarding the victim's race and (2) to only allow those attacks to go to the defendant's character as a potential racist, further limits when and how much evidence can be brought against the defendant regarding his character. See *id.*

174. FED. R. EVID. 608(a).

175. See *supra* note 134 and accompanying text.

176. See FED. R. EVID. 404(a)(2) ("Evidence of a pertinent trait of character of the victim of a crime offered by an accused" may be met with evidence "by the prosecution to rebut the same.").

177. See *supra* Part II.

178. See *supra* Part I.

### 3. Determining What Constitutes the Invocation of a Stereotype

Another potential problem with a race-shield rule involves defining when a stereotype-based attack against the victim has indeed occurred. There exists a large continuum with abject racial slurs on one end, and very subtle appeals to commonly held views on the other. Although defining the sort of attack that would trigger the ability of the prosecution to attack the defendant's character for racism is indeed a daunting task, courts have already grappled with such difficult line-drawing problems in regards to rape-shield laws, as well as in cases of general attorney misconduct.

In *State v. Ray*, an Illinois appellate court dealt specifically with issues of inflammatory language by an attorney, which the court held to have unfairly prejudiced the jury.<sup>179</sup> The prosecutor in this case engaged in "a litany of remarks so vituperative and inflammatory that they could have only created an atmosphere inimical to the even-handed dispensation of justice and thus resulted in prejudice to the defendant."<sup>180</sup> The court also found that "[o]ther prosecutorial remarks, impermissibly intimating the existence of favorable State evidence inadmissible at trial[,] . . . were extremely prejudicial because 'an insinuation which leaves the jury to speculate may be more prejudicial than erroneously admitted specific proof.'"<sup>181</sup> Furthermore, the court found that insinuations by the prosecutor not backed by evidence that witnesses were afraid to testify because the defendant had intimidated them were highly prejudicial and inflammatory and as such poisoned the jury.<sup>182</sup>

Many other courts have dealt with insinuations regarding a woman's sexual history in a similar manner, carefully and strictly applying rape-shield laws so as to prevent attorneys from slipping in inadmissible conclusions to the jury through collateral evidence. In *State v. Ragland*, the appellant defendant argued that he had a right to introduce into evidence a medical report that included the fact that the plaintiff had contracted herpes.<sup>183</sup> The court held that the mere potential for inference regarding the plaintiff's sexual history was enough to bar the evidence under the

<sup>184</sup> Similarly, in *Myers v. State*, the Court of

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179. See *State v. Ray*, 467 N.E.2d 1078, 1081–83 (Ill. App. Ct. 1984).

180. *Id.* at 1081.

181. *Id.* at 1082 (citing *People v. Emerson*, 455 N.E.2d 41, 45 (Ill. 1983)).

182. *Id.* at 1083.

183. *State v. Ragland*, C5-91-2306, 1992 Minn. App. LEXIS 955, at \*3.

184. *Id.* at \*4 ("Any reference to the complainant's herpes would have served no function other than to introduce innuendo focusing on her possible sexual experience, which is just the problem the rape shield law was intended to preclude."). Note the similarity between this reasoning and the

Appeals of Georgia held that a trial court properly excluded testimony that included the plaintiff's reputation for "partying."<sup>185</sup> Although the testimony was purportedly presented to show the victim's general reputation was in a negative light,<sup>186</sup> the trial court found that the inferences that the jury would likely draw prevented its admission under the rape-shield law.<sup>187</sup> In *Parks v. State*, the same court held that character evidence of the victim for veracity, a potentially admissible use of character evidence,<sup>188</sup> which included past sexual conduct was inadmissible under rape-shield law.<sup>189</sup> The same court in *Lockhart v. State*, ruled that an objection to the question "It wasn't unusual for [the victim] not to be home defense attorney to a witness was properly sustained, on the basis that such a question would create "an innuendo . . . [of] past sexual behavior, which is prohibited by the Rape Shield Statute."<sup>190</sup>

A similar jurisprudence can and ought to be applied to an attorney's remarks that create "an insinuation which leaves the jury to speculate"<sup>191</sup> regarding stereotype-based depictions of minority defendants. The court in *People v. Goetz* ought to have applied this same logic to Slotnick's usage of gang members to recreate the shooting, as well as the various epithets used to characterize the victims.<sup>192</sup> Just as reference to a woman's prior sexual history was often admitted to show consent before the adoption of rape-shield laws, such tactics are attempts to invoke racial stereotypes in the minds of jurors. Both tactics appeal to antiquated, naïve, and dangerous views of marginalized groups within our society.

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reasoning of the *Ray* Court. Both courts wish to prevent attorneys from getting to the jury through innuendo that which they are not allowed to get to the jury through actual evidence.

185. *Myers v. State*, 288 S.E.2d 27, 28–29 (Ga. Ct. App. 1981).

186. *Id.*

187. *Id.* ("The only possible relevance of such evidence would rest upon the innuendo that 'partying' equates to prior sexual behavior."). Notice that even the rather tame suggestion that the victim "partied" was found by the court to trigger the protection of rape shield law.

188. Character evidence for veracity can be introduced under Rule 608(a) of the Federal Rules of Evidence. "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation . . ." FED. R. EVID. 608.

189. *Parks v. State*, 249 S.E.2d 672, 673 (Ga. Ct. App. 1978).

190. *Lockhart v. State*, 322 S.E.2d 503, 505 (Ga. Ct. App. 1984).

191. *State v. Ray*, 467 N.E.2d 1078, 1082 (Ill. App. Ct. 1984) (citing *People v. Emerson*, 97 Ill. 2d 487, 497 (1983)).

192. *See supra* notes 20–23 and accompanying text.

## CONCLUSION

When we allow evidence of the race of the victim to exculpate the racist (and pander to the racist assumptions of the jury), we fail to condemn a view of the world that ought to be an anathema to our legal system. Furthermore, as demonstrated in Part III of this Note, there already exists not only a firm basis within the Federal Rules of Evidence for enacting such laws, but also the means to apply such laws given the courts' familiarity with similar laws already being applied to cases involving sexual assault. Although the defendant's racial fears may be technically relevant to claims of self-defense,<sup>193</sup> such fears, when acted on to the detriment of an innocent human being, constitute racism and as such should not constitute the basis of a claim of self-defense.<sup>194</sup>

As the law currently stands, blame is generally reserved for the statistically deviant.<sup>195</sup> Without modifications to the fact-finding process, jurors are forced to rely on their own notions of reasonableness. The law is not and should not be concerned with accommodating a defendant's view of the world if that view is counter to fundamental notions of justice and fairness. Similarly the law should not merely reflect the biases and prejudices of a randomly selected jury and the society from which it is selected. Even the well meaning among us would do well to deafen ourselves as jurors to the siren's call of racial stereotyping and fear mongering, thereby tying our legal system to the mast of our better nature. Until the day comes when such deeply rooted misunderstandings between the races is overcome, even the good of heart among us must be protected from ourselves. If not, we risk becoming complicit in the justification of the very views we seek to purge from within society and ourselves.

By adopting "race-shield" laws, we as a society can recognize the inherent wrongness of views that marginalize and dehumanize racial minorities. We must either embrace fundamental notions of justice by which to judge legal claims, or treat all honestly held beliefs as equally valid. As this Note has argued, a relativistic notion of justice leads to unjust and unacceptable conclusions regarding culpability and excuse. More importantly, such notions force the law to recognize as exculpatory

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193. They are only relevant insofar as the defendant is claiming to have been afraid, not to whether that fear was reasonable. See CRIMINAL JURY INSTRUCTIONS, NEW YORK 35.15(2)(a) (1989), *supra* note 15. Under New York law and most other jurisdictions, a self-defense claim requires (1) an honest and (2) reasonable fear of imminent severe bodily harm.

194. ARMOUR, *supra* note 46, at 5-6 (arguing that race-based claims of reasonableness ought to be rejected even though evidence of race may be logically relevant).

195. Kelman, *supra* note 41, at 801.

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mistaken beliefs based on worldviews that marginalize and dehumanize innocent people within our society. Instead, we ought to take that small leap of faith necessary to cling to our intuition that certain views of the world are just plain wrong.

