

# THE RULE OF CRIMINAL LAW: WHY COURTS AND LEGISLATURES IGNORE RICHARD DELGADO’S ROTTEN SOCIAL BACKGROUND

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## I. INTRODUCTION

A. *The Question to be Answered*

When I ran a Westlaw search for the quoted phrase “rotten social background,” in the database “TP-ALL,” which covers all books and periodicals in the Westlaw system, my inquiry revealed 168 citations. Each of them included a reference to Professor Richard Delgado’s seminal article on that defense, the article that is the subject of this symposium.<sup>1</sup> The articles citing Delgado’s piece discussed in significant depth the validity of the defense on moral, political, and economic grounds.<sup>2</sup> Several of these articles were written by some of the leading criminal law theorists in the nation, often publishing their thoughts in prestigious journals.<sup>3</sup>

By contrast, when I ran the same quoted term through Westlaw’s “ALLCASES” database, which covers all state and federal cases, I found but one case, the infamous one containing Judge Bazelon’s opinion on the rotten social background defense’s wisdom—an opinion written fully thirteen years before publication of Professor Delgado’s piece.<sup>4</sup> When I next ran Professor Delgado’s name (“Richard +5 Delgado”) through the same ALLCASES database, I discovered a number of citations to his scholarly work. But *not one* of those citations addressed his rotten social background piece. Not one.

Although these measures of scholarly impact are crude, they paint a stark picture: Professor Delgado’s rotten social background piece has played an important role in the evolution of scholarship on criminal responsibility but no role whatsoever in the evolution of case and statutory law on the same subject. Why this disparity? This Article suggests an answer to that question.

B. *The Rule of Criminal Law and Rotten Social Background*

My answer is rooted in an understanding of the idea of the rule of law. In its simplest terms, the idea aspires to a world in which clear laws, made publicly available well in advance of any allegedly wrongful action, advise persons of what conduct they must avoid to prevent their facing civil or

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

2. See, e.g., Clare Finkelstein, *Excuses and Dispositions in Criminal Law*, 6 BUFF. CRIM. L. REV. 317 (2002); Kyron Huigens, *Street Crime, Corporate Crime, and Theories of Punishment: A Response to Brown*, 37 WAKE FOREST L. REV. 1 (2002); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004); Christopher Slobogin, *Race-Based Defenses: The Insights of Traditional Analysis*, 54 ARK. L. REV. 739 (2002); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010).

3. See sources cited *supra* note 2.

4. *United States v. Alexander*, 471 F.2d 923 (1973).

criminal liability.<sup>5</sup> Should any person nevertheless violate the law, it is the legal rule, not the whims of government bureaucrats or the police, that will decide the liability question.<sup>6</sup> So stated, the aspiration is one that can never be fully achieved, nor is it clear that such a mechanical application of general legal rules to specific cases is always socially desirable. Nevertheless, the aspiration is a noble one in many respects, expressing our desire for fair treatment of the accused and for limitations on government power, especially its power to stigmatize and imprison via the criminal law.<sup>7</sup>

But, I will argue, in real legal systems the rule of law unavoidably reflects cultural, political, and social assumptions that define what the rule of law “really means” in practice in a particular society.<sup>8</sup> This observation does not render the rule of law meaningless, nor does the observation constitute a reason to reject the rule of law’s aspirations because no legal system can avoid the politicization of the rule of law.<sup>9</sup> Understanding how that politicization operates, however, can help move the rule of law in practice closer to its aspirational goals and can also help to explain the salient features of particular areas of law in an individual legal-political culture.

Notice that my last point focuses on “particular areas of law.” That is so because each area of law has different social functions, though different areas of law may sometimes have overlapping or complementary purposes.<sup>10</sup> The criminal law is designed to express a political culture’s highest level of condemnation for breach of its most fundamental moral principles.<sup>11</sup> It also determines when the state may use its most awesome

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5. See Larry Solum, *Legal Theory Lexicon: The Rule of Law*, LEGAL THEORY BLOG, July 5, 2009, <http://lsolum.typepad.com/legaltheory/2009/07/legal-theory-lexicon-the-rule-of-law.html>; *infra* text accompanying notes 51–71.

6. See *infra* text accompanying notes 41–71.

7. See Solum, *supra* note 5 (on rule of law generally); RONALD A. CASS, *THE RULE OF LAW IN AMERICA* xi–xii, 19 (2001) (discussing the virtues and aspirational nature of the rule of law); *infra* text accompanying notes 72–82 (on criminal law).

8. Cf. CASS, *supra* note 7, at xiii–xv (discussing Americans’ cultural attitudes toward the rule of law and the ways in which political contests are phrased as struggles over the rule of law); *infra* text accompanying notes 72–109.

9. See *infra* text accompanying notes 72–109. Nor can or should the rule of law ever operate in a mechanical fashion that bleeds all discretion out of the legal system. See e.g., Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195 (2010) (arguing that an innovation-eliciting approach—one in which courts show deference to officials acting in the war on terror only if the officials have a proven record of implementing proportionate and innovative solutions to new terrorism problems in analogous instances to the current one challenged—is consistent with the judiciary’s obligation to protect the rule of law).

10. See *infra* text accompanying notes 72–82.

11. See Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 U. MD. L.J. OF RACE, RELIGION, GENDER & CLASS 305, 348–49 (2001) [hereinafter Taslitz, *Civil Society*]; RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* 242 (1998) (“By officially proclaiming transgression of our weightiest norms, criminal accusations and convictions can profoundly influence racial status”).

power: the power to use force against its citizens and others.<sup>12</sup> The criminal law thus serves expressive and instrumental functions that are unique.<sup>13</sup> Furthermore, the assumptions underlying any area of law may sometimes be express, sometimes implicit in practice, sometimes conscious, sometimes unconscious.<sup>14</sup> Understanding those assumptions thus requires a fusing of popular and official attitudes, a study of the said and the unsaid.

Here I will argue that three assumptions underlie the rule of American criminal law: first, that moral and legal culpability generally cannot be shared between an offender and others, least of all between an offender and society; second, that entities, including society or the People, usually cannot be subject to criminal responsibility *because they cannot have mental states*; and third, that jurors cannot be trusted to exercise compassion in individual cases; though there are exceptions to this last principle, jurors must still be guided by very narrow and specific versions of rules to tame jurors' exercise of compassion, even where these exceptions apply.

The rotten social background defense violates each of these precepts. It overtly argues that part of the blame for a crime rests on society.<sup>15</sup> It insists that society can collectively be held responsible by paying the price of reducing the offender's crime and sentence, and it confers on jurors the power to hear wide-ranging evidence whose ultimate justification is the individualized worthiness of a particular defendant to receive the blessings of compassion.<sup>16</sup> Accordingly, the rotten social background defense violates every major assumption of the modern American rule of criminal law and thus cannot be recognized as law without calling into question the bedrock political beliefs that define the current system. The rotten social background defense is thus a more radical idea than it might at first ap-

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12. See Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686-87 (1992) (explaining via example why the state's use of force is an essential component of criminal punishment).

13. See ELLEN PODGOR, PETER HENNING, ANDREW E. TASLITZ & ALFREDO GARCIA, *CRIMINAL LAW: CONCEPTS AND PRACTICE* 4-6 (2d ed. 2010).

14. Cf. Andrew E. Taslitz, *Forgetting Freud: The Courts' Fear of the Subconscious in Date Rape (and Other) Cases*, 16 B.U. PUB. INT. L. REV. 145 (2007) [hereinafter Taslitz, *Forgetting Freud*] (discussing pervasive influence of the unconscious on the law and courts' reluctance to acknowledge this reality); David Brown, Andrew Whitford & Jeff Yates, *Perceptions of the Rule of Law: Evidence about the Impact of Judicial Insulation* 17-18, available at <http://ssrn.com/abstract=1701379> (2010) (noting that "the rule of law is best conceived of as a perception," and that "[d]isappointment about how institutions support or do not support the rule of law is best considered in the framework of perceptions because even experts on the rule of law cannot agree on how you would measure it with objective data," while finding in their empirical study that judicial insulation from obvious political forces strengthens perceptions of the rule of law).

15. See Delgado, *supra* note 1, at 58 (discussing a defendant's right to seek redress for the harm to which society subjects him).

16. Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1462-64 (1995) (discussing how a jury's decision is based partly on its judgment about how the defendant's character has been determined by his circumstances).

pear, as a comparison to the one well-known case involving the defense reveals.

*C. Judge Bazelon and the Rotten Social Background Defense's Radical Challenge*

*I. United States v. Alexander: Background*

Judge Bazelon, in *United States v. Alexander*,<sup>17</sup> recognized the radical potential of the rotten social background defense. There, at least one member of a group of several white men and one white woman in a hamburger shop hurled a racial epithet at two black customers, the soon-to-be-defendants.<sup>18</sup> One of the black customers responded with bullets, killing two of the white males and injuring one of them and the white woman.<sup>19</sup>

Both black men were convicted of weapons and assault charges, and one of them, Benjamin Murdock, was convicted on two counts of second-degree murder despite Murdock's having raised an insanity defense.<sup>20</sup> Murdock's defense theory was that he suffered from a mental disease or defect at the time of the killings that robbed him of control over his conduct, an emotional disorder caused by Murdock's "rotten social background."<sup>21</sup>

The trial court admitted significant testimony about Murdock's life experiences but, over defense objection, instructed the jury not to be "concerned with a question of whether or not a man had a rotten social background" but rather only with "criminal responsibility," that is, "whether he had an abnormal condition of the mind that affected his emotional and behavioral processes at the time of the offense."<sup>22</sup> The trial court overruled defense counsel's objection to the instruction, concluding that emphasizing rotten social background was an effort to get the jurors to decide the case based upon sympathy rather than reason.<sup>23</sup>

The United States Court of Appeals for the Federal Circuit affirmed the conviction on several grounds, including that the instruction was appropriate.<sup>24</sup> Judge Bazelon dissented, arguing that jurors could not properly decide whether Murdock suffered from mental illness as the law defined it without considering his social background.<sup>25</sup>

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17. *Alexander*, 471 F.2d 923.

18. *Id.* at 928.

19. *Id.* at 928-29.

20. *Id.* at 927.

21. *Id.* at 959.

22. *Id.*

23. *Alexander*, 471 F.2d at 959.

24. *Id.*

25. *Id.* at 960.

## 2. Bazelon's Dissent

But Bazelon went on to address more fundamental questions. The insanity defense, he insisted, was aimed at “a crucial functional question—did the defendant lack the ability to make any meaningful choice of action[?] . . . .”<sup>26</sup> Yet the phrasing of the test in language that suggests mental pathology, said Bazelon, “deflect[s] attention” from that central question by inviting an “artificial and misleading excursion into the thicket of psychiatric diagnosis and nomenclature.”<sup>27</sup> Logic and morality thus counseled against using the “trappings of the medical or disease model” for what was essentially a question of political morality.<sup>28</sup> Yet abandoning those trappings, concluded Bazelon, would defeat their social purpose, which was to “shelter [us] from a downpour of troublesome questions.”<sup>29</sup>

Notably, a successful rotten social background defense raises the question of what to do with the defendant. He might no longer be dangerous, for example, if his violent outburst released his pent-up racial anger. But, said Bazelon, those are hard judgments to make. Moreover, the kind of crime committed (seemingly meaning murder motivated by minority racial anger at the white majority) was a “prototype of the crimes that arouse the greatest public anxiety.”<sup>30</sup> Furthermore, Murdock seemed like a man in whom “bitterness and racial hostility have turned into blasting powder which can be touched off by a spark.”<sup>31</sup> If Murdock is so viewed, that left, in Bazelon's view, only four options.

One option would be to acquit and release Murdock. Release, rather than civil commitment, would be required because that latter route requires proof that dangerousness stemmed from some mental abnormality as psychiatrists understand the concept, and Murdock likely would not fit into that model.<sup>32</sup> The acquittal would occur, however, explained Bazelon, not in spite of Murdock's dangerousness *but because of it*.<sup>33</sup> That result the public would never tolerate.

Another option would be “[to] strive to find a vaguely therapeutic purpose for hospitalization.”<sup>34</sup> Yet that would require “stretch[ing]” the

26. *Id.* at 961 (Bazelon, J., dissenting).

27. *Id.* at 960–61. For other critiques of the insanity defense, see THOMAS SZASZ, *THE INSANITY DEFENSE AND ITS CONSEQUENCES* (1997); PATRICIA ERICKSON & STEVEN ERICKSON, *CRIME, PUNISHMENT, AND MENTAL ILLNESS: LAW AND THE BEHAVIORAL SCIENCES IN CONFLICT* 79–113 (2008).

28. *See Alexander*, 471 F.2d at 961.

29. *Id.*

30. *Id.* at 962.

31. *Id.*

32. *See, e.g.*, NY CLS CPL § 330.20(6) (2011). *See generally* William H. Fisher & Thomas Grisso, *Commentary: Civil Commitment Statutes—40 Years of Circumvention*, 38 AM. ACAD. PSYCHIATRY L. 365 (2010) (discussing statutes, procedures, and standards for civil commitment).

33. *Alexander*, 471 F.2d at 963.

34. *See id.*

medical model to those “not conventionally considered ‘sick.’”<sup>35</sup> In short, we would be engaging in still more of a legal masquerade—one that honest expert witnesses might refuse to support—as a subterfuge for restraining a man seen by the white majority as posing a physical danger to them, a morally questionable outcome.<sup>36</sup> The moral quandary becomes all the worse because Murdock would be unlikely to agree to the treatment, and it is unclear whether coercive therapy holds any real hope of being successful even if we accept that there is some “illness” to treat.

Yet another option would be simple preventive detention, based upon speculative predictions of future dangerousness, and perhaps for “re-condition[ing].”<sup>37</sup> But so delimiting current civil commitment doctrine would likely, in Bazelon’s view, lead to a massive expansion of the class of persons subject to commitment, in effect creating detention camps aimed at the poor and racial minorities.<sup>38</sup> In Bazelon’s words, “The price of permitting Murdock to claim the benefit of a logical aspect of the responsibility doctrine may be the unleashing of a detention device that operates, by hypothesis, at the exclusive expense of the lowest social and economic class.”<sup>39</sup> Yet doing so denies that class a fair determination of the conditions of moral responsibility that justify the extreme sanction of a criminal conviction.<sup>40</sup>

Bazelon’s final option is simply to evade these difficult questions of moral, social, and legal responsibility, either by abandoning defenses like insanity entirely or by defining such defenses so narrowly and illogically as to gut them of their moral justifications. Doing so, however, carries its own substantial cost:

[W]e sacrifice a great deal by discouraging Murdock’s responsibility defense. If we could remove the practical impediments to the free flow of information we might begin to learn something about the causes of crime. We might discover, for example, that

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35. *Id.*

36. On the importance of judicial candor to political legitimacy, see Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 399–401 (1995) [hereinafter Taslitz, *Interpretive Method*].

37. See *Alexander*, 471 F.2d at 964.

38. Cf. THOMAS SZASZ, *LAW, LIBERTY, AND PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES* 142–45 (1963); Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent*, 39 ISR. L. REV. 69 (2006) (discussing Russia and China’s use of mental civil commitments as political control).

39. *Alexander*, 471 F.2d at 964.

40. Cf. Taslitz, *Civil Society*, *supra* note 11, at 313–41 (discussing the traditional conditions of criminal responsibility); Andrew E. Taslitz, *Myself Alone: Individualizing Justice through Psychological Character Evidence*, 52 MD. L. REV. 1–32 (1993) [hereinafter Taslitz, *Myself Alone*] (discussing the intersection of those conditions with an implicit mandate to individualize the assessment of each offender’s moral responsibility and explaining the interaction between substantive rules of criminal law and procedural rules of proof).

there is a significant causal relationship between violent criminal behavior and “rotten social background.” That realization would require us to consider, for example, whether income redistribution and social reconstruction are indispensable first steps toward solving the problem of violent crime.<sup>41</sup>

A radical consequence indeed.

### *3. The Significance of Bazelon’s Dissent*

Bazelon’s four choices were in part a result of the context in which they arose: complete acquittal as a prospect via the insanity defense.<sup>42</sup> Delgado’s version of the defense generally sounds more in partial excuse, namely convicting a defendant of a lesser offense, subject to a lesser penalty, rather than necessarily instantly letting him walk the streets if some sort of confinement mechanism after acquittal is not devised.<sup>43</sup> Nevertheless, Bazelon’s discussion touches on many of the themes articulated here: the political nature of what will be recognized as law by the judiciary; the exclusion of criminals as a breed apart, especially where they are poor and racial minorities—a breed not entitled to compassion; the fear of standardless decision making, on the one hand, and of unlimited governmental power to use force on the other hand; the need for group-based voice via individual group members charged with crime and the reluctance to give them that voice; the fear of recognizing shared *social* responsibility for crime; the risks of biased, unequal treatment, particularly based upon race or class; and the enormous power of the public and the judiciary to engage in self-deception.

### *4. Judge McGowan’s Rule of Law Defense of the Majority’s Position*

Circuit Judge McGowan, in defending the majority’s position in the case, was less self-deceptive than most judges, beginning his opinion thus:

The tragic and senseless events giving rise to these appeals are a recurring byproduct of a society which, unable as yet to eliminate explosive racial tensions, appears equally paralyzed to deny easy access to guns. Cultural infantilism of this kind inevitably exacts a high price, which in this instance was paid by the two

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41. *Alexander*, 471 F. 2d at 965.

42. *See* PODGOR ET AL., *supra* note 13, at 535-36, 677, 690-92 (explaining partial versus complete defenses and the consequences of a successful insanity defense).

43. *See* Delgado, *supra* note 1, at 54-79

young officers who were killed. The ultimate responsibility for their deaths reaches far beyond these appelleants.<sup>44</sup>

This statement seems like a ringing endorsement of the idea of shared social responsibility in the criminal law. It is not. McGowan, as explained shortly, implicitly makes a sharp distinction between politics and law.<sup>45</sup> Politics might lead to new legislation—to new law—but courts properly have no say in such matters.<sup>46</sup> Courts are simply bound to apply the law, a readily determinable apolitical law, as it comes to them.<sup>47</sup> That is the essence of the rule of law. Nor may courts consider social groups or social justice concerns.<sup>48</sup> Rather, they must focus solely on the individual accused before them. Explains Judge McGowan:

As courts, however, we administer a system of justice which is limited in its reach. We deal only with those formally accused under laws which define criminal accountability narrowly. Our function on these appeals is to determine whether appellants had a fair opportunity to defend themselves, and were tried and sentenced according to law.<sup>49</sup>

In McGowan's view, that test was met. As to the instruction to ignore the rotten social background issue, McGowan again relied on rule of law language: "In this context, the court's statement cannot be regarded as either being intended to do more, or as having the effect of doing more, than to focus the attention of the jury *upon the exact legal formulation within which, and by reference to which, it was required to consider the evidence.*"<sup>50</sup> Juries too must advance the march of the rule of law.

#### D. A Roadmap

Part II of this article explains the political nature of the rule of law. Parts IIIA-D respectively discuss the nature of each of the assumptions of

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44. See *Alexander*, 471 F.2d at 965 (McGowan, J., dissenting).

45. Critical legal studies theorists, of course, are well-known for arguing the opposite extreme: that law is nothing but politics enshrouded in mumbo-jumbo and mystery. See MARK KELMAN, AN INTRODUCTION TO CRITICAL LEGAL STUDIES 242-68 (1987).

46. This is a distinctly American perspective, with Europeans frequently turning to courts (and other legal bureaucrats) for input on creating new legislation and refining old legislation in the area of criminal justice. See Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 155-56 (2011) [hereinafter Taslitz, *The Criminal Republic*].

47. See CASS, *supra* note 7, at xii-xv, 19-20.

48. See Lucinda M. Finely, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 895-99 (1989).

49. *Alexander*, 471 F.2d at 965.

50. *Id.* at 968 (emphasis added).

the American rule of criminal law and the precise way in which the rotten social background defense undermines them. Part IV, the conclusion, offers the briefest outline of an alternative political model, one consistent with the government-limiting aspirations of the rule of law as a general concept but that rejects the political ideology that defines the current variant of law's rule in the criminal justice system. Outlining that alternative highlights the true danger the rotten social background defense poses to current political structures. Once this is understood, the defense's lack of appeal to judges and legislators imbued with the current political rule of law ideology becomes clear.

Before turning to discussing the nature of the rule of law, a few caveats. My task is mostly a descriptive one rather than a normative one, though I will not avoid occasional evaluative comments. My primary goal, however, is to explain why courts shy away from the rotten social background defense. In doing so, moreover, I focus specifically on the politics of the criminal law. It is for this reason that I see this piece as more about the "rule of criminal law" than the rule of law simpliciter.

It is important to emphasize, therefore, that I am not defending the wisdom of the rotten social background defense within these parameters of the traditional understanding of when excuses are acceptable. Nor am I articulating an alternative theory to the traditional one for when excuses *should be* available, a task that would require at least one article in its own right. Rather, I am using the resistance of courts (a resistance perhaps shared by one or more of this symposium's participants) seriously even to consider the rotten social background defense as a jumping off point—an opportunity—for discussing the American ideology of the rule of law as it manifests itself in the criminal law. This piece is thus a meditation on the rule of (criminal) law, nothing more.

It is true that I will express much sympathy for what I see as the caring, equality-embracing vision that animates Delgado's idea of the rotten social background defense. But attraction to a vision is not the same thing as thoroughly explaining why a particular manifestation of that vision (i.e., the rotten social background defense) should be embraced. It is also true that I offer the briefest outline of an alternative vision of the *ideology of the rule of criminal law*, but I do that as a foil to highlight more clearly the political nature of the current ideology's assumptions.

Finally, it is not the case that I think that Delgado's suggested excuse or his alternative animating vision will magically cure the problems of poverty and crime in America. But it is true that I believe that ideas in the aggregate have real-world consequences. Rigid acceptance of one vision of the rule of criminal law—the now dominant vision—without serious skepticism about at least some aspects or manifestations of it can, I believe, do much damage. Opening eyes to other possibilities can eventually change minds, and changed minds can mean changed actions and institu-

tions—in the long-run and only gradually. Ideas are like bricks—alone, small and weak. But when the bricks are bonded with many others, held together by the mortar of unifying concepts and a motivated architect's sharp eye, the bricks become a building strong and beautiful.

## II. THE RULE OF (CRIMINAL) LAW

Efforts to build the rule of law in developing nations have met with successes and failures.<sup>51</sup> Scholarly and reformist efforts to understand the reasons for these outcomes have led to particularly thoughtful commentary on the nature of the rule of law.<sup>52</sup> Much of that commentary portrays law as as much a political and social process as a set of rules, standards, or principles, and the rule of law likewise as a social phenomenon serving political goals.<sup>53</sup> Rule of law reformers tend to see the rule of law as crucial to economic development and public safety.<sup>54</sup> Accordingly, they give special attention to commercial and criminal law.<sup>55</sup> Some reformers, most of whom are lawyers, see the rule of law as a question of having the right institutions: courts with graft-free judges efficiently resolving disputes independently from other-branch and populist pressures; legislatures writing updated, reasonably clear statutes to deal with modern problems; police who are honest and protect the public rather than preying upon it.<sup>56</sup>

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51. See generally PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed. 2006) [hereinafter RULE OF LAW ABROAD] (collecting essays, many of which in part address this point).

52. See *id.*

53. Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, in RULE OF LAW ABROAD, *supra* note 51, at 75, 75-79, 85, 88-89 (arguing that law and its rule can never be detached from its social and political environment). The most extreme view on this point, one that reduces law and its rule to nothing but politics, is well-stated by political theorist Judith Shklar:

It would not be very difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general over-use. It may well become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.

Judith N. Shklar, *Political Theory and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 1 (Allan C. Hutchinson & Patrick Monahan eds. 1987).

54. See Thomas Carothers, *The Rule-of-Law Revival*, in RULE OF LAW ABROAD, *supra* note 51, at 3, 3-13 (emphasizing rule of law's importance in promoting public safety); see also Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 3-14 (Carnegie Endowment Working Paper Series, Paper No. 34, 2003), available at <http://carnegieendowment.org/files/wp34.pdf> [hereinafter *The Problem of Knowledge*] (discussing the obstacles to knowledge that prevent the effective development of the rule of law in other countries).

55. See sources cited *supra* note 54.

56. See Carothers, *The Problem of Knowledge*, *supra* note 54, at 8-9 (emphasizing lawyers' role and institutional conception of the rule of law); CASS, *supra* note 7, at 11 ("The goal for rules of principled predictability is predictability that is adequate to allow individuals to plan their lives . . ."). Professor Frank Upham has recited the "rule of law ideal," what he also calls the "World Bank" theory of the rule of law, Upham, *supra* note 53, at 17, in largely institutional terms:

The rule-of-law ideal might be summarized as universal rules uniformly applied. It requires a hierarchy of courts staffed by a cadre of professionally trained personnel who are

For these reforms to be meaningful, however, the law “on the books” must be matched by the law in practice.<sup>57</sup> Laws that require honest judges and police but fail to attain them do not establish the rule of law. But cultural attitudes, resource-availability, political advantage, and wise institutional management all affect whether the law in reality and the law on the books are the same.<sup>58</sup>

Other commentators see institutional change as in danger of being mere window-dressing if it is not serving a broader set of theoretical goals meant to be served by the rule of law.<sup>59</sup> The rule of law comes in degrees, and success in achieving a significant degree of law’s rule requires measuring the extent to which the goals of the rule of law are in fact being achieved.<sup>60</sup> One writer outlines five common goals of the rule of law:

1. Having a government (primarily meaning an executive) that abides by standing laws and respects judicial rule, thereby limiting government power;
2. Attaining “law and order” to combat high crime rates;

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insulated from political or other nonlegal influences. The decision-making process must be rational and predictable by persons trained in law; all legally relevant interests must be acknowledged and adequately represented; the entire system must be funded well enough to attract and retain talented people; and the political branches must respect law’s autonomy.

*Id.* at 14.

57. *See id.* at 14–16 (arguing that the United States is often held up as the paradigm of the institutional rule of law yet that it in practice has few of these characteristics). *But see* CASS, *supra* note 7, at 19 (viewing the rule of law as a system that “pulls society in the direction of knowable, predictable, rule-based decision making, toward limitations on the power entrusted to government officials, toward alignment of power with legitimacy,” without guaranteeing any of these things or alone succeeding in limiting government abuses), 149–50 (arguing that imperfections in the American rule of law, while troubling, do not render our system one of men rather than laws given any realistic conception of what rule of law values can achieve).

58. *See id.* at 147 (arguing that growing disparities in the division of the economic pie, particularly in the area of the criminal law, undermine the rule of law ideal); Rachel Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners* 7–10, 15 (Carnegie Endowment Working Papers, Paper No. 55, 2005), available at <http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf> [hereinafter *Competing Definitions of the Rule of Law*] (discussing political advantage, institutional management, and culture).

59. *See* Carothers, *The Problem of Knowledge*, *supra* note 54, at 8–9 (noting that rule of law practitioners are uncertain about what is the “essence” of the rule of law, thus tending toward institutional change modeled after preconceptions of Western legal systems, while ignoring cultural variation, other ways to achieve the rule of law, and the centrality of popular perceptions of legitimacy to the very definition of the rule of law, thus reducing effectiveness in achieving the true rule of law); *id.* at 13 (noting that reformers fail adequately to collect the empirical data on the operation of individual legal systems within particular cultures to be able truly to understand what improving the rule of law in a particular system requires).

60. *See* Thomas Carothers, *The Problem of Knowledge*, in *RULE OF LAW ABROAD*, *supra* note 51, at 15, 27 [hereinafter *The Problem of Knowledge II*] (urging greater empiricism in achieving rule of law ideals); CASS, *supra* note 7, at 22 (arguing that the question for many nations is not whether the rule of law exists at all but “how well” particular nations do in achieving the rule of law’s goals and constraints).

3. Fostering equality before the law, meaning at a minimum that government officials and other powerful persons are treated the same by the law as are ordinary folk;
4. Achieving *enforced* human rights; and
5. Achieving efficient and predictable justice.<sup>61</sup>

Not everyone agrees that all five goals must guide the rule of law. In particular, proceduralists or formalists ignore human rights, seeing the rule of law as a fairly technocratic enterprise.<sup>62</sup> Substantivists, on the other hand, believe that, absent protection for human rights, the “rule of law” becomes “rule *by* law,” that is, law as an instrument solely of state power rather than as a means of liberating all persons and building a just society.<sup>63</sup>

Each goal can be achieved, moreover, to a greater or lesser extent in different societies, and some goals might conflict.<sup>64</sup> For example, too much attention to law and order might be achieved at the cost of equal administration of the law for all and inadequate attention to human rights.<sup>65</sup> Too much police efficiency in enforcing the criminal law might overwhelm the courts, compromising their ability effectively to monitor abuses of government power.<sup>66</sup>

Moreover, furthering each goal has political consequences, thus promoting different pockets of resistance in society.<sup>67</sup> Wealthy kleptocrats in a developing state might favor limiting government power because it in-

61. See Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in RULE OF LAW ABROAD, *supra* note 51, at 31, 34-36 [hereinafter *Competing Definitions of the Rule of Law II*]; cf. TOM BINGHAM, *THE RULE OF LAW* 37, 48, 55, 60, 66, 85, 90, 110 (2010) (articulating eight principles of the rule of law, but principles substantially similar to Kleinfeld’s shorter list); CASS, *supra* note 7, at 3-4 (describing the “core meaning” of the rule of law as having four elements: “(1) fidelity to rules (2) of principled predictability (3) embodied in valid authority (4) that is external to individual government decision makers.”).

62. See Kleinfeld, *supra* note 58, at 14; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that there “are times when even a bad rule is better than no rule at all.”).

63. See Kleinfeld, *Competing Definitions of the Rule of Law*, *supra* note 58, at 9.

64. See *id.* at 24 (noting that fostering judicial independence can hamper efforts to root out judicial corruption, limiting state power can weaken its ability to protect citizens against “lawbreakers and rebels,” and too robust human rights norms can destroy law and order).

65. See Carothers, *The Problem of Knowledge*, *supra* note 54, at 7 (noting that a common shortcoming of actual legal systems relative to rule of law ideals is that “the criminal law system chronically mistreats selected groups of people, again, usually minorities.”).

66. See Locke E. Bowman, *The Emperor Has No Clothes: A Journalist Sees the Criminal Justice System*, 95 J. CRIM. L. & CRIMINOLOGY 1411 (2005) (book review) (discussing the reasons that the American criminal justice system’s sheer size is overwhelming the courts); Taslitz, *Myself Alone*, *supra* note 40, at 1-21 (discussing the ways in which the sheer mass of cases has reduced the American system to one of “assembly line” justice).

67. See Kleinfeld, *Competing Definitions of the Rule of Law*, *supra* note 58, at 8.

creases that of the rising kleptocratic class and favor law and order because it is good for business.<sup>68</sup> But the kleptocrats might oppose strengthening equality before the law because that empowers the poor and the middle class in their struggles against the kleptocrats.<sup>69</sup>

Equality before the law is particularly important yet itself turns on cultural understandings—understandings not always consciously articulated—about what constitutes “equal” treatment by legal institutions (after all, arguments can always be made that likes must be treated alike but that “this case” and that one are not truly the same) and about who deserves such treatment.<sup>70</sup> Cultural resistance to equal treatment of women by the law, for example, runs high in certain societies precisely on the theory that men and women are not alike.<sup>71</sup>

Law and order can also interact with equality concerns. In Lockean social theory, states exist primarily to protect natural rights, including citizens’ physical safety.<sup>72</sup> The poor and the marginalized face the greatest dangers to that safety, thus having the most need for law and order.<sup>73</sup> Yet concepts of equality (and inequality) may lead to over-policing of the marginalized, denying them equality of treatment by the state.<sup>74</sup> Moreover,

68. *See id.*

69. *See id.*

70. *See id.* at 10 (real equality before the law turns on cultural and political factors and requires reinforcing the idea that minority rights must be upheld); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMENS’S STUD. 387, 394-433 (1996) [hereinafter Taslitz, *Patriarchal Stories*] (discussing cultural stories and cognitive processes that affect popular perceptions of what constitutes “equality” of different genders before the law in rape cases).

71. *See* Kleinfeld, *Competing Definitions of the Rule of Law*, *supra* note 58, at 10 (noting that certain interpretations of Sharia law in some Muslim countries create cultural resistance to Western secular ideas of gender equality before the law).

72. *See* ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868, 3-4 (2006) [hereinafter TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT].

73. *See* Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHICAGO-KENT L. REV. 277, 308-10 (2010) [hereinafter Taslitz, *Fourth Amendment Federalism*].

74. The process works as follows: the police act to prevent crime by stopping “suspicious” persons, but race and class themselves become markers of suspicion of criminality, leading police both to concentrate their resources in poorer minority neighborhoods and to stop more of those neighborhoods’ citizens. *See* Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 S.W. L. REV. 1091, 1112-15 (2008). Citizens know this and, once stopped, may react with defensiveness that further heightens police suspicion, leading police to use more aggressive investigative techniques that risk convicting the innocent or that, at a minimum, result in unnecessary insult to the law-abiding. *See id.* at 1114-17. Yet, the police may legitimately consciously claim simply to be equalizing resources by spending them where they are most needed, *see id.* at 1113-14 (using bass-fishing analogy), ignoring the ways in which policing activity can also unnecessarily impose unequal costs on those policed, costs stemming from subconscious and institutional forces that lead police to treat poor members of racial minority groups as “different” from middle class whites, thus justifying different treatment of both groups. *Cf.* Andrew E. Taslitz, *Racial Blindsight: the Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1 (2007) [hereinafter Taslitz, *Racial Blindsight*] (discussing how racial biases and stereotypes operate at the subconscious and institutional levels in criminal justice).

the marginalized will not risk formally challenging the powerful if they believe that task is useless, in effect denying them the benefits offered by the legal system.<sup>75</sup> True law and order and true equality before the law require police and prosecutors attentive to the risks of even unconscious disparate treatment of the oppressed and a willingness to expend the resources to keep them safe.<sup>76</sup>

Human rights understandings, despite their purportedly universal nature, too face cultural and political influences. As one author put it, “different cultures and different countries, even within the developed world—differ on what they see as human rights. Even when general concepts can be universalizable, particulars, such as the death penalty, social and economic rights, or even the practice of female genital mutilation, are disputed.”<sup>77</sup>

Understandings of each of these goals, the relative emphasis they deserve, and how to achieve them are thus always culturally and politically situated, evolving as cultural and political forces change. Moreover, law has not only instrumental value but symbolic value.<sup>78</sup> Instrumentally, law cannot be effectively and equally applied if the populace resists it.<sup>79</sup> Symbolically, law and how it is implemented send messages about who counts as equal members of the political community and what fundamental moral principles define that community.<sup>80</sup> Law is thus also “a normative system that resides in the minds of the citizens of the society.”<sup>81</sup> To ignore popular understandings of the law is thus to undermine its function in bonding disparate persons and groups into a single political community despite enduring differences among the community’s members.<sup>82</sup>

Law and its rule can, of course, exist in a tyrannical society.<sup>83</sup> But in a modern democratic society, law’s legitimacy turns on the people go-

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75. See Kleinfeld, *Competing Definitions of the Rule of Law*, *supra* note 58, at 10.

76. See Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.–C.L. L. REV. 393, 416-21 (2009) [hereinafter Taslitz, *Judging Jena*].

77. Kleinfeld, *Competing Definitions of the Rule of Law*, *supra* note 58, at 15.

78. See generally KENNETH L. KARST, *LAW’S PROMISE, LAW’S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993) (illustrating at book length the power of law’s expressive function).

79. PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 11-12, 16-17, 139-40, 164, 228 (2008) (arguing that, subject to wise exceptions, “empirical desert”—punishment most consistent with the community’s intuitions of justice, as revealed by social science research—is most likely to reduce crime in the long-run because its moral credibility discourages “resistance and subversion of the criminal justice process,” while reducing vigilantism, increasing the stigma of conviction, enhancing voluntary compliance with the law in grey areas, and enhancing criminal law’s long-run ability not merely to reflect but to shape social norms and meanings).

80. See KARST, *supra* note 78, at 1-30.

81. See Carothers, *The Problem of Knowledge*, *supra* note 54, at 8.

82. See Taslitz, *Judging Jena*, *supra* note 76, at 416-38 (discussing the disparate treatment of minorities in the criminal justice system).

83. See Kleinfeld, *Competing Definitions of the Rule of Law*, *supra* note 58, at 9. At least this is true in a conception of the rule of law that ignores human rights, as some do, see *supra* text accompa-

verned by the law having a say in its formulation, interpretation, and application.<sup>84</sup> Democratic and deliberative pedigrees matter.<sup>85</sup> In this respect too, law and its rule are down-to-the-core political.

Law-day understandings of the rule of law and those understandings recited in the rhetoric of politicians thus make little sense. To say that the rule of law is political is not to say that it is corrupt.<sup>86</sup> Indeed, under law day understandings, the United States legal system is inconsistent with the rule of law.<sup>87</sup> One well-respected author identifies at least four structural features of the American legal system that are inconsistent with this traditional understanding of the rule of law:<sup>88</sup>

1. *Federalism*: Having at least fifty-one distinct legal systems in a single nation ensures inconsistency in the content of legal rules, the ways in which they are applied, and the results in similar cases.<sup>89</sup> Yet this same federalist system is often justified as furthering democracy by constraining abuses of governmental power and bringing government closer to the people.<sup>90</sup>

2. *The Jury*: Juries in practice do far more than apply clear law to facts. They interpret and create law.<sup>91</sup> Many legal rules are stated at a

nying notes 51-78, what Kleinfeld calls “rule by law,” Kleinfeld, *supra* note 58, at 9. The rule of (or by) law can also support tyranny if the law and order element of the rule of law is overemphasized relative to its other elements. *See id.* at 5-6 (reviewing the ends of the rule of law), 9 (arguing that a “mainstay[] of extralegal power is having law enforcement” . . . “answer to the government” rather than the people); *cf.* Carothers, *The Problem of Knowledge*, *supra* note 54, at 7 (“Democracy often, in fact usually, co-exists with substantial shortcomings in the rule of law.”).

84. Law professor Bradley Wendel thus notes that many scholars have argued that law’s legitimacy depends on structuring political participation

in such a way that it does not simply feed in exogenous preferences as inputs, and produce laws as outputs, according to some aggregation process. Instead, the process must permit citizens to persuade each other, to alter their preexisting preferences, and to work together as a community, in the name of the interests of the society as a whole. Citizens must act non-strategically, be open to persuasion, and be committed to acting from a kind of idealized first-person-plural point of view, as opposed to trying to maximize the satisfaction of their preferences.

W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 130 (2010); *cf.* Kleinfeld, *supra* note 58, at 1-10 (equality before the law helps prevent the powerful from becoming “a caste apart” by giving “far more power to ordinary people at the expense of the powerful.”).

85. *See generally* Taslitz, *The Criminal Republic*, *supra* note 46, at 184-93 (arguing that deliberative styles of governance with widespread mass participation of certain kinds soften various societies’ punitive impulses as such styles promote empathy, bonding across social groups, and wider respect for the outputs of the legal system).

86. *See* Upham, *supra* note 53, at 19 (“Politics is the lifeblood of all regimes, especially democratic ones.”).

87. *See id.* (“[R]ule of law orthodoxy equates politics with corruption.”); *infra* text accompanying notes 88-112 (discussing features of the American political system).

88. *See* Upham, *supra* note 53, at 17-18.

89. *See id.* at 17.

90. *See* MALCOLM M. FEELY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* 22-23, 40-55 (2008) (listing the supposed virtues of federalism, though arguing that those virtues are today better served at the level of the municipality, town, and village rather than by state government).

91. *See* Upham, *supra* note 53, at 86-87 (arguing that jurors rarely understand the law, much less

level of purposeful ambiguity to invite jury interpretation.<sup>92</sup> For example, whether a killing was mere manslaughter or second degree murder may turn on proof that the defendant acted with a “depraved heart,” an emotionally-loaded and ill-defined term.<sup>93</sup> Likewise, whether a purported rape victim consented turns on defining “consent,” a term undefined by judicial instructions.<sup>94</sup> Jurors’ own notions of moral rules also affect what facts they find in the first place, again introducing a popular sense of justice rather than fixed legal rules.<sup>95</sup>

3. *The Adversary System*: Most lawyers are obligated to serve their clients zealously rather than serving some more objective concept of what the law requires.<sup>96</sup> They must hide truthful but confidential client statements from their opponents and from the court, even though such statements would promote achieving accurate legal factfinding.<sup>97</sup> Judges sit as passive umpires rather than active monitors of the law’s demands.<sup>98</sup> They have no ethical obligation even to correct an imbalance of resources.<sup>99</sup> The system is partly justified by the idea that the clash among equally matched lawyers will nevertheless lead to truth.<sup>100</sup> But opposing sides

limit themselves to its mere mechanical application, rather applying commonsense justice, which necessarily varies from person to person and context to context, thus leaving jurors well outside formalistic notions of the rule of law); Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward A Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998) [hereinafter Brown, *Plain Meaning*] (analyzing jury interpretation of criminal statutes); *but see* Darryl K. Brown, *Jury Nullification Within the Rule Of Law*, 81 MINN. L. REV. 1149 (1997) (arguing that, once it is understood that the application of legal rules to specific cases is necessarily an interpretive, somewhat creative, and morality-infused process, jury nullification—failure to apply to a particular case what judges perceive to be the law’s plain meaning—can be understood as consistent with the rule of law rather than undermining it).

92. See LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 196-222 (2010) (arguing that, and illustrating how, jurors necessarily interpret usually ambiguous statutory terms in the course of deliberating over a verdict, particularly where jury instructions fail to specify statutory meaning with greater specificity).

93. See PODGOR ET AL., *supra* note 13, at 299 (quoting *State v. Robinson*, 934 P.2d 38, 47-48 (1997)).

94. See *id.* at 338, 347-48.

95. See Taslitz, *Patriarchal Stories*, *supra* note 70, at 419-24.

96. See Upham, *supra* note 53, at 87-88; Bruce A. Green, *Zealous Representation Bound: The Intersection Of The Ethical Codes and The Criminal Law* 69 N.C. L. REV. 687 (1991) (discussing the meaning and limits of the obligation of zealous representation).

97. See STEVEN FRIEDLAND, PAUL BERGMAN, & ANDREW E. TASLITZ, *EVIDENCE LAW AND PRACTICE* 40, 850 (4th ed. 2010).

98. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) (“Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules . . . .”); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1711 (2007) (critiquing the “judges as umpires” metaphor as inaccurate).

99. See Upham, *supra* note 53, at 88 (arguing that judges are “not ethically required to redress inequality of resources, talent or dedication that can threaten to lead to inaccuracy or injustice. Nor is he or she to structure the trial so that truth will emerge . . .”).

100. See ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 103 (1999) [hereinafter TASLITZ, *RAPE AND CULTURE*].

rarely have equally talented lawyers and equal resources.<sup>101</sup> That inequality is obvious but studiously ignored.<sup>102</sup>

4. *The Extreme Reluctance of Government to Make the Law Available to the Poor*<sup>103</sup>: This reluctance is not the same as outright refusal. For example, indigent criminal defendants have the right to state-appointed counsel, and *Miranda* warnings include the right to have counsel appointed by the state for indigent persons before they must talk to the police.<sup>104</sup> Again, in practice, only the poorest of the poor qualify for appointed counsel, and they often get incompetent, underpaid attorneys overburdened with heavy caseloads.<sup>105</sup> Similarly, police are effective in obtaining lawyer-less statements despite *Miranda*,<sup>106</sup> and the United States Supreme Court has repeatedly narrowed *Miranda's* scope.<sup>107</sup> Under these circumstances, legal rules cannot be enforced evenhandedly.<sup>108</sup> Additionally, the full benefits of the rule of law cannot be attained without giving all sides to a dispute the resources to bring their arguments to bear effectively before decision makers—especially in an adversary system.<sup>109</sup>

Yet, most Americans and most lawyers, even if they disagree with some of these practices, would consider them consistent with the rule of law or at least behave as if they are so consistent.<sup>110</sup> The point is not that this belief is wrong. It would be absurd, for example, to argue that the United States is less committed to the rule of law than Afghanistan or other seemingly failed states<sup>111</sup> and equally absurd to claim that there is no rule of law at all in the United States.<sup>112</sup> The point instead is simply that even in America the meaning and practice of the rule of law is culturally and politically determined and its achievement comes in degrees.

101. See *id.* at 107-15.

102. See *id.*; Upham, *supra* note 53, at 87-88.

103. See Upham, *supra* note 53, at 88.

104. See ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 49, 705-07, 751-52 (4th ed. 2010).

105. See Eve Brensike Primus, *Structural Reform In Criminal Defense: Relocating Ineffective Assistance Of Counsel Claims*, 92 CORNELL L. REV. 679, 682-84, 686-89 (2008).

106. See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 119-64 (2008).

107. See TASLITZ, PARIS & HERBERT, *supra* note 104, at 757-60, 762-64 (summarizing the cases demonstrating this process of contraction).

108. See Primus, *supra* note 105, at 682-84, 686-89; Upham, *supra* note 53, at 18-19 (noting that the United States government “has never devoted even a fraction of the resources necessary to ensure that people have equal access to courts.”)

109. See Upham, *supra* note 53, at 18 (“Society will not reflect the benefits of the rule of law if the rules are not enforced evenhandedly or if one side of a dispute does not have the resources to bring the matter to the attention of the law.”)

110. See *supra* text accompanying notes 51-71 (discussing view of the American system as embodying the rule of law, not men).

111. See Rosa Ehrenreich Brooks, *Failed States, or The State As Failure?*, 72 U. CHI. L. REV. 1159, 1189 (2005); Ruth Gordon, *Saving Failed States: Sometimes A Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 962 (1997).

112. See *supra* text accompanying notes 53, 57-60.

What constitutes law is equally a contested notion.<sup>113</sup> Rather than enter into that debate, however, it is useful to note a recent jurisprudential articulation of law as a particular means of social planning.<sup>114</sup> The substance of law thus necessarily reflects a community's values and political commitments—the goals of its plan and the means chosen to attain those goals.<sup>115</sup> Legal meanings are intelligible only to the extent that they borrow from culturally salient meanings prevailing outside the formal rules of law.<sup>116</sup> What a particular law means and how it should be applied thus becomes an opportunity for contest over the nature and meaning of that society's political commitments.<sup>117</sup>

Professor Daniel Markovitz thus insists that the legitimacy of a legal system requires a political process in which there is broadly shared collective participation in creating law.<sup>118</sup> It is this shared participation that turns competing selfish individuals into public-regarding citizens, the law that results from struggle thus truly the product of the political community.<sup>119</sup> Not all lawyers can represent all interests in such struggle.<sup>120</sup> Some lawyers, argues one well-known commentator, must, however, play roles that ensure that even dissenting views on law's meaning and application

113. See Fernanda Pirea, *Law Before Government: Ideology And Aspiration*, 30 OXFORD J. LEGAL STUD. 207 (2010) (summarizing some of the debate and offering a social scientist's take on the question); Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 775 n.35 (2010) (summarizing several philosophers' views on the what is law question).

114. See SCOTT J. SHAPIRO, LEGALITY 154, 157, 163-80, 193-225 (2011).

115. See Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 592-607 (2010) (summarizing Shapiro's argument).

116. See SHAPIRO, *supra* note 114, at 213 (noting that the design of a legal system necessarily reflects the system-designers' goals). Explains Professor Kleinfeld, albeit in talking about the rule of law rather than the definition of law itself,

Thinking about rule-of-law ends requires realizing that they are historically and culturally determined concepts. New ends can be discovered by reinterpretation or reemphasis of old ideas, but creating a new end is a lengthy and intellectually weighty proposition, not something that can simply be declared by practitioners.

Kleinfeld, *Competing Definitions of the Rule of Law*, *supra* note 58, at 8. I recognize that Shapiro purports to be embracing an abstract conception of law not dependent upon coercion and other aspects of ordinary political life, but his planning concept is in fact thoroughly consistent with more coercive, political notions of the law, as Professor Schauer ably explains. See Schauer, *The Best Laid Plans*, *supra* note 115.

117. As Professor Wendel puts it:

Any time a community constituted by its allegiance to certain sources of ethical value seeks to regulate itself using the reason-giving discourse of law, it is inevitable that the meaning of law will be shaped by the community's existing narratives. So it is nonsensical to talk about law-application as a top-down imposition of legal meaning onto a community which is already possessed of abundant resources for understanding itself in terms of foundational constitutive values. Instead, the law should be understood as an "arena of struggle," or a site of contestation of the meaning of the community's political commitments.

WENDEL, *supra* note 84, at 130.

118. See DANIEL MARKOVITZ, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (2008); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (similar).

119. See WENDEL, *supra* note 84, at 130.

120. See *id.* at 130-31.

are aired.<sup>121</sup> Legality may, therefore, even require some degree of oppositional behavior challenging the existing allocation of legal entitlements.<sup>122</sup> Given the unique role of the criminal law explained above,<sup>123</sup> criminal defense lawyers have a particularly valuable oppositional function. Explains this commentator, “Criminal defense lawyers see themselves as standing with the friendless, fighting for the underdog, and resisting the power of the state, and they may regard themselves more generally as political opponents of a harshly punitive justice system.”<sup>124</sup> For criminal lawyers to serve this oppositional role in changing understandings of law and its application, particularly on behalf of those otherwise voiceless, they must have the tools to do so.<sup>125</sup> Under this oppositional approach, Delgado’s rotten social background defense is but one such tool to make the current system more responsive to *excluded groups* as well as individuals, thereby heightening the legitimacy of law’s rule. Yet the system is reluctant to see things this way. The rotten social background defense may be a bridge too far.

Understanding why this observation is so requires briefly making two additional points. First, the criminal law serves a special role in any system of laws. Criminal law and procedure are strongly devoted to maintaining the law and order aspect of the rule of law.<sup>126</sup> Criminal law also uses unique tools for punishment, such as imprisonment, that have particularly potent effects in limiting human freedom.<sup>127</sup> Moreover, criminal law imposes unique stigma on the convicted,<sup>128</sup> while criminal trials become the venue for much of a society’s symbolic battles over its most fundamental values.<sup>129</sup> Criminal law is also about purported harms to public interests, not private ones.<sup>130</sup> This combination of features suggests that crimi-

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121. *See id.*

122. *See id.*; CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).

123. *See supra* text accompanying notes 11-14.

124. *See* WENDEL, *supra* note 84, at 131; DAVID LUBAN, *THE GOOD LAWYER: LAWYERS’ ROLE AND LAWYERS’ ETHICS* 275, 283 (1983) (defending criminal defense lawyers’ adversarial role).

125. *See* Charles J. Ogletree & Yoav Sapir, *Keeping Gideon’s Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 *N.Y.U. REV. L. & SOC. CHANGE* 203, 214 (2004) (“As weak as the legal standards for effective assistance of counsel may be, perhaps the more important determinants of the quality of representation are the structural features of the public defender system that impede the quality of representation, particularly the chronic and severe shortage of resources. The growth of the public defense system after the *Gideon* decision was never matched by sufficient increases in funding and the situation has grown even worse in recent years.”)

126. *See supra* text accompanying notes 79-83.

127. *See* Taslitz, *The Criminal Republic*, *supra* note 46, at 133-34, & nn. 1,4-6, 9.

128. *See* Taslitz, *Civil Society*, *supra* note 11, at 356-58; Taslitz, *Judging Jena*, *supra* note 76, at 415-24.

129. *See* Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 *HASTINGS L.J.* 1285, 1298-1307 (2011).

130. *See* Taslitz, *Civil Society*, *supra* note 11, at 346-49.

nal law can serve unique political functions in any society, not all of which functions are admirable.<sup>131</sup>

Second, and relatedly, if the rule of law and conceptions about what sustains it or undermines it, and what should thus count as law or not, are inevitably partly political in nature, there is by definition a political status quo. Correspondingly, there will be those who challenge that status quo and the distribution of power it entails. Each status quo is sustained in part by political ideology.<sup>132</sup> Although ideology is itself a contested concept, it can fairly be defined as a conceptual framework structuring our thinking about the social world and our role in it.<sup>133</sup> Ideology makes a particular social system “seem natural, god-given, or ideal, so that the subordinate classes accept it without question.”<sup>134</sup>

Remember that rule of law systems come in degrees, vary based partly on cultural conceptions of what counts as human rights and what those rights mean, turn on institutions perceived as insulated from overt political pressures like those involved in legislative elections, require some attention to popular conceptions of justice if law’s legitimacy in practice is to be maintained, and turn on concepts of equality, including what counts as “difference” among persons, groups, and contexts.<sup>135</sup> All these features of the rule of law are contested, in flux, and reflect political combat among social groups who may gain or lose from changing understandings of these features.<sup>136</sup>

Any particular combination of these features as they exist at a given moment in time thus requires an ideology to sustain them. Dissenters from the status quo must therefore challenge that ideology. Moreover, ideological precepts may be overt or implicit, conscious or not.<sup>137</sup> When this conclusion is combined with the unique function of the criminal law, it becomes clear that the rule of law in the criminal context may operate differently than in other contexts and will correspondingly be sustained by its own unique ideology. Challenges to that ideology will thus be sensed to be challenges to the rule of law itself and the ways in which it sustains a particular political order. Those challenges may, however, for this very reason be ignored because they contradict the current understanding of a particular arrangement as natural, thus may not even be seen as a valid idea of what can constitute law or serves its rule. Alternatively, if not

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131. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that modern criminal law’s primary function is to oppress African-Americans, or at least the subset who are economically disadvantaged).

132. See Taslitz, *Patriarchal Stories*, *supra* note 70, at 404.

133. See *id.*

134. MIKE CORMACK, *IDEOLOGY* 13-14 (1992).

135. See *supra* text accompanying notes 60-76.

136. See *supra* text accompanying notes 78-109.

137. See Taslitz, *Patriarchal Stories*, *supra* note 70, at 404-10.

ignored from an ideology-enforced blindness, these challenges may be consciously ignored—a form of willful blindness—to avoid the implications they pose for existing power relationships.<sup>138</sup> It is thus to what I see as the three most relevant aspects of the ideology of the rule of criminal law to which this article next turns. Those three aspects are each challenged by the rotten social background defense, thus helping to explain its unpopularity among the judiciary and other lawmakers.

### III. THE THREE MAJOR ASSUMPTIONS OF AMERICAN CRIMINAL LAW

The three major relevant ideological assumptions of the American rule of criminal law are these: (1) there may be no comparative social responsibility; (2) entity liability is distrusted; and (3) compassion is reserved for those “like us.”

#### A. *No Comparative Social Responsibility*

##### 1. *The Non-Responsible Victim*

American criminal law claims to be highly individualistic.<sup>139</sup> Indeed, it is ordinarily viewed as so individualistic as to render the idea of shared responsibility nonsensical.<sup>140</sup> Tort law, criminal law’s civil side cousin, for example, recognizes in some jurisdictions the doctrine of contributory negligence, freeing the negligent defendant from *any* liability whatsoever if the plaintiff also behaved negligently, and, in other jurisdictions, the doctrine of comparative liability, apportioning the damages based upon the relative fault of the defendant and the plaintiff.<sup>141</sup> But criminal law contains no such overt comparative fault doctrines.<sup>142</sup> Criminal law thus does not ordinarily reduce a defendant’s potential maximum sentence, or the degree of the defendant’s crime, based upon the degree of fault of the “victim,” or at least this is so on the face of the law.<sup>143</sup> Nor does criminal law ordinarily prosecute both the offender and his alleged victim on the ground that both have committed a crime.<sup>144</sup>

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138. See generally Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005) [hereinafter Taslitz, *Willfully Blinded*] (explaining the psychological processes involved in, and political consequences of, self-deception).

139. See *id.* at 386-89.

140. See VERA BERGELSON, VICTIMS’ RIGHTS AND VICTIMS’ WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW 15 (2009) (“Criminal law . . . has expressly rejected the idea of comparative liability.”).

141. See *id.* at 14-15, 52-56.

142. See *id.* at 15.

143. See *id.* at 45.

144. Note my emphasis on the word “ordinarily”; I am not saying that this never happens. Nevertheless, it is the default legal choice in both theory and practice. Take, for example, a typical complete self-defense claim in an aggravated assault case. Either the victim is viewed as the wrongdoer,

Implicitly at least, however, there are exceptions. Thus the traditional common law lowered murder to voluntary manslaughter if, and only if, the defendant was reasonably provoked into the heat of passion *by the defendant*.<sup>145</sup> If comparative fault were irrelevant, merely being in the heat of passion and reasonably being in that state would suffice. Provocation should have no role, much less provocation by the victim. The victim cannot be prosecuted along with the homicide defendant, of course, because the victim is dead. Nevertheless, the defendant gets a sentencing discount if the victim was partly at fault. This partial defense is, however, limited to homicide cases, so it does not constitute a general exception to the no-shared-liability principle.<sup>146</sup> Moreover, there is substantial pressure to abandon the provocation mitigating excuse, replacing it, as does the Model Penal Code, with alternatives that turn solely on the *offender's* mental state and actions, not those of the victim.<sup>147</sup>

The anti-shared-liability tenor of the law can be problematic because it requires law enforcement to select one person as the victim, the other as the offender.<sup>148</sup> But the lines between these two choices are not always crystal clear.<sup>149</sup> If members of two rival gangs are threatening one another, each intending at some point to hurt the other, but the first gang member acts first, shooting but not killing the rival gang member while he sits down to dinner with his family, the shooter will be charged with aggravated assault, the rival gang member with nothing.<sup>150</sup> Yet the “victim”

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who is thus the one who really should have been prosecuted, leading to the defendant's acquittal, or the defendant is the wrongdoer, leading to his conviction but no prosecution of the victim. *See id.* at 70-71 (discussing the traditional view of self-defense).

145. *See* PODGOR ET AL., *supra* note 13, at 307-08.

146. *See* BERGELSON, *supra* note 140, at 29-31.

147. *See* MODEL PENAL CODE § 210.3(1)(b) (requiring that a defendant seeking mitigation of murder to manslaughter be suffering from an extreme mental or emotional disturbance for which there is no reasonable explanation or excuse but not requiring victim provocation, or indeed anyone's provocation); *but see* BERGELSON, *supra* note 140, at 34 (noting that some state courts read a provocation requirement into this Model Penal Code language, ignoring the Code's commentary expressly rejecting that reading).

148. *See* BERGELSON, *supra* note 140, at 1 (“The guilt of the perpetrator becomes the innocence of the victim.”).

149. *See id.* at 2 (“In reality, victims are often the coauthors of the harm they suffer,” while also giving examples). Bergelson summarizes some of the key ways in which victims might share fault with their assailants:

They may participate in risky activities; agree to infliction of pain or injury; attack or provoke others. Sometimes, they do not take necessary precautions against criminals; sometimes, they are criminals themselves. Frequently, yesterday's offenders become today's victims. For example, in Newark, New Jersey, . . . approximately 85 percent of victims killed in the first six months of 2007 had criminal records. In many instances, complex interpersonal dynamics between the victim and perpetrator invoke a question of shared responsibility.

*Id.* Bergelson gives as examples of shared fault a “victim” throwing himself under a car that happens to be speeding; three drivers participating in a drag race in which one of them dies; a man agreeing to be eaten by his fellow starving man; a woman killing her long-physically-abusive husband during a current altercation. *Id.*

150. This will be so because the shooter is the “first aggressor” for purposes of self-defense law,

might earlier already have called for an after-dinner discussion with his posse to plan on how to kill the soon-to-be shooter, a meeting called long before any actual shooting took place. Both men are dangerous. One may not have gone far enough to be prosecuted or, if he has, the need for his testimony and the system's cultural categorization pressure will likely lead prosecutors only to charge the shooter.<sup>151</sup> In any event, even if both are prosecuted, in neither independent prosecution will each defendant's penalty be reduced based upon the other's shared wrongdoing.<sup>152</sup> On the other hand, despite the law's purported adherence to a principle of no comparative liability, self-defense can be viewed as at least implicitly taking shared liability into account, much in the way that contributory negligence does. A shooter killing an innocent aggressor (in the sense that the aggressor honestly, even if wrongly, believed that he had to aggress first to avoid violence at the defendant's hands) is justified in killing the aggressor but would never be justified in killing an innocent *bystander*.<sup>153</sup> The defendant's gun may be targeted only at the one who started the violence.<sup>154</sup>

Justification defenses more generally (of which self-defense is generally viewed as but one example) likewise purportedly do not turn on shared wrongdoing but rather are a way to prove that the defendant did not act wrongfully in the first place.<sup>155</sup> The defendant was either committing homicide or acting in self-defense, thus not guilty at all. There is no middle ground. Most excuse defenses likewise partially mitigate or fully excuse the defendant's wrongful action based upon the defendant's less inculpatory mental state, not any notion of shared fault.<sup>156</sup> As with self-defense,

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the surviving victim is not. See PODGOR ET AL., *supra* note 13, at 325-26.

151. If his conduct has gone far enough, he might be charged with conspiracy, which in many jurisdictions requires merely an agreement to commit a crime and the purpose to do so. See *id.* at 481-84. In other jurisdictions, conspiracy may also require an overt act done by some member of the conspiracy in furtherance of its purposes. See *id.* at 481-85. Even where a conspiracy could be proven, prosecutors will often find it more important to convict the actual shooter and might require the lead conspirator/victim's testimony to do so, thus immunizing the latter person from prosecution. See *The Law: The Problem of Conspiracy*, TIME, Feb. 15, 1981, available at <http://www.time.com/time/magazine/article/0,9171,904723,00.html>. Furthermore, the conspiracy to kill the eventual shooter may be much harder to prove than the "victim's" actual shooting of the alleged conspirator. See PODGOR ET AL., *supra* note 13, at 488-97 (addressing the difficulty of proving conspiracy).

152. Explains Bergelson,

The aggressor-turned-victim is certainly not the proximate cause of his own death or injury. It is the target of his attack (or someone acting on his behalf) who intentionally chose to use preventive force against the perceived harm or threat of harm. Nonetheless, all state laws as well as the MPC completely exonerate the person who has reasonably defended himself or another.

See BERGELSON, *supra* note 140, at 27.

153. See *id.*

154. See *id.*

155. See PODGOR ET AL., *supra* note 13, at 558-61.

156. See Andrew E. Tashitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419, 420-21 (2009) [hereinafter

however, exceptions to this view may be found to be implicit in the law.<sup>157</sup> Nevertheless, the official stance of criminal law decision makers and as reflected in our criminal justice culture is “to think of crime as something that ‘bad guys’ do to ‘good guys’ and of criminal adjudication as ‘us’ against ‘them.’”<sup>158</sup> Criminal law theorist Vera Bergelson summarizes the official stance:

This thinking is reflected even in the way we identify criminal cases: “People v. John Doe.” We, “the People,” prosecute John Doe. If he is wrong, then we—all of us, including the victim,—are right . . . In fact, perception of victims as innocent has a long history, which significantly predates our legal system. In numerous cultures, as evidenced by linguistics, the notion of victimhood is tied to the religious sacrifice. Most Semitic, Germanic, Romance, and Slavic languages have the same word for the victims of sacrifice and the victims of crime. This homonymy is rooted in the dichotomous vision of the world as split into two categories, the guilty and the innocent. Those who were to serve as victims of sacrifice had to be pure, without blemish, and today too we continue to associate victimhood with innocence.<sup>159</sup>

## 2. *The Non-Responsible Society*

A broader, inherent variant of the no-shared-fault principle is that the offender does not share fault with his parents, his teachers, cowardly politicians, racially discriminatory potential employers, or society at large, even if the defendant can “prove” that these persons, groups, and entities strongly contributed to his wrongdoing.<sup>160</sup> His substantive criminal liability (the degree of the crime) and his potential maximum sentence will be unaffected by these factors—though a sentencing judge in a system allowing the judge some sentencing discretion based upon these factors might reduce the actual sentence for these reasons, or they might even be relevant in a sentencing guidelines system.<sup>161</sup> Concerning liability, the prin-

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Taslitz, *Tinkerbell*]. *But see id.* at 447-52 (noting that in practice ordinary people do take shared fault into account in deciding whether to feel compassion for another, and compassion is at the heart of excuse defenses). *See generally* BERGELSON, *supra* note 140 (arguing that many defenses implicitly recognize some degree of shared fault, despite explicitly refusing to do so, and that this is normatively a wise thing that should be expanded to create a general principle of shared criminal fault).

157. *See* BERGELSON, *supra* note 140, at 15-35 (discussing implicit exception to the law’s no-comparative-fault stance); *Id.* at 29-35 (re-categorizing some excuses as partial defenses based upon implicit recognition of the principle of shared fault).

158. *Id.* at 1.

159. *Id.*

160. *See supra* text accompanying notes 139-44.

161. *Cf.* Gall v. United States, 552 U.S. 38, 53-54, n. 9 (2007) (noting sentencing judge’s consid-

principle nevertheless holds that the defendant is ultimately fully responsible for his actions. He presumably had a choice concerning how he would respond to the poor parenting, lousy education, cowardice, stereotyping, or hatred of those around him. Similarly, concerning society's claimed role in promoting these difficult circumstances and the ways in which society generally acts through specific institutions and individuals, the prohibition on shared fault is arguably even stronger. Former Republican Vice-Presidential candidate, Sarah Palin, in commenting upon whether angry political rhetoric and its reflection of a broader purportedly dehumanizing political culture could have contributed to an individual's recent shooting of a congresswoman, made this point about criminal justice and American culture more broadly:

President Reagan said, "We must reject the idea that every time a law's broken, society is guilty rather than the lawbreaker. It is time to restore the American precept that each individual is accountable for his actions." Acts of monstrous criminality stand on their own. They begin and end with the criminals who commit them, not collectively with all the citizens of a state, not with those who listen to talk radio, not with maps of swing districts used by both sides of the aisle, not with law-abiding citizens who respectfully exercise their First Amendment rights at campaign rallies, not with those who proudly voted in the last election.<sup>162</sup>

Although Palin's comments were sparked by a specific criminal act, they speak to a much broader philosophy, one that well captures the dominant philosophy of the criminal law.

The strength of this prohibition on society's sharing responsibility with a criminal offender lay in the purposes of the criminal law. The dominant understanding is that the Queen of the Kingdom of Criminal Law Punishment Rationales is retribution.<sup>163</sup> There are varied theories about just what retribution is, but the theory of communicative retributivism I believe is the most attractive.<sup>164</sup> The idea here is that every criminal action insults another person or persons, treating that victim as worth less than the offender.<sup>165</sup> Thus a thief sends the message, "My desire for your money is more important than your need for it or your right to it." The purpose of

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eration of the offender's "working class background" as relevant at sentencing where he ultimately voluntarily chose to turn his back on a lucrative life of crime); BERGELSON, *supra* note 140, at 45-51 (discussing when shared fault with other individuals is considered relevant at sentencing).

162. Jason Linkins, *Sarah Palin Refudiates Sarah Palin*, THE HUFFINGTON POST, Jan. 12, 2011, available at [http://www.huffingtonpost.com/2011/01/12/sarah-palin-refudiates-sa\\_n\\_808213.html?view=print](http://www.huffingtonpost.com/2011/01/12/sarah-palin-refudiates-sa_n_808213.html?view=print) (quoting Sarah Palin).

163. See Taslitz, *Civil Society*, *supra* note 11, at 315-19.

164. See PODGOR ET AL., *supra* note 13, at 6-8.

165. See *id.*

criminal punishment is to send a message to the offender that brings him down a peg, in effect saying to him, "You are worth no more than your victim. You both merit equal respect."<sup>166</sup> Yet just using words to send this message will not make the message seem sincere or adequate to the equalizing task. The message must involve punishment, a loss of freedom of some kind, a taking of control over the person, for only that truly equalizes things.<sup>167</sup> The punishment must be proportionate—too great a punishment treats the defendant as less worthy than others, not as equally worthy—but punishment it must be.<sup>168</sup>

Yet, so stated, this explanation is inadequate. Tort law also has a retributive element.<sup>169</sup> We could, for example, have a system in which a civil victim, B, is compensated for her injuries from a general state fund, and the state separately imposes some sort of punishment on the offender, A, for his wrong, even if that punishment is "civil" in nature. That would deter the offender A and compensate the victim B. But, explains leading tort theorist Alan Calnan, such an approach would leave the victim feeling that justice was not served:

There is something very sterile and impersonal in such a scheme of rectification. It may correct the imbalance in accordance with an arithmetic proportion, but it might seem strangely unsatisfying to B nevertheless. B never has an opportunity to return the inconvenience and embarrassment thrust upon him by A. Nor will A see the injurious fruits of his mischief. While B has been made whole by the monetary award, has he been given his "due?"<sup>170</sup>

A tort suit labeled "B versus A" thus serves an important retributive goal. That goal is satisfying one individual's need for retribution against another, for personally taking part in harming the other.<sup>171</sup>

Such personal harm-infliction itself accomplishes incomplete justice, however, because there are others besides B and his immediate friends and family who seek retribution.<sup>172</sup> Although a wronged individual may feel "resentment," observers may instead feel "indignant."<sup>173</sup> "Indignation is an emotional protest against the individual's immoral abuse at another's

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166. *See id.*

167. *See* Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686-87 (1992).

168. *See* Taslitz, *Civil Society*, *supra* note 11, at 335-38.

169. *See* Hampton, *supra* note 167, at 1697.

170. ALAN CALNAN, *JUSTICE AND TORT LAW* 111 (1997).

171. *See* Taslitz, *Civil Society*, *supra* note 11, at 342-45.

172. *See id.* at 348.

173. *See* Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 60 (2000).

hands, a defense of the values assailed by the offender.”<sup>174</sup> The many observers constitute a coherent group, the “public” or “the People” because they share indignation at the wrong done to the victim *and to fundamental shared political/moral values that define the community*.<sup>175</sup> More generally, therefore, criminal punishment promotes social cohesiveness by reaffirming social norms.<sup>176</sup> As moral psychologist Neil Vidmar explains it,

An offense is a threat to community consensus about the correctness—that is, the moral nature—of the rule and hence the values that bind social groups together. In this sense the offense makes the social group or community a victim. Hostility toward the offender can thus arise from the “belongingness” in the group independent of empathy toward the specific victim or internalized feelings about a social contract . . . .

This perspective about the threat of an offense to group or community values also draws attention to the fact that punishment can serve the goal not only of attempting to change the beliefs or status of the offender but also of reestablishing consensus about the moral nature of the rule among members of the relevant social community.<sup>177</sup>

Note that in this articulation of criminal law’s central purpose, retribution wreaked on behalf of the public renders the public a single, indivisible entity, “a victim.”<sup>178</sup> Crimes unavenged shatter the bonds that tie this entity together as a single metaphorical person, untreated wounds inflicted on the body politic.<sup>179</sup> If the very purpose of punishment is to protect this preying on the public as victim, then, as at the individual level, there can be no shared fault.<sup>180</sup> To acknowledge that the public’s own values contributed to the individual’s wrong or that those values as practiced belie public hypocrisy is to challenge the very identity of the public as victim.<sup>181</sup> It is to leave the public shattered rather than whole.

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174. *Id.*

175. See Taslitz, *Civil Society*, *supra* note 11, at 317-19, 330-33, 373-76.

176. Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 42-43 (Joseph Sanders & Lee Hamilton eds. 2001).

177. *Id.*

178. See BERGELSON, *supra* note 140, at 1 (noting the ways in which criminal law fuses the public and the victim into an “us” versus the “them” that is represented by the offender).

179. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solitary Through Modern Punishment*, 51 HASTINGS L.J. 829 (2000).

180. See BERGELSON, *supra* note 140, at 1.

181. Cf. Taslitz, *Willfully Blinded*, *supra* note 138, at 430-35 (discussing the virtues and vices of hypocrisy).

So conceived, the rotten social background defense becomes a dangerous idea. Whether stated explicitly or not, what distinguishes it from other defenses is its recognition of shared fault between the criminal offender and society. It seeks to reduce the individual's degree of culpability based not on his own conduct, thoughts, or feelings but based on the wrongs done him by society at large that contributed to his criminal action.<sup>182</sup> It implies therefore that society's values, as stated or practiced, are wanting; that shared and unquestioned allegiance to those core values is unacceptable; that communal retributive feelings do not deserve full satiation; and that society itself must pay in some fashion, must repent via action for its own wrongs done to the most vulnerable among it. The defense, conceived as a partial one, does not sacrifice the individual person harmed by the burglary, robbery, or other crime on the altar of repentance because the offender will still be punished, just to a lesser degree. But the lurking fear may be that reducing the offender's punishment does not fully "stand with" the victim for the entire wrong to his dignity that he has suffered, thus insulting him.<sup>183</sup> Furthermore, the *rationale* for the reduction in penalty is society's profound moral-political failing.<sup>184</sup> To recognize that failing by making rotten social background a creature of the law is to include in the law the seeds of destruction of the very values that define it. Such an approach is thus a threat to the rule of criminal law and cannot be tolerated.

## B. Discomfort with Entity Liability

### 1. Basic Principles

The criminal law's emphasis on the individual also manifests itself by a discomfort with entity liability. The criminal law does, of course, recognize that individuals can act together, for example, conspiring to commit crimes or acting as accomplices in crime.<sup>185</sup> Accomplices are, however, judged by whether each alleged accomplice had the purpose to, or at least the knowledge that, he would be aiding another in doing a criminal wrong.<sup>186</sup> No entity of "accomplices" exists. Similarly, conspiracies are not generally viewed as distinct entities but rather conglomerations of individuals with a common criminal purpose.<sup>187</sup> Special liability may flow from joining a conspiracy because of the extra dangers group action pos-

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182. See Delgado, *supra* note 1, at 56-63.

183. See Taslitz, *Criminal Republic*, *supra* note 46, at 142 (discussing the victims' rights movement and politicians efforts symbolically to stand with the victim by imposing harsh criminal punishments).

184. See Delgado, *supra* note 1, at 60.

185. See PODGOR ET AL., *supra* note 13, at 481-88, 511-20.

186. See *id.* at 521-30.

187. See *id.* at 481-88.

es.<sup>188</sup> But it is individuals who are judged, based on their actions and states of mind, rather than, or in addition to, an indictment or information being brought against the “conspiracy” itself.<sup>189</sup> There are apparent exceptions to this principle, such as the Racketeer Influenced Corrupt Organization Act (RICO) as a basis of liability.<sup>190</sup> But these arguable exceptions depart from the core traditional model of criminal liability.<sup>191</sup> That is why I have said that the criminal law has “discomfort” with entity liability. The concept is perhaps not unheard of, but it is viewed as troubling, raising difficult challenges precisely because it departs from the criminal law’s core focus on the individual.<sup>192</sup> The most central challenge it raises is the belief that entities cannot have mental states.<sup>193</sup> Despite the multiplication of mostly minor strict liability offenses, they remain controversial,<sup>194</sup> and *mens rea* is viewed as at the heart of criminal liability.<sup>195</sup> But the evil mind and the vicious heart, it is said, can reside only in the breast of a single, living biological human being. Entities are not that.<sup>196</sup> Indeed, they are no more, or so the argument goes, than useful fictions.<sup>197</sup>

188. *See id.* at 481-88.

189. *See generally* SAMUEL H. PILLSBURY, *HOW CRIMINAL LAW WORKS: A CONCEPTUAL AND PRACTICAL GUIDE* 335-57 (2009) (summarizing the highly-individual-focused American conspiracy law); JOSEPH MCSORLEY, *A PORTABLE GUIDE TO FEDERAL CONSPIRACY LAW: TACTICS AND STRATEGIES FOR CIVIL AND CRIMINAL CASES* (2003) (similar but focusing on the federal system and the nature of indictments as well).

190. Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941-48 (1970) (codified as amended at 18 U.S.C. §§ 505, 1961-1968, 2516-2517 (2000)). As one professor explains:

By centering these prohibitions on the enterprise and pattern elements rather than on individual actions, RICO revolutionized the way in which modern law conceptualized criminality. Common law judges defined crimes almost exclusively as isolated violations of the law committed by individuals. Prior to 1970, statutory formulations followed this practice. Consequently, recidivist activity and organizational misconduct were marginalized or ignored, and conventional evidentiary principles made a defendant’s associational affiliations and prior pattern of wrongdoing inadmissible at trial. These evidentiary restrictions limited the utility of criminal sanctions, because illicit enterprises routinely survived successful prosecutions of their leadership. RICO changed this by making enterprise and pattern the core of each enforcement effort. By shifting the focus from prosecuting individual violators to attacking all forms of sustained enterprise criminality, Congress dramatically altered how cases are investigated, prosecuted and sanctioned.

Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281, 286-87 (2004).

191. *See id.*

192. *See id.*

193. *Cf.* Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 GEO L.J. 1215, 1223-24 (2003) (arguing deterrence is the primary justification, if any, for corporate criminal liability) [hereinafter Khanna, *Top Management*]; Daniel R. Fischel & Alan O. Sykes, *Corporate Crimes*, 25 J. LEGAL STUD. 319, 323 (1996) (describing corporations as mere “webs of contractual relationships consisting of individuals who band together for their mutual economic benefit”).

194. *See* PODGOR ET AL., *supra* note 13, at 146-52.

195. *See* Taslitz, *Myself Alone*, *supra* note 40, at 20-24.

196. Professor John Hasnas thus insists that:

Corporations, like all businesses, are abstract entities. They have no mind in which to form intentions, no hearts in which to conceive a guilty will, and no bodies that can be imprisoned or corporeally punished in response to bad behavior. They have no actual existence apart from the human beings from which they are comprised. How then can corporations

## 2. *The Corporate Criminal Liability Analogy*

The criminal law does, of course, recognize corporate criminal liability.<sup>198</sup> But the traditional approach to corporate liability again does not treat the corporation as a separate entity but rather a tool of individuals.<sup>199</sup> For example, corporate case law and legislation often purport to embody principles of strict vicarious liability through the doctrine of respondeat superior.<sup>200</sup> Under this doctrine, the corporation is automatically responsible for the acts of its agents because a corporation can only act through individuals.<sup>201</sup> Inquiry into the corporation's mental state is thus unnecessary.<sup>202</sup> Such an inquiry would be nonsensical, for the corporation exists only because the law says it does. It has no prior reality, certainly not one capable of thought. In short, it has "no body to kick, no soul to damn."<sup>203</sup>

Another influential model of corporate criminal liability is that of the Model Penal Code (MPC).<sup>204</sup> Under the most commonly used of the three MPC corporate liability standards, a corporation is criminally liable if its conduct was "authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."<sup>205</sup> This standard limits the respondeat superior doctrine to actions by some high-level agents.<sup>206</sup> This standard too thus assumes no independent corporate existence. Indeed, many commentators on, and much of the law of, corporate criminal liability thus justifies its imposition on grounds of deterrence (rather than retribution) alone and views the corporation as little more than an aggregation of its individual members.<sup>207</sup> The

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be subject to criminal punishment in contradistinction to (and often in addition to) their individual members? How can there be corporate as opposed to individual criminal responsibility?

JOHN HASNAS, TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW 23 (2006).

197. *See id.*

198. *See generally* WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY (2006) (reviewing and critiquing corporate criminal liability).

199. *See* Fischel & Sykes, *supra* note 193, at 323; HASNAS, *supra* note 190, at 23.

200. Pamela Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1102-03 (1991).

201. *See id.*

202. *See id.*

203. Valerie D. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85, 100 (1992).

204. *See* Bucy, *supra* note 200, at 1103.

205. MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962). The other two situations in which the Code imposes corporate liability are for mere violations or similar offenses showing a plain legislative purpose to impose corporate liability and the conduct was of a corporate agent acting on its behalf within the scope of his employment, and an offense consisting of "an omission to discharge a specific duty of affirmative performance imposed on corporations by law." *Id.* at § 2.07(1)(a), (b).

206. *See* Bucy, *supra* note 200, at 1103.

207. *See* Khanna, *Top Management*, *supra* note 193, at 1223-24; Fischel & Sykes, *supra* note 193, at 323; HASNAS, *supra* note 196, at 23.

corporate “person” is thus a fiction without an empirical reality.<sup>208</sup> Notions of corporate moral culpability are therefore meaningless.<sup>209</sup>

Yet, ordinary people think of corporations as having unique characters.<sup>210</sup> Individual corporate personalities are discussed by potential and current employees.<sup>211</sup> These personalities are thought to flow from the corporate culture, which in turn flows from its organization and its operating rules.<sup>212</sup> Corporations can do harm, including harm that insults individuals’ shared equal worth in the way that retributivists care about, and that harm in turn flows from the corporation’s composite way of doing business and treating others.<sup>213</sup> Humans necessarily treat social reality much the same as physical reality: capable of affecting the world via social structures like churches, banks, and government agencies.<sup>214</sup> An individual human being is herself made of separate organs, cells, and other biological structures that in isolation do not make a person.<sup>215</sup> In the view of many social scientists, part of what links these structures together as a single human being is the story that person tells about herself that creates a coherent whole.<sup>216</sup> In the view of some commentators, it is no more metaphysical to see the story that corporations tell about themselves or that others tell about them as central to making corporations distinct “persons” for the purposes of criminal liability.<sup>217</sup> The civil law, particularly since the *Citizens United* case,<sup>218</sup> certainly treats corporations as persons for most purposes, including purposes ordinarily associated with individual thought and feeling and with the political nature of being human, namely, the exercise of freedom of speech.<sup>219</sup> Whether that is wise or not, reci-

208. See HASNAS, *supra* note 196, at 23.

209. See *id.*

210. See Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 533-34 (2006) [hereinafter Taslitz, *Expressive Fourth Amendment*].

211. See *id.*

212. See *id.* at 539-41.

213. Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. 73, 90-94 (forthcoming 2012) [hereinafter Taslitz, *Reciprocity*].

214. See JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 122 (1995) (defining “social facts”).

215. See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 49-50 (2003) [hereinafter Taslitz, *Respect*].

216. See *id.*

217. See, e.g., PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 32 (1984) (“[C]orporations are not just organized crowds of people[.] . . . [T]hey have a metaphysical-logical identity that does not reduce to a mere sum of human-being members.”); CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* 62 (2d ed. 2001) (“Any consideration of corporate liability which ignores the complex process of social construction will be arid and unproductive.”); *id.* at 63-83 (summarizing arguments that corporations have a metaphysical, moral, and legal existence separate from the individuals comprising them).

218. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

219. See Taslitz, *Reciprocity*, *supra* note 213, at 74-77.

procuity suggests that corporations should have similar obligations, not merely similar benefits, to those granted to human beings.<sup>220</sup>

Nor is this idea of corporations as legal persons of merely theoretical interest. Commentators have crafted practical guidelines for determining the degree of *mens rea* of corporations, for example, as negligent, reckless, knowing, or purposeful.<sup>221</sup> They include such factors as the organization of the corporate hierarchy, the overt and covert statements of corporate goals, the efforts made to educate employees about their moral and legal responsibilities, their efforts to monitor legal compliance, their reactions to past violations, the reward structure and indemnification policy, and whether they have internally punished and corrected for the current violation.<sup>222</sup> Just as human *mens rea* is inferred from actions, words, and history, so can this be true of the corporation.

Even the MPC itself seems to make a concession to corporate personhood. The MPC makes an important nod toward a character morality by providing for a due diligence defense.<sup>223</sup> Under this defense, a corporation can evade liability by demonstrating by a preponderance of the evidence that it exercised due diligence to prevent the crime.<sup>224</sup> The due diligence defense squarely shifts the focus from an individual agent's knowledge and behavior to that embraced in the corporation's structure, practices, and policies—in short, in its ethos.<sup>225</sup>

A character-morality approach would also inquire into due diligence, but the burden would be on the prosecution to show its absence rather than on the defense to show its presence.<sup>226</sup> A sound approach to due diligence would also reject reactive fault—requiring a corporate effort to correct wrongdoing only after it is discovered—because it leaves culpable corporate indifference unpunished until the uncertain and perhaps long-coming point when the state uncovers it and, even then, insulates the corporation from liability if it thereafter falls into line.<sup>227</sup> Proactive fault—requiring corporate efforts to prevent wrongdoing in the first place and holding it fully responsible for their absence—is both fairer and a better deterrent.<sup>228</sup>

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220. See *id.* at 82-94.

221. See Taslitz, *Expressive Fourth Amendment*, *supra* note 210, at 539-46.

222. See *id.*

223. See MODEL PENAL CODE § 2.07(5) (Proposed Official Draft 1962); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1299-1301 (2000) (explaining the MPC due diligence defense and its state analogues); *Id.* 1307-08 (defending a "proactive fault" regime attributing liability to a corporation when its "practices and procedures are inadequate to prevent the commission of a crime," an approach that, while not identical to ethos liability, seems to have much in common with it).

224. See Bucy, *supra* note 200, at 1162-63.

225. See *id.* Under an ethos-liability standard, however, due diligence is a factor, not alone necessarily determinative, in judging the presence of a culpable ethos. See *id.*

226. See *id.*

227. See Laufer & Strudler, *supra* note 223, at 1308 (discussing reactive fault and its weaknesses).

228. See *id.* (defining proactive fault but criticizing it and even ethos liability as creating only a

Prosecutors have moved away from strict liability regimes as well by using compliance programs as evidence of due diligence, justifying diversion programs.<sup>229</sup> Federal Prosecutorial Guidelines for Diversion, for example, consider such things as whether the corporation has made full disclosure of wrongdoing, implemented a well-designed and effective compliance program, failed to learn from prior mistakes, identified the culprits within the organization, disciplined them, and paid restitution.<sup>230</sup> The United States Sentencing Commission has also stepped into the fray, adopting Guidelines for Organizational Defendants that fine-tune the severity or leniency of corporate criminal sentences based upon such factors as the establishment of compliance procedures that are actually implemented and reasonably capable of reducing the prospect of criminal conduct, the implementation of special policies to address the particularly high risk of deviance in particular business sectors, the efforts made to communicate legal and ethical standards effectively to employees, the consistent discipline of both wrongdoers and those responsible for failing to detect their behavior, the taking of reasonable steps at compliance with the law via monitoring and auditing systems, and the willingness to admit guilt and cooperate with the prosecution.<sup>231</sup>

Again, these are standards seeking to identify actions stemming from flawed corporate character, guiding sentencing authorities in choosing among such penalties as community service, fines of varying sizes, structural interventions into corporate operations and management, day fines, and the suspension of business activities.<sup>232</sup> The flaw in the Guidelines is

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form of negligence liability when, in the authors' view, corporate liability must be graded based upon corporate *mens rea* akin to the MPC negligence, recklessness, knowledge, purpose spectrum, an approach they label "constructive corporate fault"). I see no inconsistency between the ethos and constructive corporate fault approaches, for ethos-liability is a good guide to corporate negligence, while constructive fault recognizes that even greater degrees of evil corporate conduct can be shown.

229. See Laufer & Strudler, *supra* note 223, at 1299. Professor Laufer has more recently cautioned that corporations sometimes structure compliance programs to enhance their reputations as good citizens and give the appearance of deterring wrongdoing rather than the reality, suggesting ways that the law can prevent corporations from snookering prosecutors. See LAUFER, *supra* note 198.

230. See Laufer & Strudler, *supra* note 223, at 1303; U.S. DEP'T OF JUSTICE, GUIDANCE ON PROSECUTIONS OF CORPORATIONS, June 16, 1999, in BNA COMPLIANCE MANUAL, 41 PREVENTION CORP. LIABILITY 1200 (1999).

231. See Laufer & Strudler, *supra* note 223, at 1305-07; U.S. SENTENCING GUIDELINES MANUAL, ch. 8, Sentencing of Organizations (2004); Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002); ASS'N OF CORP. COUNSEL, THE NEW FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS: GREAT FOR PROSECUTORS, DEADLY FOR THE PRIVILEGE, <http://www.acca.com/protected/article/attyclient/sentencing.pdf> (March 2005); LAUFER, *supra* note 198, at xiii, 42-43, 63-65, 71, 103, 112, 115, 118-19, 134, 139, 184, 191-92, 195 (summarizing and analyzing the most recent versions of the federal organizational sentencing guidelines and related policies).

232. See GUIDELINES MANUAL, *supra* note 231, §§ 8A1-8D; J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 323-24 (2002) (summarizing some of these penalties); HASNAS, *supra* note 196, at 45-55 (summarizing many aspects of the organizational guidelines and the incentives they create in detail).

only that they kick in too late—after the condemnation accompanying a verdict of guilt of a crime has been announced, based largely or entirely on inappropriate principles of strict liability.<sup>233</sup>

In sum, both the law of, and commentary on, corporate criminal liability are moving toward—without having yet reached—a character-based model condemning serious culpable indifference stemming from a unique and independent corporate personality. This model of corporate liability is designed to encourage internal corporate systems for the generation and dissemination of information about wrongdoing, the creation of proactive compliance systems and auditing procedures, the deterrence of future crimes, the education of employees in proper moral and legal standards, and the swift punishment of wayward individuals. The model's major presence at the sentencing phase rather than at the liability phase reflects, however, the law's ambivalence about corporate liability specifically and entity liability more generally. The primary justification for sentencing approaches is deterrence, thus leaving moral inquiries out of the liability analysis because the corporate entity, as a fiction, is still viewed as lacking even the capacity for independent moral and thus legal liability.

### 3. *The People's Mens Rea*

#### a. *Why Even Large, Amorphous Groups Like "the People" Can Be Culpable*

If the criminal law is troubled by entity liability, such as that of corporations, it should be even more troubled by an ultimate, superordinate entity: the People or the public.<sup>234</sup> That may indeed underlay in part the law's aversion to shared liability with "society" that the rotten social background defense presupposes. Yet law, history, and philosophy often recognize the social reality of "the People" and analogous concepts.<sup>235</sup> The Constitution itself claims to speak in the name of the People.<sup>236</sup> The First, Second, Fourth, and Ninth Amendments create rights of the People.<sup>237</sup> National elections are said to reflect the will of the People of the United States.<sup>238</sup> Prosecutors act in the People's name.<sup>239</sup> The Lock-

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233. See Bucy, *supra* note 200, at 1160. See generally Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines*, 1 OHIO ST. J. CRIM. L. 487 (2004) (summarizing strengths and weaknesses of the federal organizational guidelines and proposing remedies).

234. See Taslitz, *Respect*, *supra* note 215, at 70-75.

235. See *id.*

236. See U.S. CONST. pmbl.

237. See *id.* amends. I, II, IV, IX.

238. See James A. Gardener, *Consent, Legitimacy, and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 211 (1990).

239. See Alan Vinegrad, *The Role of the Prosecutor: Serving the Interests of All the People*, 28 HOFSTRA L. REV. 895 (2000).

ean ideology playing an important role in the American Revolution and the ideology underlying the Constitution likewise concern the People.<sup>240</sup> In Lockean theory, individuals come together to form a society to protect their natural rights.<sup>241</sup> But this society—this People—creates a government to help the People achieve the practical things that protect those rights.<sup>242</sup> The government is but the tool. It is the People who have a real, independent identity, and they can act to destroy and replace governments that subvert the People’s will.<sup>243</sup>

To define a people as an “imagined community,” even if accepted as accurate, does not make the people any more of a fiction.<sup>244</sup> As discussed above, storytelling—imagination—is essential to individual and to corporate identity.<sup>245</sup> The People’s existence as a real entity is a fundamental assumption of American law and its justifying ideologies.<sup>246</sup> Philosophers work to defend the concept as viable, and social scientists and historians recognize that appeals to peoplehood can prompt or retard social action and can promote group identification.<sup>247</sup> Peoplehood can be used to exclude some individuals and groups as really not part of the People, to embrace others as central to what makes the People unique, to resolve conflict or to start it.<sup>248</sup> We recognize smaller, dual peoplehoods too—the People of Nebraska, or of Omaha, who are also still part of the American People.<sup>249</sup> If we do not accept the People as real, the entire edifice of American republican ideology falls, to be replaced at best by a cold and brutal understanding of the world as selfish individuals forever competing against one another for power.<sup>250</sup> Perhaps the latter image is more accurate, but it is not the one that moves the heart, that flows from the judge’s pen, or that fills the legislator’s speeches.

Yet practical problems arise. Many individuals and groups are part of “the People.”<sup>251</sup> Unlike with human organs, each of the component parts

240. See TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 72, at 3.

241. See *id.*

242. See *id.*

243. See *id.*

244. See Taslitz, *Respect*, *supra* note 215, at 70-71.

245. See *id.*

246. See *id.*

247. See *id.* at 99-101; Martin O. Heisler, *Challenged Histories and Collective Self-Concepts: Politics in History, Memory, and Time*, 618 ANNALS 199 (2008).

248. See Taslitz, *Respect*, *supra* note 215, at 40; Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 TEX. TECH L. REV. 1383, 1391-92, 1400-04 (2007).

249. Cf. Taslitz, *Fourth Amendment Federalism*, *supra* note 73 (discussing state, federal, and local peoples).

250. Andrew E. Taslitz, *The Jury and the Common Good: Fusing the Insights of Modernism and Postmodernism*, in FOR THE COMMON GOOD: A CRITICAL EXAMINATION OF LAW AND SOCIAL NORMS 312, 324-27 (Carolina Academic Press, Robin Miller, ed. 2004) (comparing liberal and republican ideology in American political and legal thought).

251. Andrew E. Taslitz, *The Happy Fourth Amendment: History and the People’s Quest for Consti-*

of peoplehood has individual thoughts and feelings. Each person's motivation for action will differ.<sup>252</sup> How can we divine a single, composite mental state for such an entity? I do not have the space here to provide an answer, though I note that there are answers aplenty. The same problem of many minds arises with discerning legislative intent and a host of similar issues that other scholars have addressed effectively.<sup>253</sup> Moreover, the problem is not fundamentally that different from the effort to discern corporate intent. Corporate mental state can be discerned from dominant corporate structure and actions. This is so even if individual persons comprising the corporation have varied individual motives and beliefs, and it is so even if there are subsidiary but nevertheless conflicting currents in the corporation's behavior.<sup>254</sup> The same can be said of a People. Granted, it is rare that the People's "state of mind" is unambiguous and undivided, but the same may be said for individual human beings as well.<sup>255</sup> At least in some cases, the People's action or inaction and the means by which it acts or fails to do so can be discerned with sufficient clarity. I offer here but one example.

Post-Holocaust philosopher Norman Geras questioned in what sense could the German people be held responsible for Nazism and Hitler, and, more broadly, in what sense can any society composed of numerous individuals be said to be responsible for such grave wrongs.<sup>256</sup> Geras's answer returned to the idea of the social contract.<sup>257</sup> The implicit social contract, he argued, even if it is never consciously articulated, is one of mutual indifference in such cultures.<sup>258</sup> In this contract, no one attempts to alleviate the frequent grave assaults or cognate misfortunes committed against another, despite these evils happening frequently.<sup>259</sup> Therefore, no one suffering great pain reasonably expects that others will come to his aid.<sup>260</sup> To the contrary, each member of society expects others' indifference to his or her plight.<sup>261</sup> In turn, each member shows reciprocal indif-

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*tutional Meaning*, 43 TEX. TECH L. REV. 137, 143-44 (2010) [hereinafter Taslitz, *Happy Fourth Amendment*].

252. See *id.* at 144-45.

253. See Taslitz, *Interpretive Method*, *supra* note 36, at 388-90; CASS SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE (2009).

254. See *supra* text accompanying notes 198-233.

255. See Taslitz, *Forgetting Freud*, *supra* note 14, at 174.

256. See generally NORMAN GERAS, THE CONTRACT OF MUTUAL INDIFFERENCE: POLITICAL PHILOSOPHY AFTER THE HOLOCAUST (1998).

257. See *id.* at 27-28 (distinguishing Geras' theory from Rawls's theory of social contract); Mills, *infra* note 264, at 3-7 (defining Racial Contract); D.A. LLOYD THOMAS, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO LOCKE ON GOVERNMENT (1995) (stating Locke's theories on political organization and "natural law").

258. See GERAS, *supra* note 256, at 28-32.

259. See *id.*

260. See *id.*

261. See *id.*

ference to his neighbor's pain.<sup>262</sup> This shared expectation neither to give nor receive aid is the "contract of mutual indifference."<sup>263</sup> Like other social contracts, says Geras, it explains the fundamental ground rules of society by equating political with contractual obligations.<sup>264</sup>

Geras argues that this imagined world is a close approximation of our actual world.<sup>265</sup> In general, each of us expects neither to give nor receive aid for our grave misfortunes.<sup>266</sup> There are, of course, groups of care and concern, such as family, friends, and neighbors, in each of our lives.<sup>267</sup> Nevertheless, we are indifferent to most grave evil. Our focus is ordinarily limited to our own ends and on those within our narrow circle of intimates in our daily lives.<sup>268</sup> Our localized communities of care do not address or confront the problems of grave assault and acute danger.<sup>269</sup> "People went to their deaths at Auschwitz and Treblinka," declares Geras, "despite having others who cared about them."<sup>270</sup> As demonstrated by the Nazi murder of six million Jews, generalized indifference can end the fortunes of entire subgroups of care.<sup>271</sup>

It is no answer, Geras continues, to say that there is too much grave assault and that most of us lack the resources to help. To the contrary, most of us remain idle though we have the capacity to assist, or we simply do less than we are able.<sup>272</sup> Geras also rejects the prospect of delegating such responsibility to the government. Government alone is inadequate and can become the instrument of indifference, precisely as it was in the Third Reich. An effective government requires monitoring by a caring citizenry.<sup>273</sup>

Though we are mere "bystanders," argues Geras, our widespread lack of concern makes each of us responsible for the grave harms we ignore.<sup>274</sup> Though direct responsibility falls on the proximate authors of the misdeeds and those "upholding and enforcing conditions of grave oppression and

262. *See id.*

263. *See id.*

264. *See GERAS, supra* note 256 at 27; CHARLES W. MILLS, *THE RACIAL CONTRACT* 9-11(1997).

265. *See GERAS, supra* note 256, at 29-30.

266. *See id.*

267. *See id.* at 33-34 (defining sub-groups of care and their place within the contract of mutual indifference).

268. *See id.*

269. *See id.* at 34 (describing the self-centered focus that prevents us from empathizing with others).

270. *Id.*

271. *See GERAS, supra* note 256 (noting that indifference has led to extinction of subordinated groups); BERNARD SCHLINK, *THE READER* (1995) (depicting how indifference at the individual level, within the context of a broader social contract of mutual indifference, can wreak widespread havoc).

272. *See GERAS, supra* note 256, at 30-33, 63-77.

273. *See id.* at 34-35.

274. *See id.* at 6 (quoting Germans who preferred ignorance); *Id.* at 17-23 (noting that indifference plus latent anti-semitism fueled the Holocaust); *Id.* at 49-59 (quoting authors who examined bystander guilt).

wretchedness,” all that are aware but remain idle are blameworthy.<sup>275</sup> Bystanders merit shame. While they may not be criminally liable, they do suffer three other sorts of guilt: (1) “political guilt,” the idea that we are all co-responsible for the way we are governed, thus each bearing the burden of state misdeeds; (2) “moral guilt” for blindness to others’ misfortune, a lack of imagination of the heart, and an indifference that blights the soul; and (3) “metaphysical guilt” for violating the solidarity among all men by our passive presence in the face of great wrong or crime.<sup>276</sup> It was widespread indifference by the many technically innocent Germans (those who killed no Jews) that made the Holocaust possible.

Although seemingly speaking of individual responsibility, Geras in fact explains indifference toward individuals as members of a subordinated group.<sup>277</sup> Holocaust-like phenomena are distinguishable from other sorts of horror by this apathy to the plight of subordinated groups and their members.

Philosopher Larry May uses group terminology to explain what Geras phrases in individual terms, and, in doing so, clarifies why bystanders can be morally complicit in harms committed by perpetrators, thus blurring the dichotomy between the two groups. Geras likewise recognizes a middle group of those who “uphold and enforce conditions of oppression” and are thus not clearly distinct from perpetrators.<sup>278</sup>

May argues that holding and expressing group-subordinating attitudes imposes moral responsibility on the offending speaker. For example, a man who discusses women as “other” promotes more widespread, deeply entrenched views of women as lesser beings.<sup>279</sup> Similarly, the expression of racist attitudes creates a sense of solidarity among those of similar or comparable views.<sup>280</sup> The wider and more intense the declarations of another group’s inferiority, the greater the risk that others will act upon those beliefs to harm the sub-group.<sup>281</sup> Sexist and racist speech further

275. *Id.* at 17-19.

276. *See id.* at 52-56 (outlining German philosopher Karl Jaspers’ multi-fold scheme of guilt).

277. This observation follows from Geras seeking to explain Germans’ indifference toward the physical pain that the Nazis inflicted on the Jews as members of a despised group. *See id.*, at 3-24, 99. One way in which Mills’ idea of a Racial Contract is superior to Geras’ idea of a contract of mutual indifference is that Mills more expressly recognizes the group nature of the problem. *See MILLS, supra* note 264, at 9-11. The discussion in this section fuses concepts drawn both from Geras and Mills.

278. GERAS, *supra* note 256, at 17-24.

279. *See* LARRY MAY, MASCULINITY & MORALITY 65-74 (1998) (analyzing the effect of pornography on gender relations); *Id.* at 92-94 (noting that labeling women as “others” feeds rape culture).

280. *See* LARRY MAY, SHARING RESPONSIBILITY 46-54 (1992) (“Those who have racist attitudes, as opposed to those who do not, create a climate of attitudes in which harm is more likely to occur.”); *Id.* at 83-87 (discussing the effects of group interaction on group norms and functions); *Id.* at 151-61 (discussing guilt and community membership).

281. *See* MAY, MASCULINITY & MORALITY, *supra* note 279, at 63-65 (discussing group harm); MAY, SHARING RESPONSIBILITY, *supra* note 280, at 36-48 (discussing shared group responsibility).

promote stereotypes that help to justify such abuses.<sup>282</sup> Furthermore, the messages embodied in prejudicial speech help to create and sustain the cultural conviction that one group is superior and the other inferior.<sup>283</sup> Such destructive messages are particularly powerful when they are expressed via violence.<sup>284</sup> In a racially divided society, an abundance of citizens exhibit such views.<sup>285</sup> In any given society, many of those whom Geras labels as mere “bystanders” bear responsibility closer to those of the perpetrators.

Geras is correct in his assertion that mere bystanders may be held morally responsible for their inaction. As May illustrates, there are at least three ways in which members of a dominant group who do not actively challenge subordinating messages share moral blame for the bias-motivated harms committed by other members of the dominant group.<sup>286</sup> First, the passive tolerators of such harms benefit from their complacency and toleration. For example, kind and compassionate men who would never dream of committing rape benefit because some women fear rape so much that they are more dependent on, and accepting of, their male companions.<sup>287</sup> Second, many passive onlookers admit that they would rape or wound if they could get away with it.<sup>288</sup> Some active and passive dominant group members thus share a kind of brotherhood of oppression.<sup>289</sup> Third, many of the passive are capable of diminishing the risk of harm by challenging hateful messages, yet fail to do so.<sup>290</sup> A society that does not condemn hate crimes and similar sorts of violent hateful messages in law and in action thus makes us collaborators in the rape and racist cultures. As Geras explained, “The road to Auschwitz was built by hate, but paved with indifference.”<sup>291</sup>

282. See MAY, SHARING RESPONSIBILITY, *supra* note 280, at 64-68.

283. See Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 763 & nn.136-41 (1999) [hereinafter Taslitz, *Racist Personality*].

284. See *id.* at 763 & n.141.

285. Cf. TASLITZ, RAPE AND CULTURE, *supra* note 100, at 37-38 (1999) (summarizing continuing willingness of many whites to express negative attitudes about blacks).

286. See MAY, SHARING RESPONSIBILITY, *supra* note 280, at 46-49 (discussing bystander guilt); *Id.* at 152-58 (discussing community guilt).

287. See MAY, MASCULINITY & MORALITY, *supra* note 279, at 92-94.

288. See Taslitz, *Racist Personality*, *supra* note 283, at 761-62; see also MAY, MASCULINITY & MORALITY, *supra* note 279, at 79-94 (explaining the psychology behind four types of rapists).

289. See MAY, MASCULINITY & MORALITY, *supra* note 41, at 92-93 (explaining male bonding as a tool to ostracize and degrade women).

290. See *id.* at 92-93 (stating that males are collectively responsible for rape); MAY, SHARING RESPONSIBILITY, *supra* note 272, at 49-50 (discussing complacency and guilt); *Id.* at 83-95 (discussing responsibility for group omissions); *Id.* at 153-60 (discussing complacency and guilt).

291. GERAS, *supra* note 256, at 18 (quoting IAN KERSHAW, POPULAR OPINION AND POLITICAL DISSENT IN THE THIRD REICH 277, 364 (1983)). Geras and especially May seem to suggest that “pure” hate speech, consisting merely of words unaccompanied by violent conduct, imposes moral responsibilities on the speaker for the resulting increased risk of harm. See Taslitz, *Racist Personality*, *supra* note 283, at 762-65 (making this point as to May).

As other writers have recognized, this idea of a contract of mutual indifference need not be limited to events as grave as the Holocaust. Rather, it can include indifference to the fate of groups and their individual members that cause great harm because of their group membership.<sup>292</sup> I make no claim that American society in fact embraces a singular contract of mutual indifference. But there is a case to be made that we embrace a contract of racial indifference to the plight of poor racial minorities,<sup>293</sup> especially when it comes to crime. Criminologist Michael Tonry has thus persuasively argued that it was foreseeable, and it probably was actually foreseen, by legislators that declaring the federal War on Drugs would result in mass incarceration of lower-class Blacks.<sup>294</sup> Tonry makes no claim that Congress collectively, or most legislators individually, wanted to inflict such harm. They just did not care.<sup>295</sup> Law professor Michelle Alexander similarly carefully traces the ways that the modern criminal justice system operates to maintain white social dominance via what she calls the “New Jim Crow.”<sup>296</sup> The larger point is simply that the idea of a contract of mutual indifference demonstrates how a people can by its actions reveal a culpable, extremely reckless indifference to the fate of poor racial minorities, and of the individual group members who suffer from that indifference. That indifference is demonstrable based upon actions and societal organization. It is reason to hold the entire group we call “the People” (or the state and local peoples) and its contributing individual members morally culpable.

*b. The Purported Problems Posed by the Individual Subconscious and the Duty to Aid*

Yet even this acknowledgement would not solve the whole problem for the criminal law. First, it attributes a mental state to an entire group that may in fact have its roots in the subconscious understandings of the individual members.<sup>297</sup> The criminal law is radically skeptical of using purported subconscious thoughts as a basis for criminal liability.<sup>298</sup> That skepticism is rooted in concerns about problems of proof and interpretation.<sup>299</sup> I have elsewhere explained, however, that there are ways to de-

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292. See MILLS, *supra* note 264.

293. See *id.*

294. See MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1996) [hereinafter TONRY, *MALIGN NEGLECT*]; MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011).

295. See TONRY, *MALIGN NEGLECT*, *supra* note 294, at 179-81.

296. See generally ALEXANDER, *supra* note 131.

297. Cf. Taslitz, *Racial Blindsight*, *supra* note 74 (discussing subconscious roots of much racial bias).

298. See Taslitz, *Forgetting Freud*, *supra* note 14, at 163-64.

299. See *id.* at 166-69.

sign legal tests that avoid inquiry into a specific person's subconscious psychological state even where that state has moral relevance, particularly by imposing certain sorts of negligence or recklessness liability.<sup>300</sup> For example, in determining whether a rape occurred, expecting a man in a sexual relationship to behave *as if* he were morally sensitive to a woman's protestations is an inquiry that avoids case-specific proof problems; yet, that inquiry is nevertheless rooted in concerns about subconscious motivated sexual insensitivity—a form of self-deception, hypocrisy, or related ways to justify achieving desired results without consciously admitting the cruelty with which your actions are done.<sup>301</sup> Perhaps more importantly, however, any concern about the subconscious here fails truly to treat the People as an entity independent from its individual members.<sup>302</sup> The People can have a state of culpable indifference toward others' suffering even if the individuals comprising the People act from subconscious motivations that the law (perhaps unwisely) refuses to recognize.<sup>303</sup>

Second, American law generally does not recognize a duty to aid others.<sup>304</sup> Yet that law makes exceptions for special relationships, such as parent to child, or for contractual relationships.<sup>305</sup> Of particular relevance is this exception: where someone who otherwise has no duty to aid creates a risk of harm to another (or contributes to doing so), the risk-creator has a duty to prevent or reduce the likely resulting harm.<sup>306</sup> It is not a great leap in logic to conclude that where the People contribute to the risks of harm, including criminal harm, stemming from contributing to the creation of neighborhoods and family conditions constituting a rotten social background, the People have some obligation of care toward its members to reduce the resulting harm, including the harm done to the criminal offender. Similarly, just as contract may impose a duty to act on individuals, so should the social contract that we *purport* to follow—which is surely not one of mutual indifference—recognize some minimal degree of obligation for the People to aid its members, showing at least some modest level of care and concern. But recognizing care and concern at such a level of abstraction, divorced from the specific word-as-bond between two contractors or the concrete expected love of parent to child, may be too much of a stretch from existing conceptions of the duty to aid for judges and legislators to make the conceptual leap.

The rotten social background defense thus asks us to recognize some level of care for our fellow Americans as displayed by our actions. It

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300. See Taslitz, *Willfully Blinded*, *supra* note 138, at 441-43.

301. See *id.* at 427-34.

302. See *supra* text accompanying notes 160-62.

303. See *supra* text accompanying notes 155-59.

304. See PODGOR ET AL., *supra* note 13, at 87-92.

305. See *id.* at 87-90.

306. See *id.* at 91-92.

requires us to treat even poor criminals as equal members of the body politic. It requires us, as Americans, to take responsibility for the fate of the less fortunate among us. It demands that we accept complicity as individuals in the cruelty of an independent entity, the People, of which we are a constituent part, even if we each believe as individuals that we have done no affirmative wrong. It asks us to acknowledge the hypocrisy of the contract of mutual indifference and to reject it thoroughly. But to do these things might require some minimal level of sacrifice, to admit endemic racism and classism in our society, to seek openly to reform our political and economic system to be more inclusive, all difficult psychological feats. Moreover, recognizing the rotten social background defense would logically require confronting us with evidence of these public wrongs at a criminal trial, thus shattering the shields of self-deception.

The rotten social background defense is thus not like other abuse excuses.<sup>307</sup> Using the battered womens' syndrome, for example, to reduce a woman's murder of her husband while he slept from murder to manslaughter does demand understanding how abused women react generally, how society may fail to come to her aid in this one way, and how this individual woman suffered.<sup>308</sup> But the focus is on *her* mental state and its causes, thus reducing her responsibility because she acted, perhaps, under "extreme emotional disturbance."<sup>309</sup> The rotten social background defense is different. It ultimately lays substantial responsibility squarely *at society's feet*, even while acknowledging that the defendant had the necessary mental state for the crime. It puts *us* on trial along with *them*. To permit that to occur is to violate basic precepts of *mens rea*, entity liability, moral culpability, and duty toward others that violate our whole sense of what defines American criminal law. Consequently, it must not be recognized as "law" at all, for it would subvert American criminal law as it now stands rather than continue its rule. Reformers wishing to convince courts to embrace an idea that they view as subversive have a tough row to hoe.

Yet, it should finally be noted, the rotten social background defense is in one way profoundly conservative. If the People have done wrong, the question of remedy arises. But the defense seeks no punishment of the People. Entities can be punished. Corporations can, for example, be fined, imprisoned (by restricting their freedom of action or the government monitoring or even entirely commandeering business activities), placed on probation or parole, or even executed (ending the corporation's

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307. See generally ALAN DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS TO RESPONSIBILITY* (1995) (listing and critiquing various abuse excuses and the very concept itself).

308. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 112-16 (2000).

309. Michael Dowd, *Dispelling the Myth About the "Battered Woman's Defense": Towards a New Understanding*, 19 *FORDHAM URB. L.J.* 567, 576-77 (1992).

independent legal life).<sup>310</sup> But the rotten social background defense seeks no fine to be paid by taxpayers, no takeover of educational systems to ensure that they do their job right, no direct form of social change whatsoever. All the defense seeks is recognition of society's wrongdoing, of its *partial* culpability. The offender generally still suffers conviction, still faces a sentence, though the offense of conviction will be less serious, the sentence less harsh. If the offender is dangerous and leaves prison walls earlier than would otherwise be the case, perhaps society pays the price of imposing on itself the increased risk that another of its members will be preyed upon. But sentences for even offenses of moderate severity are already extraordinarily harsh in the United States relative to the rest of the Western world,<sup>311</sup> and any further individual wrongdoing, should it in fact occur, will subject the offender to further punishment. Moreover, if the price is seen as including more-rehabilitative alternatives to a lengthier sentence—perhaps seriously monitored and stiff parole combined with realistic job training, a combination that should sharply decrease recidivism in the aggregate<sup>312</sup>—the risk of harm from new crimes occurring because of somewhat earlier release of an offender from prison becomes small. That alternative may indeed in the long run reduce crime and save money, thus benefitting both accused and the People alike. The price being paid is thus a practical one—something that can be accomplished despite the People's nature as an entity—and exacts a relatively modest price in material terms, perhaps no long-run price at all. Sacrificing hypocrisy may, however, be a price too enormous for America to pay.

### C. Compassion, Exile, and the People's Voice

Compassion or sympathy is the desire to reduce another's suffering—a desire sufficiently strong that it motivates action to achieve that outcome.<sup>313</sup> There are at least two steps involved in the compassion-conferral process: empathy (standing in another person's shoes to think what they think, feel what they feel) and norm-application to decide whether, given

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310. See Justin A. Thornton & Harry J. Stathopoulos, *Corporate Punishment: The New Federal Sentencing Guidelines for Organizations*, 4 S.C. LAW. 29, 30 (1992); Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1, 3 (1988); Daniel M. Wall, *DOJ Disavows "Prison Sentence" for Corporate Defendant*, 3 ANTITRUST 40 (1988); Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 327 (2001).

311. See Richard S. Frase, *Historical and Comparative Perspectives on the Exceptional Severity of Sentencing in the United States*, 36 GEO. WASH. INT'L L. REV. 227 (2004).

312. MARK A. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* (2009).

313. See PAUL EKMAN & THE DALAI LAMA, *EMOTIONAL AWARENESS: OVERCOMING THE OBSTACLES TO PSYCHOLOGICAL BALANCE: A CONVERSATION BETWEEN THE DALAI LAMA AND PAUL EKMAN*, PH.D. 7 (2008).

what the other thought and felt, he deserves reduction of his suffering.<sup>314</sup> Compassion comes in degrees, and it is arguably the basis for all excuses recognized by the criminal law.<sup>315</sup>

There are, however, numerous obstacles to achieving empathy. It takes cognitive energy to understand another's world.<sup>316</sup> Consequently, humans readily turn to cognitive shortcuts like stereotypes or the projection of our own feelings onto others.<sup>317</sup> Overcoming these lazy, automatic cognitive processes requires motivation to empathize.<sup>318</sup> Moreover, perceived status variations affect empathic abilities.<sup>319</sup> Lower-status persons are better able to empathize with higher-status persons than vice-versa.<sup>320</sup> Perceived similarity between subject and observer promotes empathy, perceived difference undermines it.<sup>321</sup> Empathy requires imagination, and we more easily imagine the circumstances of those of similar race, class, nationality, ethnicity, and social status.<sup>322</sup> Shared experience reduces cognitive load, making true empathy easier, different experiences making it harder.<sup>323</sup>

Accused criminals in run-of-the-mill cases have different life experiences and are often from different classes, races, and ethnicities from the majority of Americans.<sup>324</sup> These criminals are of relatively low social

314. Taslitz, *Tinkerbelle*, *supra* note 156, at 420.

315. *See id.* at 421.

316. *See* CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE 39-41 (1997).

317. *Id.* at 39.

318. *See id.*

319. *See id.*

320. *See id.* at 40; *see also* DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 97 (1995).

321. *See* CLARK, *supra* note 308, at 40; *see generally* DAVID HUME, A TREATISE OF HUMAN NATURE (John P. Wright et al., eds. 1948) (1739). *Accord* TASLITZ, RAPE AND CULTURE, *supra* note 100, at 73-75 (1999) (analyzing social science demonstrating that status differences between fact finders and alleged victims in rape cases can skew the accuracy of jurors' credibility and mental state judgments); Taslitz, *Racial Blindsight*, *supra* note 74 (exploring myriad ways that racial differences subconsciously interfere with various criminal justice system actors' ability to make accurate judgments about a purported offender's thoughts, emotions, and character).

322. *See* CLARK, *supra* note 316, at 40. Rousseau argued that we all share critical similarities, denial of them being a form of self-deception:

Human beings are by nature neither kings nor nobles nor courtiers nor rich. All are born naked and poor, all are subject to the misfortunes of life, to difficulties, ills, needs, pains of all sorts. Finally, all are condemned to death. That is what the human being really is, that from which no mortal is exempt . . . Each may be tomorrow what the one whom he helps is today.

JEAN-JACQUES ROUSSEAU, EMILE (Allan Bloom trans. 1979). Philosopher Martha Nussbaum argues that "[t]he tendency of the human imagination to respond vividly to the spectacle of pain is a device that leads in the direction of overcoming these lies." MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 343 (2001) [hereinafter, NUSSBAUM, UPHEAVALS].

323. *See* CLARK, *supra* note 316, at 40-41 ("[W]hen we have not experienced a similar problem, we may read a situation cognitively but fail to view it as a problem.").

324. *See, e.g.*, PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 1-10 (2009); ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 1-6, 186-93 (2007).

status.<sup>325</sup> Most are racial minorities from urban areas.<sup>326</sup> Race raises the likelihood that stereotypes, rather than active imagination, will control.<sup>327</sup> Geographic and social distance also blocks imaginative empathy.<sup>328</sup> Experimental data suggests that stereotypes can be combated, but that must be done aggressively, on an individualized case-by-case basis, in a face-to-face fashion.<sup>329</sup> Possible remedies include priming observers with frequent mention of egalitarian values, creating cognitive dissonance, presenting exemplars contrary to the stereotype, offering information about base rates to demonstrate that the group's behavior is not so different from the majority's, making race salient, and educating the observers about the psychological processes that often result in stereotypical thinking.<sup>330</sup> In short, diverse jurors, well-educated by expert testimony, wide-ranging evidence, and knowledge of the suspect's life circumstances, and who have face-to-face contact with him, are more likely than would be true under other circumstances accurately imaginatively to empathize with him.<sup>331</sup> Those empathy-enhancing circumstances are precisely the ones that the rotten social background defense seeks to promote.

325. Taslitz, *Judging Jena*, *supra* note 76, at 416-21.

326. See Vernetta Young, *Demythologizing the "Criminalblackman": The Carnival Mirror*, in *THE MANY COLORS OF CRIME: INEQUALITIES OF RACE, ETHNICITY, AND CRIME IN AMERICA* 54, 65 (Ruth D. Peterson et al., eds. 2006). Although different races and classes of people commit different kinds of crimes at varying rates, people of all races and classes commit crimes. *Id.* For example, "Whites accounted for 70.6 percent of all arrests[, and] 60.5 percent of all arrests for violent index offenses" reported in the 2003 Uniform Crime Reports. *Id.* at 55. Simultaneously, African-Americans comprised over fifty percent of new prison admissions overall and sixty-three percent of those sent to state prison specifically for drug offenses. See Doris Marie Provine, *Creating Racial Disadvantage: The Case of Crack Cocaine*, in *THE MANY COLORS OF CRIME: INEQUALITIES OF RACE, ETHNICITY, AND CRIME IN AMERICA*. In urban areas, such as New York City, "white/other" rates of imprisonment can be as low as 8.2 percent, with Black and Hispanic males making up the remaining prisoners. See Alex R. Piquero et al., *Neighborhood, Race, and the Economic Consequences of Incarceration in New York City, 1985-1996*, in *THE MANY COLORS OF CRIME: INEQUALITIES OF RACE, ETHNICITY, AND CRIME IN AMERICA* 266. Poverty-stricken areas populated by racial and ethnic minorities have even higher imprisonment rates. See *id.* In the hundreds of cases I tried as a prosecutor in Philadelphia, I can recall only a handful of cases in which the suspects were not Black or Hispanic.

327. See Taslitz, *Racial Blindsight*, *supra* note 74, at 1-15.

328. See Taslitz, *Fourth Amendment Federalism*, *supra* note 73, at 284, 293, 295; LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 62-66, 69-70 (2008) (providing the leading recent empirical study in this area).

329. See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 *UCLA L. REV.* 1241 (2002), *reprinted in* *CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW* 45, 55-63 (Gregory S. Parks et al., eds. 2008) (suggesting solutions, all of which must be applied face-to-face with jurors in each individual case, ideally in combination).

330. See *id.* at 51-63 (discussing most of these remedies); TASLITZ, *RAPE AND CULTURE*, *supra* note 100, at 7, 131-33 (analyzing the precise types of jury instructions, expert, and other evidence that can help to counter stereotypes); Taslitz, *Forgetting Freud*, *supra* note 14, at 176-78 (summarizing ways to access or alter our sub-or semi-conscious beliefs).

331. See also Taslitz, *Tinkerbelle*, *supra* note 156, at 468-75 (offering more detailed support for this conclusion).

But empathy does not ensure compassion. Social norms do.<sup>332</sup> Social scientists have identified certain norms that dominate American willingness to confer compassion. Compassion requires a certain threshold judgment that a sufficient degree of the offender's wrongdoing stemmed from ill luck rather than personal responsibility.<sup>333</sup> Beyond this threshold, a variety of factors determine the degree of compassion.<sup>334</sup> These factors include special deprivation (the offender's circumstances have brought him a greater degree of deprivation than most would suffer), an imbalance of fortunes (this includes limited wealth and other burdens largely an accident of birth), and vulnerability (being more vulnerable than most Americans to certain types of suffering).<sup>335</sup> The rotten social background defense arguably seeks to appeal to these justifying principles of compassion-conferral. But lawyers can also act as sympathy-entrepreneurs, trying to extend the reach of, or modify the content of, compassion norms.<sup>336</sup> Such entrepreneurialism requires a wide evidentiary base to convince judges of the modified norm's wisdom.<sup>337</sup> The rotten social background defense gives these lawyer-entrepreneurs the tools to argue for such change. Of course, that too means moving far afield from just case specifics to social generalities about neighborhoods, schools, poverty, status, and class position, then swinging back to relate it all to the person standing before the jury.

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332. See MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 48-52 (2004) [hereinafter NUSSBAUM, HIDING].

333. See CLARK, *supra* note 316, at 100 (“[P]eople tend to perceive others' problems as falling closer to one end or the other of a luck-responsibility continuum.”).

334. See *id.* at 102-03 (noting little, if any, sympathy found by experimental subjects for a grocery store employee caught drinking on the job in a series of vignettes); *Id.* at 130 (noting that people sympathize “only to a point”).

335. See *id.* at 113-14.

336. See CLARK, *supra* note 316, at 42, 84 (using the terms “sympathy brokers” and “sympathy entrepreneurs”). Clark defines sympathy brokers as intermediaries conveying on others' behalf the argument that those others deserve sympathy. See *id.* at 42. Clark notes that such brokers are often necessary because our culture discourages individuals from making obvious bids for attention, understanding, and sympathy for themselves. See *id.* Brokers thus seem to argue for the salience, relevance, and supposedly correct application of sympathy norms to individual cases. Examples include friends, news writers, charitable organizations, and lawyers. See *id.* at 84. But these same persons and entities, Clark recognizes, can also act as sympathy entrepreneurs, who “reinforce and clarify various long-standing grounds for sympathy.” *Id.* at 84-85. Lawyers, particularly criminal defense lawyers, can be especially effective sympathy brokers or entrepreneurs. See *id.* at 93-96 (describing battered women's advocates, along with animal rights and other activists, as classic examples of sympathy entrepreneurs), 131-33; see generally Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039, 1039-40 (1998) [hereinafter Taslitz, *Abuse Excuses*].

337. ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 81-82, 123-44, 158-68, 174-77 (2002) (describing tactical strengths and weaknesses of lawyers using various sorts of expert testimony on the experiences of battered women); Brown, *Plain Meaning*, *supra* note 91, at 1215 (describing how jurors interpret vague statutory terms, enlivening their meaning with common-sense understandings expressed during deliberations); Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 57-68 (1998) (explaining how and why battered women's advocates prefer to present a fuller picture of the woman's life and how opponents seek to blur that picture).

The expression of compassion is also a way of reintegrating an offender into the social community.<sup>338</sup> Compassion will thus not be granted to those viewed as outside the circle of concern. Philosopher Martha Nussbaum sees as a prerequisite to the exercise of compassion a bond resulting from a sense of shared sympathizer-sympathizee vulnerability. She explains:

This creation of a community of vulnerability is among the great strengths of compassion, as a motive for helping; but it also explains why people who think that their possibilities are utterly above those of others may fail to have compassion for the plight of those others. Rousseau said that the kings and nobles of France lack compassion for the lower classes because they “count on never being human beings,” subject to the vicissitudes of life.<sup>339</sup>

Compassion thus serves as a safeguard against the excesses of retribution. One of the risks of retributive justice is that the offender will receive *disproportionate* punishment—more pain than he deserves.<sup>340</sup> This outcome is likely where, as so often happens, stereotyping and assumptions lead us to see an individual as outside the community of concern, not one of the People at all. The real goal of punishment for such persons is exile to prevent them from contaminating the body politic.<sup>341</sup> The effort to appeal to compassion can fairly be evaluated only by decision makers given the sort of intimate, detailed knowledge of another’s life that can enable them to be seen as at least one of “us” rather than as a monster or outsider. Being one of us does not guarantee compassion, but it does encourage a fair assessment of whether it should be granted.

Yet, here again the rule of law presents an obstacle. Such individualized judgments of moral culpability are made by juries, unless a defendant

338. In one social scientist’s words, sympathy for a rule-breaker builds a “mental bridge” between him and us, “call[ing] forth the rule breaker’s feelings of connection, guilt, deference, relief, gratitude, and obligation” and thereby “[t]ying] him or her to the very society whose rules were violated.” CLARK, *supra* note 316, at 199.

339. See NUSSBAUM, HIDING, *supra* note 332, at 50.

340. See Taslitz, *Civil Society*, *supra* note 11, at 335-38.

341. I have addressed this point previously:

Where status/power concerns are primary, for instance, retributive responses will dominate. Yet, such responses can elicit resistance by the offender—a stiffened spine against community values. Thus, retribution leaves open the question of why one community member still rejects the community’s values, a source of social discomfort. This discomfort can be resolved by the literal and symbolic exclusion of the offender from the community. As Wenzel puts it, “[i]f offenders are no longer regarded as members of the community (symbolically, by withholding from them rights members typically have, or physically, by locking them away), their dissent no longer causes uncertainty or threat to the value consensus . . . although the consensus has then a reduced range.”

Taslitz, *Fourth Amendment Federalism*, *supra* note 73, at 295.

chooses otherwise.<sup>342</sup> But the law is distrustful of ordinary people having unlimited power to exercise compassion.<sup>343</sup> The pattern of excuses thus tends to be limited to certain categories, such as duress, insanity, involuntary intoxication, and subjective entrapment.<sup>344</sup> The rules are phrased in a way that creates the appearance of a fairly specific rule requiring the jury to find a few discrete facts.<sup>345</sup> Facts, rather than values, purportedly dictate outcomes.<sup>346</sup> The goal is at least to create the appearance of cabining jury discretion, promoting equal outcomes for similarly-situated persons, and following true “rules” rather than rough guidelines or “mere” value judgments.<sup>347</sup> Slightly more wide-ranging but still seemingly rule-bound judgments are limited to partial excuses or certain narrow categories of crime, such as homicide, but the appearance of “rule”-like judgment still dominates.<sup>348</sup> Without such limitations, juries would be free openly to create their own law, to evolve new norms and give them the force of law, to craft truly individualized justice.<sup>349</sup> Whatever benefits these results might bring, they give the People’s representatives in the courtroom—the jury—too much power relative to judges and legislatures, or at least too much for the “rule of law” to allow.<sup>350</sup>

Once again, the rotten social background defense’s sheer breadth thus violates fundamental American rule of law assumptions. More so than any other excuse, rotten social background overtly and candidly frees jurors *to make law*, sometimes law specific to the single case before them; to enhance juror power relative to less directly democratic governmental institutions; and to render judgment overtly political (because it involves a judgment about the justice of society’s governing institutions). That is not the rule of law as currently understood in America. It is, to the contrary, once again subversion.

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342. See U.S. CONST., amend. VI (guaranteeing the right to a jury trial in criminal cases); see generally Taslitz, *Myself Alone*, *supra* note 40 (explaining how jury trials, particularly including wide-ranging evidence about an accused’s life circumstances and character, promote individualized justice).

343. See Taslitz, *Tinkerbelle*, *supra* note 156, at 467 (making similar and related arguments concerning judicial distrust of giving jurors the discretion to exercise compassion that the rotten social background defense allows).

344. See PODGOR ET AL., *supra* note 13, at 640-643, 673-84, 697-703, 650-61.

345. See *id.* at 640-643, 673-84, 697-703, 650-61 (listing relevant doctrinal rules and their elements or the ultimate facts that must be proven). I say “appearance” because even these relatively narrow fact-determinations partly involve value determinations, and deciding whether to grant compassion is still a discretionary choice, albeit a form of narrow, guided direction.

346. See Taslitz, *Tinkerbelle*, *supra* note 156, at 469.

347. See *id.* at 468-69.

348. See *id.* at 469.

349. See *id.* at 468, 470.

350. Cf. *id.* at 468-70 (making similar point, albeit not using rule of law language).

## IV. CONCLUSION

The rule of law necessarily includes unstated political assumptions. Those assumptions can vary with the particular area of law and its social function. The American rule of criminal law assumes no shared responsibility, especially between offender and society; no entity liability, including for the People as an entity, because supposedly artificial entities cannot have *mens rea*; and no jury freedom to exercise seemingly unlimited case-by-case, individualized exercises of compassion with the state's blessing. The rotten social background defense challenges all these assumptions, purportedly rendering the law unpredictable and the institutions that guarantee its rule politically and morally unjustifiable. The defense thus cannot be recognized in American criminal law, so it is not.

But alternative political conceptions of the rule of criminal law are conceivable. A more expansive role for restorative justice, for example, would not consider the offender as preying on society but rather as a member whose bond with society has been injured, wounding them both.<sup>351</sup> In such a conception, the purpose of punishment is to heal both offender and community, to make them both one.<sup>352</sup> Retribution, other authors have shown, can be re-articulated as consistent with, but a part of, the more dominant restorative vision.<sup>353</sup> Under this vision, responsibility for crime is necessarily shared because both have the responsibility to repair any breach, and the failure to do so is necessarily a failure of community and individual alike.<sup>354</sup>

Similarly, recognizing entities as capable of *mens rea* and of the sort of insult to equal human worth that justifies imposing criminal liability gets us past the idea that the People can by definition never be to blame. We all collectively and individually have responsibility for the major failures of our social contract.

Nor need we necessarily fear the individualizing of justice by the People's voice, the jury, in the exercise of compassion. Such individualizing promotes legitimacy and fairness, keeps law consistent with the People's most fundamental values, and counteracts legal hypocrisy and status inequality.<sup>355</sup> It also allows for the jury to monitor the government and broader institutions of the state and to condemn them where they fall

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351. See generally REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (David B. Wexler, ed. 2008) (collecting essays defining more therapeutic forms of criminal law practice, including drawing on ideas of restorative justice); HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2002) (defining and explaining restorative justice).

352. See ZEHR, *supra* note 351.

353. See CHRISTOPHER BENNETT, THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT (2010) (articulating book-length defense of this point).

354. See *id.*

355. See Taslitz, *Myself Alone*, *supra* note 40; Taslitz, *Tinkerbelle*, *supra* note 156, at 471-75.

short.<sup>356</sup> Respect for the equal worth that underlay the very notion of human rights, candor, a monitorial eye against governmental abuses, and a recognition of our mutual bonded-ness to one another surely do not present the sort of ills against which the most general concept of the rule of law aims.

The rotten social background defense is thus not inconsistent with the idea of the rule of law or with conceivable variants of that idea. Rather, the defense is inconsistent only with our current governing conception of the criminal law's rule. The rotten social background defense calls us to a more inclusive, realistic, compassionate, and equal form of moral and legal rule. That is its strength, and that is its fatal flaw.<sup>357</sup>

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356. See Andrew E. Taslitz, *Catharsis, the Confrontation Clause, and Expert Testimony*, 22 *CAP. U. L. REV.* 103 (1993) (discussing the importance of the constitutional right to confront the witnesses against an accuser at trial as a way of enabling the jury and the public to monitor, deter, and correct governmental abuses).

357. I want to make a brief comment concerning Professor Morse's oral critique of my paper during the live presentation portion of this symposium (I do not have access to his article pre-publication). Professor Morse argues in part that my "defense" of the rotten social background defense does not square with standard ideas of when even partial excuses are acceptable. See <http://www.law.ua.edu/resources/podcasts/criminal-law>. Nor does he see my piece as articulating a theory of responsibility to justify an alternative responsibility-reducing approach supportive of the rotten social background defense. Notably, I do not fully accept standard articulations of what justifies excuses as either accurately describing the practices of American courts, legislatures, and juries or as normatively desirable. See generally *Tinkerbelle*, *supra* note 156 (offering an extended defense of the role of compassion in excuse-recognition, while addressing appropriate limits on the jury's exercise of compassion to avoid wide-ranging, unguided decision making). More importantly, however, my goal here has simply *not* been either to articulate a standard defense of rotten social background as an excuse or to offer a full-blown alternative theory of responsibility. My goal, rather, has been to use the rotten social background defense as a meditation on the nature of the rule of law, including the ideological components of that concept generally and of its particular manifestation in the area of American criminal law. My piece is, in short, more a meditation on the politics of law rather than an analysis of whether the rotten social background defense is a good theoretical idea based on some overarching philosophical theory of human responsibility. It is true that my piece necessarily touches on concepts of responsibility, but it does so to point out the ideological nature of some of those concepts. It is also true that I express much sympathy for an alternative political conception of the rule of criminal law and that I see the rotten social background defense as more consistent with that alternative political vision than would be true in a world without that defense. But Morse is simply mistaken to challenge my piece on the terms that he does because I do not set out to do what he seems to believe I have in fact done. Morse does attribute one political motive to my argument, however, namely that jury embrace of the rotten social background defense will spark widespread social change to fight the injustices currently present in the criminal justice system (Morse is flatly wrong when he accuses me of seeing the entire system as hopelessly unjust in all instances, though I do see systemic injustices of certain kinds). I am not so naïve as to believe that to be the case. I do believe, however, that the defense might promote more just outcomes in at least some cases—judged solely by a political standard—and that cumulatively many instances of greater justice can contribute in minor ways to social change. See *TASLITZ, RAPE AND CULTURE*, *supra* note 100, at 58-63, 77-80, 103-51 (defending this position in the context of rape trial reforms). I also believe that, even where outcomes are not changed, educating jurors and others can contribute in a minor way to social change. But society-wide change requires social movements, and I thus far see no widespread nascent social movement to foster greater equality in ways that would reduce crime or the injustice sometimes involved in combatting it. Additionally, I clearly see law as partly a political phenomenon, but I make no claim that it is solely that or that political decisions (meaning those that affect the distribution of social power) alone should

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determine law's content. My goals here are thus extraordinarily modest: to address solely the attack on the rotten social background defense as by definition inconsistent with the rule of law, to sensitize readers to the political ideology and effect of rule of law concepts, and to prompt further discussion of whether those concepts can be relevant to other concerns affecting the wisdom of the rotten social background defense.