

# ALABAMA CIVIL RIGHTS & CIVIL LIBERTIES LAW REVIEW

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## THE WRETCHED OF THE EARTH

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### I. INTRODUCTION: RASHON AND MATTHEW

*Imagine two young men born on opposite sides of town on the same day. One, Rashon, grows up in a run-down apartment in a housing project, the son of a black single mother who was sixteen years old at the time of his birth. The apartment in which he spent his childhood years was drafty, the plumbing leaked, and the smeared windows looked out on a common yard littered with trash, discarded bicycles, and other urban detritus. The peeling wallpaper exposed walls painted many years ago with faded lead-based paint which the infant had ingested. Rats scurried everywhere, especially after dark. On a given day, you might see furtive*

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*groups of young men, hoods pulled low over their faces and keeping a weather eye out for approaching police. Rashon was a low birthweight baby whose mother did not take vitamins or supplements when pregnant with him, but did take drugs when they were available.*

*During his early years, Rashon was in the care of a series of neighbors and relatives while his mother struggled to hold a series of dead-end jobs. At other times, she was home with him, which he liked. When he was six, Rashon started at the local elementary school, a short walk away through noisy, cluttered streets occupied by urban gangs, some engaged in dealing drugs. His teachers were young, inexperienced, and in almost all cases marking time while waiting for the opportunity to transfer to a better school. Every student in his class was black or Latino, with the exception of a single Vietnamese immigrant child. At the start of the year, none knew how to read, could count beyond three or four, or knew about the world of books and stories. Like most of his classmates, Rashon had spent most of his days watching TV or playing in the asphalt area surrounding his apartment building. The school lacked a library, a play field with grass or sports equipment, a science laboratory, or a fulltime nurse or counselor.*

*Matthew grew up on the other side of town. His neighborhood was one of gracious homes and neat lawns lining clean, well lighted streets. Nearly all of the families were white, like Matthew and his parents, or Asian, and worked in professional jobs, such as physician or lawyer, or in management positions in large corporations. A few owned their own businesses. Matthew grew up in a cheerful home with an intact family that included a stay-at-home mother, a father who commuted daily to a well-paid job, and one other sibling. Both parents were married to each other and were college graduates.*

*When he was five, Matthew started school at the local kindergarten, which, like Rashon's, was public and located a few short blocks away. Matthew's walk to school, however, took him along streets that were peaceful and quiet, with children walking to school, some accompanied by their parents, and others, slightly older, waiting for the school bus. A few maids and gardeners arrived, by foot or bus, to provide services to double-income earners who would soon be leaving for work.*

*Matthew's teachers were skilled and well educated. Most had graduate degrees, had been in teaching for many years, and were glad to teach where they did. Classes were small, and the school had almost no disciplinary problems. The students were orderly, cooperative, and, nearly all white or Asian. When he started first grade, Matthew, like many of his classmates, knew how to read. His house was full of books, and his parents monitored his hours of television.*

*At the age of 12, Rashon had his first brush with the law.*

## II. ROTTEN SOCIAL BACKGROUND AND THE LAW

Judge David Bazelon introduced the term “rotten social background,” for the first time in the legal literature, in *United States v. Alexander*<sup>1</sup> and a subsequent law review article entitled *The Morality of the Criminal Law*.<sup>2</sup> In *Alexander*, the prominent federal appellate judge pondered the punishment due a young African-American defendant who grew up in a single-parent, low-income household in Watts, California who had been convicted of shooting a white Marine who called him a “black bastard” in a restaurant.<sup>3</sup> The defense argued that the client should have been acquitted because his “rotten social background” compelled him to shoot.<sup>4</sup> Judge Bazelon explained in a dissenting opinion that though the defendant was not mentally ill, the jury should have been permitted to consider his social and economic background as a mitigating factor that might justify an acquittal or, at least, a lesser charge.<sup>5</sup>

In a later law review article, Bazelon returned to the “rotten social background” defense, noting that our legal system declines to take into account social conditions that predictably render poor ghetto children devoid of the training, opportunities, hope, role models, and internal controls necessary to resist temptations and conform their conduct to the requirements of the law.<sup>6</sup> He considered how little punishment of such offenders advanced traditional rationales of criminal punishment,<sup>7</sup> how instead it enabled society to brush problems of neglect and poverty under the rug,<sup>8</sup> and urged that society develop effective means to reduce the number of such cases coming before the courts.<sup>9</sup> The rotten social background dilemma was one of several recurring, but unsolved, moral problems affecting the criminal justice system that Bazelon addressed in his article.<sup>10</sup>

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1. *United States v. Alexander*, 471 F.2d 923, 926-65 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

2. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976) [hereinafter Bazelon, *Morality*].

3. 471 F. 2d at 957-58.

4. *Id.* at 957-59.

5. *Id.* at 958-61. A psychiatrist testified that the defendant's racist treatment had taught him that he could not trust white people. Judge Bazelon suggested that although his mental impairment was not severe enough to amount to insanity, it nevertheless may have reduced his responsibility for the murder. *Id.* at 957-59.

6. See Bazelon, *Morality*, *supra* note 2, at 389-90, 394, 401-02. See also David Bazelon, *The Crime Controversy: Avoiding Realities*, 35 VAND. L. REV. 487, 490 (1982) [hereinafter Bazelon, *Realities*].

7. Bazelon, *Morality*, *supra* note 2, at 386-90, 95. See also *United States v. Alexander*, 471 F. 2d at 960-61.

8. Bazelon, *Morality*, *supra* note 2, at 386-90, 394, 397-402. See also *United States v. Alexander*, 471 F. 2d at 926, 965.

9. Bazelon, *Morality*, *supra* note 2, at 386-89, 394, 397-402. See also *United States v. Alexander*, 471 F. 2d at 965.

10. Others were the role of moral concepts in the criminal law, Bazelon, *Morality*, *supra* note 2, at 386-88; means that the mighty might use to secure the cooperation of the rest of society, *id.* at 386;

A few years later, I wrote the first law review article specifically on the subject of the defense. In “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, published in the *Journal of Law & Inequality*,<sup>11</sup> I offered a number of reasons that, to my way of thinking, called for at least limited recognition of such a defense. Those reasons included social science evidence of the effects of severe environmental deprivation on human agency, especially in the case of youths raised their entire lives in such settings.<sup>12</sup> I pondered the form such a defense might take<sup>13</sup> and addressed a number of possible objections to it.<sup>14</sup>

Forty years have passed since publication of Judge David Bazelon’s dissent in *United States v. Alexander* and twenty-five since the appearance of my *Rotten Social Background* article. The country is groaning under the expense of mass incarceration,<sup>15</sup> while the gap between the rich and the poor now stands highest of any industrialized nation.<sup>16</sup> In a recent year, more black men were in the grip of the criminal justice system than were enrolled in college.<sup>17</sup> Recently, a retired Supreme Court justice decried this country’s excessive reliance on the death penalty, especially in light of its disproportionate application to black defendants who murder whites.<sup>18</sup> Despite these developments, the relationship between severe poverty—

the concept of reciprocal decency as a limitation on the criminal law, *id.* at 387; and victimless crime, *id.*

11. See Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQ. 9 (1985) [hereinafter Delgado, *Rotten*].

12. *Id.* at 23-37. See also *id.* at 68-75 (questioning whether punishing an RSB defendant serves the classic rationales of criminal punishment).

13. *Id.* at 37-90.

14. E.g., *id.* at 22-23, 40, 65-68.

15. See, e.g., Richard Delgado, *Rodrigo’s Portent: California and the Coming Neocolonial Order*, 87 WASH. U. L. REV. 1293, 1295-96, 1304-05 (2010) [hereinafter Delgado, *Portent*]; Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1025-26 (2010).

16. See Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879, 901-04 (2007) [hereinafter Delgado, *Myth*] (book review).

17. See MARC MAURER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990); *Testimony of Marc Mauer, Before the Subcomm. On Legislation and Nat. Security and the Subcomm. On Gov. Information, Justice and Agriculture of the House. Gov. Operation Comm.*, 101st Cong. (1990), available at <http://www.druglibrary.org/schaffer/LIBRARY/testimony.htm>, for the classic statement of this comparison. For more recent information on incarceration and its consequences, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6-7, 95-136 (2010); *Mass Incarceration in America*, AMER. PROSPECT (SPECIAL ISSUE), Jan. 2011, available at <http://www.nxtbook.com/nxtbooks/americanprospect/2011010102specialreport/#/0>.

18. See John Paul Stevens, *On the Death Sentence*, N.Y. Rev. of Books, Dec. 23, 2010, available at <http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/?pagination=false> (noting that the criminal justice system is shot through with racism, especially in connection with capital punishment, skewed in favor of conviction, and infected with hysteria); Richard Delgado, *Shooting the Messenger*, 30 AM. IND. L. REV. 477, 483 (2006) (book review). See also Bazelon, *Realities*, *supra* note 6, at 490 (noting that poverty and unemployment increase arrests).

especially of the childhood variety—and criminal responsibility, while intuitive and compelling, still has yet to be determined.

Among the issues that a rotten social background defense raises are:

\* Why is the defense entitled as it is, rather than, say, “defense of severe environmental deprivation” (my original subtitle)?

\* What is the relation between extreme poverty and crime?

\* Is rotten social background (RSB) a useful defense notion?

\* Is it a relevant factor in sentencing and sentence mitigation?

\* Is RSB capable of being accommodated under an existing defense, such as insanity or diminished capacity?

\* Is the United States in effect criminalizing poverty?

\* What is the relation between racial rage and criminal responsibility?

\* Does modern technology, including the Internet, make RSB more salient than before?<sup>19</sup>

The ensuing symposium issue addresses many of these issues. The article by Paul Robinson, for example, explores whether pervasive and intense mind-altering experiences similar to prison-camp interrogations might rise to the level at which courts could excuse resulting criminal conduct.<sup>20</sup> Another, by Andrew Taslitz, takes the position that a defense of severe environmental deprivation would draw on notions of restorative justice and shared responsibility for failures of the social contract, but is unlikely to win broad support any time soon.<sup>21</sup> Two others, by Angela Harris<sup>22</sup> and Stephen Morse<sup>23</sup> point out difficulties that lie in the way of locating rotten social background either in the current culture or landscape of criminal law defenses. And a piece by Erik Luna argues that calibrating punishment in light of a defendant’s impoverished or enriched background would advance some of the aims of the criminal law.<sup>24</sup>

In this essay, I decline the temptation to add to my previous analysis<sup>25</sup> or to respond to my critics, including those in this symposium. Instead, I take it as given that the country has not adopted a rotten social background defense and is unlikely to do so anytime soon.<sup>26</sup> I then ask what it means

19. These are the questions the editors of the law review posed to potential contributors to the symposium.

20. See Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and “Rotten Social Background,”* 2 ALA. C.R. & C.L. L. REV. 52 (2011).

21. See Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado’s Rotten Social Background,* 2 ALA. C.R. & C.L. L. REV. 79 (2011).

22. See Angela Harris, *Rotten Social Background and the Temper of the Times,* 2 ALA. C.R. & C.L. L. REV. 131 (2011).

23. See Stephen J. Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense,* 2 ALA. C.R. & C.L. L. REV. 147 (2011).

24. See Erik Luna, *Spoiled Rotten Social Background,* 2 ALA. C.R. & C.L. L. REV. 23 (2011).

25. At eighty-one pages, the article in *Law & Inequality* was one of my longest.

26. See, e.g., JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 725-28 (4th ed. 2007); Peter Arenella, *Demystifying the Abuse Excuse: Is There One?* 19 HARV. J.L. & PUB. POL’Y

that this is so.<sup>27</sup> What does it say about our legal system and set of values? About our attitudes toward personal safety, social cost, and offenders, particularly ones who are nonwhite, intellectually impaired, or otherwise disadvantaged from an early age? Might we develop a rotten social background defense some time in the future? Why or why not? What would need to change? And, in the meantime, what vision of America does the absence of such a defense summon up? What recourse does the poor community have for a legal system that will predictably convict and incarcerate many of its members for behavior that, given their upbringing, was entirely predictable?

### III. WHAT DOES FAILURE TO RECOGNIZE THE LEGAL RELEVANCE OF ROTTEN SOCIAL BACKGROUND SAY ABOUT OUR SOCIETY?

Since Judge Bazelon first proposed a rotten social background defense some decades ago,<sup>28</sup> little change has taken place. Despite a number of law review articles discussing such a defense,<sup>29</sup> and some brief mentions, usually neutral, in treatises and hornbooks,<sup>30</sup> no judicial decision has expressly endorsed it. Indeed, as is discussed later, some courts appear to be doing the precise opposite—namely, enhancing punishment when it comes to their attention that a defendant was raised in desperate circumstances.<sup>31</sup>

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703, 704 (1996); Delgado, *Rotten*, *supra* note 11, at 9 (noting that “No jurisdiction in the United States . . . recognizes a [general] defense based on socioeconomic deprivation *simpliciter*”). But note that “[o]ther societies have adopted similar forms of legal pluralism to provide a system of justice without destroying a divergent culture or race.” Delgado, *Rotten*, *supra* note 11, at 82-85 (discussing American Indian tribal courts, Colombian courts, and ones in certain African nations that have accommodated different varieties of RSB).

27. See Part I, immediately *supra*.

28. See *supra* notes 1, 2. See also Bazelon, *Realities*, *supra* note 6.

29. See, e.g., Anders Kaye, *Powerful Particulars: The Real Reason the Behavioral Sciences Threaten Criminal Responsibility*, 37 FL. ST. L. REV. 539, 543 n.6 (2010); Mythri Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327 (2002); Stephen P. Garvey, *Questions of Mercy*, 4 OHIO ST. J. CRIM. L. 321, 325-27 (2007); David Dolinko, *Some Naïve Thoughts about Justice and Mercy*, 4 OHIO ST. J. CRIM. L. 349, 354 (2007). As of a recent date, 107 law review articles had cited my article according to the Weslaw database. Judge Bazelon’s dissenting opinion in *Alexander* had been cited in fifty-seven law review articles for the purpose of considering the rotten social background defense. And the defense is discussed in various levels of detail in 156 law review articles including two in Canada. Examples of articles criticizing the defense include Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329 (1998); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985). A common criticism is that the defense would contravene our belief in free will. See Stephen Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976) [hereinafter Morse, *Twilight*]. Might it be, as well, that even thinking about the defense gives us a bad conscience, calling up, as it does, our history of chattel slavery, lynching, whipping, sheriffs with cattle prods, church burning, the Ku Klux Klan, and the War with Mexico?

30. See, e.g., DRESSLER, *supra* note 27, at 725-28; SANFORD H. KADISH, ET AL., CRIMINAL LAW AND ITS PROCESSES 926-28 (8th ed. 2007); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 7.2(b)(1) (2d ed. 2003).

31. See, e.g., Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247(2011) [hereinafter Delgado, *Reconsideration*] (discussing

Rather than lament or puzzle why this is so, I take the opposite course and ask what such an oversight says about us. If a society, such as ours, contains a large number of people who live under sufficiently poor conditions that they predictably turn to crime—yet, we continue to incarcerate them—what does this say about us? Much as scientists try to understand the nature and history of diseases as well as cure them, it behooves us to ascertain the meaning of our current policy, beginning with the label that has been fastened to it since its early days.

### A. *The Name of the Defense*

The name we call a thing says much about us and our attitude toward it.<sup>32</sup> It can also shape our response to it, whether favorable and sympathetic or harsh and derisive. When Judge Bazelon first referred to a possible defense of severe environmental deprivation as the “rotten social background” defense,—and the name stuck—what did this indicate about the mindset and assumptions he and his readers must have shared?

To name the defense in the manner Judge Bazelon did and to refer to it exclusively or mainly by that title, whether one is sympathetic to it or not, is a distancing move. The term has a slightly derisive or ironic ring. We can almost see the sneer, the curled lips that the writer expects from at least some of his readers, even if he does not share that attitude himself. The writer is defensive about having raised the possibility of such a defense. He thinks, with at least part of his mind, that the idea is ludicrous—or at least will be received that way.

The writer nevertheless goes ahead and lays out the reasons that argue for such a defense. But the name gives away the writer’s inner reservation. The writer who names the defense that way, in effect, says that his class, the class of good, law-abiding people, the ones who rarely need excuses because they always resist temptation—indeed, find it easy to do so because life is good to them—have little use for such a defense. He raises it out of duty or obligation, or perhaps because it is an interesting intellectual problem. It is a defense that will belong to *those* people—someone else—and members of their (much lower) class. Unfortunates, perhaps worthy of our sympathy, but nevertheless the kind of people about whom we shake our heads sadly. Let them eat cake. Let them—perhaps—have a defense of rotten social background. It is only when we

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such cases). See also SENTENCING PROJECT, *supra* note 17 (discussing disproportionate punishment meted out to minorities convicted of crime); text and note 100 *infra* (discussing similar point). But see *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000), discussed in note 37 *infra* (holding that courts must permit defense counsel in death penalty cases to introduce evidence of social background in mitigation of sentence).

32. See Jeremy Waldron, 2009 *Oliver Wendell Holmes Lectures, Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1600 (2010).

realize, with a start, that we are implicated in Rashon's rotten social background, that as a newborn child he was in no way responsible for it, that we stop shaking our heads and look a little more closely at the defense and the case for it, as indeed we should.<sup>33</sup>

### *B. Practical Consequences*

For the lack of a RSB defense for defendants raised in abject poverty says much about us.

It speaks volumes about us normatively, which I take up later. But it also says something about the things we value, practically speaking, in everyday life.

For one thing, it means that on some level we are willing to tolerate more crime. Most people would agree that if we were to devote sufficient resources to redressing rotten social background *itself*, the rate of crime would drop. Some poor people will commit crimes, especially property offenses like theft, out of simple desperation. Others will do so because they have never enjoyed a realistic opportunity to develop as normal people, with normal controls, a normal aversion to disturbing or hurting those around them, and a normal identification with loving parents, companions, role models, and other members of society in general.<sup>34</sup>

What, then, about lack of an RSB defense? Does that, too, contribute to more crime? Here, causation is only slightly less direct, but still evident upon a moment's reflection. Imprisonment of a family member, especially the breadwinner, wrecks families.<sup>35</sup> It deprives them of a figure, often an adult who could have contributed earnings toward the household income, so that the money the family commands to pay for rent, groceries, electricity, heat, education, and medical care drops precipitously.<sup>36</sup> Both rotten social background and its punishment<sup>37</sup> thus deepen the financial predicament of a poor family. Moreover, the two forms of neglect enhance each other. Rotten social background itself is criminogenic.<sup>38</sup> And

33. See Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1942-44 (1990) [hereinafter Delgado, *Zero-Based*] (making this point).

34. See *id.*; Bazelon, *Realities*, *supra* note 6, at 490 (noting how certain socioeconomic conditions breed crime).

35. See, e.g., JUAN F. PEREA, ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 1129 (2d ed. 2007); ALEXANDER, *supra* note 17, at 174-75.

36. See *supra* note 35.

37. More accurately, the refusal to recognize a criminal defense that takes a defendant's background into account in mitigation of punishment or sentence. See *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (ruling that effective assistance of counsel required presentation of mitigating evidence of a defendant's troubled childhood during sentencing phase of a murder trial); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality opinion) (approving of general rule requiring individualized consideration of each defendant's history and circumstances).

38. See Delgado, *Rotten*, *supra* note 11; Bazelon, *Realities*, *supra* note 6, at 490; Bazelon, *Moral-*

its punishment—because we afford no defense of it—increases poverty and, eventually, crime.<sup>39</sup>

It is important not to overstate here. Punishment of all crimes, even ones stemming from desperate circumstances, deters crime to some extent.<sup>40</sup> But this deterrent effect probably reaches a maximum with relatively moderate punishments or even probation.<sup>41</sup> Very long punishments merely devastate families financially and emotionally, with little corresponding gain. They also place the offender in a setting inhabited by hardened criminals, thus supplying a protracted exposure to antisocial attitudes, behaviors, and techniques.<sup>42</sup> Judiciously applied defenses, even new ones, can mitigate some of these troubling consequences.

### C. Loss of Role Models

If the person who goes to jail is a father figure, it deprives children—especially boys, who will most need it—of a male role model.<sup>43</sup> Even after the inmate leaves prison—as ninety-five percent will<sup>44</sup>—the conviction will render the ex-prisoner for all practical purposes unemployable.<sup>45</sup> If the only options remaining are hustling, drug dealing, or crimes like identity theft, burglary, or pimping, this, of course, simply adds to the amount of crime in society.

It also teaches youth who grow up in depressed communities that prison is their very likely fate.<sup>46</sup> Most poor black families either have a member or close friend who has gone to jail or is now incarcerated.<sup>47</sup> If imprisonment becomes an accepted status, even a badge of honor and a rite of

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ity, *supra* note 2, at 389-90, 394, 397-402; Nicholas D. Kristof, *The Big (Military) Taboo*, N.Y. TIMES, Dec. 25, 2010, at WK16, available at <http://www.nytimes.com/2010/12/26/opinion/26kristof.html> (noting that early childhood programs have proven effective in reducing subsequent crime).

39. That is, punishment guarantees more desperate poverty for the family that loses a wage earner. See text and notes 34-35, 37 *supra*; SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN (2009), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf).

40. Deterrence is one of the classic rationales of the criminal justice system. See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 39 (1968).

41. In other words, sentencing a young offender convicted of auto theft to a prison term of seven years is likely to produce no more deterrence than one of four years or even probation. See Bazelon, *Realities*, *supra* note 6, at 496-47; VALERIE WRIGHT, *DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VERSUS SEVERE PUNISHMENT* (2010), available at <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

42. See, e.g., any episode of LOCKUP, MSNBC's prison documentary series, describing the chaos, noise, threat, sexual aggression, and violence of a typical prison or penitentiary, available at <http://www.msnbc.msn.com/id/27118605/>

43. See text and notes 34-35 *supra*.

44. See PAUL BUTLER, *LET'S GET FREE: A HIP-HOP MODEL OF JUSTICE* 30 (2009).

45. *Id.* at 30-31.

46. *Id.* at 23-40.

47. *Id.*

passage, then applying oneself to middle-class pursuits such as studying or preparing for a profession will exert little appeal.<sup>48</sup> What is the point of knocking oneself out to get good grades, make the debate team, or win election to a student office if one's next stop is apt to be a jail or prison?

The threat of punishment of course will deter crime to some extent.<sup>49</sup> Most of us are rational actors who do not wish to incur social disapproval, much less go to jail. But some of us internalize this attitude more than others. Early exposure to a father figure who stays out of trouble and brings home a regular paycheck is, for many young people, a prime way of acquiring that attitude.<sup>50</sup> Long prison sentences, by depriving the young of role models like these, interfere with a youth's identification with legality and render him vulnerable to the attractions of a career in crime.<sup>51</sup>

#### *D. Institutional and Social Costs*

Failure to take account of rotten social background in the law of criminal defenses also exacts broad social costs. As discussed in the next section, it changes the general tenor of society (and not for the better). But it also has some more immediate consequences.

##### *1. Sweeping Under the Rug*

A carefully drafted RSB defense would focus attention on the causes of crime. As things stand now, society punishes those who grow up destitute and without adequate role models or internal controls, without any consideration of how they became that way. If we provided an opportunity, from time to time, to consider how defendants like the ones in Alexander came to be walking time bombs, we might be able to defuse the next one before it exploded.<sup>52</sup>

The prime components of rotten social background are easy to name: substandard education, poor housing, poor childhood nutrition, and inadequate access to health care.<sup>53</sup> Desultory and inattentive parenting plays a

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48. *Id.* (noting that mass incarceration breeds a sense of fatalism and acceptance of that fate).

49. Most readers of this essay, for example, would view the prospect of a term in jail with horror. Many ghetto residents might not. *See, e.g., Bring the Pain* (HBO television broadcast June 1, 1996) (Comedian Chris Rock remarked, "If you're black, you get more respect coming out of jail than coming out of school.").

50. *See, e.g.,* PEREA, *supra* note 35, at 1129.

51. *Id.*

52. *See, e.g.,* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (urging that legal decisionmaking structures promote examination of contested issues that are in a state of moral flux and that this benefits society in general). *See also* text and notes 7-8 *supra* (raising a similar point); *United States v. Alexander*, 471 F.2d at 926 (Bazelon, C.J. plurality opinion) (stating that courts need to probe and cope with societal problems such as poverty and racism).

53. *See, e.g.,* Waldron, *supra* note 32, at 1599, 1617 *passim* (describing elements of what every citizen is entitled to in a well-ordered society). *See also* Delgado, *Zero-Based*, *supra* note 32, at 1942-

role, as well, but attention to the above-named needs would mitigate much of the problem in just one generation. The next generation, raised in generally safe and nurturing environments, would likely grow up to be more attentive parents, as well.<sup>54</sup>

## 2. *Legitimacy Costs*

Every single academic discipline knows that poverty is an important determinant of human action and one's life chances. Sociologists study how a poor background, inadequate childhood training, and a deficient education impair a person's aspiration level, prospects, and health.<sup>55</sup> They show how free will is a social construction of limited utility and that most people make choices under a range of influences, pressures, and apparent options. Economists talk about social capital and the correlation between investment in education and other personal resource-attractors and the ability to get ahead.<sup>56</sup> Psychologists study how crowded living conditions cause irritability; how noise, threat, and disorder create a hair-trigger amygdala;<sup>57</sup> and how obedience to seeming authority (such as a local gang leader) often follows virtually automatically from its mere assertion.<sup>58</sup>

Yet law, alone among major disciplines, proceeds as though all those matters were irrelevant and as though two individuals raised under radically different circumstances have equal chances to conform their behavior to society's dictates.

*Rashon's first offense was shoplifting. It arose when he and some friends snuck some candy bars under their sweatshirts at a neighborhood*

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44 (describing young children who begin life with practically no social capital and are "bankrupt from birth"); Bazelon, *Realities*, *supra* note 6, at 499 (listing the necessities of life for a child raised in impoverished circumstances).

54. See CHILDREN'S DEFENSE FUND, CHILD POVERTY IN AMERICA (2008) (on file with the ALABAMA CIVIL RIGHTS & CIVIL LIBERTIES LAW REVIEW); John Harwood, *President's Speech Especially Poignant on the King Holiday*, N.Y. TIMES, Jan. 16, 2011, at A15, *available act* (describing Children's Defense Fund report showing that four in ten black children are raised in poverty, compared to one in ten for whites; fewer than four in ten black children live with two parents, compared with three in four whites; black children are much more likely than are others to die before their first birthday or to become obese; are more likely to be held back in school, suspended, or drop out entirely; and to end up in prison); *Id.* (describing a report by a labor market expert documenting how fully forty percent of young black workers are underutilized, i.e., unemployed or underemployed. The tendency toward income inequality is most pronounced among blacks, where the top ten percent of families received as much income as the bottom seventy percent combined).

55. See, e.g., Kaye, *supra* note 30, at 543, 561-84; Delgado, *Rotten*, *supra* note 12, at 24-33; DANIEL MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

56. See, e.g., RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW (5<sup>th</sup> ed. 1998); MOYNIHAN, *supra* note 55 (both discussing the role of capital, including the social kind, in advancement and the search for profit); Delgado, *Rotten*, *supra* note 11, at 24-25 & nn.109, 111 (discussing economic analysis of crime).

57. See, e.g., Delgado, *Rotten*, *supra* note 11, at 34-37; Kaye, *supra* note 29, at 545, 571, 578-83.

58. See text and notes 76-77 *infra* (discussing studies by Stanley Milgram and Phillip Zimbardo of obedience to authority).

*convenience store. The merchant quickly dialed 911, and a police car caught up with the boys a block away, where they were beginning to eat the candies. The officer brought them back to the convenience store for identification, which the store manager quickly supplied based on visual inspection and a quick look at the tape from the store's surveillance camera.*

*At a hearing in juvenile court, the judge reproved Rashon and told him that the next time he saw him in his courtroom he would throw the book at him. He assigned Rashon to a child welfare worker and ordered him to meet with her regularly for the next two years. He also told Rashon that any deviation from the straight and narrow, including missing school or hanging out with bad elements in his neighborhood, would receive swift retribution. Two weeks later, Rashon's mother received a phone call from the social worker and made an appointment for the three of them to meet. The day before the appointment, her boss notified the mother that she was needed to work overtime. She called the social worker and left a message, but never heard back. Rashon and the social worker never met.*

*A little later that very year, twelve-year old Matthew, in a neat neighborhood a few miles away, had his first brush with the law . . . .*

### *E. Governing Through Crime*

Given the prudential reasons why refusing to recognize a defense of rotten social background is socially reckless, one may ask why we tolerate a state of affairs that increases crime, deprives the poor and black communities of role models, and erodes the legitimacy of the criminal justice system in the eyes of many. The next section reviews reasons why this failure speaks badly of us. But by now, the reader may be curious about a reason. So here is one:

In a recent book, Jonathan Simon argues that American society has begun "governing through crime."<sup>59</sup> His central argument helps explain why society has apparently been willing to tolerate rotten social background, namely that influential members of society endorse this shortcut in order to achieve short-term gains.<sup>60</sup> He points out that imprisonment is a crude but relatively inexpensive way to achieve social control over large masses of people, now that slavery, Jim Crow, and racism are no longer available.<sup>61</sup> For example, it is a convenient means of manipulating the

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59. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

60. *Id.* at 4 (noting that "crime has now become a significant strategic issue" and that "the technologies, discourse, and metaphors of crime and criminal justice have become more visible features of all kinds of institutions"). See also Harris, *supra* note 22, noting that the very fear of crime enables leadership to manipulate society.

61. *Id.* at 82, 107, 234-35. See also ALEXANDER, *supra* note 17, at 26-57 (making the same

labor pool, taking numbers out of the pool when society does not need workers, and preserving others in a stand-by status, if it thinks it may need them later.<sup>62</sup> It is cheaper than meeting basic human needs.<sup>63</sup>

Might it be that the law of criminal defenses exhibits such a pattern, as well, and that the failure to provide a rotten social background defense reflects an implicit decision that we prefer the current form of social ordering? Poor people must make heroic efforts to conform their behavior to law. If they refuse to stay out of trouble, they must pay the price. As will be seen, however, people like twelve-year old, clean-cut Matthew, growing up in the suburbs, rarely pay this price, even when they offend.<sup>64</sup>

Is this crude economic determinism? No. Serious commentators, such as Michelle Alexander, who are not at all Marxists (at least in print) argue that imprisonment, of blacks at any rate, is a convenient means of manipulating the labor pool, keeping control of black males, and a contemporary counterpart of the institution of slavery.<sup>65</sup> Failure to provide a defense of severe environmental deprivation, then, may be a means by which mainstream society regulates The Other and keeps them in check. The skeptical reader who thinks, “This is crass Marxist materialism,” is invited to consider how we manage to adjust the crime and incarceration rate according to shifting societal moods; how we punish crack cocaine differently from the powder variety;<sup>66</sup> how we fund the prosecutor’s office much more amply than the public defender’s;<sup>67</sup> and how black and Latino defendants receive much longer sentences and less lenient treatment than white ones convicted of the same offense.<sup>68</sup> Consider, too, how even when minority men are in fact not criminal, we find it necessary to construct them that way in newspaper and television coverage and in fiction.<sup>69</sup>

point); Haney Lopez, *supra* note 15, at 1027, 1036-39, 1045-50 (same); Naomi Murakawa, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 L. & SOC. REV. 695 (2010) (noting how recent analyses of crime overlook the role of race and attributing this to colorblind jurisprudence).

62. SIMON, *supra* note 59, at 28, 84-89; ALEXANDER, *supra* note 17, at 49-50; Haney Lopez, *supra* note 15 (positing that criminalization serves the purpose of social stratification).

63. See generally SIMON, *supra* note 59.

64. See text and notes 81-82 *infra*.

65. See ALEXANDER, *supra* note 17, at 49-50, 173-208.

66. *Id.* at 5-6, 109-11.

67. See, e.g., Kwixuan H. Maloof, *A Question of Parity*, FOGCITYJOURNAL.COM, July 20, 2009, available at <http://fogcityjournal.com/wordpress/1348/a-question-parity/#more-1348> (describing different levels of funding for the two offices).

68. See THE SENTENCING PROJECT, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* (2008) available at [http://sentencingproject.org/doc/publicatons/rd\\_reducingracialdisparity.pdf](http://sentencingproject.org/doc/publicatons/rd_reducingracialdisparity.pdf). See also ALEXANDER, *supra* note 17 (describing treatment of minority defendants in the criminal justice system).

69. See, e.g., Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1260-66 (1992) (describing media images of the black criminal).

## IV. SYSTEMIC COSTS OF REFUSING TO RECOGNIZE A DEFENSE OF SEVERE ENVIRONMENTAL DEPRIVATION

Let us now leave practical considerations aside and turn to what failure to recognize a defense of RSB means about society in a broad, general sense.

I realize I now tread in dangerous waters, because I want to say that society's failure to consider carefully a defense of severe environmental deprivation says many things about us, not all of them pleasant.

It means, principally, that we are willing to make double victims of people like Rashon. We first tolerate the deplorable conditions in which many of them are born and grow up. Then, when they predictably offend later, we punish them a second time, rationalizing, perhaps, that we ourselves (growing up in far better circumstances) would have resisted the temptation and hewed the straight and narrow.<sup>70</sup>

The latter certitude—that we would not do likewise—is, of course, counterfactual. The truth is that we have no idea what we would have done had we been Rashon. Might we have offended, as well? Only the most assured among us would confidently say that we would not. Novels like *Lord of the Flies*<sup>71</sup> and *Heart of Darkness*<sup>72</sup> imply otherwise. Literature from wartime,<sup>73</sup> slave-owning society,<sup>74</sup> life-boat ethics,<sup>75</sup> and other extreme circumstances does so, as well. We think we have free will and would never commit a serious crime. But none of us can say that with much certainty, knowing that many others, like ourselves, have given in when the pressures were great. Experiments like Stanley Milgram's obedience to authority study at Yale<sup>76</sup> or Phillip Zimbardo's mock prison camp at Stanford<sup>77</sup> remind us that we are weaker than we like to think.

Yet we persist in denying that growing up in conditions like Rashon's derails human choice, volition, and goodness as surely as does insanity, a betrayed lover's rage, or a home-owner's mistaken belief that an eighteen-

70. In other words, our minds veer away from the thought that "there but for the grace of God go I". See Kaye, *supra* note 29, at 554 (making a similar point).

71. See WILLIAM GOLDING, *LORD OF THE FLIES* (1954).

72. JOSEPH CONRAD, *THE HEART OF DARKNESS* (1902).

73. See *United States v. Karl Brandt* (the medical case), in *Trials of War Criminals Before the Nuremberg Military Tribunals* (1948), reprinted in JAY KATZ ET AL., *EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS* 292-306 (1976) (upholding the conviction of German physician charged with war crimes).

74. See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 36-40 (6th ed. 2008) (discussing constitutional provisions, adopted under pressure from Southern delegates, that protected the institution of slavery).

75. See *Regina v. Dudley*, (1884) 14 QBD 273 (upholding conviction of lifeboat survivors, facing starvation, who killed and ate the ship's boy).

76. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (Harper 2009) (1974).

77. PHILLIP ZIMBARDO, *THE LUCIFER EFFECT* (2007).

year old exchange student from Japan, looking for a Halloween party, was a dreaded foreign menace deserving of being shot dead outside the door at which, moments earlier, he had knocked looking for help finding the right address.<sup>78</sup>

We make people like Rashon throwaway people. In fact, we throw them away twice, once when they are born into unutterable circumstances, and, later, a second time, when, having become monsters, they transgress our criminal law and we punish them without a second thought.<sup>79</sup>

Some criminal law scholars think that this is as it should be.<sup>80</sup> I don't believe I am writing with them in mind. As another writer said recently, I write "for those willing to take the risk of appearing thoughtful in these matters."<sup>81</sup>

So, let us look more closely at what we are doing. One way to approach our question is to ask what kind of society we would want to be born in, if we were choosing behind a Rawlsian veil of ignorance.<sup>82</sup> Carry out a thought experiment: You do not know whether you will be born Matthew or Rashon. Society could either recognize a defense of rotten social background, or not.

Ponder your choice with what happened to Matthew in mind.

*When he was twelve (the same age as Rashon), Matthew and some of his friends decided to torment a certain girl in their sixth grade class. The girl, who was white like them, was homely, with buck teeth, frizzy hair, and a pronounced stutter. She was, in addition, a talented violinist and top student. The boys coined a nickname for her ("Frizz"), lifted her skirt when they saw her on the playground or in the lunch room, and hacked into her Facebook page, making a number of changes that caused her much grief and shame. When her mother intervened at school and the boys were unrepentant ("She bothers us all the time, too"), the mother called the local police. When in the course of their own investigation, they*

78. See Cynthia K. Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 429-52 (1996) (discussing the case of Yoshihiro Hattori and a number of others).

79. I refer, of course, to the current absence of an effective defense based on RSB. See, e.g., Kaye, *supra* note 29, at 544; Delgado, *Rotten*, *supra* note 11. But see Williams v. Taylor, 529 U.S. 362, 397-98 (2000) (holding that presentation of such evidence is permissible, in a murder prosecution, in mitigation of sentence); Jayaraman, *supra* note 29, 331 *passim* (discussing mitigation in capital cases).

80. See e.g., Morse, *Twilight*, *supra* note 29.

81. See Waldron, *supra* note 32, at 1615. See also Kaye, *supra* note 29, at 540-42, 552 (observing that particular, concrete stories and events, not abstract considerations, are what kindle conscience and stir empathy, and noting that this holds with special force for individuals whose crime stems from oppressive conditions. "It is wrong to hold a person responsible if she did not act with free will." *Id.* at 540). See also Gary Watson, *Responsibility and the Limits of Evil: Variations on a Stawsonian Theme*, in AGENCY AND ANSWERABILITY: SELECTED ESSAYS 219, 235-45 (Gary Watson ed., 2d ed. 2004) (describing a hypothetical kidnap-murder and showing the moral relevance of details about the killer, his background, his attitudes, and his victims).

82. See JOHN RAWLS, A THEORY OF JUSTICE 11-15, 60-62, 100-02, 303 (Revised ed. 1971).

*discovered that the boys were plotting to kill the girl's beloved cat, they called in the child authorities, with the result that the case wound up in front of the same judge who would sentence Rashon a few months later for a much different offense. The judge listened carefully to the social worker's report, which was favorable, and to the boys' parents' entreaties, which were entirely believable, and let all the boys off lightly, on their promise not to bother the girl or her cat again. The school authorities took no additional measures against the boys, but transferred the girl to another class, where she was much happier. Matthew graduated in the top third of his high school class, attended the state university for two years, and is today a successful life insurance executive. "Frizz" went on to study music at Juilliard. None of the boys had a further encounter with the law. Rashon did, however.*

Society treats youths like Matthew and Rashon very differently. One is born into an intact family and attends good schools. The other struggles against overwhelming odds including poverty, inattention (starting at birth) from the adults in his life, and poor housing, education, and health care. One receives lenient treatment for small offenses. The other, as we shall see later, has the book thrown at him.

Society can greatly reduce the number of what we may call "RSB" children by expending a few resources on them. The amount required would not be great.<sup>83</sup> Europe does so and enjoys a lower violent crime rate than ours.<sup>84</sup> The resources that would be necessary to give youth like Rashon a fighting chance are easy to name: better schools with no holes in the roofs, plenty of books, windows that are not broken, adequate libraries, working bathrooms, and well trained teachers.<sup>85</sup> They would include state-funded neighborhood medical clinics where poor and struggling families could bring their children when they wake up with a severe stomach ache or high fever.<sup>86</sup> They would include nutritional supports, including for the mother when pregnant with them,<sup>87</sup> dental care for those who could not afford it,<sup>88</sup> and plenty of playgrounds, basketball courts, and other such low-cost facilities that would enable the young to exercise and let off steam safely and healthily.

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83. At least compared to the military budget and the cost of foreign wars, just to name two items we fund routinely.

84. See Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, April 23, 2008, at A1, available at <http://www.nytimes.com/2008/04/23/world/americas/23int-23prison.12253738.html> (comparing crime rates here and in Europe).

85. See, e.g., CHILDREN'S DEFENSE FUND, *supra* note 54; Bazelon, *Realities*, *supra* note 6, at 487-92 (discussing some of these forces and their consequences for the poor).

86. See sources cited *supra* note 85.

87. *Id.*

88. *Id.*

They would include childcare for working mothers like Rashon's.<sup>89</sup> Programs like these would add to everyone's taxes, of course. What would we get in return? Less crime, a happier and more productive citizenry, and, perhaps, a better social conscience. Conservatives might not feel better (and might, indeed, feel worse, believing that social investment merely weakens the moral fiber of citizens and that higher taxation amounts to a variety of theft<sup>90</sup>). But they would benefit, and might grudgingly admit so, from greater social safety, a lower crime rate, and a more productive economy, which would, of course, mean higher returns from their investments and greater dividends from their shares of stock. Since the incarceration rate would drop, the cost of prisons, now bankrupting California and threatening to do the same to other states,<sup>91</sup> would decrease as well, so that many states, now on the verge of bankruptcy, would be able gradually to turn the corner. This would benefit conservatives in many of the above ways as well as through greater profit margins from state and local bonds in which the wealthy often invest.

But, let us return to the argument: The question, then, reader, is which society would you choose if you were uncertain what position you would occupy in that society—Rashon's or Matthew's? You could choose the current society, knowing that it contains many of what I call (after Frantz Fanon) the wretched of the earth.<sup>92</sup> You would be taking the gamble that you might be one of the wretched. Or, of course, you might be Matthew, and paying his society's current relatively moderate tax bill.

Or, in the hypothetical society I have described, you could be Rashon, with many state-paid supports aimed at giving you a reasonable start in life.<sup>93</sup> Finally, you could be Matthew, the now grown-up insurance executive in the hypothetical society, but paying, naturally, a heftier tax bill to ameliorate the misery of society's wretched.

I believe that most of us would hedge our bets and opt for the society with social supports and slightly higher taxes. We would enjoy the security that if we were born black, brown, or very poor we would have a reasonable chance to grow up healthy, sane, educated, and intact. We would know that our families and friends would enjoy the same opportunity and

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89. See, e.g., JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 6-7, 37 (2010).

90. See Paul Krugman, *Ground Rules for a Divided Nation*, SEATTLE TIMES, Jan. 14, 2011, at A16, available at [http://seattletimes.nwsources.com/html/opinion/2013940310\\_krugman16.html](http://seattletimes.nwsources.com/html/opinion/2013940310_krugman16.html) (noting the differing moral approaches of conservatives and liberals). See also David Brooks, Op-Ed., *The Achievement Test*, N.Y. TIMES, Jan. 4, 2011, at A21, available at <http://www.nytimes.com/2011/01/04/opinion/04brooks.html>; Bob Herbert, Op-Ed., *Get Ready for a G.O.P. Rerun*, N.Y. TIMES, Jan. 4, 2011, at A14, available at <http://www.nytimes.com/2011/01/04/opinion/04herbert.html> (same).

91. See Delgado, *Portent*, *supra* note 15, at 1295-96 (describing this predicament).

92. See FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1961).

93. See text and notes 51-53, 84-87 *supra* (listing some of the main supports).

that society would contain less crime than it does now, as well as less misery and social pathology.

*Fourteen-year old Rashon is now in jail, serving a seven-year term. His journey there was tawdry and, in some ways, predictable. He and some friends decided to rob a local convenience store whose manager, they decided, was mean—he didn't let kids hang out there—and had it coming. One of the friends brought a gun, which was unloaded, intending to use it to scare the manager into emptying the cash register. At the last minute, Rashon came up with some bullets, which he found in a secret hiding place in his mother's apartment. The robbery went awry; the friend panicked; and the store owner took a bullet to his hand, requiring surgery. At his trial, which was in adult court, Rashon testified that he and his friends had only planned to scare the manager, and that he had brought the bullets only to make it look like they were serious. Unimpressed, the jury convicted him of aggravated assault.*

## V. JUSTIFICATION

Is it justifiable to choose as I have just now imagined most of us would? In other words, how would one justify measures designed to reduce the number of wretches in our midst? An odd question, no? But law is full of questions that in other settings no rational, caring, feeling human being would take seriously.<sup>94</sup> Still, we are (most of us, at any rate—this symposium may well find readers and followers outside of law) lawyers and law professors and law students. So, let's pause and ask how one would justify taxing ourselves and our fellows to reduce the number of the wretched of the earth—young people, like Rashon, who live thoroughly appalling lives, predictably offend, and go to jail without being able to present their circumstances by way of mitigation or defense.

Two main justifications come to mind, one prudential, the other principled. The prudential justification is that it simply is unappealing to live in a society like ours that contains so much misery.<sup>95</sup> It makes everyone insecure. And it gives us a justifiably bad conscience because we know that in a Rawlesian world, we would not choose the present social arrangements.<sup>96</sup> We only acquiesce in them because we are in a favored position. We know that we, and our children, will never be in Rashon's shoes. The deck is already stacked in our favor.

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94. See Rawls, *supra* note 82, at 11-15, 60-62, 100-02, 303 (describing hypothetical situation in which one faces policy choices from an original position behind a veil of ignorance).

95. See text and notes 32-57 *supra* (discussing instrumental reasons why society should take action to reduce childhood RSB).

96. See Rawls, *supra* note 82, at 11-15, 60-62, 100-02, 303.

But crime can visit everyone. It is not safe or comfortable living in a society that is, in part, wretched. Many of us would, for this reason alone, choose my hypothetical alternate society—that is, one along European lines<sup>97</sup> with moderate taxation and low crime—and, with the aid of their checkbook, reach out a helping hand to Rashon and his friends and neighbors.

What about principle?

The first thing to note is that consistency with settled criminal-law principles and doctrines<sup>98</sup> is not a strong point here. In other words, pointing out that a defense or mitigation of having suffered a rotten social background that strongly inclined one, as a youth at least, in a criminal direction is inconsistent with the current system of criminal law defenses is a pallid argument. For we could change our system of defenses.<sup>99</sup> We currently pile on punishment when we find certain aggravating conditions, such as a depraved motive or mentality.<sup>100</sup> We could, similarly, ease up on punishment if we found mitigating circumstances that would predictably sap a person's will and inclination to act responsibly and conform to law. To say, as some conservatives do, that most poor people do not violate the law, is simply untrue.<sup>101</sup> Most of them do. Many rich people do, as well, but they get away with it.<sup>102</sup> It is absurdly callous to assert that poverty, lack of opportunity, a poor education, and desperate circumstances play no role in predisposing people to lives of crime, especially if they are born into those circumstances and live in them all their lives.

If, as I've argued, our moral impulses (those of most of us, anyway) incline in this direction, we could—and should—align the law to harmonize with our intuitions when confronted with cases like that of Rashon.

97. European countries generally feature higher taxation rates than ours and lower rates of violent crime and social delinquency. *See* text and note 84 *supra*.

98. E.g., “we only excuse a defendant whose will was completely overborne (as with self-defense), who did not know the difference between right and wrong (insanity), or whose conduct advanced an important social objective (the justification of necessity).”

99. For example, one can easily imagine the above statement modified to include defendants whose environmental circumstances seriously eroded their ability to conform to legal mandates.

100. *See, e.g.*, RICHARD G. SINGER & JOHN Q. LAFOND, *CRIMINAL LAW: EXAMPLES & EXPLANATIONS* 177 (4<sup>th</sup> ed. 2007) (discussing aggravating and mitigating circumstances in connection with certain felonies); text and note 31 *supra* (same); Delgado, *Reconsideration*, *supra* note 31 (describing cases where courts pile on penalties on learning that the defendant is a member of a disempowered minority group, such as Indians, that they believe is especially prone to commit crimes similar to those of the defendant).

101. This is supposedly an argument against the defense. *See, e.g.*, Morse, *supra* note 23. But, of course, most insane people do not commit violent deeds either.

102. *See, e.g.*, J. KELLY STRADER & SANDRA JORDAN, *WHITE COLLAR CRIME: CASES, MATERIALS, AND PROBLEMS* (2d ed. 2009); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (both noting how white actors, often in high corporate or governmental positions, commit a host of dangerous acts, sometimes with little chance of conviction).

A second principled reason to relieve Rashon of the full weight of criminal punishment when he offends in ways that are predictable, given his upbringing, is simply that part of it is our fault.<sup>103</sup> At birth, he is a child. The awful circumstances into which he is born are not his fault.<sup>104</sup> Every child is born innocent and full of potential, full of hope.<sup>105</sup> The forces that shape them—if we are brutally honest—are environmental. If you, the reader, are (as you probably are) an exemplary person, intelligent, learned, sensitive to the needs of others, it is not because you were born that way. Attentive, caring adults provided the setting that enabled you to develop as you did. If you had, in addition, genes for intelligence, good health, physical strength, and emotional acuity, those are to your parents' credit, not yours. If Rashon has turned out badly, not all of it, by any means, is that tiny baby's fault, nor, even, that of the youth who helped load the gun before he and his friends took their fateful walk to the convenience store.

Many areas of law recognize external fault as lessening an actor's liability, ranging from contributory or proportional liability in the law of tort<sup>106</sup> to criminal procedure's exclusionary rule,<sup>107</sup> which denies the state the benefit of wrongfully seized evidence.<sup>108</sup>

If, as seems undeniable, the fault for Rashon's crime lies partly with us, we ought logically to punish ourselves or, at least, absolve Rashon for part of the responsibility for his offense.

But, you point out, only a fraction of desperately poor kids commit offenses like Rashon's.<sup>109</sup> Out of a large sample of kids like him, offered a chance to take part in an exciting small-time heist at the corner store, let's say half would be seriously tempted and one-third would agree to participate as bit players, as Rashon did.

This proves, you say, that Rashon could have chosen otherwise. He could have shown self-restraint, conformed his behavior to the expectations of the law. Surely he knew that helping his friends steal money at

103. See, e.g., Delgado, *Zero-Based*, *supra* note 33, at 1942-44 (noting that children are born blameless, full of promise, and that much of what happens to them in their early years is beyond their choice); Delgado, *Rotten*, *supra* note 11, at 89 (same).

104. See text and note 103 *supra*.

105. *Id.*

106. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 451-62 (5th ed. 1984) (describing defense of contributory negligence).

107. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

108. *Id.* See also Kaye, *supra* note 29, at 540 (noting that the basic inclination to punish a wrongdoer depends on "the judgment that she is responsible for the wrong." If society is, in part, responsible for the individual's misbehavior, then, logically, we ought to reduce the punishment).

109. See text and notes 97-100 *supra*; Bazelon, *Realities*, *supra* note 6, at 492 (noting that only a small proportion of those who endure poverty and a rotten background end up committing crimes); Morse, *Twilight*, *supra* note 29, at 1259-61 (same); Delgado, *Rotten*, *supra* note 11, at 10 ("Of course, not all poor persons violate the law and not all those from privileged backgrounds are law-abiding; it remains, however, that of more than one million offenders entangled in the correctional system, the vast majority are members of the poorest class"), *Id.* at 24-29 (same).

gun-point from a convenience store was wrong. Yet, he went ahead and did it, anyway. The temptations, lack of socialization, and inadequate training, care, and love that he received as a youth—other kids experience those same forces and yet remain law-abiding.

“Only one-half (or so) of such kids turn out bad.” Does that mean we owe nothing to those who do? Consider that our police routinely racially profile black, Latino, and Middle Eastern-looking motorists based on similar odds even though the officer knows better and is free to look away.<sup>110</sup> Similarly, with the legal standard of probable cause to make an arrest or a pedestrian stop,<sup>111</sup> we exonerate the police officer if the action turns out to be unfounded and the citizen innocent.<sup>112</sup> The odds during the stop were, say, two to one, meaning that in the circumstances in which the police officer acted, two times out of three the citizen acting suspiciously would be found to be engaged in something criminal. But the third time, the citizen is not. Still, we tolerate, even encourage, the police officer’s chance-taking. We don’t require certainty or one hundred percent success. By the same token, we should not deny that criminal responsibility ebbs when the actor is under the influence of environmental forces that prove overwhelming merely in a large proportion—but not all—cases.<sup>113</sup>

At a minimum, we ought to permit Rashon, through his counsel, to tell his story.<sup>114</sup> Perhaps hearing about the dispiriting circumstances of his upbringing and the near-total absence of community and parental supports that society provided him with during his critical years will prompt us to resolve to build a better society. Perhaps it will make Rashon feel better—at least someone listened to his story, heard what kind of life he led before his crime. If his lawyer tells that story well and fully, perhaps Rashon will be the better for hearing it. Perhaps he will gain a degree of self-understanding. Perhaps he will resolve to lead a better life once he gets out of jail. Perhaps he will seek to reenter life a second time, seeking out experiences, an education, a loving partner, a stable neighborhood like the ones he never had. Storytelling not only has the power to change the lis-

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110. See DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002).

111. Probable cause does not require that the police officer know to a certainty that the suspect is guilty of an offense, such as harboring contraband. The officer need only have a reasonable suspicion that this is so. See U.S. CONST. amend. IV; *United States v. Puerta*, 982 F.2d 1297, 1300 (9th Cir. 1992).

112. A reasonable subjective belief—good faith—in short, is enough. See *United States v. Leon*, 448 U.S. 897 (1984).

113. Punishment under such circumstances would seem to come close to punishing on the basis of status. See, e.g., *United States v. Robinson*, 370 U.S. 660 (1962) (holding unconstitutional the criminalization of drug addiction). See also Delgado, *Rotten*, *supra* note 11, at 52-53 (discussing addiction).

114. On the role of stories and narratives in law and legal analysis, see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Anthony Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998).

tener. Sometimes a story even touches the heart and mind of the one telling it.<sup>115</sup>

Could not Rashon have shaken off the bonds that held him back in his early years? By the age of ten or eleven, might he not have been able to see the poor hand that fate dealt him and begun the process of emancipating himself from the malign forces of neglect, crime, and despair all around him? Some do. Literature is full of tales of boys, especially, who rose from impossible circumstances to become tycoons of industry<sup>116</sup> or Lord Mayor of London.<sup>117</sup>

The sad truth, though, is that our society exhibits very little upward mobility.<sup>118</sup> Studies show that practically none of those born in the lowest echelon of society rise to anywhere near the top.<sup>119</sup> And precious few rise at all. Why should they even try? All it takes is a few cases like Rashon's second trial—or *United States v. Alexander*,<sup>120</sup> for that matter—to send the signal that the rest of us don't care.<sup>121</sup> At a minimum, until we loosen the bonds that inhibit upward mobility, we have no business punishing the wretched of the earth who find themselves trapped in the bottom layers of society and, predictably, grow up without many controls or options.

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115. Expert witnesses could help interpret stories like Rashon's. See Kaye, *supra* note 29, at 540 (noting that The behavioral sciences . . . encourage us to imagine determinism in a new way. They provide us with concrete, vivid, and particular details about the ways in which human acts are actually caused. Reflecting upon these details enables us to shift from an abstract conception . . . to a particularistic [one] of . . . human action. This particularistic conception . . . engages our emotions in a much deeper way than its abstract counterpart and induces a more careful consideration of the ramifications of determinism for our lives and acts. This in turn significantly shifts our moral intuitions . . .).

116. See, e.g., Delgado, *Myth*, *supra* note 16 (describing Horatio Alger and other stories of individuals who rose from poor origins to great wealth).

117. *Id.* at 884 & n.23 (describing the story of Dick Whittington—and his cat—who rose from humble origins to high political office).

118. *Id.* at 900-07.

119. *Id.* at 900-03.

120. 471 F.2d 923, 928-29 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

121. See Waldron, *supra* note 2, at 1631 (describing how legal rules, or their absence, can send a powerful signal about what we value).