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Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation

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Introduction

No jurisdiction in the United States or elsewhere recognizes a criminal defense based on socioeconomic deprivation *simpliciter*.[1] Is this refusal principled and justified, or only a timid response to the prospect of changing to accommodate that which appears alien?[2] That environment plays a significant role in shaping an individual's values and behavior is beyond dispute. For over two decades preferential treatment and affirmative action have been incorporated within our liberal-democratic heritage as means of compensating for unequal opportunity resulting from discrimination, inadequate education and material deprivation.[3]

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1. *See, e.g.*, Herbert Packer, The Limits of the Criminal Sanction 133 (1968).

2. There is, of course, a third possibility. Judicial and legislative reluctance to create an RSB defense may be based upon principle, yet other important principles weigh in favor of such a defense. For example, reluctance to create such a defense may stem from the conviction that we must protect society from dangerous criminals, or that those who violate the law deserve to be punished. Though these principles are plausible, other principles, such as the impropriety of punishing someone who never had sufficient opportunity to develop into an autonomous adult, may be more compelling. *See generally infra* part IV.

3. *See, e.g.*, Equality and Preferential Treatment: A Philosophy & Public Affairs Reader (Marshall Cohen, Thomas Nagel & Thomas Scanlon, eds. 1977); Allan P. Sindler, Bakke, DeFunis, and Minority Admissions: The Quest for Equal Opportunity (1978). Recently, certain aspects of affirmative action, particularly quotas, have become controversial. This is not because opponents reject the idea that unequal opportunity and environmental adversity can affect an individual's chances in life—everyone realizes that. Disagreement centers, rather, on the remedy or re-

There is also a strong relationship between environmental adversity and criminal behavior.[4] 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.[5] Unless we are prepared to argue that offenders are poor because they are criminal, we should be open to the possibility that many turn to crime because of their poverty[6]—that poverty is, for many, a determinant of criminal behavior.[7]

Assuming that socioeconomic deprivation causes criminal behavior rather than the converse, should that mitigate criminal responsibility?[8] The current climate is hardly conducive to

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sponse to those conditions, issues that lie outside the scope of this article. *See generally* sources cited *supra*.

4. *Infra* part II examines this relationship from the perspectives of the physical and social sciences.

5. Richard Singer & William Statsky, Rights of the Imprisoned 507-10 (1974); Charles Silberman, Criminal Violence, Criminal Justice (1978). *See generally* U.S. Dep't of Justice, Survey of Inmate Characteristics (1982). For commentary on this relationship with poverty, see generally part III *infra*; John Harris, *The Marxist Conception of Violence*, 3 Phil. & Pub. Aff. 192 (1974).

6. *See* Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. Cal. L. Rev. 514, 520 (1968): "Adverse social and subcultural background is statistically *more* criminogenic than is psychosis. . . ."

7. This is not to deny that there could be other factors, such as genetic constitution and moral depravity, which are causal determinants of criminal behavior. *See* Sarnoff Mednick, *Crime in the Family Tree*, Psychology Today, Mar. 1985, at 58; *Criminal Destiny: Nature Meets Nurture*, 125 Science News 342 (June 2, 1984) (four studies indicate a possible link between heredity and certain property crimes; studies received "harsh criticism" from scientists and civil libertarians); Stanton Samenow, Inside the Criminal Mind (1984) (most criminals are opportunistic risk-takers, not helpless or "sick" victims). Common sense wisdom, however, suggests that all things being equal, poverty increases the chances that an individual will turn to crime. *See infra* part II; Richard Quinney, The Problem of Crime 56-64 (1977) (describing the influence of biological criminology on modern criminology); *Criminal Destiny*, *supra* (researchers who urged genetic explanation for property crime conceded that social factors such as poverty and inadequate home environment play major roles in determining who will grow up to be a career criminal).

8. Arguably, deprivation is morally distinct from criminality. Providing compensatory treatment for the socially and educationally disadvantaged benefits innocent persons with the potential for socially useful behavior—individuals who, as a result of unjust social conditions, are unable to compete on an equal basis for positions of affluence and power. A criminal defense based on social deprivation, on the other hand, forestalls placing a burden—punishment—on an individual who is not innocent, or, at least, not innocent in the same way as the first type of socially disadvantaged individual, and probably will not become a productive member of society. What this argument overlooks is that the second type of individual, just as the first, is in his or her predicament because society has been structured so as to permit extreme poverty. *See infra* part IV. In such circumstances, it is not obvious that society has the right to punish persons whose criminal inclinations result from social and economic decisions designed to benefit the larger society.

exploration of such issues.[9] Indeed, the last few years have witnessed attacks upon and retrenchment of established criminal defenses, and the interest in environmental coercion that sprang up in the 1970s with the Patty Hearst case and *Kaimowitz v. Department of Mental Health*[10] has subsided. Still, the issues raised by a "rotten social background"[11] (RSB) criminal defense transcend shifts in sociopolitical fashion, raising questions that go to the heart of our system's notions of justice and equity.[12]

Others have explored those issues, most notably Judge David Bazelon and Professor Stephen Morse, who debated the merits of a defense of environmental or social deprivation in a series of exchanges in *Southern California Law Review*.[13] But the question whether RSB should be recognized as a criminal defense has not been resolved, nor, indeed, have the issues been much sharpened; the debate has proceeded without careful review of the social science literature on environmental criminogenesis,[14] the relevant

9. *See, e.g.*, Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense" - Why Not?*, 72 Yale L.J. 853 (1963); Barbara Wootton, Crime and the Criminal Law (1963) (advocating extension of the principle of strict liability throughout substantive criminal law); 1982 Amendment to § 28 of the California Penal Code ("As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse. . . ." Cal. Penal Code § 28(b) (West 1984)); Hyman Gross, *Some Unacceptable Excuses*, 19 Wayne L. Rev. 997 (1973); Nathaniel Branden, *Free Will, Moral Responsibility and the Law*, 42 S. Cal. L. Rev. 264 (1974); John Masterson, *Public Perceptions of Delinquency*, Psychology Today, Apr. 1984, at 8 (public believes criminals commit crimes out of sense of adventure, alienation, or bad parenting—in that order). *But cf. infra* text at notes 109-189 ("Black rage" may be on upswing as result of social cutbacks instituted by supply-side theorists).

10. Civil No. 73-19434-AW (Wayne Co., Mich. Cir. Ct., July 10, 1973) (*reprinted in* 2 Prison L. Rep. 433 (1973)); M. Shapiro & R. Spece, Bioethics & Law 210 (1981). ("Detroit psychosurgery case" held involuntarily committed mental patient could not give valid informed consent to experimental brain surgery to control violence).

11. The phrase "rotten social background" (hereinafter "RSB") seems to have been coined by the trial judge in *United States v. Alexander* and was later used by Judge Bazelon to describe conditions of socioeconomic and environmental adversity. United States v. Alexander, 471 F.2d 923, 961 (D.C. Cir. 1973) (Bazelon, J., dissenting).

12. The central issue is the extent of criminal responsibility. Typically, a person is responsible only if his or her behavior is voluntary. *Infra* notes 32-62 and accompanying text. Voluntary behavior is impossible when factors beyond the individual's control irresistibly incline him or her to act as he or she does. In such cases, the morality underlying the criminal law militates against attributing responsibility to the individual for his or her criminal behavior. *Id.* When responsibility is absent or sufficiently diminished, criminal sanctions are inappropriate. *Cf.* John Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 Am. J. Psychiatry 10 (Jan. 1984), suggesting that current emphasis on retributive theory of punishment will cause increased attention to defendants' histories.

13. *See infra* text accompanying notes 87-104.

14. Though social scientific evidence is not dispositive on whether to recognize the RSB defense, it is particularly relevant to determine whether an RSB inter-

criminal law and jurisprudential considerations,[15] or conceptual analysis of the various forms an RSB defense might take.[16]

This article attempts to address these issues. Part I reviews the RSB debate. Part II summarizes some of the social scientific and medical literature on the contribution of environmental deprivation to criminal behavior. Part III canvasses existing criminal defenses and analyzes their capacity to accommodate RSB factors. Part IV explores the possibility of a new, independent RSB defense, including its justifications and likely limitations. Part V considers the insights that other societies and approaches might provide on the question of an RSB defense. Finally, part VI synthesizes the discussion and identifies the forms an RSB defense might assume and the costs and benefits of each option.

Although my goal is to identify the many troubling questions raised by an RSB defense and to suggest answers, I shall be satisfied if I achieve the less ambitious goal of nudging the pendulum of public opinion toward more open-minded and serious consideration of these matters.

I. Theories of Criminal Justice and the RSB Debate

A. Locating RSB Within Criminal Theory: Preliminary Survey

A brief inquiry into the theory of criminal justice is indispensable for understanding the background against which the RSB debate is waged.[17] Generally, a criminal offense is committed whenever an action fulfills a crime's material elements. Although some would end the inquiry here,[18] our system of criminal law rec-

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feres with free choice, and therefore defeats responsibility. *See infra* notes 32-62 and accompanying text.

15. By jurisprudential considerations I mean those moral and social values underlying criminal law. *See infra* notes 32-62, 303-423 and accompanying text.

16. Conceptual analysis is relevant to questions about what form an RSB defense should take and where it should be located in criminal law. Conceptual analysis also helps determine whether an RSB defense is an excuse or justification, whether it is a facet of a traditional defense or is unique, and whether it should be relevant to guilt or mitigation. *See generally infra* parts IV and VI.

17. For general discussions of the theoretical bases of criminal punishment, see, e.g., Contemporary Punishment: Views, Explanations and Justifications (Rudolph Gerber & Patrick McAnany eds. 1972); The Philosophy of Punishment (Harry B. Acton ed. 1969); Burton Leiser, Liberty, Justice and Morals: Contemporary Value Conflicts 202-23 (2d ed. 1979); Sanford Kadish & Monrad Paulsen, Criminal Law and Its Processes, Cases and Materials 1-71 (3d ed. 1975).

18. This view is attributed to certain positivists and determinists. *See, e.g.*, George Fletcher, Rethinking Criminal Law 496, 512 (1978); Barbara Wootton, Crime and the Criminal Law 51-53 (1963). *See also* H.L.A. Hart, Book Review, 74 Yale L.J. 1325, 1328-31 (1965) (reviewing Barbara Wootton, Crime and the Criminal

ognizes considerations collectively known as defenses. Most defenses are exculpatory,[19] while some are based on nonexculpatory factors.[20] An exculpatory defense defeats or mitigates fault. A nonexculpatory defense excuses someone from criminal liability, even if it is obvious that he or she is at fault.[21] Exculpatory defenses examine the internal or external circumstances of the offender at the time of the offense to determine whether he or she may justifiably be found guilty.[22] Nonexculpatory defenses, by contrast, exonerate due to extrinsic policies unrelated to individual fault.[23] Though both types of defense may incorporate RSB considerations, exculpatory defenses do so more readily than nonexculpatory defenses. To clear the way for discussion of the more important kind of defense for RSB purposes, I shall first examine nonexculpatory defenses.

1. Nonexculpatory defenses.

Nonexculpatory criminal defenses are primarily recognized in unusual situations involving clearly defined and circumscribed classes of persons.[24] Although the rationales on which they are based vary, the essential feature of nonexculpatory defenses is that they are unrelated to guilt and desert.[25] A nonexculpatory defense says that though the individual is guilty of a crime deserving punishment, there are other considerations—for example, public policy, morality, or jurisprudential ideals—which persuade us not to punish.

Despite the traditionally limited scope of such defenses, a few scholars have urged nonexculpatory treatment of offenders in certain types of RSB situation, based on notions of economic fairness

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Law (1963)); M.V. Julian, *A Determinist's Perspective of Criminal Responsibility*, 8 Alberta L. Rev. 376 (1970).

19. The terms "exculpatory defenses" and "nonexculpatory defenses" are used to aid conceptual clarity. *See* Hyman Gross, A Theory of Criminal Justice 318-28 (1979). *See also* Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 229-43 (1982).

20. Examples of nonexculpatory defenses based upon public policy considerations include diplomatic immunity, entrapment, infancy, double jeopardy, and statutes of limitation. All are based on policies extrinsic to individual culpability and desert. For a fuller discussion of these defenses see Robinson, *supra* note 19, at 229-43; Wayne LaFave & Austin Scott, Handbook on Criminal Law 268-413 (1972).

21. *See* Gross, *supra* note 19, at 320; Gross, *supra* note 9, at 1001; Robinson, *supra* note 19, at 229-32.

22. *See* sources cited *supra* note 21.

23. *See* Robinson, *supra* note 19, at 229-32.

24. *See* authorities cited *supra* note 19. *See supra* note 20 for examples of nonexculpatory defenses.

25. *See* examples cited *supra* note 20.

and reciprocal justice.[26] Invoking classical liberal theories of social contract,[27] they argue that societies and governments are formed to enhance the quality of each member's existence. To maintain the benefits of a communal state, each member must abide by proscripts and prescripts promulgated to maintain the social order.[28] Because such a system is based upon mutuality, these scholars argue, if some segments of society are deprived of the benefits of the "social contract," they are also excused from the obligations imposed upon them by it.[29]

Related approaches are derived from the idea of societal

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26. *See, e.g.*, Harris, *supra* note 5; Gross, *supra* note 19, at 318-20; Gross, *supra* note 9, at 1000.

27. For an overview of social contract doctrine see Patrick Riley, Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, and Hegel (1982).

28. Many retributionists justify criminal punishment on the same basis. *See, e.g.*, Herbert Morris, On Guilt and Innocence 33-34 (1976); Herbert Fingarette, *Punishment and Suffering*, 50 Proc. Am. Phil. Ass'n 499 (Aug. 1977).

29. Harris, *supra* note 5, at 219:

> Consider . . . a man who has been convicted of armed robbery. On investigation, we learn that he is an impoverished black whose whole life has been one of frustrating alienation from the prevailing socio-economic structure—no job, no transportation if he could get a job, substandard education for his children, terrible housing and inadequate health care for his whole family, condescending-tardy-inadequate welfare payments, harassment by the police but no real protection by them against dangers in his community, and near total exclusion from the political process. Learning all this, would we still want to talk—as many do—of his suffering punishment under the rubric of "paying a debt to society"? Surely not. Debt for what?

See also Silberman, *supra* note 5; Wilson Grier & Price Cobbs, Black Rage (1968); Marvin Wolfgang & Bernard Cohen, Crime and Race (1970).

Of course, it could be maintained that a person must obey the law despite receiving less than a fair share of the social benefits. In this view, taking the law in one's own hands is never justified. Civil society requires suffering injustices while using lawful means to rectify social wrongs. This argument is not persuasive. In order to rectify social injustice lawfully, one needs education, money and power—goods which an impoverished ghetto dweller lacks. To insist that he or she accept social injustices and then to admonish him or her to act only within the law to remedy this situation is insensitive to the daily burdens of living in the ghetto. Majority members of society simply do not have to bear or comprehend burdens which so stunt individual development, aspirations and happiness. Worse still, such insistence is a demand to retain the present power structure and conditions until someday when the poor are reprieved. Such a view is not a proposal for change, but rather a recipe for social stagnation. For fuller discussion of this argument, see *infra* notes 315-353, 380-397, 432-435 and accompanying text.

Equally unpersuasive is the reply that there is no alternative to lawful change which is consistent with the nature of a civil society. It is true that law is a process for righting injustices peacefully, and therefore is inconsistent with justifying or excusing violence. After all, why institute a legal order if one is entitled to act violently when suffering social injustice? Such a right would break down law generally to no one's benefit. Yet, law is now of little importance in the ghetto. There, impoverished social and economic conditions have already caused a breakdown of law. *See generally infra* notes 109-189 and accompanying text. Until these

fault—that it would be unjust for society to punish a person for committing a crime that would not have occurred but for society's neglect in dealing with the causes of crime,[30] or for acting out of the very motives that society encourages and reinforces.[31] Nonexculpatory approaches to RSB are examined more fully in part IV. At this point, I merely note that they rely on controversial political premises and lack the clearly defined boundaries associated with currently recognized nonexculpatory defenses.

2. Exculpatory defenses.

Exculpatory defenses accommodate RSB defendants more easily than do nonexculpatory defenses. Exculpatory defenses are based on the injustice of punishing criminal conduct where the actor was either not responsible or not accountable for his or her transgressions.[32] "Responsibility" refers to the defendant's capacity to appreciate the criminality of the conduct (i.e., cognitive-emotive capacity) or to conform the conduct to the requirements of the law (i.e., volitional capacity).[33] Defenses in this category include insanity, diminished capacity, intoxication, and automatism.[34] Defenses based on accountability focus on the circumstances of the actor at the time of the offense to determine whether the wrongful act can properly be attributed to the actor.[35] Non-accountability defenses include most of those classified under justification or excuse.[36]

Justification defenses hold the defendant unaccountable because by acting unlawfully, he or she furthered an important social interest.[37] The defense of necessity, for instance, is usually consid-

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conditions change, the legitimacy of law in the ghetto is suspect and the admonition to use only lawful means for change disingenuous.

30. *See* Gross, *supra* note 19, at 323.

31. *See* Harris, *supra* note 5, at 218.

32. Professor Fletcher uses the German concept of "attribution." Generally, attribution depends upon whether the actor can be linked to the wrongful act and can be fairly held accountable for it. Fletcher, *supra* note 18, at 459, 491-514. I use the term "attribution" in the same generic sense as Fletcher uses it.

33. *See generally* LaFave & Scott, *supra* note 20, at 268-351; Rollin Perkins & Ronald Boyce, Criminal Law 936-1015 (3d ed. 1982); Fletcher, *supra* note 18, at 496-97.

34. *See generally* LaFave & Scott, *supra* note 20, at 268-351; Perkins & Boyce, *supra* note 33, at 936-1015.

35. *See* Fletcher, *supra* note 18, at 496-97.

36. *See, e.g.*, Packer, *supra* note 1, at 105-08; J.L. Austin, *A Plea For Excuses*, 57 Proc. Aristotelian Soc'y 1-2 (1956-57); LaFave & Scott, *supra* note 20, at 356-412; Perkins & Boyce, *supra* note 33, at 1028-72.

37. *See, e.g.*, Austin, *supra* note 36; Kadish & Paulsen, *supra* note 17, at 542-55; Perkins & Boyce, *supra* note 33, at 1067-72.

ered a justification.[38] With excuses, the defendant is not exonerated because he or she chose the more socially desirable of two actions. Rather, the defendant is excused because, as a result of circumstances beyond his or her control, it is not fair to hold the actor responsible for the criminal act.[39] An example of an excuse defense is duress.[40]

Fortunately, despite the elaborate conceptual and definitional framework of exculpatory defenses, they share a common theoretical foundation.[41] The standard, best expressed by legal philosopher H.L.A. Hart, is that no one should be held blameworthy and punished for criminal conduct if he or she acted involuntarily—that is, without free choice.[42] Involuntariness includes not only external restraints on volition, but also internal interference with cognition and control. Thus, it covers situations of automatism, where the unlawful act results from seizure, occurs during unconsciousness, or is due to uncontrollable external physical forces;[43] necessity, where natural phenomena and notions of morality overwhelm inhibitory powers;[44] coercion and duress, where the excuse derives from intimidation by another human being;[45] insanity, where the distortion in the actor's conduct is caused by psychological illness;[46] and mistake, where the constraints upon choice stem from ignorance, of law or fact, beyond the control of the actor.[47] While each of these currently recognized exculpatory defenses[48] addresses particular forces that preclude or frustrate the exercise of free will, they are all variations of the same basic theme: "I

38. Kadish & Paulsen, *supra* note 17, at 542-55.

39. *See* Fletcher, *supra* note 18, at 798-99.

40. Kadish & Paulsen, *supra* note 17, at 561-76.

41. *See, e.g.*, H.L.A. Hart, Punishment and Responsibility 35-40 (1968); Fletcher, *supra* note 18, at 798-817; Packer, *supra* note 1, at 108-13; Gross, *supra* note 19, at 317-23; Kadish & Paulsen, *supra* note 17, at 72-73, 669. *See also* the five general purposes stated in the definition of offenses in the Model Penal Code: "to safeguard conduct that is without fault from condemnation as criminal." Model Penal Code § 1.02(1)(c) (Proposed Official Draft 1962).

42. *See* Hart, *supra* note 41, at 35-40.

43. *See, e.g.*, LaFave & Scott, *supra* note 20, at 337-41; Perkins & Boyce, *supra* note 33, at 993-95.

44. *See, e.g.*, LaFave & Scott, *supra* note 20, at 381-88; Perkins & Boyce, *supra* note 33, at 1065-67.

45. *See, e.g.*, LaFave & Scott, *supra* note 20, at 374-81; Perkins & Boyce, *supra* note 33, at 1077-79.

46. *See, e.g.*, LaFave & Scott, *supra* note 20, at 268-95; Perkins & Boyce, *supra* note 33, at 950-95.

47. *See, e.g.*, LaFave & Scott, *supra* note 20, at 356-69; Perkins & Boyce, *supra* note 33, at 1044-50.

48. Part III of this article examines existing criminal defenses and their capacity to accommodate RSB factors in greater detail.

couldn't help myself."[49]

Where a person "could not help him or herself"—where the choice whether to act unlawfully is eliminated or greatly diminished—there is no culpability.[50] To be culpable, the criminal must be the voluntary source of the harm. A criminal act that is external to and dissociated from the individual tells us nothing about the individual's character;[51] in Aristotle's words, were it not for such externalities, the actor "would not choose any such act in itself."[52] Because the act cannot be attributed to the defendant, there is no basis for imposing criminal sanctions: retributionist aims would not be furthered,[53] no deterrent effect is likely,[54] and the only goals that may be furthered by punishing the defendant—restraint and rehabilitation—would rarely, if ever, call for the stigmatic sanctions of the criminal law.[55] Voluntary choice is central to culpability. The voluntary choice model, as formulated by Hart, is widely accepted as the principle of justice limiting imposition of punishment.[56]

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49. *See* Gross, *supra* note 19, at 137. *See, e.g.*, Sanford Kadish, A. Schulhofer & M. Paulsen, Criminal Law and Its Processes, Cases and Materials 249-50 (4th ed. 1983); Hart, *supra* note 41, at 38-39.

50. *See also* Fletcher, *supra* note 18, at 454-514.

51. *See* George Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269, 1271 (1974); Gross, *supra* note 9, at 1003-04.

Of course, the individual's character itself may be the product of social deprivation. If this is so, should an individual be criminally liable for expressing criminal character when that character is beyond his or her control and when society could have created conditions in which non-criminal character was possible by eradicating poverty and social deprivation? *See infra* notes 365-374, 417-421 and accompanying text.

52. Aristotle, Ethica Nicomachea 1110a (W.D. Ross trans. 1925); *discussed in* Fletcher, *supra* note 18, at 803.

53. Retributivist aims might be furthered if the criminal with an RSB is guilty since, in one type of retributivist theory, punishing the guilty is necessary to restore "the moral balance disturbed by [the] crime." Gertrude Ezorsky, The Ethics of Punishment, in Philosophical Perspectives on Punishment xvii (Gertrude Ezorsky, ed. 1972). *See generally infra* notes 380-397 and accompanying text. However, the point is that because his or her action is largely a product of RSB, he or she is not guilty, as the action was not voluntary and guilt cannot be assigned to an involuntary actor.

54. Special deterrence is unlikely where the act is involuntary. *General* deterrence—of similar crimes by others—could occur. Yet, punishment of the innocent to deter others is morally offensive, *see infra* text accompanying notes 402-410, and has been condemned by most writers, *id*.

55. In Hart's words:

> [W]e should restrict even punishment designed as "preventive" to those who at the time of their offense had the capacity and a fair opportunity or chance to obey the law: and we should do this out of considerations of fairness and justice to those whom we punish. This is an intelligible ideal of justice to the individual.

Hart, *supra* note 18, at 1328.

56. *See* authorities cited *supra* note 41.

3. Exculpatory choice-based analysis and the RSB defendant.

At least one commentator has applied choice-based analysis, similar to Hart's, to RSB defendants and squarely rejected any degree of exculpation.[57] The child who is brought up in a ghetto and later becomes a criminal is accountable because the child "allowed himself to be shaped by his environment."[58] Other commentators, although sympathetic to the idea of exculpation, reject an RSB defense because it would be too difficult to apply and limit.[59] For these scholars, nothing theoretically prevents recognition of a defense of environmental deprivation. If the practical hurdles (such as the "slippery slope" and problems of proof) can be overcome, "perhaps . . . the law will take a culturally differential as well as a physiologically differential view of volitional impairment."[60] In one passage, Hart appears to take this view.[61] A small minority of scholars support an RSB defense with less reservation.[62]

Later sections of this article apply choice-based and nonexculpatory defense-based analyses to the RSB defendant. First, however, I will review two scholarly debates that have, more

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57. *See* Branden, *supra* note 9.

58. *Id.* at 278. Fletcher argues that allowing RSB as an excuse is inconsistent with society's concern for its own preservation. Fletcher, *supra* note 18, at 802.

59. *See, e.g.*, Morris, *supra* note 6, at 520; Packer, *supra* note 1, at 133.

60. *See* Packer, *supra* note 1, at 133.

61. Hart, *supra* note 41, at 51.

62. Morris, *supra* note 6, at 520. Philosopher John Hospers once held the view that most criminals do not act freely. He describes an incident in which a woman refused to do what was necessary to save the life of her child until it was too late. He then concludes:

> Was she responsible for her deed? In ordinary life, after making a mistake, we say, "Chalk it up to experience." Here we could say, "Chalk it up to neurosis." She could not help it if her neurosis forced her to act this way—she didn't even know what was going on behind the scenes, her conscious self merely acted out its assigned part. This is far more true than is generally realized: criminal actions in general are not actions for which their agents are responsible; the agents are passive, not active—they are victims of neurotic conflict. Their very hypoactivity is unconsciously determined.

Quoted in Leiser, *supra* note 17, at 220. If Hospers was correct, preventive detention, not blame-imposing punishment, should be the law's emphasis; criminals should be treated as sick rather than culpable. Of course, this conclusion conflicts with deeply rooted values within our liberal society, such as limited government intervention into individual's lives and general values of freedom and self-regulation of the individual.

Before the empirical basis of the RSB defense can be demonstrated, one must have a model clarifying what "causality" means in the social and psychological sciences. For classic discussions of the nature of sociological and psychological explanation see John S. Mill, A System of Logic (1965); Ernest Nagel, The Structure of Science 447-546 (1979); and Carl Hempel, Aspects of Scientific Explanation (1974).

or less directly, explored issues of environmental determination and their implications for criminal law.

B. The RSB Debate

In an earlier article, I argued that a defense should be available to those whose criminal conduct was induced by coercive thought-reform techniques.[63] I justified this result on both theoretical and practical grounds: neither the pragmatic aims of punishment nor notions of just distribution of punishment are fulfilled by holding the coercively persuaded defendant criminally liable. I characterized such a defendant's lack of blameworthiness in the concept, "transferred or superimposed mens rea—criminal intent that is not the actor's own."[64] Transferred mens rea incorporates the notion that the coercively persuaded defendant's choice to act criminally is not truly his or her own but is more properly attributed to the indoctrinators.[65] I contended that the scope and criteria of the defense could be delineated since the defense is based on egregious conduct which is externally manifested. In a reply article,[66] Professor Joshua Dressler described some theoretical and practical difficulties which he maintains would accompany recognition of a brainwashing defense. Dressler charged that the proposed defense lacks the narrowly circumscribed and distinct quality of currently recognized excuses to criminal liability. According to Dressler, "[t]he law has allowed only those defenses that fall within specific, reasonably identifiable categories in which choice is obviously substantially limited."[67] Moreover, if choice and moral blame were found lacking in a coercively persuaded defendant, they could be found lacking in virtually anyone.[68] In particular, a deprived environment "[m]ight demonstrate that a ghetto inhabitant's choice in committing a criminal act was also substantially reduced. . . ."[69] Although we disagree on much, Dressler and I agree on this latter proposition.[70]

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63. Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 Minn. L. Rev. 1 (1978). The exchange between Professor Dressler and the author is discussed in 2 Paul Robinson, Criminal Law Defenses § 1962(b), at 439-44 (1984).

64. Robinson, *supra* note 63, at 11.

65. *Id.*

66. Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 Minn. L. Rev. 335 (1979).

67. *Id.* at 355.

68. *Id.* at 358.

69. *Id.* at 358.

70. Richard Delgado, *A Response to Professor Dressler*, 63 Minn. L. Rev. 361, 365 (1979) [hereinafter cited as *Response*].

Professor Dressler suggests two ways of avoiding the injustice resulting from treating morally similar claims unequally: "[e]ither reaffirm current law, which is strict but clear, or enlarge the coercive persuasion defense to include within its possible reach the full panoply of environmental influences."[71] Although Professor Dressler might prefer the former route,[72] others defend the position that environment must be accounted for in assessing criminal responsibility and accountability.

Judge Bazelon first raised the possibility that extreme poverty might give rise to an RSB defense in *United States v. Alexander*,[73] a 1973 opinion by the D.C. Circuit Court of Appeals. In *Alexander*, one of the defendants shot and killed a marine in a tavern after the marine called him a "black bastard."[74] The defense attempted to show that the youth's action stemmed from an irresistible impulse to shoot, which they, in turn, traced to an emotionally and economically deprived childhood in Watts, California. The defendant reported that when he was young, his father deserted the family and the boy grew up with little money or attention. He was subjected to racist treatment and learned to fear and hate white persons.[75]

A psychiatrist testified that the defendant suffered from impaired behavior controls rooted in his "rotten social background."[76] The psychiatrist refused to label the defendant insane, however.[77] The trial judge instructed the jury to disregard the testimony about the defendant's deprived background and to consider only whether or not his mental condition met the legal standard of insanity.[78] The jury found him sane and the defendant was sentenced to twenty years to life.[79]

The court of appeals affirmed.[80] In a lengthy, troubled opinion that concurred in part and dissented in part, Judge Bazelon laid out his early thoughts on the RSB defense. For Bazelon, the trial judge erred in instructing the jury to disregard the testimony about defendant's social and economic background. That testimony might well have persuaded the jury that the defendant's be-

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71. Dressler, *supra* note 66, at 359.

72. *But see id.* at 337 n.15, where Dressler admits to being a philosophical determinist and intimates he might prefer the "path of revolutionizing the law."

73. 471 F.2d 923, 957-65 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).

74. *Id.* at 957 (Bazelon, C.J., concurring in part, dissenting in part).

75. *Id.* at 958-59.

76. *Id.* at 959.

77. *Id.* at 958.

78. *Id.* at 958-59.

79. *Id.* at 927.

80. *Id.* at 926.

havioral controls were so impaired as to require acquittal, even though that impairment might not render him clinically insane.[81] Apart from this, exposure to the testimony would benefit society. As a result of learning about the wretched conditions in which some of its members live, society would presumably decide to do something about them.[82]

Nevertheless, Bazelon was not prepared to abandon all the trappings of the "disease" model.[83] Among other things, that model provides a rationale for detaining dangerous persons following acquittal. Bazelon reviewed other possible dispositions for the RSB defendant—outright release, preventive detention, and psychological reprogramming—finding each unacceptable.[84] According to Bazelon, the ultimate solution to the problem of violent crime in our society is some form of income redistribution coupled with other social reform measures.[85] The current narrow insanity test conceals the need for such reform and thus should be broadened,[86] although disposition of offenders not "sick" in any classic sense remained a problem for Bazelon.

Judge Bazelon further developed his views on an RSB defense in his Hoover lecture[87] and in a reply article.[88] In his Hoover address, Bazelon declared that "law's aims must be achieved by a moral process cognizant of the realities of social injustice."[89] Persons must obey the law not out of fear, but because they personally believe its commands to be just.[90] Punishment is justified

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81. *Id.* at 961.

82. *Id.* at 965. Some may contend that there are better forums for educating the public about the effect of RSB than the courtroom. Television, film, and newspapers reach a wider public. Moreover, the courts should be free to carry on judicial business, not public education. Nevertheless, a person deserves his or her day in court and with it the right to tell his or her story as he or she sees it. Educating the public is not the *primary* goal of an RSB defense, nor should it be. In the context of an actual trial, however, the lesson society learns and its determination to alter the social conditions which breed crime are uniquely and conspicuously urgent.

83. *Id.* at 961. The disease model palliates criminal responsibility when the defendant is sick, rather than bad or weak.

84. *Id.* at 962-63.

85. *Id.* at 965. This does not mean that an RSB defense is misplaced, that crime should not be treated as crime and eradicating poverty should be tackled politically. If poverty causes some to commit crimes, then whether they should be held accountable remains a question of *justice* regardless of whether eradicating poverty is politically the most effective way to eliminate crime.

86. *Id.*

87. David Bazelon, *The Morality of the Criminal Law*, 49 S. Cal. L. Rev. 385 (1976).

88. David Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. Cal. L. Rev. 1269 (1976).

89. *See* Bazelon, *supra* note 87, at 386.

90. *Id.* at 387.

only when inflicted on persons whose actions are morally condemnable.[91] This, in turn, requires that society's conduct in relation to the defendant entitle it to sit in condemnation,[92] and that the defendant's mental, emotional, and behavioral controls were intact at the time of the crime.[93] Citing the example of the defendant in *United States v. Alexander*, Bazelon urged that when these two conditions are not met, society is not entitled to inflict punishment.[94]

In a response to Judge Bazelon[95] and a short rejoinder,[96] Professor Stephen Morse argued against Judge Bazelon's position. For Morse, all environments affect choice, making some choices easy and others hard.[97] Rarely, however, will environmental adversity completely eliminate a person's power of choice.[98] Poor persons are free to choose or not choose to commit crimes, and the criminal law may justifiably punish them when they give in to temptation and break the law.[99] Although he conceded a statistical correlation between poverty and crime, Morse denied that poverty causes crime.[100] He pointed out that some poor persons are law-abiding, while some wealthy persons break the law,[101] and that economic improvements often result in more, not less, crime.[102] Moreover, Bazelon's social-welfare suggestions would be impractical because there is not enough money to eradicate all poverty; giving money to the poor would entail higher taxation, thus endangering such goals as free accumulation and disposition of wealth; and though eradicating poverty may eliminate some crime, it is a wasteful way to do it.[103] Consequently, Bazelon's broadened inquiry into culpability could exonerate dangerous criminals without generating socially useful knowledge or experience. Indeed, Bazelon's defense skirts paternalism. When an individual has freely broken the law, respect for that individual's personhood *demands* punishment; any other treatment demeans

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91. *Id*. at 385.
92. *Id*.
93. *Id*. at 388, 392, 396.
94. *Id*. at 389.
95. Stephen Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. Cal. L. Rev. 1247 (1976).
96. Stephen Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. Cal. L. Rev. 1275 (1976).
97. *See* Morse, *supra* note 95, at 1252.
98. *Id*. at 1249, 1251.
99. *Id*.
100. *Id*. at 1259.
101. *Id*. at 1259, 1261.
102. *Id*. at 1259.
103. *Id*. at 1263.

the defendant, and treats him or her as something less than an autonomous individual.[104]

The Bazelon-Morse debate thus raises, but does not answer, a number of key questions concerning a "rotten social background" defense. Does economic and cultural disadvantage impair controls or otherwise cause crime, and if so, how? If severe impairment can be shown in a particular case, what effect should this have on criminal responsibility? What should be done with the successful RSB defendant? The remainder of this article explores these and related questions.

II. Social Science and the RSB Defendant

A number of approaches attempt to explain crime and delinquency. Some focus on relatively broad environmental and social influences. Others are concerned with physical factors operating at an individual level. Common to all approaches is the idea that pressures often beyond the actor's control may increase the difficulty of conforming to social rules and behavioral expectations, sometimes to the point of impossibility.

A. Social and Institutional Criminogenesis

One of the most widely accepted theories of criminogenesis, that of Robert Merton, Richard Cloward and Lloyd Ohlin,[105] posits that criminal behavior is based on frustration-aggression. Our affluent society builds expectations among its members, especially through media images of consumption. At the same time, our egalitarian system raises hope that all may achieve success. The economic structure, however, allows only some to succeed while

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104. *Id.*

105. *See generally* Robert Merton, Social Theory and Social Structure (1957); Richard Cloward & Lloyd Ohlin, Delinquency and Opportunity: A Theory of Delinquent Gangs (1960). In addition to the social scientific and medical writings on RSB reviewed in this section, there is a vast body of first-person literature on what it is like to live in a ghetto or other RSB. Work by men in this body of writing include: Claude Brown, Manchild in the Promised Land (1965); Eldridge Cleaver, Soul on Ice (1968); Soul on Fire (1978); Piri Thomas, Down These Mean Streets (1967); Ralph Ellison, Invisible Man (1947); Chester Hines, The Quality of Hurt, The Autobiography of Chester Hines (1972); Paul Jacobs, Prelude to Riot, A View of Urban America from the Bottom (1967); The Autogiography of Malcolm X (A. Haley ed. 1964). Writing by women calls attention to the experience of similar injustices and frustrations caused by RSB and the added burden of gender-based oppression. *See, e.g.*, Toni Morrison, The Bluest Eye (1972); Ntozake Shange, For Colored Girls Who Have Considered Suicide When the Rainbow is Enuf (1977); Maxine Hong Kingston, The Woman Warrior (1977); This Bridge Called My Back: Writings by Radical Women of Color (Cherrie Moraga & Gloria Anzaldua eds. 1981).

most must remain in the lower strata.[106] For some, economic frustration is compounded by racial and sexual discrimination. The pent-up anger that results often spills over into violence and aggression.[107]

This section reviews a number of major sources of frustration-aggression, including poverty, unemployment, inadequate living conditions, poor schools, a climate of violence, inadequate family structure, and racism.[108] Section B examines criminogenesis from a physical and physiological viewpoint.

1. Poverty.

Significant relationships between poverty and crime rates are well documented. Studies have found a positive correlation between criminality and such variables as 1) income below the level required to purchase a minimum healthy lifestyle;[109] 2) receipt of Aid to Families with Dependent Children;[110] 3) income below one-

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106. *See* Merton, *supra* note 105; Cloward & Ohlin, *supra* note 105. Kenneth Clark describes the resulting frustration:

> Those who are required to live in congested and rat-infested homes are aware that others are not so dehumanized. Young people in the ghetto are aware that other young people have been taught to read, that they have been prepared for college, and can compete successfully for white-collar, managerial and executive jobs. Whatever accommodations they themselves must make to the negative realities which dominate their own lives, they know consciously or unconsciously that their fate is not the common fate of mankind. . . .The discrepancy between the reality and the dream burns into their consciousness.

Dark Ghetto, Dilemmas of Social Power 12 (1965).

107. Leonard Berkowitz, *The Study of Urban Violence: Some Implications of Laboratory Studies of Frustration and Aggression*, in Black Psyche 238 (S. Guterman ed. 1972); Moyer, *A Physiological Model of Aggression: Does It Have Different Implications?* in Neural Bases of Violence and Aggression 161 (W. Fields & W. Sweet eds. 1975). *See generally* J. Mark & F. Ervin, Violence and the Brain (1970); J. Delgado, Physical Control of the Mind: Toward a Psychocivilized Society (1969); Kenneth E. Moyer, The Physiology of Hostility 70 (1971); Richard Delgado, *Organically Induced Behavioral Change in Correctional Institutions: Release Decisions and the "New Man" Phenomenon*, 50 S. Cal. L. Rev. 213, 219-23 (1977), and sources cited therein [hereinafter cited as *New Man*].

108. The racism with which this part of the article, and particularly subsection 3, is concerned is racism directed against Blacks. The experience of other racial and ethnic minorities, such as Indians, Hispanics and Asians is historically distinct, although much of the analysis in this section applies to parts of their experience as well.

109. *See, e.g.*, James DeFronzo, *Economic Assistance To Impoverished Americans*, 21 J. Criminology 119-36 (1983); Judith Blau & Peter Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 Am. Soc. Rev. 114-29 (1982). *But cf.* Messner, Poverty, Inequality and Homicide Rate: Evidence From a Sample of SMSAs, presented at the 1981 Annual Meeting of the American Sociologists Association, Toronto, *discussed in* DeFronzo, *supra*, at 121.

110. DeFronzo, *supra* note 109, at 124.

half the median family income;[111] 4) a poverty composite composed of state infant mortality rates, percentage of persons twenty-five or older with fewer than five years of education, percentage of the population that is illiterate, percentage of families with incomes under $10,000, percentage of Armed Forces Mental Test failures, and percentage of children living with one parent.[112] These studies defined crime as either homicide only[113] or included rape, aggravated assault, robbery and other offenses as well.[114]

Although these statistics indicate only correlation, not causation, a report issued by the National Advisory Commission on Civil Disorders found that inner-city violence, at least, was a direct response to poverty, frustration, and neglect.[115] The Commission warned that unless measures were undertaken to give those in the ghetto a chance to participate in mainstream society, a permanent Black underclass would remain a continual source of violent street crime. More than fifteen years later, the Black underclass remains. Over fifteen percent of our population and thirty-nine percent of Blacks live in poverty, the highest level since 1965.[116] For many, poverty is a vicious cycle over which they have little control.[117]

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111. Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. Pol. Econ. 521-65 (1973).

112. Loftin & Hill, *Regional Subculture and Homicide: An Examination of the Gastil-Hackney Theme*, 39 Am. Soc. Rev. 714-24 (1974); Robert N. Parker & M. Dwayne Smith, *Deterrence, Poverty and Type of Homicide*, 85 Am. J. Soc. 614-24 (1979).

113. Loftin & Hill, *supra* note 112, at 715, 720; Parker & Smith, *supra* note 112, at 616.

114. Blau & Blau, *supra* note 109, at 115; DeFronzo, *supra* note 109, at 120-22; Ehrlich, *supra* note 111, at 527.

115. Report of the National Advisory Commission on Civil Disorders 6, 10 (1968) [hereinafter cited as Kerner Commission Report]. A 1985 Eisenhower Foundation report found no change. *Street Crime in U.S. Called 'Astronomical'*, San Francisco Chron., Mar. 4, 1985, at 7, col. 2 [hereinafter cited as Eisenhower Foundation]. *See also* Wolfgang, *Delinquency and Violence from the Viewpoint of Criminology*, in Neural Bases of Violence and Aggression 477, *supra* note 107, at 477 (the poor live in a less healthy environment than the well-to-do and hence are more likely to be exposed to factors that increase physiologically based criminogenesis); *Economic Woes May Harm Health Later*, Sci. News, July 7, 1984, at 7 (reporting congressional study of social, health effects of economic recessions). For a summary of studies of the relationship between poverty and crime, see P. Tappan, Crime, Justice, and Correction (1960).

116. *U.S. Poverty by the Numbers*, Newsweek, Aug. 15, 1983, at 17. *See* D. Glasgow, The Black Underclass: Poverty, Unemployment and Entrapment of Ghetto Youth (1976); Gisela Bolle & Thomas McCarroll, *Teenage Orphans of the Job Boom*, Time, May 13, 1985, at 46; *Setbacks for Black Children Reported in New U.S. Study*, San Francisco Chron., June 4, 1985, at 14, col. 4 [hereinafter cited as *Setbacks*].

117. Under the best of circumstances, breaking the cycle can take a family three generations to accomplish. Kerner Commission Report, *supra* note 115, at 15-16. *See also Gallup Poll: Whites More Satisfied with Their Lives*, San Francisco

2. Chronic unemployment.

Chronic unemployment guarantees a life of poverty and introduces additional tensions of its own. Nationwide, unemployment has hovered between about seven and ten percent in recent years. The unemployment rate for Blacks is twenty percent and the rate for Black teenagers a remarkable 48.2 percent. This rate does not include those who have given up looking for jobs because of failure and discouragement.[118]

The Kerner Commission found a long-term pattern of Black unemployment largely unaffected by cyclical upswings of our economy.[119] The unemployed remain unemployed; if they do find work it is in low-level, dead-end jobs that provide neither adequate economic rewards nor the emotional satisfaction of meaningful work.[120] Nor is the situation likely to improve soon. Shrinking domestic markets, technological streamlining of production processes, relocation of jobs away from the inner city, and a growing reliance on overseas labor for domestic goods mean that unemployment among the unskilled, inner-city sector is likely to remain high.[121]

The federal government has done little to remedy chronic inner-city unemployment. The present federal job creation programs emphasize high-skilled workers over the hard-core unemployed,[122] and the number of jobs created can provide work for only a fraction of the unemployed.[123] Few inner-city youths are connected to any personal or institutional networks that might help them enter the job market.[124]

Unemployment ensures that the victim of RSB remains in a

Chron., Feb. 8, 1985, at 21, col. 1 (poll showed large differences in satisfaction between whites and Blacks, attributable in large part to differences in economic opportunity and status); Bolle & McCarroll, *supra* note 116, at 46-47.

118. The State of Black America 51 (J. Williams ed. 1981) [hereinafter cited as State of Black America]. *See* Bolle & McCarroll, *supra* note 116.

119. Kerner Commission Report, *supra* note 115, at ch. VII. *See also* State of Black America, *supra* note 118, at 50-55; Bolle & McCarroll, *supra* note 116.

120. Lyn Curtis, Violence, Race and Culture (1975); President's Commission for a National Agenda for the 80's, Urban America in the 80's 18 (1980) [hereinafter cited as Urban America in the 80's].

121. Glasgow, *supra* note 116, at ix; Urban America in the 80's, *supra* note 120, at 24, 58; Phillips, Urban Underemployment and the Spatial Separation of Jobs and Resources 8 (1977); Bolle & McCarroll, *supra* note 116.

122. Urban Institute, Changing Domestic Priorities Project: The Reagan Experiment (1982); Katz, *War on the Poor*, in Reaganomics: The New Federalism 99 (Carl Lowe ed. 1984); *Unemployment on the Rise*, Time, Feb. 8, 1982, at 24.

123. Newsday, Feb. 13, 1983, at 2; Bolle & McCarroll, *supra* note 116 (current Administration proposes to eliminate Job Corps, $600 million per year program aimed at helping unemployed).

124. Bolle & McCarroll, *supra* note 116, at 47. *See Setbacks*, *supra* note 116.

trouble-filled environment, with its daily temptations and assaults on dignity.[125] When he or she compares his or her lot in life with that of the affluent, frustration and resentment are predictable responses.[126]

3. Substandard living conditions.

In impoverished neighborhoods, overcrowded housing creates an atmosphere rife with potential violence.[127] It has been shown that overcrowding in conjunction with substandard living conditions generates delinquency.[128] When an individual lives in a crowded household as well as a crowded neighborhood, he or she lives under more or less continual stress.[129] Every individual wants a place in which he or she can restore himself or herself. The inner-city home serves this purpose inadequately. A study of working-class Blacks in the ghettoes of Chicago found that the workers could not sleep at night due to a lack of space for beds. Crowded quarters increased family friction and workers were unable to decrease their job-related stress when they went home.[130] One consistent effect of household crowding was increased use of

125. *See infra* notes 127-166 and accompanying text; Bolle & McCarroll, *supra* note 116 (young persons "drifting into a netherworld of unemployment, welfare and crime from which they will not escape").

126. *See* sources cited *supra* note 106. *See also* Hines, *supra* note 105, at 57.

127. The Kerner Commission, for example, pointed to "crowded ghetto living conditions, worsened by summer heat" as a cause of civil disorders in the 1960s. Kerner Commission Report, *supra* note 115, at 325. One author states "Congestion is what it might be called . . . human congestion . . . bodies stacked floor upon floor, children swathed in piss-stenched blankets, nibbled at by wandering rats, people stretched out layer by layer a bittersweet cake, overpowering to the taste." O. Hawkins, Ghetto Sketches 9 (1972). *See infra* note 170 (neurologically-based hyperaggressivity as a result of overcrowding).

128. *See, e.g.*, Lawrence, *Science and Sentiment: Overview of Research on Crowding and Human Behavior*, in Urban Problems: Psychological Inquiries 525 (N. Kalt & S. Zalkind eds. 1976); R. Baron, Human Aggression 135-40 (1977) (reporting studies on effects of crowding in prisons). *See also* Thornberry & Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 Hast. L.J. 313 (1983).

129. A. Booth, Urban Crowding and Its Consequences 13 (1976); Baron, *supra* note 128, at 135-40. *See also* Jacob, *supra* note 105, at 128: "The housing projects were the places I liked least because a feeling of tenseness hangs over them, a feeling that someday soon the buildings will burst apart, spilling their human contents into the streets in a boiling, screaming mass"; *"The Thermostat Stuck at Hot": A Psychoanalyst Studies the Problem of Anger in Urban Life*, Time, Dec. 24, 1984, at 62 [hereinafter cited as *Thermostat Stuck at Hot*].

130. C. Carlestom, Urban Conglomerates As Psychosocial Human Stresses 33 (1972). Of course, the unemployed, homemakers, and others who spend most of their days in the home do not see home as a "haven" but as their workplace. For them, the defects noted in this section are even more devastating than they are for those who work outside the home, as they are suffered more or less constantly.

physical punishment by parents.[131] Additional problems included childrens' inability to do homework and loss of parental control as children were encouraged to spend their time elsewhere.[132]

4. Inadequate schools.

The educational system has traditionally served as the institution which prepares children to assume their roles in society. For a variety of reasons, the inner-city school has not fulfilled this purpose for the majority of students.[133] Part of this reason is money; a National Urban League study found that minority children attending schools in large urban areas receive substandard educational programs because of inadequate funding.[134] Moreover, destructive teacher-pupil interaction patterns often develop, blunting the children's aspirations and conditioning them to fail.[135] Studies found that inner-city teachers harbored low expectations of their students,[136] placed disproportionate emphasis on order and control,[137] mistook nonstandard speech patterns for lack of intelli-

131. Booth, *supra* note 129, at 81.

132. Carlestom, *supra* note 130, at 33.

133. *Setbacks*, *supra* note 116 (Childrens' Defense Fund report showed 36% of Black high school graduates attended college in 1982; in 1977, the figure was 50%); The Urban Predicament 267 (W. Borbub & N. Glazer eds. 1970). In cities and urban areas where the poor and minorities are concentrated, public school academic achievement is many years below the national average. *See, e.g.*, Watson, *Education: A Matter of Grave Concern*, in State of Black America, *supra* note 118, at 66. *See also* Kerner Commission Report, *supra* note 115, at 424-56. As reported by the National Urban League, these schools graduate young people who "are unable to read, write or perform mathematical functions at the sixth or eighth grade level. Many are unable to perform simple everyday tasks such as completing an application for employment. . . ." Watson, *supra*, at 68. *See also* Ogbu, *Cultural Discrimination and Schooling*, 13 Anthropological Educ. Q. 290, 304 (some minority cultures in opposition to dominant culture, impeding acquisition of norms and values of majority cultures).

134. State of Black America, *supra* note 118, at 67.

135. Glasgow, *supra* note 116, at 56, 57; Goff, *Some Educational Implications of the Influence of Rejection on Aspiration Levels of Minority Group Children*, in The Psychological Consequences of Being a Black American 36 (R. Wilcox ed. 1971). *See also* Press, *Signs of decline in black college enrollment, studies show*, San Francisco Examiner, June 9, 1985, at A8, col. 1 (Black college enrollment dropping; families abandoning ideal of sending children to college or university).

136. Cole & Brurer, *Cultural Difference and Inferences About Psychological Processes*, in Urban Problems: Psychological Inquiries, *supra* note 128, at 25; Rubovits & Muehr, *Pygmalion Black and White*, in *id.* at 41. *See* Ogbu, *supra* note 133, at 303 (showing importance of cultural expectations by comparing performance of Japanese outcasts ("Buraku") who perform poorly in Japanese schools but well in United States after emigrating here).

137. Rollins, Howard, McCandles, Boyd, Thompson, Marian, Brassel & William, *Project Success Environment: An Extended Application of Contingency Management of Inner-city Schools*, in Urban Problems: Psychological Inquiries, *supra* note 128, at 246.

The school system in every large American city has its own "down-

gence,[138] and confused listlessness resulting from hunger or inadequate sleep with apathy. School failure is highly correlated with crime; the worse a child does in school, the more likely he or she is to commit delinquent acts and to be picked up by the police.[139]

5. Treatment by the police.

Most ghetto dwellers can expect to experience some confrontation by police at least once in their lives.[140] The large number of unemployed who have no recourse but to congregate visibly on the streets is only one of many problems between urban police and the poor. Police officers are usually recruited from the undereducated and politically conservative ranks of society.[141] The department's value system and socialization by older officers often reinforce class and racial bias.[142]

Statistics bear out overt discrimination by police officers. For example, in New York City, Blacks are disproportionately represented among police shooting casualties. Whites, comprising 64.1 percent of the population, are victims in 17.5 percent of police

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town." And in every American city "downtown" has succeeded in wiping out school children's natural curiosity, substituting trivia for education. The school official who came to hear what I was telling the students had wasted his time, for one essential to education, the notion of dialogue, was completely missing.

See also M. Suelzle & M. Katz, *The Manufacture of Social Incompetence in a Young Black Child*, 18 Integrated Educ. 65 and n.5-6.

138. Cole & Brurer, *supra* note 136, at 25. *See* Stevens, *Black and Standard English Held Diverging More*, N.Y. Times, Mar. 15, 1985, at 10, col. 4 (Black vernacular not becoming standardized, but is diverging from standard English, reflecting "increasing racial segregation and isolation of urban blacks" according to University of Pennsylvania study). *But see* Ogbu, *supra* note 133, at 302-03 (some minorities have a "caste" system of their own). *See generally* UNESCO, The Use of the Vernacular Languages in Education (1978).

139. Hirschi, The Cause of Delinquency 115 (1969). *See* sources cited *supra* note 138.

140. Glasgow, *supra* note 116, at 144. These figures evidently do not include minor traffic offenses. Police protection functions poorly for other groups as well. Battered women, for example, often have difficulty getting police to respond to or take their assault complaints seriously. *See, e.g.*, Maria Pastoor, *Police Training and the Effectiveness of Minnesota "Domestic Abuse" Laws*, 2 Law & Inequality 557, 559-75 (1984). *See generally* Marjory Fields, *Wife-Beating: Government Intervention, Policies and Practices*, in Battered Women: Issues of Public Policy, U.S. Comm'n on Civil Rights (1978).

141. J.Q. Wilson, Varieties of Police Behavior 152-53 (1968); Robert Woodson, Black Perspectives on Crime and the Criminal Justice System 85 (1977). *See* Meldelsohn, *Police Community Relations: A Need in Search of Police Support*, in Urban Problems: Psychological Inquiries, *supra* note 128, at 405.

142. Woodson, *supra* note 141, at 80. *See* Wilson, *supra* note 141, at 43-44, 152-53. *See also* Arthur Neiderhoffer, Behind the Shield: Police in Urban Society 52-65 (1967); P. Manning, *Violence and the Police*, 452 Annals 135, 137 (1980). *But see* M. Meyer, *Police Shooting at Minorities: The Case of Los Angeles*, in Violence and the Police, *supra*, at 108 (no racism in shootings).

shootings; Blacks, comprising only 20.5 percent of the population, are victims in 60.4 percent of shootings.[143] Blacks are more likely to be stopped, interrogated, or arrested than whites, and more likely to be convicted and sentenced to prison.[144] Disciplinary action is less often taken against officers guilty of brutality directed against Blacks.[145]

Discriminatory practices of police, like those of teachers, have self-fulfilling consequences:[146] "Blacks can never quite respect laws which have no respect for them. . . . [L]aws designed to protect white men are viewed as white men's law."[147] The stress of ghetto life is exacerbated by a police department that does not hesitate to use force and believes force is the only language the ghetto dweller understands.[148]

6. Development of an alternative value system.

Because of the lack of opportunity available to the inner-city poor, the rewards from crime often exceed those offered by work.[149] As a result, a parallel, underground economy based on drug dealing, pimping and prostitution, numbers running and gambling, welfare fraud, forgery, and property theft has developed. Law enforcement knows that "street crimes" are overwhelmingly committed by the unemployed and underemployed. From the

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143. James Fyfe, *Race and Extreme Police-Citizen Violence*, in 2 Race, Crime, and Criminal Justice 92 (R. McNeely & C. Pope eds. 1981). *See Police in N.Y. Are Cited for Racial Hostility*, Philadelphia Inquirer, Nov. 15, 1984, at 4A, col. 1 (House subcommittee investigation found police commented on and arrested Blacks for behavior they would overlook in whites) [hereinafter cited as *Racial Hostility*].

144. Mendez, *Crime: A Major Problem in Black America*, in State of Black America, *supra* note 118, at 220, 224; Piliavan & Briar, *Police Encounters With Juveniles*, in Urban Problems: Psychological Inquiries, *supra* note 128, at 54.

> Half of those arrested for violent crimes are under the age of 18. 50% of these juveniles who are arrested for violent crimes are black. A writer has recently described black youth as an endangered species and warned that an entire generation of black innercity youth could be lost to lawlessness, violence and unemployment. . . . The fact is that 1 million young blacks in 25 major cities form an underclass which simply has no future in America.

A.D. Calvin, *Unemployment & Crime Among Black Youth*, 27 Crime & Delinq. 234, 242 (1981). *See also Racial Hostility*, *supra* note 143.

145. Woodson, *supra* note 141, at 89. *See also Race of Victim a Factor in Deciding Death Penalty, Study Finds*, L.A. Times, Dec. 19, 1983, Pt. I, at 3, col. 1 (Blacks who kill whites given more severe penalties than whites or Blacks who killed Blacks). *Cf. Racial Hostility*, *supra* note 143.

146. Piliavan & Briar, *supra* note 144, at 59.

147. Black Rage, *supra* note 29, at 149.

148. Frantz Fanon, The Wretched of the Earth 33, 84 (1963); Piliavan & Briar, *supra* note 144, at 59.

149. Raymond Michalowski, *Crime Control in the 1980's: A Progressive Agenda*, 19 Crime and Soc. Just. 13 (Summer 1983); DeFronzo *supra* note 109.

early nineteenth century, when the Paris police anxiously followed the price of bread knowing that increases would be followed by increases in crime, to the present, crime and deprivation have remained linked.

Young persons exposed to this alternative economy come to accept it as normal. Delinquency, far from an isolated decision of a wayward individual, "has its roots in the dynamic life of the community."[150] Rather than see himself or herself as a wrongdoer or a misfit, "within the limits of his social world and in terms of its norms and expectations, . . . [the delinquent] may be a highly organized and well-adjusted person."[151]

Poor children see that most successful persons around them have attained their status as a result of crime. An ex-offender observed: "If it had been doctors and lawyers who drove up and parked in front of the bars in their catylacks, I'd be a doctor today. But it wasn't; it was the men who were into things, the pimps, the hustlers and numbers guys."[152]

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150. Shaw & McKay, *Social Disorganization*, in I Crime and Justice: The Criminal in Society 537, 540-41 (L. Radzinowicz & M. Wolfgang eds. 1971).

151. *Id.* at 539. Charles E. Silberman brings this hypothesis into the present. In Criminal Violence, Criminal Justice he outlines how inner cities have developed underground economies of their own to meet the needs of the underemployed. He cites an armed robber's perception that the ends for poor and middle-class people are the same, and only the means differ:

> I really think there's a lot of similarity between the people who live out in the middle class neighborhoods and the people I know. . . . Everybody wants to have their own joint, own their own home, and have two cars. It's just that we are going about it in a different way. I think keeping up with the Joneses is important everywhere.

Charles Silberman, Criminal Violence, Criminal Justice 87 (1978).

Drawing on sociologist Robert K. Merton's theory that American society inculcates success-oriented values in all sectors of American society, while providing the path to legitimate success only to some, Silberman argues that for those denied the opportunity to succeed legitimately, the subcultural or illegal economy provides an alternative route. "To youngsters growing up in lower-class neighborhoods, crime is available as an occupational choice, much as law, medicine, or business management is for adolescents raised in Palo Alto or Scarsdale." *Id.* at 89-90. Street gangs have complex organizations and functions. *See* Frederic Thrasher, The Gang (1927); William F. Whyte, Street Corner Society: The Social Structure of an Italian Slum (3d ed. 1943).

152. Silberman, *supra* note 151, at 90-92. According to Silberman, theft is not the isolated act of an individual, but part of a much larger system of illegal property distribution. There is also an extensive network of fences and an ever-present demand for the goods. For many poor persons, buying goods that are "hot" is the only way they can afford them. In much the same way, numbers running and gambling, pimping and prostitution, and drug dealing provide opportunities for success otherwise unavailable to the poor. The goods and services provided by this economy do not operate in a vacuum; rather, they meet needs and demands that already exist in the community. Black writer Yula Moses holds back none of her scorn for what she believes white society has done to Black people by allowing drug addiction to grow and flourish in the ghettoes:

The alternative culture not only legitimizes economic crime, but also crimes of violence. Social scientist Lyn Curtis sees inner-city violence as an alternative outlet for masculinity for Black males prevented from expressing it in socially acceptable ways, such as through work and sports.[153] In his tale of a young boy coming of age in Harlem, Claude Brown recounts:

> I was growing up now, and people were going to expect things from me. I would soon be expected to kill a nigger if he mistreated me, like Rock, Bubba Williams and Dewdrop had.
>
> Everybody knew these cats were killers. Nobody messed with them. If anybody messed with them or their family or friends, they had to kill them. I knew now that I had to keep up with these cats; if I didn't, I would lose my respect in the neighborhood. I had to keep my respect because I had to take care of Pimp and Carole and Margie. I was the big brother in the family. I couldn't be running and getting somebody after some cat who messed with me.[154]

Unfortunately, weapons are more readily available in this setting than are automobiles, the middle-class symbol of masculinity.[155] Because of the presence of weapons, insignificant altercations can easily escalate into assaults or homicides.[156] The importance of maintaining one's "cool" and never backing down is an integral part of the culture. Wolfgang theorizes that victim-precipitation homicide, not uncommon in all-Black killings, may be a form of suicide in a culture where actual suicide would be per-

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> Most black people do wrong because white men have burdened them down with wine and dope and toil and lying law and every kind of vain and vile thing that you can see on a TV screen. White men have much to answer for. . . .Walk in these streets and hear the vain filth on the lips of young men and women who might as well be dead. White men have done this crime and it is worse than slavery. If these young men and women wore chains they could see, then they could never love them. But white men have dug a pit for the body and the mind.

Yula Moses, Drylongso: A Self-Portrait of Black America 182 (J. Gwaltney ed. 1980).

153. Lynn, *supra* note 120, at 43; Merton, *supra* note 105. *See also* San Francisco Chron., May 6, 1985, at 1, col. 2 ("Bureau of Justice statistics found that one out of 22 Black males is a murder victim, a rate six times higher than that of the general population"); Autobiography of Malcom X, *supra* note 105, at 139:

> Looking back, I think I really was at least slightly out of my mind. I viewed narcotics as most people regard food. I wore my guns as today I wear my neckties. Deep down, I actually believed that after living as fully as humanly possible, one should then die violently. I expected then, as I still expect today, to die at any time.

154. Brown, Manchild in the Promised Land, *supra* note 105, at 121-22.

155. Curtis, *supra* note 120, at 33, 52.

156. *Id*. at 50. Berkowitz found that in an experiment, college students were more likely to attack their tormenters by administering electric shocks when weapons were present than when only neutral objects were available. Berkowitz, *supra* note 107, at 241.

ceived as "uncool."[157]

7. Inadequate homes.

The negative environment in which they live "makes it impossible for [RSB] parents to convey a sense of order, purpose and self-esteem to their children."[158] Although a parent may wish that his or her child someday escape the ghetto, he or she may not know how to aid the child in that quest.[159] Moreover, RSB parents are often frustrated and irritable themselves; irritated, frustrated parents frequently become neglectful and abusive.[160] Male children face additional problems. Many boys are raised in homes in which no father is present. According to Curtis, "[t]he little boy growing up without a father is said to eventually perceive that he has been erroneously identifying with the female head of household and accordingly overcompensates with extreme toughness."[161]

8. Racism.

Many of those who live in conditions like those described in this section are Black, and consequently face the added barrier of racism.[162] The discriminatory behavior by the police and school officials described above is just one part of the institutional racism confronting the Black ghetto dweller.[163] The Kerner Commission

157. Wolfgang, *supra* note 115, at 477. *See* Curtis, *supra* note 120, at 51.

158. Bazelon, *supra* note 87, at 403. *See* W. Healy & H. Brown, New Light on Delinquency and Its Treatment 122 (1936); *A Threat to the Future, Coming to Grips With the Crumbling Black Family*, Time, May 14, 1984, at 20.

159. *See* Daniel Hurley, *Arresting Delinquency*, Psychology Today, Mar. 1985, at 63, 65. Fifty-eight percent of Americans polled said that Blacks should not "push themselves where they are not wanted." Harper's, *supra* note 149, at 11.

160. Wolfgang, *supra* note 115, at 463; Don Irwin, *Most Family Violence Involves Poor, Study Says*, L.A. Times, Apr. 23, 1984, at 14, col. 1 (Justice Department's Bureau of Justice statistics); Hurley, *supra* note 159, at 65-66. It is difficult to blame parents who are themselves victims for helping to make victims of their children. A Black mother or father knows first hand the barriers that keep the ghetto dweller in the ghetto, and their parental behavior has been described as "a definite and deliberate, if unconscious, method of preparing a black boy for his subordinate place in the world." Black Rage, *supra* note 29, at 63.

161. *Setbacks*, *supra* note 116 (Childrens' Defense Fund study showed high rate of family break-up and children living with neither parent, in Black community); Curtis, *supra* note 120, at 33. *See also* Curtis, *Split Families Mean Trouble for Youths*, San Francisco Chron., Mar. 23, 1985, at 9, col. 5 (Stanford University study found that teenagers in split families had higher rates of deviance and crime than those in intact families); San Francisco Chron., *supra* note 153.

162. Racism has a long history in the United States. *E.g.*, C. Vann Woodward, The Strange Career of Jim Crow (1974); Dan Lacy, The White Use of Blacks in America (1972).

163. *See supra* notes 139-149 and accompanying text.

found a system of racially differential treatment ranging across every aspect of life, from housing to employment to education. The unemployment rate for Black college graduates, for example, is higher than that for white high school drop-outs.[164]

In addition to systematic exclusion, the poor, especially minority poor, are rejected and scorned by a society which still clings to myths attributing failure to individual shortcomings.[165] What Grier and Cobbs preceptively pointed out fifteen years ago in their classic book, *Black Rage*, holds true today:

> [T]he black boy in growing up encounters some strange impediments. . . . In time he comes to see that society has locked arms *against* him, that rather than help he can expect opposition to his development, and that he lives not in a benign community but in a society that views his growth with hostility.[166]

B. Physical Theories of Crime and Violence

1. Physiology of rage: stress and irritable aggression.

According to neurophysiologists who study violence and aggression, the brains of higher organisms contain overlapping sets of neural circuitry responsible for different types of aggression.[167] Abnormal or prolonged stimulation of any of the circuits can lead to its hyperdevelopment and a consequent increase in aggressive behavior.[168] Controlled studies with animals and humans support this model.[169] Organisms subjected to electric shocks, overcrowding, or other unpleasant stimuli fight, kill their young, and engage

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164. Baltimore Sun, Oct. 2, 1983, at 11, col. 1; Glasgow, *supra* note 116, at 10; San Francisco Chron., *supra* note 153.

165. Roberts, *Some Mental and Emotional Health Needs of Negro Children and Youth*, in The Psychological Consequences of Being a Black American 334 (W. Wilcox ed. 1971); McGraw, *'It Has Gone Underground': Housing Bias Remains Rampant in State, U.S.*, L.A. Times, May 3, 1984, Part 1, at 1, col. 3; *see* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 135-49 (1982). *See also* Hines, *supra* note 105, at 48:

> In addition I wanted to get away; I wanted to leave. . .all the United States of America and go somewhere I could escape the thought of my parents and my brother, somewhere black people weren't considered the [scum] of the earth. It took me 40 years to discover that such a place does not exist.

166. Grier & Cobbs, *supra* note 29, at 58-59. *See* Goodman, *'I Am Bewildered,' Kenneth B. Clark has watched the progress of desegregation since Brown v. Board of Education and he is not encouraged*, San Francisco Chron., This World, Feb. 17, 1985, at 12 (northern racism deeply entrenched; situation not improving).

167. *E.g.*, Moyer, *supra* note 107, at 26-29, 38-47. *See generally* sources cited *supra* note 107.

168. Moyer, *supra* note 107, at 172. *See also id.* at 161, 164-64, 179-80.

169. *See* studies cited in Moyer, *supra* note 107.

in other forms of aggressive behavior, and continue to do so even after the aversive stimuli cease. Humans subjected to stress and danger become irritable and aggressive.[170]

2. Malnutrition.

Among the poor, lack of economic resources limits both the quantity and the quality of food.[171] Experimental and empirical evidence supports the relationship between nutrition and aggressive behavior.[172] Poverty and improper eating habits limit nutritional intake, increasing the probability of aggression both by impairing the formation of proper neural connections and by increasing the stress, drive state and aversiveness associated with hunger and poor nutrition.[173]

Animal studies found that a reduced protein diet was linked to brain lesions and aggressive behavior.[174] This finding has implications for Black ghetto residents who commonly consume a high fat, low protein diet as a result of poverty or cultural patterns.[175] The effects of malnutrition are especially damaging for a school-age child. A controlled study of two groups of twenty-one Black

170. Moyer, *supra* note 107, at 161-65, 179-80 (citing studies on pain stress, hunger stress, sleep deprivation, and deprivation of reinforcement); Kenneth Moyer, *Kinds of Aggression and Their Physiological Bases*, in The Physiology of Hostility 46 (1971) (overcrowding); Delgado, *New Man*, *supra* note 107, at 220-21 and sources cited therein. *See also* Cleaver, Soul on Fire, *supra* note 105, at 52 (on moving to an overcrowded RSB neighborhood in California when he was 12): "Now the circle was complete. There was fighting at home, fighting in Gladys's house all around us, fighting up and down the street, and fighting at school"; Larry Stammer, *Vietnam Trauma: Bush Vets, Still Not Out of the Woods*, L.A. Times, May 6, 1984, at 1, col. 1; B. Bower, *Volcanic Ash Takes Stressful Toll*, Sci. News, Apr. 7, 1984, at 214, col. 2 (aggression and general adjustment problems in wake of volcanic explosion).

171. Tobias & Neziroglu, *Aggressive Behavior, Clinical Interfaces*, in Aggression and Violence: A Psychobiological and Clinical Approach 197 (L. Valzelli & L. Morgese eds. 1980) [hereinafter cited as Aggression and Violence]; *Once Again: Hunger Troubles America*, N.Y. Times, Jan. 2, 1983, § 6 (magazine), at 72.

172. Hellon, *Crime, Malnutrition, and Other Forms of Cerebral Trauma*, 4 J. Ortho. Psychiatry 259 (1975). *See* Weisburd, *Food for Mind and Mood*, Sci. News, Apr. 7, 1984, at 216 (reporting studies on connection between nutrition and behavior).

173. Tobias & Neziroglu, *supra* note 171, at 197; Benjamin Pasamanick, *A Child is Being Beaten: The Effects of Hunger*, 466 Vital Speeches, May 15, 1971.

174. Tobias & Neziroglu, *supra* note 171, at 197.

175. R. Williams, Textbook of Black Related Diseases 633 (1975). *See* LeRoi Jones [Imamu Amiri Baraka], *Soul Food*, in Home 101 (1966). The mean daily per capita intake of protein for Blacks is 69.37 grams, and for individuals below the poverty level is 68.69, while their white counterparts consume 77.13 grams. Vital and Health Statistics (U.S. Nat'l Center for Health Statistics, Series 11, No. 202, 1977). *See also On the Death of Poor Babies*, N.Y. Times, Mar. 19, 1985, at 30, col. 1 (U.S. infant mortality rate not declining; has remained at "disquieting" rate, according to ex-assistant secretary of HHS; editorial blames administration cuts in social services, especially nutritional grants for pregnant women).

children, each group belonging to the lowest economic stratum of unskilled laborers, was conducted to determine the effect of malnutrition on intellectual performance. The mean score of the undernourished group was well below that of the better-nourished group.[176] Even though, fortunately, there is evidence that this difference can be made up with proper health care, malnutrition has immediate behavioral effects. Children who arrive at school hungry have difficulty concentrating on the task of learning.[177] Harvard psychiatrist David E. Barrit studied the effect of mild malnutrition by giving one group of Guatemalan children a high calorie diet while giving the other low-calorie supplements. The undernourished children showed significant deficits in intelligence; children given the high-calorie diet were more active and socially engaged with their schoolmates.[178] Similar effects were observed in a study of food deprivation in adults.[179]

Another major index of malnutrition is iron-deficiency anemia; among low-income children attending health clinics, eleven to eighteen percent were observed to be iron-deficiency anemic.[180] Anemia may interfere with the child's capacity to resist diseases, his or her attention span, and his or her emotional equanimity.

3. Lead and other poisoning.

Another physical hazard of growing up poor is lead and other poisoning. Despite the higher prices paid for dilapidated housing in the ghetto,[181] children living in deteriorated, unrepaired buildings constructed before the 1950s still risk exposure to peeling paint containing high levels of lead.[182] Early symptoms of lead poisoning include anorexia, vomiting, subtle loss of intellectual and motor skills, and irritability. In the later stages, gross uncoordination and lethargy develop and convulsions occur, sometimes leading to death.[183] High concentrations of other toxic chemicals are often found in inner-city neighborhoods as well.[184]

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176. J. Cravioto, *Malnutrition and Behavioral Development*, in The Pre-School Child (1964).

177. State of Black America, *supra* note 118, at 141.

178. Herbert Wray, *Malnutrition of Childhood Emotions*, Sci. News, Aug. 14, 1985, at 101.

179. *Id.*

180. *Once Again: Hunger Troubles America*, *supra* note 171, at 72.

181. Arthur Simon, Faces of Poverty 42 (1968).

182. State of Black America, *supra* note 118, at 154.

183. *Id.* at 155.

184. *See* Hayes, *Toxic Substances: Protecting the Minority Community*, 17 NBA Bull. 5 (Jan./Feb. 1985); sources cited *infra* note 189.

4. Alcoholism and chemical abuse.

The high incidence of alcoholism and other forms of chemical dependency among RSB residents is a further cause of violent, aggressive behavior. Alcohol weakens inhibitions and increases acts of aggression. In a recent year, sixty percent of homicides were committed by persons under the influence of alcohol and fifty-five percent of arrests involved alcohol intoxication. Alcohol reduces brain serotonin turnover and induces thiamine deficiency;[185] thiamine deficiency further impairs neurotransmission and induces high levels of aggression in laboratory animals.[186] PCP ("Angel Dust"), amphetamines, and opiates increase criminal behavior, the former by direct stimulation of brain centers, the latter by their high cost, which causes some users to steal to support their habits.[187]

Alcoholism affects even the unborn. Children of heavy drinkers showed below-average weight, height and head size, and increased frequency of head and face malformations and mental retardation.[188] Research conducted on monkeys showed that the equivalent of three to five drinks consumed rapidly cuts off all circulation to the fetus.[189] Alcoholism during pregnancy is more likely to occur when there is insufficient nutritional education and a culture which encompasses despair and little hope for a better future.

III. Accommodation of Rotten Social Background Cases Within Existing Criminal Defenses

This section examines the extent to which accepted criminal defenses are capable of accommodating RSB defendants. There are two reasons why looking for new answers with old solutions is a useful endeavor. First, courts and legislatures are conservative, especially with respect to criminal law innovation; they try to effect change only when necessary and through the least dramatic

185. Valzelli, *Aggression and Violence: A Biological Essay of the Distinction*, in Aggression and Violence, *supra* note 171, at 48.

186. *Id*. *See* Essman, *Drug Effects Upon Aggressive Behavior*, in Aggression and Violence, *supra* note 171, at 146, 151.

187. Essman, *supra* note 186, at 154.

188. Time, Mar. 19, 1984, at 67.

189. Valzelli, *supra* note 185, at 48. *See also* Sci. News, June 2, 1985, at 348 (reporting recent Johns Hopkins symposium findings indicating that pre-birth chronic exposure to environmental chemicals, including carbon monoxide (commonly found in heavily trafficked inner-city neighborhoods and poorly ventilated slum housing) may cause behavioral deficits in children even when no physical birth defects are present).

means.[190] If all or most meritorious RSB defenses could be raised through existing channels, creating a new RSB defense would be an unnecessary challenge to a legal system committed to incrementalism. Second, close scrutiny of existing defenses may reveal their pitfalls as applied to RSB cases. This knowledge will help in formulating an all-inclusive RSB defense, if that task becomes necessary.

A. Defenses Based on the Assumption That RSB Impairs Mental/Emotional Processes

This group of defenses is important both quantitatively—because many RSB cases may be argued to fall within it—and qualitatively—because when they do, chances of obtaining acquittal are reasonably good. These defenses are excuse-oriented. The defendant concedes the commission of wrongful acts, but argues that his or her mental condition precludes criminal responsibility.

1. Insanity.

Presently, there are four principal formulations of insanity defense in the United States.[191] Although the various tests sound alike and are founded on similar rationales, their differences are magnified when the tests are applied to our RSB defendants. Regardless of the test used, proving an insanity defense is a formidable task; insanity has been called the "rich man's defense."[192]

The oldest test is the M'Naghten right-wrong test, according to which a person is not responsible for his or her act if he or she did not know that the act was wrong, or was unable to distinguish between right and wrong.[193] The narrow focus—did the defendant know right from wrong?—restricts expert testimony, making the M'Naghten test less open to creative use than other tests. Few RSB defendants will be able to enter a successful defense under this standard.

Other tests have turned away from M'Naghten's narrow scope and restriction of expert testimony to defendant's cognitive

190. *See, e.g.*, People v. Lisnow, 88 Cal. App. 3d Supp. 21, 151 Cal. Rptr. 621 (1978) (Vietnam Vet Syndrome defense analyzed in terms of automatism or insanity); People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974) (intolerable prison conditions defense established through category of necessity).

191. *See generally* Annot., 9 A.L.R. 4th 526 (1981).

192. LaFave & Scott, *supra* note 20, § 36 at 272.

193. State v. Allen, 4 Kan. App. 2d 534, 609 P.2d 219 (1980); State v. Schantz, 98 Ariz. 200, 403 P.2d 521 (1965), *cert. denied*, 382 U.S. 1015 (1965); State v. Larson, 281 N.W.2d 481 (Minn. 1979), *cert. denied*, 444 U.S. 973 (1980).

impairment.[194] Some states have adopted a standard under which the actor is excused if he or she did not know right from wrong *or* acted under irresistible impulse.[195] The "irresistible impulse" formula permits the verdict of not guilty by reason of insanity if the defendant is found to have had a mental disease which kept him or her from controlling conduct.[196] Although this test incorporates volitional as well as cognitive impairment, it is still restrictive because it requires a yes or no answer to the question of volitional control.[197] This shortcoming is partially ameliorated by the broader scope of evidence admissible under the rule.[198] The studies reviewed in part II indicate that some RSB defendants may fall within this version of the insanity defense.[199]

The remaining tests are the "product" test, developed first in New Hampshire[200] and later embraced by Judge Bazelon in the *Durham*[201] decision, and the Model Penal Code's "substantial capacity" test.[202] The product test excuses a person when his or her criminal conduct was produced by a mental disease or impairment.[203] It allows psychiatrists to testify relatively freely about the mental state of the defendant, with "product" meaning merely that the mental disease or impairment was a but-for cause of the act.[204] The Model Penal Code test provides that a person is not responsible for criminal conduct if, as a result of mental disease or defect, he or she lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law.[205] Like the "product" test, the MPC standard is relatively flexible. The need for severe cognitive impair-

194. LaFave & Scott, *supra* note 20, § 37 at 282.

195. Herron v. State, 287 So. 2d 759 (Miss. 1974), *cert. denied*, 417 U.S. 972 (1974); State v. Hamann, 285 N.W.2d 180 (Iowa 1979); Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980) (M'Naghten rule plus "delusional compulsion" test).

196. LaFave & Scott, *supra* note 20, § 37, at 283.

197. *Id.* at 285.

198. *Id.*

199. *See supra* notes 105-166 and accompanying text (frustration-aggression); *supra* notes 167-189 and accompanying text (physiologically induced irritability).

200. State v. Pike, 49 N.H. 399, 6 Am. Rep. 533 (1869); State v. Jones, 50 N.H. 369, 9 Am. Rep. 242 (1871).

201. Durham v. United States, 94 App. D.C. 228, 214 F.2d 862 (D.C. Cir. 1954). The *Durham* text was abandoned by the federal system in United States v. Brawner, 153 App. D.C. 1, 471 F.2d 969 (D.C. Cir. 1972) and is now in eclipse. *See* Richard Arens, Insanity Defense (1974) (general history of *Durham* rule).

202. At least half the states have adopted this test in some form. The development of this test in the courts is reported in Annot., 9 A.L.R. 4th 526 (1981).

203. Arens, *supra* note 201, at 14.

204. Carter v. United States, 102 App. D.C. 227, 252 F.2d 608 (D.C. Cir. 1957).

205. Model Penal Code § 4.01 (Proposed Official Draft 1962). Jurisdictions are given the option of selecting either "criminality" or "wrongfulness."

ment or sudden irresistible impulse is replaced by simple inability to appreciate wrong or to conform to societal standards.

There are difficulties in using any of the versions of the insanity defense for the RSB defendant. Under some standards, it is difficult even to get evidence of RSB admitted.[206] Moreover, the RSB defendant must plead that he or she is mentally ill, a condition that carries severe stigma, and be prepared to face confinement in a mental institution.[207] Moreover, current public hostility toward the insanity defense[208] may lead judges and juries to avoid applying it in new or controversial settings. Jurors who are themselves products of RSB, especially, may resent excusing an actor because of social background when they themselves obey the law. Causation may also be difficult to prove. Even though extreme deprivation may be shown, juries may refuse to believe that RSB has impaired the defendant's mental or emotional processes. Finally, even when successful, the defense does little to focus attention on the underlying conditions responsible for the defendant's impairment and criminal act.

Nevertheless, several features make insanity an attractive defense for some RSB defendants. The bifurcated trial used in some jurisdictions may give the defendant two opportunities to win acquittal. During the guilt phase, a non-mental defense may be proved; psychiatric evidence may also be introduced at this time to prove diminished capacity.[209] Under an insanity plea, the Model Penal Code and "substantial capacity" tests allow introduction of some limited evidence on the defendant's background. The deprivation and poverty of the defendant can be recounted to the jury,[210] and it is no longer necessary to establish that the defendant suffers some extreme form of psychosis, such as schizophrenia.[211] Moreover, because insanity *excuses* an actor for criminal conduct, neither the goals of criminal justice nor society's moral sense are compromised—or so it may be argued—for the actor is

206. *See, e.g.*, Zamora v. State, 361 So. 2d 776 (Fla. Dist. Ct. App. 1978), *cert. denied*, 372 So. 2d 472 (1979) (evidence of the effect of television on adolescents inadmissable on relevance grounds because of adherence to M'Naghten rule).

207. *See* LaFave & Scott, *supra* note 20, § 41, at 317.

208. *See generally* William Winslade & Judith Wilson Ross, The Insanity Plea (1984); Morse *Reply*, *supra* note 95; Morse, *Final Word*, *supra* note 96.

209. People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

210. Paul Harris & Peter Gabel, *Critical Legal Theory*, 11 N.Y.U. Rev. L. & Soc. Change 369, 403-04 (1982).

211. Psychiatric testimony can remain extremely helpful, however. *See* Winslade & Ross, *supra* note 208, at 74-102 (discussing the indispensability of psychologists' testimony at trial of man who killed baseball star Lyman Bostock).

exculpated solely because the jury finds the actor not responsible for his or her conduct.

Attorney Paul Harris reports success using an insanity plea as a springboard for his "Black Rage" defense.[212] Harris uses three elements: (1) general psychological principles, (2) the client's upbringing, problems and strengths, and (3) the historical-sociological experience of a Black person in America.[213] For a public defender laboring under enormous caseloads, it may be difficult to employ this elaborate formula regularly, but Harris's cases show that the insanity defense is capable of application to some RSB defendants. Further, as Harris formulates it, the defense need not be purely psychological, but includes historical, cultural, and environmental elements, as well.

2. Subnormality.

Subnormality as a distinct defense has little relevance to RSB cases for several reasons. Most jurisdictions confine the defense to extreme feeble-mindedness of a biological nature.[214] For some, the deficiency must be so great as to render the defendant insane.[215] A defendant entering an RSB defense is asserting that adverse external forces have influenced behavior, not that he or she has a weak intellect.[216] Pleading this defense for such a defendant demeans his or her dignity and could easily backfire. A few states excuse persons whose mental retardation does not rise to the level of insanity.[217] Also, there is limited authority that evidence of mental age is admissible in determining criminal responsibility.[218] For the most part, however, the existing subnormality defense is inappropriate for the RSB defendant.

3. Automatism.

Automatism is behavior performed in a state of unconsciousness or dissociation.[219] It is generally accepted as a defense in this

212. Paul Harris, *Psychiatric Defense: Black Rage*, in California Attorneys for Criminal Justice, Criminal Law Seminar Syllabus, 1-16 (1979) (on file with author).

213. *Id.* at 1.

214. Robinson, *supra* note 63, at § 174(a)-(c).

215. *Id.* at § 174(a).

216. Any differences in IQ scores between RSB persons and others can probably be explained by cultural bias in the test. *See* Delgado, et al., *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. Rev. 128, 290-311 (1983).

217. *See* People v. Wells, 33 Cal. 2d 330, 348, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949); Robinson, *supra* note 63, at § 174(a).

218. *E.g.*, State v. Kelsie, 93 Vt. 450, 108 A. 391 (1921); Robinson, *supra* note 63, at § 175.

219. LaFave & Scott, *supra* note 20, § 44, at 337; Patricia Gould, *Automatism:*

country, although regarded as esoteric. The case law is sparse.[220] Jurisdictions and legal commentators disagree about details of the defense, such as allocation of burden of proof,[221] its relationship to the insanity defense,[222] and even its underlying basis.[223]

There are several types of situation which give rise to an automatism defense, but the principal type relevant to this article is one caused by psychological trauma. Although there are no cases using this defense in an RSB setting, an analogy may be drawn to ones giving relief to defendants suffering Vietnam Veteran Syndrome.[224] In these cases the defendant has returned home from

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The Unconsciousness Defense to a Criminal Action, 15 San Diego L. Rev. 839, 840 (1978).

220. A typical statute is Nev. Rev. Stat. § 194.010(6)(1979), which lists as one class of persons not liable to criminal punishment "[p]ersons who committed the act charged without being conscious thereof."

California has been the leader in developing case law on the subject. The seminal case is People v. Hardy, 33 Cal. 2d 52, 198 P.2d 865 (1948).

221. Some jurisdictions only require the defendant to produce evidence of automatism, leaving the burden of persuasion with the prosecution. People v. Cruz, 83 Cal. App. 3d 308, 147 Cal. Rptr. 740 (2d Dist. 1978); State v. Welsh, 8 Wash. App. 719, 508 P.2d 1041 (1973). Other jurisdictions require the defendant to prove automatism. State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975); Fulcher v. State, 633 P.2d 142 (Wyo. 1981).

222. Some jurisdictions hold that automatism is a defense distinct from insanity, while others treat automatism as a type of insanity. For a jurisdiction-by-jurisdiction analysis, see Annot., 27 A.L.R. 4th 1067, 1076-78 (1984).

223. According to most authorities the act is voluntary, but the actor is exculpated because he or she is unaware of the nature of the act. Robinson, *supra* note 19, at 223-24. Professor Robinson cites various medical authorities for the proposition that such acts are the product of the effort or determination of the actor. *Id.*

LaFave, on the other hand, says that acts brought on by automatism are involuntary, so the actor must be exculpated under Model Penal Code § 2.01 (voluntary act requirement). LaFave & Scott, *supra* note 20, § 44, at 338.

The better view is that automatism is different from insanity, in that the former may be present notwithstanding the defendant's lack of a mental illness, and in that acquittal by reason of automatism does not result in institutionalization. Annot., 27 A.L.R. 4th 1076, 1077 (1984).

224. *See* Geraldine Brotherton, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 New Eng. L. Rev. 91 (1981); People v. Lisnow, 88 Cal. App. 3d Supp. 21, 151 Cal. Rptr. 621 (1978). In these cases, "post-traumatic stress disorder" is used to explain the commission of acts of violence in response to conditions similar to previous combat conditions. Post-traumatic stress disorder is a delayed reaction to stress. The defense is based upon the "surfacing of mental dysfunctions caused by extremely stressful events." Brotherton, *supra*, at 92. *See* Stammer, *supra* note 170. *Compare* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 299-300 (3d ed. 1980) ("transient situational disturbance").

PTSD may also be triggered by an "environment tending to recreate a feeling of helplessness or urgency intrinsic to the development of the disorder in the first place." Brotherton, *supra*, at 101-02. A similar combination could provide the conditions that would cause an RSB actor to engage in criminal conduct. Such a defendant could, for example, assert that hostile treatment by a police officer triggered reflexive response patterns laid down during earlier exposure to violent situations. *See also infra* notes 244-245 and accompanying text (battered woman defense).

war apparently unscathed, only to react violently to a sudden stimulus. As was shown in part II, children raised in extremely poor neighborhoods often come to harbor intense anxiety and unfocused resentment as a result of poverty, mistreatment, and constant stress. Like the Vietnam veteran, these "walking time bombs" need only a single, seemingly minor spark to set them off into a violent rage.

Obviously, the defense presupposes a special set of facts,[225] so that many, perhaps most, RSB cases would not fit within it. Morever, even when the right cases arise, they present the problem of determining the appropriate disposition for the successful defendant. In most jurisdictions automatism is a complete defense—the court must set the defendant free, even though there may be reason to suspect the violence may recur.[226] For this reason, courts may prefer to treat cases of automatism under insanity when possible, so that the defendant may be committed. A more sensible solution would be conditional release for the purpose of providing professional help needed to combat the problem.[227]

4. Diminished capacity.

Although a defendant's mental illness may not be of the type or degree required by the insanity defense, the defendant may still be eligible for a diminished capacity/partial responsibility defense. Jurisdictions have recognized such an excuse by statutes and cases declaring that the existence of a mental illness may negate a required mental element of the offense.[228] The mental illness required is "something short of insanity" and is referred to as "partial responsibility" or "diminished capacity."[229] While insanity is a complete defense to any offense, diminished capacity reduces the offender's liability to that of a lesser offense.[230] A typical example is first versus second degree murder, where courts examine the defendant's mental state to determine whether the defendant acted with premeditation and deliberation.[231] First degree murder

225. Viz, severe trauma followed by reflexive violence in response to a stimulus that evokes the earlier traumatic events.

226. *See supra* note 223.

227. LaFave & Scott, *supra* note 20, § 44, at 341.

228. *See* Robinson, *supra* note 19, at 206 n.16 and cases and statutes cited therein; Alexander Brooks, Law, Psychiatry, and the Mental Health System 200-01 (1974).

229. Robinson, *supra* note 19, at 206, 254; LaFave & Scott, *supra* note 20, at 326.

230. Sources cited *supra* note 229. For this reason, the defense has been mainly used in homicide cases. Brooks, *supra* note 228, at 201.

231. LaFave & Scott, *supra* note 20, § 42, at 327-28.

requires a cool mind and reflection before the act, which may not be present in an RSB case.

There are other differences between insanity and diminished capacity. A successful insanity plea results in a not guilty verdict and commitment in a state mental hospital. A successful diminished capacity defense results in acquittal or conviction of a lesser included offense.[232] The diminished capacity defense may be raised without the notice requirement of the insanity defense,[233] and evidence can be admitted in the guilt phase of a bifurcated trial,[234] whereas evidence on insanity cannot.

Diminished capacity is well suited for certain RSB cases. The defense is especially valuable in those jurisdictions that still adhere to the restrictive M'Naghten test of insanity. The prosecution bears the burden of proving beyond a reasonable doubt that the defendant was not acting with diminished capacity,[235] and a successful defense avoids commitment to a mental institution.[236] Indeed, in many cases, diminished capacity can be used to avoid conviction altogether. If a mental illness or other condition (perhaps severe RSB) can be shown to have negated the intent to kill, voluntary manslaughter cannot be proved.[237] In minor crimes there may not be a lesser included offense, so that acquittal may be required.[238]

To the extent that the diminished capacity defense does not require a mental illness so severe as that required by the insanity pleas, it better accommodates emotional disability caused by RSB. It is easier to argue that temporary psychological disorders, such as transient situational disturbance,[239] or post-traumatic stress syndrome, diminish one's capacity rather than render one insane. Diminished capacity is also preferable from the standpoint of treatment. Insanity conjures up an image of permanency; others may be skeptical of any later claim of rehabilitation. It may be more credible that one's diminished capacity has been restored to normality after a brief period. Finally, while an insanity plea la-

232. Robinson, *supra* note 19, at 206.

233. *See generally* LaFave & Scott, *supra* note 20, § 40.

234. The wisdom of a bifurcated criminal trial on the issue of the insanity defense is discussed in Annot., 1 A.L.R. 4th 884 (1980).

235. This is so because the requisite mental state is an element of the crime charged. With insanity, by contrast, many jurisdictions require the defendant to prove his or her mental condition by a preponderance of the evidence. Brooks, *supra* note 228, at 304-05.

236. *Cf. id.* at 201 (proof of diminished capacity negates element of offense).

237. People v. Gorshen, 51 Cal. 2d 716, 732-32, 336 P.2d 492, 501-03 (1959).

238. LaFave & Scott, *supra* note 20, § 42, at 330-31.

239. *See* Diagnostic and Statistical Manual of Mental Disorders, *supra* note 224, at 299-300.

bels individuals "crazy," a finding of diminished capacity leaves the actor with some semblance of dignity or, at any rate, an opportunity to regain it.

B. Defenses Based on the Assumption That RSB Limits Range of Choice

The defenses in this section differ from those in the preceding section, which are based on mental impairment of various types resulting from RSB. The defenses presented here—self defense, necessity and duress, provocation, extreme emotional disturbance and mistake—take an opposite approach. Rather than focus on the defendant's internal mental capacity, these defenses focus on external forces, common in the RSB experience, affecting the actor's behavior. Although expert testimony may help to establish these defenses, it is less crucial than with insanity and diminished capacity. What is important is convincing a jury that, under the circumstances, the defendant could not fairly be held accountable for his or her actions.

Two obstacles are common to these defenses. First, the defendant must establish a causal connection between the RSB and the act.[240] Expert testimony—for example, from a sociologist or psychologist—may be useful in accomplishing this. Second, these defenses are general, and the prospect of excusing too many may argue against extending them to new settings.[241] An internal defense, like insanity, does not raise this difficulty because the defendant is depicted as unique.

1. Self-defense.

A person who reasonably believes himself or herself in danger of unlawful bodily harm at the hands of another person is justified in using necessary force to avoid the danger.[242] There are various additional requirements, including immediacy of the harm, reasonableness of the force used, and necessity of retreat if the harm can be avoided in that manner.[243]

A case suggesting possible extension of self-defense to RSB cases is *People v. Garcia*.[244] A woman raped by three men re-

240. Professor Robinson raises this problem in his recent treatise when he analogizes ghetto life and brainwashing. Robinson, *supra* note 63, at § 192(b).

241. *See* Fletcher, *supra* note 18, at 801-02.

242. LaFave & Scott, *supra* note 20, § 53, at 391.

243. *Id*.

244. 54 Cal. App. 3d 61, 126 Cal. Rptr. 275, *cert. denied*, 426 U.S. 911 (1975). *See When Battered Women Kill, Why Some Take Murderous Revenge and Others Do Not*, San Francisco Chron., This World, Jan. 20, 1985, at 8, col. 1.

sponded by killing two of them and shooting the third. In her first trial, the defendant raised a conventional impaired consciousness defense in which she essentially asked to be forgiven for her rage. She was awarded a new trial, in which she asserted a creative defense—a combination of self-defense and the historic victimization of women by men. She successfully showed that her rage was a justified and reasonable response under the circumstances and was acquitted.[245]

Where self-defense could be applied in an RSB case, it has the same political-psychological advantage noted in *Garcia*; it enables the defendant to take an aggressive position rather than a defensive "excuse" position. A justification defense is unlikely to win acceptance beyond extreme cases, however, because of the collateral consequences[246] of justification and because of the implication that justified behavior is correct, or at least permissible. The latter argument is difficult to make, particularly where violent acts are concerned.[247]

The prevalence of violence in RSB neighborhoods, however, makes the possibility of having to defend oneself very real. Because the ghetto-dweller is more sensitized to danger than the average person, he or she is more likely to commit homicide or assault under mistaken circumstances.[248] As observed above, the prevailing standard allows for mistaken beliefs if they are "reasonable." In this regard, self-defense poses the same question as does provocation—what is reasonable?[249] The traditional test offers little guidance.

Reasonableness can be looked at in two ways: (1) whether the actor's belief is reasonable, or (2) whether the actor reasonably believes.[250] The latter, subjective standard better accommodates RSB cases. Under this standard, the defendant is able to "tell his

245. *See also* State v. Anaya, 438 A.2d 892, 894-95 (Me. 1981); People v. Allery, 101 Wash. 2d 591, 595, 682 P.2d 312, 316 (1984); State v. Kelly, 97 N.J. 178, 190-97, 204-07, 478 A.2d 364, 369-73, 375-76 (N.J. 1984) (emotional state of battered women must be considered at trial for killing men who battered them); New Jersey v. Walker, 199 N.J. Super. 354, 409 A.2d 728 (Jan. 3, 1985) (same). The citation for the second (successful) Garcia trial is Cr. No. 4259 (Super. Ct. Monterey Co. Cal. 1977). This case is discussed in Harris & Gabel, *supra* note 210, at 379-81.

246. *See infra* notes 260-264 and accompanying text. The principal collateral consequences are that the victim would have no right to resist and that accessories to the crime would be excused.

247. Of course, imperfect self-defense may often be available in serious felony cases. *See supra* notes 236-237.

248. This discussion does not consider those situations in which there is actual immediate danger of death; the defendant's response is always reasonable if the threat of death is actual.

249. Robinson, *supra* note 63, at § 184(b).

250. *Id.* at § 184(b)-(c).

or her story"—kill or be killed—in an effort to convince the jury that ghetto conditions alter what the objective reasonable person would consider imminent harm. In particular, because of the pervasiveness of violent crime in the ghetto, the use of deadly force in response to an actual nondeadly attack might be justified.[251]

Although some of the requirements of self-defense may one day be relaxed, such as that of "immediacy of harm," the weight of authority favors keeping self-defense narrow.[252] Most RSB cases which might be included under self-defense can also fit under duress, a defense which courts seem more willing to expand. Nevertheless, rage associated with a life of extreme poverty may make excusable acts that would otherwise demand punishment. When it can be applied, self-defense would seem preferable to an excuse like insanity or duress.

2. Necessity and duress.

Although duress and necessity are closely related and often used interchangeably, they are distinct defenses. Duress is a defense to criminal conduct when the actor is under an unlawful threat of imminent death or serious bodily harm which causes him or her to engage in criminal conduct.[253] The person who coerces the actor is guilty of the crime he or she compels the threatened person to commit.[254] Traditionally, the threatened harm must be imminent, although some modern authority has suggested that this requirement be relaxed.[255]

Necessity is available when "*triggering conditions* permit a *necessary and proportional response*."[256] The triggering condition is the external force which causes the actor to choose between violating the law (thus producing a harm) or abiding by the law (thus producing an even greater harm).[257] A standard example is that of a driver speeding to transport a critically injured person to the hospital. Although the actor's speeding is illegal, it is necessary to prevent an even greater harm, the loss of life.[258] A vital distinc-

251. *Id*. at § 184(f) (mistake as to proportionality).

252. *See* Robinson, *supra* note 19, at 235; Fletcher, *supra* note 18, at 855-60.

253. LaFave & Scott, *supra* note 20, § 49, at 374.

254. *Id*.

255. Model Penal Code § 3.02 (Proposed Official Draft 1962); *see also* George Fletcher, *Should Intolerable Prison Conditions Generate a Justification or Excuse for Escape?* 26 UCLA L. Rev. 1355, 1367 (1979) (imminency only important insofar as it demonstrates or fails to demonstrate the defendant's strain at the time of the act).

256. Robinson, *supra* note 19, at 216.

257. *Id*. at 216-17.

258. *Id*. at 218. The actor is permitted to choose the "lesser of two evils" so long

tion between these two defenses is that duress is an excuse and necessity a justification.[259]

There are a number of problems with presenting a necessity defense for an RSB defendant. First, the defense negates the victim's right to respond; if the actor is justified, there is no right to resist.[260] For those who are the victims of RSB defendants it can be argued that merely because the defendant is justified, it does not follow that the victim cannot be justified as well.[261] However, this position is difficult to square with the theoretical basis for justification and, practically speaking, if two persons are trying to execute incompatible acts, they cannot both be justified.[262]

A second problem is accessorial liability. If an act is justified, then others may assist the actor and not be criminally liable.[263] If the actor has an excuse, the defense is personal to him or her, so that an assistant could well be criminally liable.[264] Adopting a justification in these circumstances could arguably promote anarchy because society would need to tolerate not only the acts of the RSB perpetrator but those of non-RSB persons who helped him or her commit the offense. In a few RSB situations—such as that of the individual who aids a poor person in stealing food necessary to avoid starvation—it does not seem outrageous to suggest that one might be justified in assisting a perpetrator. However, in most RSB situations, particularly those having to do with crimes of violence, that intuition breaks down.

A final problem with necessity is the requirement that the act be necessary and proportionate.[265] In the example above an RSB parent may be justified in stealing to prevent his or her family from starving, but the balance of evils tips in the other direction once the defendant uses violence to accomplish this objective.

The difficulties associated with a duress RSB defense stem from the formulation of the defense: its imminence-of-harm re-

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as his or her act is necessary to further the interest at stake and the harm caused reasonable in relation to the interest furthered. *Id*.

259. *See generally id*. *Accord*, Fletcher, *supra* note 18, at 829. This differentiation is logical and well accepted today. *Cf*. LaFave & Scott, *supra* note 20, § 49 (duress treated as a "lesser evils" justification).

260. Fletcher, *supra* note 18 at 760-61.

261. Comment, *Intolerable Conditions as a Defense to Prison Escapes*, 26 UCLA L. Rev. 1126, 1176-78 (1979).

262. Fletcher, *supra* note 255, at 1358. *But see* Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and "Rethinking"*, 32 UCLA L. Rev. 86-92 (1984) [hereinafter cited as Dressler, *New Thoughts*].

263. Fletcher, *supra* note 18 at 761-62.

264. *Id*. at 762.

265. Robinson, *supra* note 19, at 216-20.

quirement and the requirement that a "person" have coerced the defendant. Both problems seem to be diminishing as the theories of duress and necessity evolve. Necessity is routinely applied whenever the act is justified by a choice of lesser evils analysis, regardless of the source of coercion.[266] Meanwhile duress is routinely applied to a severely pressured or coerced actor regardless of the type of coercion.[267] One reason for this is the Model Penal Code's shift of emphasis away from the threat or coercion which instigated the act and toward the act itself.[268] Many courts construe the imminency requirement liberally as well, basing the determination on the totality of the circumstances.[269]

Duress seems to be better suited than necessity to accommodate most RSB cases. While a jury applying a necessity test may not believe that a defendant chose the lesser of two evils, the same jury might acquit on duress grounds because living in stressful, impoverished circumstances may have pushed the defendant past his or her breaking point. Unlike the defendant who successfully pleads insanity, the defendant in a duress case does not have to be institutionalized following acquittal. Further, the defense recognizes that anyone could have snapped under the circumstances,[270] a feature that upholds the dignity of the defendant while eliminating the need for a great deal of psychological testimony. Duress cannot fit all RSB situations, of course, and not all formulations of the defense are as expansive as the one described.[271] Still, to the extent it applies, duress is one of the better defenses available to an RSB defendant.

3. Provocation.

Provocation is the killing of another while under the influence of a reasonably incurred emotional disturbance or "heat of passion."[272] Provocation negates the element of malice in an intentional killing.[273] Some jurisdictions require the provocation to

266. *Id*. at 234-35.

267. *Id*. at 235.

268. Model Penal Code § 2.09 (Proposed Official Draft 1962).

269. Robinson, *supra* note 63, § 177(d), at 359.

270. Model Penal Code § 2.09 (Proposed Official Draft 1962); Fletcher, *supra* note 18, at 834.

271. *E.g.*, United States v. Bailey, 444 U.S. 394, 409-10 (1980) (Supreme Court treats necessity and duress as interchangeable defenses with a very narrow "lesser evils" applicability).

272. LaFave & Scott, *supra* note 20, § 76; Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. Crim. L. & Criminol. 421 (1982) [hereinafter cited as *Heat of Passion*].

273. LaFave & Scott, *supra* note 20, § 76. *See also* People v. Brubaker, 53 Cal. 2d 37, 44, 346 P.2d 8, 12 (1959).

be so great as to overcome the intent to kill.[274]

There are four elements to a claim of provocation: (1) reasonable provocation, (2) provocation in fact, (3) inadequate time to "cool off," and (4) actual failure to cool off. Because a reasonable person does not kill even if provoked,[275] provocation is only a mitigating factor and not a complete defense. The test, an objective one, asks whether a reasonable person would have lost self-control.[276] The majority rule refuses to consider extenuating circumstances peculiar to the defendant.[277] A minority view allows evidence of the defendant's personal circumstances in assessing the reasonableness of the response.[278]

Provocation could apply to certain RSB defendants, such as those charged with street gang fighting. A broad notion of what a reasonable person would have done in the circumstances would enable jurors to place themselves in the shoes of the defendant and to understand, if not agree with, the defendant's violent reaction. Moreover, if the more stringent majority test is used, the jury may hear sufficient evidence of RSB to be able to empathize with the defendant's plight and to apply the standard humanely.

4. Extreme emotional disturbance.

The Model Penal Code has taken the lead in expanding the common law provocation doctrine. It provides that:

> Criminal homicide constitutes manslaughter when . . . [it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.[279]

The Model Penal Code makes provocation, in effect, an "imperfect duress" defense, recognizing that certain situations not previously covered by provocation should trigger a defense one rung lower than duress. The difference between duress, which is a com-

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274. *E.g.*, Johnson v. State, 129 Wis. 146, 160, 108 N.W. 55, 60 (1906) (provocation must be such as to suspend the reasonable person's ordinary judgment, making his or her mind "deaf to the voice of reason").

275. LaFave & Scott, *supra* note 20, at 573.

276. *Id.*

277. A good example is Bedder v. Director of Public Prosecutors, (1954) 2 All E.R. 801 (H.L.) in which a defendant killed a prostitute for jeering at his sexual impotence. The reasonable provocation test was not satisfied by a showing that the defendant was in fact impotent, the court holding that his physical abnormality was irrelevant.

278. *See* 1 Paul Robinson, Criminal Law Defense, § 102(a)-(b), at 482-86 (1984).

279. Model Penal Code § 210.3 (Proposed Official Draft 1962).

plete excuse, and the "imperfect duress" defense of provocation lies mainly in the degree and perhaps the type[280] of extreme emotional disturbance/provocation required. The Code allows the defendant to introduce evidence of the outward situation responsible for his or her emotional distress or "blinding rage." Although the Model Penal Code's expansion of provocation to include extreme emotional disturbance is a step toward creating a sliding scale approach to criminal responsibility, the rule is limited to homicide.[281]

The Model Penal Code's extreme emotional disturbance formulation should apply in many RSB situations. The stimulus need not come from the victim, as is the case with traditional provocation. It could come in part from intolerable living conditions and brutal treatment.[282] Moreover, the adequacy of the instigating conditions is not judged by the circumstances as they are or would be regarded by a middle-class juror or judge; they are determined from the perspective of the RSB defendant.[283] If the jury concludes that the RSB victim committed the crime while extremely disturbed, a state for which there is "reasonable [environmental] explanation or excuse," the defense would apply.

5. Mistake.

Generally, mistake of fact or law is no defense unless it negates an element of a crime[284] or the defendant mistakenly believed that external circumstances justified his or her action.[285] As discussed earlier, an RSB defendant may be moved to defensive violence by stimuli that would not move the reasonable person. The defendant need only show that he or she had a reasonable basis for believing that self-defense was necessary.[286] To establish this, defense counsel can introduce evidence of the environment in

280. Robinson, *supra* note 278, at § 102(a) (provocation need not come from the victim; no limitation in circumstances that may constitute provocation; provocation determined by circumstances as defendant believed them to be; adequacy judged by person in defendant's "situation").

281. *Id.* at 481-82.

282. *Id.* at 482.

283. *Id.*

284. LaFave & Scott, *supra* note 20, § 47; *see* Robinson, *supra* note 19, at 204-08. As such, the defense is often used in cases of bigamy and statutory rape. In these cases the issue is whether mistake negates the mens rea implied by the statute, or whether the actor should be held strictly liable. *See* LaFave & Scott, *supra* note 20, § 47, at 358-60.

285. Although universally accepted as a defense, there is disagreement as to whether the proper classification is that of justification or excuse. *See* Robinson, *supra* note 19 at 239-40 (excuse). *But cf.* Model Penal Code §§ 3.04(1), 3.05(1)(c), 30.6(1) and 3.07(1) (Proposed Official Draft 1962) (expresses view of many jurisdictions that the act is justified).

286. LaFave & Scott, *supra* note 20, § 53, at 393.

which the defendant lived.[287] Mistake terminology has also found its way into provocation doctrine as a basis for mitigation.

The availability of mistake defenses to an RSB defendant is limited, however—courts are wary of extending it beyond failure-of-proof and mistake as to a justification. To allow a mistake of law defense because the RSB defendant does not appreciate the gravity of his or her crime, for example, would create a broad excuse, indeed.[288]

C. Defenses Based on Policy Decisions and Constitutional Restraints

As a final line of defense, an RSB defendant, like any criminal defendant, may avoid conviction if there is a constitutional flaw in the prosecutorial process. In addition, a particular jurisdiction may have a statute of limitations, or the prosecutor may decline to press charges for discretionary reasons. None of these approaches exculpate, of course; there is a violation of criminal statute, the harm sought to be avoided occurred, and the defendant is generally regarded as blameworthy.[289]

1. Eighth amendment "status" defense.

The Constitution, aside from the prohibition against *ex post facto* laws,[290] does not expressly intrude upon the area of criminal responsibility, a matter generally thought reserved to local, state, and federal legislatures. In the last twenty-five years, however, the eighth amendment prohibition against cruel and unusual punishment has added a substantive dimension. In *Robinson v. California*,[291] the Supreme Court held that a person cannot constitutionally be convicted for a status, as opposed to an antisocial act.[292]

In *Robinson* the defendant was convicted for being "addicted to the use of narcotics," which the Supreme Court concluded was a status and not an act.[293] The majority reasoned that for Robinson

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287. *Id.* at 577-78.

288. *But see infra* notes 427-429, 502-507 and accompanying text (isolation and failure to internalize controls model).

289. Because the defendant is blameworthy, Prof. Robinson terms these defenses "nonexculpatory public policy defenses." Robinson, *supra* note 19, at 229.

290. U.S. Const., art. I, §§ 9 (federal) and 10 (state).

291. 370 U.S. 660 (1962).

292. For a comprehensive treatment of this topic, see Robinson, *supra* note 63, at § 194(b); R. Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 Colum. L. Rev. 927 (1969).

293. The statute under which he was convicted is Cal. Health & Safety Code § 11721 (West 1964), *discussed at* 370 U.S. 660-61 n.1.

to undergo punishment in the absence of any evidence of criminal acts is unconstitutional, although he could be compelled to undergo medical treatment for the problem. Justice Douglas, concurring, went even further, saying it was unconstitutional for a state to punish a person for suffering from a disease.[294]

Under *Robinson*, RSB could be seen as a status, or disease, manifested in such symptoms as irritability, dyscontrol, rage and despair. In this view, RSB would be a disease analogous to epilepsy or schizophrenia, and much more highly criminogenic than these. An epileptic is not worthy of moral blame for any criminal acts committed while in an epileptic fit because he or she is not responsible for the condition's cause. Likewise, the actor afflicted with an RSB-induced criminal propensity generally is not responsible for the conditions that give rise to it; people do not choose to be born or live in an RSB environment. To punish the actor would arguably violate the principle that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion [crime] symptomatic of the disease."[295]

Although later cases retreat from this position to the extent of permitting punishment of crimes committed as a *result* of an addiction,[296] at least one commentator urges that acts closely related to an addiction be beyond punishment as crimes of status.[297] This expansive interpretation would seem broad enough to include much RSB crime. Finally, eighth amendment notions of retributive or utilitarian proportionality may bar punishment of RSB individuals who can show that they had little choice or meaningful opportunity to refrain from crime.[298]

2. Miscellaneous constitutional and public policy defenses.[299]

Defenses based on entrapment, illegal search and seizure, and coerced confession are of general applicability. Nonetheless, they deserve brief mention because conflicts with the police are more

294. *Robinson v. California*, 370 U.S. 660, 668-78 (1956) (Douglas, J., concurring).
295. Powell v. Texas, 392 U.S. 514, 569 (1967), *reh'g denied*, 393 U.S. 898 (1968).
296. *Id.*
297. *See* Robinson, *supra* note 63, at § 194(b).
298. *See* Joshua Dressler, *Substantive Criminal Law Through the Looking Glass of* Rummell v. Estelle *Proportionality and Justice as Endangered Doctrines*, 34 Sw. L.J. 1063, 1081-88 (1981) [hereinafter cited as Dressler, *Substantive Criminal Law*]; Coker v. Georgia, 433 U.S. 584, 592 (1977).
299. These defenses include statute of limitations, double jeopardy, testimonial immunity, entrapment, incompetency, prosecutorial discretion, and dismissals based upon the exclusionary rule or prosecutorial misconduct.

likely to occur in poor neighborhoods and the police are more likely to engage in illegal searches, entrapment, and third-degree tactics when the defendant is poor than otherwise.[300] Exclusionary rules bar evidence gained through such police tactics. Finally, a prosecutor may simply decline to prosecute the RSB defendant;[301] with many complaints, there is little political pressure to file. Even when there is, a prosecutor's duty is to see that justice is done.[302] If the prosecutor is apprised of the RSB defendant's background, perhaps he or she may charge a lesser offense or pursue lesser punishment.

This section demonstrates that many RSB defendants already have defenses under existing law. However, none of these existing defenses was designed to include all RSB cases, and it is largely a matter of chance that an RSB defendant happens to meet the requirements of a given defense. If a distinct RSB defense were adopted, the societal deprivation which results in crime among the poor would be exposed, and defense counsel would no longer have to sift through a haphazard array of traditional defenses to serve his or her client.

IV. A New Defense

An environment of extreme poverty and deprivation creates in individuals a propensity to commit crimes.[303] In some cases, a defendant's impoverished background so greatly determines his or her criminal behavior that we feel it unfair to punish the individual.[304] This sense of unfairness arises from the morality of the criminal law itself, in that "our collective conscience does not al-

300. *Supra* notes 140-148 and accompanying text.

301. *See* Sue Titus Reid, Crime and Criminology 383-86 (1976). *See also* L.A. Times, June 6, 1984, Pt. I at 2, col. 4 (murder charges dismissed in case of 16-year-old Aaron Maxwell when San Diego County prosecutor concluded youth acted "in something approaching self-defense" in fatal shooting of stepfather who "created an atmosphere of terror in the household," with frequent beatings of family members.) *See also Goetz Won't be Tried for Attempted Murder, Grand Jury Indicts Him on Gun Charges*, L.A. Times, Jan. 26, 1985, at 1, col. 5 ("subway vigilante" found to have acted in self-defense; journalist speculates grand jury empathized with his violent reaction to terror-filled rides on N.Y. subway and earlier mugging).

302. Model Code of Professional Responsibility E.C. 7-13 (1981); Model Rules of Professional Conduct Rule 3.8 (1983).

303. *Supra* part II (medical and psychological impact of RSB). *See also The Staying Power of Aggression*, Sci. News, Dec. 8, 1984, at 360 (once a person is set, in early life, on a path of irascibility and aggression, the pattern rarely changes).

304. *See, e.g.*, United States v. Alexander, 471 F.2d at 957-65 (Bazelon, C.J., concurring in part and dissenting in part). Judge Bazelon observes: "No matter what the trial judge intended, his instruction [to disregard evidence relating to rotten social background] may have deprived . . . [defendant] of a fair trial on the issue of responsibility." *Id.* at 960.

low punishment where it cannot impose blame."[305] And blame is inappropriate when a defendant's criminal behavior is caused by extrinsic factors beyond his or her control.

Still, the criminal law does not recognize a rotten social background, as such, as relevant to the issue of guilt. Commentators have noted this seeming inconsistency. For example, Professor Packer observes:

> If a person engages in criminal conduct while in an epileptic fit, we say that he was incapable of performing a voluntary act and we acquit. . . . At the other extreme, we recognize that cultural deprivation of a kind associated with urban poverty may in a very real sense restrict the individual's capacity to choose and make him more susceptible to engaging in antisocial conduct than the "average" member of society. However, we regard those constraints as too remote to justify an excuse on the ground that the person could not have helped acting as he did.[306]

Professor Norval Norris, in commenting on the insanity defense, argues:

> Why not permit the defense of dwelling in a Negro ghetto? Such a defense would not be morally indefensible. Adverse social and subcultural background is statistically *more* criminogenic than is psychosis; like insanity, it also severely circumscribes the freedom of choice. . . . You argue that insanity destroys, undermines, diminishes a man's capacity to reject what is wrong and adhere to what is right. So does the ghetto — more so.[307]

Indeed, why *not* permit a defense of dwelling in a ghetto? I have two purposes in this part of the article: (1) to analyze the legal and moral argument for a new defense of rotten social background; and (2) to suggest possible models for such a defense. Then, after a brief discussion to consider cultures and belief systems that take RSB into account in determining criminal liability, I return, in the concluding section, to the merits and applicability of the various models.

A. The Case for a Rotten Social Background Defense

Where extreme social and economic disadvantage demonstrably creates a defendant's criminal propensity, punishment may be inappropriate from two perspectives: first, because the RSB-criminal's behavior can be defended on theories of justification and excuse; and second, because society's rationales for inflicting

305. Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954) (citing Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945)).

306. Packer, *supra* note 1, at 133.

307. Morris, *supra* note 6, at 520.

punishment are undermined. I shall discuss these two perspectives, the defendant's culpability and society's entitlement to punish, separately.

1. The defendant's culpability: justification and excuse.

In evaluating the relevance of a rotten social background to the issue of defendant's guilt, my starting point is in conventional legal theory; "the law itself can provide illuminating points of reference for moral evaluation of illegal violence."[308] In our legal system, most criminal defenses arise either from the doctrines of justification or excuse.[309] Current defenses do not directly address the RSB defendant,[310] but this lack should not preclude a new defense, if it is grounded in the same rationales that underlie existing justifications and excuses.

Generally, justification asserts that conduct is not wrongful, while excuse asserts that although the conduct is wrongful, the actor cannot be blamed for it.[311] Professor Fletcher illustrates the differences between excuse and justification by the example of a starving man who steals a loaf of bread:

> If the attempt to take the loaf of bread is merely excused and not justified, the attempted theft is wrongful and the storekeeper may use at least reasonable force to resist the intrusion. On the other hand, if the intrusion is justified, the property owner must tolerate the taking of the bread.[312]

To pursue the analogy, if society occupies the role of the storekeeper (by responding to the intrusion), then justification implies that society will tolerate or encourage the RSB defendant's conduct. Excuse, on the other hand, implies that while society will not blame the RSB defendant, it will nonetheless do what it can to prevent the conduct, because the conduct is wrong.[313] Justification, then, focuses on the objective quality of the *act*; excuse fo-

308. R. Kent Greenawalt, *Violence—Legal Justification and Moral Appraisal*, 32 Emory L.J. 437, 437 (1983).

309. *See generally* LaFave & Scott, *supra* note 20, at 356-413.

310. *See supra* part III (current criminal defenses).

311. Robinson, *supra* note 19, at 229. "The distinction between justification and excuse is roughly the difference between saying 'What you did was really all right,' and 'What you did was wrong in some sense, but we can't blame you for it.'" Greenawalt, *supra* note 308, at 442. *See also* Fletcher, *supra* note 18, at 759-69; George Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269 (1974).

312. Fletcher, *supra* note 18, at 760.

313. This does not mean, of course, that society cannot try to eradicate the general conditions giving rise, for example, to a justified act of killing in self-defense—conditions like an absence of respect for human life. The point here is only that given such conditions, Jones' act of killing Smith in self-defense is justified; it is the right thing to do *given the circumstances*.

cuses on the subjective blameworthiness of the *actor*.[314]

a. Justification.[315]

The law justifies the use of physical force in defense of one's rights against aggressors, defense of the rights of others against aggressors, protection of rights against non-aggressors, and protection of other interests against threatened harm.[316] All justification defenses are limited by two requirements: (1) the action must be *necessary* to protect the interest at stake, and (2) the action must be *proportional* to the threatened harm.[317] The Model Penal Code presents the general justification defense in terms of choice of evils, requiring that the harm sought to be avoided be greater than the harm sought to be prevented by the law defining the offense.[318]

If individuals have a right to protect themselves against violations of important interests,[319] how might an RSB defendant's conduct be justified? What interests is the RSB defendant protecting? An individual may justifiably use force to protect his or her interest in freedom from violence itself; thus, justification will often depend on what "violence" means. "About extreme physical force no doubt exists, but what of psychological persecution or a social and economic order that produces impoverishment of body or spirit? Are these instances of violence?"[320] In the view of Professor John Harris, harm which others could have prevented may sometimes be regarded as a form of violence.[321] Our duty not to injure anyone by performing harmful actions may, logically, include the duty not to injure by failing to perform actions which would prevent an

314. Albin Eser, *Justification and Excuse*, 24 Am. J. Comp. L. 621, 635 (1976). In the German criminal code, a justified act is a legal act. *Id.* at 629.

315. For a general summary of the theory of justification, see Greenawalt, *supra* note 308, at 448-66; Dressler, *New Thoughts*, *supra* note 262.

316. Greenawalt, *supra* note 308, at 449. Greenawalt also cites the justifying interests of punishment and paternalism but notes that these are not relevant to the discussion of private acts of violence.

317. Robinson, *supra* note 19, at 216.

318. Model Penal Code § 3.02 (1962).

319. Greenawalt, *supra* note 308, at 494. "The general justification defense permits forcible action to protect important interests whether or not the threat to those interests derives from human wrongdoing, and whether or not the harm that would otherwise be suffered would be a violation of rights." *Id.*

320. *Id.* at 439.

321. John Harris, *supra* note 5, at 192, 212-20 (1974). Harris defines "violence" broadly. For the RSB defendant, it is only necessary to hold that one who fails to intervene when another is being injured *harms* that person. The inaction constitutes harm; it is unnecessary to decide whether it constitutes *violence* (as Harris holds).

injury from occurring.[322] In this sense, human beings, or societies at large, may be the cause of harms which are conventionally seen as resulting from natural causes. Harris quotes Frederick Engels' observations on violence:

> [I]f the attacker knows beforehand that the blow will be fatal we call it murder. Murder has also been committed if society places hundreds of workers in such a position that they inevitably come to premature and unnatural ends. Their death is as violent as if they had been stabbed or shot.[323]

Harris observes that our conclusion that an individual caused harm when he or she failed to act follows from pre-established duty, or norms; more properly, a *duty* should follow when we can say that human action could have prevented the harm from occurring.[324] If he is right, a society does violence to an individual when it refuses to prevent the deprivation and suffering resulting from its social and economic order.[325] An RSB defendant may have a right to resist that violence.[326]

An RSB defendant may have a right to protect other interests as well. Commentators have written of the individual's right of self-respect, or right to have the community treat him or her with full and equal respect and concern.[327] One scholar expresses

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322. Harris, *supra* note 5, at 211. One difficulty with this view is the jurisprudential insistence on a distinction between misfeasance and nonfeasance, between act and omission. Typically, a person has a duty not to injure another by positive conduct; absent a special relationship, one has no duty to prevent someone from being harmed, even if prevention costs the rescuer little or nothing. Recently, however, commentators have argued against this general common law distinction. For a moral justification of the legal duty to rescue see Ernest Weinrib, *The Case for a Duty to Rescue*, 90 Yale L.J. 247 (1980). For an individualistic or prudential justification of the duty to rescue see Comment, *Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue*, 31 UCLA L. Rev. 252 (1983).

323. Harris, *supra* note 5, at 194 (quoting Frederick Engels, The Condition of the Working Class in England 108 (Henderson & Chaloner trans. 1958).

324. Harris, *supra* note 5, at 198-212. *But see* Mack, *Bad Samaritanism and the Causation of Harm*, 9 Phil. & Pub. Aff. 230 (1980) (criticizing Harris' view on what comprises "causing harm").

325. Of course, this may depend on one's conception of the proper role of the state. If one conceives of the proper role of the state in libertarian terms, this argument will not persuade. *See* Robert Nozick, Anarchy, State, and Utopia (1974). A liberal might hold that the state is obligated to prevent certain forms of economic injustice. *See, e.g.*, John Rawls, A Theory of Justice (1971) (arguing that a distributional pattern is best if it benefits the least fortunate member of society better than any alternative pattern). Similarly, if one has a radical view of social organization, the state will be required, at its very inception, to provide for social and economic justice. *See, e.g.*, Michael Walzer, Radical Principles (1980). Thus, the question of whether to recognize an RSB defense is not restricted to criminal law, but rather is tied to central questions in political philosophy.

326. *See* Herbert Marcuse, *Repressive Tolerance*, in A Critique of Pure Tolerance 81-117 (Beacon ed. 1965).

327. *See* C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substan-*

this notion as "the principle of personhood,"[328] writing: "We want the law . . . to allow people to act like humans. . . . Likewise, we want the law to treat us as humans, to treat us as unique personalities, capable of emotions, and inherently different from, and better than, all other living things and all inanimate objects."[329] This sense of personal dignity, of selfhood, has been successfully invoked in criminal trials in the form of "Black pride" defense,[330] but in the context of excuse.[331]

A third group of interests which an individual may protect are rights to full and equal participation in society. Defense of these rights may take the form of civil disobedience, as well as political violence and even revolution.[332] In some cases an act can be seen as a protest against political or economic subjugation, an appeal to a right more fundamental than the one protected by the law which is broken.[333] Professor Greenawalt uses the example of slavery to illustrate a situation in which persons are entitled to protest against, and break, unjust laws:

> Some of the victim's moral reasons for obeying the law may be largely undercut by the violation of his rights. If the violation is virtually total, as in the slavery example, the slaves owe nothing to the government or to members of society as such, though they may have universally applicable moral responsibilities to all humans that bear on whether they should obey the law.[334]

Some might object to use of the example of slavery, arguing

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tive Content of Equal Protection, 131 U. Pa. L. Rev. 933, 933 (1983); Jean Paul Sartre, *Introduction*, in Fanon, *supra* note 148, at 18.

328. Dressler, *Substantive Criminal Law*, *supra* note 298, at 1073.

329. *Id.*

330. *See* Harris & Gabel, *supra* note 210, at 379: "The defense stressed Lester's pride and efforts to assert his manhood in a racist society which struck him down at every turn"; Harris, *supra* note 212, at 14 (quoting from National Lawyer's Guild "Conspiracy" 1970). *See also infra* note 431 and accompanying text.

331. One can argue that a society which permits social and economic decisions to steal the self-respect of large numbers of identifiable citizens has little claim to the allegiance of these citizens. An unforeseeable, temporary interference with the development of the self-respect of this or that person is permissible, perhaps, but *not* the predictable, permanent loss of self-respect of certain identifiable races, minorities or economic classes. In the latter case, loss of self-respect is systemic and the legitimacy of the state is called into question. *See infra* notes 335-340, 387-397 and accompanying text.

332. *See generally* David Richards, *Rights, Resistance and the Demands of Self-Respect*, 32 Emory L.J. 405 (1983).

333. *See* Eisenhower Foundation, *supra* note 115 (street crimes form of "slow rioting"). For a discussion of the appeal to "natural rights" in American political history and its application to political acts of violence, see Jordan Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 Emory L.J. 545, 558-68 (1983).

334. Greenawalt, *supra* note 308, at 490. Greenawalt discusses the limitations on using morally justified force against unjust laws. The limitation of universal moral

that the deprivations of rights claimed by an RSB individual are not so severe as those justifying the slave's rebellion. After all, the RSB individual's claims concern inadequate political participation (not a complete denial of participation) and economic repression (not servitude). However, as Greenawalt observes, inadequate political participation and harsh economic treatment were the very claims which justified the American Revolution.[335] If the Revolution was justified, one must be prepared to consider that denial of political participation and systematically unfair economic treatment can justify a forcible response.[336]

Professor Reisman points out that in some circumstances violence might be the only available means of political expression:

> [I]nsistence on non-violence and deference to all established institutions in a global system can be tantamount to confirmation and reinforcement of those injustices. In certain circumstances violence may be the last appeal or the first expression of demand of a group or unorganized stratum for some measure of human dignity.[337]

A society might operate largely on morally sound principles of equal dignity and participation, yet fail to recognize the rights of a few groups or strata. In that case, a member of one of these groups (for example, an RSB individual) might be justified in committing an illegal act rather than complying with the unjust system and thereby reinforcing it.[338] In doing so, he or she prevents the *justly* treated members of society from being lulled into the belief that the existing system operates effectively for all members. Judge Bazelon noted this lulling effect in *United States v. Alexander*,[339] and warned of the dangers of society's reliance on the

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responsibilities to all human beings is discussed at text accompanying *infra* note 353.

335. Greenawalt, *supra* note 308, at 486.

336. *Id.*

337. W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 Va. J. Int. L. 1, 6 (1973).

338. At least three possibilities exist. First, an RSB defendant might be justified in committing a crime if his or her motives are those encompassed by an RSB defense, for example, need, anger, cultural isolation and so forth. Second, an RSB defendant might be justified in committing a crime, e.g., robbing a bank, partly for political reasons. In this case, the political significance of his or her act must be communicated to the public. Third, an RSB defendant may be justified in committing a crime, for example, rioting, solely for political reasons. The second and third cases are obviously political crimes; the first is an economic crime. An RSB defense applies to the first case; it is less likely to be raised in the second and third. Political actors, like the Chicago Seven or the FALN, rarely seek to defend their actions because they do not recognize the legitimacy of the courts to try them. For a discussion of political crime, see Stephen Shafer, The Political Criminal: The Problem of Morality and Crime (1974). *See also supra* notes 333-334 and accompanying text.

339. 471 F.2d at 957.

form of justice when the substance is yet to be achieved. Although Bazelon ultimately concluded that Alexander should not be exonerated, he did urge that existing defenses be broadened to permit full consideration of cases like his.[340] Bazelon's premise was that allowing presentation of information about rotten social background at a trial would eventually require that society "consider . . . whether income redistribution and social reconstruction are indispensable first steps toward solving the problem of violent crime."[341]

In the language of justification, then, the RSB defendant can be seen as acting to protect important personal interests. However, there are difficulties with the application of justification to the conduct of the RSB defendant, not the least of which are the limitations within the doctrine itself. To be justified, an actor's conduct must be necessary to prevent the invasion of rights and proportional to that invasion.[342] The necessity requirement insists that there be no realistic nonviolent alternatives open to the defendant to redress the conditions under which he or she suffered. In this regard,

> The nature of a government can be of crucial importance. . . . [T]he greater the political participation and freedom in a society, the stronger will be the moral claim that obedience is owed to fellow citizens, the more dubious will be assumptions that forcible action alone can accomplish reform, and the weightier will be concerns that widespread force will undermine a government that is reasonably just.[343]

In other words, a justified RSB defendant is one who can show that other, less violent alternatives failed to protect his or her rights. In the past, activists who have argued that civil disobedience was necessary to prevent social evils have failed on this issue, because courts deny any immediacy between the defendant's actions and the prevention of evil.[344]

The proportionality requirement requires that an RSB defendant's actions be calculated to answer the degree of harm threatened. Thus, justification would be inappropriate in *United States v. Alexander*,[345] for example, where the defendant re-

340. 471 F.2d at 926.

341. 471 F.2d at 965. This, certainly, cannot be the only reason for permitting information about an RSB at trial. The courts cannot merely be a forum for such discussions. However, the courts provide an excellent setting for showing how society harms itself by permitting extreme poverty and social deprivation.

342. *See supra* note 317 and accompanying text.

343. Greenawalt, *supra* note 308, at 496.

344. *Id.* at 483.

345. 471 F.2d at 923. The German criminal code does not require that physical force be proportional to the threatened harm, since the basis of justification, in in-

sponded to a racial slur by shooting the person who spoke it. Furthermore, the RSB defendant's conduct is often directed at a particular person, and this presents the problem of identifying a wrongdoer against whom the RSB defendant's interests must be protected.[346] When it is an economic or social system which violates a person's rights, it is difficult to justify violence against any individual in particular.[347] As Frederick Engels observed, "[e]veryone is responsible and yet no one is responsible."[348] Acts of violence appear even more tragic and pointless because it is often the poor and powerless themselves who are the victims of violent crime.[349] In this respect, limiting the use of force benefits everyone.

Furthermore, even where the RSB defendant is clearly and self-consciously a political actor whose conduct is intended to bring attention to violations of his or her rights and whose target is an appropriately chosen symbol of a demonstrably unfair system or practice, some argue that the defendant should nevertheless submit to the sanctions of the law in order to demonstrate respect for law in general.[350] There is some merit in this view—but only if society is prepared to regard the civil disobedient's sacrifice with similar seriousness and engage in appropriate soul-searching. In a society that would not do so (e.g., Hitler's Germany, the American South during slavery), it seems pointless to insist that the lawbreaker (the Jew, the runaway slave) submit to "the rule of

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dividual autonomy, dictates an absolute right to prevent invasion without consideration of whether the force is excessive. *See* Fletcher, *supra* note 18, at 860-74.

346. An example would be an RSB person who steals another's welfare check to obtain the money necessary to purchase food or housing. The thief may have little duty to the state, see Greenawalt, *supra* note 308, at 490, but he or she still has a moral duty not to injure the victim as a person, *id*.

347. Of course, one could argue that those who most benefit from the present social structure—the rich and powerful—may be legitimate subjects of violence. This is unpersuasive. One may require the rich to sacrifice their wealth to rectify social wrongs, perhaps, but not their lives or physical integrity. Probably most—though not all—rich people are not fully aware of the extent of human suffering brought on by economic conditions in this society. Take their wealth and power, but leave them free to develop into different kinds of people.

348. Harris, *supra* note 5, at 195 (citing Frederick Engels, The Condition of the Working Class in England 108 (Henderson & Chaloner trans. 1958)).

349. "If a high percentage of aggressive personal violence emanates from members of 'lower' classes, it is also directed at members of those classes, and the great majority of members of all classes perceive the need to restrict violence. Thus approaches to violence do not involve sharply competing class interests or perceptions." Greenawalt, *supra* note 308, at 445.

350. One of the most notable proponents of this view was Dr. Martin Luther King, Jr.: "I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law." Martin L. King, Jr., Why We Can't Wait 86 (1963).

law."[351]

A final difficulty with justification is that even if an individual is entitled to use force to protect his or her rights against a representative of the society which oppresses him or her, he or she may still be bound by a higher moral duty to that person as a human being. Ultimately, the criminal law serves to protect the integrity of relationships between human beings, not political abstractions.[352] The effect of justification is to condone and encourage the RSB defendant's conduct, a result that may seem morally and prudentially wrong.[353]

b. Excuse.

Although the *conduct* of a defendant might be wrong, can the defendant be *blamed* for committing the wrongful act?[354] The doctrine of excuse focuses on the lack of blameworthiness of the defendant.[355] The central theme of excuses is that the actor is not responsible for his or her actions;[356] excuses are highly individualized and subjective.[357]

An excuse defense argues that a *disability* caused an *excusing condition*.[358] There are four categories of excusing condition:

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351. Morality cannot demand self-sacrifice in unjust circumstances for the sake of "the rule of law." In Hitler's Germany no Jew had a moral obligation to obey the law for the sake of the law. Common knowledge and experience tell us this. Are present social circumstances in the United States anything like those that prevailed in Nazi Germany? Probably not. However, ghetto conditions still might be wholly unacceptable. This is why it is essential for average Americans to make themselves aware of ghetto conditions, so that they can see just how indecent such conditions are. It is astounding how many "informed" people are unaware of what ghetto life is really like. *See supra* part II. For example, how many non-minority students in this year's graduating law classes have ever lived or worked in a ghetto? Understanding just how bad ghetto conditions are might reveal how hollow is the call for ghetto dwellers to exercise restraint and obey the law.

352. Whether a society which is itself unjust is entitled to enforce standards of morality between human beings is a separate question, which I discuss as society's entitlement to punish. *See infra* notes 377-423 and accompanying text.

353. It may also be politically untenable. *See* Greenawalt, *supra* note 308, at 440, questioning whether the state will ever acknowledge that violence directed against it is justified. *But see* Harris & Gabel, *supra* note 210, at 369-70 (arguing that the effort should be made, nevertheless).

354. Fletcher, *supra* note 18, at 1276.

355. Eser, *supra* note 314, at 635; Fletcher, *supra* note 311, at 1308: Excuses express "compassion for one of our kind caught in a maelstrom of circumstance."

356. Robinson, *supra* note 19, at 221; Professor Fletcher discusses this in terms of what the situation reveals (or doesn't reveal) about the defendant's character. *See* Fletcher, *supra* note 18, at 299-300; Fletcher, *supra* note 311, at 1271.

357. Professor Hart observes, "the need to inquire into the 'inner facts' is dictated . . . by the moral principle that no one should be punished who could not help doing what he did." Hart, *supra* note 41, at 39.

358. Robinson, *supra* note 19, at 221.

(1) when the conduct was not the product of the actor's voluntary effort; (2) when the conduct is voluntary but the actor does not accurately perceive its nature or consequences; (3) when the actor perceives the nature and results of his or her conduct but does not see them as wrong or criminal; (4) when the actor understands the wrongfulness of his or her conduct but does not have the ability to control it.[359]

For an RSB defendant, an excuse defense would require demonstrating that a rotten social background constitutes or creates a disability falling within one of these categories.[360] For instance, writers observe that daily existence in a ghetto environment creates a reservoir of rage, which, if tapped, can take control of the individual's actions: "[T]he experience of growing up black in America creates an inner rage which often must explode in actions defined as criminal."[361] In this sense, the defendant's conduct resembles a seizure or automatic reflex.[362] The actor's conduct is not voluntarily determined, but rather directed by the dominating emotional force of rage.[363]

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359. *Id.* at 222.

360. The requirement of an abnormal condition, or disability, of mind or body serves a number of purposes: it narrows the number of persons who can attempt to benefit from the excuse; it gives society something to blame other than the individual—we can say to ourselves that the *condition* is at fault; and the condition will often be physically confirmable. RSB seems to fulfill these requirements adequately, with the possible exception of the first. As the review of medical and social science findings in part II indicated, RSB conditions are tangible and leave physical effects. RSB is also something that we can blame, as we blame insanity for the crime of a psychotic. RSB is not, however, limited in its extension—there are many, many individuals in this country who live in grossly inadequate surroundings, suffer malnutrition, parental and social neglect, and racism. A broad RSB defense that would potentially apply to all or many such persons will be perceived as a threat to society and will incur insuperable political resistance. For that reason, the models of RSB defense selected in parts IV and VI are deliberately narrow.

361. Harris, *supra* note 212, at 2; Grier & Cobbs, *supra* note 29.

362. Model Penal Code § 2.01(2) (Proposed Official Draft 1962) includes in the definition of acts which are not voluntary "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual."

363. United States v. Banks, CR. No. 71-64 SAW (N.D. Cal. 1971), provides an example of the way in which this disability might develop. The defendant, a Black man, grew up in a poor, inner-city neighborhood. His parents separated and his father could not provide financial support. As a result, the defendant's mother cleaned white peoples' homes to earn a living. Still, lack of money forced the family onto welfare. These facts, coupled with a cultural emphasis on Black pride and manhood, led the defendant to develop a strong pride and a determination never to accept state support. As an adult, Banks experienced chronic unemployment despite repeated efforts to find a job. This, coupled with the immediate pressures caused by his inability to pay for his family's medical care, caused Banks to suffer "severe transient situational disturbance." While in this state Banks attempted a bank robbery. The successful defense of Banks is described in Harris & Gabel, *supra* note 210, at 447.

Even where the defendant's conduct appears outwardly voluntary, the power of the RSB defendant's mental and emotional trauma might cause a different excusing condition, the loss of ability to control conduct. This was the defense counsel's argument in *United States v. Alexander*:

> At the critical moment [when the slur was spoken] when he stepped back in the Little Tavern restaurant, and he was faced with five whites, with all of his social background, with all of his concepts, rightly or wrongly, as to whether white people were the bogeymen that he considered them to be, *the question at this moment is whether he can control himself*. . . . Now you have got to take the trip back through his lifetime with him and look at the effect that his lifetime had on him at that moment and determine whether he could control himself or not.[364]

Dyscontrol could also result from physical and physiological changes associated with early poverty and deprivation.[365] These changes could also alter perception and interpretation, causing the person to perceive incorrectly the nature or consequences of his or her actions.[366]

And, the circumstances of an RSB defendant's existence might lead him or her to a conclusion that his or her conduct is not wrongful, or less wrongful than any other available alternatives.[367] Or, finally, a defendant might be so socialized to behave in a manner necessary for survival in the ghetto that he or she does not see the wrongfulness of his or her conduct.[368]

Focusing on an RSB defendant as an individual seems more appropriate than focusing on the justifiability or legality of his or her acts; nevertheless, there are possible objections to applying the doctrine of excuse to an RSB defendant. One objection to analyzing a rotten social background as a disability is that not all persons with rotten social backgrounds commit crimes. Excusing the RSB defender could undermine the dignity and courage of those who choose to abide by the law despite their hardships. It could even encourage them to disregard the law by providing an excuse. Recently, one Black writer stated the case for holding disadvantaged Black people responsible for their actions:

> It is evident that such spurious thinking must end, for it has led us as a community to abandon old values, to excuse unconscionable wrongs. . . . [I]n the excuses we make for the mis-

364. 471 F.2d at 959 n.100.

365. *See supra* notes 109-189 and accompanying text.

366. *Id.*

367. *See supra* notes 149-157 and accompanying text; *infra* notes 427-429 and accompanying text.

368. *Id.*

> conduct of our young people . . . we sow the seeds of our own future degradation. Those of us who work hard owe it to ourselves and to other Blacks to refuse to put up with the current landscape of Black hooliganism and self-contempt.[369]

The response to this objection is that a defense of rotten social background, like any excuse defense, is individualized and subjective. It does not excuse merely because one has suffered privation, insult, and unequal treatment. Rather, the theory requires that a jury determine whether, in this *particular* defendant's case, a rotten social background amounts to a disability falling within a *particular* excusing condition.[370] The defense counsel in *United States v. Alexander* emphasized this point in his remarks to the jury: "Now we know that most people survive rotten social backgrounds. But most people are not now here at this time on trial. The question is whether the rotten social background was a causative factor [for this defendant] and prevented his keeping controls at that critical moment."[371]

A second objection, posed by Professor Fletcher, is that admitting a defense obscures the distinction between the actor's character and the circumstances affecting his or her capacity for choice.[372] In Fletcher's words, "it goes without saying that a person's life experience may shape his character."[373] An excuse, however, "must represent a limited, temporal distortion of the actor's character."[374] The answer to this is that an RSB defense does not purport to make background, as a shaper of character, the excusing condition. The rotten social background is relevant only in that it can *cause* an excusing condition. While a person's back-

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369. Orde Coombs, *Speak! Black Thugs Are* Not Victims, Essence, Jan. 1984, at 116. *See also* William Tucker, *Kindness is Killing the Black Family: Welfare, Says One Journalist, Hurts Blacks More Than It Helps*, San Francisco Chron., This World, Jan. 27, 1985, at 7-8.

370. One might object that if social deprivation does not cause criminal behavior in one case, it cannot be the cause of criminal behavior in a relevantly similar case. This raises the question of how it is ever possible to know that social deprivation (as opposed to a Catholic upbringing or being an only child) causes criminal behavior. Although social and medical science gives some help, it remains that we can never know this with certainty. However, we can never know anything with certainty. There are always hidden assumptions, probabilistic inferences, etc., in any causal argument. Intuitive wisdom, which structures so much of our daily lives, is based on such assumptions and inferences. That brutality and violence teach a child that brutality and violence are acceptable does not require philosophic or scientific certainty, just common sense.

371. 471 F.2d at 959 n.100. *See also* Delgado, *supra* note 63, at 24 (law accepts excusing conditions when paradigmatic cases appear and moral intuitions call for exculpation, despite lack of theory to explain borderline cases).

372. *See* Fletcher, *supra* note 18, at 801.

373. *Id.*

374. *Id.* at 802.

ground encompasses his or her entire past, the excusing condition arises at a specific moment when the crime was committed. It is with this moment that the theory of excuse is concerned. An individual always "carries" his or her background with him or her, but the jury must determine whether it caused an excusing condition at the time of the crime.[375]

A third possible objection is that if the theory of excuse is successfully invoked, a possibly dangerous individual is released and continues to endanger society. These cases will very likely arise. The jury will then be faced with the difficult choice between convicting a person who is not blameworthy and acquitting a person whose past history can disable him or her in circumstances which cannot be predicted or controlled. This objection is partially answered by providing for the court to impose nonpunishment alternatives to release.[376] These alternatives are discussed in part VI of this article. This is only a partial answer, however. What of the victim of the rage or dyscontrol defendant? It will be small consolation to the victim that the acquitted defendant is detained, perhaps for a brief period, before going free. The dilemma is even more acute when we realize that the victim of the RSB defendant will often be a woman, an elderly person, or a member of a poor, inner-city neighborhood—persons who already receive little protection from society. Indeed, the harm done the victim is part of the *victim's* RSB; if it goes unpunished, is not that RSB etched a little deeper?

Yet, harm to the victim has already been done; nothing can undo that. The defendant's acquittal, if accompanied by measures to remedy his or her dangerous condition, may break the spiral of recidivism in a way that a prison sentence would not. His or her trial will expose the public to the RSB conditions that predisposed the defendant to crime in a way that summary conviction would not. Society may then take measures to avoid creating additional RSB individuals; this, in turn, will mean fewer future victims.

375. For example, a Black woman's background may include anguished witnessing of her mother's mistreatment by a rich white woman. That background does not cause the Black woman to assault a similar rich white woman 20 years later. Rather, the background creates a susceptibility in the Black woman to react hostilely to certain kinds of white women. The cause of the crime is the present behavior of a rich white person, not the Black woman's social background.

376. Of course, there are problems with detaining an "innocent" person, even if he or she is dangerous. *See supra* note 84 and accompanying text; *infra* part VI. Perhaps such an individual can be given a choice of detention or reeducation. Perhaps not. This is one of the many issues that make the question of an RSB defense so difficult.

Whether deterrence will be weakened or retribution left unsatisfied if RSB offenders go free is treated in the next section.

2. Responding to the criminal: society's entitlement to punish.

Recognizing that in many instances an RSB defendant is blameless leads to a second, related reason for a new RSB defense: society may lack the warrant to punish him or her. "To say that a person deserves a certain punishment is not to say that someone is justified in inflicting it."[377]

What gives society the right to punish? The rationales for punishment are usually associated with either retributive or utilitarian theories.[378] These theories conflict somewhat in their premises about the purpose of the criminal law. I shall evaluate how these approaches apply to the RSB defendant in order to determine whether society is entitled to inflict punishment on him or her under any theory.[379]

a. Retributive theories.

According to most retributive theorists, punishment is inflicted simply because justice requires (or permits) it, whether viewed from the perspective of society or that of the wrongdoer.[380] From society's perspective, the wrongdoer has taken unfair advantage of the agreed-upon sharing of benefits and burdens, and therefore the wrongdoer owes something to society as a result of renouncing the burden of self-restraint which others have assumed.[381] Punishment exacts the debt and restores moral equilibrium.[382]

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377. John Hospers, *Punishment, Protection and Retaliation*, in Justice and Punishment 24 (J.B. Cederblom & William Blizek eds. 1977). Where punishment serves none of the accepted rationales, it may be unconstitutional. Delgado, *supra* note 63, at 8.

378. Packer, *supra* note 1, at 9-11.

379. Punishment, as defined by Professor Hart, has five features: (1) it must include pain and other consequences normally considered unpleasant; (2) it must be for an offense against legal rules; (3) it must be inflicted upon an actual or supposed offender; (4) it must be intentionally administered by human beings other than the offender; (5) it must be administered and imposed by an authority constituted by a legal system against which the offense is committed. Hart, *supra* note 41, at 4-5.

380. Professor Packer refers to society's interest as revenge and to the criminal's interest as expiation. Packer, *supra* note 1, at 37-38. *See also* Dressler, *Substantive Criminal Law*, *supra* note 298, at 1075-76; Harris, *supra* note 5, at 240 (through disobedience, a person wills his or her own punishment and therefore has a duty to undergo suffering).

381. Morris, *supra* note 28, at 34.

382. *Id.*

From the criminal's perspective, punishment is fitting because it recognizes his or her autonomy (in the choice to do wrong),[383] and allows him or her the opportunity to re-enter society after having paid his or her debt.[384] This opportunity has been described as the criminal's "right to be punished."[385] To some writers, only the retributive theory can morally justify punishment because it focuses entirely on the just deserts (or rights) of the individual in his or her relation to society, rather than on any instrumental purposes punishment might serve.[386]

How does this theory of punishment apply to an RSB defendant? The view that the criminal needs punishment "to heal the laceration of the bonds that joined him to society"[387] assumes the actual existence of a community to which each individual is bonded in a meaningful way.[388] This assumption has been challenged. For instance, a Dutch criminologist studying the relationship between poverty and crime concluded that lack of community orientation is a prominent feature of industrial capitalist societies and a principal cause of crime.[389] Capitalism breeds criminality in two ways: first, the system is based upon exchange, which necessarily means that the interests of individuals are opposed, thus encouraging egoism and discouraging community.[390] Second, any remaining sense of community is destroyed by the unequal distri-

383. Sources cited *infra* note 385.

384. Harris, *supra* note 5, at 217.

385. Kant, Hegel and Marx all supported the notion of a right to be punished. *See* Harris, *supra* note 5, at 217-20.

Professor Herbert Morris is a contemporary proponent of an individual's right to be punished. Morris' theory is that: (1) an individual has a fundamental right to punishment; (2) this right derives from a fundamental right to be treated as a person; (3) this right is natural, inalienable, and absolute; (4) the denial of this right implies the denial of all moral rights and duties. Morris, *supra* note 28, at 32. *But see* John Deigh, *On the Right to Be Punished: Some Doubts*, 94 Ethics 191 (1984) (raising objections to the notion that we have a right to be punished).

386. *See* discussion of utilitarian theories, *infra* notes 398-401 and accompanying text.

387. Hart, *supra* note 41, at 39.

388. "[F]airness dictates that a system in which benefits and burdens are equally distributed have a mechanism designed to prevent a maldistribution in the benefits and burdens." Morris, *supra* note 28, at 34. The criminal law is the "mechanism" to which Morris refers.

One can imagine a retributive theory which avoids the notion of a community of persons. For example, an individual can act wrongfully and be punished by God.

389. *See generally* William Bonger, Criminality and Economic Conditions (A. Turk ed. 1969).

390. *Id.* at 40-47. "Egoism" refers to motives of greed and selfishness, and includes a general indifference toward others. "[I]n the last instance it is the mode of production that is able to develop the social disposition innate in man . . . or prevent this disposition from being developed, or may even destroy it *entirely*. *Id.* at 33.

bution of wealth, which consigns some to poverty,[391] and by unequal laws.[392] The laws of capitalist societies make the egoistic acts of criminals illegal because they conflict with the interests of the powerful, while the egoistic acts of the powerful are legalized.[393] In this sense, it is not much of a "burden" to the economically powerful to obey the laws, nor is it a "benefit" to the powerless to live in a community which is indifferent to them.[394]

If the community excludes certain persons, is it entitled to punish those individuals on the basis of a debt they owe the community? According to Professor Jeffrie Murphy, retribution, "the only morally defensible theory of punishment, is largely inapplicable in modern societies. The consequence: modern societies . . . lack the right to punish."[395] Like others, Professor Murphy draws this conclusion by showing that there is little basis for community in the reality of rotten social background:

> [T]o think that [the notion of community] applies to the typical criminal from the poorer classes is to live in a world of social and political fantasy. Criminals typically are not members of a shared community of values with their jailers; they suffer from what Marx calls alienation. And they certainly would be hard pressed to name the benefits for which they are supposed to owe obedience.[396]

Thus, even if an RSB defendant is responsible for his or her acts, retribution theory provides little moral basis to punish him or her for those acts.[397]

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391. Bonger, *supra* note 389, at 53: "[Poverty] kills the social sentiments . . . destroys all relations between men. He who is abandoned by all can no longer have any feeling for those who have left him to his fate." *See also* Cleaver, *supra* note 105, at 136:

> They have no bank accounts, only bills to pay. The only way they know of making withdrawals from the bank is at the point of a gun. The shiny fronts of skyscrapers intimidate them. They do not own them. They feel alienated from the very sidewalks on which they walk. This white man's country, this white man's world.

392. Bonger, *supra* note 389, at 47-49.

393. A. Turk, *Introduction*, in Bonger, *supra* note 389, at 14.

394. Fletcher, *supra* note 18, at 417-18; Bonger, *supra* note 389, at 22-26. The benefits of community life arguably include equal economic opportunity and decent living and working conditions, as well as the interests noted in the discussion of justification—the interest in self-respect and equal political participation. Despite the lack of these benefits, the powerless never consent in any meaningful way to the rules which govern their existence. *See supra* notes 387-393 and accompanying text; *infra* notes 395-397, 421-422 and accompanying text; and part V.

395. Harris, *supra* note 5, at 221.

396. *Id*. Harris' rhetoric is overdrawn. RSB victims do clearly derive *some* benefits from the surrounding society—electricity, water, protection from being eaten alive. What the radical argument puts in doubt is whether those benefits are all they should be, all the RSB person is entitled to, or whether they exceed the detriments of growing up in a society like ours.

397. This is particularly true for the RSB person born and raised in poverty for

b. Utilitarian theories.

In a common utilitarian theory, the purpose of law is to increase the total happiness of society and minimize the total pain.[398] The purpose of criminal law is to prevent future crime through punishment of offenders.[399] Punishment is forward-looking; it is not inflicted to rectify prior injustice, the concern of retributivist theories, but to prevent crime in the future.[400] There are two theories of how this preventive purpose is achieved: deterrence and rehabilitation.[401] Because their assumptions about criminality differ, I discuss them separately.

i. Deterrence.

Deterrence theory argues that punishment prevents crime by making an example of the criminal; punishment functions as a threat and warning.[402] Prevention occurs "when persons make, as they will, rational choices to forgo the benefits of crime because the pain of punishment is greater."[403] The theory presupposes that criminals are rational calculators, who, before committing crimes, evaluate how much they stand to gain or lose and the chances of apprehension.[404]

Professor Packer points out that deterrence operates in a second, more subtle way. Psychologically, public infliction of punishment reinforces norms of acceptable behavior by stigmatizing those who violate those norms.[405] In this way, deterrence operates

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his or her entire life. Such a person plays no part in his or her isolation from the majority community and can scarcely be blamed for it.

More traditional retributivist theories—not based on the notion of benefits and burdens—could simply punish the RSB defendant for breaking the law, whether or not the defendant benefits from social life at all. Such a theory of punishment amounts to little more than the assertion of force.

398. *E.g.*, Packer, *supra* note 1, at 11; Stanley Benn & Richard Peters, Social Principles and the Democratic State 173-85 (1959); Dressler, *Substantive Criminal Law*, *supra* note 298, at 1075.

399. *See* sources cited *supra* note 398.

400. Hospers, *supra* note 377, at 25; Dressler, *Substantive Criminal Law*, *supra* note 298, at 1075.

401. Packer, *supra* note 1, at 39.

402. *Id.* at 142. Deterrence implies that society would be entitled to punish nonoffenders if their punishment served the end of general deterrence. For instance, Professor Hospers discusses the horrors of post-revolution society, where people were shot for what they might do rather than for what they had done. *See* Hospers, *supra* note 377, at 30-31.

403. Dressler, *Substantive Criminal Law*, *supra* note 298, at 1075.

404. *Id.* *See* Packer, *supra* note 1, at 39-52 (general and specific deterrence functions of criminal law).

405. Packer, *supra* note 1, at 43-44. Packer describes the ritual of criminal trials as a process of socialization, which "strengthen[s] the identification of the majority with a value system that places a premium on law-abiding behavior."

when "we automatically and without conscious cognition follow a pattern of learned behavior that excludes the criminal alternative."[406]

Both functions are at best weakly served by inflicting punishment on an RSB defendent. Although some who live in poverty do heed the law's sanction, many will not be deterred. These include the RSB person who commits crime out of rage or on the basis of political principle. Moreover, the threat of punishment is unlikely to deter the desperately poor, who commit crimes out of economic necessity. As Packer observes:

> Deterrence does not threaten those whose lot in life is already miserable beyond the point of hope. It does not improve the morals of those whose value systems are closed to further modification, either psychologically (in the case of the disoriented or the conscienceless) or culturally (as in the case of the outsider or the member of a deviant subculture).[407]

For a deterrent to work, it must threaten the individual with loss of things he or she considers valuable. When an individual lives a miserable, impoverished life, he or she has little, if anything, to fear from a deterrent, sometimes not even the loss of his or her freedom.[408]

It is also questionable whether, and how much, punishing RSB defendents reinforces norms. Indeed, if that punishment is seen as unfair, it is counter-productive: "Punishment of the morally innocent does not reinforce one's sense of identification as a law-abider, but rather undermines it . . . . If we are to be held liable for what we cannot help doing, there is little incentive to avoid what we can help doing."[409] Unjust punishment is useless punishment.[410]

ii. Rehabilitation

In the rehabilitative ideal, punishment[411] can prevent future

406. Packer, *supra* note 1, at 43.

407. Packer, *supra* note 1, at 45.

408. Some recidivist criminals accept prison and prefer it to life in the ghetto. *See* Reid, *supra* note 301, at 592-606, 688-92 (1976).

409. Packer, *supra* note 1, at 65.

410. *Id*. (unjust punishment not really punishment at all, but force inflicted upon a person). Some may argue that punishing an RSB defendant may not deter the defendant or others more or less exactly like him or her, but may deter other ghetto dwellers. If the defendant could not help his or her criminal behavior, however, punishment in order to deter others is unjust. One could just as easily punish someone who is mentally ill in order to deter sane individuals from committing crime. Further, such arbitrary treatment of the RSB or mentally ill defendant is likely to backfire; it might persuade people that the law is arbitrary, not deserving our respect and obedience.

411. For some rehabilitative theorists, punishment is an anachronism, a holdover

crime by rehabilitating the offender—by finding and treating those personality aspects which predispose him or her to commit crime.[412] According to this view, the criminal law is a vehicle for applying techniques which modify the behavior of persons who commit antisocial acts, on the premise that the individual will benefit from such modification.[413] Rehabilitation assumes that offenders are "sick,"[414] psychologically or morally, and may be required to undergo personality modification to regain their health.[415]

The theory of rehabilitation does not emphasize the individual's blame for his or her actions, nor does it presuppose a rational actor or the existence of meaningful choice. Nevertheless, the assumptions of the rehabilitative theory do not adequately justify punishing many RSB defendants.[416] First, the assumption that crime committed by an RSB defendant manifests sickness or depravity is often false. The starving person who steals food is motivated by what most would call a healthy instinct for survival. Even violent crimes may have motivations we would consider normal, for instance those interests noted in the discussion of justification—assertion of self-respect, racial, sexual and political equality, etc.[417] One writer observes that most criminals are, in fact, motivated by the personality traits which capitalist societies encourage as "normal": self-interest, indifference to others, acquisition.[418]

By espousing a benevolent purpose to justify punishment, re-

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from a more primitive era. *See* Karl Menninger, The Crime of Punishment (1968); Comment, *A Jam in the Revolving Door: A Prisoner's Right to Rehabilitation*, 60 Geo. L.J. 225 (1971). *See, e.g.*, Hospers, *supra* note 377, at 29-30.

412. *Id.* at 29.

413. Packer, *supra* note 1, at 12, 25. This notion reflects a distinction between the utilitarian theories of deterrence and rehabilitation: deterrence attempts to prevent crimes by would-be offenders; rehabilitation attempts to prevent additional crimes by one-time offenders. "Deterrence says it is the modification of the behavior of the noncriminals that matters; rehabilitation says it is the modification of the behavior of the criminals that is decisive." Richard Wasserstrom, *Some Problems With Theories of Punishment*, in Justice and Punishment, *supra* note 377, at 187.

414. For instance, one proponent of a system based on rehabilitation, Lady Barbara Wootton, maintains that such a system would ultimately obscure the distinction between hospitals and penal institutions. *See* Wootton, *supra* note 18, at 79-80.

415. *See* Wasserstrom, *supra* note 413, at 180-81.

416. *Compare* text accompanying *infra* notes 494-495, proposing "ESB" (Enriched Social Background) disposition for persons acquitted under rage model.

417. *See supra* notes 320-341 and accompanying text.

418. *See supra* note 391 and accompanying text. Of course, society may still wish to rehabilitate the normally-motivated RSB offender, so that he or she will use nonviolent, socially acceptable ways of satisfying his or her needs. This presupposes, however, that legitimate means of self-advancement are in fact open to the offender. This will not always be so. *See* text accompanying *supra* notes 105-189 and *infra* notes 495-497 (proposing Enriched Social Background—ESB—solution to RSB).

habilitation may be easily abused. Punishment need not be proportional to the offense committed when the focus is on the "disease" motivating the actor rather than the offense itself. Indeed, rehabilitation implies that the requirement of an actual offense could be discarded altogether.[419]

Moreover, when an offender is assumed "sick," his or her release from confinement is conditioned upon demonstration of a personality change in the form of cooperation with the punishing society: "It is almost inevitable that the prisoner will be considered 'unimproved' or 'unrehabilitated' until he shares the values of the person treating him."[420] I have already noted the moral inconsistency of demands that an individual assume the values (and thus the burdens) of the punishing society without enjoying its benefits.[421] When those values include those responsible for the social conditions that led to the defendant's conduct in the first place, the demand is more unfair. Central to rehabilitation theory is the claim that society has the right to insist that the defendant be rehabilitated. The case of the RSB defendant challenges that right.

Neither retributivist or utilitarian theories give society the right to punish an individual where the relationship between the individual and society does not validate the theory's assumptions. Essentially, society's right to punish requires that individuals have a realistic chance to act in a socially acceptable way, or, once an offender, the possibility of becoming the sort of person who can benefit from acting in accord with social and legal norms. As one writer puts it:

> Each of the theories underlying the criminal law describes functions which can or should be carried out only with men capable of responding in accordance with the tenets of the theory. Each depends upon men who are capable of choosing how they will behave. And each expresses concern about imposing the "criminal" designation upon one who is not personally responsible.[422]

Evidence of a rotten social background, then, is relevant in

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419. *See* Morris, *supra* note 28, at 38. That is, we may want to detain and rehabilitate someone who is likely to commit a crime, but has not already done so. Once rehabilitation is the goal, there is no obvious reason not to do so. Of course, one could argue that other values, such as individual liberty, would permit rehabilitation only when a person breaks the law.

420. Hospers, *supra* note 377, at 29. Rehabilitation of an RSB person probably requires inculcating conventional values, taking away his or her right to decide values individually. One can imagine a defendant saying "punish me for my crime, if you will, but don't interfere with my own conception of what is valuable. You don't have the [moral] right to do *that*."

421. *See supra* notes 395-396 and accompanying text.

422. Abraham S. Goldstein, The Insanity Defense 16 (1967).

criminal trials because with this evidence, society can acknowledge blamelessness where appropriate, and avoid punishing those it does not have the right to punish.[423]

B. Possible Models

Evidence of a rotten social background could be introduced in criminal trials in various ways. It could be relevant to a defense of excuse or justification, to a public policy defense relating to society's responsibility for the rotten social background, or to considerations in the sentencing stage. In any of these ways, information about extreme poverty and deprivation can have the beneficial effect hoped for by Judge Bazelon in "compel[ling] us to explore these problems, and thereby offer[ing] some slight hope that we will learn, in the course of deciding individual cases, something about the causes of crime."[424]

1. Excuses.

The previous discussion suggested a number of possible excuse defenses;[425] the particular circumstances of each case would determine the appropriateness of each approach.

a. Involuntary rage.

Under this model, the RSB defendant would argue that a precipitating event evoked rage so powerful as to block his or her consciousness, rendering subsequent actions involuntary. Studies of repressed anger reviewed in part II indicate that long-term exposure to environmental insult can make an individual a virtual "time bomb." Such a person may react to a seemingly minor provocation with a violent response of which he or she is scarcely aware. Professor Hart summarizes the conventional theory of cases of automatic behavior as follows:

> What is missing in these cases appears to most people as a vital link between mind and body; and both the ordinary man and the lawyer might well insist on this by saying that in these cases there is not "really" a human action at all and certainly nothing for which anyone should be made criminally responsible. . . .[426]

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423. A fourth rationale, incapacitation, is not discussed because nonpenal dispositional alternatives exist that serve the purpose of removing violent persons from the streets. *See infra* part VI and *supra* notes 376-377 and accompanying text.

424. 471 F.2d at 926.

425. *See supra* notes 354-379 and accompanying text.

426. Hart, *supra* note 41, at 107. *See also* Dressler, *Heat of Passion*, *supra* note 272, at 468.

When extreme environmental deprivation causes the type of physical disorder required by the conventional defense, then the RSB person should be exculpated. The defense, however, should not be limited to cases of physical disorder, like epilepsy or brain tumor. The kind of pent-up rage and despair that can result from living in a crowded, violent neighborhood can cause an explosion of violence just as disordered brain circuitry can. When this occurs, a defense should be available. The defense would require proving: (i) that the defendant was acting automatically; and (ii) that the automatic state was caused by the extreme deprivation of a rotten social background.

b. Isolation from dominant culture.

The theory underlying this model of the defense is that some urban ghettos are social and cultural islands unto themselves, with their own rules, norms and values.[427] A person who has lived since birth in such an environment may be so strongly socialized by it that he or she has little sense of the values of the larger society or opportunity to acquire the norms necessary to function responsibly in that society.[428] This defense would be particularly appropriate for a young defendant who has had little or no exposure to life outside the ghetto, and for whom acquiescence to ghetto norms was required to survive.[429] It would require a psychological and sociological analysis of the defendant's development, and proof that the defendant did not adequately internalize the values of the larger society, while in fact living by ghetto norms endorsing violence and other criminal behavior.

c. Inability to control conduct.

This model assumes that a rotten social background can cause inability to control conduct, as insanity does. This defense would require a broad definition of disability, for instance, that proposed by Judge Bazelon in *Alexander*: that at the time of the defendant's unlawful conduct his or her mental or emotional processes or be-

427. *See supra* notes 149-157 and accompanying text; Shulins, *From Stone Age to Space Age*, L.A. Times, July 8, 1984, Pt. I, at 2, col. 1 (Hmong refugees, unaware of U.S. customs and laws, lit charcoal fires in apartments and shot songbirds for food).

428. This would be similar to relaxing responsibility for a visitor from another culture who violates the law while acting in a way considered lawful and appropriate in his or her own society, and unaware that his or her action is illegal in the new culture. *See Why the Hmong Have Spurned America's Offer*, Philadelphia Inquirer, Dec. 31, 1984, at 4A, col. 1 (Asian settlers from primitive region hunted dogs and cats for food in Minneapolis with crossbows).

429. *See* Delgado, *Response*, *supra* note 70, at 365, describing such a hypothetical case.

havioral controls were impaired to such an extent that he or she cannot justly be held responsible for his or her act.[430] This test is an advancement over the current medical-model tests for responsibility in that it allows for broad socioeconomic explanations for loss of control. To a greater extent, it also preserves the dignity of an RSB defendant by not forcing him or her to opt, for strategic purposes, for a plea of insanity when he or she is not insane.[431]

2. Public policy defenses.

Public policy defenses are based on the idea that crime often directly results from poverty and social neglect and, as such, society should take responsibility for it. By way of analogy, the current defense of entrapment recognizes that when a government agent is responsible for the defendant's *mens rea*, criminal punishment is inappropriate.[432] As applied to RSB defendants, the argument would be that society brings about crime by ignoring or permitting intolerable living conditions that make crime inevitable. This public policy defense would be appropriate where the defendant's situation indicates that he or she had no realistic opportunity to escape the environment—that he or she was "entrapped" in a ghettoized existence.[433]

Further analogous support can be found in the civil law of contributory negligence.[434] In a negligence action, the plaintiff's own conduct may often affect his or her right to recover for harm suffered. If, in a criminal trial, the state represents the interests of

430. United States v. Brawner, 471 F.2d 969, 1032 (D.C. Cir. 1973) (Bazelon, C.J., concurring in part and dissenting in part).

431. Defense attorneys have been able to bring in evidence of rotten social background by introducing evidence of the actor's personal experience and the political realities of his or her life in combination with general psychiatric principles. In so doing, they avoided characterizing their clients as "raving lunatics." *See* Harris & Gabel, *supra* note 210, at 1, 9-13. The impairment could be cognitive, emotional, or volitional, depending on the facts. The mediating mechanism could be physical, psychological, or, perhaps, sociological. The key is that the jury find subjection to environmental deprivation removed the defendant's ability to control his or her actions.

432. *See* Sorrells v. United States, 287 U.S. 435, 448 (1935); Model Penal Code § 2.13 (Proposed Official Draft 1962).

433. This argument directly questions the legitimacy of political authority. What justifies state power? In this case, it seems unfair for society to punish individuals whose opportunities for satisfying their goals are so severely restricted. Arguably, the authority or power of the state is not justified in the ghetto. *See supra* notes 351-410 and accompanying text. *Cf.* Steven Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. Rev. 1103, 1205 (1983) (suggesting that the legitimacy of government depends upon how government affects the person being asked to conform to law).

434. *See* Charles Gregory, Harry Kalven, and Richard Epstein, Cases and Materials on Torts 383-406 (1977).

society in punishing a lawbreaker, then it is plausible to argue that society's responsibility for the causes of crime make it a "contributor," and should bar or limit attachment of responsibility to the defendant.[435]

3. Justification.

With some ambivalence, I conclude that justification is not an acceptable model for a new defense based on rotten social background. Although there is appeal in the claim that an oppressed and exploited person who reasserts humanity through a criminal act is justified in doing so,[436] the moral, practical, and political hurdles in the way of such a new defense seem insurmountable.[437]

4. Mitigation of sentence.

Evidence of rotten social background should be admissible during sentencing as a special circumstance which made conforming to the law especially difficult. When this is shown, the sentence should be reduced accordingly.

Sentence mitigation is probably appropriate for any RSB defendant:

> The special features of mitigation are that a good reason for administering a less severe penalty is made out if the situation or mental state of the convicted criminal is such that he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been impaired or weakened otherwise than by his own action, so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed.[438]

Where a defendant could not be acquitted on the basis of rotten

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435. *Cf.* Bazelon, *supra* note 87, at 401-02: "[I]t is simply unjust to place people in dehumanizing social conditions . . . and then command those who suffer, to 'Behave or else!' "

436. Some of the RSB-connected interests a defendant might assert are: freedom from violence and harm, *supra* notes 327-331 and accompanying text; the right of self-respect, *supra* notes 317-321 and accompanying text; and the right to full and equal participation in society, *supra* notes 319-341 and accompanying text.

437. The practical difficulties are discussed *supra* notes 342-353 and accompanying text (proportionality and necessity requirements). The moral hurdle is discussed *supra* notes 352-353 and accompanying text (lawbreaker's duty to victim as a human being). The political problem is discussed *supra* notes 352-353 and accompanying text (RSB justification would condone and encourage the defendant's conduct). While proof of one of the fact patterns in *supra* note 436 should not, by itself, justify illegal conduct, an RSB defendant could, of course, claim an existing justification (such as necessity or self-defense), if the facts warranted it. *See supra* notes 242-252, 256-265 and accompanying text.

438. Hart, *supra* note 41, at 15.

social background, consideration of his or her background is still relevant to sentencing.

C. *Summary*

From both individual and societal perspectives, a strong case can be made for new defenses for the criminal defendant whose crime stems from poverty, mistreatment, or a legitimate and frustrated desire for self-respect. Destitution and neglect affect individual behavior and choice; they are thus highly relevant to issues of criminal responsibility. Broader considerations favor a new defense, as well. If the criminal law reflects and reinforces a system of morality, then a criminal trial is an obvious and appropriate place to apply, test, and develop that morality.[439] As Judge Bazelon observed: "We cannot rationally decry crime and brutality and racial animosity without at the same time struggling to enhance the fairness and integrity of the criminal justice system. That system has first-line responsibility for probing and coping with these complex problems."[440] The simplest meaning of fairness in criminal trials is that no one should be punished without first having the opportunity to argue the issue of his or her culpability.[441] The best reason for a defense acknowledging a rotten social background is that it is unfair to ignore it.

V. RSB in Comparative Perspective: Other Cultures and Ideologies

I have argued for a new RSB defense on social scientific, medical, and jurisprudential grounds. Before describing the form a new defense would take, I will briefly consider how other cultures or systems of thought treat environmentally induced deviance.

Part A considers RSB-induced crime from the perspective of critical criminology. Part B reviews the treatment of culturally based deviance and criminality in other societies.

A. *Critical Criminology*

Traditional analysis of crime holds that crimes are committed by irrational individuals who threaten a rational social order.[442]

439. This is not to suggest that anything a defendant wants to raise as a defense necessarily should be admissible. However, because the capacity for responsible conduct is a developmental capacity—that is, we learn it—factors like one's social environment, which bear so directly on the development of this capacity, have an obvious role to play at trial.

440. 471 F.2d at 926.

441. Packer, *supra* note 1, at 69.

442. *See* Bonger, *supra* note 389, at 4, 162. Traditional criminology, by contrast, emphasized the psychopathology of the individual offender. *Id.* at 4; Harris, *supra*

Critical analysis, by contrast, views many types of crime as rational responses to conditions of competition and inequality in the structure of our social and economic institutions.[443]

A pioneer in applying Marxist theories to criminology, William Bonger,[444] attributed the relatively high crime rates of most Western industrial societies to capitalism.[445] According to Marx and Bonger, capitalism creates poverty, and therefore crime, because it requires inexpensive labor and suppressed wages.[446] Cycles of inevitable economic depression coupled with industrial and service automation tend to maintain a permanent underclass.[447] At the same time, free market values encourage competition and exploitation of others, thus rewarding persons who aggressively skirt or violate the law in pursuit of self-interest.[448]

Initially, Bonger's ideas were rejected as inconsistent with the prevailing "free will" theory of criminology.[449] They have been revived and expanded by the school of "critical criminology" that has emerged in the United States during the last fifteen years.[450] Critical criminologists accept the central premises of Marxist theory and add a psychological element, alienation. Alienation occurs when people feel powerless, have only their labor to sell, measure their self-worth by possessions and income,[451] and

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note 5, at 233 n.53; H. Barnes & N. Teeters, New Horizons in Criminology 4-8, 84-87 (1943) (illustrating traditional view).

443. Bonger, *supra* note 389; Erik Wright, The Politics of Punishment 4-21 (1973); David Gordon, *Capitalism, Class, and Crime in America*, 19 Crime & Delinq. 164, 174-77 (1973).

444. *See supra* note 442.

445. *Id.*

446. *Id.* Karl Marx, *Capital*, in The Marx-Engels Reader 422-34 (R. Tucker ed. 1978). *See also* Howard M. Wachtel, *Capitalism and Poverty in America: Paradox or Contradiction?*, 24 Monthly Rev. 51 (June 1972).

447. Marx, *supra* note 446, at 413, 422-28.

448. *Supra* notes 393-394 and accompanying text; *infra* notes 454-455 and accompanying text.

449. Bonger, *supra* note 389, at 4; Kenneth Dolbeare, Political Change in the United States: A Framework for Analysis 163 (1974); Richard Quinney, Class, State and Crime: On the Theory and Practice of Criminal Justice 17 (1977).

450. *E.g.*, Donald Gibbons, The Criminological Enterprise, Theories and Perspectives (1979); Quinney, *supra* note 449; Robert M. Bohm, *Radical Criminology: An Explanation*, 19 Criminology 565 (1982); Hinch, *Marxist Criminology in the 1970's: Clarifying the Clutter*, 29 Crime & Soc. J. 65 (1983). Other terms used to describe this movement are "radical," "Marxist," "socialist," and "new." For a discussion of the growing acceptance of critical perspectives see William Pelfrey, *Mainstream Criminology: More New Than Old*, 17 Criminol. 323 (1979). *See also* L. Taylor, P. Walton and J. Young, The New Criminology (1973); Maurice Cornforth, Historical Materialism (1971); J.H. Reinman & S. Headlee, *Marxism and Criminal Justice Policy*, 27 Crime & Delinq. 24 (1981). *But see* Alan Hunt, *Marxism and the Analysis of Law*, in Sociological Approach to Law 91 (Adam Podgorecki and Christopher Whelan eds. 1981) (asserting that Marxism does not constitute a general theory).

451. *E.g.*, Robert K. Merton, Social Structure and Anomie, 3 Amer. Sociol. Rev.

become separated from each other by competition[452] and subtly encouraged racial, sexual and class animosities.[453]

In the Marxist and critical criminologist view, vengeful, self-seeking behavior is a normal response to an oppressive social system[454] and can only be ended when that system is radically restructured.[455] The alienated worker or unemployed RSB person is shorn of self-respect, has no attachment to the broader community, and is a constant source of misdirected rebellion through crime.[456] Punishment of persons for crimes they commit out of economic and political necessity is, in this view, senseless and inequitable.

B. Cross-Cultural Perspectives

The left-critical argument described above is essentially normative; it holds that capitalist societies are morally compelled to moderate criminal punishment of their own underclasses. A cross-cultural survey indicates that in a number of cultures, the values and conduct of divergent groups have indeed been accommodated by the majority.[457]

672, 680 (1938); Wright, *supra* note 443, at 6 n.5. *See generally* Herbert Marcuse, One Dimensional Man: Studies in the Ideology of Advanced Industrial Society (1965); Herbert Gintis, *Alienation and Power*, 4 Rev. Rad. Pol. Economics 1, 24-30 (1972). *See also* Emile Durkheim, The Division of Labor in Society (1964) (using similar concept of *anomie* to explain demoralization of workers in capitalist states).

452. *See* Gordon, *supra* note 443, at 174; Michalowski, *supra* note 149, at 14; Harris, *supra* note 5, at 234-35. *See also infra* note 456 for first-person accounts of alienation resulting from RSB.

453. Marx, *supra* note 446, at 422-28; Reich, *Economic Theories of Racism*, in Problems in Political Economy: An Urban Perspective 107 (D. Gordon ed. 1971); Shulman, *Race, Class and Occupational Stratification: A Critique of William J. Wilson's The Declining Significance of Race*, 13 Rev. Rad. Pol. Economics 21 (1981); Gordon, *supra* note 443, at 181, Hinch, *supra* note 450, at 66; Anthony Platt, *Street Crime: A View from the Left*, 9 Crim. & Soc. J. 16 (1978). *See also infra* note 459 and sources cited therein.

454. *E.g.*, Gordon, *supra* note 443, at 174, Wright, *supra* note 443, at 4-21; Platt, *supra* note 453, at 534-38; Tony Stigliano, *Jean-Paul Sartre on Understanding Violence*, 19 Crime & Soc. J. 52 (1983); Hortense Powdermaker, *The Channelling of Negro Aggression by the Cultural Process*, 48 Amer. J. Sociol. 750, 753 (1943).

455. *See* Quinney, *supra* note 449, at 126; Michalowski, *supra* note 149, at 13; Marx, *supra* note 446.

456. For searing first-hand descriptions of alienation, see Cleaver, Soul on Ice, *supra* note 105, at 137-40; Hines, *supra* note 105, at 48, 57; Ellison, *supra* note 105; Kenneth Clark, Dark Ghetto: Dilemmas of Social Power 88 (1965) (account of ghetto junkie).

457. A small number of United States cases illustrate these principles. In addition to the treatment of American Indians discussed immediately *infra*, see *Not Guilty Verdict in 'Evil Spirit' Shooting by Girlfriend*, San Francisco Chron., May 28, 1985, at 5, col. 5 (Ethiopian immigrant acquitted by Oakland, California, jury for wounding woman he believed an evil spirit who was hurting him); Haeseler, Orinda Teenager Convicted of Second-Degree Murder, San Francisco Chron., Mar. 4, 1985,

An example close to home is the recent development of Indian tribal law in the United States.[458] Early in United States history, the colonists imposed European norms and legal standards on native populations,[459] with predictable results.[460] Two centuries of resistance and disintegration prompted a movement to grant Native Americans a degree of legal and cultural autonomy. Under tribal law, infractions of community standards and injury to members of the tribe are dealt with within the Indian nation's own judicial system.[461] The tribal court applies state or federal law, tribal law rooted in tradition and custom, or any combination of these.[462] The rules of procedure and standards establishing culpability may be quite different from those provided in state or federal law.[463] Furthermore, the remedy or disposition may conflict with Anglo-European concepts of justice.[464]

Other societies have adopted similar forms of legal pluralism to provide a system of justice without destroying a divergent culture or race. The treatment of witchcraft is an example. In Colombia, legal resources such as lawyers and courts are

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at 1, col. 1 (judge found that unique pressures of upper-class suburban high school had disabled teenage girl from acting with premeditation in murder of popular friend).

458. *See generally* Vine Deloria, Jr. & Clifford Lytle, American Indians, American Justice (1983); Steve Talbot, Roots of Oppression: The American Indian Questions (1981).

In addition to the more or less formalized recognition of cultural and legal autonomy of American Indians, United States law has sporadically and unsystematically recognized other forms of cultural difference in assessing criminal responsibility. Often this occurs through liberal interpretation of what, for example, a reasonable Eskimo would do under the circumstances. *E.g.*, Alvarado v. Alaska, 486 P.2d 891 (1971) (jurors selected from urban area poorly equipped to judge reasonableness of defense of consent in rape case stemming from events at remote Eskimo fishing village); Sheila Toomey, *Eskimo Erotica? Traditional-Conduct Plea Wins Sex-Charge Acquittal*, Nat'l L.J., Feb. 4, 1985, at 6, col. 1 (Eskimo man acquitted of charges of child molestation after cultural experts testified he acted within the bounds of tradition through a form of wrestling which involved touching boy's genitals and clothing). *See also supra* notes 244-245 (battered women defense).

459. Deloria & Lytle, *supra* note 458; Jethro Lieberman, How the Government Breaks the Law 130-44 (1973). For the theory that United States treatment of American Indians and other minorities amounted to a kind of internal colonialism, see Robert Blauner, Racial Oppression in America (1972); Frantz Fanon, The Wretched of the Earth (1968) (colonial thesis applied to North Africa).

460. The consequences include resistance, alienation, and suffering. *Supra* note 459. *See also* Rodolfo Acuna, Occupied America: A History of Chicanos (1981); Ex Parte Crow Dog 109 U.S. 556 (1883).

461. *See* Deloria & Lytle, *supra* note 458, at 110-38, 161-92; Indians and Criminal Justice 88-89 (Laurence French ed. 1982); Felix Cohen, Handbook of Federal Indian Law 122-50, 382 (1971).

462. Deloria & Lytle, *supra* note 458.

463. Felix Cohen, Handbook of Federal Indian Law 224, 246, 250-52 (1982 ed.).

464. *Id.* at 250-51.

disproportionately located in urban areas because of the geographic and status difference between the white elite and the Indian population.[465] Language and cultural differences pose additional barriers.[466] In a case involving witchcraft,[467] the Colombian Supreme Court ruled that a Choco Indian accused of murder was incapable of standing trial. To reach this decision, the court used ancient legislation that considered Indians the juridical equivalent of minors.[468] One justice would have held the Indians to the uniform standard contained in the national criminal code, but tailored the penalty to the educational level and experience of the accused.[469]

Belief in witchcraft and the supernatural is also a problem for criminal justice systems in Nigeria, Tanzania and other East African countries. Where belief in the supernatural influences an individual's response to a perceived threat, the presiding judge may take those beliefs into consideration in deciding guilt or innocence.[470] In some modern African states, an accused may be tried under native law, which provides special treatment for witchcraft.[471]

In East African murder cases arising from witchcraft, defendants have usually been found guilty; punishment, however, has sometimes been tempered by a judicial plea for executive clemency.[472] Some legal writers in these countries argue that complete legal defenses should be available whenever a killing occurs as a

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465. David S. Clark, *Witchcraft and Legal Pluralism: The Case of Celimo Miquirucama*, 15 Tulsa L.J. 679, 682 (1980) [hereinafter cited as *Witchcraft*]. There are dozens of Indian tribes throughout Latin America who have kept their customs, language, and religion in the face of European colonization. Julain Hayes Steward, Handbook of South American Indians (1946); Robert Wauchope, Handbook of Middle American Indians (1967).

466. *See supra* note 465.

467. *Witchcraft*, *supra* note 465, at 684. The defendant killed Francisco Javier Gonzalez, believing him to be an evil witch, *id*. at 684, 693. The defendant was a member of a remote, isolated Indian tribe, a "primitive person," living in a "semisavage state."

468. *Id*. at 683, 690-91. The law is Art. 1 Law 89 (1890), which excludes from the penal process Indians found living in a semisavage condition. *Id*. at 686, 690.

469. *Id*. at 694.

470. *See* Paul H. Brietzke, *Witchcraft and Law in Malawi*, 8 E. Afr. L.J. 1, 8 (1972). *See also* J. Barton, J. Gibbs, V. Li and J. Merryman, Law in Radically Different Cultures 56-58, 516-22 (1983) [hereinafter cited as Barton].

471. Brietzke, *supra* note 470; Munoru, *The Development of the Kenya Legal System, Legal Education and Legal Profession*, 9 E. Afr. L.J. 1 (1973). *See* Barton, *supra* note 470, at 494, 691-97.

472. L.O. Aremu, *Criminal Responsibility for Homicide in Nigeria and Supernatural Beliefs*, 29 Intl. & Comp. L.Q. 112 (1980).

result of bona fide belief in the supernatural.[473] Mitigation in the sentencing phase in witchcraft-related cases[474] and the call of legal scholars for complete defenses indicate that toleration for culturally-determined deviance is strongly entrenched in East Africa.

There have also been efforts to afford Australian and New Zealand aboriginals culturally tailored legal treatment. Reacting to the pressures of relocation, urbanization, and unfamiliar European institutions, aboriginals form disproportionately large segments of the prison populations of both countries.[475] Reformers advocate legal treatment that respects the cultural heritage of the aboriginals and cushions the effect of across-the-board application of European criminal standards.[476] The reformers point out that native concepts of honor and property sometimes cause the aboriginal to act in ways that, although criminal, are necessary to retain self-esteem or status within the culture.[477] When this happens, the reformers urge, the law should treat the offense with leniency.

The *favelas*[478] of Brazil offer a final example. These squatter settlements are built on land whose title is in dispute. The authorities view the settlements as illegal and their residents as trespassers.[479] The residents distrust all intrusions by government figures.[480] In many cases, however, authorities and land owners recognize the futility of attempting to eject the squatters and have opted for a policy of benign neglect, essentially leaving the favelas to govern themselves. Disputes are resolved through an informal,

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473. *See id.*; Lutapimwa L. Kato, *Functional Psychosis and Witchcraft Fears Excuses to Criminal Responsibility in East Africa*, 4 L. & Soc. Rev. 385 (1970).

474. Brietzke, *supra* note 470; Aremu, *supra* note 472, at 124; Kato, *supra* note 473, at 393.

475. W. Clifford, *An Approach to Aboriginal Criminology*, 15 Austl. & N.Z. J. Criminol. 3, 8 (1982).

476. *Id*. *See also* Comment, *R. v. Peter*, 13 Melb. U.L. Rev. 648, 650 (1982) (judge in Aboriginal murder case says he and his brother judges are aware of special problems of Aboriginals and take them into account in sentencing); A.M.E. Duckworth, C.R. Foley-Jones, P. Lowe, & Maller, *Imprisonment of Aborigines in North Western Australia*, 15 Austl. & N.Z. J. of Crim. 26, 41 (1982) (recommending use of Aboriginal tribunals to administer criminal justice).

477. *See* sources cited *supra* note 476.

478. This is the name given to squatter settlements found in and around the major cities of Brazil. Settlements are composed of mud, tin, and cardboard shacks and house the poorest in Brazilian society. There are rarely any municipal or social services, such as electricity, water, sanitation, schools, or clinics. *See generally* Eric Robert Wolfe and Edward G. Hansen, The Human Condition in Latin America 180-85 (1972).

479. *See* Bonaventura De Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, 12 L. & Soc. Rev. 5 (1977).

480. *Compare* sources cited *supra* notes 478-479 with Herbert Jacob, Crime and Justice in Urban America 49-50 (1980); Armando Morales, Ando Sangrando, I Am Bleeding (1972).

grassroots legal system developed to punish offenders and maintain social stability.[481] This system's concepts of justice are quite different from those of the majority Brazilian society. For example, taking of property from the well-to-do, tourists, or outsiders is seen as a relatively minor offense.[482] As in Native American tribal law, procedures for establishing culpability and fashioning remedies are strikingly different from those used by the courts of the dominant culture.[483]

VI. Assessment

In part IV, I identified four types of RSB defense that seemed theoretically defensible—an involuntary rage model;[484] a cultural isolation/failure to internalize expectations model;[485] a dyscontrol model;[486] and a model based on societal fault.[487] I also noted that even when an RSB defense is inapplicable, RSB factors should be admissible to mitigate sentence.[488] In this part, I discuss applying each of the four RSB defense models and assess their respective strengths and weaknesses.

A. Involuntary Rage Model

The involuntary rage model is arguably consistent with current views of criminal responsibility.[489] Its nearest analog is the defense of automatism[490] and its emerging variants, the Vietnam veteran[491] and battered woman syndromes.[492] The rage-RSB defense is also well grounded in empirical science; a review of medical and social science literature showed that life in a violent, overcrowded, stress-filled neighborhood can induce a state in which a resident reacts to certain stimuli with automatic aggres-

481. *Supra* note 479, at 40, 42-43, 51, 121-22.

482. *Id.* at 64-89. *See also* William Clifford, An Introduction to African Criminology 138-40 (1974) (concept of theft limited to community or tribe).

483. *Supra* note 479, at 96-99, 102-03.

484. *Supra* notes 425-426 and accompanying text.

485. *Supra* notes 427-429 and accompanying text.

486. *Supra* notes 430-431 and accompanying text.

487. *Supra* notes 432-435 and accompanying text.

488. *Supra* note 438 and accompanying text.

489. *Supra* notes 32-62, 354-376 and accompanying text (criminal law excuses when defendant could not help himself or herself; when acts were not products of autonomous choice). *See generally* Robinson, *supra* note 63, §§ 171e, f, at 268-74.

490. *Supra* notes 219-227 and accompanying text.

491. *Supra* note 224 and accompanying text.

492. *Supra* notes 244-245 and accompanying text. *See also* Dressler, *Heat of Passion*, *supra* note 272.

sion.[493] Some defendants should be able to prove that they lived under such conditions and that these conditions were causally connected to the crimes charged.

The involuntary rage defense would be an excuse, rather than a justification, and should theoretically be invocable in connection with any offense. In application, however, the defense's structure limits it to acts of reflexive violence committed by persons subjected to prolonged environmental stress.

What to do with a defendant acquitted under this model of RSB defense is a difficult problem. Automatism is generally considered a complete defense, resulting in acquittal and release.[494] Acquittal and release would be appropriate for a "rage" defendant who is no longer a social danger—whose act is a one-time-only explosion instigated by an unusual set of nonrecurring circumstances, or whose crime has purged, or "burned off," his or her rage so that he or she is no longer a danger to others. Discharge is inconceivable, however, for the rage-acquitted defendant who remains dangerous. Some such persons could be civilly committed under a "dangerous to others" statute and their dangerousness treated with therapy and counseling. It would have to be shown, of course, that the individual's dangerousness stemmed from mental disease.

Those who are dangerous but not mentally ill could not be civilly committed under present law. Insofar as their crimes stemmed from rotten social background, the appropriate and logical disposition would be a "sentence" to live in an enriched social background (ESB), designed to counter the effects of deprivation and mistreatment. In the ESB environment, the defendant would receive love, support, education, and respectful treatment.[495] An analogy could be drawn to the "urban homesteading" program, in which public funds are spent to restore decaying inner-city neighborhoods.[496] If houses, why not persons?

The cost of maintaining ESB programs to combat RSB might

493. *Supra* notes 167-170 and accompanying text; *see supra* notes 107-148, 224 and accompanying text.

494. *Supra* notes 220-223, 226-227 and accompanying text.

495. *Cf. Thermostat Stuck on Hot*, *supra* note 129 (urban anger will not cease until society begins attending to needs of its most dependant populations). Hurley, *supra* note 159 (discussing Washington University study that treated teenage delinquents by grouping them with normal youths in field trips, sports, and other enjoyable activities; 91% of delinquent youths showed decline in antisocial behavior.) Coerced medical or psychological treatment would be no part of ESB treatment, however. *See supra* note 420 and accompanying text (danger of medicalizing deviance).

496. *See Urban Homesteaders*, Time, Jan. 30, 1984, at 16.

be high, however, both in dollars and political support. Further, deterrence might be weakened—RSB individuals might even be tempted to fake rage or escalate their offenses to mimic the impulsive violence that could qualify for an RSB-rage defense.[497] Others might be tempted to follow their example. Yet, violent criminal acts are repugnant to most people and dangerous for the perpetrator; recognizing a defense for persons who act out of environmentally induced rage should not tempt many to emulate their acts. Moreover, the perpetrator has no guarantee that the RSB defense will be successful; juries are likely to apply it sparingly and only when severe RSB and a causal link to the crime are convincingly shown. Moreover, the costs of human renewal programs need to be measured against those of the current alternative, prison. Prisons are expensive and ineffective; many inmates emerge more bitter and crime-prone than before.[498] The families of inmates also undergo great hardship.[499] Any loss of deterrent effect might well be offset by these other gains.

Recognition of a defense based on an involuntary rage model has further advantages. It can enable society to recognize and begin to address the causes of environmentally induced alienation and anger.[500] It can provide an excuse for the defendant whose reflexive act was beyond his or her control, who "could not help" himself or herself.[501] Although likely to be controversial, the rage model of RSB defense deserves serious consideration.

B. Cultural Isolation/Failure to Internalize Norms

The cultural isolation model outlined in part IV is also consistent with current criminal theory, because an offender who never had a realistic opportunity to absorb the majority culture's norms can scarcely be held accountable when he or she violates them.[502] The defense would be available in two cases: (i) that of persons raised in extreme cultural isolation, in which knowledge of laws

497. *See* Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949 (1966).

498. *E.g.*, Reid, *supra* note 301, at 591-620.

499. *See generally* Brenda McGowan & Karen Blumenthal, Why Punish the Children (1978) (National Council on Crime & Delinquency); Ann M. Stanton, When Mothers Go to Jail (1980); L. Alex Swann, Families of Black Prisoners (1981).

500. *Supra* notes 82, 86 and accompanying text. This advantage, earlier noted by Judge Bazelon, attaches equally to any of the four versions of RSB defense.

501. *Supra* notes 49-50 and accompanying text.

502. *See supra* notes 46-48 and accompanying text. The nearest analog in existing defenses would be mistake of law. *Supra* notes 47-48, 284-287 and accompanying text. *See* Robinson, *supra* note 63, at § 184 (seeing trend to broaden doctrine of mistake to include new fact patterns).

and norms simply never filters through, or does so only in the most attenuated form;[503] and (ii) cases of pressured adoption of deviant subcultural values.[504] Although cases in the first group should not arise often,[505] as parts II and V indicated, they will sometimes occur, and when they do, the case for exculpation is strong. This offender's crime is likely to be less violent than that of the rage-RSB defendant, and resistance to the defense accordingly less. As with the foreign visitor unaware of local customs who commits a social gaffe,[506] the isolation-RSB defendant is a victim of circumstances. The appropriate disposition of this defendant would be education in the majority culture's values and laws. The trial itself may already have served this function adequately. Unlike the rage-RSB defendant, the individual acquitted under the first variety of isolation model is in need of education, not re-education; there is no pre-existing rage response or reflex to overcome. Any necessary acculturation can probably be achieved through a form of conditional release, similar to parole or probation, under the direction of the court. The latter approach could be used with most persons in the second category as well.[507]

C. Dyscontrol

In the dyscontrol model, a defendant will be exculpated if his or her rotten social background caused a generalized, enduring inability to control conduct, in a manner comparable to insanity.[508] In *United States v. Alexander*,[509] Judge Bazelon proposed a definition of dyscontrol broad enough to encompass many RSB cases. Under his test, a defendant would be excused if, at the time of his or her act, behavioral controls were impaired to such a degree as to make punishment unfair.[510] My review of RSB and criminogenesis showed that inadequate nutrition, exposure to noxious substances, inadequate child-rearing practices, and constant stress

503. *See supra* notes 127-139, 141-161 and accompanying text; Shulins, *supra* note 428.

504. *Supra* notes 428-429 and accompanying text.

505. Mass communications and compulsory schooling are counteracting influences.

506. *See* Shulins, *supra* note 427.

507. Where the individual remains too dangerous for conditional release, consignment to Enriched Social Background programs, *supra* notes 495-496 and accompanying text, or civil commitment, *infra* note 513 and accompanying text, seem the only remaining possibilities.

508. This model differs from the "rage" model described in part A in that the "rage" model is limited to acts of reflexive violence, while the dyscontrol model is aimed at acts that result from long-term, settled impairment of control.

509. 471 F.2d at 923.

510. *Id.* at 161 (Bazelon, C.J., dissenting), *discussed supra* notes 78-79.

can seriously impair a person's ability to conform his or her conduct to society's demands.[511] When dyscontrol is convincingly shown, it should be a defense for any crime, whether against persons or property.

Bazelon's dyscontrol formula is general: it excuses persons whose controls were impaired to such an extent as to make them criminally non-responsible. Whether impairment has reached that extent in a particular case is a matter appropriately consigned to the jury.[512] Unlike disposition under other variants of the RSB defense, the defendent who successfully invokes the dyscontrol model could generally be subject to civil commitment.[513]

D. Societal Fault

The societal fault model[514] is more a means of scaling down the defendant's responsiblity than the basis for a separate, complete defense. The model would be used when another model does not apply or when the defendant does not wish to invoke such a model.[515] In the societal fault model, the defendant is partially exonerated because he or she is able to show that the RSB conditions that resulted in his or her act are chargeable to society.[516] The jury would be instructed, as they are in negligence cases in some jurisdictions, to determine the proportion of individual and societal fault.[517] The defendant's punishment would be reduced accordingly. For example, if the defendant committed an offense normally punished by ten years in prison and the jury found that society bore forty percent of the responsibility for the defendant's action, the defendant would receive a sentence of six years. The defense would be limited to cases in which the defendant can prove that specific social institutions, such as schools, failed to discharge a duty to the defendant, resulting in his or her commission of a criminal offense.[518]

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511. *See supra* notes 105-189 and accompanying text.

512. In our system, the jury, as the voice of society, is called upon to make many such normative judgments, e.g., Jerome Hall, Yale Kamisar, Wayne LaFave, & Jerold Israel, Modern Criminal Procedure 1973-86 (3d ed. 1969).

513. Commitment laws generally permit involuntary commitment of persons who suffer a mental disease that renders them dangerous to others. Alexander Brooks, Law, Psychiatry and the Mental Health System 678-708 (1974).

514. *See supra* notes 432-435 and accompanying text ("public policy defenses").

515. For example, a defendant may refrain from invoking one of the models that entails institutionalization. *Supra* notes 496, 503, 504, 513 and accompanying text.

516. *See supra* notes 432-435 and accompanying text.

517. *See* William Prosser, Handbook of the Law of Torts 435-38 (4th ed. 1971) (contributory negligence doctrine).

518. Without this limitation, the defense could expand almost without limit.

VI. Conclusion

This article examined the case for a rotten social background ("RSB") defense from the viewpoints of legal theory, behavioral science, and existing law. I also reviewed how other legal and ideological systems treat cultural minorities. We saw that unremitting, long-term exposure to situations of threat, stress, and neglect indelibly mark the minds and bodies of those exposed. In some cases, the resulting propensity for crime is so strong as to justify the conclusion that the individual is not responsible. When this occurs, an existing criminal defense, such as diminished capacity, automatism, or duress will sometimes be available. When not, we should consider creating a new defense. I identified four possible models for such a defense and discussed their respective merits and applications.

Judge Bazelon's suggestion that society begin sober consideration of its treatment of RSB defendants is too apt, and the problem of environmentally induced criminogenesis too insistent, to be ignored. Certainly, this article has only scratched the surface. The search for solutions can only benefit society, and enlighten and inform conscience.