

# ROTTEN SOCIAL BACKGROUND AND THE TEMPER OF THE TIMES

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## I. INTRODUCTION

In this essay, I will not enter the debate over whether there should or should not be a rotten social background (RSB) defense, nor explore how RSB might fit into, or not fit into, existing criminal law doctrine. Instead, I want to reflect on why it might be that American law today does not recognize any sort of RSB defense. I will read the absence of an established RSB defense as a measure of the temper of our times. In other words, I will use the anniversary of the proposed RSB defense as an excuse for a bit of good old armchair philosophizing.

In 1972, when Judge Bazelon proposed such a defense in his dissent in *United States v. Alexander*,<sup>1</sup> and a few years later when he defended the idea in a published lecture, such a defense seemed at least imaginable. Today, in 2011, it seems far less so. I will argue that the broad version of RSB, and the rationale Judge Bazelon offered for it, now seem archaic because of their lack of fit with three features of our contemporary moment: (1) the culture of neoliberalism, (2) the culture of control, and (3) the culture of therapy.

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1. *United States v. Alexander*, 471 F.2d 923, 960-61 (D.C. Cir.) (Bazelon, J., dissenting).

## II. JUDGE BAZELON'S ARGUMENT

In his published lecture, *The Morality of the Criminal Law*,<sup>2</sup> Judge Bazelon begins by distinguishing two approaches to criminal justice. Under the first, entirely utilitarian approach, the central problem of criminal justice is establishing and maintaining state control over the population by any means necessary. Bazelon suggests that this approach might be associated with J. Edgar Hoover, the famous director of the Federal Bureau of Investigation—in whose name Bazelon was delivering his lecture.<sup>3</sup> Bazelon, however, identifies himself with a second approach to criminal justice, under which the central problem of criminal justice is establishing and maintaining public legitimacy. This is accomplished, in Bazelon's view, only when the law becomes "a moral force in the community."<sup>4</sup>

To be a legitimate moral force in the community, "the law should not convict unless it can condemn."<sup>5</sup> Bazelon elaborates:

According to this view, a decision for conviction requires the following three determinations: (1) a condemnable act was committed by the actor-defendant; (2) the actor can be condemned—that is, he could reasonably have been expected to have conformed his behavior to the demands of the law; and (3) society's own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act.<sup>6</sup>

Bazelon argues that the first two principles are relatively well established in substantive criminal law, but the third is not—and even the second is frequently given only lip service. He spends a good deal of the lecture discussing the disappointing career of the D.C. Circuit's "product test" for insanity, pioneered in *Durham v. United States*<sup>7</sup> and abandoned in *United States v. Brawner*.<sup>8</sup> According to Bazelon, the purpose of this test was to guide a jury in deciding when an offender's mental impairment is so serious that "the community can no longer conclude, with the requisite certainty, that the act was the product of a free choice to do wrong."<sup>9</sup> It failed because the "experts" dominated the decision-making process, but

2. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 386 (1976).

3. *Id.*

4. *Id.* at 387.

5. *Id.* at 388.

6. *Id.*

7. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954), *overruled by* *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

8. *See generally Brawner*, 471 F.2d 969 (D.C. Cir. 1972), *superseded by statute*, Insanity Defense Reform Act of 1984, Pub. L. No. 99-646, *as recognized in* *Shannon v. United States*, 512 U.S. 573 (1994).

9. Bazelon, *supra* note 2, at 393.

in Bazelon's view the effort was noble.<sup>10</sup> Indeed, instead of the Model Penal Code's test for responsibility, which the D.C. Circuit ultimately adopted, Bazelon would have instituted a new test, under which "a defendant is not responsible *if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act.*"<sup>11</sup>

For Bazelon, this approach to responsibility would have "freely allow[ed] expert and lay testimony on the nature and extent of behavioral impairments and of physiological, psychological, environmental, cultural, educational, economic, and heredity factors."<sup>12</sup> And, in his view, it would open the criminal trial process to the third of Bazelon's moral inquiries: whether "society's own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act."<sup>13</sup> Bazelon argues that many of the offenders who found themselves subject to the flawed *Durham* test were people from disadvantaged backgrounds whose impairments psychiatrists were reluctant to describe as mental diseases:

These defendants received only cursory mental examinations, for the doctors in public hospitals were too overworked for anything more thorough. Some psychiatrists would then testify that these defendants did not suffer from mental diseases, reasoning that mental impairments associated with social, economic, and cultural deprivation and with racial discrimination—so-called "personality disorders"—were not "diseases." Other psychiatrists would find a mental disease, but proceed to testify that the crime was not the product of that mental condition because, "This is normal behavior for a great many people in that subculture."<sup>14</sup>

Bazelon offers as an example a judge who in 1959 encountered a juvenile girl who had been pregnant at age 10 and raped at age 16. The judge described these "precocious sexual experiences" as "pathetic," but "far from being uncommon among children in her socioeconomic situation," and therefore likely not as traumatic as they would have been for a more privileged child.<sup>15</sup> Bazelon reports that he was initially "appalled" by this assessment, and then "realized that he may be right, *and that is the most frightening thought of all.*"<sup>16</sup>

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10. *See id.* at 394.

11. *Id.* at 396 (emphasis in original) (quoting *Browner*, 417 F.2d at 1032 (Bazelon, C.J., concurring in part and dissenting in part)).

12. *Id.*

13. *Id.* at 388.

14. *Id.* at 394.

15. Bazelon, *supra* note 2, at 394-95.

16. *Id.* at 395 (emphasis in original).

Bazon hoped that a broad inquiry into criminal responsibility would confront jurors and by extension, other members of the public, with their own often failed responsibility to their fellow citizens:

In my opinion, it is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, “Behave—or else!” . . . We cannot produce a class of desperate and angry citizens by closing off, for many years, all means of economic advancement and personal fulfillment for a sizeable part of the population, and thereafter expect a crime-free society.<sup>17</sup>

Bazon acknowledged that one possible response to his proposed test might simply be a moralistic, and complacent, insistence by juries that every defendant is responsible.

But on the other hand, if my *Browner* formulation were to elicit detailed information concerning the plight of those who live in the “other America,” jurors might be so troubled as to force society to confront a difficult set of questions. What do we do with persons deemed dangerous but not responsible, and how do we accurately determine dangerousness? How do we preserve the dignity of those found to lack adequate behavioral controls? Is there any real difference between the penitentiaries and the public mental hospitals?<sup>18</sup>

Bazon’s “rotten social background” defense, then, like Richard Delgado’s version several years later,<sup>19</sup> portrayed responsibility as a two-way street: If society has failed to be responsible to its citizens, those citizens cannot justly be held “responsible” for their crimes against that society.

The premises on which Bazon’s version of RSB was founded, as Delgado makes clear in his contribution to this Symposium,<sup>20</sup> are still valid today. The people in our prisons and jails are still overwhelmingly the disadvantaged: poor, and disproportionately black and Latino.<sup>21</sup> Mental

17. *Id.* at 401-02.

18. *Id.* at 396.

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

20. Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1 (2011).

21. See, e.g., Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, (July 2007), [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf); Erica Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 56 (2011) (noting that “in 2004, approximately thirty-three percent of surveyed inmates in state prisons reported that they had earned less than \$800 in the month preceding their arrest”).

illness is still rife in this population, yet it remains under-diagnosed and under-treated.<sup>22</sup> If anything, conditions have worsened since Bazelon first made his proposal. Economic inequality has dramatically increased in the United States, while social mobility has lessened.<sup>23</sup> Mental health advocates argue that the “deinstitutionalization” movement closed the public mental hospitals of which Bazelon spoke without providing adequate community alternatives.<sup>24</sup> And the United States is just beginning to recover from a development that Bazelon denounced at its inception: a mass incarceration strategy that created soaring prison and jail populations and strained physical facilities to their breaking point.<sup>25</sup>

I submit, however, that despite the aptness of Bazelon’s proposal, a broad RSB defense of the kind he describes is less plausible today than it was in 1972 or 1976. There are undoubtedly a number of reasons for this, but the reasons I will explore here are cultural.

### III. SUBSTANTIVE CRIMINAL LAW AND ITS RELATIONSHIP TO CULTURE

At this point, it will be useful to define what I mean by “culture” in this essay. First, by culture I mean simply the practices, beliefs, and images in which a group of people finds meaning and self-definition, and for purposes of this essay by “group” I mean Americans. Though law is sometimes imagined as something outside or other than culture, law is an integral part of American culture. Guyora Binder and Robert Weisberg suggest that “law [is] an arena for the performance and contestation of representations of self and as an influence on the roles and identities available to groups and individuals in portraying themselves.”<sup>26</sup> As an arena and an influence, criminal law is everywhere in America. What happens in criminal courtrooms affects, and is affected by, a world of conversa-

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22. See Doris J. James & Lauren E. Glaze, Bureau of Justice Statistics, *Mental Health Problems of Prison and Jail Inmates* 1 (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf> (reporting that “at midyear 2005 more than half of all prison and jail inmates had a mental health problem”); Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders With Mental Illness* 1 (2003), <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf> (asserting that although there are three times more mentally ill people in prisons than in mental health hospitals, “All too often seriously ill prisoners receive little or no meaningful treatment”).

23. See Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (Update with 2007 Estimates)* (2009), <http://elsa.berkeley.edu/~saez/saez-UStopincomes-2007.pdf>.

24. See Shane Levesque, *Closing the Door: Mental Illness, the Criminal Justice System, and the Need for a Uniform Mental Health Policy*, 34 NOVA L. REV. 711, 716-20 (2010) (describing the “deinstitutionalization” movement in the 1960s and the unintended consequences of “transinstitutionalization”—the diversion of the mentally ill into the criminal justice system instead of the mental health system).

25. See Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL’Y 265, 268 (2006) (arguing that “overcrowding has gone unchecked in many jurisdictions”).

26. Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1152 (1997).

tions about blame and responsibility, self and community, morality, and ethics taking place on television talk shows, in barbershops, and in kitchens. Another facet of this relationship has to do not with trials but with the laws on the books. Criminal justice scholars refer to the “expressive” function of substantive criminal law.<sup>27</sup> The recent spate of criminal justice measures bearing the names of female child victims provides an example.<sup>28</sup> These laws are meant to “send a message”—to offenders, to would-be offenders, to all citizens—about behaviors the majority of American citizens find morally reprehensible.<sup>29</sup> The slower and more complicated recent shifts in the criminal law of sexuality provide another example. Influenced by, and influencing, ideas about gender and sexuality, American rape law is shifting slowly from being primarily about male property and female respectability to being about individual autonomy.<sup>30</sup>

A secondary meaning of culture in this essay is any set of practices and ideas that hangs together and does work in the world. These little-c cultures are particular conversations going on within our big-c culture. In the next few sections, I will suggest that RSB, the defense that wasn’t and isn’t, is an absence in our jurisprudence that reflects the influence of three different cultures in this smaller sense: the culture of neoliberalism, the culture of control, and the culture of therapy.

### A. The Culture of Neoliberalism

The idea of an RSB defense, and Bazelon’s defense of it on moral grounds, recall the argument of two other articles published within a few years of Bazelon’s lecture and written by a prominent Harvard law professor. Frank Michelman proposed, in 1969 and again in 1973, that the Fourteenth Amendment guarantees to all persons the provision of basic material needs.<sup>31</sup> Moreover, Michelman’s arguments, and Bazelon’s, resonated with the demands of a contemporaneous grassroots welfare movement. Aided by lawyers, social workers, and community organizers—many working through “Community Action Agencies” funded by the federal Office of Economic Opportunity, an arm of President Lyndon

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27. See generally William S. DeFord, Comment, *The Dilemma of Expressive Punishment*, 76 U. COLO. L. REV. 843 (2005).

28. See Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 23-24 (2010) (describing several of these laws and arguing that naming a law after a child has become “the common way to market new criminal legislation”).

29. See DeFord, *supra* note 27, at 844.

30. See generally STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (2000) (arguing that sexual assault law should be reformulated around a right of autonomy).

31. See Frank I. Michelman, *The Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

Johnson's "War on Poverty"—thousands of welfare mothers learned benefits law and agitated to have their rights enforced.<sup>32</sup> From their battles came a new organization, the National Welfare Rights Organization, led by Johnnie Tillmon, an African American welfare mother herself. The NWRO claimed a guaranteed decent income as a right and counted, in 1969, "more than 100,000 dues-paying members in some 350 local organizations."<sup>33</sup> For the NWRO, a guaranteed income was a necessity for equal citizenship; it was an entailment of human dignity. Moreover, the proposal seemed politically feasible. Many prominent economists and policymakers, including Milton Friedman, believed that a guaranteed minimum income could more efficiently ameliorate the costs of unrelieved poverty than work-based benefits.<sup>34</sup> In fact, in 1969 President Richard Nixon proposed abolishing Aid to Families with Dependent Children and replacing it with a program that, although more costly, would provide minimum benefits to all poor households, whether working or not.<sup>35</sup>

Yet today the idea of a guaranteed minimum income for all citizens, working or not, "doesn't live in this world anymore."<sup>36</sup> What happened? One thing that happened was the rise of a discourse linking welfare to African Americans, and both to a vivid image of lazy "welfare queens" who could not be bothered to work for a living. The significance of this development will be pursued below. For the moment let us trace a different cultural thread: the rise of the contemporary culture of neoliberalism.

The term "neoliberalism" is conventionally used to refer to a cascade of related phenomena. From an economic history perspective, the neoliberal moment began in the early 1970s—just as Judge Bazelon was writing about RSB—when a sudden spike in crude oil prices produced by concerted action in Saudi Arabia and other oil-producing nations helped push the U.S. economy into a tailspin.<sup>37</sup> This was the first of a series of events that led to the reorganization of American capitalism in the 1970s and 1980s, including the collapse of the manufacturing economy and the emergence of a "service economy" at both the high and low ends (that is, from janitorial and domestic services at the low end to professional service work, like law and accounting at the high end); the flight of those manufacturing jobs overseas and the development of "just in time" production methods that left multinational corporations far more flexible and capital more mobile; a corresponding decline in numbers and power of organized

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32. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 341 (1971); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1848-49 (2001).

33. Forbath, *supra* note 32, at 1850.

34. *Id.* at 1854.

35. *Id.* at 1854-55.

36. *Id.* at 1825 (citing remarks by Lawrence Lessig).

37. See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 27 (2007).

labor; the crisis in Keynesian theory, and the emergence of “supply-side economics” and an enthusiasm for the deregulation of regulated industries; and what Jacob Hacker calls the “Great Risk Shift,” which overall has left individual households in charge of dealing with the risk of financial catastrophe.<sup>38</sup>

The culture associated with these changes revolves around a devoted faith in “free markets,” and a correspondingly profound pessimism about the ability of government to effectively intervene in economic and social relations.<sup>39</sup> An example of neoliberal policymaking is the turn against the social welfare state that began in the 1970s and intensified in the 1980s. Compared to many Western European nations, of course, the United States has never really had much of a welfare state.<sup>40</sup> Nonetheless, the modest welfare state that we have had took a body blow in terms of both its size and its credibility in the late 1970s and early 1980s, culminating in President Bill Clinton’s elimination of “welfare as we know it.” Americans have long had a strong anti-statist streak.<sup>41</sup> But in the present moment there is a striking lack of faith in government to effectively address social problems, even among constituencies that would benefit from a more generous social welfare state. In political life this often takes the form of electoral candidate campaigns against “big government,” but the dislike is not so much of government per se—our military state is quite robust, after all—as about the efforts of government to engage in downward redistribution.<sup>42</sup>

38. See JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* (2008).

39. David Harvey defines neoliberalism this way:

[A] theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade . . . State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit.

HARVEY, *supra* note 37, at 2.

40. See generally Alberto Alesina, Edward Glaeser & Bruce Sacerdote, *Why Doesn't the United States Have a European-Style Welfare State?*, *Brookings Papers on Economic Activity*, 2001 BROOKINGS PAPERS ON ECON. ACTIVITY, available at <http://www.jstor.org/stable/1209137>.

41. *Id.* at 224.

42. Lisa Duggan argues that the discrediting of proposals for wealth redistribution follows from the pro-business agenda that neoliberalism supports:

Neoliberalism developed over many decades as a mode of polemic aimed at dismantling the limited U.S. welfare state, in order to enhance corporate profit rates. The raising of profit rates required that money be diverted from other social uses, thus increasing overall economic inequality. And such diversions required a supporting political culture, compliant constituencies, and amenable social relations. Thus, pro-business activism in the 1970s was built on, and further developed, a wide-ranging political and cultural project—the reconstruction of the everyday life of capitalism, in ways supportive of upward redistribution of a range of resources, and tolerant of widening inequalities of many kinds.

LISA DUGGAN, *THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE*



From this perspective, Bazelon's framing of the RSB defense sounds hopelessly naïve. Underpinning his proposal is a robust confidence in the possibility of alternatives to detention and punishment: specifically, the possibility of downward redistribution of wealth across society as a whole in order to eliminate the preconditions for RSB. That optimism made sense for a moment in the 1960s, when a "War on Poverty" could be declared by the federal government and big ambitious programs of "social engineering" were not only imaginable but inspiring to a broad swath of the public. But we no longer have that optimism about government action. Within the culture of neoliberalism, if we know anything, we know that government efforts to improve "society" are likely to be inefficient, full of unintended consequences, and the source of moral hazard left and right.

I think many today would agree with the claims Bazelon originally made and that Professor Delgado has vividly underscored in our own time: poor education, lack of economic opportunity, poor parenting, and racism are criminogenic. But I also think that today, many would disagree that government intervention can effectively ameliorate these problems. Consider the debate over public education. Many reformers argue that a business model of service delivery, the dismantling of teachers' unions, and increased parental access to private and deregulated charter schools, would be an improvement over our present state-centered model.<sup>43</sup> Consider, as well, the present effort to defeat "Obamacare" in many states, and the deep suspicion of government as provider of social welfare that it represents.<sup>44</sup> The culture of neoliberalism suggests that the socio-economic inequalities that produce the kind of differential opportunities and outcomes Bazelon and Delgado describe cannot be effectively altered by state action.<sup>45</sup>

### B. *The Culture of Control*

"Nothing works" was the cry that set into motion today's focus on mass incarceration and on retribution.<sup>46</sup> As David Garland notes, some-

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ATTACK ON DEMOCRACY xi (2003).

43. See Kenneth J. Saltman, *Putting the Public Back in Public Schooling: Public Schools Beyond the Corporate Model*, 3 DEPAUL J. FOR SOC. JUST. 9, 12-15 (2009) (describing features of the neoliberal turn in education).

44. See Michael D. Shear, *Democrats Plan Attack on Republican Repeal Effort*, THE NEW YORK TIMES, Jan. 6, 2011, available at <http://the caucus.blogs.nytimes.com/2011/01/06/democrats-plan-attack-on-republican-repeal-effort/> (describing Republican attacks on the Obama Administration's health care reform law and Democratic efforts to defend the law).

45. See generally Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003).

46. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25, 48 (1974) (concluding that "nothing works"; "we haven't the faintest clue about how to rehabilitate offenders and reduce recidivism"). This essay turned out to be something of a shot heard 'round the world: within a few short years after its publication, criminologists had been convinced of

time in the late 1970s criminologists and policymakers abruptly began to doubt the criminal justice system's ability to rehabilitate offenders—an ideal formerly taken to be the lodestar of criminal justice.<sup>47</sup> This sudden loss of faith in what had been a central idea in criminology signaled an entirely new approach to criminal punishment.

In his book *The Culture of Control*,<sup>48</sup> David Garland attempts to explain, through the lenses of history, criminology, and sociology, how this abrupt shift took place, and he attempts to describe the new reigning approach to criminal justice. He distinguishes the two orientations this way:

The criminologies of the welfare state era tended to assume the perfectability of man, to see crime as a sign of an under-achieving socialization process, and to look to the state to assist those who had been deprived of the economic, social, and psychological provision necessary for proper social adjustment and law-abiding conduct. Control theories begin from a much darker vision of the human condition. They assume that individuals will be strongly attracted to self-serving, anti-social, and criminal conduct unless inhibited from doing so by robust and effective controls, and they look to the authority of the family, the community, and the state to uphold restrictions and inculcate restraint. Where the older criminology demanded more in the way of welfare and assistance, the new one insists on tightening controls and enforcing discipline.<sup>49</sup>

Garland sees the emergence of neoliberal ideology in the United States and the United Kingdom as one foundation of the culture of control. His account, however, focuses not only on a renewal of faith in markets as the best way to allocate social goods and the concomitant the loss of faith in government to positively affect economic and social relations, but on a new stratification and loss of social solidarity between the privileged and the poor, racial majorities, and racial minorities.<sup>50</sup> The ideology of neoliberalism, in his view, stands simultaneously for more freedom for the privileged and more discipline for the subordinated: “Thus the new conservatism proclaimed a moral message exhorting everyone to return to the

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Martinson's conclusion, even though the evidence to support it was mixed. See Francis T. Cullen & Paul Gendreau, *From Nothing Works to What Works: Changing Professional Ideology in the 21<sup>st</sup> Century*, 81 PRISON J. 313, 322 (2001).

47. Garland writes: “Rehabilitation had been the field's central structural support, the keystone in an arch of mutually supportive practices and ideologies. When faith in this deal collapsed, it began to unravel the whole fabric of assumptions, values and practices upon which modern penality had been built.” DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8 (2001).

48. *Id.*

49. *Id.* at 15.

50. *Id.* at 101.

values of family, work, abstinence, and self-control, but in practice its real moral disciplines fastened onto the behavior of unemployed workers, welfare mothers, immigrants, offenders, and drug users.”<sup>51</sup>

In the early 1980s, Garland argues, “crime” became the symbol of this stratification and the perceived need for more control over the lower classes.<sup>52</sup> Not only crime rates but the fear of crime escalated, and a new politics emerged in which white middle-class people saw themselves as the victims of the “undeserving and increasingly disorderly urban poor.”<sup>53</sup> Fear and a perception of high social distance between “us” and “them” fostered a punitive rather than compassionate approach to criminal offenders.<sup>54</sup> This punitive turn has been expressed in a number of specific policies: the rise of mandatory minimum sentences, a greater reliance on incapacitation, as in “three-strikes” laws, more crowded prisons, and a new movement for “victims’ rights.”<sup>55</sup> The meaning of prison has changed as well: it now represents, Garland argues, a kind of internal exile for populations that have no economic prospects and few social supports.<sup>56</sup>

Garland argues, however, that the more important shifts are subtler. Crime has become a political issue, not just an issue for the “experts.” High-profile crimes demand instant responses by politicians, even when those responses have little or no prospect of accomplishing actual positive change.<sup>57</sup> Jonathan Simon goes further to suggest that “governing through crime” has become a new mode of doing politics.<sup>58</sup> Garland argues, as well, that a new industry offering private “security,” together with new public-private partnerships pursuing crime prevention, have extended the boundaries of criminal justice beyond the state.<sup>59</sup>

51. *Id.* at 99-100.

52. *Id.* at 101.

53. GARLAND, *supra* note 47, at 153.

54. *Id.* at 164.

55. *See id.* at 132-34.

56. Garland puts it this way:

In the USA today the prison system contains a massive population of working-age adults whose structural exclusion from the workforce is routinely forgotten in economic analyses and unemployment statistics. Large-scale incarceration functions as a mode of economic and social placement, a zoning mechanism that segregates those populations rejected by the depleted institutions of family, work, and welfare and places them behind the scenes of social life. In the same way, though for shorter terms, prisons and jails are increasingly being used as a *faute de mieux* repository for the mentally ill, drug addicts, and poor, sick people for whom the depleted social services no longer provide adequate accommodation.

*Id.* at 178-79.

57. *Id.* at 173 (describing “a kind of retaliatory law-making, acting out the punitive urges and controlling anxieties of expressive justice . . . Its chief aims are to assuage popular outrage, reassure the public, and restore the ‘credibility’ of the system, all of which are political rather than penological concerns.”).

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

59. GARLAND, *supra* note 47, at 116-17 (describing the emergence of a private security industry); *Id.* at 124-26 (describing public-private partnerships).

From this perspective, as well, it's easy to see why an RSB defense seems otherworldly today. RSB seems to offer the dangerous classes a "get out of jail free" card, in direct conflict with the notion that they need punishment and control. RSB solicits sympathy for a population—poor black and Latino men—who today are understood as threateningly "other." RSB can be expected to carry little political traction in an environment where being "tough on crime" is what gets you votes. It offers, instead, the specter of violent and dangerous offenders let loose on a helpless and unsuspecting population. And indeed, in the absence of a well-functioning welfare state, a robust RSB defense might have the kind of effect that the 1960s "de-institutionalization" of the mentally ill had: less, rather than more, support for the disadvantaged.

### *C. The Culture of Therapy*

The third road in which the absence of the RSB defense stands is the so-called culture of therapy. In her book *Saving the Modern Soul*,<sup>60</sup> Eva Illouz describes how Freudian psychology met and converged with an American tradition of self-help to produce a new culture, which she and others call the culture of therapy. Illouz finds these tenets, among others, at the core of the culture of therapy:

(1) The view that everyday private emotional life is full of hidden meaning, meaning that can be uncovered and incorporated with constant effort at interpreting and reflecting on oneself, guided by experts;<sup>61</sup>

(2) A focus on the nuclear family as the point of origin of the self, "the site within which and from which the story and history of the self can begin . . . the cause and foundation of one's emotional life";<sup>62</sup>

(3) Every individual life as an existential narrative drama in which we struggle to save ourselves from evils like loss, mental and emotional syndromes of all kinds, and trauma and to achieve normality and health;<sup>63</sup>

(4) Finally, the sense that emotional health and social success are linked: to be a successful human being at work, in romantic relationships, and in raising children, we must achieve insight into and mastery over our personalities and develop our powers of internal reflection to the fullest extent.<sup>64</sup>

The culture of therapy, as Illouz notes, is an "emotional style":<sup>65</sup> an approach to thinking about, talking about, and interacting with the self that

60. EVA ILOUZ, *SAVING THE MODERN SOUL: THERAPY, EMOTIONS, AND THE CULTURE OF SELF-HELP* (2008).

61. *Id.* at 38.

62. *Id.* at 39.

63. *See id.* at 43-44.

64. *Id.* at 50.

65. *Id.* at 14.

circulates both in elite circles of psychotherapists and academics and in popular circles among people who read general-interest magazines and watch television. It is visible in the multi-million dollar industry of self-help books and the new book sub-industry devoted to memoirs; it is reflected in countless movies and television shows, both fiction and non-fictional; it rules Oprah's new television network and her magazine; and it sustains a large professional class of therapists of various kinds with degrees in psychology and social work, as well as self-identified "alternative" or "New Age" therapists practicing many different kinds of healing.

What is the relationship between substantive criminal law and the culture of therapy? An association that might immediately jump to mind is the idea of "the abuse excuse," a phrase that came into widespread use in the 1980s with Alan Dershowitz's book of the same name<sup>66</sup> and was thrown around in the media during the period of the trial of the Menendez brothers and of Lorena Bobbitt, whose lawyers made a successful self-defense claim based on evidence that she was a battered wife after she cut off her husband's penis.<sup>67</sup> Those who worry about abuse becoming an "excuse" hold therapeutic culture responsible for turning moral problems into problems of health and disease. Under this account, the rise of therapeutic culture means that there are no more bad people, only ill people. The result is a hollowing out of moral responsibility and the erosion of notions of honor and integrity.<sup>68</sup> Another troubling feature of the culture of therapy, from this perspective, is its emphasis on victimhood as a kind of badge of social citizenship. As Illouz explains it:

The therapeutic narrative calls on us to improve our lives, but it can do so only by making us attend to our deficiencies, suffering, and dysfunctions. In making this suffering a public form of speech, in which one must expose to others the injuries inflicted on the self by others, one becomes ipso facto a public victim, somebody whose psychic damage points to the past injuries perpe-

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66. See generally ALAN DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* (1995).

67. As one commentator puts it:

The "abuse excuse" has become a catchy phrase [*sic*] describing a decline in moral values marked by circumstances where otherwise guilty people use past victimization to seek absolution for their crimes. The Menendez brothers, Lorena Bobbitt, abused women who slay their abusers and then hide behind the murky "battered woman's defense," kids who kill because they saw too much violence on television, adults who lash out because of childhood injustices, and women whose acts may be the product of things like PMS and post-partum depression, all leap to mind as examples of a decaying society unwilling to demand individual accountability for criminal acts.

Michael G. Dowd, *Women and the Abuse Excuse*, FINDLAW, 1999, <http://library.findlaw.com/1999/Nov/1/129404.html>.

68. See generally CHRISTINA HOFF SOMMERS & SALLY SATEL, *ONE NATION UNDER THERAPY: HOW THE HELPING CULTURE IS ERODING SELF-RELIANCE* (2005).

trated by others and whose status as victim is acquired in the very act of telling others one's injuries in public.<sup>69</sup>

The idea of an RSB defense might fit very nicely into the category of "abuse excuse." The charge against RSB would be that it inappropriately places a large swath of individuals outside of the criminal justice system altogether, removing their status as moral agents and treating them instead as objects for treatment and control. Bazelon's suggestion that those at the bottom of our society cannot justly be held responsible for their crimes is meant as a moral indictment of the privileged, but it simultaneously denigrates the poor. The expected consequence for substantive criminal law is an expansion of criminal excuses, all of which represent retreats from moral agency.

Our first response to this argument might be to observe that although we undoubtedly live in a therapeutic culture, excuses, whether based on abuse or something else, do not seem to be proliferating. It is true that evidence of intimate violence and its effects is now widely admissible in criminal cases to support claims of self-defense and duress. But the general diminished responsibility defense that Bazelon hoped to see has not taken hold in American law. To the contrary, the responsibility defenses we have are rarely successful. Consider, for instance, the insanity defense. Michael Perlin argues that policymaking regarding the mentally ill and criminal responsibility has been hampered by the belief that the insanity defense is overused—a belief so false and yet so well entrenched that Perlin calls it a "myth."<sup>70</sup> Perlin cites research finding that "the insanity defense is used in only about one percent of all felony cases, and is successful just about one-quarter of the time."<sup>71</sup> Yet, he argues, lawmaking and policymaking is driven by factors that limit the availability of the defense: the fear that defendants will "beat the rap" by faking mental illness; the belief that emotional handicaps are not exculpatory; the "demand that a defendant conform to popular images of extreme craziness in order to be legitimately insane"; and a fear that "the soft, exculpatory sciences of psychiatry and psychology . . . will somehow overwhelm the criminal justice system by thwarting the system's crime control component."<sup>72</sup>

A similar story can be told about the "diminished capacity" defense that has been recognized in some American jurisdictions. Stephen Morse argues that although many courts and legislatures have permitted defen-

69. ILLOUZ, *supra* note 60, at 185.

70. Michael L. Perlin, "The Borderline Which Separated You From Me": *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1404 (1997); see also Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 648-49 (1989-90).

71. Perlin, *The Borderline*, *supra* note 70, at 1404.

72. *Id.* at 1407-08.

dants to use evidence of mental illness to negate mens rea, “they have usually placed illogical limitations on the defendant’s ability to do so,” and in some jurisdictions evidence of mental illness is only admissible on the issue of legal insanity.<sup>73</sup> Like the insanity defense, the diminished capacity defense has been contracted, rather than expanded, in response to high-profile cases.<sup>74</sup> The trend regarding the admissibility of evidence of voluntary intoxication to disprove mens rea similarly is toward restriction rather than expansion.<sup>75</sup> Richard Bonnie concludes that the idea that criminal excuses are proliferating in our culture of therapy is a mass media invention.<sup>76</sup>

I want to offer a second response to the suggestion that the culture of therapy is conducive to broad and all-encompassing excuses for criminal actions: The logic of the culture of therapy itself is consistent with a contraction rather than expansion of general criminal excuses like RSB. Ilouz notes that the culture of therapy makes a sharp distinction between the past and the future—you are not responsible for your past, in which you were a victim, but you are responsible for your future, because you have an obligation to recognize and transcend the wounds of the past.<sup>77</sup> In the culture of therapy, failure can always be corrected, and one has a moral duty to correct one’s past failures. Indeed, the “positive thinking” strand of the culture of therapy would extend moral responsibility for correcting one’s situation even to physical illness: People battling serious illnesses, like cancer, are expected to display the proper “positive” attitude in order to triumph over their disease, and may even be told that they brought disease upon themselves by “negative thinking.”<sup>78</sup>

From this perspective, paradoxically, RSB as a defense is in tension with therapeutic culture. RSB is in line with the culture of therapy insofar as the defendant who raises it has been traumatized by the past and wants to present that trauma as central to his or her actions. But RSB also vi-

73. Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 6-7 (1984).

74. See Walter L. Gordon, III, *Old Wine in New Bottles: California Mental Defenses at the Dawn of the 21<sup>st</sup> Century*, 32 SW. U. L. REV. 75, 89 (2003) (describing actions taken in California through ballot initiatives and legislation to restrict the diminished capacity defense in the wake of the killing of San Francisco Mayor George Moscone and Supervisor Harvey Milk by Dan White).

75. See Meghan Paulk Ingle, Note, *Law on the Rocks: The Intoxication Defenses Are Being Eighty-Sixed*, 55 VAND. L. REV. 607, 609-10 (2002) (arguing that voluntary intoxication defenses face “elimination by statutory abrogation”); see generally *Montana v. Egelhoff*, 518 U.S. 37 (1996) (upholding a Montana statute that rendered inadmissible evidence of voluntary intoxication to negate mens rea).

76. Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POL’Y 1, 6-7 (1995).

77. ILOUZ, *supra* note 60, at 185 (arguing that the act of naming one’s suffering also “compels him or her to change and to improve his or her condition”).

78. BARBARA EHRENREICH, *BRIGHT-SIDED: HOW THE RELENTLESS PROMOTION OF POSITIVE THINKING HAS UNDERMINED AMERICA* 43 (2009) (describing “victim-blaming” directed at cancer victims who fail to triumph over their disease, or fail to be “positive” about it).

olates the narrative of transcendence in which individuals are expected to transcend their suffering by “doing work” on themselves, rather than looking to systemic solutions.

#### IV. CONCLUSION

My argument has been that RSB, the defense that wasn't and isn't, can serve as a kind of absence against which we can examine the intersection of the culture of neoliberalism, the culture of control, and the culture of therapy. Let me end with a disclaimer. I don't want to suggest by these remarks that because these various cultures line up against a potential RSB defense that such a defense is therefore impossible in American law. Calling anything a “culture” makes it seem far more fixed, homogenous, and permanent than people's beliefs and actions actually are. There are some indications that the “culture of control” is weakening, for instance, in response to tight state budgets and efforts of “innocence projects” to discredit the punitive turn in our criminal justice system.<sup>79</sup> And any conglomeration of ideas and practices large enough to be called a “culture” is capable of containing many contradictions and tensions. Indeed, a culture's capacity for supporting irreconcilable positions may be precisely the source of its mass appeal.

But the temper of the times makes a difference. Judge Bazelon's call for a broad responsibility defense, even though echoed by some contemporary scholars,<sup>80</sup> seems unlikely to be heeded in legislatures any time soon. That is not a function of its logic or its jurisprudential fit; it is a reflection of the interplay of legal rules with currents and discourses far beyond the criminal justice system.

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79. See Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1698, 1729 (2006) (surveying evidence that the commitment to mass incarceration is weakening in response to budget concerns and that death penalty abolitionists have recently gained the upper hand).

80. See Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 289 (2003) (proposing a “generic, doctrinal mitigating excuse of partial responsibility that would apply to all crimes, and that would be determined by the trier of fact”).