

# SEVERE ENVIRONMENTAL DEPRIVATION (AKA RSB): A TRAGEDY, NOT A DEFENSE

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## I. INTRODUCTION

I am privileged to be able to comment on an excellent series of papers that address whether Severe Environmental Deprivation (SED)<sup>1</sup> should be a defense to crime and criminal justice policy more generally. The five

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When the Editors of the *Alabama Civil Rights and Civil Liberties Law Review* invited me to contribute to this conference, I was flattered but hesitant. In 2000, I published a book chapter, *Deprivation and Desert*, in which I canvassed the arguments for why severe environmental deprivation (SED) should be considered an independent excusing or mitigating defense in criminal law and concluded that none of them succeeds. See Stephen J. Morse, *Deprivation and Desert*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 114 (William C. Heffernan & John Kleinig eds., 2000). Nothing in the intervening years had persuaded me that my analysis was misguided and I did not want to repeat myself. The Editors therefore graciously permitted me to provide a commentary on the other excellent articles in the issue. Part II of this Article briefly reviews and sometimes expands the argument of the 2000 chapter to offer a framework for analysis. Consequently, I have not entirely avoided repeating myself.

1. Like Professor Delgado, I think the more popular locution, Rotten Social Background, is undesirable for precisely the reasons he gives.

main papers by Professors Richard Delgado, Andrew Taslitz, Paul Robinson, Erik Luna, and Angela Harris variously address the wisdom of the proposed defense, whether and why it has not been and is not likely ever to be adopted in any jurisdiction, and possible extensions of it. In this commentary, I make two general arguments: first, that SED or any other potentially powerful predisposing cause of crime should not per se be a defense to crime that excuses or mitigates criminal responsibility; and second, that criminal law defenses to responsibility are crucial to the just adjudication of guilt and innocence, but they are not an appropriate means to remedy undoubted social, biological, and psychological problems. I conclude that no jurisdiction has adopted the defense because it is conceptually unjustifiable and empirically unworkable. SED is a tragedy, but it should not be a defense to crime.

I begin by presenting the framework I apply for thinking about such problems. I then identify the main theses Professors Delgado and Taslitz present and consider their merits. Next, I turn to the arguments of the other papers. Finally, I conclude with a number of criminal justice reform suggestions, including many that I believe the other writers would endorse. A brief conclusion follows.

## II. RESPONSIBILITY AND SED: A FRAMEWORK FOR ANALYSIS

The structure of criminal responsibility is quite straightforward in American criminal law. Crimes are defined by their elements, including acts and mental states (*mens rea*). If the prosecution proves these elements beyond a reasonable doubt, the defendant is prima facie guilty. The defendant can nonetheless avoid liability by establishing an affirmative defense of justification or excuse.<sup>2</sup> There are, roughly, two excusing conditions: lack of rational capacity and compulsion. Compulsion may be either external, such as a gun at one's head, or internal, such as an alleged lack of control capacity produced by mental disorder. How does SED fit into this framework?

SED might help explain why a defendant did not form the *mens rea* required by the definition of a crime, but then prima facie guilt is avoided because the elements cannot be proven and not because SED was an independent defense. In some cases, the otherwise criminal behavior of an SED defendant might be justified by necessity—say, stealing food to avoid starvation—but then it is the positive balance of evils that creates the justi-

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2. It is constitutionally permissible to put the burden of persuasion for affirmative defenses on the defense. I therefore use the vague term "establish" to denote all cases in which a defendant succeeds with an affirmative defense, wherever the burden of persuasion may have been placed. There are also "policy" defenses, such as jurisdiction and the statute of limitations, but these have nothing to do with culpability.

fication and not SED per se. In cases of both prima facie guilt denial and justification, there is no need for a doctrine of SED although evidence of SED might help prove both.

SED is therefore meant to be an excusing condition, but what is the theory of excuse that underlies it? In *Deprivation and Desert*,<sup>3</sup> I identified six candidates: causation/determinism/free will, compulsion, insanity/diminished capacity, subculture, payment in advance, and social forfeit. In response to a suggestion Professor Taslitz made at the conference, let me add a seventh: lack of opportunity. Let us briefly consider each of these.

Causation and determinism and lack of contra-causal, libertarian free will are not criteria for or excusing conditions in the criminal law.<sup>4</sup> Most scientifically informed people believe that all events in the universe, including human action, are fully caused. Moreover, most accept the truth of some form of determinism as a working hypothesis. Thus, if causation or determinism per se were an excuse, no one would ever be responsible for any behavior. Some people welcome such a conclusion, but it would be a radical change in American law. Further, causation and determinism are not the underlying rationales for the positive law of excuses. Even if the universe is causal and determined, some people lack rational capacity or are compelled, and most people have substantial rational capacity and do not lack control capacity or otherwise act under compulsion.

We do not blame and punish excused agents because we believe it is unfair and probably consequentially useless to hold accountable an irrational or compelled agent. For example, we do not hold young children fully responsible because they are determined and we are not. The reason for excusing young children is that they cannot be fully rationally guided by the rules and standards of law and morality. Even causation by an abnormal variable, such as mental disorder, does not excuse unless it sufficiently deprives the agent of rational or control capacity. The excusing conditions, like all other events in the universe, are caused, but the reason we excuse is that a genuine excusing condition is present.

I have termed the persistent but erroneous belief that causation excuses the “fundamental psycholegal error.”<sup>5</sup> It is flatly inconsistent with positive law. I do not deny that many people have deterministic anxiety when they learn more about the causation of a particular bit of behavior and become concerned that the agent did not have “free will.” And there is a very powerful metaphysical view that determinism and responsibility are incompatible. On the other hand, there is an equally powerful metaphysi-

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3. See *supra* Author note.

4. Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry and Psychology*, 25 BEHAV. SCI. & L. 203, 203 (2007).

5. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1593-94 (1994).

cal position, compatibilism, which holds that agents can be responsible in a deterministic universe. The criminal law cannot wait for the solution to a probably unresolvable metaphysical debate. It is sufficient to note that all the doctrines of responsibility are fully consistent with the truth of determinism and are justified by moral and political theories we have reason to endorse.

Compulsion, whether external or (more controversially) internal, is an excusing condition, but there is no reason to believe that most people subjected to SED are acting under compulsion when they commit criminal acts. If someone is threatening them sufficiently, then the traditional excuse of duress will obtain and there is no need for an independent SED excuse. If, for some reason, a victim of SED suffers from sufficiently impaired behavioral controls, then the insanity defense is the only doctrinal vehicle for raising such a claim. Unfortunately, the insanity defense will not apply often because many such people may not have a sufficiently severe mental disorder to qualify. If we think that substantially impaired behavioral controls should mitigate or excuse, then the criminal law should develop a generic excusing condition for this situation that would be available to all defendants who might suffer from such impairments through no fault of their own.<sup>6</sup> Although SED may be a risk factor for impaired behavioral controls, an SED defense would be over-and-under-inclusive to achieve the result of mitigating or excusing people with impaired behavioral controls because many SED sufferers do not suffer from such problems and many non-SED sufferers may have such difficulties. In any case, the genuine excusing work would be done by compulsion, not by SED. Finally, it seems patronizing and demeaning to claim that all victims of SED are impaired human beings.

The same considerations apply to the argument that legal insanity or some form of diminished capacity is the underlying rationale for an SED defense. If the defendant is suffering from mental disorder, perhaps as a result of SED, then legal insanity or some type of diminished capacity mitigation may apply in an appropriate case. In that event, it is legal insanity or diminished capacity, traditional doctrines with a well-established rationale, that are doing the legal and moral work, and there is no need for an independent SED defense. Suppose, however, that the defendant does not suffer from a diagnosable disorder or one severe enough to qualify for a defense associated with mental disorder. It is possible that the defendant's rational capacities were diminished by SED through variables independent of mental disorder. In that case, there is a powerful moral and legal argument for a defense, but it would be based on impaired rational

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6. See Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 299 (2003).

capacity and not on SED per se, and it should be equally available to other defendants with such impairments not arising from SED.<sup>7</sup> Once again, SED would be under-and-over-inclusive as a proxy for such impairments. Many people without SED may have such impairments and most people with SED will not have them. Again, it would be demeaning and patronizing to claim that all SED victims are impaired in this way that diminishes their responsibility and autonomy.

The sub-cultural claim is that communities marked by high levels of SED may inculcate beliefs and attitudes that cause them to reject the morality of the dominant culture or at least certain aspects of it. There are two problems with this rationale. The first is factual. Is it really true that there are communities in which those who socialize children believe and inculcate in the children the belief that the core offenses of force, theft, and fraud are really acceptable forms of behavior? This strikes me as implausible although it is more plausible that they may teach that different justifications apply for what would otherwise be wrongs. More plausibly still, there may be a code of the street<sup>8</sup> or a code inculcated by gangs that is seriously at odds with the larger society's moral and legal rules. Young men who are imperfectly socialized as a result of other effects of SED may be particularly vulnerable to adopting such codes. Having such a code or set of beliefs might well contribute to antisocial behavior.

Even if the foregoing scenario were true, however, this rationale is undermined by the normative arguments against providing a subcultural defense to rational agents who know what the rules are, even if they have antisocial values and beliefs arising from any subculture and not just an SED subculture. No coherent, workable society can give legal permission to people to act according to their own private or subjective moral code. This would abandon the rule of law and undermine social safety. And it is not unfair to blame and punish responsible agents who do know the dominant rules but choose to flout them out of allegiance to their own rules.

I suspect that lurking unacknowledged in the sub-cultural claim is the implicit view that the dominant society's rules are so unfair and disadvantageous to those who suffer SED that society has no right to impose its rules on them. This claim is a version of the social forfeit claim, however, which this part of the article will presently address.

As noted, Professor Taslitz suggested that lack of opportunity may be the underlying rationale for the SED defense,<sup>9</sup> but he did not say why. Let us assume, although I am confident that many would contest this, that

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7. This was the gist of Judge Bazelon's dissent in *U.S. v. Alexander*, 471 F.2d 923, 926 (D.C. Cir. 1972) (per curiam).

8. See generally ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (2000).

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

SED would be a reasonable proxy for lack of opportunity. Why should lack of opportunity excuse hurting another human being? As long as the defendant is rational and uncompelled, it is difficult to imagine what theory would justify providing an excuse. Lack of opportunity may understandably frustrate and anger an agent and such emotions may undermine rational controls. But then diminished rational capacity would be the underlying excusing condition. We must then ask generally in which circumstances should understandable frustration and anger be mitigating or excusing and the defense would no longer be an SED defense. Criminal law traditionally employs the analogous provocation/passion doctrine to mitigate intentional homicides, so such a suggestion for a generic mitigating doctrine is not unthinkable. Nevertheless, we should tread lightly. Not all victims of SED will experience such frustration and anger at intense levels, and many will not be in the heat of anger when they commit their crimes. Moreover, such a mitigation or excuse undermines the law's deterrent power just in those cases in which it is most needed.

Payment in advance is a theory first advanced by English philosopher, Martha Klein.<sup>10</sup> The gist of the argument is that if the defendant suffered because he was subjected to SED and the SED was causally related to his criminal offending, then he has "paid in advance" for the suffering that he deserves for committing the crime. This suggestion is not about responsibility, however, and is not an excuse for the crime. Instead, it implicitly adopts a "whole life" view of deserved suffering in which how much suffering a defendant deserves for a current crime must be assessed in light of how much he has undeservedly suffered at other times in ways causally related to his criminal behavior.

Assume that we had a measure of the suffering and were quite clear that the prior SED played a causal role in the current criminal behavior. If these practical problems were solved and one finds the payment in advance account attractive, what is the practical response? The deprived wrongdoer may be a very dangerous agent and it may not be fair to his law-abiding fellow citizens to fail to incarcerate him or to abbreviate his sentence because he has paid in advance. I suppose, however, that we could incarcerate him in such pleasurable conditions that it would cause hardly any suffering at all and may even make up for the previous SED-related suffering.<sup>11</sup> But then "prisons" for those who paid in advance might be so nice that people would commit crimes so that they could break

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10. MARTHA KLEIN, DETERMINISM, BLAMEWORTHINESS, AND DEPRIVATION 4 (1990).

11. See Saul Smilansky, *Hard Determination and Punishment: A Practical Reductio*, 30 LAW & PHIL. 353 (2011) (arguing that if criminals are not really responsible, then the state must make the conditions of confinement sufficiently pleasant to compensate the prisoners for the deprivation of liberty imposed).

into them. I am afraid that payment in advance will simply not do as a response to SED and it does not deny responsibility in any case.

The last, extremely serious rationale for an SED defense is what I term “Social Moral Forfeit” (SMF). The claim is that our society is immensely unjust and that this injustice is causally responsible for SED, which is in turn causally responsible for crime. Thus society is at fault for individual criminal acts, and we do not have the moral right to punish the individual wrongdoer. The right to impose punishment is forfeit. At the very least, society shares the blame, as Professor Taslitz argues.<sup>12</sup>

The difficulties with this claim are both normative and empirical. Is our society so unjust? Is the injustice the primary cause or the cause at all of SED and thus of crime? Is poverty necessarily caused by injustice and what is the precise link between poverty and crime? As Paul Robinson correctly shows, the SED variables are not as strongly associated with crime as Professor Delgado and others suggest.<sup>13</sup> The critique of our political, moral, and legal culture is vastly more conceptually and empirically fraught than the proponents of SED imply. Moreover, there are always counter-stories to those the proponents of SED tell, stories of people exposed to great adversity but who are sustained and prosper as a result of good families and culture. The answers to all the empirical and normative questions will be essentially contested.

Even if we were convinced that all the normative and empirical premises in the SMF claim were true, the defense has nothing to do with the individual wrongdoer’s responsibility unless we accept the erroneous causal theory of excuse and thus deny the very possibility of genuine responsibility.

### III. SEVERE ENVIRONMENTAL DEPRIVATION AS CRITIQUE AND DEFENSE: THE DELGADO AND TASLITZ ARGUMENT FOR SED

There is no consensual definition of SED, but that will not be fatal to thinking of SED as a critique and as a criminal law defense. Like Justice Stewart’s famous dictum about pornography, we “know it when [we] see it,”<sup>14</sup> at least in relatively extreme forms. Moreover, legislatures and courts often have to grapple with applying and refining relatively ill-defined standards. For example, in *Atkins v. Virginia*,<sup>15</sup> in which the Supreme Court categorically excluded people with retardation from capital

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12. Taslitz, *supra* note 9, at 82.

13. Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and “Rotten Social Background,”* 2 ALA. C.R. & C.L. L. REV. 53 (2011).

14. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

15. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

punishment, the Court left it to the states to provide a functional definition of retardation.

The main empirical supports for SED, detailed in the papers by Delgado and Taslitz, are the assertions that many poor people seem to have few realistic prospects for normal socialization because poverty abnormally distorts their lives and that poverty is strongly linked to crime in the United States.<sup>16</sup> They do not explicitly identify the mechanism by which poverty is criminogenic, although they do allude to some possible candidates, such as broken family structure and poor socialization resulting from the strains of poverty. They almost entirely ignore many mediating variables, such as differing sub-cultural norms, that affect whether poverty causes crime.<sup>17</sup> Nevertheless, although I could quibble with many of their factual assertions,<sup>18</sup> as does Professor Robinson, for the purposes of argument, I will accept them. Nothing in my argument turns on the truth of these claims.

Professors Delgado and Taslitz make a further, far more controversial claim that is partly empirical and partly normative. Both squarely place the causal and moral blame for poverty and its criminogenic effects on unjust social arrangements. The role of individual agents, families, and cultural norms are not to blame, although Taslitz does seem to acknowledge “shared responsibility” between agents and society.<sup>19</sup> Now, no one denies that there is socioeconomic inequality in the United States and that governmental policies play some role in producing it, but once again, the mechanism that explains the causal relation between poverty, inequality, and crime, if there is a causal relation, is unknown and it is not clear that those policies are unjust. For example, it is difficult to explain why violent crime rates are currently so low despite a severe recession and a dramatic increase in socioeconomic inequality. Without knowing the causal mechanism, it is extremely hard to determine how much of the variance in wealth and its concomitants is explained by governmental policies as com-

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16. See Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1 (2011); see also Taslitz, *supra* note 9.

17. See generally Sam Roberts, *A Village With the Numbers, Not the Image, of the Poorest Place*, NEW YORK TIMES, Apr. 21, 2011, at A1 (Roberts’ story is about the poorest district in the United States, Kiryas Joel, 50 miles northwest of New York City. Heavily populated by Ultra-Orthodox Jews, it has no homeless residents and no slum, and crime, drug addiction, and unwanted pregnancy are virtually non-existent.); see generally James Q. Wilson, *Hard Times, Fewer Crimes*, WALL STREET JOURNAL, May 28, 2011, at C1 (explaining the downturn in crime during the recent, severe economic recession by, *inter alia*, large changes in American culture). Culture matters.

18. For example, Professor Delgado asserts that sending young men to prison further impoverishes their families because the family is thereby deprived of a breadwinner. But among the poorest criminals—those who might plausibly raise an SED defense—the likelihood that they were economically contributing to supporting their partners and children or had good employment skills and stable job histories is not likely to be high. Indeed, Professor Delgado notes that only four in ten African-American children live in a two parent home, and that proportion is surely much lower among those at the bottom of the economic ladder.

19. Taslitz, *supra* note 9, at 100.



pared to other variables. Moreover, claiming that social policies are unjust depends on highly contested notions of what justice demands. This disagreement is highly relevant to one interpretation of the SED defense, as I shall explain presently.

Drawing on the supporting claims that proponents of the SED defense make, here is the structure of the argument. It has two premises, each of which could be unpacked further and has numerous, controversial, hidden premises. The question is whether the conclusion follows from those premises.

Premise 1: Society is deeply unjust, including its criminal law doctrines, practices and institutions, and as a result, society is largely to blame for causing criminal conduct either by omission or commission. To use Professor Taslitz's preferred phrase, society shares the blame.<sup>20</sup>

Premise 2: Society has a duty to remedy the criminogenic conditions.

Conclusion: Adoption of the SED excuse is a proper means to remedy injustice and to reduce crime.<sup>21</sup>

Note that the conclusion is capable of two interpretations. The first is that the defense is about culpability; the second is that the defense has nothing to do with culpability. The culpability claim itself has two interpretations. The first is that SED excuses because it is a good proxy for a genuine excusing condition. The second is that having suffered SED itself excuses for no other reason than the existence of the history of SED. The non-culpability interpretation is essentially an attempt to put society on trial and to transform it. It is intimately tied to the Social Moral Forfeit justification for the defense discussed in the preceding Part. Thus, the conclusion does not follow from the premises unless one of the following is true: Either SED actually diminishes culpability, or in the alternative, providing the excuse will cause society to remedy the criminogenic conditions it is responsible for creating. Professor Delgado is somewhat ambiguous about which interpretation he favors. There is material that suggests all of the above. In his paper, Professor Taslitz clearly has opted for the non-culpability claim because he writes that the SED excuse puts society on trial, and he concedes the culpability of most defendants who might plausibly raise the defense.<sup>22</sup>

If SED is culpability diminishing, we need to know precisely how it works. If, as Professor Taslitz said in answer to a question at the conference, the genuinely excusing condition is that poor people have reduced opportunities, how is reduced opportunity an excusing condition? Why? If the agent's behavior meets the elements and he is rational and un-

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20. Taslitz, *supra* note 9, at 82.

21. SED proponents also suggest other reforms in criminal justice, such as major alterations in the drug laws. I agree with most such recommendations. See *infra* Part VII.

22. Taslitz, *supra* note 9.

coerced, why should lack of opportunity in other spheres excuse? If SED is a proxy for another genuine excusing condition, what is the condition for which it is a proxy and is it a sufficiently accurate proxy? If it is an excuse in itself, how is it different from a more general claim based on causation that obliterates all responsibility for all people? I submit that neither culpability diminishing theory succeeds. No general and genuine excusing condition for which SED is a proxy has been proposed or demonstrated, and the empirical case is too attenuated for any proxy claim. As the previous Part demonstrated, SED will be over-and-under-inclusive. If SED is simply an excuse in itself, this is simply the causal theory of excuse and obliterating all responsibility is not really an option in any world we live in or care to live in.

But perhaps, as Judge David Bazelon thought and as Professors Taslitz and Delgado seem to agree, providing the excuse will force society to confront and to correct its own culpable share of the blame. Unlike the conceptual problems besetting SED as a genuine mitigating or excusing condition, there is no conceptual difficulty with this interpretation of the defense. It is a consequentially-based proposal to increase social justice that must be judged by its ability to do so and by whether it is consistent with our culture's political morality. Will it work, and is it the right means to use even if it will?

I suggest that it is a fantasy to believe that providing a defense in individual cases and telling SED stories in court will produce the sociocultural and socioeconomic changes that Delgado and Taslitz think will produce a more just society and will vastly reduce crime. We are already awash in stories and witnessing in the general culture. No one is unaware of the type of argument about social injustice that Professors Delgado and Taslitz deploy, and our society already has an enormous apparatus of transfer payments and social welfare programs and services to address environmental deprivation and the further problems it might create.

Defendants cannot now introduce evidence of SED at trial unless it is relevant to a genuine, existing excusing condition. If SED were used to put society on trial, defendants would have a chance to tell their stories. Nonetheless, what reason is there to believe that providing such a "defense" in the criminal justice system will have the promised transformative effect if the barrage of such information in the media and political debate has not already had this effect? And all these concerns are independent of whether the criminal justice system is an appropriate institution to perform transformative social engineering—the explicit goal of the second interpretation of the defense—rather than to adjudicate genuine guilt and innocence?

If we do provide the defense, an enormous number of practical problems arise. The first and most practical question is how plea bargaining will be affected. As is well known, few cases in state courts and a compa-

ratively trivial number in federal court are tried; most are settled by plea agreement. Assuming that SED is plausible in large numbers of cases and that juries are willing to grant the excuse or mitigation, assumptions I return to presently, there will be a greater incentive for the prosecution to grant more lenient bargains, and thus, the stories will not be told in many cases. Moreover, there could be a political backlash against the shorter sentences that result. A successful SED may become a victim of its own success.

What will be the standard for SED? How severe is severe enough? Should SED be available for all plausible defendants or only some? Which?<sup>23</sup> How is society to be put on trial so that juries understand that society is on trial and they are not simply hearing terribly sad stories of tragic life circumstances? How will the defendant prove sufficient societal guilt to deserve an excuse? What kinds of evidence will be considered relevant, who will be the expert witnesses on SED, and how will they explain societal guilt in ways that meet ordinary evidence standards for expert witnesses? In the alternative, if the stories are told only by lay people, many ordinary jurors may conclude that they, themselves, have suffered similarly dreadful backgrounds and are nonetheless law-abiding. I would predict that law-abiding jurors, many of whom may come from the same background as the defendant, will consistently reject the defense. Should we abandon the defense, or should we keep trying at great expense fruitlessly to convict society? What do we do about equal justice problems produced by very different juries that have different views of how to understand social justice? What does it mean to have “individualized justice,” which Professor Taslitz applauds,<sup>24</sup> when juries are left entirely rudderless to decide? What is the relation between SED and jury nullification? If explicit instructions concerning the latter are improper, why would the former be proper? And so on.

A major problem, as everyone beginning with Judge Bazelon recognizes, is how properly to respond to dangerous offenders if SED is a full defense requiring acquittal or is a mitigating partial defense that results in substantially lower penalties. I fully agree with Professors Delgado and Taslitz and countless others that the United States imprisons too many people for too long. Even if the socioeconomic and racial composition of the prison population accurately reflects the base rate of violent offending in various groups rather than discriminatory criminal justice, there is vast overcriminalization. Our drug laws and mandatory minimum prison sentences are prime examples of criminal justice policies that do not work and that disproportionately affect poor people and racial minorities. Our sen-

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23. I return to this question when discussing Professor Luna's contribution.

24. Taslitz, *supra* note 9, at 127.

tences are draconian by the standards of developed countries and could be shortened with little risk to social safety. Voluntary programs to increase the human capital of prisoners would also help.

Even if all such measures were implemented, the public safety impact of SED would still be very large. Violent offenders are disproportionately poor and minority and victimize people from their own communities. Many are poorly socialized young males who may not benefit much from prison programs even if they were available. To acquit or to imprison such offenders only briefly would fail to respect the legitimate interests of the community and victims. And, as Judge Bazelon recognized in *Alexander*, no palatable alternative to insure social safety exists.<sup>25</sup> Even if jurors are sympathetic to the plight of deprived offenders, which is by no means guaranteed, they will be loathe to release seriously dangerous young men who have committed violent crimes. These offenders will then prey primarily on disadvantaged but law-abiding citizens who deserve more from us. This price is far too great to soothe the guilty consciences of some advocates for social justice.

Moreover, an SED defense is not the appropriate means to achieve broad social justice in our moral and political culture. Advocates want nothing less than a massive transformation of our social structure. This is a political proposal, and it should be addressed by political institutions, especially the legislatures. Of course, issues bearing on social welfare routinely reach the courts<sup>26</sup> and many issues of social justice have constitutional status.<sup>27</sup> Nevertheless, the transformations such cases provide do not flow from jury verdicts but from the calm reflection of jurists, and they seldom work a massive transformation in social structure. In short, the social justice Professors Delgado and Taslitz desire must flow from the political process, which can provide and implement redistributive and other allegedly welfare-enhancing policies. In contrast, the primary purposes of criminal justice are to achieve retributive justice and social safety. An SED defense would do neither. The defense might indirectly increase social safety if jurors routinely accepted it, if society was consequently transformed, if severe deprivation was thereby diminished, and if crime vastly decreased as a result. But this is a pipedream.

I recognize that it is easy to raise hard questions in response to a doctrinal proposal, but an SED defense untethered from culpability would be a radical proposal and would increase the danger to the people already most disadvantaged by exposure to crime. The burden should properly be placed on the proponents of such proposals to answer the hard questions

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25. *Alexander*, 471 U.S. at 962-64 (Bazelon, C.J., dissenting).

26. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

27. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

and not simply to indict society. Further, I recommend that they join me in expending our energy on proposals to reform criminal justice doctrines and practices that result in overcriminalization and overincarceration.

Professor Taslitz's lovely appreciation of Richard Delgado's work opens with a basic question: If the SED proposal had such an important influence on scholarship, why has it had so little practical impact?<sup>28</sup> I have suggested that the answer is obvious. As a culpability defense, it has no basis or it is a *reductio* that denies the very possibility of responsibility. On either the culpability or social forfeit interpretation, it is not practically feasible. Although arguments about proposals such as SED sometimes animate scholars, they seldom have purchase in the real world. And rightly so in this case. On either of its interpretations, SED as a defense is not a wise doctrine.

#### IV. PROFESSOR PAUL ROBINSON & THE ANALOGY OF "COERCIVE INDOCTRINATION" TO SED

Professor Paul Robinson confirms that causation per se does not excuse, and he very usefully demonstrates that an SED excuse is not supported by a traditional desert, deterrence, or incapacitation justification for punishment.<sup>29</sup> He then turns to a tentative proposal for an excuse of "coercive indoctrination" (CI) that he believes might explain why at least some people exposed to SED should have a genuine excuse.<sup>30</sup> In my comment on his paper, I will consider whether CI is valid on its own terms, and if so, whether it is a partial rescue of SED. Even within traditional excuse theory, I am afraid that Professor Robinson's valiant effort to concede a little ground based on the analogy to CI does not succeed. I am sympathetic to the proposal, however, and offer an alternative formulation that brings it more comfortably within traditional excuse theory. Even then, alas, it will not work as analogous to SED and offers SED advocates little help. I conclude this Part with brief remarks on responsibility for character and for behavior flowing from one's character.

Professor Robinson defines CI as "changing a person's values or beliefs through coercive means."<sup>31</sup> If the defendant would not have committed the crime if his values and beliefs had not been coercively changed, then he is entitled to an excuse because he is not accountable for having those criminogenic mental states. Professor Robinson suggests that SED is a "specialized form of CI" because SED may implant criminogenic val-

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28. Taslitz, *supra* note 9, at 79.

29. Robinson, *supra* note 13, at 61-65.

30. *Id.* at 69-72.

31. *Id.* at 54.

ues and beliefs.<sup>32</sup> He also tentatively proposes the following specific criteria for coercive indoctrination:

An actor is excused for his conduct constituting an offense if:

- (1) he was coerced to adopt beliefs and values that were not his own
- (2) by influences sufficiently strong that he could not reasonably have been expected to have resisted their effect, given his abilities and situation; and
- (3) the nature of the coerced beliefs and values were such as to demand the offense; and
- (4) the actor would not have committed the offense had he not been coercively indoctrinated with those beliefs and values . . . .<sup>33</sup>

Professor Robinson uses two case studies to pump intuitions about the attractiveness of the proposal. The first, Tenneson, was a Korean prisoner of war who behaved treasonously after being indoctrinated by his North Korean captors.<sup>34</sup> The second, Cabarga, was a seventeen year old who was an accomplice to kidnapping and child abuse of a two and one-half year old girl by a seductive older man, Treefrog.<sup>35</sup> When Cabarga was seven years old, Treefrog made him a psychological captive and then abused the boy sexually and physically and indoctrinated him with the captor's immoral and illegal views concerning sex between children and adults. Although the two cases are somewhat distinguishable, as Professor Robinson notes, both arouse sympathy and seem to fit the proposed CI criteria.

What is the basis for providing an excuse when these criteria are satisfied? As Professor Robinson recognizes, it cannot simply be causation, no matter how abnormal and severe the cause might be. The excusing condition appears to be having predisposing beliefs, desires, and values acquired through no fault of one's own.<sup>36</sup> In my taxonomy of potential bases

32. *Id.* at 55.

33. *Id.* at 69.

34. *Id.* at 65-69.

35. Robinson, *supra* note 13, at 68-73.

36. The criteria refer to values and beliefs that "demand" the offense, but this is vague and too strong. Possessing particular values and beliefs may or may not be highly predisposing to criminal behavior depending on what other values, beliefs, and critical capacities the agent has. We are in the realm of practical reason, not the realm of mechanical causation. It will seldom be the case that the agent is incapable of not acting inconsistently with strongly held views. Consider Martin Luther's famous claim, "Here I stand; I can do no other." His beliefs about Church doctrine and practices and

for an SED excuse, Robinson's proposal is a form of or akin to the "sub-culture" claim applied to particular individuals.

My concern is that the basis for the CI excuse proves too much. Having criminogenic beliefs, desires, and values acquired through no fault of one's own could be said to be true of most criminal offenders from almost any background. For example, how do the criteria differ from child-rearing? Imagine parents who with loving kindness bring their child up to be a revolutionary or whose non-abusive child-rearing practices produce antisocial attitudes in their children. Professor Robinson tries to avoid this *reductio* by having a "coercion" criterion, but the nurtured revolutionary or the person with antisocial attitudes is no more accountable for their attitudes than the victim of coercive persuasion. All people have numerous beliefs, desires, and values for which they are not responsible and which predispose them to whatever behavior, criminal and noncriminal alike, they are predisposed to perform. Moreover, people have positive and negative "conversion" experiences without any reflection whatsoever, which transform them and predispose them to behavior that they were not previously predisposed to perform. In such cases, it makes little sense to say that they are "accountable" for having their new, transformative beliefs, desires, and values. As I shall discuss below, however, it does make sense that they must then take responsibility for who they are and for any actions motivated by their transformed characters.

We are intuitively sympathetic to people like Tenneson and Cabarga, who were truly victims, but they are in principle indistinguishable from each other and from most criminals. Having criminogenic values and beliefs for which one is not accountable is simply too overinclusive as an excuse criterion; it is not rescued by a "coercion" requirement, and it threatens to absolve all people of all responsibility for most, and perhaps all, behavior.

In some cases, however, an agent's background might intentionally or unintentionally undermine the potential for rational critical evaluation in some contexts, including cases in which the desired behavior is recognized to be immoral and illegal in the wider culture. For example, imagine a child otherwise treated wonderfully by his parents but who is imbued by them with deeply racist or anti-Semitic beliefs and attitudes. As a late adolescent or adult, the child might find it very difficult even to consider why his attitudes and actions based on them may not be justifiable. Indeed, a major feature of many memes is that they are prone to disable the rational evaluation of the meme.<sup>37</sup>

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his social and religious values highly predisposed him to schismatic activities, but he was surely capable of not performing them. I think it would be sufficient if Professor Robinson substituted "highly predisposing" or some similar locution.

37. KEITH E. STANOVICH, WHO IS RATIONAL? STUDIES OF INDIVIDUAL DIFFERENCES IN

Disabled critical evaluative faculties are a rationality problem and diminished rationality is a classic excusing or mitigating condition. It is possible that SED or CI would disable critical evaluative capacities, but if so, it is the disability, not SED or CI, that is doing the excusing work. At present, however, there is no doctrinal means to make such a mitigating or excusing claim. Most people with such problems will not be legally insane, and there is no generic diminished responsibility mitigator available to criminal defendants at trial.

If some doctrinal claim were available for lack of critical evaluative capacity, assessing this lack would be very difficult. Further, it might seem to offer a defense to racists, political and religious “fanatics,” and others who are dangerous and seem otherwise perfectly rational and not lacking a general capacity for empathy and conscience. Such a claim might therefore seem unworkable and undesirable. In principle, however, lacking critical evaluative capacity is a potential diminished responsibility criterion akin to familiar, normatively desirable rationality criteria for mitigation and excuse. If it were incorporated into excuses, CI and SED evidence would be admissible to support the claim, but it should be available to all defendants suffering from this defect from whatever cause.

Let us re-examine Tenneson and Cabarga to determine how they would fare according to the formulation I just suggested. Tenneson, at least at first, was certainly incapable of critical rational evaluation, but as time went on, he must be held to ratify his choices unless he was constantly being indoctrinated and was prevented from independent interaction with the world around him that would provide an opportunity for reflection. Cabarga, whose indoctrination began at age seven and continued throughout his adolescence, almost certainly had limited access to the possibility of critical evaluation, but over time, as an independent adult, he could also be held to ratify. Unfortunately, the case study material in both cases does not tell us enough about the preexisting personality characteristics of either and their capacities at the time of the offense. Tenneson’s first treasonous actions provide a sympathetic case, but for how long he might be excused is fact specific, and we do not have sufficient details. Cabarga was still a juvenile when he was charged, a status that our jurisprudence already associates with diminished rationality and diminished culpability.<sup>38</sup> Again, we do not have the full details, but it is plausible that the life he led and his youth together substantially undermined his capacity for critical reflection.<sup>39</sup>

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REASONING 179-80, 187-92, 194-97 (1999).

38. See, e.g., *Graham v. Florida*, 130 S. Ct 2111 (2010); see also *Roper v. Simmons*, 543 U.S. 551 (2005).

39. Assuming the utility in general of empirical desert, which is Professor Robinson’s preferred principle for distributing blame and punishment, an interesting question is how much should we trust ordinary citizens’ perceptions of justice when they do not have all the necessary facts and are respond-



The lack of critical evaluative capacity would only permit the defense for those whose unfortunate background deprives them substantially of the capacity for critical evaluation, and thus, it is unlikely to provide a defense to most people from an SED background. SED in general does not necessarily implant the wrong values. People from deprived environments are not taught that core criminal behavior is right. Some people from such environments, and others, may be deprived of adequate socialization, but I speculate that critical evaluative faculties will seldom be so substantially compromised to warrant mitigation or excuse. In my view, to believe otherwise simply blinks reality and threatens to demean, patronize, and stigmatize entire classes of people who do not deserve such treatment from fellow citizens.

Finally, let us turn to the question of the responsibility for character, including one's predisposing desires, beliefs, and values. How can it be the case that we are mostly responsible for who we are and for the behavior to which our mental states predispose us? I agree that Tenneson may not threaten the intuitive sense that most people appear to have that we are responsible for who we are and for how we consequently behave, but should we accept the general intuition? Suppose Professor Robinson is right that *Alexander* was marked by selfishness, arrogance, and pride. Was it really his fault that he was this type of person (assuming, too, that this type of personality predisposes one to antisocial behavior)?

I claim that no one is mostly causally responsible for their character. It was shaped by biological and environmental factors and the interaction between them over which the agent had little or no control. By the time agents recognize what their personalities or characters are—some time in adolescence characteristically—it is damnably difficult to do much to change character intentionally. The ability to do so and the desire to do so are themselves the product of those earlier variables over which the agent had little or no control.

Nonetheless, successful social interaction and individual autonomy and dignity require that we must all take responsibility for our characters, even if we are not causally responsible for what that character may be. Most importantly, we must all learn to manage the consequences of our characters, especially if an agent's personality predisposes the agent to harm others. This is an inevitable feature of human social interaction among flawed creatures such as ourselves. As Immanuel Kant said, out of the crooked timber of humanity, no straight thing is ever made.<sup>40</sup> Managing

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ing to extraordinary circumstances that are not part of the ordinary experience that grounds our moral reflections and moral intuitions. This is true of Tenneson and Cabarga. Although I agree that the criminal justice system treated both too harshly, I strongly doubt that the system thereby lost moral credibility.

40. Immanuel Kant, *Idea of a Universal History with a Cosmopolitan Purpose*, in THE COSMOPOLITAN READER 21 (Polity Press 2010).

one's character and its behavioral consequences is every agent's duty, especially when important rights and interests of others are at stake. This may be very difficult for some agents who have been dealt a bad hand by life. As long as we retain reasonable rational and control capacities, however, there is little reason not to hold us responsible for our behavior, even if we have unfortunate characters and propensities.

#### V. PROFESSOR ERIK LUNA & THE IMPLICATIONS OF PRIVILEGED ENVIRONMENTAL BACKGROUND (AKA SRSB)

Professor Erik Luna excellently and amusingly addresses a thought experiment Fitzjames Stephen raised in the nineteenth century concerning the effect social privilege should have on culpability and sentencing.<sup>41</sup> Professor Luna proposes "spoiled rotten social background" as a defense analogous to SED that might be used by people from privileged backgrounds, and he considers the promises and perils of such a defense. In the spirit of consistency, I will refer to this defense as Privileged Environmental Background (PEB). Professor Luna usefully considers the defense in light of the various theories of punishment. He concludes that PEB, like SED, is unwise because it is unjustified and not likely to work.<sup>42</sup> Professor Luna thus offers a *reductio* argument against SED. I agree with virtually everything Professor Luna says. Therefore, after a brief detour to address a bugaboo of mine that his paper raises, I shall get off the soapbox and shall focus on other related implications of PEB in the spirit of SED and in Professor Luna's own tongue-in-cheek spirit.

At various points, Professor Luna discusses the responsibility issue in terms of "free will."<sup>43</sup> He refers to it as an "often misunderstood and misapplied concept,"<sup>44</sup> but he also seems to validate the possibility that free will perhaps can be a continuum concept or that it can justify an excuse in some cases. I know that Professor Luna understands the issues and is trying generously to use the terms others use to make arguments. In my view, however, and as I argued above, using free will to explain or to justify any criminal law doctrine or policy is a major mistake because it perpetuates confusion and special pleading. To repeat what I said above, free will is not an element of any definition of crime or of any excusing condition. Moreover, it is not even a necessary foundation for criminal responsibility generally if one takes the internal view of criminal justice. One can make an external metaphysical argument that has the potential to

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41. See JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 152-54 (R.J. White, ed. Cambridge 2d ed. 1967) (1874).

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

43. *Id.* at 25, 32, 33, 45, 49.

44. *Id.* at 25.

deny all conceptions of genuine responsibility, but that is not the claim of SED proponents, at least not explicitly. They, too, are internalists. In short, I wish all criminal law theorists would stop talking about free will at all. If it must be discussed, then the writer should take the opportunity simply to say that free will is an irrelevant distraction. Otherwise, they just contribute to the distraction, albeit unwittingly. Thus endeth the sermon from the soapbox.

Now let us turn to my *reductio* of Professor Luna's *reductio*. What causes the seemingly privileged criminals to offend? Surely it was paradoxically criminogenic factors over which the defendant had no rational control. On either theory of SED, defendants from a privileged background should have a defense too. On the forfeit theory, society must have failed these people because it did not prevent those variables that produced criminal behavior despite the apparently privileged background. On the genuine excuse theory, they had antisocial dispositions through no fault of their own. In all fairness, we should permit PEB defendants to explain how, again paradoxically, their backgrounds inculcated in them criminogenic variables through no fault of their own, or how society shares the blame for permitting this to happen. For example, how did society fail the families of Leopold and Loeb and permit the children to turn into horrendous murderers?

What this tongue-in-cheek suggestion indicates, however, is how perilously close either version of SED comes to the causal theory of excuse, which would obliterate all coherent notions of genuine responsibility and desert.

## VI. PROFESSOR ANGELA HARRIS & THE CULTURAL CRITIQUE OF CRIMINAL JUSTICE

Professor Angela Harris explicitly abjures entering the debate about whether SED is a wise criminal justice policy. Instead she simply employs three hypotheses or critical interpretations of the culture of the last four decades since SED was first suggested—neoliberalism (NL), the culture of control (CC), and the therapeutic culture (TC)—to explain why SED was not adopted.<sup>45</sup> I agree with Professor Harris that criminal law both expresses culture and influences it. Nevertheless, her cultural critique is not fully convincing on methodological and substantive grounds. To the extent that the hypotheses are meant to be potential causal models, they fall prey to the immense complication of broad scale social explanations. Professor Harris paints with a very broad brush but with very few strokes given the complexity of the task. The causal relations between

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

culture and criminal law are vastly difficult to understand and interact with so many other variables that I doubt if an adequate explanation is possible. Cultural critique can be intellectually fascinating and a spur to normative thought. Also, for those inclined to this kind of theorizing, it can provide satisfying “goodness of fit” accounts that rationalize the buzzing and blooming confusion of our social world. But I question whether it can provide a satisfying causal account that might have the potential to suggest useful interventions to remedy the underlying causes of injustice.

Turning now to the substance of Professor Harris’s argument, I suggest that the criminal law of the last three or four decades is a more mixed picture than Professor Harris’s analysis suggests. As a preliminary matter, however, let me note that both the neoliberal and the culture of control accounts are inconsistent with adoption of SED, but adoption is not necessarily inconsistent with at least one interpretation of the therapeutic culture. Most important, even if her argument is generally correct, it does not remotely demonstrate that these three social trends caused jurisdictions not to adopt SED. At most, she can show that SED is inconsistent with a trend, but as Professor Harris recognizes,<sup>46</sup> these trends are never monolithic, society is never fully internally consistent, and there are always exceptions to even the most dominant trends.

I confess that discussion of NL is above my pay grade. For example, I am not a sufficient expert in the micro and macroeconomic theories and data and in the social welfare literatures that must be mastered to have an informed view. My armchair observation, which accords with Professor Harris’s analysis, is that in the decades under consideration, faith in markets has risen and that faith in the ability of social programs to increase human capital has waned.<sup>47</sup> I also note that, like Professors Delgado and Taslitz, there is virtually no mention of the role of subcultural values and practices in inhibiting or facilitating socioeconomic inequalities in general and criminal behavior specifically. Finally, even if SED is inconsistent with NL in the sense that NL would in fact inhibit adoption of SED, Professor Harris has not shown that NL alone or in combination with CC and TC has been the cause of non-adoption.

Professor Harris then turns to the culture of control, using David Garland’s work,<sup>48</sup> which I admire extravagantly, to claim that there is a new reactionary culture of control and that the new discipline is targeted at certain social groups.<sup>49</sup> First, let us recognize that during this period,

46. *Id.*

47. See generally AMY L. WAX, RACE, WRONGS, AND REMEDIES (2008) (attributing racial achievement gaps to a history of racism and oppression, but arguing that only individual effort and sub-cultural values can remedy the wrong).

48. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

49. Harris, *supra* note 45, at 139-42.

substantive criminal law has been liberalized in many respects. As Professor Harris notes, the law has become more sensitive to vulnerable victims, such as victims of sexual misconduct and stalking.<sup>50</sup> It has also become more sensitive to formerly disfavored groups, as in *Lawrence*, in which the Supreme Court declared that the criminalization of private consenting adult homosexual behavior violated substantive due process.<sup>51</sup> Finally, determinate sentences, albeit far too harsh in too many places, were an attempt to reduce racial and socioeconomic disparities in sentencing, as is the recent partial abolition of the crack/powdered cocaine punishment distinction in the federal criminal code. Although capital punishment is still “popular,” it is imposed with decreasing frequency nationwide.

Professor Harris properly questions whether targeting certain groups creates an unfortunate “us versus them” mentality, which treats the criminal as “other.”<sup>52</sup> I do not think most people think of criminals as “them” or “other.” My armchair speculation is that most people think of most criminals as people like themselves who have behaved badly, but for recognizable human reasons including anger, greed, jealousy, thrill-seeking, and the like. Some, such as Jeffrey Dahmer, Ted Bundy, and Bernard Madoff are genuinely “other,” but they are exceptions. They are also probably clinical psychopaths, and they are irredeemable unless we discover the way to fix them.

An important question is whether and how various laws “target” allegedly disfavored groups. Simply because law enforcement affects certain groups more, it does not necessarily mean that those groups were targeted for improper motives, such as racism. For example, the Black Congressional Caucus strongly supported the crack/powder cocaine punishment differential that did affect African-Americans more severely. If the cause of apparently disproportionate impact is general law enforcement techniques, of course they fall more heavily on groups or on neighborhoods that account for more crime. Moreover, even if some criminal behavior that is not inherently dangerous, such as possessing and selling drugs, is distributed relatively evenly across all strata of our society, it is unsurprising that such criminal behavior is policed and prosecuted more often in disadvantaged neighborhoods and thus, among disadvantaged people. These are much higher crime areas, especially for violent crime, and they will be more heavily policed. Consequently, all types of criminal behavior, serious and non-serious alike, are more likely to be swept into the criminal justice system. These are inevitable features of the distribution of

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50. *Id.* at 142-46.

51. *See generally Lawrence*, 539 U.S. 558. What is especially striking about this shift is that the case overruled a case holding that it was constitutional to criminalize such behavior that was decided a scant seventeen years earlier. *Id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). That is rapid social progress in the culture wars.

52. Harris, *supra* note 45, at 141.

criminal behavior in our society. They do not mean that society is using criminal justice to engage in racial and socioeconomic targeting. I am not denying that some law enforcement practices may be motivated by racist or other unacceptable motives. I am simply suggesting that the causes of apparently disproportionate impact are complex and not necessarily objectionable or unjust.

More generally, I do not think we are in a particular law and order phase, except for the lamentable overcriminalization and overincarceration resulting from the drug war and the like. If law enforcement would like to arrest and convict more serious offenders, they should do so for those offenses and should not use minor drug offenses as a proxy to obtain fingerprints or to remove potentially dangerous people from the streets.<sup>53</sup> If, however, society believes, as it seems to, that virtually all drug offenses are serious, then there is no more culture of control concerning drug enforcement that targets the disadvantaged than there is a culture of control for enforcing laws against robbery, rape, and homicide, which also target the disadvantaged. There is always a waxing and waning of the culture of control.

Once again, it is true that CC would in general inhibit the growth of new excuses that would lead to acquittal and outright release or to mitigation and early release. But Professor Harris has not shown that CC has caused legislators and judges mostly to ignore and to reject SED. Moreover, as I suggest immediately below, many more doctrinal and policy initiatives that are inconsistent with CC were adopted during the period when society was allegedly under CC's sway.

I agree with Professor Harris that we live in a therapeutic culture (TC), although it is hardly as monolithic as it might appear to Eva Illouz or others. It has two distinct trends. The first treats people as victims with impaired agency who must be objects of therapy. The other treats people as agents who must assume responsibility for their admittedly imperfect selves, even though they may have been impaired through no fault of their own, and who must assume primary responsibility for fixing themselves. Illouz, who is cited extensively, claims that TC includes both trends, but since they are inconsistent, any causal claim about TC must be inconclusive, and all explanations will be possible if one simply cites the trend that is consistent with the position one wants to take.<sup>54</sup>

The "abuse excuse" is where Harris claims that TC and SED intersect, but which strand of TC does it intersect with? Clearly the former. The sufferers are the victims, and it is up to others to excuse them and to

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53. See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* 121-25 (2011).

54. EVA ILLOUZ, *SAVING THE MODERN SOUL: THERAPY, EMOTIONS, AND THE CULTURE OF SELF-HELP* 185 (2008).

fix them. Professor Harris then claims that TC has nonetheless not been conducive to a proliferation of excuses.<sup>55</sup> Indeed, she claims that excuses have been contracting, in part as a result of the second trend in TC. How we could confirm this empirically is anyone's guess, but never mind. For the most part, I believe that her account of the trend in excusing conditions is incomplete.

There has not been much contraction in the insanity defense or any other. Legal insanity claims are quite unsuccessful in some jurisdictions, but not in others. Five jurisdictions abolished the defense in the wake of the political ferment that followed John Hinckley, Jr.'s acquittal by reason of insanity for attempting to assassinate President Reagan and others,<sup>56</sup> but this was a unique event and no other jurisdiction has done so for decades. Moreover, although there has not been wholesale adoption of new excuses, including the alleged abuse excuse, there has been subjectivization of defenses, liberal admission of battered victim testimony, and the like. To reduce killings from murder to manslaughter, ten states have adopted the Model Penal Code's "extreme mental or emotional disturbance rule,"<sup>57</sup> which is considerably broader than the traditional provocation/passion doctrine. The Supreme Court has insisted since 1978 that defendants have the virtually unfettered right to introduce any mitigating evidence at capital sentencing, whether or not it is statutorily authorized. The Supreme Court has also given constitutional recognition to the mitigating effects of developmental disability<sup>58</sup> and of youth.<sup>59</sup> There is a trend to permitting defendants with mental disorder to introduce evidence of their disorder to negate the *mens rea* required by the definition of crimes, albeit usually with limitations. "Diminished capacity" in California was a *sui generis* doctrine and although it was legislatively abandoned in 1980, California still has a broader rule of *mens rea* negation than many jurisdictions.<sup>60</sup> A substantial minority of states never permitted introduction of voluntary intoxication to negate *mens rea*, but most do, and there has been little retrenchment in that regard. Most states still permit this although they are not constitutionally required to do so.<sup>61</sup> Yes, one can point to some illiberal counter-examples, such as the Supreme Court's lamentable refusal to require the states to permit the defendant to introduce

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55. Harris, *supra* note 45, at 142-46.

56. In one of the five states, Nevada, the state supreme court declared abolition unconstitutional. *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001).

57. Susan D. Rozelle, *Controlling Passion: Adultery and Provocation Defense*, 37 RUTGERS L.J. 197, 202 (discussing how Arkansas follows the Model Penal Code).

58. See generally *Atkins*, 536 U.S. 304.

59. See generally *Graham*, 130 S. Ct 2011; see also *Roper*, 543 U.S. 551.

60. Robert Weinstock et al., *California's diminished capacity defense: evolution and transformation*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 347 (1996).

61. *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996).

most types of expert testimony of mental disorder to negate *mens rea*,<sup>62</sup> but there is no trend in this direction. In sum, there has not been a genuine contraction of defenses as a result of the TC or anything else.

SED has not been adopted because it does not fit anywhere within traditional responsibility theory. One of its interpretations—the causal theory of excuse—entails an external complete critique of responsibility that is normatively undesirable and impractical. SED has never gained any real world traction because it is simply an unwise idea, and not because legislators or judges fear that it would undermine some monolithic culture of control.<sup>63</sup> In fact, I know of no serious legislative debate about adopting such a defense and few courts have seriously considered it since Judge Bazelon first proposed it. SED is entirely the province of intellectuals engaged in scholarly debate.

## VII. CRIMINAL JUSTICE REFORM THAT CAN MAKE A DIFFERENCE

This part considers internal reforms of criminal justice that fit within the traditional structures of culpability doctrines, enforcement, and policy. I believe that these reforms would be salutary for the nation as a whole and would disproportionately benefit people from disadvantaged backgrounds. This brief comment can only be suggestive and I cannot provide a full justification for the proposals. Some would require book length treatment to do them justice. They will be indicative, however, of the kinds of changes that I believe should be made. I also believe that proponents of SED would agree with most of them and perhaps all of them.

The substantive criminal law reform that would have the greatest impact on criminal justice and on disadvantaged people would be to decriminalize the manufacture of drugs by individuals for personal use, the buying and selling of small quantities of drugs associated with personal use, the possession of small quantities of drugs, and the use of drugs. I would favor complete decriminalization of the recreational use of drugs, but I would be satisfied with the first steps just outlined. I fully acknowledge that decriminalization would be an immense step and that the devil would be in the details. I am especially chastened by responsible, sensible commentators like James Q. Wilson, who claims that, as bad as things are now in disadvantaged communities, decriminalization would destroy these

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62. Clark v. Arizona, 548 U.S. 735, 779 (2006).

63. As I shall argue in the next part, I agree with Professor Harris that a generic diminished responsibility defense based on diminished rationality or diminished control capacity is not illogical or jurisprudentially awkward. See *infra* Part VIII. But SED is not such a defense. It is not logical and it is not a good jurisprudential fit with the internal structure of criminal law. It is either a radical critique of all responsibility, an attempt to do social welfare through criminal justice, or a poor proxy for diminished rationality and control, which are genuine excusing and mitigating conditions.



communities.<sup>64</sup> I believe, but cannot prove, that he is wrong. Many people agree with him and many agree with me.

Our nation's longest running war, the war on drugs, is not being won. Prices for drugs on the street decline and the purity increases, despite an ever-proliferating budget for fighting the war.<sup>65</sup> Criminalization itself causes crime and corruption. Poor people and minorities are disproportionately engaged in drug markets, and they are imprisoned far more often for drug crimes, including non-violent crimes such as possession, even if this is not the goal of the drug wars. The war on drugs is not working. It is time to try something new, such as cautious decriminalization coupled with enhanced treatment.

As I have repeatedly argued, the criminal law should include a generic partial responsibility mitigating claim based on substantially diminished capacities for rationality or control that would be available at trial for all crimes and that would lead to a reduction in sentence.<sup>66</sup> It would give all defendants, including those from severely deprived environments, an opportunity at trial to demonstrate that they were not fully responsible for themselves at the time of the crime as a result of traditional mitigating circumstances. Most defendants might not succeed, but they would have a chip in the plea bargaining process, and this mitigating claim would not demean or patronize any demographic group. The reduction in sentences that would follow would have to balance culpability and social safety concerns, but I think that this can be reasonably accomplished.

Our society imprisons far too many people for far too long and with too few services. Mandatory minimum sentences and unnecessarily draconian sentencing enhancements for recidivism are prime examples of the latter. Of course, people who do serious crimes should do serious time, but people who commit trivial offenses should not do serious time, and even serious offenders should not be imprisoned longer than is necessary consistent with an empathic concept of desert and the need to protect society. Prisons should offer services and programs on a voluntary basis that would increase human capital, such as good educational programs.<sup>67</sup> Many people think that we should not spend public moneys for the benefit of offenders when so many law-abiding citizens also need programs and services, but this view is shortsighted. Good services that increase the

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64. James Q. Wilson, *Against the Legalization of Drugs*, 89 COMMENTARY 21, 24-25 (February, 1990).

65. It is possible that these factors indicate that sellers have to increase the attractiveness of their product because law enforcement is succeeding at suppressing use, but I doubt it.

66. Morse, *Diminished Rationality*, *supra* note 6, at 299. I thank Professor Harris for noting this in her contribution.

67. For those willing to countenance a more paternalistic approach, successful interventions might be made a condition for receiving less harsh prison conditions or for early release. I suspect such conditions would be held constitutional. *See generally* McKune v. Lile, 536 U.S. 24 (2002).

offender's post-incarceration productivity and decrease recidivism will ultimately save money and human lives. I agree, however, that such services and programs should be rigorously evidence-based.

The death penalty should be abolished. Full stop. Even if some capital offenders deserve to die and the state has the moral right to execute them, the penalty will never be fairly imposed. And, it is widely thought to be imposed improperly based on racial characteristics, such as the race of the victim.

Abusive police practices, especially those that unjustly target minorities and poor people, must end. I recognize that everything depends on what is meant by unjust. If racial or socioeconomic animus is the motivation, it is *per se* unjust. But what of aggressive stop and frisk practices, for example, which are aimed primarily at young males who are poor and minority? This question is complicated. Young, poor and minority males are more likely to possess weapons unlawfully and to commit violent crimes than other demographic groups. On the other hand, aggressive practices anger the communities in which they occur and the yield of weapons discovered is low. Nevertheless, we do not know if the low yield is a function of successful deterrence or an indication that the practice is not necessary. Again, this issue is complicated, but aggressive practices should be evidence-based, and citizens of all types must be treated with dignity and respect. Such treatment is crucial to the legitimacy of law enforcement and a culture of good compliance with the law.

The suggestions I have made so far are little more than hand-waving at enormously complicated, politically and morally contested issues. But I think they are the right thing to do. They would achieve many of the criminal justice goals, albeit not the socioeconomic goals, of the proponents of SED and would do so without radical changes in substantive criminal law and its enforcement.

## VIII. CONCLUSION

My writing about SED is sometimes interpreted to mean that I have little sympathy for people who have been deprived or victimized, but nothing could be further from the truth. I have immense sympathy for those who are less fortunate and recognize fully that much of our good and ill fortunes is a matter of luck and has little to do with our personal merits or demerits. As Part VII indicates, I also favor many reforms of criminal justice that would work disproportionately to the advantage of offenders with deprived backgrounds. Nonetheless, I believe that most adults are fully responsible agents who are capable of managing their characters and controlling their antisocial behavior. Treating people with deprived backgrounds as not responsible or as less responsible deprives them of agency, autonomy, and dignity. It demeans and patronizes them. It contributes to

the personal and social pathologies that are already so evident and destructive.

Severe deprivation is indeed a tragedy, but it is not an excusing condition, unless like many other possible causes, it produces a genuine excusing condition. If deprivation does disproportionately produce genuine excusing conditions, then the law will in effect properly recognize and respond to some of the harmful consequences of deprivation by providing a traditional excuse. It will do this without having to deform criminal justice by making it an outlet for indicting society. Criminal law and enforcement should be reserved for achieving retributive justice and the prevention of serious infringements of the rights of fellow citizens. If we wish to indict and convict society, we should do it in the political process, where such activities properly belong. Finally, SED has not been adopted because it is unwise and unworkable, not because our society has no sympathy for the disadvantaged or because we are captured by a culture of control.

