

# SPOILED ROTTEN SOCIAL BACKGROUND

*Erik Luna\**

I. ....	23
II. ....	28
III. ....	34
IV. ....	41
V. ....	48

## I.

For years now, the concept of “rotten social background”—coined by Judge David Bazelon<sup>1</sup> and fully explicated by Richard Delgado<sup>2</sup>—has stimulated debate by prominent scholars about the role of socio-economic deprivation in assigning blame.<sup>3</sup> In general, the rotten social background

---

\* Professor of Law, Washington and Lee University School of Law. The following is a revised version of my symposium speech at “*Rotten Social Background*” 25 Years Later: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, held at The University of Alabama School of Law, on Friday, February 11, 2011. Many thanks to Richard Delgado for inspiring this event, to David Bruck, Peter Henning, and Scott Sundby for thoughtful comments, and to Katherine Brings and Thomas J. Moran for excellent research assistance.

1. United States v. Alexander, 471 F.2d 923, 959-65 (D.C. Cir. 1972) (Bazelon, C.J., dissenting); see also David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976) [hereinafter Bazelon, *Morality of the Criminal Law*]; David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976) [hereinafter Bazelon, *Rejoinder*].

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

3. See, e.g., Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976) [hereinafter Morse, *Reply*]; Stephen J. Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. CAL. L. REV. 1275 (1976) [hereinafter Morse, *Final Word*]; Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 283-85 (1987); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 713-15 (1988); 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); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW 801* (Oxford University Press 2000); Stuart P. Green, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders*, 2010 U. CHI. LEGAL F. 43 (2010); Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1 (2011) [hereinafter Delgado, *Wretched of the Earth*]; 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); 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); Angela P. Harris,

(RSB) defense would excuse or mitigate punishment for the impoverished and socially disadvantaged—those who have suffered from racial and ethnic discrimination, dysfunctional family lives, substandard housing in violent neighborhoods, inadequate education, chronic unemployment, and so on.<sup>4</sup> According to proponents of the defense, socio-economic deprivation might produce an abnormal mental condition that so impairs behavioral control that an offender cannot be held (fully) liable for the resulting conduct.<sup>5</sup>

In his contribution to this symposium, Professor Delgado acknowledges that the RSB concept has not been incorporated into American criminal law doctrine and it is unlikely that the defense will be accepted at any point in the near future.<sup>6</sup> Instead, he asks what it means that the U.S. has failed to adopt the defense: “What does it say about our legal system and our values? . . . [W]hat vision of America does the absence of such a defense summon up?”<sup>7</sup> To help illustrate the influence of socio-economic background on criminality and the consequences of rejecting the RSB defense, Professor Delgado intersperses the story of two young men, “Rashon” and “Matthew,” born on the same day but on opposite sides of the track.<sup>8</sup> It serves as a powerful literary tool, wielded by a leading figure in the narrative approach to legal scholarship.<sup>9</sup>

The article is provocative, in the very best sense of the word, forcing us to think about the meaning and effect of America’s failure to adopt a rotten social background defense. Here, I would like to take up Professor Delgado’s challenge, although my journey begins with a different question: What might be the logical implications of incorporating rotten social background into American criminal law? Certainly, the practical impact might be significant. Judge Bazelon recognized some of the possible repercussions—what he termed the “downpour of troublesome questions” and the “unattractive alternatives”—including the possibility of releasing the defendant outright despite the danger he might present or, instead, civilly committing him as a means of preventative detention.<sup>10</sup> Professor

---

*Rotten Social Background and the Temper of the Times*, 2 ALA. C.R. & C.L. L. REV. 131 (2011); Stephen J. Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147 (2011).

4. See generally Delgado, *Rotten Social Background*, *supra* note 2.

5. *Id.*

6. Delgado, *Wretched of the Earth*, *supra* note 3, at 3-6. *But cf.* Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327 (2002) (discussing relevance of RSB evidence in capital sentencing).

7. Delgado, *Wretched of the Earth*, *supra* note 3, at 6.

8. See *id.* at 3.

9. See, e.g., RICHARD DELGADO, *RODRIGO’S CHRONICLE: CONVERSATIONS ABOUT AMERICA AND RACE* (New York University Press 1995); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988).

10. *Alexander*, 471 F.2d at 961-65 (Bazelon, C.J., dissenting); see also Bazelon, *Morality of the*

Delgado has also discussed these issues in some depth,<sup>11</sup> as has Stephen Morse in his response to Judge Bazelon's 1976 Hoover Lecture and in a more recent book chapter.<sup>12</sup> For now, however, let's put aside the practical consequences of the RSB defense and consider the doctrinal and theoretical upshot.

The RSB defense might represent a sort of relaxation of causation requirements in criminal law doctrine. As Professor Delgado notes, the relationship between socio-economic deprivation and criminal responsibility, "while intuitive and compelling, still has yet to be determined."<sup>13</sup> If adopted, the RSB defense might mean that a strong correlation will suffice to establish a defense, serving as an heuristic device or shortcut in response to the incredibly thorny issues of causation. Likewise, the RSB defense could transform the often misunderstood and misapplied concept of "free will," permitting exculpatory claims in contexts where such arguments have been historically rejected.<sup>14</sup> It might even open up the door for other defenses that have had little traction outside of academe, such as claims of addiction and brainwashing.<sup>15</sup>

But for now, I would like to put these questions aside as well. Instead, I would like to engage in a type of thought experiment, which, to be clear, I do not advocate but only offer as a mental exercise. It involves the mirror image of the RSB defense—an imaginary doctrine that I will call "spoiled rotten social background," or SRSB for short. With your indulgence and in the spirit of this symposium's lead article, I would like to tell you a story, one that is not nearly as riveting as Professor Delgado's account of "Rashon" and "Matthew"—indeed, it is quite silly but very real, providing the spark for my hypothetical SRSB doctrine.

The story involves Lindsay Lohan, the twenty-five-year-old Hollywood starlet.<sup>16</sup> Her father is a former Wall Street broker and the heir to a multi-million dollar pasta business; her mother is a former television actress and dancer; and her siblings all have been actors or models. Lohan's career began as a child model, appearing in fashion ads, television commercials, and even a soap opera. She made her big-screen debut in the 1998 remake of *The Parent Trap*, a box-office hit for which she received

---

*Criminal Law*, *supra* note 1, at 396-98; Bazelon, *Rejoinder*, *supra* note 1, at 1271.

11. See Delgado, *Rotten Social Background*, *supra* note 2, at 22-23, 40, 65-81.

12. See Morse, *Deprivation and Desert*, *supra* note 3, at 114; see Morse, *Reply*, *supra* note 3; see Morse, *Final Word*, *supra* note 3.

13. Delgado, *Wretched of the Earth*, *supra* note 3, at 5.

14. *But see infra* notes 122-23 and accompanying text.

15. See Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1 (1978); Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 355 (1979).

16. *BIOGRAPHY FOR LINDSAY LOHAN*, The Internet Movie Database, [HTTP:// WWW.IMDB.COM/NAME/ NM0517820/ BIO](http://www.imdb.com/name/nm0517820/bio).

some critical acclaim. In the ensuing years, Lohan would make a dozen more movies (including the lead role in *Mean Girls*); host popular television shows (e.g., *Saturday Night Live*); record two record albums and a number of music singles and videos; start her own line of clothing and merchandise; and serially date the rich and famous.

Just as well known, however, are Ms. Lohan's encounters with the law. In May 2007, she was arrested for driving under the influence; two months later, she was again arrested for DUI, as well as for possessing cocaine. She pled guilty to misdemeanor drunk driving and drug possession and was sentenced to one day of imprisonment, ultimately spending only an hour and a half in jail. In 2010, Lohan failed to appear for a scheduled court hearing and was subsequently found to have violated her probation. During the summer, she was sentenced to 90 days in jail, of which she served only two weeks. In 2011, Lohan was arrested for stealing a \$2,500 necklace from a Los Angeles jewelry store. She pled no contest to misdemeanor theft and was sentenced to 120 days in jail, but instead served five weeks of house detention. Most recently, Lohan violated her probation (again), though it appears she may escape serious jail time (again).

Until the summer of 2010, I knew nothing about Lindsay Lohan, other than my adolescent daughter likes *The Parent Trap* (thankfully, she is largely oblivious to Lohan's antics). But late one evening, my inbox was inundated with emails, including a message from a fellow criminal law professor: "I assume someone has brought this to your attention by now but I figured I'd make sure. I know if LiLo tweeted about me, I'd want to know."<sup>17</sup> At the time, I vaguely understood that the word *tweeted* had something to do with something called "Twitter"—a social media site that, like all others, I do not frequent—but I had no clue what a "LiLo" was. I soon found out.

Shortly after being sentenced to ninety days in jail, Lindsay Lohan (a.k.a. "LiLo") had posted online a series of short messages ("tweets") bemoaning the punishment. The first tweets quoted from the Universal Declaration of Human Rights prohibition on torture and cruel treatment, while a later tweet would reference an article about an Iranian woman who was scheduled to be stoned to death for adultery. Such allusions were crass, no doubt, but it was Lohan's second set of tweets that filled me with true horror:

[T]his was taken from an article by Erik Luna: "November 1 marked the 15th anniversary of the U.S. Sentencing Guidelines. But there were no celebrations, parades, or other festivities in

---

17. E-mail from Alafair Burke to author (July 8, 2010, 12:22 a.m. EST) (on file with author).

honor of this punishment scheme created by Congress and the U.S. Sentencing Commission. Instead, the day passed like most others during the last 15 years: Scores of federal defendants sentenced under a constitutionally perverted system that saps moral judgment through its mechanical rules.”<sup>18</sup>

It was bad enough that Lohan apparently saw herself as Hollywood’s Aleksandr Solzhenitsyn, but now she was quoting me to support her claims!

Although the reference to my Cato Institute paper was painfully misguided,<sup>19</sup> the congratulatory messages flowed in from family, friends, colleagues, and students, as Lohan’s shenanigans went “viral” (whatever that means). One media outlet ran the story under the headline “wonky professor gets dose of online fame from Hollywood starlet” (I had to look up “wonky” just to make sure I knew what they were calling me).<sup>20</sup> Another article said that Lohan had chosen “a random article by Erik Luna,” “some man who’s probably very smart.”<sup>21</sup> This gratuitous remark was much appreciated, particularly after another story referred to my paper as “obscure and rather dry” (ouch!).<sup>22</sup> But at least my friends at the Cato Institute got a kick out of the incident.<sup>23</sup> “We really had no idea that our legal scholarship was that chic,” quipped Chris Kennedy, Cato’s media relations director. “For all we know Lindsay Lohan herself is a closet constitutional scholar.”<sup>24</sup>

In the blink of an eye, however, the fifteen minutes of fame were up—my lifetime supply, the entire Warholian allotment,<sup>25</sup> consumed by one ridiculous story. They say there is no such thing as bad press—or as P.T. Barnum put it, “I don’t care what the newspapers say about me as long as

18. David Lat, *Should Lindsay Lohan Go to Law School?*, ABOVE THE LAW, July 9, 2010, <http://abovethelaw.com/2010/07/should-lindsay-lohan-go-to-law-school/> (quoting Lohan’s tweets).

19. See Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, CATO POL’Y ANALYSIS, Nov. 1, 2002, <http://www.cato.org/pubs/pas/pa458.pdf>. See, e.g., Lat, *supra* note 18 (noting problems with Lohan’s reference).

20. Chris Moody, *First Lohan, Next Gaga: WonkyProfessor Gets a Dose of Online Fame from Hollywood Starlet*, THE DAILY CALLER, July 9, 2010, <http://dailycaller.com/2010/07/09/first-lohan-next-gaga-wonky-professor-gets-a-dose-of-online-fame-from-hollywood/starlet/>.

21. Hannah Lawrence, *Lindsay Lohan Claims Cruel Treatment: Celeb Speak*, HOLLYWOOD.COM, July 8, 2010, [http://www.hollywood.com/news/Lindsay\\_Lohan\\_Claims\\_Cruel\\_Treatment\\_Celeb\\_Speak/6990903](http://www.hollywood.com/news/Lindsay_Lohan_Claims_Cruel_Treatment_Celeb_Speak/6990903).

22. John Hudson, *Lindsay Lohan Hearts the Cato Institute*, THE ATLANTIC WIRE, July 8, 2010, <http://www.theatlanticwire.com/politics/2010/07/lindsay-lohan-hearts-the-cato-institute/19394/>.

23. See *id.*; Amy Argetsinger & Roxanne Roberts, *Reliable Source: Lindsay Lohan Takes on Human Rights*, WASH. POST, July 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070902807.html>; Kiki Ryan, *Lohan Tweets Cato, Cato Amused*, POLITICO CLICK, July 8, 2010, [http://www.politico.com/click/stories/1007/lohan\\_tweets\\_cato\\_cato\\_amused.html](http://www.politico.com/click/stories/1007/lohan_tweets_cato_cato_amused.html).

24. Ryan, *supra* note 23.

25. See, e.g., THE OXFORD DICTIONARY OF QUOTATIONS 803 (Elizabeth Knowles ed., 5th ed. 1999) (quoting Andy Warhol: “In the future everybody will be world famous for fifteen minutes.”).

they spell my name right.”<sup>26</sup> But the great nineteenth-century impresario worked under the big top, not in the ivory tower. It is one thing to be cited in the *U.S. Reports* or to appear on the pages of an elite law journal, quite another to be quoted in paparazzi blogs or to have your name appear in the same sentence as the words “fire crotch” (not a reference to me, mind you).<sup>27</sup> But obscurity quickly returned, and as time passed, it became evident that LiLo and I had been ships passing in the night—she, the luxury party yacht, me, the wonky dinghy—our fleeting internet connection having no deeper meaning.

Then it dawned on me, only a few days before this symposium, as I struggled to come up with something new to say about the rotten social background defense: LiLo had provided me the perfect foil! Although she claimed to be the victim of some cosmic oppression, the real story was to the contrary. “Compared with the justice most people get, she’s been treated gently and carefully,”<sup>28</sup> noted Walter Olsen, a senior fellow at the Cato Institute. “She’s gotten second chances that many people aren’t given.”<sup>29</sup> Lavished with fame and fortune, Lindsay Lohan does not suffer from RSB. Instead, her social background is spoiled rotten.<sup>30</sup>

## II.

The “spoiled rotten social background” doctrine would apply to individuals who have received everything that has been denied to those of rotten social backgrounds. The prototypical SRSB defendant would live in the lap of luxury, maybe the progeny of a rich, famous, and powerful family, like Paris Hilton, any delinquent member of the Bush and Kennedy clans, or perhaps the human train-wreck that has become Charlie Sheen.<sup>31</sup> Throughout their lives, every need of SRSB defendants was taken care of; they never knew what it truly means to want. If they desired an education, SRSB defendants could attend (and drop out of) the finest prep schools and universities. If SRSB defendants wanted to work, they had

---

26. See, e.g., Michael Turney, *Further Perspective on the Publicity Phase of Public Relations: “I Don’t Care What the Newspapers Say About Me as Long as They Spell My Name Right.”* ONLINE READINGS IN PUBLIC RELATIONS, Dec. 1, 2010, <http://www.nku.edu/~turney/prclass/readings/3eras1x.html>.

27. See, e.g., Lawrence, *supra* note 21; Mike Vilensky, *Lindsay Lohan is Being Mocked by Fellow Inmates*, NEW YORK MAGAZINE, July 25, 2010, <http://www.nymag.com/daily/intel/2010/07/lohan.html>.

28. Argetsinger & Roberts, *supra* note 23.

29. *Id.*

30. *But see infra* note 121.

31. See generally KITTY KELLY, *THE FAMILY: THE REAL STORY OF THE BUSH DYNASTY* (2004); Paris Hilton, BIOGRAPHY.COM, <http://www.biography.com/articles/Paris-Hilton-11271420> (last visited April 18, 2011); Charlie Sheen, BIOGRAPHY.COM, <http://www.biography.com/articles/Charlie-Sheen-9481297> (last visited April 18, 2011); Chris Fantz, *The Kennedys*, INFOPLEASE, <http://www.infoplease.com/spot/kennedybio2.html>.

their choice of careers provided on the proverbial silver platter. While growing up, they never experienced a climate of violence in their neighborhoods, nor were they prejudiced by racial, ethnic, or class discrimination. If anything, some SRSB defendants may have discriminated against others because of their skin color or their socio-economic condition.

So if we accept the RSB defense for offenders who suffered from severe environmental deprivation, what might be the implications for offenders of spoiled rotten social backgrounds? One possibility is that the SRSB defendant should be deemed *more* culpable and should receive *harsher* punishment than less affluent offenders.<sup>32</sup> In other words, the SRSB doctrine would simply be the opposite end of a continuum—from an exculpatory rotten social background, through some kind of prototypical middle-class defendant whose criminal liability is neither aggravated nor mitigated by his socio-economic condition, to the SRSB offender whose responsibility could be exacerbated by his wealth and opportunities.

Before proceeding, a couple of caveats need to be mentioned. First, it is not obvious how SRSB would be incorporated into determinations of guilt, at least in the American criminal justice system, which neither criminalizes wealth nor makes a privileged social background an element of some crime. To be sure, there are other places and other times when the *accoutrements* of affluence could be a criminal offense. For example, the Cuban penal code contains the crime of “hoarding,” more or less, accumulating property and acting like a capitalist.<sup>33</sup> Although no such offense exists in the U.S., there are crimes that in practice apply only to the wealthy, such as the vast body of white-collar offenses. Nonetheless, these crimes are formally applicable to both the rich and the poor and thus do not operate as an explicit alter ego to the rotten social background defense. For the SRSB doctrine to work in present-day America, we would focus not on basic culpability issues but instead on calibrations of punishment that follow determinations of guilt.

Second, it is not always, or even usually, true that a given criminal law defense or doctrine will have a counterbalance at the opposite end of a rational continuum from mitigation to aggravation. Although we may excuse or mitigate the punishment of the mentally ill, for instance, we do not enhance the sentence of someone who happens to be especially “sane” or possesses some heightened level of analytical acuity. Still, there are a number of examples of parallelism or correspondence in criminal law doctrine. The defendant who successfully claims the defense of duress deflects his responsibility for a crime to the individual who coerced it.<sup>34</sup> In a

---

32. *But see infra* Part IV.

33. *See* Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 529, 565, 582 n.220 (2004).

34. *See, e.g.*, JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 305 (5th ed. 2009) [hereinaf-

sense, the excused coercee is matched by the culpable coercer. A similar gloss might be placed on the perpetrator-by-means doctrine or innocent-instrumentality rule of accomplice liability.<sup>35</sup>

Better examples can be found in sentencing law. California incorporates several mitigating and aggravating factors that are roughly the inverse of one another. Aggravating factors include great violence or bodily harm, a particularly vulnerable victim, prior convictions and prison sentences, and unsatisfactory performance on probation or parole.<sup>36</sup> In turn, mitigating factors include exercising caution to avoid bodily harm, the victim's participation in the crime, the absence of a prior criminal record, and satisfactory performance on probation or parole.<sup>37</sup> These types of matching sentencing factors can also be seen in many modern death penalty statutes.<sup>38</sup> So although parallelism is not a universal characteristic of criminal law doctrine, there may be some coherence or commonsense appeal to the idea that if factor X decreases responsibility, negative-X should increase responsibility.

Besides the logical or at least aesthetic attraction of having the SRSB yin for the RSB yang, how might we justify a privileged social background doctrine? The argument structure might be somewhat similar to that employed by supporters of a rotten social background defense. For example, we might draw upon the enduring theory of social contract, where governments are created for the good of their members, providing freedom for all by placing affirmative obligations on individuals and collectives to respect the rights of others.<sup>39</sup> Some claim that RSB defendants have received less than their fair share of the benefits of the social contract—they remain in a modern “state of nature,” living a Hobbesian existence that is “nasty, brutish, and short”<sup>40</sup>—and as a result, these defendants have a diminished obligation to obey the law and thus reduced responsibility for the crimes they commit.<sup>41</sup> Conversely, it might be argued that people of privileged social backgrounds have obtained more than their rightful share of the social contract. In fact, some SRSB defendants might be seen as receiving a sort of unjust enrichment, with their wealth ex-

---

ter DRESSLER, UNDERSTANDING CRIMINAL LAW]; JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 305 (6th ed. 2008).

35. See DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 34, at 468-69; KAPLAN, WEISBERG & BINDER, *supra* note 34, at 769-70.

36. CAL. RULES OF COURT, Rule 4.421.

37. *Id.* at Rule 4.423.

38. See, e.g., CAL. PENAL CODE § 190.3 (1978); WYO. STAT. ANN. § 6-2-102(h)-(j) (2001); MODEL PENAL CODE § 210.6(3)-(4) (2009).

39. See, e.g., THE SOCIAL CONTRACT FROM HOBBS TO RAWLS (David Boucher & Paul Kelly eds., 1994).

40. THOMAS HOBBS, LEVIATHAN 82 (Michael Oakeshott ed., Basil Blackwell 1960) (1651).

41. See, e.g., Delgado, *Rotten Social Background*, *supra* note 2, at 14. See also Jeffrey Reiman, *The Moral Ambivalence of Crime in an Unjust Society*, 26 CRIM. JUST. ETHICS 3 (2007).



tracted from the lower socio-economic classes.<sup>42</sup> For this reason, their share of the collective social pie is disproportionately large; and as a matter of reciprocal fairness, their cost in terms of punishment for violating the social contract might be disproportionately large as well.

Contemporary social contract theories might also support the SRSB doctrine. Under John Rawls's contractarian vision of justice as fairness, hypothetical moral decision-makers are placed in what he termed the original position, an "initial status quo which insures that the fundamental agreements reached in it are fair."<sup>43</sup> These decision-makers are shrouded in a veil of ignorance, which prevents them from knowing their own personal traits, their socio-economic status, the culture and history of the relevant community, and all other sources that might prejudice the deliberative process. They then agree upon principles of justice not knowing how these principles will affect their own welfare. Among the tenets that Rawls's decision-makers would adopt is the so-called "difference principle," which requires that socio-economic inequalities be arranged so that they are to the greatest benefit of the least advantaged.<sup>44</sup> It is not implausible that these decision-makers might also agree to arrange the distribution of punishments in a progressive fashion, calling for SRSB defendants to receive harsher sentences than the less affluent.

Another political theory with ancient roots, civic republicanism, has received renewed interest from legal scholars over the past few decades. The revivalists promote active citizenship and civic virtue as a means to prevent the corruption of self-interest, all in service of deliberative democracy.<sup>45</sup> Core to modern republicanism is the willingness to do one's part to promote the common good, including acts of self-sacrifice for the benefit of the community. Although perhaps apocryphal, the American founding fathers epitomized republican virtue—successful, powerful, often quite wealthy men who believed it was their duty to fight for liberty precisely because their privileged social positions allowed them to do so.<sup>46</sup> In contrast, the SRSB defendant would seem to represent the worst corruption of civic virtue, contravening the public good despite the benefits he has received in life. To the modern civic republican, the SRSB defendant may be far more deserving of punishment than an underprivileged individual who commits the same offense.<sup>47</sup>

---

42. Cf. Reiman, *supra* note 41.

43. JOHN RAWLS, A THEORY OF JUSTICE 15 (rev. ed. 1999).

44. *Id.* at 60-65, 298-303.

45. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter Michelman, *Republic*]; Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, *Traces*]; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

46. Cf. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Sunstein, *supra* note 45.

47. See Stephen G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV.

The various aims of criminal law might also be served by the SRSB doctrine. The best known non-consequentialist rationale for the criminal sanction, (deontological) retributivism, often conceptualizes punishment as “just deserts.” Moral blameworthiness may be seen as a function of an offender’s subjective state of mind, the wrongful nature of his acts, and (arguably) the harm he has caused.<sup>48</sup> Moreover, punishment for culpable wrongdoing must be proportionate to the gravity of the offense,<sup>49</sup> where an offender’s mental state and the quality of his actions may demonstrate a greater level of moral depravity that justifies increased punishment. So conceived, retributive responsibility is often associated with the highly contested concept of free will,<sup>50</sup> where offenders deserve to be punished because they freely chose to commit crime.

So how might this understanding of retribution affect the responsibility of offenders from privileged social backgrounds? As mentioned, the SRSB defendant confronts none of the social and institutional factors that are allegedly criminogenic—indigence and pitiful living conditions, bad schools and unemployment, racism and mistreatment by law enforcement, the absence of law-abiding role models and familial structure, and so forth. If we believe that free will is not only relevant but exists on a continuum, we might feel that the SRSB defendant’s decision to violate the law is in some sense “freer,” uninhibited by those forces that hinder autonomous decision-making. Put another way, SRSB involves a normative judgment that an offender is more blameworthy and deserving of punishment precisely because he had the benefit of pro-social influences and institutions, and yet still violated the law.

The same might be said of character theories of punishment or the reactive-attitudes approach to moral responsibility. In general, character theories argue that a person should be punished only for, and in proportion to, those acts that reflect a “bad” moral character.<sup>51</sup> Depending on which variant is adopted, character theory might excuse an individual or mitigate his punishment because the wrongful actions were caused by other actors

801, 808 (1993) (“[J]ust as a civic republican government must inculcate civic virtue in its citizens, the civic republican view of government seems to mandate that the government must discourage and even punish civic vice”) (footnote omitted).

48. See generally *Symposium: Harm v. Culpability: Which Should be the Organizing Principle of the Criminal Law?*, 5 J. CONTEMP. LEGAL ISSUES 1 (1994).

49. See generally ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (2005). See also DRESSLER, *UNDERSTANDING CRIMINAL LAW*, *supra* note 34, at 52-54.

50. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 132 (1968); GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 10-11, 269-70, 273-81 (2007) [hereinafter FLETCHER, *GRAMMAR*].

51. See Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 2 SOC. PHIL. & POL'Y 59 (1990); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 799-807 (1978) [hereinafter FLETCHER, *RETHINKING CRIMINAL LAW*]; Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5 (1982).

or forces of nature, for instance, or were not a reflection of an enduring character trait.<sup>52</sup> In turn, reactive-attitude theory argues that moral responsibility is a function of the attitudes and emotions we feel in our interpersonal relationships, constituted in a community and creating expectations of all members.<sup>53</sup> In particular, the practice of blaming, assessing responsibility, and assigning punishment involves an evaluation of the attitudes expressed by the actions of others. An individual may be excused or considered less blameworthy, therefore, because his acts are not reflections of anti-social attitudes (e.g., “he didn’t mean it” or “he wasn’t himself”).

Unlike character theory, the reactive-attitudes approach is not a theory of punishment per se, but instead a form of compatibilism that attempts to reframe the debate over free will and determinism. But for present purposes, reactive-attitudes and character theories offer parallel analyses of RSB and SRSB. If someone commits a crime against us—let’s say he steals our money—we may infer from the offender’s act that he has a bad character, and we may feel resentment against him. However, if it turns out that the offender is an impoverished parent without means to feed his children, our assessments of his character and our reactive attitudes toward him might change. We might feel that even an individual of good moral character might be tempted to steal to feed his children, and our attitude toward him might turn from resentment to pity. But now let’s say the thief is not a destitute parent but instead a wealthy financier: What would the act say about his character and what would be our reactive attitudes toward him? Although this is just a guess, I suspect that many people would see the thief as having a very bad character, and our feelings of resentment toward him might be heightened given the lack of a decent explanation or excuse for his behavior—all of which, in our minds, may make this SRSB defendant more blameworthy than other offenders.

Finally, the SRSB doctrine might be supported by utilitarian aims such as specific deterrence, which assumes that an offender is a (sufficiently) rational actor to weigh the costs and benefits of committing crime and that imposing painful consequences such as imprisonment will tip his cost-benefit analysis against offending.<sup>54</sup> Under one interpretation, the wealth of the SRSB defendant—in terms of the benefits it provides in preventing detection of criminality in the first place, negotiating with criminal justice actors, or putting on a defense in court—requires the threat of heightened

---

52. See Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 730-35 (1992) (summarizing character theories).

53. See Peter Strawson, *Freedom and Resentment*, in PERSPECTIVES ON MORAL RESPONSIBILITY 45 (John Martin Fischer & Mark Ravizza eds., 1993); see generally R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS (1994).

54. See, e.g., DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 34, at 14-15; FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973).

punishment in order to alter the defendant's calculations against violating the law.<sup>55</sup> Enhanced sentences might also be justified by the goal of general deterrence, which suggests that punishing a given offender can serve as an example for other potential wrongdoers, tipping their cost-benefit analysis against committing crime. Because SRSB defendants often have high public profiles and their cases receive greater media attention than the prosecution of less affluent offenders, general deterrence might be maximized by the imposition of exemplary punishment on the rich and famous.

Again, let me reiterate that this is just a thought experiment; I am neither advocating these arguments nor even claiming that they are the best interpretations of the relevant theories.<sup>56</sup> Rather, I am simply suggesting that they are not wholly implausible and roughly comport with the line of reasoning that has been offered in favor of a rotten social background defense.

### III.

So if we accept the hypothetical SRSB doctrine for purposes of argument, how does it map onto the practice and theory of American criminal law? To be honest, it is hard to find examples of SRSB in effect. To the contrary, some criminologists and social historians have argued that crime and punishment are defined by a capitalist society's ruling class, who use the criminal justice system as a means of socio-economic control.<sup>57</sup> For instance, vagrancy laws emerged in England in the wake of the Black Death and the demise of feudalism, forcing the depleted working class to accept low wages and tying them to the land as a substitute for serfdom.<sup>58</sup> Likewise, England's "Bloody Code" attempted to manage the lower classes through the threat of capital punishment, with the number of executable offenses increasing dramatically during the eighteenth and nineteenth centuries, predominantly for property crimes committed by the British poor.<sup>59</sup>

Both traditions carried over to the New World, duly modified to American conditions and demands. Vagrancy statutes were aimed at per-

---

55. Cf. John C. Goodman & Philip Porter, *Is the Criminal Justice System Just?*, 22 INT'L REV. L. & ECON. 25 (2002).

56. See *infra* Part IV.

57. See, e.g., IAN R. TAYLOR, PAUL WALTON & JOCK YOUNG, *THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE* (1973). See generally *CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY* (David F. Greenberg ed., Temple University 1993) (1981).

58. See, e.g., William J. Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 SOC. PROBS. 67 (1964).

59. See, e.g., DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975); E.P. THOMPSON, *WHIGGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975).

ceived threats to the socio-economic order—the poor, the unemployed, the homeless, minorities and foreigners, and other “undesirables”—with the police wielding such laws as street-sweeping devices in metropolitan America.<sup>60</sup> The death penalty was also disproportionately used against minorities and the poor, intended to strike fear in African-Americans, both before and after emancipation, as well as keeping the (presumably) amoral lower classes in check, particularly during tumultuous times or as a response to terrifying crimes.<sup>61</sup>

But while the underclass bore the brunt of law enforcement, the affluent often avoided criminal liability and punishment precisely because of their wealth and influence. As Justice William Douglas noted in 1960, those arrested of vagrancy were “not the sons of bankers, industrialists, lawyers, or other professional people” who are “sufficiently vocal to protect themselves” and “have the prestige to prevent an easy laying-on of hands by the police.”<sup>62</sup> A dozen years later, Douglas made a similar observation about capital punishment: “It is the poor, the sick, the ignorant, the powerless and the hated who are executed. One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loeb are given prison terms, not sentenced to death.”<sup>63</sup>

On occasion, wealth has even served as an explicit argument for leniency, with Justice Douglas’s allusion being a case in point. In 1924, two scions of wealthy Chicago families, Nathan Leopold and Richard Loeb, were tried for the brutal thrill killing of a 14-year-old boy.<sup>64</sup> During closing argument, defense attorney Clarence Darrow used his clients’ socio-economic background as an argument to spare their lives:

If we fail in this defense it will not be for lack of money. It will be on account of money. Money has been the most serious handicap that we have met. There are times when poverty is fortunate. I insist, Your Honor, that had this been the case of two boys of these defendants’ age, unconnected with families of great wealth, there is not a state’s attorney in Illinois who could not have consented at once to a plea of guilty and a punishment in the penitentiary for life.<sup>65</sup>

---

60. See, e.g., Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956); William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

61. See generally STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002).

62. Douglas, *supra* note 60, at 13.

63. *Furman v. Georgia*, 408 U.S. 238, 251-52 (1972) (Douglas, J., concurring).

64. See, e.g., HAL HIGDON, *LEOPOLD & LOEB: THE CRIME OF THE CENTURY* (1999).

65. Clarence Darrow, Closing Argument, *The State of Illinois v. Nathan Leopold & Richard Loeb*, (August 22, 1924) available at <http://law2.umkc.edu/faculty/projects/ftrials/leoploeb/darrowclosing.html>.

He then argued, “We are here with the lives of two boys imperiled, with the public aroused. For what? Because, unfortunately, the parents have money. Nothing else.”<sup>66</sup>

Darrow’s clever move—turning Leopold and Loeb’s advantaged upbringing into an argument for mitigation—helped save the lives of his clients. But despite its rhetorical value, this kind of claim was almost assuredly inconsistent with reality; indeed, I know of no scholar of American history who claims that wealthy defendants were at a disadvantage vis-à-vis impoverished defendants. Those of privileged social backgrounds were, and still are, less likely to be the focus of a police investigation, to be subjected to searches and seizures and custodial interrogations, to be detained pending trial, to receive deficient legal counsel, to go without private investigators and expert witnesses on their behalf, et cetera.<sup>67</sup> In fact, prosecutors who bring up such discrepancies between rich and poor offenders, or simply refer to the defendant’s wealth and ability to hire the best attorneys, risk mistrials and reversals.<sup>68</sup>

Over the past half-century, however, concerns about socio-economic disparities in the criminal justice system have had a large influence on American jurisprudence. The Supreme Court “revolution” in criminal procedure doctrine—including its invalidation of vagrancy-type statutes<sup>69</sup>—has been described as a tacit response to institutionalized discrimination.<sup>70</sup> The same is true of the Court’s 1972 decision in *Furman v. Georgia*, striking down the death penalty as it then existed in the United States.<sup>71</sup> Perhaps most influential of all, perceptions of racism and class bias in incarceration played a major part in the rise of determinate sentencing in the twentieth century.

For much of American history, criminal sanctions were pursuant to indeterminate sentencing schemes, marked by open-ended terms of imprisonment. Despite benevolent intentions, grounded in the so-called “rehabilitative ideal,”<sup>72</sup> indeterminate sentencing allegedly produced unwarranted disparities and arbitrary outcomes.<sup>73</sup> Liberal scholars and activists,

---

66. *Id.* For what it is worth, Darrow was not only one of the most renowned lawyers in American history, but also a hard determinist.

67. *See, e.g.*, DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); JEFFREY REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* (9th ed. 2010).

68. *See Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990); *People v. Bond*, 125 N.E. 740, 742 (Ill. 1919).

69. *See generally Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

70. *See, e.g.*, Dan M. Kahan & Tracey L. Meares, *Forward: The Coming Crisis of Criminal Procedure*, 86 *GEO. L.J.* 1153, 1155-59 (1998).

71. *See generally Furman*, 408 U.S. 238. *See also McCleskey v. Kemp*, 481 U.S. 279, 330-32 (1987) (Brennan, J., dissenting).

72. *See FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981).

73. *See, e.g.*, MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

in particular, argued that indeterminate sentencing resulted in harsher punishment for minorities and members of lower socio-economic classes. Beginning in the 1970s, there was a national movement toward determinate regimes that rejected indefinite confinement and instead adopted relatively limited sentencing ranges ascertained at the time of conviction.<sup>74</sup>

Probably the most famous (or infamous) determinate scheme is the system of sentencing guidelines adopted by the federal government in the mid-1980s. This system is painfully elaborate and subject to much criticism,<sup>75</sup> but let me provide the basic gist. Under the guidelines, a federal sentencing judge must first determine the appropriate “base offense level” for the defendant’s crimes of conviction and the relevant “criminal history” category given his prior record of offending. The judge will then refer to a two-dimensional grid of offense levels and criminal history scores, providing the punishment ranges for all possible offenses and offenders. The appropriate range, sometimes referred to as the “heartland” for a given crime and criminal history, might be adjusted by aggravating and mitigating circumstances.<sup>76</sup>

However, Congress specifically prohibited judges from considering a defendant’s race, national origin, and socio-economic status in setting punishment.<sup>77</sup> Moreover, the U.S. Sentencing Commission—the federal agency tasked with creating the rules of federal sentencing—promulgated guidelines stating that education and vocational skills, employment record, family ties and responsibilities, lack of guidance as a youth, and similar indicia of disadvantaged upbringing were not ordinarily relevant in sentencing.<sup>78</sup> As such, the federal guidelines appeared to reject both the rotten social background defense and the hypothetical SRSB doctrine as grounds to increase or decrease punishment.

Nonetheless, there is an ongoing debate about whether some of the discouraged factors, like lack of guidance as a youth, might be relied upon by judges after the Supreme Court’s groundbreaking 2005 decision in *United States v. Booker*<sup>79</sup>—a difficult issue that I will simply dodge in this article. More importantly, the apparent rejection of the rotten social background defense and the hypothetical SRSB doctrine does not mean that the guidelines have no race- or class-based effects. Probably the best

---

74. See, e.g., Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 252-55 (2003).

75. See generally Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25 (2005).

76. SEE THE COMMISSION’S “SIMPLIFICATION PROJECT”: DEPARTURES AND OFFENDER CHARACTERISTICS, 9 Fed. Sent’g Rep. 149 (1996).

77. 28 U.S.C. § 994(d) (2006); see also U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2009).

78. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.2, 5H1.5, 5H1.6, 5H1.12 (2009).

79. *United States v. Booker*, 543 U.S. 220 (2005); see *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimrough v. United States*, 552 U.S. 85 (2007).

known example of disparate impact is the notorious sentencing disparity between powder cocaine and crack cocaine,<sup>80</sup> which Congress only partially alleviated in 2010.<sup>81</sup> Most relevant for purposes of the SRSB doctrine, the federal courts have struggled in determining the extent to which a defendant's wealth can be considered, either directly or indirectly, during sentencing.

Several opinions have rejected enhanced punishment due to the defendant's wealth. In a 1991 case, the Fourth Circuit held that it was impermissible to increase a drug defendant's criminal fine because of his substantial assets.<sup>82</sup> In the court's words, "to permit an upward departure based on a defendant's ability to pay a greater fine would be tantamount to holding that the district court may impose *any* fine amount it determined the defendant's economic situation would permit."<sup>83</sup> The Fifth Circuit reached a similar conclusion in 2004, rejecting the trial court's ten-fold increase in a criminal fine because the defendant had a net worth of about \$3 million.<sup>84</sup> According to the court, the fact that the increase was necessary to make the fine truly "punitive" for a wealthy defendant constituted an impermissible use of socio-economic status.<sup>85</sup>

A few cases have even upheld probationary sentences for wealthy defendants in situations where others would have certainly received a prison term. These judgments are sometimes based on otherwise discouraged, wealth-related factors that are deemed so exceptional in a given case as to merit special consideration.<sup>86</sup> In 2009, the Third Circuit considered the sentence of a business owner and CEO convicted of tax evasion, for which the guidelines had recommended a twelve to eighteen month term of im-

---

80. See, e.g., *Kimbrough*, 552 U.S. at 98 (citation omitted):

[T]he [U.S. Sentencing] Commission stated that the crack/powder sentencing differential "fosters disrespect for and lack of confidence in the criminal justice system" because of a "widely-held perception" that it "promotes unwarranted disparity based on race." Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed "primarily upon black offenders."

81. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (reducing the crack/powder disparity from 100:1 to 18:1, by upping the required amount of crack cocaine to trigger a mandatory sentence). See generally Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010).

82. *United States v. Graham*, 946 F.2d 19 (4th Cir. 1991).

83. *Id.* at 22. However, the relevant federal statute and sentencing guidelines require courts to consider the defendant's earning capacity and financial resources in determining whether to impose a fine and, if so, the appropriate amount. 18 U.S.C. § 3572(a)(1) (2006); U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (2003).

84. *United States v. Painter*, 375 F.3d 336 (5th Cir. 2004).

85. *Id.* at 339. See also *United States v. Mancilla-Mendez*, 191 F. App'x 273 (5th Cir. 2006).

86. See *Koon v. United States*, 518 U.S. 81, 82 (1996) ("A court may depart on the basis of a discouraged factor . . . only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case."). For instance, the payment of "extraordinary restitution" has served as a basis to reduce a defendant's prison term. See, e.g., *United States v. Kim*, 364 F.3d 1235 (11th Cir. 2004).



prisonment.<sup>87</sup> A majority of the en banc court affirmed the trial judge's sentence of home confinement and a quarter-million dollar fine instead of a prison sentence, due to, among other things: the defendant's employment history, strong community ties, notable charitable acts, numerous letters of support from community leaders, and the fact that the defendant's incarceration would result in his employees losing their jobs.<sup>88</sup>

The dissenters jibed that "a defendant who committed a very serious offense 'did not receive so much as a slap on the wrist—it was more like a soft pat.'"<sup>89</sup> The factors relied upon by the majority were common characteristics to many white-collar criminals, and imposing a fine in lieu of imprisonment "only reinforces the perception that wealthy defendants can buy their way out of a prison sentence."<sup>90</sup> The dissenters also emphasized the perverse irony of what they called "gilded cage confinement," where the defendant would be detained "in the very mansion built through the fraudulent tax evasion scheme at issue in this case—an 8,000-square-foot house on approximately eight acres, with a home theater, an outdoor pool and sauna, a full bar, \$1,843,500 in household furnishings, and \$81,000 in fine art."<sup>91</sup>

However, some cases are not inconsistent with the hypothetical SRSB doctrine. Courts have rejected defense pleas for fines or probation in order to prevent unwarranted sentencing disparities,<sup>92</sup> as well as to send a message to wealthy defendants that they cannot skirt justice, thereby countering the public perception that "the higher you are, the less you have to fear from the law."<sup>93</sup> A few decisions have also discounted the purported good works and public service of SRSB defendants, arguing that more is expected of those of wealth and status.<sup>94</sup> "Wealthy people commonly make gifts to charity," Judge Richard Posner recently opined.<sup>95</sup> "They are to be commended for doing so but should not be allowed to treat charity as a get-out-of-jail card."<sup>96</sup> Other cases have disregarded the fact that inno-

---

87. *United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009).

88. *See id.* at 560-75. *Cf.* *United States v. Cooper*, 437 F.3d 324, 330 (3d Cir. 2006), *abrogated on other grounds* by *Kimrough v. United States*, 552 U.S. 85 (2007); *United States v. Holz*, 118 F. App'x 928 (6th Cir. 2004); *United States v. Serafini*, 233 F.3d 758 (3d Cir. 2000); *United States v. Milikowsky*, 65 F.3d 4, 9 (2d Cir. 1995).

89. *Tomko*, 562 F.3d at 579 (Fisher, J., dissenting) (quoting *United States v. Crisp*, 454 F.3d 1285, 1291 (11th Cir. 2006)).

90. *Id.* at 586.

91. *Id.* at 587.

92. *United States v. Samueli*, 575 F. Supp. 2d 1154 (C.D. Cal. 2008).

93. *United States v. Ferguson*, 456 F.3d 660, 666 (6th Cir. 2006) (quoting district court), *abrogated on other grounds* by *Kimrough v. United States*, 552 U.S. 85 (2007).

94. *United States v. Ali*, 508 F.3d 136, 149 (3rd Cir. 2007) (quoting *United States v. Fred Cooper*, 394 F.3d 172, 176 (2005)). *See also* *United States v. Thurston*, 358 F.3d 51, 78-80 (1st Cir. 2004); *United States v. McHan*, 920 F.2d 244, 248 (4th Cir. 1990); *United States v. Crouse*, 145 F.3d 786 (6th Cir. 1998); *Serafini*, 233 F.3d at 778-83 (Rosenn, J., dissenting).

95. *UNITED STATES V. VRDOLYAK*, 593 F.3D 676, 682 (7TH CIR. 2010).

96. *Id.* (citation omitted).

cent employees or the community in general might be negatively impacted by imprisoning a wealthy employer.<sup>97</sup> As one court noted, “because defendants who have employees are more likely to be wealthy,” relying upon job losses “would have the effect of ‘reward[ing] the wealthy with probationary sentences while punishing the impoverished with incarceration.’”<sup>98</sup>

In fact, the current trend in federal sentencing seems to be consistent with the SRSB doctrine, at least when it comes to punishing wealthy defendants convicted of economic crimes.<sup>99</sup> The original U.S. Sentencing Commission established guidelines that ensured “a short but definite period of confinement” for white-collar offenders,<sup>100</sup> which some criticized as being too harsh. In the ensuing years, however, punishment for economic crimes would increase dramatically, due in large part to more expansive interpretations of financial loss.<sup>101</sup> Here are some of the better-known white-collar offenders and their sentences:<sup>102</sup>

- Patrick Bennett (Bennett Funding): twenty-two years
- Bernard Ebbers (WorldCom): twenty-five years
- Andrew Fastow (Enron): six years
- Donald Ferrarini (Underwriters Financial): twelve years, one month
- Walter Forbes (Cendant): twelve years, six months
- Steven Hoffenberg (Towers Financial): twenty years

97. See, e.g., *United States v. O’Malley*, 364 F.3d 974, 983 (8th Cir. 2004); *United States v. Morken*, 133 F.3d 628, 630 (8th Cir. 1998); *United States v. Rutana*, 932 F.2d 1155, 1158 (6th Cir. 1991).

98. *United States v. Baucom*, 360 Fed.App’x 457, 465 (4th Cir. 2010) (quoting government brief).

99. See, e.g., Peter J. Henning, *White Collar Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757 (2006); Frank O. Bowman, III, *Pour Encourager Les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373 (2004).

100. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 22 (1988). See also U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 55-60 (2004), available at [www.uscc.gov/Research/Research\\_Projects/Miscellaneous/15\\_Year\\_Study/15\\_year\\_study\\_full.pdf](http://www.uscc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf).

101. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011). See generally Henning, *supra* note 99.

102. SEE S. PATRICK MORIN, JR., *WHEREFORE ART THOU GUIDELINES?: AN EMPIRICAL STUDY OF WHITE-COLLAR CRIMINAL SENTENCING AND HOW THE GALL DECISION EFFECTIVELY ELIMINATED THE SENTENCING GUIDELINES*, 7 PIERCE L. REV. 151, 162-66 (2008-2009); DAVID S. HILZENRATH, *HEDGE FUND BOSS GETS 11-YEAR SENTENCE FOR INSIDER TRADING*, Wash. Post, OCT. 14, 2011, AT A11; JAY REEVES, *THE SCRUSHY CASE*, Houston Chron., JUNE 30, 2007, AT 3; SEE ALSO Charles W. Mulford & Eugene E. Comiskey, *The Financial Numbers Game: Detecting Creative Accounting Practices* 117 (JOHN WILEY & SONS, INC. 2002); SEE GENERALLY MARQUET INTERNATIONAL’S WHITE COLLAR ROGUES GALLERY, [HTTP://WWW.MARQUETINTERNATIONAL.COM/ROGUES.HTM](http://www.marquetinternational.com/rogues.htm) (LAST VISITED APRIL 15, 2011). IT SHOULD BE NOTED, HOWEVER, THAT SOME OF THESE CONVICTIONS AND/OR SENTENCES HAVE BEEN OVERTURNED ON APPEAL. SEE, E.G., *SKILLING V. UNITED STATES*, 130 S. CT. 2896 (2010); *UNITED STATES V. SIEGELMAN*, 640 F.3D 1159 (11TH CIR. 2011).

- Sanjay Kumar (Computer Associates): twelve years
- Joseph Nacchio (Qwest): six years
- Jamie Olis (Dynergy): six years
- Jeffery Skilling (Enron): twenty-four years
- Raj Rajaratnam (Galleon Management): eleven years
- John Rigas (Adelphia): fifteen years
- Timothy Rigas (Adelphia): twenty years
- Richard Scrushy (HealthSouth): six years, ten months
- Sam Waksal (ImClone): seven years, three months

For purposes of the SRSB doctrine, perhaps the most fascinating development occurred in the sentencing of financier Marc Dreier, who was convicted in 2009 of running a grand Ponzi scheme. In support of a lengthy term of imprisonment, prosecutors filed not only the traditional sentencing memorandum but also what the *Wall Street Journal* termed “wealth porn”—pictures of the defendant’s extravagant lifestyle, including his yacht, approximately \$200,000 Aston Martin, and his beach-front home in the Hamptons.<sup>103</sup>

The movement against wealthy offenders may well be concentrated in the area of federal economic crimes, which, it should be noted, has generated substantial debate. Some contend that white-collar sentencing has become unduly harsh,<sup>104</sup> while others believe that the punishment is not nearly tough enough.<sup>105</sup> What is clear, however, is that hefty prison terms for corporate executives who defraud investors were virtually unheard of until recent years.<sup>106</sup> And, if nothing else, this backlash against one type of affluent offender is compatible with the hypothetical SRSB doctrine.

#### IV.

Which brings me back to the basic issue: Should there be an SRSB doctrine? As mentioned at the outset, the rotten social background defense

103. Nathan Koppel, *Prosecutors Resort to Wealth Porn in Dreier Case*, WALL ST. J. July 9, 2009, available at <http://blogs.wsj.com/law/2009/07/09/prosecutors-resort-to-wealth-porn-in-dreier-case/>.

104. See, e.g., Alan Ellis, John R. Steer & Mark H. Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25 CRIM. JUST. 34 (Winter 2011); James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT’G REP. 138 (2008). See also *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008); *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

105. See, e.g., Paul Leighton & Jeffrey Reiman, *A Tale of Two Criminals: Why We’re Tougher on Corporate Criminals, But They Still Don’t Get What They Deserve*, in *THE RICH GET RICHER AND THE POOR GET PRISON: A READER* (2009) available at <http://paulsjusticepage.com/RichGetRicher/fraud2004.htm>.

106. See, e.g., Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731 (2007); Krysten Crawford, *Ebbers: Wrong Place, Wrong Time*, CNN/MONEY, July 13, 2005, available at [http://money.cnn.com/2005/07/08/news/newsmakers/ebbers\\_walkup/index.htm](http://money.cnn.com/2005/07/08/news/newsmakers/ebbers_walkup/index.htm).

raises a host of practical concerns—and so does the SRSB doctrine. Consider, for instance, the problem of when the doctrine would apply, which would raise myriad questions such as how wealthy must a defendant be, what kind of opportunities must have been available to him, what type of education must he have received, what sort of employment must he have been offered, and so on. We might limit the SRSB doctrine to the extremely privileged, just as some scholars have suggested that the RSB defense should be limited to cases of extreme deprivation. But unless we adopt an ad hoc, Potter Stewart-esque approach to decision-making,<sup>107</sup> or we simply leave the question to the unguided discretion of a jury, we will need to provide some basic rules or limits. And like the concept of socioeconomic deprivation, the notion of a privileged social background will be subject to great debate.

For example, a respected University of Chicago law professor blogged that his combined family income of more than \$250,000 per year still did not prevent him from struggling to pay the bills. He wrote, “A quick look at our family budget . . . will show that like many Americans, we are just getting by despite seeming to be rich. We aren’t.”<sup>108</sup> Of course, if the standard were a quarter-million dollars per year, the average lawyer might be considered a member of the underclass.<sup>109</sup> And what should be done with the Horatio Alger-style narratives—people who go from rags to riches, from RSB to SRSB—should they be able to claim a defense to criminal liability because of their impoverished past, or, instead, should they be punished more harshly because of their affluent present? The same question would be raised by those who go from privilege to poverty.

Putting aside these problems, it is not at all clear that the political theories mentioned earlier would necessarily support the SRSB doctrine. As presented above, the social contract argument might be based on the assumption that a wealthy offender has received more than his rightful share of social benefits. But just as defendants suffering from socioeconomic deprivation often victimize those of equally rotten social backgrounds, it may be the case that the victims of SRSB defendants tend to come from wealth and privilege. When the unjustly rich victimize the unjustly rich, would the SRSB doctrine still apply, or does it merely provide *Schadenfreude* for Marxists everywhere?

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

108. See Ameet Sachdev, *Earnings of More Than \$250,000 in a Year, but Professor Laments Family Just Getting By*, CHI. TRIB., Sept. 23, 2010, at 1 (U. of C. professor’s blog lamenting Obama’s proposed tax hikes on the rich draws firestorm of criticism); Debra Cassens Weiss, *Law Prof’s Deleted Post: I’m Not ‘Super Rich’ Enough for Higher Taxes*, ABA J., Sept. 21, 2010, available at [http://www.abajournal.com/news/article/law\\_prof\\_page\\_not\\_found\\_post\\_im\\_not\\_super\\_rich\\_enough\\_for\\_higher\\_taxes/](http://www.abajournal.com/news/article/law_prof_page_not_found_post_im_not_super_rich_enough_for_higher_taxes/).

109. See, e.g., U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *Lawyers, in OCCUPATIONAL OUTLOOK HANDBOOK 2010-11 EDITION* (2010) (providing statistics on lawyer salaries), available at <http://www.bls.gov/oco/pdf/ocos053.pdf>.

Speaking of Marxism, its apologists take as a given that the wealth of the bourgeoisie comes through exploitation of the proletariat. Needless to say, capitalist nations like the United States operate on a far different set of assumptions. The American legal system considers it “illogical and improper to equate financial success and affluence with greed and corruption.”<sup>110</sup> If Americans are parties to a binding social contract, individual prosperity is not a tell-tale sign of breach.

Today, however, social contract is widely understood to be a metaphor, not a historical fact of binding obligation. As Ronald Dworkin once argued, “A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.”<sup>111</sup> A hypothetical agreement reached by hypothetical parties cannot bind real people and thus fails to provide an obligation-based argument for the equally hypothetical SRSB doctrine. Moreover, social contract theories typically involve abstractions and idealizations of human reasoning, often denuded of emotions and ideological commitments, and therefore do not reflect the diversity of opinions and reality of decision-making. Once these particulars and the historical background are added, the resulting arrangement may not resemble modern liberal governance at all. Indeed, some have argued that the social contract ideal provided the framework for oppression of those who were considered property or lacked the power to consent and enter contractual obligations.<sup>112</sup> This type of social contract does not seem to provide the grounds for the SRSB doctrine.

John Rawls and his exponents have defended the model of justice as fairness from various critiques, including those just mentioned. The goal is not to bind anyone in a contractual sense, but instead to provide a mental device to work out the principles of justice, where abstraction proves essential to avoiding self-interested bargaining.<sup>113</sup> For present purposes, the problem is not the mechanism; rather, it is a specific principle of justice and its application to the distribution of punishment. The ostensible basis for the SRSB doctrine—the difference principle—assumes that decision makers are risk-averse, that is, driven by fear of being the least advantaged. In fact, however, they may be risk-neutral and prefer maximizing the average utility of all persons, which would undermine a contractarian argument for progressive distribution principles, including those related to punishment.<sup>114</sup> Even if we accept the difference principle and

---

110. *United States v. Jackson-Randolph*, 282 F.3d 369, 377 (6th Cir. 2002) (citation omitted).

111. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 151 (1978).

112. *See, e.g.*, DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 119-20 (1966). *See also* CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1989); CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997).

113. *See* RAWLS, *supra* note 43, at 120-21.

114. *See, e.g.*, JOHN C. HARSANYI, *ESSAYS ON ETHICS, SOCIAL BEHAVIOR, AND SCIENTIFIC EXPLANATION* 37-63 (1976).

Rawlsian theory more generally, to my knowledge nothing akin to the SRSB doctrine has been forwarded as a principle of justice or one of its corollaries.<sup>115</sup>

Civic republicanism is also of dubious value for the SRSB doctrine. To begin with, some historians have rejected the republican revival in law as being anachronistic and suffering from presentism—“mistakenly transposing a belief system rooted in the Revolutionary period to contemporary times without regard for differences of context”—making the entire endeavor preposterous.<sup>116</sup> Putting history aside, the description of civic republicanism provided by American proponents (mostly constitutional theorists) hardly seems like a workable model of criminal justice. The revival is dangerously vague and rife with platitudes, some have argued, and it could provide a thin theoretical cover for populism and minority repression.<sup>117</sup>

To the extent that republicanism has been worked out as a functional theory of criminal justice, its prescriptions are not altogether supportive of the SRSB doctrine. As articulated by John Braithwaite and Philip Pettit, republicanism seeks to maximize a social and relational conception of liberty as non-domination (or “dominion”), the freedom from arbitrary power, whether public or private.<sup>118</sup> A criminal justice system maximizes such liberty by implementing, *inter alia*, a presumption in favor of parsimony in criminal justice interventions, checks on the power of official actors, compensation for crime victims, and reintegration of offenders into society. None of these principles necessitates harsher punishment for SRSB defendants.<sup>119</sup> To the contrary, they favor non-incarcerative sanctions and alternative dispute resolution processes, which Professor Braithwaite has suggested for white-collar offenders.<sup>120</sup>

115. See, e.g., Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307 (2004); Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 443 (2004); Samuel J.M. Donnelly, *The Goals of Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity)*, 41 SYRACUSE L. REV. 741 (1990).

116. Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 HARV. L. REV. 1025, 1027-28 (1998) (reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)).

117. See, e.g., Gey, *supra* note 47; Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

118. See, e.g., JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* (1990); Philip Pettit, *Indigence and Sentencing in Republican Theory*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 230 (William C. Heffernan & John Kleinig eds., 2000); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999).

119. Professor Pettit does note in passing that “there may also be scope for making extra demands of the offender who is so wealthy that paying full restitution hardly causes the slightest inconvenience. . . . And so in this case there may be good reason to consider making further requirements by way of eliciting a recognition of the victim’s status.” Pettit, *Indigence and Sentencing*, *supra* note 118, at 243. What form this might take is unclear, but the imposition of conventional punishment (e.g., incarceration) would be inconsistent with the theory’s principles.

120. See, e.g., JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2002);

Turning to punishment theory, I mentioned at the beginning that rotten social background raises difficult issues of causation versus correlation, as well as the relevance of concepts like free will for judgments about crime and punishment. Implicit within the SRSB doctrine is the notion of contra-causal freedom, more or less, that the defendant could have acted otherwise and not violated the law. As noted earlier, however, the relationship between socio-economic deprivation and criminal responsibility has yet to be ascertained, and the same is true of socio-economic privilege. Moreover, all decent conceptions of desert are premised on individual culpability, not group characterizations or actuarial assessments. In general, criminal liability requires a voluntary act by the defendant that caused (or created a sufficient risk of) a specified social harm.<sup>121</sup> Holding someone liable or modifying his sentence based on his affluence or poverty, without demonstrating a direct causal link between the socio-economic condition and the criminal act, would seem to shift the goal of punishment from just deserts to wealth redistribution.

Even if the relationship between socio-economic condition and criminal responsibility were somehow resolved, in terms of causation and a colloquial understanding of free will, the findings might not support the SRSB doctrine. The rotten social background defense relies, in part, on the absence of pro-social influences and structures and the presence of an alternative value system or sub-culture that legitimizes criminality. But the same might be true of the SRSB defendant. His wealth and privilege may provide him the precise opportunities to engage in criminal behavior with impunity, where any misconduct is overlooked and run-ins with the law are brushed under the carpet, maybe thanks to his parents and their many connections.<sup>122</sup> Such misconduct may be fostered by the SRSB defendant's cohorts, who themselves are likely to come from the type of privileged background that limits the exposure of their wrongdoing to law enforcement. As such, the SRSB defendant's crimes may be "caused" by wealth and power and a will that is "too free."

Some prominent scholars would reject this account, not because it is gibberish (which it may well be), but because concepts like free will are irrelevant to criminal law's criteria for responsibility and excuse. At times, criminal justice actors and the law itself refer to "free will" in dis-

---

John Braithwaite, *Corporate Crime and Republican Criminological Praxis*, in CORPORATE CRIME: CONTEMPORARY DEBATES (Frank Pearce & Lauren C. Snider eds., 1995); Braithwaite, *Assessing Optimistic*, *supra* note 118, at 14-15, 54, 58.

121. DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 34, at 85-116.

122. Or the SRSB defendant may have had little familial oversight or parents who had their own run-ins with law, as appears to be the case with Lindsay Lohan. *See, e.g.*, Todd Ruger, *Lohan Family Drama Has a New Stage: Here*, SARASOTA HERALD TRIB., Nov. 9, 2011, at A1; Frank Eltman, *Another Lohan Saga Plays Out on Long Island as Lindsay's Parents Struggle to Divorce*, ASSOCIATED PRESS, Aug. 6, 2007 available at <http://www.chron.com/entertainment/article/Lohan-divorce-saga-plays-out-on-Long-Island-1838690.php>.

curring the standards of criminal responsibility,<sup>123</sup> but presumably they do not mean it in the metaphysical sense of an agent able to act uncaused by anything other than himself. After all, we are all caused. Instead, Professor Morse has persuasively argued that the best understanding of responsibility in criminal law involves the capacity for rational decision-making and the absence of coercion.<sup>124</sup> These criteria are fully applicable to the SRSB defendant; as far as I know, there is no evidence that the affluent are inherently irrational or compelled to commit crime. Of course, if an affluent offender was sufficiently irrational—for instance, he was unable to reflect and decide what to do in particular circumstances guided by moral and legal standards and a basic grasp of factual and social reality—then he might be excused from criminal responsibility or merit a sentencing reduction. But it would be the defendant’s irrationality, not his wealth, doing all the work.

Likewise, reactive-attitude and character theories are also ambiguous with regard to the SRSB doctrine. Admittedly, my earlier example was unenlightening. When the crime at issue is larceny, comparing a Jean Valjean-type character to a Wall Street swindler tells us nothing more than the obvious: Genuine, material necessity will influence our assessments of moral responsibility and character. But if we change the offense to one without a discernible tie to conditions of legal duress or choice of evils—sexual assault, for example—would our reactive attitudes and character judgments be affected by the defendant’s socio economic background? Frankly, I am not sure why wealth and privilege would push one way or the other. If anything, the SRSB defendant might be more likely to have a clean record and to have engaged in philanthropic endeavors. The crime might be seen as out of character, therefore, generating Strawsonian reactions like “he wasn’t himself,”<sup>125</sup> which might fit within a legally cognizable claim for mitigation.<sup>126</sup>

Consequentialist arguments are also equivocal. If society’s utilitarian calculus took into consideration not only deterrence but also rehabilitation and incapacitation as a means to minimize future criminality, the rich defendant might warrant less punishment than the poor defendant—the exact opposite of what would be called for under a combined RSB-SRSB doc-

123. See, e.g., CAL. PENAL CODE § 207(c) (West, through 2003 amendments) (using term “free will” in crime of kidnapping); COLO. REV. STAT. § 18-3-401 (West, through 2003 amendments) (defining consent in terms of “free will” for purposes of sex crimes).

124. See, e.g., Morse, *Deprivation and Desert*, *supra* note 3; Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry and Psychology*, 25 BEHAV. SCI. & L. 203 (2007); Stephen J. Morse, *From Sikora to Hendricks: Mental Disorder and Criminal Responsibility*, in THE EVOLUTION OF MENTAL HEALTH LAW 129 (Lynda E. Frost & Richard J. Bonnie eds., 2001).

125. Strawson, *supra* note 53, at 128.

126. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5K2.20 (2003) (mitigation for “aberrant behavior”) available at [http://www.ussc.gov/Guidelines/2003\\_guidelines/Manual/ADPCVOLII.PDF](http://www.ussc.gov/Guidelines/2003_guidelines/Manual/ADPCVOLII.PDF).



trine. The dominant crimes of the affluent tend to be non-violent and thus are less likely to require incapacitation. Moreover, the SRSB defendant's greater wealth, education, employment opportunities, family support, and community ties make it more likely that he can be successfully treated and, in turn, less likely that he will recidivate.<sup>127</sup> His privileged background provides the precise ingredients for reform that are unavailable to an offender with a rotten social background.

These arguments are buttressed by scholarship calling for further incorporation of economic analysis, social norms, and subjective experiences into sentencing calculations. According to some law-and-economics scholars, non-incarcerative penalties like fines are preferable to imprisonment because they are both parsimonious as a penal matter and tend to increase rather than deplete the fisc.<sup>128</sup> But optimally deterrent fines are not feasible for all defendants. While large fines can impose an adequate disutility on many white-collar offenders—given the already highly stigmatic effect of their convictions—the limited assets of poor offenders puts a cap on the deterrent value of monetary penalties. This makes it less likely that a sufficiently deterrent fine can be inflicted on those from lower socio-economic classes, meaning that imprisonment may be reserved for poor defendants unable to pay the optimal fine.

In the real world, the use of fines for white-collar crimes has proven to be politically unpalatable, perhaps because alternative sanctions do not adequately express condemnation.<sup>129</sup> The solution is not to turn to imprisonment, some scholars argue, but instead to augment fines with so-called “shaming penalties,” requiring an offender to wear a sandwich board on a street corner, for instance, publicizing his crime.<sup>130</sup> These sanctions provide striking indications of the offender's degradation, thereby meeting the public's demand for condemnation. Although this approach may not work with a shameless RSB defendant, affluent offenders can suffer great disutility from the self-debasement that accompanies shaming penalties.<sup>131</sup>

---

127. Cf. Podgor, *supra* note 106, at 758 (noting low “future dangerousness” of white-collar offenders).

128. See, e.g., Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980); John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 ECON. INQUIRY 583, 584 (1992); A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). See also Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395 (1991); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996).

129. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

130. See, e.g., *id.*; Dan M. Kahan, & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999).

131. See, e.g., Kahan, *What Do Alternative Sanctions Mean*, *supra* note 129, at 642-44.

If the sole issue is the length of imprisonment, the subjective experience of punishment could also call for sentencing differentials between rich and poor offenders. The notion here is that identical prison terms may only be nominally equal, as the experience of incarceration will vary depending on the individual's baseline conditions.<sup>132</sup> Because the affluent are used to finer accommodations, more property and freedom of movement, superior food and medical care, et cetera, their suffering from imprisonment will be more intense than inmates from impoverished backgrounds. To obtain an equivalent punitive bite, so to speak, the SRSB defendant might receive a shorter prison term than the defendant with a rotten social background—again, the precise opposite of what these doctrines would suggest.

If this bothers you, it should—it certainly bothers me, and it bothered the man who coined the phrase rotten social background. On several occasions, Judge Bazelon recounted the story of an African-American girl named Betty Jean, who came before a respected juvenile court judge in Washington, D.C.<sup>133</sup> Her attorney argued that she had a mental disorder and required a psychiatric examination, noting that, among other things, the girl began having sex at the age of 10, gave birth to a child before she was a teenager, and was raped at the age of 16. Although the juvenile court judge agreed that her background was pathetic, he argued: “Such experiences are far from being uncommon among children in her socioeconomic situation with the result that the traumatic effect may be expected to be far less than it would be in the case of a child raised by parents and relatives with different habits.”<sup>134</sup> Initially, Judge Bazelon “was appalled at what struck [him] as gross insensitivity”—but he “later realized that [the juvenile court judge] may be right, *and that is the most frightening thought of all.*”<sup>135</sup>

## V.

Once again, let me emphasize that I neither advocate the above arguments nor contend that they are the best understanding of the relevant theories.<sup>136</sup> Instead, I am only claiming that the interpretations are at least

---

132. See, e.g., Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009); Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565 (2009).

133. See Bazelon, *Morality of the Criminal Law*, *supra* note 1, at 394-95; David L. Bazelon, *Racism, Classism, and the Juvenile Process*, 53 JUDICATURE 373, 377 (1970); *United States v. Brawner*, 471 F.2d 969, 1020 n.30 (D.C. Cir. 1972) (Bazelon, C.J., concurring) *superseded by statute*, Insanity Defense Reform Act of 1984 (IDRA), 18 U.S.C. §§ 17, 4241-4247, *as recognized in Shannon v. United States*, 512 U.S. 573 (1994).

134. *Brawner*, 471 F.2d at 1020 n.30.

135. Bazelon, *Morality of the Criminal Law*, *supra* note 1, at 395 (emphasis in original).

136. Like me, some of the cited scholars might disown such interpretations or their applications. See, e.g., Kolber, *Subjective Experience*, *supra* note 132, at 187 (“I do *not* argue that more sensitive

plausible and tend to undermine the hypothetical SRSB doctrine. These arguments can be met by sound counterarguments,<sup>137</sup> which themselves would be subject to reasonable responses, and on and on in an iterative process. What all of this suggests is that the arguments for and against SRSB, just like those in favor of and in opposition to a rotten social background defense, are not always obvious, and the ultimate outcome of the theoretical, doctrinal, and practical debate is far from clear.

If we take the RSB defense as working within the criminal justice system and accepting the current structure of criminal law doctrine, there is no reason why its arguments from “causation” and “free will” and those based on mercy and full life histories would not apply more generally, including to SRSB defendants. However, the RSB defense might instead be seen as part of a far more radical program of class- and race-based remedies, aimed at “the subversion of American criminal justice, at least as it now exists.”<sup>138</sup> I like radical, and I am no fan of the criminal justice system in its current state. But there are great perils in the use of group status and wealth classifications to assess culpability and set punishment.

From poor laws to slave codes, the impoverished and racial and ethnic minorities have historically suffered from line-drawing in criminal justice—and the elimination of such lines have been seen as advancements in equality and (little “l”) liberalism. Around the time Judge Bazelon introduced the phrase “rotten social background,” the courts were invalidating laws that prohibited and punished on the basis of racial classifications, thereby eliminating the last explicit vestiges of slavery and Jim Crow in criminal justice.<sup>139</sup> The Supreme Court had also stricken down sentencing schemes that expressly allowed greater punishment for indigent defendants.<sup>140</sup> Equal protection, the Court argued, requires that the maximum punishment for a given crime be the same for all defendants irrespective of their socio-economic status.

---

(often wealthier) offenders should receive shorter prison sentences than less sensitive (often poorer) offenders who commit crimes of equal seriousness. There may be good policy reasons for sentencing them to equal prison terms.”). Others might (partially) recant their prior claims. *See, e.g.,* Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006).

137. *See, e.g.,* Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. 907 (2010); Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1 (2009); John B. Owens, *Have We No Shame?: Thoughts on Shaming, “White Collar” Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047 (2000); James Q. Whitman, *What's Wrong With Inflicting Shame Sanctions*, 107 YALE L.J. 1055 (1998); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997).

138. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995). *See also* Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997).

139. *See* *Loving v. Virginia*, 388 U.S. 1 (1967).

140. *See* *Williams v. Illinois*, 399 U.S. 235 (1970). *See also* *Bearden v. Georgia*, 461 U.S. 660 (1983).

I fully recognize that formalistic notions of equality—what Anatole France derided as “majestic equality”—would forbid the rich as well as the poor to sleep under bridges and to beg in the streets.<sup>141</sup> But the problem with these types of crimes, I believe, is not that their enforcement would only impact the poor, but instead that sleeping under a bridge or begging in the streets should not be a subject of the criminal justice system at all. Likewise, the central problem with today’s draconian drug laws and harsh mandatory minimum sentences is not merely their disparate impact on those with rotten social backgrounds—which is undeniably true—but that we, as a society, would send a man, rich or poor, black or white, to prison for non-violent consensual conduct,<sup>142</sup> or that we would incarcerate another human being for years if not decades pursuant to some mechanical, even syllogistic formula.<sup>143</sup>

For the most part, impoverished minorities are not handicapped in today’s criminal justice system because they are unable to raise a rotten social background defense—but instead because law enforcement can stop and search them at will by rattling off some pretext,<sup>144</sup> for example, or if they are brought to court, they often receive the facade of legal representation.<sup>145</sup> As I have argued elsewhere, our dysfunctional criminal justice system requires wholesale reform (again, I like radical).<sup>146</sup> We criminalize far too much and our punishments are unnecessarily harsh, due to a combination of demagogic politics, media frenzies, and public fear, as well as the misguided notion that the criminal justice system offers the answers to our social ills.

The solution will be found not in group classifications, but in protections of individual liberty and checks on government authority. Defendants should be treated as individuals, not as members of a class, regardless of whether their backgrounds are rotten or spoiled rotten. In the end, every individual has a fundamental interest in liberty, even if she happens to be among the *Mean Girls*. As Cato’s Chris Kennedy said, “Lindsay certainly seems to treasure her freedom, and we can at least appreciate her

---

141. See JOHN BARTLETT, BARTLETT’S FAMILIAR QUOTATIONS 586 (Justin Kaplan ed., 1992) (quoting ANATOLE FRANCE, THE RED LILY 91 (1894)).

142. See, e.g., Erik Luna, *Drug Détente*, 20 FED. SENT’G REP. 304 (2008).

143. See, e.g., Luna, *Gridland*, *supra* note 75.

144. See, e.g., *Whren v. United States*, 517 U.S. 806 (1996); Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2008-2009 CATO SUP. CT. REV. 133.

145. See, e.g., REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (April 2009) available at [http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied\\_%20Right%20to%20Counsel%20Report.pdf](http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied_%20Right%20to%20Counsel%20Report.pdf); *Indigent Representation: A Growing National Crisis: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 16-30 (2009) (testimony of Erik Luna) available at [http://judiciary.house.gov/hearings/printers/111th/111-29\\_50068.PDF](http://judiciary.house.gov/hearings/printers/111th/111-29_50068.PDF).

146. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

sentiment.”<sup>147</sup> This shared passion for liberty is something worth tweeting about.

---

147. Ryan, *supra* note 23.

