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# Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders

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**Hard Times, Hard Time:  
Retributive Justice for Unjustly Disadvantaged Offenders**

Stuart P. Green \*

Criminological studies consistently indicate that a disproportionate percentage of crimes in our society – both violent and non-violent -- are committed by those who are poor and socially disadvantaged. If we assume that at least some of the disadvantaged who commit crimes are disadvantaged because they fail to get from society what they “deserve” in terms of economic or political or social rights, the question arises whether this fact should affect the determination of what such people “deserve” from society in terms of punishment. The question is all the more pressing given recent Census Bureau figures indicating that the economic recession that began in 2008 has resulted in a higher percentage of residents living below the poverty line than at any point since 1997, with figures for 2009 certain to be even higher given rising unemployment rates.

Most scholars who have been concerned with this issue have assumed that there is one set of principles that will explain the proper relationship between distributive and retributive justice: The fact that an offender has been denied the basic entitlements of a just society, however defined, is taken to have implications for criminal liability across the board, regardless of the offense charged.<sup>1</sup> The argument that I develop here suggests that a proper analysis of the relationship between distributive and retributive justice should proceed on a case-by-case basis. Such an analysis would take account of three distinct factors. First, it would look to the specific kind of offense with which the offender is charged. The fact that an offender is deeply and unjustly disadvantaged might be relevant to determining his blameworthiness for committing one kind of criminal offense (say, an offense against the person) but not another kind of offense (say, an offense against property or an offense against the administration of justice). Under this approach, we need to consider what it is that makes an offender blameworthy for committing a particular kind of offense in the first place, and then ask whether and how such blameworthiness is affected by his disadvantage. Second, we need to look at the precise form that the offender’s disadvantage takes. The fact that an offender has been denied any reasonable opportunity to

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<sup>1</sup> See, e.g., Stephen R. Perry, *The Relationship Between Corrective and Distributive Justice*, in JEREMY HORDER (ED.) *OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES* (Oxford: OUP, 2000); Wojciech Sadurski, *Distributive Justice and the Theory of Punishment*, 5 *OXFORD JOURNAL LEGAL STUDIES* 47 (1985); Saul Smilansky, *Control, Desert and the Difference Between Distributive and Retributive Justice*, 131 *PHILOSOPHICAL STUDIES* 511 (2006).

obtain property, for example, might be relevant to determining his blameworthiness for committing a particular kind of offense in a way that his being denied the opportunity to participate in the political process or the right to certain kinds of basic police protection by the state might not. Third, we need to consider the economic and social circumstances of the crime victim, if any. For example, a criminal act directed by a disadvantaged offender at a similarly disadvantaged victim might be blameworthy in a way that the same crime directed at a privileged member of the political or economic elite would not.

## I. The Recession, Poverty, Crime, and Injustice

### A. The Recession and Poverty

The recession that began in 2008 has been particularly hard on the poor. Household income in the U.S. among all groups declined during 2008, but more sharply for the poor than for the wealthy and middle class. According to Census Bureau statistics, there were 39.8 million people living in poverty in the United States during 2008, up from 37.3 million the year before.<sup>2</sup> This represents a poverty rate of 13.2 percent in 2008, up from 12.5 percent in 2007, the highest rate since 1997. The number of families living in poverty also increased in 2008, to 8.1 million from 7.6 million in 2007, as did the percentage of families living in poverty, to 10.3 percent from 9.8 percent the year before. In addition, according to U.S. Department of Agriculture figures, the

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<sup>2</sup> U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008* (Sept. 2009) (Washington, D.C.: U.S. Government Printing Office, 2008). Social scientists have traditionally distinguished between two different senses of poverty – “absolute” and “relative.” See, e.g., Amartya Sen, *Poor, Relatively Speaking*, 35 OXFORD ECONOMIC PAPERS 1 (1983). Absolute poverty measures the number of people living below a certain income threshold (the “poverty line”), who thereby lack the resources to meet the basic needs for healthy living. In theory, the measure of absolute poverty is independent of country, culture, and technological level. Relative poverty, by contrast, has been defined as the inability of citizens to fully participate in economic terms in the society in which they live. It measures the extent to which a household’s financial resources falls below an average income threshold for the relevant economy. Under this approach, people are said to be living in poverty if “their income and resources are so inadequate as to preclude them from having a standard of living considered acceptable in the society in which they live.” European Commission, *Joint Report on Social Inclusion* (2004), at 8, [http://ec.europa.eu/employment\\_social/soc-prot/soc-incl/final\\_joint\\_inclusion\\_report\\_2003\\_en.pdf](http://ec.europa.eu/employment_social/soc-prot/soc-incl/final_joint_inclusion_report_2003_en.pdf).

Since the 1960s, the U.S. Government has defined poverty in absolute terms. In the United States, the rate of absolute poverty is fairly low, given the high standard of living compared to other countries. D. Bradley, et al., *Determinants of Relative Poverty in Advanced Capitalist Democracies*, 68 AMERICAN SOCIOLOGICAL REV. 22-51 (2003). But the rate of relative property is quite high, given the relatively high median income and high degree of income inequality. *Id.* Determining the poverty threshold depends on the size of the household in which a person lives. For example, in 2008, the poverty threshold for a single person under the age of 65 was \$11,201 in income. For a family of four with two children, the figure was \$21,834. U.S. Census Bureau, “Poverty Thresholds for 2008 by Size of Family and Number of Related Children Under 18 Years,” <http://www.census.gov/hhes/www/poverty/threshld/thresh08.html>. Each person living in such a household will be counted as living in poverty. U.S. Census Bureau, *How the Census Bureau Measures Poverty*, <http://www.census.gov/hhes/www/poverty/povdef.html>. The Department of Health and Human Services issues separate poverty guidelines for determining who is eligible for various federal programs such as food stamps, the national school lunch program, legal services for the poor, Head Start, and the like. In the European Union, by contrast, poverty is defined in relative terms. European Anti-Poverty Network, *Poverty and Inequality in the European Union*, <http://www.poverty.org.uk/summary/eapn.shtml>. Year 2005 E.U. data show that about 78 million people, or sixteen percent of the population, were in poverty or at-risk-of poverty, though there was considerable variance among member states. *Id.*

number of Americans who lived in households that lacked consistent access to adequate food during 2008 was at the highest level since the government began tracking what it calls “food insecurity” in 1995.<sup>3</sup> And the number of persons living in poverty and poverty and food insecurity rates are expected to be even higher in 2009 figures, as a result of the far higher rate of unemployment than in 2008.<sup>4</sup>

Looking abroad, the effects of the recession have been at least as dramatic. A recent report from the office of U.N. Secretary-General Ban Ki-moon estimates that 90 million additional people have been pushed into poverty as a result of the global economic recession,<sup>5</sup> the effects of which have been felt in Europe, in Africa, and in Asia, where more than 60 million people live below the \$1.25 a day absolute poverty line.<sup>6</sup>

## **B. Poverty and Crime**

Why should criminal law theorists be concerned with the problem of poverty and other forms of disadvantage, whatever their source? One reason is that the poor account for a disproportionately high percentage of crime victims. According to U.S. Department of Justice figures, during 2007 the annual rate of victimization for all crimes, both violent and non-violent, per 1,000 persons with incomes of less than \$7,500 was 64.6, compared to 45.9 for persons with incomes between \$7,500 and 14,999, and 14.6 for persons with incomes over \$50,000.<sup>7</sup> Thus, the deeper the recession and the higher the rate of poverty, the greater the number of people likely to be victims of crime and the more harmful such crime is likely to be.

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<sup>3</sup> The figure was 49 million Americans, an increase of 13 million since the year before. See Mark Nord, Margaret Andrews, and Steven Carlson, *Household Food Security in the United States, 2008* Economic Research Report No. (ERR-83), November 2009, <http://www.ers.usda.gov/Publications/Err83/>. About a third of these struggling households had what was referred to as “very low food security,” meaning that family members were forced to skip meals or otherwise forgo food at some point in the year.

<sup>4</sup> Erik Eckholm, *Last Year’s Poverty Rate Was Highest in 12 Years*, N.Y. TIMES (Sept. 11, 2009).

<sup>5</sup> *Recession Pushed 90 Million into Extreme Poverty-UN*, REUTERS ALERTNET (July 6, 2009), <<http://www.alertnet.org/thenews/newsdesk/L2892172.htm>>.

<sup>6</sup> Craig Kielburger & Marc Kielburger, *U.S.-Born Crisis Hits Africa Hard*, TORONTO STAR, <<http://www.thestar.com/News/GlobalVoices/article/600493>>; *60 Million Asians below Poverty Line Due to Recession*, THAI INDIAN NEWS (June 22, 2009), <[http://www.thaindian.com/newsportal/business/60-mn-asians-below-poverty-line-due-to-recession-official\\_100207983.html#ixzz0T4fvSiP9](http://www.thaindian.com/newsportal/business/60-mn-asians-below-poverty-line-due-to-recession-official_100207983.html#ixzz0T4fvSiP9)> (according to the president of the, Asian Development Bank, “[i]nstead of breaking out from poverty, we expect that more than 60 million people in developing Asia... will remain below the \$1.25 a day absolute poverty line in 2009, as a result of the global recession”). See generally PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* (OUP, 2007).

<sup>7</sup> U.S. Department of Justice, *National Crime Victimization Survey, 2006 Statistical Studies* (Washington, 2008). During 2006, the burglary rate for those with a household annual income of less than \$7,500 was 56 per 1,000 households, while the rate for those with a household annual income of \$75,000 or more was 22 per 1,000. U.S. Department of Justice, Bureau of Justice Statistics, National Crime Victimization Survey, [http://www.ojp.usdoj.gov/bjs/cvict\\_v.htm#income](http://www.ojp.usdoj.gov/bjs/cvict_v.htm#income).

A second reason is that the poor and disadvantaged account for a disproportionately high percentage of criminal offenders. While the Department of Justice does not tabulate arrest or conviction rates by class or income (instead, it does so for interrelated factors such as race, sex, age, and geographic area), there are a number of scholarly studies which directly suggest that, the lower one's income, the more likely one is to engage in criminal activity, both violent and non-violent.<sup>8</sup> (This is hardly to imply, of course, that all, or even a particularly significant percentage of, impoverished people commit crime, or that well-to-do people do not also commit crimes.)

Whether a direct connection can be drawn between economic recession and higher rates of offending is another question. From an *a priori* perspective, it seems reasonable to suppose that people are more likely to engage in crime when: (1) they lack a steady source of legitimate income, (2) they have time on their hands to engage in criminal activity, and (3) the state reduces expenditures for policing and social services.<sup>9</sup> From an empirical perspective, however, proving a link between economic recession and increases in crime has proved difficult.<sup>10</sup> There are complicated questions about both the appropriate way to measure economic recession and the best way to measure the crime rate.<sup>11</sup> And there are numerous factors other than the economy that affect crime rates, such as evolving norms, changes in demographics, trends in policing methods, and prosecutorial and sentencing practices.

Despite the difficulty of establishing a definitive causal connection between economic recession and increased crime, however, a few observations can be made. First, there is good evidence that, as economic conditions worsen, the incidence of property crime and robbery tends to rise.<sup>12</sup> For example, the rate of retail theft – including shoplifting, employee theft, and vendor

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<sup>8</sup> See citations in piece by Richard H. McAdams in this symposium. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (New York: Russell Sage Fdn, 2006) 34-51; Ralph C. Allen, *Socioeconomic Conditions and Property Crime: A Comprehensive Review and Test of the Professional Literature*, 55 AM. J. ECON. & SOC. 293 (1996); Jongmook Choe, *Income Inequality and Crime in the United States*, 101 ECONOMICS LETTERS 31 (2008); John Hagan and Ruth D. Peterson, *Criminal Inequality in America: Patterns and Consequences*, in John Hagan & Ruth D. Peterson (eds.), CRIME AND INEQUALITY (Stanford, Cal.: Stanford University Press, 1995) 14; Roy M. Howsen and Stephen B. Jarrell, *Some Determinants of Property Crime: Economic Factors Influence Criminal Behavior but Cannot Completely Explain the Syndrome*, 46 AM. J. ECON. & SOC. 445 (1987); Eckart Kühlhorn, *Victims and Offenders of Criminal Violence*, 6 J. QUALITATIVE CRIMINOLOGY 51 (1990).

<sup>9</sup> See Theodore G. Chiricos, *Rates of Crime and Unemployment: An Analysis of Aggregate Research Evidence*, 34 SOCIAL PROBLEMS 187 (1987); Jeffrey Fagan & Richard B. Freeman, *Crime and Work*, 25 CRIME AND JUSTICE 225 (1999).

<sup>10</sup> National Council on Crime and Delinquency, *Special Report: Crime and Economic Hard Times* (Feb. 2009), <[http://www.nccd-crc.org/nccd/n\\_pubs\\_main.html](http://www.nccd-crc.org/nccd/n_pubs_main.html)>.

<sup>11</sup> Economic downturns can be measured in terms of gross domestic product, real income, unemployment, industrial production, or wholesale and retail sales. See National Bureau of Economic Research, *U.S. Business Cycle Expansions and Contractions*, <<http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/Crime.cfm>>. In measuring crime rates, one might look to factors such as crimes reported, arrests made, convictions obtained, and inmates incarcerated. See United States Department of Justice, *Crime Trends from the FBI's Uniform Crime Reports* (2008), <<http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/Crime.cfm>>.

<sup>12</sup> Thomas M. Arvanites and Robert H. Defina, *Business Cycles and Street Crime*, 44 CRIMINOLOGY 139 (2006); Christine Hauser and Al Baker, *Keeping Wary Eye on Crime as Economy Sinks*, N.Y. TIMES (Oct. 10, 2008), <<http://www.nytimes.com/2008/10/10/nyregion/10crime.html?scp=1&sq=Keeping%20Wary%20Eye%20on%20Cri>>

fraud – increased significantly between 2007 and 2008, for the first time in many years.<sup>13</sup> Second, and by contrast, there seems to be no particular correlation between recession and violent crime. Indeed, during the first half of 2009, when the recession was at its worst, the rate of violent crime actually dropped.<sup>14</sup> Third, whatever kind of crime one is looking at, there is ordinarily a lag between economic change and crime rates.<sup>15</sup>

### C. Poverty and Injustice

There is yet another reason why criminal law scholars should be concerned with the problem of poverty and disadvantage, and that is the one I am mainly concerned with here – namely, the possibility that an offender’s impoverishment or other form of disadvantage might bear on his blameworthiness in committing his offense. Whether this is the case would seem to turn, in the first, instance, on whether the offender’s poverty or disadvantage is itself unjust. A person might be impoverished for any number of reasons other than systemic injustice: for example, she might be indolent or reckless or merely unlucky. When we talk about desert in the context of distributive justice, we refer to the fair distribution of burdens and benefits among the members of a given society. In order to say whether a person’s impoverishment is truly unfair or unjust, we need an underlying theory that explains what people are entitled to in terms of wealth and opportunity, and exactly how such entitlements arise. Such a theory would consider, for example, whether society is obligated to: (1) provide for the basic public safety of all its members (whether citizens or mere residents<sup>16</sup>), including basic police protections; (2) create conditions which make it possible for its members to have an opportunity for a decent life, including conditions that make it possible for members to earn a living, and to obtain healthy food, medical care, adequate shelter, and an education; (3) provide members with the opportunity to participate in the political process, enjoy certain basic human rights, such as freedoms of speech, conscience, assembly, privacy, and the like; and to resolve disputes, and obtain legal process; and (4) and impose demands on members, such as the obligation to pay taxes and serve in the military, according to some principle of fair distribution.<sup>17</sup>

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[me%20as%20Economy%20Sinks%20\(Oct&st=cse>](#); Maryann Spoto, *Bank Robberies on the Upswing Around the State*, NEWARK STAR-LEDGER (Feb. 23, 2009).

<sup>13</sup> National Retail Federation, *Organized Retail Crime Survey: 2009* (June 2009), <[http://www.nrf.com/modules.php?name=News&op=viewlive&sp\\_id=738](http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=738)>.

<sup>14</sup> Steven Raphael & Rudolf Winter-Ember, *Identifying the Effect of Unemployment on Crime*, 44 J. LAW & ECONOMICS 259 (2001); Federal Bureau of Investigation, *Crime Rates Lower in 2008*, <[http://www.fbi.gov/page2/sept09/crimestats\\_091409.html](http://www.fbi.gov/page2/sept09/crimestats_091409.html)>; David Stout, *Violent Crime Fell in 2008, F.B.I. Report Says*, N.Y. TIMES (Sept. 15, 2009), [http://www.fbi.gov/page2/sept09/crimestats\\_091409.html](http://www.fbi.gov/page2/sept09/crimestats_091409.html); Shaila Dewan, *The Real Murder Mystery? It’s the Low Crime Rate*, N.Y. TIMES (Aug. 1, 2009), <<http://www.nytimes.com/2009/08/02/weekinreview/02dewan.html?scp=1&sq=real%20murder%20mystery%20low%20crime%20rate&st=cse>>.

<sup>15</sup> Hauser & Baker, above note \_\_\_\_.

<sup>16</sup> There is an interesting question, though not one that I shall pursue here, concerning the extent to which societies have an obligation to extend to non-citizen residents and to aliens the rights that they extend to their citizens. See generally SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (Cambridge, 2004).

<sup>17</sup> Here, I loosely follow an approach suggested in William C. Heffernan, *Social Justice/Criminal Justice*, WILLIAM C. HEFFERNAN & JOHN KLEINIG (EDS.), *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE* (New York: OUP, 2000), at 50.

To what extent society has an obligation to provide in this way for its members, and where such obligation comes from, are obviously among the most complex and contested questions in all of normative political theory.<sup>18</sup> Indeed, the nature of such obligation involves one of the most contested set of issues in our political discourse more generally. To try to resolve these issues here would lead us well beyond the scope of this article. Moreover, even if we could agree about what constitutes distributive injustice in the abstract, we would face additional problems in trying to decide if and when a given society qualifies as unjust – or, more precisely, exactly who in a given society should be regarded as unjustly deprived of the basic opportunities that they deserve.

Later on, I will offer a means of sidestepping these problems: Rather than trying to develop a theory of what constitutes social injustice, I will simply stipulate a set of scenarios that almost everyone, I assume, would regard as unjust. Beginning with these scenarios, we will then trace the implications of distributive injustice for the assignment of retributive blame.

## **II. Prior Attempts to Assess the Effect of Impoverishment and Disadvantage on an Offender's Blameworthiness for Crime**

In this section, we consider four approaches previously developed for addressing the possible normative effect of an offender's poverty or other form of disadvantage on her blameworthiness and liability for criminal conduct. I shall refer to these approaches, respectively, as: (1) necessity, (2) excuse, (3) broken social contract, and (4) non-justiciability.

### **A. Necessity**

Under current Anglo-American law, the most plausible argument an impoverished defendant could make for avoiding liability for at least some crimes is one based on the idea of necessity. Under the influential Model Penal Code formulation, the defendant must show that: (1) she was faced with a clear and imminent danger of harm or serious bodily injury; (2) her action was effective in abating the danger that she seeks to avoid; (3) there was no effective legal way to avert the harm; (4) the harm caused by the criminal act was less serious than that sought to be avoided; and (5) she is not to blame for creating the emergency conditions in which she finds herself.<sup>19</sup> A defendant who asserts a necessity defense argues that even though she did in fact commit all of the requisite acts, she nonetheless did nothing morally wrong. This is so

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<sup>18</sup> For helpful surveys, see Serge-Christophe Kolm, *Distributive Justice*, A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY (Robert E. Goodin & Philip Pettit, eds. 1993); Julian Lamont, *Distributive Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <<http://plato.stanford.edu/entries/justice-distributive/>>.

<sup>19</sup> Model Penal Code § 3.02. Interestingly, the MPC choice of evils provision, despite its general embrace by scholars, has been less influential in the legislative sphere than many other Code provisions. See Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 TULANE L. REV. 191 (2007).

because the crime's definition of prohibited conduct is, in a sense, incomplete.<sup>20</sup> Contemporary law permits what the crime as-defined otherwise prohibits where circumstances make her action the right (or at least not the wrong) thing to do.

The applicability of the necessity defense depends entirely on the nature of the offense committed and the circumstances that occasioned its commission.<sup>21</sup> One who committed trespass or theft because she otherwise would have suffered the effects of hunger or exposure can argue, at least in theory, that her conduct was justified under the defense of necessity. By contrast, one who committed rape or murder or assault as a result of her impoverishment would almost invariably be unable to establish a defense of necessity, because her action (1) would not be effective in abating the danger she sought to avoid, and (2) even if it was (say, if she killed *V* to get the loaf of bread he was holding), the harm caused by the criminal act would be no less serious than that sought to be avoided.

In practice, even a starving or homeless person charged with theft or trespass will have a hard time establishing a necessity defense if the prosecution can show that: she would not have suffered any serious injury if she had not committed the crime; there were legal alternatives to her, such as attending a soup kitchen or homeless shelter; or she somehow bore responsibility for the impoverished situation in which she found herself. Presumably as a result of these stringent requirements, reported cases in which a defendant, charged with theft or trespass, was acquitted by virtue of the necessity defense are virtually nonexistent, at least in modern times.<sup>22</sup>

Still, the defense exists in theory and it is worth saying how it differs from the problem with which this paper is specifically concerned. The first point is simply that the necessity defense is only loosely correlated with poverty and other forms of chronic disadvantage. Poverty, in the systemic sense described above, is neither a sufficient nor necessary condition for the application of the necessity defense. No matter how impoverished a person might be, she will not be eligible for the defense unless it can be shown that at the moment of her crime her death or injury was imminent and unavoidable. If she could find temporary sustenance by, say, attending a soup kitchen, then she is unlikely to be able to claim the defense. By the same token, a hiker stranded in the wilderness in a snow storm has the privilege to commit trespass and theft

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<sup>20</sup> The idea of "incompleteness" in this context is suggested by Sanford Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 258 (1987).

<sup>21</sup> See MPC Commentary to § 3.02, at 9-10 ("[a] speed limit may be violated in pursuing a suspected criminal. An ambulance may pass a traffic light. . . A druggist may dispense a drug without the requisite prescription to alleviate grave distress in an emergency").

<sup>22</sup> The history of the necessity defense is a particularly convoluted one. In the famous "lifeboat" case of *Queen v. Dudley & Stephens*, 14 Q.B.D. 273, 286 (1884), the court accepted as a given Matthew Hale's statement that it was not the law of England that a starving man could be justified in stealing a loaf of bread. Prior to Hale's time (1609-76), however, English law was apparently more receptive to economic necessity as a defense to theft. See generally DANA Y. RABIN, *IDENTITY, CRIME, AND LEGAL RESPONSIBILITY IN EIGHTEENTH-CENTURY ENGLAND* (New York: Palgrave, 2004), at 86-89. For an account of how medieval European law dealt with the question of poverty, see BRIAN TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* (Berkeley: University of California Press, 1959). Rabbinic law also permits one to commit crimes such as theft in order to preserve life. See Babylonian Talmud: *Yoma* 83b.



if doing so will prevent death or serious bodily injury. The fact that she has millions in the bank back home is irrelevant; the only thing that counts is her immediate circumstances at the moment she commits her offense. More generally, the defense of necessity functions (though at times uneasily<sup>23</sup>) within the settled confines of the criminal law. It does not question the basic justice of how property rights are distributed. Nor does it question the basic integrity of theft law. Indeed, to the extent that lawmakers have anticipated a given choice of evils and “determined the balance to be struck between . . . competing values” in a manner that conflicts with the defendant’s choice, the defense would be unavailable.<sup>24</sup>

### **B. Excuse of “Rotten Social Background”**

A second way in which the criminal law might respond to the problem of the impoverished or otherwise disadvantaged offender is that such deprivation might constitute, or provide the basis for, an excuse defense. Whereas justification defenses consist of arguments that the defendant’s conduct was not harmful or wrongful, excuse defenses focus on the culpability of the actor himself. Thus, to say that a given criminal act is excused is not to say that the offender’s act was not wrong (in the sense that a justified act is not wrong), but rather that the offender should not be held fully responsible for her conduct and should either be exempt from punishment entirely or have his punishment mitigated.<sup>25</sup>

Judge David Bazelon, who had previously crafted a significant expansion of the insanity defense, was one of the first to write about the possibility that a background of extreme poverty might serve to relieve a criminal defendant of liability.<sup>26</sup> In *United States v. Alexander*, one of the defendants had shot and killed a victim who had called him a “black bastard.”<sup>27</sup> The defendant, who was not mentally ill according to the recognized diagnostic categories, nevertheless wanted to present evidence that his conduct was the result of an “emotional illness,” which in turn was the product of a socially and economically deprived childhood growing up in the Watts section of Los Angeles. The trial judge instructed the jury to disregard the evidence regarding the defendant’s so-called “rotten social background” (RSB), and the Court of Appeals affirmed the conviction. Judge Bazelon wrote separately, laying out his views on the possibility of such a deprived background defense. “Because of his early conditioning,” Bazelon suggested, the defendant may well have been “denied any meaningful choice when the racial insult triggered” his reaction.<sup>28</sup> It was possible, he wrote, that the defendant’s underprivileged childhood had impaired his “mental or emotional processes and behavior controls, rul[ing] his

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<sup>23</sup> See John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUSTON L. REV. 397, 403-04 (1999) (noting “anxiety” regularly felt by courts applying the necessity defense).

<sup>24</sup> *State v. Tate*, 505 A.2d 941, 946 (N.J. 1986).

<sup>25</sup> See generally JEREMY HORDER, *EXCUSING CRIME* (Oxford: OUP, 2005).

<sup>26</sup> Most famously in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

<sup>27</sup> 471 F.2d 923, 957 (D.C. Cir. 1973) (Bazelon, J., concurring in part, dissenting in part).

<sup>28</sup> *Id.* at 960.

violent reaction in the same manner that the behavior of a paranoid schizophrenic may be ruled by his ‘mental condition.’”<sup>29</sup>

The idea that a rotten social background might provide a criminal law defense was subsequently developed by Richard Delgado.<sup>30</sup> Relying on empirical data establishing a supposed statistical correlation between criminal behavior, on the one hand, and poverty, unemployment, substandard living conditions, inadequate schools, a climate of violence, inadequate family structure, and racism, on the other, Delgado argued that courts should recognize a novel excuse defense based on extreme poverty and social deprivation. In particular, Delgado offered the possibility that a person’s rotten social background might *cause* various behavioral disabilities which in turn might constitute various excusing conditions such as that the actor’s conduct was not the product of his voluntary effort, that he did not accurately perceive the nature or consequences of his act, that he did not see his conduct as wrongful, or that he did not have the ability to control his conduct.<sup>31</sup> The defense envisioned by Delgado is one that is closely analogous to defenses such as automatism and battered woman syndrome. According to Delgado, “a review of medical and social science literature show[s] that life in a violent, overcrowded, stress-filled neighborhood can induce a state in which a resident reacts to certain stimuli with automatic aggression. Some defendants should be able to prove that they lived under such conditions and that these conditions were causally connected to the crime charged.”<sup>32</sup>

There are a few points to note about the rotten social background approach. First, as in the case of the necessity defense, Bazelon and Delgado’s defense is developed from within the existing structure of criminal law. It does not challenge the basic framework of the law or the legitimacy of our institutions of punishment. Instead, Bazelon and Delgado argue for an expansion of available excuse defenses. Second, unlike the necessity approach, the RSB approach makes no distinction based on the nature of the crime committed; it would apply not only to theft and other property crimes but also to a wide range of violent crimes (indeed, given the facts of *Alexander*, it seems to have been conceived expressly with violent crimes in mind). Third, the RSB defense would recognize no distinction based on the circumstances of the victim of the crime; it would presumably be available even when the victim came from the same deprived background as the defendant.

### C. Broken Social Contract

A third approach to the problem of the impoverished defendant looks at criminal punishment from the perspective of social contract theory.<sup>33</sup> The argument consists of three

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<sup>29</sup> *Id.* Bazelon subsequently elaborated on his views in a law review exchange with Stephen Morse. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976).

<sup>30</sup> Richard Delgado, *Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW AND INEQUALITY 9 (1985).

<sup>31</sup> *Id.* at 63-64.

<sup>32</sup> *Id.* at 85-86.

<sup>33</sup> A leading example is Jeffrie Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 228 (1973).

basic steps. The first is to assert, or intuit, that our legal system exists within a social contract. Under such a contract, citizens agree (or would agree in a hypothetical original position<sup>34</sup>) to abide by the rules of the system in return for the security and predictability that such rules bring. Since war and disorder threaten to make everyone's life nasty, brutish, and short (in Hobbes' memorable phrase), it is reasonable from each person's self-interested standpoint to accept the authority of a sovereign ruler who will enforce rules, protect property, and make life generally safe. As Jeffrie Murphy has put it, "since he [the citizen] derives and voluntarily accepts benefits from their operation, he owes his own obedience as a debt to his fellow-citizens for their sacrifices in maintaining them."<sup>35</sup>

Second, when people fail to abide by the rules of the system, when they accept the benefits that the system brings without reciprocating, they gain an unfair advantage. Criminal punishment is said to be a means of restoring the equilibrium of benefits and burdens by taking from the individual what he owes.<sup>36</sup> If a citizen "chooses not to sacrifice by exercising self-restraint and obedience, this is," again in Murphy's language, "tantamount to his choosing to sacrifice in another way -- namely, by paying the prescribed penalty."<sup>37</sup> In other words, part of the social contract consists of citizens' agreeing to be punished if he breaks the rules.

The third step of the argument requires us to consider what it would mean to live in a society that is unjust. Under the social contract theory, we judge the justness of laws by asking whether it would be reasonable for people to agree to them in light of their self-interest. But if the social arrangement is not one that would be reached behind a hypothetical veil of ignorance, the obligation to abide by the rules of the system cannot exist. If the state and its citizenry fail to uphold their end of the bargain, then the law ceases to be binding; it loses its moral authority. Citizens emerge, in Murphy's neo-Marxist term, "alienated" from their fellow citizens and the government.

And what are the implications of such breach in the context of criminal justice? Criminal justice can be thought of as a "two-way street." Where society has breached its obligation to its citizens, say, by distributing property in an unjust manner, those citizens no longer have a duty to comply with the law. And where citizens no longer have a duty to comply, society no longer has a right to punish for lack of compliance. Indeed, if there is no moral obligation to obey the law, it would be unjust to use the power of the state to impose criminal penalties on those who fail to obey the law.

That, in any event, is the theory. There are, however, a number of potential problems that should be noted. First, the theory rests on what Okeoghene Odudu has called a "grotesque

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<sup>34</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (Cambridge: Harvard University Press (1971).

<sup>35</sup> Murphy, above note \_\_\_, at 228.

<sup>36</sup> For a well-known formulation of the punishment-as-equilibrium-restorer argument, see Herbert Morris, *Persons and Punishment*, 52 *THE MONIST* 475 (1968).

<sup>37</sup> Murphy, supra note \_\_\_, at 228.

conception of crime.”<sup>38</sup> The social contractarians assume that while we all desire to engage in various forms of criminal activity, we voluntarily refrain from doing so in order to reap the benefits of others’ forgoing such conduct as well. While this may be true with respect to paying one’s taxes and refraining from price-fixing, however, it hardly explains why we abstain from committing murder and rape. It seems very odd indeed to suggest that the wrongfulness of rape or murder consists in taking an “unfair advantage” over those who comply with the law.<sup>39</sup> In fact, as I shall suggest below, such offenses are based on a different kind of moral imperative entirely. Second, the theory seems more suited to explaining why a tort system requires the defendant to compensate the injured party. It is harder to see how it can explain the obligation of one convicted of crime to serve hard time in prison. In cases where the injury is done to some individual victim, it’s not at all clear how criminal punishment is an appropriate means for restoring the equilibrium.<sup>40</sup> Third, to the extent that the social contract theory relies on a monolithic conception of the social contract, it seems overly broad in its reach. By monolithic, I mean that the society is deemed to be either just in the main, or it is not. If it is not, then the contract is void, and the citizen owes no duty to obey the law. Under this approach, it would seem not to matter who was breaching the contract, or who was the victim of the crime. Nor would it matter which laws were being violated: The offender will be no more obliged to comply with the laws against murder and assault than with those against theft and obstruction of justice. Indeed, in explaining how the broken contract theory applies, Murphy himself offers the example of an impoverished and discriminated-against African-American man who uses a weapon to hold up a bank.<sup>41</sup>

#### **D. Non-Justiciability**

Antony Duff has offered yet another approach to the problem of imposing criminal sanctions on the severely impoverished and politically excluded.<sup>42</sup> Duff is interested in what he calls the “preconditions” of punishment, the conditions that must be satisfied before a defendant can be tried at all (as opposed to the conditions that must be satisfied before he can be justly convicted). He argues that one precondition of criminal punishment is that the agent be bound by the laws under which she is to be tried and punished. Under this approach, people are bound by the law only when they are treated as a responsible part of the community.

Duff then considers the case of an offender who has been excluded from the community whose law she has violated. There are three ways in which this exclusion might take place: First, she is “excluded from participation in the political life of the community, having no real chance to make [her voice] heard in those fora in which the laws and policies under which” she

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<sup>38</sup> Okeoghene Odudu, *Retributive Justice in an Unjust Society*, 16 *RATIO JURIS* 416, 419 (2003).

<sup>39</sup> Murphy himself recognized this and other problems with the theory in his later writing. See Jeffrie Murphy, *Does Kant Have a Theory of Punishment?*, in *RETRIBUTION RECONSIDERED: MORE ESSAYS IN THE PHILOSOPHY OF LAW* (New York: Springer/Verlag, 1992) 31.

<sup>40</sup> Odudu makes a similar point, above note \_\_\_, at 419.

<sup>41</sup> See Murphy, above note \_\_\_, at \_\_\_\_.

<sup>42</sup> R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 181-201 (Oxford: OUP, 2001).

must live are decided.<sup>43</sup> Second, she has been “excluded from a fair share in, or a fair opportunity to acquire, the economic and material benefits that others enjoy.” And, third, she has been denied by the state and her fellow citizens the “respect and concern due” her as a citizen.<sup>44</sup>

In each such case, he says, “there is reason to doubt whether [the precondition of being bound by law] is adequately satisfied.” He is careful to explain that those who have been systematically excluded or unjustly disadvantaged are not necessarily justified or excused in their criminal acts. Rather, his argument is that such actors cannot properly be “called to account.”<sup>45</sup> In effect, he is arguing that such a case is non-justiciable.

Duff’s approach differs markedly from the first three considered. Unlike the necessity approach, there is no claim that the impoverished offender’s act is justified. Unlike the RSB excuse approach, there is no claim that the defendant’s act should be excused. And, unlike the broken social contract approach, there is no claim that a citizen is relieved of his obligation to obey the law. Indeed, what is striking about Duff’s account is his lack of concern with the moral status of the offender one way or the other. Rather, his focus is on the moral status of society in judging the offender.

So, exactly what are the implications of Duff’s argument? It is noteworthy that all of the “exclusion” scenarios he describes involve impoverished defendants committing relatively minor, economically-driven offenses against relatively wealthy victims: for example, he describes the case of an impoverished single parent stealing clothes from a supermarket for her children.<sup>46</sup> But at the same time, Duff properly recognizes that “if the law lacks the standing to call the unjustly excluded to account, it lacks that standing in relation to *all* crimes, including the most serious *mala in se*.”<sup>47</sup> In other words, under Duff’s approach, society would have no more right to prosecute and punish an impoverished and excluded defendant who committed an aggravated rape or first degree murder than it would to prosecute an impoverished defendant who committed a *de minimis* theft. Moreover, it would seem to make no difference, in terms of society’s right to punish, whether the victim of *D*’s crime was a wealthy member of the ruling class, or was no less impoverished than *D* herself.

At one level, Duff’s argument seems unassailable: If one accepts the premise that a society in which some are profoundly disadvantaged lacks the moral authority ever to judge its citizens, then it follows that such authority will be lacking regardless of what kind of crime a

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<sup>43</sup> Id. at 183.

<sup>44</sup> Id.

<sup>45</sup> Id. at \_\_\_\_\_. For a similar argument, see Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. VALUE INQUIRY 391, 394(2009) (even if an unjustly impoverished offender is responsible for her actions, society might not be entitled to hold her responsible for her actions).

<sup>46</sup> Id. at 182.

<sup>47</sup> Id. at 184 (emphasis added).

given citizen has been accused of. But is the premise valid? It seems to me that a society might well have the moral status to make judgments in some cases but not others. For example, even if a society with a profoundly unjust division of property lacks the moral authority to make moral judgments regarding certain property crimes, it might still retain the moral authority to make moral judgments with respect to crimes like murder and rape. Moreover, even if society did lack the moral authority to pass judgment on one or more of its citizens with respect to all offenses, it would still be worth asking if such citizens deserved blame to begin with. Indeed, conceptually, the question of society's standing to judge does not even arise if it is determined that the offender is blameless. It is to that issue we now turn.

### III. A Case-Specific Approach to Assessing Blameworthiness

My main criticism of the previously described attempts to assess the culpability of severely disadvantaged offenders has been that they are painted with too broad a brush. As an alternative to the four approaches just discussed, I now propose an approach that looks more narrowly at the specifics of the offender's case.

#### A. Kinds of Deprivation, Victim, and Offense

The approach developed here takes account of three variables in considering the crime committed: the kind of unjust deprivation, if any, to which the offender has been subjected; the kind of unfair advantage or disadvantage to which the victim has been subjected; and the particular offense committed.

Let us consider, first, the character of the offender's deprivation. So far in this paper we have focused primarily on the offender's poverty and economic disadvantage. But, as Duff recognizes, there are also other forms of disadvantage that may be relevant, such as systematic exclusion from social and political involvement, and failing to receive the "respect and concern" to which one is presumably entitled.

What does it mean to live in a society in which one is unjustly denied basic social, political, or economic rights? Earlier, we noted the difficulty of resolving such a contested question. I promised to sidestep the issue and instead simply stipulate what I assume to be clear and uncontroversial examples of disadvantage. I now offer three such cases:

*Denial of property rights.* *D* lives in a society which, as a result of the social caste into which he has been born, entirely denies him and others in his class the right to own property.<sup>48</sup> The fact that *D* is not merely without property, but is legally barred from owning it allows us to avoid the possibility that *D* is in some way to blame for his impoverishment. Nor do we need to worry about cases in which *D* voluntarily decides to

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<sup>48</sup> This is a situation that more or less appears to have been true of slaves in the ante-bellum South (though for present purposes, we need not add the additional condition that *D* is himself treated as another's property). See DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* (Chapel Hill: UNC Press, 2003). Though, as Penningroth explains, slaves were often able to participate in a substantial informal economy and thereby gradually accumulate property

forgo property ownership, as in a commune. I take it that such a legal order would qualify as unjust even if *D*'s basic day-to-day needs were provided for.

*Denial of political rights.* The society in which *D* lives denies him and others similarly situated, again as a result of social caste, the basic rights of citizenship, such as the right to vote; the right to petition, express one's views, and assemble; and the right to due process in court proceedings. Once again, by assuming that such disentanglements are imposed on *D* owing to his caste, we avoid the possibility that *D* is somehow to blame for his circumstances, as is the case, say, where a felon is deprived of the right to vote as part of his punishment.

*Denial of right to basic state protections.* *D*'s society offers him and others in his class few of the basic public safety protections that it offers others. For example, the police rarely respond to emergency calls emanating from *D*'s neighborhood, and they routinely fail to investigate crimes occurring there; prosecutors regularly fail to initiate prosecutions for crimes that occur in *D*'s part of town; and EMS and fire crews are slow to respond to emergencies that occur there. (*D* presumably does still benefit from "public good" protections that necessarily apply to society as a whole, such as military defense and protections relating to matters such clean air and water and food and drug safety).

Beginning with these "worst case" hypotheticals will allow us to consider the means by which an offender's economic or social deprivation might bear on judgments of blameworthiness without addressing the difficult normative and empirical issues of what it means to live in a society that fails to give people what they deserve, and which, if any, societies in the world today would qualify as economically unjust.

It should be clear these kinds of deprivation are by no means mutually exclusive; indeed, they are mutually reinforcing and closely interrelated. Those who are economically impoverished are often also politically marginalized and deprived of basic state protections. Race plays a significant role here. In the United States, members of minority groups often suffer the highest rates of unemployment and poverty, are the most common targets of police harassment, experience the most acute sense of political alienation, and are subject to the highest rates of arrest and incarceration.<sup>49</sup> There is also a deeper conceptual link between categories: The right to own property, to participate in the political process, and to receive police and emergency protection by the state can be meaningless unless they are backed by a right to enforce such rights in court. But this is not to say that such rights are *reducible* to the right to due process. It is merely to say that in some cases, the right to due process is a necessary precondition or corollary to the right to own property or participate politically.

The second variable concerns the economic, political, and social circumstances of the crime's victim (where the crime has an identifiable victim). Here we will want to ask whether the victim: (1) was himself subject to unjust disadvantages, (2) was the beneficiary of unjust advantages; or (3) was neither unjustly advantaged nor unjustly disadvantaged.

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<sup>49</sup> See generally WESTERN, above note \_\_\_\_.

The final variable is the type of offense committed. For present purposes, I will focus on three offense types: offenses against the person (such as rape and murder), offenses against the administration of justice (such as perjury and obstruction of justice), and offenses against property (such as theft and criminal trespass). These categories are by no means meant to encompass all of the criminal law's special part. There are numerous other offenses that do not fall clearly into any of these categories.

## **B. The Offender's Blameworthiness**

The goal here is to determine the extent to which an offender's social, economic, or political disadvantage affects his blameworthiness for committing various kinds of offense. Before we proceed, however, it is appropriate to say something briefly about why we should care whether an offender's act is judged blameworthy in the first place. For present purposes, I shall assume that it is intrinsically wrong for society to punish criminal offenders who are blameless (and also wrong to punish blameworthy offenders more harshly than they deserve). To talk this way is to appeal to a familiar "negative" version of retributivism. The claim, for present purposes, is not that we should punish the blameworthy because they deserve it, but simply that we should not punish those who are not blameworthy. In short, I intend to rely on moral desert as a "side constraint" on whatever other rationale we have for imposing criminal sanctions (such as some version of consequentialism).<sup>50</sup>

To say that a criminal offender is at fault for violating a given law presupposes, at some level, that the law itself is just. Determining exactly what it means for a law to be just, however, is another matter. We often ask what requirements must be satisfied in order for conduct to be properly criminalized.<sup>51</sup> But a law that fails to satisfy such requirements is not necessarily unjust; it may merely be unwise or imprudent or overreaching. There may also be laws that are just on their face but which are applied in an unjustly selective or discriminatory manner.

For present purposes, we need not resolve these issues. Instead, let us consider laws that almost everyone would agree *are* unjust: one is a law that made it a crime for blacks to sit at a white lunch counter; another is a law that made it a crime for a Jew to marry or have sexual relations with a gentile. Such laws are unjust, I take it, because they further no legitimate interest of the state and because they discriminate on the basis of morally impermissible criteria, such as race, religion, and ethnic identity. It is hard to imagine any circumstance in which the application of such laws would be considered just. One who violated such laws would have done nothing morally wrong and could not properly be said to be at fault. The argument is not that the offender would be justified or excused in breaking the law, or that society would be morally unjustified in bringing a prosecution (though each of these claims is presumably true), but rather that the offender did not do an act that was blameworthy to begin with. And because the offender was not at fault, it would be unjust, from a retributive standpoint, to impose criminal penalties on him.

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<sup>50</sup> In so doing, I follow Duff and others. ANTONY DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (Oxford: Oxford University Press, 2001), at 11-14.

<sup>51</sup> E.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (Oxford: OUP, 2008).



The question I want to address is whether a similar “lack of blameworthiness” would occur in other contexts involving laws that are not unjust on their face, but which might be unjust as applied in the context of certain kinds of political, social, and economic circumstances. For reasons that will become clearer as we proceed, I think it is reasonable to say that, in a liberal social democracy which provided basic political and economic rights to its citizens, a person who committed each kind of offense identified -- offenses against the person, offenses against public order and the administration of justice, and offenses against property -- and had no excuse or justification for doing so, would have done an act that was morally wrong and would deserve to be punished. The question is whether, with respect to each type of offense, we would reach the same conclusion in cases where the offender lived in a society in which he was denied basic social, political, or economic rights.

### **C. Offenses against the Person**

Imagine that *D* commits a violent, non-defensive act of murder or rape or assault against a fellow citizen. Should the fact that he has failed to receive what he deserves from society in terms of economic, political, or social opportunities affect our judgment about whether he deserves to be punished for his act?

Assuming that *D*'s impoverishment and disenfranchisement have not caused his criminal act to be excused or justified by means of insanity, mistake, duress, or necessity, I believe that his impoverishment and disenfranchisement should not affect our judgment of his culpability. The reason is that the moral underpinnings of violent offenses against the person, such as murder and rape, do not depend on background considerations of social justice. Such offenses arise out of what Rawls called “natural duties” (which are to be contrasted, as we’ll see in a moment, to crimes like perjury and obstruction of justice, which arise out of what he called “political obligation”). In Rawls’s words:

[I]n contrast with obligations [like those derived in the original position], [natural duties] have no necessary connection with institutions or social practices; their content is not, in general, defined by the rules of these arrangements. Thus we have a natural duty not to be cruel, and a duty to help another, whether or not we have committed ourselves to these actions. It is no defense or excuse to say that we have made no promise not to be cruel or vindictive . . . . Indeed, a promise not to kill, for example, is normally ludicrously redundant, and the suggestion that it establishes a moral requirement where none already existed is mistaken. . . . A further feature of natural duties is that they hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons.<sup>52</sup>

In short, the moral obligations that *D* breaches when he commits a violent offense against another person are obligations owed to his fellow citizens, as individuals, rather than to the government. We can recognize the importance of life and physical and sexual integrity, and

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<sup>52</sup> JOHN RAWLS, A THEORY OF JUSTICE 114-15 (1971).

therefore the wrongfulness of murder, assault, and rape, without presupposing any developed institutional structure.<sup>53</sup>

Should it matter which class the victim of *D*'s crime is a member of? Should it matter, for example, that *V* is a member of the ruling class that was responsible for *D*'s impoverishment or social disadvantage? It is hard to see why it should. There is nothing about *V*'s complicity in *D*'s impoverishment or disenfranchisement, wrongful as it is, that invalidates *V*'s claim to life or bodily integrity. Even in those cases in which *V* could have, but failed to, protect *D* from acts of violence directed against him by others, *D* would not be justified in using violence against *V* unless *V* himself posed a direct threat to *D*'s physical well being.

#### **D. Offenses Against Public Order and the Administration of Justice**

Imagine now that the offense committed by *D* is a non-violent offense against public order or the administration of justice, such as obstruction of justice, bribery, or perjury. How would we judge his blameworthiness with respect to these offenses, assuming again that *D* has failed to get what he deserves from society in terms of economic, political, or social opportunities?

The moral content of such offenses is complex; I have dealt with them at length elsewhere.<sup>54</sup> At one level, such offenses seem directed primarily at the government; at another level, they are directed at individual victims. An offender who commits perjury, for example, not only undermines the integrity of the judicial process but might also cause significant harm to a litigant whose cause is damaged by the false testimony. A similar dynamic might occur in the case of the offender who obstructs justice. As for bribery, it typically harms the integrity of the governmental process as well as the constituents of the official who, in accepting the bribe, acted in his own self interest rather than in the public interest.

The fact that *D* has been denied the right to participate fully in the political life of his community, or denied the police protections that are afforded other citizens, would seem to mitigate, or even negate, the wrongfulness of his act in obstructing justice, committing perjury, or paying a bribe. While *D* would still be engaging in what is arguably a wrongful act of deception or covering up, the wrongfulness of that act would be significantly reduced by the circumstances in which it occurred. Unlike offenses like murder and rape, which involve a violation of natural duties, offenses like obstruction of justice and perjury are precisely the sort of offenses that involve a violation of political obligations. Their moral content is rooted in complex institutional practices involving a dense network of reciprocal duties. A defendant who commits such a crime has done a blameworthy act only when he has an obligation to obey such laws.

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<sup>53</sup> In an email to me, Antony Duff has asked what we should say about a legal system which defined rape as intercourse with a woman without her husband's or parent's consent. I would respond that such a crime would be so different from our modern understanding of rape that we should regard it as a distinct offense, one lacking the "natural duty" background of rape defined as intercourse without the *victim's* consent.

<sup>54</sup> STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME (Oxford: OUP, 2006).

Once again, the identity of the victim harmed by *D*'s act may affect our judgment of his blameworthiness. For example, if *D* committed perjury or obstruction of justice in litigation against a member of the ruling elite, we would be less likely to regard his act as blameworthy than if he had done so in litigation against a similarly disempowered fellow citizen.

The fact that *D* has been denied the right to *own property*, by contrast, seems to bear less directly on his culpability for such offenses than his being denied the right to participate in the political process or receive basic protections from the state. One can imagine circumstances in which *D*, whose state-imposed poverty makes it impossible for him to hire a lawyer, and who is not otherwise provided with indigent counsel, uses perjury or obstruction as a means of "leveling the playing field." Perhaps in such circumstances his impoverishment would mitigate the blameworthiness of his act. But, normally, there is no necessary connection between economic and political rights. One can easily imagine cases in which *D* was unjustly impoverished without being unjustly disenfranchised and unjustly disenfranchised without being unjustly impoverished.

### **E. Offenses Against Property**

Finally, let us imagine that the crime *D* commits is not a violent offense against another's physical well-being, or an offense against public order or the administration of justice, but is rather an offense against another's rights in property, such as theft or fraud or criminal trespass.<sup>55</sup> How should we judge his blameworthiness for these offenses, assuming again that *D* has been denied the right to own property, to participate in the political life of his community, or to enjoy the basic public safety protections that other citizens enjoy?

Here we need to examine the moral content that underlies crimes against property.<sup>56</sup> The essence of property offenses is that they involve an offender's (wrongfully) causing harm to another's interests in, and rights to, property.<sup>57</sup> Property, in turn, is best thought of not as a physical thing but as the bundle of rights organized around the idea of securing, for the right of the holder, exclusive use or access to, or control of, a thing.<sup>58</sup> Control may take various forms,

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<sup>55</sup> My concern here is with property crimes of general application. I leave to the side property crimes that are said to be aimed specifically at the poor. See generally Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIMINAL LAW & CRIMINOLOGY \_\_ (forthcoming); Barbara A. Hudson, *Beyond Proportionate Punishment: Difficult Cases and the 1991 Criminal Justice Act*, 22 CRIME, LAW & SOCIAL CHANGE 59, 70 (1995).

<sup>56</sup> A topic that is dealt with in far more detail in a forthcoming book, tentatively titled *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age*.

<sup>57</sup> Historically, this has not always been the case. As George Fletcher has famously argued, at early common law, the law of larceny was intended primarily to protect society against manifest breaches of the peace, rather than protecting owners' property rights per se. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (Boston: Little Brown, 1978).

<sup>58</sup> For a useful discussion, see JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* (New York: Aspen, 2d ed. 2005), at 2.

including the right to exclude others, the privilege to use the property, the power to transfer it, and immunity from having it taken from the owner, or harmed without the owner's consent.<sup>59</sup>

Crimes against property therefore involve harms to persons in the sense that they involve harms to persons' interests in property; and property, properly understood, concerns legal relations *among people* regarding the control and disposition of valued resources. While the term "crimes against property" may provide a convenient shorthand, it is nonetheless more accurate to speak of "crimes affecting persons' rights and interests in property."<sup>60</sup> Such conduct is harmful because it undermines the very reasons we have a system of property in the first place -- namely, to facilitate the creation and preservation of wealth that makes many forms of human endeavor possible.

On the continuum of offenses described by Rawls, ranging from pure or nearly pure "natural duty" offenses like murder and rape at one end, to pure or nearly pure "political obligation" offenses like obstruction and perjury on the other, theft lies somewhere in the middle, having attributes of both. While we may recognize in some natural or pre-legal sense that it is morally wrong to appropriate what "belongs" to another without her permission, it is often impossible to make anything like a fully informed moral judgment about the blameworthiness of such conduct until we know a good deal about what is meant by highly legalized concepts such as property, ownership, possession, custody, title, contract, appropriation, fiduciary duty, and the like.

Claims of property make sense only in a social context in which there is some level of cooperative behavior.<sup>61</sup> Whether it is wrong to violate a given law against theft, and whether it is therefore just to be subject to criminal penalties for doing so, depends on whether the property regime within which such law functions is itself just. This is very different from the crimes-against-the-person paradigm we considered earlier. As the late Jim Harris put it:

The background right [to property] is historically situated. It does not have the same ahistorical status as do rights not to be subject to unprovoked violence to the person. There are no natural rights to full-blooded ownership of the world's resources.

Good faith implementation of the moral background right may or may not achieve a threshold of justice for a property institution. If it does, the trespassory rules of the

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<sup>59</sup> Tony Honoré divides what he calls the liberal concept of full ownership into a list of components: the right to possess, use, and manage a thing; the right to income from its use by others; the right to sell, give away, consume, modify, or destroy it; the power to transmit it to the beneficiaries of one's estate; and the right to security from expropriation. A.M. Honoré, *Ownership*, in ANTHONY G. GUEST (ED.), *OXFORD ESSAYS IN JURISPRUDENCE* (Oxford: Clarendon Press, 1961) 107.

<sup>60</sup> With the possible, and interesting, exception of morals offenses such as prostitution and consensual bigamy, and perhaps a few other unusual offenses such as animal cruelty, and possibly certain crimes against the environment, *all* crimes are crimes affecting persons' rights and interests -- whether in their property, physical safety, in public order, in the family, or elsewhere.

<sup>61</sup> For a useful discussion, see Carol M. Rose, *The Moral Sense of Property*, 48 *WILLIAM & MARY L. REV.* 1897, 1899 (2007).

institution are, *prima facie*, morally binding. Murder, assault and rape are always moral wrongs. Theft is morally wrong only when the justice threshold is attained.<sup>62</sup>

And when does a given property institution achieve a threshold of justice? That, of course, is an immensely complex and controversial question, one that lies beyond the scope of this paper. For the moment, however, I think we can safely assume that the threshold would not be met by a regime under which a whole class of citizens was legally forbidden from owning property. In such a society, we should be able to say, at a minimum, that a person who is unjustly barred from owning property who steals from one who was complicit in unjustly benefiting from such a system has not performed an act that is morally blameworthy.<sup>63</sup>

The harder question arises in cases in which an unjustly impoverished offender steals from one who has not unjustly benefited from the system, including victims who are themselves unjustly impoverished.<sup>64</sup> (Suppose, for purposes of discussion, that otherwise impoverished citizens were permitted to own certain limited types of property, or property of very low monetary value.) An argument could be made that, unless a given law of theft is enacted against a background of property laws that treat *D* fairly, the law is simply not binding on *D*, and his stealing would not be wrong. This approach seems inconsistent, however, with our intuition that the impoverished victim clearly has had what few rights he possesses violated, and that it is *D* who is responsible for the violation. For this reason, I am inclined to say that *D* should be viewed as non-culpable only when he steals from those who are in some way complicit in causing his unjust impoverishment.

Finally, what about a thief who was denied not the right to own property, but rather the right to participate in the political process or the right to protection by the police? Here, there should be no impediment to finding that *D* has done a blameworthy act. Such theftuous conduct would still undermine the system of property of which *D* is in some sense a beneficiary.

## Conclusion

We end where we began, with the question whether the fact that a criminal offender lives in a society that denies him what he deserves in terms of economic, social, or political rights should affect the determination of what he deserves in terms of punishment – a question that is all the more urgent given the connection between the current economic recession and rising rates

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<sup>62</sup> J.W. HARRIS, *PROPERTY AND JUSTICE* (Oxford: OUP, 1996), at 14. For a similar argument, see Emmanuel Melissaris, “The Point of Offences Against Property” (ms. at 15) (“no offense against property has been committed when the defendant does not, for whatever reason, enjoy the minimum of welfare guaranteed to everyone, while at the same time the victim is well-off and is not deprived of an unreasonably large amount of property”).

<sup>63</sup> Cf. Tadros, above note 392, at 132 (suggesting that justification rationale applies only “to people who have less than their fair share of wealth who take goods from people who have more than their fair share of wealth”).

<sup>64</sup> In fact, as noted above note \_\_\_\_, a disproportionate percentage of the victims of property crimes in the U.S. are in impoverished. Criminologists have offered various explanations for the peculiar fact that the very people with the least amount of property worth stealing are the same people who are most likely to be the victims of theft. See, e.g., Daniel Larsson, *Exposure to Property Crime as a Consequence of Poverty*, 7 J. SCANDINAVIAN STUDIES IN CRIMINOLOGY AND CRIME PREVENTION 45 (2006).

of poverty. The answer offered here has been a qualified yes, depending on the type of crime the offender has committed, the type of deprivation to which he has been subjected, and the circumstances of the crime victim. It should be clear, however, that my analysis is intended as nothing more than a “first cut.” With so many variables, one can imagine an almost infinite number of hypothetical situations. My goal has been not to resolve all of these hypotheticals, but rather to suggest the complexity of the problem and the error of thinking that there is a one-size-fits-all solution.

By stipulating as to what would constitute serious cases of distributive and political injustice, we have been able to avoid some deeply contested issues in political theory. Still, the question remains whether, in the real world, we are in danger of imposing retributive penalties on offenders who, by virtue of their social circumstances, should be regarded as blameless. The concern, I believe, is a legitimate one. While few societies in history have ever distributed wealth equitably, the current disparity between rich and poor within the U.S. and elsewhere seems particularly gross. The gap between the haves and have-nots is now greater than at any time since 1929.<sup>65</sup> In 1980, the poorest twenty percent of families in the U.S. earned 5.3 percent of aggregate income, while the richest fifth received 41.1 percent; by 2008, the share of the poorest twenty percent had dropped to 3.4 percent, while the richest fifth’s share had risen to 50.1 percent.<sup>66</sup> Viewed globally, the gap between rich and poor is even more dramatic: the United Nations Development Program reported in 1998 that the world’s 225 richest *individuals* had a combined wealth that was equal to the combined annual income of the world’s 2.5 *billion* poorest people.<sup>67</sup> More than ten years later, it is undoubtedly worse. When we consider the fact that a disproportionate share of crime, including crime against property, is committed by offenders who are living in or near poverty, together with the possibility that at least some of this poverty is the result of unjust political and economic systems,<sup>68</sup> the seriousness of the problem begins to emerge. By imposing criminal sanctions on arguably blameless offenders, we run the risk of compounding the sins of distributive injustice with those of retributive injustice.

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<sup>65</sup> EDWARD WOLFF, *TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA 2* (New York: New Press, 2d ed. 2002).

<sup>66</sup> See Census Bureau, above note \_\_; see also U.S. Census Bureau, 2009 Statistical Abstract, table 676; Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q.J. ECON. 1 (2003).

<sup>67</sup> United Nations, *Human Development Report 1998*, <http://hdr.undp.org/en/reports/global/hdr1998/>

<sup>68</sup> In countries like Equatorial Guinea, Zambia, and Swaziland, where kleptocratic leaders reportedly line their own pockets and leave their populations destitute, the injustice of the economic system approaches that described in my hypothetical above. See Ian Urbina, *Taint of Corruption in No Barrier to U.S. Visa*, N.Y. TIMES (Nov. 16, 2009), [http://www.nytimes.com/2009/11/17/us/17visa.html?\\_r=1&sq=africa corruption poverty&st=cse&adxnml=1&scp=1&adxnmlx=1258917716-aZzo8YcKMDy/qU5W4PJbeA](http://www.nytimes.com/2009/11/17/us/17visa.html?_r=1&sq=africa%20corruption%20poverty&st=cse&adxnml=1&scp=1&adxnmlx=1258917716-aZzo8YcKMDy/qU5W4PJbeA); Barry Bearak, *In Destitute Swaziland, Leader Lives Royally*, N.Y. TIMES (Sept. 6, 2008), at A1, <http://www.nytimes.com/2008/09/06/world/africa/06king.html?scp=1&sq=destitute%20swaziland&st=cse>; Celia W. Dugger, *Ex-Zambian Leader’s High Life Awaits a Verdict*, N.Y. TIMES (June 21, 2009), <http://www.nytimes.com/2009/06/22/world/africa/22zambia.html?scp=2&sq=zambia&st=cse>.