
JUST DESERTS IN UNJUST SOCIETIES

A CASE-SPECIFIC APPROACH

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SHOULD the fact that a criminal offender lives in a society that fails to give him what he ‘deserves’ in terms of economic or political or social rights affect the determination of what he ‘deserves’ from that society in terms of punishment? More generally, to what extent is the fairness of a given system of retributive justice dependent on the fairness of the system of distributive or socio-economic justice within which it is situated? Are questions of distributive or socio-economic justice conceptually prior to questions of retributive justice?

Most writing on these issues has tended to assume that there is one set of principles that will explain the proper relationship between retributive and socio-economic justice. The fact that an offender has been denied the basic entitlements of a just

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society, however defined, is taken to have implications for criminal liability across the board, regardless of the offence charged and the circumstances of the victim harmed.¹ Under such an approach, if an offender is deemed to be subject to unjust economic impoverishment, or deprived of the right to participate in the political process, or denied the basic protections owed him by the state, the argument is made that it would be unjust, or at least problematic, to impose criminal liability on him for a whole range of offences, whether murder or rape, theft or assault, welfare fraud or obstruction of justice.

An analogous tendency informs much criminal law theory scholarship more generally. We often assume that there is one proper understanding of various issues in the general part (concerning, say, acts and omissions, justifications and excuses, or principals and accomplices), and that, if we can just get that understanding straight, it should apply across the board to all offences within the special part. Under such an approach, either one need not go to the trouble of considering how a given theory would apply with respect to specific offences; or, if one does, and discovers that the theory works for some offences but not others, one should conclude that the theory is incomplete or defective.

I aim to take a different approach here. The argument to be developed suggests that a proper analysis of the relationship between retributive and socio-economic 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 offence 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 offence (say, an offence against the person) but not another (say, an offence against property or against the administration of justice). Under this approach, we would need to consider what makes an offender blameworthy for committing a particular kind of offence in the first place, and then ask whether and how his disadvantage affects such blameworthiness. Second, we would 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 obtain property, for example, might be relevant to determining his blameworthiness for committing a particular kind of offence in a way that his being denied the opportunity to participate in the political process or the right to certain kinds of basic police protections by the state might not. Third, we would need to consider the economic and social circumstances of the crime victim (assuming there is an identifiable victim). For example, other things being equal, a criminal act directed by a disadvantaged offender at a similarly disadvantaged

¹ See, eg, SR Perry, 'The Relationship Between Corrective and Distributive Justice' in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000); W Sadurski, 'Distributive Justice and the Theory of Punishment' (1985) 5 *OJLS* 47, 58–9; S Smilansky, 'Control, Desert and the Difference Between Distributive and Retributive Justice,' (2006) 131 *Philosophical Studies* 511.

victim might be blameworthy in a way that the same crime directed at a privileged member of the political or economic elite would not.

The analysis developed here is also intended to reflect another goal of criminal law theory. Philosophical theorizing about the criminal law should, I believe, aspire to universality, both descriptively, in the sense of providing an analysis of what the criminal law *is* in a wide range of systems around the world, and prescriptively, in the sense of providing a normative vision, across many systems, of what criminal law *ought* to be. It should seek to provide an understanding of the criminal law that is relevant not just in our own society, but also in societies whose values and practices are very different from our own.² Consideration of how a system of retributive justice would apply in a society with a profoundly unjust economic or political order provides an opportunity to develop such an understanding.

1 SOCIO-ECONOMIC DEPRIVATION, CRIME, AND INJUSTICE

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 and disadvantaged account for a disproportionately high percentage of crime victims. According to US Department of Justice figures, during 2006 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 14.6 for incomes over \$75,000.³ During the same period, the burglary rate for those with a household annual income of less than \$7,500 was 55.7 per 1,000 households, while the rate for those with a household annual income of \$75,000 or more was 22.4 per 1,000.⁴ Thus, the higher the rate of poverty, the greater the number of people, at least at the low end of the scale, likely to be victims of crime and the more harmful such crime is likely to be.

A second reason is that the poor and disadvantaged account for a disproportionately high percentage of criminal offenders. While the Department of Justice does

² I have addressed this aspiration in SP Green, 'The Universal Grammar of Criminal Law' (2000) 98 *Michigan Law Review* 2104.

³ US Census Bureau, *Statistical Abstract of the United States 2009*, table 305, online at <<http://www.census.gov/prod/2008pubs/09statab/law.pdf>>. The rates were 45.9 per thousand for persons with incomes between \$7,500 and \$14,999, 31.4 for persons with incomes between \$15,000 and \$24,999, 34.5 for persons with incomes between \$25,000 and \$34,999, 22.5 for persons with incomes between \$35,000 and \$49,999, and 24.5 for persons with incomes between \$50,000 and \$74,999.

⁴ *Ibid* at table 309.

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 suggest that the lower one's income, the more likely one is to engage in criminal activity, whether violent or non-violent.⁵ (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.)

A third reason why criminal law scholars should be concerned with the problem of poverty and disadvantage is the one with which we shall mainly be concerned here—namely, the possibility that an offender's impoverishment or other form of disadvantage might bear on his blameworthiness in committing his offence. Whether this is the case would seem to turn, in the first instance, on whether the offender's disadvantage is itself unjust. A person might be impoverished or otherwise disadvantaged for any number of reasons other than systematic injustice: for example, she might be indolent, 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.⁶ 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),⁷ 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

⁵ See, eg, B Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006) 34–51; J Hagan and RD Peterson, 'Criminal Inequality in America: Patterns and Consequences' in J Hagan and RD Peterson (eds), *Crime and Inequality* (Stanford, Cal: Stanford University Press, 1995) 19–22; RM Howsen and SB Jarrell, 'Some Determinants of Property Crime: Economic Factors Influence Criminal Behavior but Cannot Completely Explain the Syndrome' (1987) 46 *American Journal of Economics & Society* 445, 454; E Kühlhorn, 'Victims and Offenders of Criminal Violence' (1990) 6 *Journal of Qualitative Criminology* 51, 55.

⁶ WC Heffernan, 'Social Justice/Criminal Justice' in WC Heffernan and J Kleinig (eds), *From Social Justice to Criminal Justice* (New York: Oxford University Press, 2000) 47, 49.

⁷ 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 S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004).

- (4) impose demands on members, such as the obligation to pay taxes and serve in the military, according to some principle of fair distribution.⁸

To what extent society has an obligation to provide in these ways for its members, and where such obligation comes from, are obviously among the most complex and contested questions in all of normative political theory.⁹ Indeed, the nature of such obligation involves some of the most contested issues in our political discourse as well. To try to resolve these issues here would lead us well beyond the scope of this chapter. 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 try 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.

2 SOCIO-ECONOMIC INJUSTICE AND BLAMEWORTHINESS

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.

2.1 Necessity

Under current Anglo-American law, the most plausible argument a disadvantaged defendant could make for avoiding liability for at least some crimes is one based on

⁸ Here, I loosely follow an approach suggested in Heffernan, 'Social Justice/Criminal Justice', 50–1.

⁹ For helpful surveys, see S-C Kolm, 'Distributive Justice' in RE Goodin and P Pettit (eds), *A Companion to Contemporary Political Philosophy* (Oxford: Blackwell, 1993); J Lamont and C Favor, 'Distributive Justice' in *Stanford Encyclopedia of Philosophy*, online at <<http://plato.stanford.edu/entries/justice-distributive/>>.

the idea of necessity. Under the standard common law formulation, the defendant must show that:

- (1) she was faced with a clear and imminent danger of harm or serious bodily injury;
- (2) she reasonably believed her action would be effective in abating the danger that she sought to avoid;
- (3) there was no effective legal way to avert the harm;
- (4) the harm caused by her criminal act was less serious than that sought to be avoided; and
- (5) she was not to blame for creating the emergency conditions in which she found herself.¹⁰

A defendant who asserts a necessity defence argues that even though she did in fact commit all of the requisite acts, she nonetheless did nothing morally wrong. This is so because the crime's definition of prohibited conduct is, in a sense, incomplete.¹¹ 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 defence depends entirely on the nature of the offence committed and the circumstances that occasioned its commission. 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 defence of necessity.¹² By contrast, one who committed rape or murder or assault as a result of her impoverishment would almost never be able to establish a defence 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 defence if the prosecution can show that: (1) she would not have suffered any serious injury if she had not committed the crime; (2) there were legal alternatives available to her, such as attending a soup kitchen or homeless shelter; or (3) she somehow bore responsibility for the impoverished situation in which she found herself. Presumably as a result of these stringent

¹⁰ J Dressler, *Understanding Criminal Law* (5th edn; Newark: LexisNexis, 2009) 291–3.

¹¹ The idea of 'incompleteness' in this context is suggested by SH Kadish, 'Excusing Crime', (1987) 75 *California Law Review* 257, 258.

¹² See Model Penal Code and Commentaries § 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.'). Cf BA Hudson, 'Beyond Proportionate Punishment: Difficult Cases and the 1991 Criminal Justice Act' (1995) 22 *Crime, Law & Social Change* 59, 61–3.

requirements, reported cases in which a defendant, charged with theft or trespass, was acquitted by virtue of the necessity defence are virtually non-existent, at least in modern times.¹³

Still, the defence exists in theory and it is worth saying how it differs from the problem with which this chapter is specifically concerned. The first point is simply that the necessity defence is only loosely correlated with poverty and other forms of chronic disadvantage. Poverty, in the systematic sense described above, is neither a sufficient nor a necessary condition for the application of the necessity defence. No matter how impoverished a person might be, she will not be eligible for the defence unless it can be shown that at the moment of her crime her death or injury was imminent and unavoidable.¹⁴ If she could find temporary sustenance by, say, attending a soup kitchen, then she is unlikely to be able to claim the defence. By the same token, a hiker stranded in the wilderness in a snow storm has the privilege to commit trespass and theft 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 offence. Second, there is no requirement that the defendant's disadvantage, if there is one, be unjust (though one can perhaps imagine that in some cases the fact that the offender's disadvantage was unjust would increase the harm she was seeking to avoid). More generally, the defence of necessity functions (though at times uneasily¹⁵) 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 defence would be unavailable.¹⁶

¹³ The history of the necessity defence is a particularly convoluted one. In the famous lifeboat case of *Dudley & Stephens*, 14 QBC 273, 283 (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 (1609–1676), however, English law was apparently more receptive to economic necessity as a defence to theft. See generally DY Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England* (New York: Palgrave 2004) 86–9. For an account of how medieval European law dealt with the question of poverty, see B Tierney, *Medieval Poor Law: A Sketch of Canonical Theory and Its Application in England* (Berkeley: University of California 1959). Rabbinic law also permits one to commit property crimes such as theft in order to preserve life. See *The Babylonian Talmud: Seder Mo'ed: Yoma 83b* (Rabbi Dr Leo Jung trans; Brooklyn: Soncino Press 1938).

¹⁴ Of course, it could be argued that the law of necessity is too limited in this sense and that it should be expanded to apply to cases of 'cumulative' necessity, in something like the way that the law of provocation has been expanded, under the Model Penal Code's defence of extreme mental or emotional disturbance, to apply to cumulative provocation. See Model Penal Code §210.3(1)(b).

¹⁵ See JT Parry, 'The Virtue of Necessity: Reshaping Culpability and the Rule of Law' (1999) 36 *Houston Law Review* 397, 403–04 (noting 'anxiety' regularly felt by courts applying the necessity defence).

¹⁶ *State v Tate*, 505 A2d 941, 946 (NJ 1986). See also Model Penal Code § 3.02(1)(c).

2.2 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 defence. Whereas justification defences consist of arguments that the defendant’s conduct was not harmful or wrongful, excuse defences 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.¹⁷

Judge David Bazelon, who had previously crafted a significant expansion of the insanity defence,¹⁸ 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. In *United States v Alexander*, one of the defendants had shot and killed a victim who had called him a ‘black bastard’.¹⁹ 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 an RSB defence: ‘Because of his early conditioning’, Bazelon suggested, the defendant may well have been ‘denied any meaningful choice when the racial insult triggered’ his reaction.²⁰ It was possible, he wrote, that the defendant’s underprivileged childhood had impaired his ‘mental or emotional processes and behavior controls, rul[ing] his violent reaction in the same manner that the behavior of a paranoid schizophrenic may be ruled by his “mental condition”’.²¹

The idea that a rotten social background might provide a criminal law defence was subsequently developed by Richard Delgado.²² Relying on empirical data establishing a correlation between criminal behaviour, on the one hand, and poverty, unemployment, substandard living conditions, inadequate schools, a climate of

¹⁷ See generally J Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004).

¹⁸ Most famously in *Durham v United States*, 214 F2d 862, 874–76 (DC Cir 1954).

¹⁹ 471 F2d 923, 957 (DC Cir 1973) (Bazelon concurring in part, dissenting in part).

²⁰ *Ibid* at 960.

²¹ *Ibid*. Bazelon subsequently elaborated on his views in an exchange with Stephen Morse. See DL Bazelon, ‘The Morality of the Criminal Law’ (1976) 49 *Southern California Law Review* 385, 387–98; SJ Morse, ‘The Twilight of Welfare Criminology: A Reply to Judge Bazelon’ (1976) 49 *Southern California Law Review* 1247; DL Bazelon, ‘The Morality of the Criminal Law: A Rejoinder to Professor Morse’ (1976) 49 *Southern California Law Review* 1269.

²² R Delgado, ‘“Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?’ (1985) 3 *Law and Inequality* 9.

violence, inadequate family structure, and racism, on the other, Delgado argued that courts should recognize a novel excuse defence based on extreme poverty and social deprivation. In particular, Delgado offered the possibility that a person's rotten social background might cause various behavioural 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. The defence envisioned by Delgado is one that is closely analogous to defences 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 crimes charged.²³

There are a few points to note about the rotten social background approach. First, as in the case of the necessity defence, Bazelon and Delgado's defence 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 defences. Second, as in the case of the necessity defence, there is no requirement that the offender's rotten background necessarily be unjust, though perhaps one could argue that the defence takes on a distinctive character when it is. Third, in contrast to 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). Fourth, the RSB defence 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.

2.3 Broken social contract

A third approach to the problem of the disadvantaged defendant looks at criminal punishment from the perspective of social contract theory.²⁴ The argument consists of three 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

²³ Ibid at 85–6.

²⁴ A leading example is JG Murphy, 'Marxism and Retribution' (1973) 2 *Philosophy & Public Affairs* 217, 224–31.

hypothetical original position)²⁵ 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 governmental authority that 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 [the] operation [of rules that it is a crime to violate], he owes his own obedience as a debt to his fellow-citizens for their sacrifices in maintaining them.'²⁶

Second, when people fail to abide by the rules of the system and 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.²⁷ 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.'²⁸ In other words, part of the social contract consists of citizens' agreeing to be punished if they break 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.²⁹ First, the theory rests on what Okeoghene Odudu has

²⁵ J Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) 17–22.

²⁶ Murphy, 'Marxism and Retribution', 228.

²⁷ For a well-known formulation of the punishment-as-equilibrium-restorer argument, see H Morris, 'Persons and Punishment' (1968) 52 *The Monist* 475.

²⁸ Murphy, 'Marxism and Retribution', 228.

²⁹ For a helpful summary of criticisms, and attempted refutation, see R Dagger, 'Playing Fair with Punishment' (1993) 103 *Ethics* 473.

called a ‘grotesque conception of crime’.³⁰ The social contractarians seem to 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.³¹ In fact, as I shall suggest below, such offences 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 is not at all clear how criminal punishment is an appropriate means for restoring the equilibrium.³² 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. 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 what offence was being violated or who the victim was. 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 commits armed robbery.³³

2.4 Non-justiciability

Antony Duff has offered yet another approach to the problem of imposing criminal sanctions on the severely impoverished and politically excluded.³⁴ 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

³⁰ O Odudu, ‘Retributivist Justice in an Unjust Society’ (2003) 16 *Ratio Juris* 416, 419.

³¹ See J Hampton, ‘Correcting Harms Versus Righting Wrongs: The Goal of Retribution’ (1992) 39 *UCLA L Rev* 1659, 1660. Murphy himself recognized this and other problems with the theory in his later writing. See JG Murphy, ‘Does Kant Have a Theory of Punishment?’ in JG Murphy (ed), *Retribution Reconsidered: More Essays in the Philosophy of Law* (Alphen aan den Rijn: Kluwer, 1992) 31.

³² Odudu makes a similar point. O Odudu, ‘Retributivist Justice in an Unjust Society’ (2003) 16 *Ratio Juris* 416, 419.

³³ JG Murphy, ‘Marxism and Retribution’ (1973) 2 *Philosophy & Public Affairs* 217, 242.

³⁴ RA Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) 181–201.

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 must live are decided. 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’ to her as a citizen.³⁵

In each such case, he says, ‘there is reason to doubt whether [the precondition of being bound by law] is adequately satisfied’.³⁶ 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 the polity itself has no standing to ‘call’ the disadvantaged person ‘to account’.³⁷ 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 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, one way or the other, with the moral status of the offender. 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 most of the ‘exclusion’ scenarios he describes involve impoverished defendants committing relatively minor, economically-driven offences against relatively wealthy victims: for example, he describes the case of an impoverished single parent stealing clothes from a supermarket for her children.³⁸ 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*’.³⁹ Indeed, he considers the hypothetical case of a black South African brought to trial in the apartheid era for ‘committing a serious assault against a neighbor’, and concludes that, ‘given his systematic exclusion from citizenship in the polity in whose name the courts act, he is not responsible for his conduct before this court,

³⁵ Ibid at 183.

³⁶ Ibid at 183–4.

³⁷ Ibid at 184–88. For a similar argument, see V Tadros, ‘Poverty and Criminal Responsibility’ (2009) 43 *Journal of Value Inquiry* 391, 393–94 (even if an unjustly impoverished offender is responsible for her actions, society might not be entitled to hold her responsible).

³⁸ Duff, *Punishment, Communication, and Community*, 182.

³⁹ Ibid at 184 (emphasis in original).

or to this polity'.⁴⁰ In other words, under Duff's approach, society would have no more right to prosecute and punish an impoverished and excluded defendant who committed a serious *malum in se* crime than it would to prosecute an impoverished defendant who committed a *de minimis malum prohibitum* offence. 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 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 offences, it would still be worth asking if such citizens deserved blame, in some abstract or free-floating sense, to begin with.⁴¹ Indeed, if we assume (as retributivists do) that moral blameworthiness is a prerequisite for just criminal punishment, the question of society's standing to judge would not even arise where the offender was determined to be blameless. It is to the issue of blameworthiness that we therefore now turn.

3 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

⁴⁰ RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007) 191–3.

⁴¹ Duff would presumably dispute the idea that blame can be deserved in some free-floating or abstract sense, insisting that: '[b]lame requires a suitable relationship between blamer and blamed, as fellow members of a normative community whose business the wrong is: it is an attempt at moral communication, appealing to values by which blamer and blamed are, supposedly, mutually bound.' RA Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial' (2010) 23 *Ratio* 123, 125. At the same time, Duff acknowledges that even if society as a whole lacks standing to blame the offender, there might still be individuals within society, such as the offender's victims, who have the standing to do so. Duff, *Answering for Crime*, 193.

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.

3.1 Kinds of deprivation, victim, and offence

The approach developed here takes account of three variables in considering the crime committed:

- (1) the kind of unjust deprivation, if any, to which the offender has been subjected;
- (2) the kind of unfair advantage or disadvantage to which the victim, if any, has been subjected; and
- (3) the particular offence committed.

Let us consider, first, the character of the offender's deprivation. So far in this chapter 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.⁴²

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 (but not others outside his class) the right to own property.⁴³ 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 forgo property ownership, as in a commune. I take it that a legal order that denied *D* property rights in this way 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, petition, express one's views, assemble, and receive due process in court proceedings. Once again, by assuming that such disentanglements are imposed on *D* owing to his caste, we avoid

⁴² Duff, *Punishment, Communication, and Community*, at 183.

⁴³ 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 DC Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* 45 (Chapel Hill: University of North Carolina, 2003). Though, as Penningroth explains, slaves were often able to participate in a substantial informal economy and thereby gradually accumulate property. *Ibid* at 46.

the possibility that *D* is somehow arguably 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 neighbourhood, 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 emergency medical services 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 defence, clean air and water regulations, and food and drug safety measures.)

Beginning with these hypothetical 'worst cases' will allow us to consider the means by which an offender's economic or social deprivation might bear on judgments of blameworthiness without directly 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 or socially unjust.

It should be clear that 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 the same people who are 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.⁴⁴ There is also a deeper conceptual link between categories: the right to participate in the political process, own property, receive basic police and emergency protection, and have access to court processes can each be meaningless, standing alone, unaccompanied by the other rights. For example, the right to own property may be of little value unless it is backed up by due process rights in court. And the right to speech may be essentially meaningless unless one has access to basic means of communication necessary to express oneself in the modern world.

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 himself: (1) suffered unjust disadvantage; (2) benefited from unjust advantage; or (3) experienced neither unjust advantage nor unjust disadvantage.

The final variable is the type of offence committed. For present purposes, I shall focus on three offence types: offences against the person (such as rape and murder); offences against the administration of justice (such as perjury and obstruction of justice); and offences against property (such as theft and criminal trespass). These

⁴⁴ See generally Western, *Punishment and Inequality in America*.

categories are by no means meant to encompass all of the criminal law's Special Part. There are numerous offences that do not fall clearly into any of these categories.

3.2 The offender's blameworthiness

The goal here is to determine the extent to which an offender's unjust social, economic, or political disadvantage affects his blameworthiness for committing various kinds of offence. 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).⁴⁵

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.⁴⁶ But a law that fails to satisfy such requirements is not necessarily unjust; it may merely be unwise or imprudent. 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-only 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 surely true), but rather that the offender did not do an act that was blameworthy

⁴⁵ In so doing, I follow Duff and others. See Duff, *Punishment, Communication, and Community*, 11–14.

⁴⁶ See generally D Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008).

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.

The question that needs to be addressed is whether a ‘lack of blameworthiness’ would also 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 all of its citizens, a person who committed each kind of offence identified—that is, offences against the person, against public order and the administration of justice, and 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 offence, 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.

3.3 Offences 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, his impoverishment and disenfranchisement should not affect our judgment of his culpability. The reason is that the moral underpinnings of offences such as murder and rape do not depend on background considerations of social justice. Such offences 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.⁴⁷

⁴⁷ Rawls, *A Theory of Justice*, 114–15.

In short, the moral obligations that *D* breaches when he commits a violent offence against another person are obligations owed to his fellow human beings, as individuals, rather than to the government or to society generally. We can recognize the special sanctity of life and physical and sexual integrity, and therefore the wrongfulness of murder, assault, and rape, without presupposing any developed institutional structure.⁴⁸

Should it matter which class the victim of *D*'s crime is a member of? Perhaps if *V* was also disadvantaged, we might think that *D* would be guilty of exploiting *V*'s vulnerability and that *D*'s act would therefore be more wrongful than it otherwise would be.⁴⁹ On the other hand, if *V* was a member of the ruling class that was responsible for *D*'s unjust impoverishment or social disadvantage, it is hard to see why *D*'s act should be regarded as any less wrongful than in a case in which *V* was neither disadvantaged nor specially advantaged. There is nothing about unjustly advantaged *V*'s complicity in *D*'s impoverishment or disenfranchisement, wrongful as it is, that would invalidate *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.

3.4 Offences against public order and the administration of justice

Imagine now that the offence committed by *D* is a non-violent offence 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 offences, 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 offences is complex; I have dealt with them at length elsewhere.⁵⁰ At one level, such offences seem directed primarily at the government, or at the polity on whose behalf the government claims to act; at another level, they are directed at individual victims. An offender who commits perjury or obstruction, for example, not only undermines the integrity of the judicial process but might

⁴⁸ Regarding this point, Antony Duff has asked me what we should say about a legal system that 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 offence, one lacking the 'natural duty' background of rape defined as intercourse without the *victim's* consent.

⁴⁹ I have previously considered the exploitative character of crimes against the vulnerable in SP Green, 'Looting, Law, and Lawlessness' (2007) 81 *Tulane Law Review* 1129, 1147.

⁵⁰ SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford: Oxford University Press, 2006).

also cause significant harm to a litigant whose cause is damaged by false testimony or destruction of documents. 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, might, depending on its precise context and purpose, mitigate, or even negate, the wrongfulness of his offence against the administration of justice. For example, a bribe paid by a disenfranchised citizen to a corrupt dictator in order to avoid the implementation of an ecologically damaging and unwarranted agricultural policy might lack culpability in a way that a bribe paid by the same citizen to the same dictator for the purpose of avoiding conscription in what was otherwise a just war might not. Unlike murder, assault, and rape, which involve a violation of natural duties, bribery, obstruction of justice, and perjury are precisely the sorts of offence 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.

Our judgment of *D*'s blameworthiness may also be affected by the circumstances of his victim. If *D* committed perjury or obstruction of justice in litigation against a member of the ruling elite who was in part responsible for creating a process that systematically favoured people of his own class, we might think that *D* would do nothing wrong in trying to 'level the playing field' through his unlawful acts. Our judgment would be likely to differ, however, if *D* committed perjury or obstruction in litigation against a similarly disempowered fellow citizen. Even though neither *D* nor his disadvantaged victim would be part of the web of political obligations that, I have argued, underlies the crime of perjury and obstruction, *D* would nevertheless have derived some benefit from that web, if only temporarily, and he would have done so at the expense of a victim who was even more disempowered than he. As such, we should regard his act as a wrongful one.

The fact that *D* has been denied the right to *own property*, by contrast, seems to bear less directly on his culpability for such offences than his being denied the right to participate in the political process or receive basic protections from the state. 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. (Though one can also 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 levelling the playing field. Perhaps in such cases his impoverishment could be said to mitigate the blameworthiness of his act.)

3.5 Offences against property

Finally, let us imagine that the crime *D* commits is not a violent offence against another's physical well-being, or an offence against public order or the administration of justice, but is instead an offence against another's rights in property, such as theft or fraud or criminal trespass.⁵¹ How should we judge his blameworthiness for these offences, 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 had by other citizens?

Here we need to examine the moral content that underlies crimes against property.⁵² The essence of property offences is that they involve an offender's (wrongfully) causing harm to another's interests in, and rights to, property.⁵³ 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.⁵⁴ Control may take various forms, 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.⁵⁵

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'.⁵⁶ Such conduct is harmful because it undermines the very reasons we have a system of property in the first place—namely, to facilitate

⁵¹ 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 K Gustafson, 'The Criminalization of Poverty' (2009) 99 *J Criminal Law & Criminology* 643.

⁵² This topic is dealt with in far more detail in my forthcoming book, tentatively titled *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age*.

⁵³ Historically, this has not always been the case. As George Fletcher has argued, at early common law, the law of larceny was intended primarily to protect society from manifest breaches of the peace, rather than to protect owners' property rights per se. See GP Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown 1978) 31–9.

⁵⁴ For a useful discussion, see JW Singer, *Introduction to Property* (2nd edn; New York: Aspen, 2005) 2–3.

⁵⁵ Tony Honoré divides what he calls the 'liberal concept of 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. AM Honoré, 'Ownership,' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 107, 112–24.

⁵⁶ With the possible, and interesting, exception of morals, offences such as prostitution and consensual bigamy, and perhaps a few other unusual offences such as animal cruelty, and possibly certain crimes against the environment, *all* crimes are crimes affecting persons' rights and interests—whether in their property or physical safety, in public order, in the family, or elsewhere.

the creation and preservation of wealth that makes many forms of human endeavour possible.

On the continuum of offences described by Rawls, ranging from pure or nearly pure ‘natural duty’ offences like murder and rape, at one end, to pure or nearly pure ‘political obligation’ offences like obstruction of justice 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 behaviour.⁵⁷ Whether it is wrong to violate a given law against theft, and whether it is therefore just to be subjected 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 violent-crimes-against-the-person paradigm we considered earlier because the set of norms on which the two kinds of offence are based are different. As 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 subjected 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 institution are, *prima facie*, morally binding. Murder, assault and rape are always moral wrongs. Theft is morally wrong only when this justice threshold is attained.⁵⁸

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 chapter. For the moment, however, 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 that *D* was not morally blameworthy for stealing property from *V*, where *D* was unjustly barred from owning property, and *V* helped create or perpetuate the conditions that caused *D*’s unjust impoverishment.⁵⁹

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

⁵⁷ For a useful discussion, see CM Rose, ‘The Moral Sense of Property’ (2007) 48 *William & Mary L Rev* 1897, 1899.

⁵⁸ JW Harris, *Property and Justice* (Oxford: Oxford University Press, 1996) 14.

⁵⁹ Compare with Tadros, ‘Poverty and Criminal Responsibility’, 392 (suggesting that a 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’).

who are themselves unjustly impoverished.⁶⁰ (This supposes, 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 was enacted against a background of property laws that treated *D* fairly, the law would simply not be binding on *D*, and his stealing would not be wrong. This approach seems inconsistent, however, with our intuition that the impoverished victim would have had what few rights he possessed violated, and that it would be *D* who was 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* had done a blameworthy act. Such theftuous conduct would still undermine the system of property of which *D* was in some sense a beneficiary.

4 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 ever-widening gap in our society between the haves and have-nots. 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, or even spell out, all of these hypothetical cases, but rather to suggest the complexity of the problem and the error of thinking that there is a one-size-fits-all solution.

⁶⁰ In fact, as noted above, a disproportionate percentage of the victims of property crimes in the US are 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, eg, D Larsson, ‘Exposure to Property Crime as a Consequence of Poverty’ (2006) 7 *J Scandinavian Studies in Criminology and Crime Prevention* 45 (two reasons why poor people are more exposed to property crime than those who are not poor are that they live in neighbourhoods with more crime and that they have fewer opportunities to keep their property safe from crime).

By stipulating 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. Vast segments of the world's population are habitually denied basic opportunities to obtain property, participate in the political life of their communities, and enjoy the protection of the state; and while we certainly cannot assume that every such deprivation is the result of injustice, it seems likely that many are.

Few societies in history have distributed wealth equitably, but the current disparity between rich and poor within the US and elsewhere seems particularly gross. The gap between the haves and have-nots is now greater than at any time since 1929, and it continues to grow.⁶¹ In 1980, the poorest 20 per cent of families in the US earned 4.2 per cent of aggregate income, while the richest fifth received 44.1 per cent; by 2008, the share of the poorest 20 per cent had dropped to 3.4 per cent, while the richest fifth's share had risen to 50 per cent.⁶² The sheer breadth of poverty is staggering. According to Census Bureau statistics, there were 43.6 million people living in poverty in the United States during 2009, up from 39.8 million the year before.⁶³ This represents a poverty rate of 14.3 per cent in 2009, up from 13.2 per cent in 2008 and the highest rate since 1997.⁶⁴ According to US Department of Agriculture figures, the 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 1995.⁶⁵

⁶¹ EN Wolff, *Top Heavy: A Study of the Increasing Inequality of Wealth in America and What Can Be Done About It* (2nd edn; New York: New Press, 2002) 2.

⁶² See C DeNavas-Walt, BD Proctor, and JC Smith, *Income, Poverty, and Health Insurance Coverage* (Washington: US Government Printing Office, 2009), Table A3 at 45–6, online at <<http://www.census.gov/prod/2010pubs/p60-238.pdf>>. See also T Piketty and E Saez, 'Income Inequality in the United States, 1913–1998' (2003) 118 *QJ Economics* 1.

⁶³ DeNavas-Walt, *ibid* 13. Social scientists have traditionally distinguished between two different senses of poverty—'absolute' and 'relative'. See eg A Sen, 'Poor, Relatively Speaking' (1983) 35 *Oxford Economic Papers* 153. 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. See European Anti-Poverty Network, *Poverty and Inequality in the European Union*, online at <<http://www.poverty.org.uk/summary/eapn.shtml>>. 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 fall 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'. Council of the European Union, *Joint Report by the Commission and the Council on Social Inclusion 8* (2004) online at <http://ec.europa.eu/employment_social/soc-prot/soc-incl/final_joint_inclusion_report_2003_en.pdf>.

⁶⁴ DeNavas-Walt, Proctor, and Smith, *Income, Poverty, and Health Insurance Coverage*, 13.

⁶⁵ See M Nord, M Andrews, and S Carlson, US Department of Agriculture Economic Research Services, *Household Food Security in the United States, 2008, Economic Research Report No 83*, 8, online at <<http://www.ers.usda.gov/Publications/Err83/>>. The figure was 49.1 million Americans, an

Viewed globally, the gap between rich and poor is even more dramatic: According to the most recent report of the World Institute for Development Economics Research, the richest 1 per cent of adults alone owned 40 per cent of global assets in the year 2000, in contrast to the bottom *half* of the world's adult population, which owned barely 1 per cent of global wealth.⁶⁶ And a recent report from the office of the UN's Secretary-General estimates that, as a result of the global economic recession, up to 90 million additional people have been pushed into poverty.

There are also vast numbers of people throughout the world who lack fundamental political rights and basic protection by the state. Determining exactly who is denied political rights is a complex process that involves potentially subjective judgments, but various attempts have been made. One is the annual survey conducted by Freedom House, an independent, non-governmental watchdog organization that supports the promotion of democracy and human rights around the world.⁶⁷ Applying basic standards derived from the Universal Declaration of Human Rights, the survey looks at the extent to which people around the world are denied the right to vote freely for distinct alternatives in legitimate elections, compete for public office, join political parties and organizations, elect representatives who are accountable to the electorate, and enjoy freedoms of expression, belief, association, and organization. Of the 193 countries surveyed, the study determined that 89 qualified as 'free', 62 as 'partly free', and 42 as 'not free', suggesting that a substantial percentage of the world's population is denied basic political and human rights.⁶⁸ As for the denial of basic protections by the state, groups such as Human Rights Watch have compiled a body of reports that, taken as a whole, suggest that many millions of people in numerous countries around the globe receive inadequate state

increase of approximately 13 million over the year before. Ibid at 6. 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. Ibid at 4–5.

⁶⁶ JB Davies et al, United Nations University, *The World Distribution of Household Wealth, Discussion Paper No 2008/03*, at 7 (Feb 2008), online at <http://www.wider.unu.edu/publications/working-papers/discussion-papers/2008/en_GB/dp2008-03/_files/78918010772127840/default/dp2008-03.pdf>.

⁶⁷ Freedom House, *Freedom in the World Survey 2009*, online at <<http://www.freedomhouse.org/template.cfm?page=21&year=2009>>.

⁶⁸ Ibid. 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 political and economic system arguably approaches that contained in the hypothetical 'worst cases' described in the text. See generally I Urbina, 'Taint of Corruption is No Barrier to US Visa' (Nov 16, 2009) *NY Times*, online at <[http://www.nytimes.com/2009/11/17/us/17visa.html?_r=1&sq=africa corruption poverty&st=cse&adxnnl=1&scp=1&adxnnlx=1258917716-aZzo8YcKMDy/qU5W4PJbeA](http://www.nytimes.com/2009/11/17/us/17visa.html?_r=1&sq=africa%20corruption%20poverty&st=cse&adxnnl=1&scp=1&adxnnlx=1258917716-aZzo8YcKMDy/qU5W4PJbeA)> (extensive corruption in Equatorial Guinea by Teodoro Nguema Obiang, forest and agricultural minister and son of president); B Bearak, 'Living Royally in Destitute Swaziland' (6 Sept 2008) *NY Times* A1 (king of Swaziland spends excessively while two-thirds of country lives in poverty and corruption bleeds treasury); CW Dugger, 'Ex-Zambian Leader's High Life Awaits a Verdict' (22 June 2009) *NY Times* A4 (Frederick Chiluba, former president of Zambia, on trial for stealing about \$500,000).

protection from terrorism, domestic violence, torture, police brutality, and other forms of violence.⁶⁹

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, who have essentially no voice in the political life of their country, or who lack basic protections by the state, together with the possibility that some of this deprivation, in at least some places in the world, is the result of unjust political or economic systems, the potential seriousness of the problem begins to emerge. By imposing criminal sanctions on arguably blameless offenders, we run the risk of compounding the sins of socio-economic injustice with those of retributive injustice.

⁶⁹ Eg, Human Rights Watch, *Reconciled to Violence: State Failure to Stop Domestic Abuse and Abduction of Women in Kyrgyzstan* (26 Sept 2006), <<http://www.hrw.org/en/reports/2006/09/26/reconciled-violence-o>>; Human Rights Watch, *Honoring the Killers: Justice Denied For "Honor" Crimes in Jordan* (19 April 2004), <<http://www.hrw.org/en/reports/2004/04/19/honoring-killers-o>>; Human Rights Watch, *Lethal Force: Police Violence and Public Security in Rio de Janeiro and São Paulo* (8 Dec 2009), <<http://www.hrw.org/en/reports/2009/12/08/lethal-force-o>>; Human Rights Watch, 'Rest in Pieces': *Police Torture and Deaths in Custody in Nigeria* (27 July 2005), <<http://www.hrw.org/en/reports/2005/07/26/rest-pieces-o>>; Human Rights Watch, *'Lives Destroyed': Attacks on Civilians in the Philippines* (30 July 2007), <<http://www.hrw.org/en/reports/2007/07/30/lives-destroyed>>.