CRIMINAL RESPONSIBILITY, SOCIAL RESPONSIBILITY, AND ANGRY YOUNG MEN: REFLECTIONS OF A FEMINIST CRIMINAL DEFENSE LAWYER

ABBE SMITH*

I
SHORT STORIES AND COURT STORIES

A. A Crime of Passion

The story could be told in two ways:

On May 12, 1988, a man with a single-gauge shotgun stalked two women he did not know. He followed the two women for three and a half circuitous miles on the Appalachian Trial in central Pennsylvania, until

* Deputy Director and Clinical Instructor, Criminal Justice Institute, Harvard Law School. B.A. 1978, Yale University; J.D. 1982, New York University School of Law. I am grateful to Richard Delgado, Sally Greenberg, Randy Hertz, Jean Hess, Wendy Kaminer, Eva Nilsen, Steve Wizner, and Ellen Yaroshefsky for their helpful suggestions. I also wish to acknowledge the Law and Society Association Annual Meeting, May 1993; the Association of American Law Schools Annual Meeting, Clinical Section Program, January 1994; and the Frontiers of Legal Thought Conference, Duke University School of Law, January 1994, for providing me with opportunities to present this paper.

they stopped by a secluded stream, set up camp, and made love outside their tent. Hidden from view, the man watched. When the women had finished their lovemaking, the man loaded his gun, aimed, and fired. He hit one of the women in the arm. He emptied, loaded, aimed, and fired again, this time hitting her in the neck. He fired again and again and again, loading and emptying each time, hitting her in the other side of her neck, her face, her head. The second woman, as yet unharmed, led the way for cover. As she fled, the man shot her in the head and back, killing her. The first woman, shot five times, managed to escape the attacker and survive.[1]

After the shooting, the man broke down his rifle, put it in a plastic garbage bag, and buried it in the ground, along with the knit cap he was wearing. Then he fled. He managed to elude capture for nearly two weeks by hiding on a Mennonite farm until a posse of armed police officers arrested him.

The other version of the story is longer:

It begins with a boy who was never really parented, was sexually abused at an early age, and had problems at school—perhaps a result of a serious, undiagnosed learning disability. His story continues as a troubled adolescent who was ridiculed by his peers and left home. He perceived himself as being constantly rejected by women, including his mother, who "may have been involved in a lesbian relationship."[2] He made his way to Florida, where he was imprisoned for theft. In prison, he was sexually assaulted and became increasingly isolated from human contact.

At the time he spotted the two women on the Appalachian Trail, he was living mostly by himself in the woods of the Michaux State Forest, in central Pennsylvania.[3] He had never before committed a violent offense; there was nothing in his previous behavior to suggest he would kill. A combination of extraordinary factors, all happening at once, caused him to do what he did. Suddenly, he could bear neither his past nor his present life; the physical and emotional deprivation was too great. Seeing the women lovers in a passionate embrace triggered in him a rage born of immeasurable loss.

He did not mean to do it. He couldn't help it.

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1. *See* Claudia Brenner, *Survivor's Story: Eight Bullets, in* GREGORY M. HEREK & KEVIN T. BERRILL, HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 11 (1992).

2. Commonwealth v. Carr, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990).

3. *See id. See also* Mark Fazlollah, *Hermit is Guilty of Killing Hiker*, PHILA. INQUIRER, Oct. 28, 1988, at B1 ("Carr, who police said had been living in a cave and in holes in the woods outside Gettysburg, had been dubbed by the local press as the 'mountain man' of Adams County.").

The above stories come from the case of *Commonwealth v. Carr*,[4] in which I played the unusual role of attorney for the surviving victim, Claudia Brenner.[5] In that role, I preferred the first version of the story: this was a cold-blooded, premeditated murder motivated by bigotry, not some psychosexual disorder. Committing a hate crime[6] of the worst sort, the defendant, Stephen Roy Carr, killed one person and tried to kill another simply because of their sexual orientation.

At trial, the defendant intended to claim that he was "provoked" to kill by his observations of the women's lovemaking. This claim is appalling for a host of reasons: the women were engaged in lawful behavior,[7] they did not know the defendant, and they had never done him any harm. They had no idea the defendant was watching them, and they were doing what many lovers have done on the remote, heavily wooded outposts on the Appalachian Trail. Moreover, the defendant put himself at the scene: evidence revealed that after first encountering the lovers, the defendant followed them for miles, engaging in "spying" and "voyeurism."[8] As the trial judge noted, "[After the] first glance of what [the defendant] contends [was] evil [and provocative,] . . . he eagerly pursued it for a better view."[9] This sequence of events does not constitute provocation.

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4. 580 A.2d 1362 (Pa. Super. Ct. 1990).

5. Victims are increasingly retaining lawyers, especially in high profile cases involving sex. Recent examples include Nicole Brown Simpson's family in the O. J. Simpson murder trial, *see* Adam Pertman, *Judge Allows Accusations that Simpson Was Abusive*, BOSTON GLOBE, Jan. 19, 1995, at 1 (referring to the "impassioned plea" by Gloria Allred, a lawyer for the Brown family, that family members of the victims remain in the courtroom during trial); William Clairborne, *Simpson Jurors to Hear Evidence of Prior Abuse*, WASH. POST, Jan 19, 1995, at A1 ("Gloria Allred, a lawyer for the Brown family told [Judge] Ito that excluding family members would 'dehumanize and depersonalize' Nicole Simpson . . . ."); Jennifer Levin's family in the prosecution of Robert Chambers for her murder (the "Preppie Murder Case"), *see* Timothy Clifford & Marianne Arneberg, *Trial Ends as Chambers Takes Plea; Expects 5-15-Year Sentence*, N.Y. NEWSDAY, Mar. 26, 1988, at 3; Patricia Bowman in the William Kennedy Smith rape trial, *see* State v. Globe Communications Corp., 622 So. 2d 1066 (Fla. Dist. Ct. App. 1993); and Desiree Washington in the Mike Tyson rape trial, *see* Tyson v. Indiana, 626 N.E.2d 482 (Ind. Ct. App. 1993). *See generally* Ellen Yaroshefsky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 145-46 (examining the tension between victims' rights and zealous advocacy on behalf of defendants); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 84-87 (1977) (stating that providing counsel to victims empowers them and protects their rights). The story of my representation of Claudia Brenner appears in Abbe Smith, *Where Angels Fear to Tread: On Representing a Victim of Crime, in* WAR STORIES (Gary Bellow & Martha Minow eds., forthcoming 1995).

6. *See generally* GREGORY M. HEREK & KEVIN T. BERRILL, HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN (1992). *See also* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2196 (1993) (upholding state statute that enhanced penalty schemes for hate crimes).

7. *See* Commonwealth v. Bonadio, 415 A.2d 47, 51 (Pa. 1980) (finding statute that prohibited consensual sexual intercourse *per os* or *per anus* between persons who are not husband and wife facially unconstitutional on Equal Protection grounds).

8. Commonwealth v. Carr, No. CC-385-88, slip op. at 13 (Pa. C.P. Adams County Apr. 3, 1989) (unpublished opinion on post-verdict motions).

9. *Id.*

As victim's counsel, I convinced the prosecutor to move *in limine* to prevent the defense from arguing that the defendant was provoked by the women's sexual relationship. Since the sight of two women engaged in lovemaking is not "an event which is sufficient to cause a reasonable person to become so impassioned as to be incapable of cool reflection,"[10] evidence of lesbian sexuality was irrelevant and would only serve to inflame and distract the jury.

At the hearing on this motion, defense counsel argued that the defendant should be allowed to introduce evidence of his personal, psychological, and sexual history to support the claim of provocation.[11] The judge granted the prosecution's motion.[12]

But what about the second version? Now that the defendant is serving a life sentence, and my role has evolved gradually from representation to reflection,[13] I have mixed feelings. The second version was never heard. Not by a jury. Not by a judge. Maybe not fully by defense counsel. What if Stephen Roy Carr, someone who had no record of violence before he came upon the two unsuspecting women, shot them in a fit of passion beyond his understanding and out of his control? What if, notwithstanding the evidence that suggests otherwise, he really didn't mean it? What if he couldn't help himself? The judge who presided over the trial and ruled against the admission of evidence on provocation responded to these questions:

> Defendant's argument that he was provoked by sexual conduct must be judged, not by what he considers reasonable, but by the law. There may be little or no doubt his murderous impulses were stimulated by what he saw. The question is, does the law give recognition to this reaction?[14]

The judge's answer was no,[15] Carr must be held responsible for his actions.

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10. *Carr*, 580 A.2d at 1364 (stating the legal definition of provocation).

11. *See* Commonwealth v. Carr, No. CC-385-88, slip op. at 3-4 (Pa. C.P. Adams County Apr. 3, 1989) (unpublished opinion on post-verdict motions). Defense counsel argued in pretrial hearings, "We are prepared to present testimony that Stephen Carr ha[d] been sexually abused as he was growing up by a neighbor of his. We are willing to present evidence that Stephen Carr ha[d] been sexually abused by a male in the prison system down in Florida. We are prepared to present evidence that Stephen Carr's mother may be involved in a lesbian relationship. We are . . . prepared to present evidence that Stephen Carr ha[d] been . . . ridiculed [at] school. We are prepared to present evidence that what happened on the afternoon of May 13, 1988 affected Steve's . . . ability to reason, and pushed him over the edge and provoked him to [do] the act which [is] alleged. . . ." *Id.*

12. The ruling was affirmed by the Pennsylvania Superior Court. *Carr*, 580 A.2d at 1365.

13. I have moved from being a full-time practicing criminal lawyer and occasional law professor to being a clinical teacher, a vocation which exalts "reflection" and other forms of soul-searching.

14. *Carr*, No. CC-385-88, slip op. at 13.

15. *Id.* at 16.

B. A Crime of Self-Defense

The story could be told in two ways:

On June 3, 1985, a woman, in the company of three men, lured her estranged husband from his work place to a remote boat ramp in Chicopee, Massachusetts, where the three young men beat him to death with baseball bats. After the beating, the four drove off, went to a shopping mall, and then hung out in the woman's apartment drinking beer. Later, the woman had sex with one of the men.

The second version of the story is longer:

It begins with a young girl whose parents were both alcoholics and whose father had trouble keeping a job. The father would go into unpredictable rages, especially when he drank. Usually, he vented his rage upon his wife, beating her with his hands, his fists, and his feet. Later, his daughter became a target of his violent tantrums. There was never a good reason for the beatings: sometimes the daughter forgot to feed the dog; sometimes she didn't close the cupboard; sometimes she didn't respond quickly enough when he called; sometimes the father didn't like the look on her face.[16]

The young girl wore the conditions of her life for the world to see: black eyes, swollen bruises on her face and arms, chunks of hair pulled from her head.[17] Her father's belt left open welts on her body, and his hand left swollen imprints on her face.[18]

When the father was alone with his daughter, the abuse became sexual. The father put his hands all over his daughter's seven-year-old body, touched her undeveloped breasts, and put his fingers in her vagina.[19] He made her tell him she loved him. Soon, the sexual abuse included rape.[20] Too young to understand what was happening to her or how to make it stop, the girl would grab her mother's legs when her mother went to work, leaving the girl alone with her father.[21]

The girl was first kicked out of the family trailer home when she was ten years old; she left for good at age twelve.[22] She became involved with a much older man, who promised her protection, but became possessive and

16. *See* Petition for Commutation at 2, Commonwealth v. Grimshaw, 590 N.E.2d 681 (Mass. 1992) [hereinafter Petition for Commutation, *Grimshaw*]. For examples of child abuse poignantly depicted in recent fiction, *see generally* DOROTHY ALLISON, BASTARD OUT OF CAROLINA (1992); JANE SMILEY, A THOUSAND ACRES (1991).

17. Petition for Commutation, *Grimshaw*, *supra* note 16, at 5.

18. *Id. See also* OPINION OF THE ADVISORY BOARD OF PARDONS OF THE COMMONWEALTH OF MASSACHUSETTS, IN THE MATTER OF LISA BECKER GRIMSHAW, PETITIONER FOR COMMUTATION 6 (June 10, 1993) [hereinafter OPINION OF THE ADVISORY BOARD, GRIMSHAW].

19. Petition for Commutation, *Grimshaw*, *supra* note 16, at 4.

20. *Id.* at 2.

21. *Id.* at 5.

22. *Id.* at 5-6. *See also* OPINION OF THE ADVISORY BOARD, GRIMSHAW, *supra* note 18, at 6.

violent. She sought refuge with another man who outdid his predecessors: he seemed determined either to kill or permanently disfigure the young woman, who was getting old fast. He punched her repeatedly in the face, knocked her teeth out, and beat her face against the floor. "No man is going to have you," he told her.[23]

The abuse escalated. The young woman tried to leave the relationship. She moved in with a friend. She moved in with her sister. Each time, the man would beg her to return, would promise things would be different. The young woman would give in.[24]

When she got pregnant, she married the man, hoping to achieve her fantasy of a "normal" family life.[25] But things got worse. The man often became enraged. On one occasion, the man drew a knife and threatened to "cut the baby out of [his wife's] stomach."[26] He raped her anally. He literally ripped her clothes off when she tried to leave the apartment to go to work.[27] Physical and sexual abuse became inseparable. He held a pan of boiling water over his wife's head and threatened to pour it on her face unless she performed oral sex on him. He handcuffed her while she slept and raped her, vaginally and anally, when she awoke. Afterward, he left her chained to the bed, bleeding.[28]

The woman tried to end the abuse by placating the man, telling family and friends, calling the police, filing restraining orders, going to court, and moving out.[29] When nothing seemed to make him stop, she tried to end the relationship. She filed for divorce[30] and rented her own place to live.[31]

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23. Petition for Commutation, *Grimshaw*, *supra* note 16, at 8.

24. *Id.*

25. *Id.* at 8-9. *See also* OPINION OF THE ADVISORY BOARD, GRIMSHAW, *supra* note 18, at 7 (" '[I] discovered that I was pregnant, and I married Tommy. I wanted my child to belong to a family.' ").

26. Petition for Commutation, *Grimshaw*, *supra* note 16, at 9. *See also* OPINION OF THE ADVISORY BOARD, GRIMSHAW, *supra* note 18, at 8.

27. Petition for Commutation, *Grimshaw*, *supra* note 16, at 9-10. *See also* OPINION OF THE ADVISORY BOARD, GRIMSHAW, *supra* note 18, at 7.

28. Petition for Commutation, *Grimshaw*, *supra* note 16, at 7. *See also* OPINION OF THE ADVISORY BOARD, GRIMSHAW, *supra* note 18, at 7.

29. Petition for Commutation, *Grimshaw*, *supra* note 16, at 12-13. *See also* OPINION OF THE ADVISORY BOARD, GRIMSHAW, *supra* note 18, at 8 n.13 ("Ms. Grimshaw filed for divorce on December 8, 1982. According to a copy of a Criminal Complaint, Mr. Grimshaw broke into Ms. Grimshaw's apartment on November 21, 1984. Approximately 11 hours after this incident, Ms. Grimshaw went to Springfield District Court to file for a restraining order. Ms. Grimshaw stated in her affidavit in support of the restraining order that she and her son [were] in fear of their lives. The emergency order was granted on November 21, 1984 and the order was then extended from November 26, 1984 to November 20, 1985.").

30. Petition for Commutation, *Grimshaw*, *supra* note 16, at 12 (stating that divorce papers cited "cruel and abusive treatment"). *See also* OPINION OF THE ADVISORY BOARD, GRIMSHAW, *supra* note 18, at 8 (describing measures Ms. Grimshaw took to leave her husband).

31. Petition for Commutation, Grimshaw, *supra* note 16, at 12.

But the man didn't stop. He stalked his estranged wife, following her to and from work. He manipulated his son into letting him into the apartment. When he couldn't gain entry any other way, the man broke in. The woman had to change the locks on the doors several times.[32]

Once, when the police failed to respond to the wife's call for help, she started to nail her windows shut. Her husband broke through the door, grabbed the hammer his wife was using, and struck her on the face and mouth, knocking her teeth out. Blood was everywhere.[33]

When it became clear his wife still wouldn't return to him, he threatened to kill her.[34]

When three young men befriended her and offered help, she accepted. Enough is enough, they said; this guy ought to be taught a lesson. Maybe if we give him a taste of his own medicine, he will leave you alone, they told her. You've tried everything, nothing has worked, you have nothing to lose, they reasoned. You lead him to us and we'll knock some sense into him, they said. They grabbed a couple of baseball bats on the way out.

The plan was to beat the husband, not to kill him, but the men got carried away. The woman had just wanted to make her husband stop. She had wanted to stop the beatings and the threats to her life. She meant to defend herself. She meant to protect herself and her child. Things got out of control. She didn't mean for him to die.

The above stories come from the case of *Commonwealth v. Grimshaw*.[35] I became involved in the case after trial, when I represented Ms. Grimshaw for the purpose of obtaining clemency.

At trial, much of the second story was heard by the jury. In contrast to the judge's ruling in the Appalachian Trail case, the judge here ruled that the "law [does] give recognition to [the defendant's] reaction."[36] In addition to the testimony of the defendant and several friends and neighbors, the judge allowed expert testimony on battered women's syndrome. The jury acquitted Ms. Grimshaw of murder, convicting her instead of the lesser crime of manslaughter.[37]

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32. *Id.* at 13.

33. *Id.* at 14-15. *See also* OPINION OF THE ADVISORY BOARD, GRIMSHAW, *supra* note 18, at 8 (detailing measures taken before and after the incident).

34. Petition for Commutation, Grimshaw, *supra* note 16, at 15.

35. 590 N.E.2d 681 (Mass. 1992).

36. *Carr*, No. CC-385-88, slip op. at 13. *But see Grimshaw*, 590 N.E.2d at 682 n.1 ("The issue whether the judge properly allowed the admission of expert testimony on the battered woman syndrome is not before this court. Whether such evidence is admissible in Massachusetts has yet to be decided. . . . Therefore, we take no position on the matter at this time.").

37. *See Grimshaw*, 590 N.E.2d at 686 (noting that "this case involved a battered woman syndrome defense, which the jury probably accepted in the light of their verdict of manslaughter. . . .").

Implicitly rejecting the jury's comparatively sympathetic verdict, the judge sentenced Ms. Grimshaw to fifteen to twenty years, close to the maximum prescribed for manslaughter—a hefty sentence for a first offender under these circumstances.[38] The evidence of Ms. Grimshaw's background and of the history of abuse she suffered at the hands of the decedent seemed to mean something to the jury, but not to the judge. Although he allowed the evidence to be heard at trial, he didn't seem to like what he heard. Sure, she'd had a tough life, but she had taken the law into her own hands. She had deliberately lured her husband to his death; she must be held responsible for her actions.

C. A Crime of Despair

The story could be told in two ways:

In the winter of 1986, a young mother was at home with her two-year-old child late in the evening.[39] As she lay on the sofa watching television, a teenager, whom the mother knew from the neighborhood, entered the house through a window. He grabbed the woman, held a knife to her throat, and brutally raped her, over and over again. At some point, the woman's child awakened and emerged from her room to see what was wrong. The teenager grabbed the child, began to sexually assault her, apparently changed his mind, and tossed the child back in her room. He then resumed raping the mother.

The teenager said nothing throughout the incident. His face was fixed in a cold, emotionless stare. When he finished raping the woman, he went to her refrigerator, took out a beer, and drank it.

The other version of the story is longer:

The story starts with a baby born to a poverty-stricken, drug-addicted mother who lives here and there. She is not sure who the father of her child is; she is not even sure what day it is. She soon hooks up with another drug addict who becomes her boyfriend. Together they spend their time getting high and assaulting the baby. One or both of them stub out cigarettes on the baby. One or both of them put objects in the baby's anus. The boyfriend puts his penis in the baby's anus. The Department of Social Services finds the baby, age two, in an abandoned apartment with scars all over his body in varying degrees of healing. There is no way of knowing exactly what had been done to the baby and by whom, since everything happened before he could talk.[40]

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38. *See* Mass. Gen. Laws Ann. ch. 265, § 13 (West 1990). *But see Grimshaw*, 590 N.E.2d at 686 ("The sentence imposed was within the maximum authorized by the Legislature . . . and we find no argument of constitutional dimension within the defendant's claim that the judge acted with undue severity.").

39. I am not citing this case for reasons that will become apparent.

40. For a remarkably similar story, *see* Don Terry, *Drug Raid Uncovers 19 Children in Squalid Chicago Apartment*, N.Y. TIMES, Feb. 3, 1994, at A14 ("[O]ne of the children, a 4-year-old boy remained in the hospital today as doctors and the police continued to examine

The baby is taken from the mother and placed in foster care, where he continues to be sexually and physically abused. Meanwhile, his mother receives treatment in a drug rehabilitation program and comes out clean. The baby, now a child, is returned to his mother. Soon there is another boyfriend, more drugs, another child. This new boyfriend inflicts more abuse on the child. The mother endures abuse as well. Eventually someone discovers the situation. The child is again placed in foster care, as is his younger brother.

The child is troubled: he seems both starved for love and angry when it is offered. He has never committed any acts of juvenile delinquency and has never been in any real trouble at the time he rapes his neighbor. He is fourteen years old.

I represented this teenager at his rape trial when I was an attorney at the Defender Association of Philadelphia. I will not cite the case in order to protect lawyer-client confidentiality and the privacy of my client, whom I will call Leroy Williams.

Leroy was a fourteen-year-old African-American who seemed much younger. He liked to draw the cartoon characters he saw on Saturday morning television. Though he had never been in a juvenile jail before, he did not seem unhappy to be at the Youth Study Center.[41] He liked to please people. He developed good, nurturing relationships with several social workers and correction officers at the Center.

He loved it when I came to visit. He showed me his pictures. He introduced me to his new "friends," the staff at the Center. The only thing he didn't like to talk about was the case. He admitted that he had done it, but he couldn't say much more. He didn't know why he had raped; the lady was nice and he never wanted to hurt her. He knew now it was a bad thing. He was ashamed.

The case had been transferred to adult criminal court by a judge who was later successfully challenged for being biased.[42] Partly as a result of this challenge, the case never went to trial. If it had, I certainly would have challenged the transfer decision on the grounds that the transfer criteria had not been met.[43] I might have tried to introduce evidence of Leroy's

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what appeared to be cuts, bruises, belt marks and cigarette burns up and down his body."). *See also Frontline: Who Killed Adam Mann?* (PBS Boston affiliate WGBH television broadcasts, Dec. 3, 1991 & June 1, 1993).

41. The juvenile jail in Philadelphia is called the Youth Study Center, one of my favorite criminal justice euphemisms.

42. In the Interest of Anthony McFall, 617 A.2d 707 (1992).

43. In Pennsylvania, the Commonwealth must not only make out a prima facie case that the child committed a felony, but also show reasonable grounds to believe that the child will not be amenable to treatment, rehabilitation, or supervision as a juvenile. *See* 42 PA. CONS. STAT. § 6355 (1994). Leroy's young age, his lack of a prior record, his openness to those who would offer treatment, the failure of the system to provide treatment in the past, and the fact that the crime at issue was more the product of serious family problems—and

background to demonstrate his inability to form criminal intent.[44] Though the practice is currently in disfavor, I might also have tried to introduce Leroy's background to establish diminished capacity.[45] It is doubtful that a judge would have allowed a jury to hear the evidence, however, since the law does not recognize a defense based on deprivation *simpliciter*.[46]

In the past, this type of information might have been presented at sentencing instead of at trial, though many judges would have flatly rejected an argument that a defendant's miserable background should mitigate punishment.[47] But now, even for those judges who might otherwise have considered it,[48] sentencing guidelines and mandatory minimum sentences have effectively rendered such evidence irrelevant.[49]

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resulting psychological problems—than criminality strongly militated against his transfer to adult criminal court.

44. *See* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9, 9, 27 (1985) (arguing that the criminal law ought to recognize a defense of severe environmental deprivation to mitigate culpability). Obviously, my client and I would have had to make a tactical choice about the defense we would present before offering such evidence. If the defense was that the defendant didn't do it, evidence of his own prior sexual abuse would not be terribly helpful.

45. *See, e.g.*, Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 861-65 (1977) (assessing the partial criminal defenses of diminished responsibility and diminished capacity and recommending the abolition of all but the "strict" variant of the *mens rea* model). *But see* Joshua Dressler, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953, 960 (1984) (arguing that a humane legal system that allows for differential punishment relating to gradations of *mens rea* requires mitigation for psychological factors).

46. Delgado, *supra* note 44, at 9. *See also* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 133 (1968) (explaining that deprivation of the kind associated with urban poverty may restrict the individual's capacity to exercise free will, but the law regards this as too remote to excuse the person from wrongdoing).

47. For one of the most powerful literary pleas on behalf of those who commit crime out of misery and desperation, *see* VICTOR M. HUGO, LES MISERABLES (Charles Wilbour trans., Halcyon House 1947) (1862).

48. *See* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993) (noting that, traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining sentences); Jane Okrashinski, *Atlanta Roundtable: Views From the Bench*, 1 FED. SENTENCING REP. 321 (1988) (discussing the way in which social background is taken into account in sentencing). *But see* Michele H. Kalstein, Kirstie A. McCornock & Seth A. Rosenthal, *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575, 649 n.345 (1992) ("Despite the [Federal Sentencing] Guidelines, some judges continue to cite a less well-situated offender's background as a reason for giving that offender a *harsher* sentence, on the theory that that offender is more likely to commit future crimes.") (emphasis added).

49. Kalstein, McCornock & Rosenthal, *supra* note 48, at 604.

> [Federal Sentencing] Guidelines effectively forbid the court to consider the personal characteristics of the defendant . . . and focus instead on the offense and the defendant's role in the offense . . . . [N]one of the following individual traits are relevant to sentencing determinations: age, education, vocational skills, mental and emotional conditions, physical conditions, previous employment, family and community ties, race, sex, religion, socioeconomic status and prior good works.

D. Which Story is Heard

Prosecutors like the terse first stories. They are presented as prosecution opening statements at trial.[50] The only question is whether they can prove beyond a reasonable doubt that the defendant committed the act charged. Prosecutors are not interested in defendants' sob stories. Instead, they want to stick to the "facts,"[51] which are told by victims and law enforcement agents, rather than defendants. The current fixation on "context" in legal scholarship has no place at trial.[52]

Judges seem to prefer the shorter story, too. They are in a hurry to dispose of cases, and they don't like expert witnesses, psychologists, or mental-state defenses. They hate "novel defenses"[53] even more because of the media attention they attract. Allowing a social scientist to testify in a criminal case is worse than allowing a mental health professional to testify;

See also Wendy Kaminer, *Can Someone Be a Victim and Still Be Guilty?*, S.F. EXAMINER, Jan. 21, 1994, at D1.

> [E]xcuses seem less like evasions of accountability if they're considered in passing sentence rather than in determining guilt. . . . The problem, however, is that in recent years, judges' authority to determine sentences has been severely limited. In many cases, particularly in federal courts, sentences are set not by judges but by mandatory minimum sentencing laws or guidelines. In these cases, if mitigating factors are not considered by juries when they determine innocence or guilt, they will not be considered at all.

50. For a probing discussion of the different stories defense lawyers and prosecutors tell in closing arguments, see Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 58 (1992).

> [A] trial lawyer has great latitude in choosing what story s/he will tell and how s/he will tell it even when . . . arguing a relatively uncomplicated case. Although the lawyer's range of choice is circumscribed by the evidence, by the substantive law, by procedural rules, and by the stock scripts that shape everybody's notions of what a closing argument should look like, lawyers nonetheless retain the power to construct widely diverse tales beneath a superficial semblance of sameness and conventionality.

51. *See id.* at 61 (describing the prosecutor's account of the facts of a case "as a series of historical acts that indisputably occurred [leaving] only the actor's motivation to be considered . . . .").

52. *See, e.g.*, Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1620 (1990) ("A contextualist casts doubt on the possibility of sovereign reason, removed from historical situations, and even questions any idea of individuality that assumes an ahistorical human core."). *See also* Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 143-44 (1993) (describing the teaching of law students in a clinical context as transforming their critical analysis of legal institutions into a strategy for a particular case); Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991) (arguing that one effect of conceptual and contextual criticism is the destruction of the "sense of inevitability of legal outcomes and interpretations").

53. George P. Fletcher, *Convicting the Victim*, N.Y. TIMES, Feb. 7, 1994, at A17. *See also* Dianna Marder, *Defendants Test Limits in Making Excuses*, PHILA. INQUIRER, Feb. 13, 1994, at D1 (exploring the phenomenon of "new" and "not [so] new" defenses, in cases such as that of Lorena Bobbitt, who severed her husband's penis after he allegedly raped her; the Menendez brothers, who killed their parents after years of alleged sexual abuse; and Ellie Nesler, who killed a man accused of molesting her son).

in the judge's view, at least mental health professionals draw on their own experience with patients.[54]

Many judges like to keep the trials short and the sentences long. When I was a public defender in Philadelphia, a judge was famous for remarking that he didn't understand why trials should take so long when the crimes alleged usually took no more than a couple of minutes.

Defense lawyers, on the other hand, like the second, longer stories. They are presented in defense opening statements. When a prosecution opening statement suggests that a case is open-and-shut, simple, or sure, the defense immediately responds that the case is far more complicated and uncertain than the prosecutor has suggested.[55]

Prosecutors and most judges like to focus on the act; defense lawyers like to focus on the actor.[56] If the prosecutor likes a snapshot of the event, the defense lawyer prefers a home movie, beginning with the defendant's childhood.

Defense lawyers like context. Often, the context in which a seemingly simple event took place reveals that it wasn't so simple.[57] They like to point out the context of a witness' identification: the opportunity to observe, the conditions under which the observations took place, the ability to describe the perpetrator, the ability at a later date to recall what happened

54. *See, e.g.*, Junda Woo, *Urban Trauma Mitigates Guilt, Defenders Say*, WALL ST. J., Apr. 27, 1993, at B1 (reporting the testimony of James Garbarino, an expert on child violence, that an 18-year-old Milwaukee woman suffered from "urban psychosis," which reduced her responsibility for her crime).

55. *See* Amsterdam & Hertz, *supra* note 50, at 74-75 ("While the prosecutor recounts an historical chronicle, defense counsel incants a narrative of rediscovery."). *But see id.* at 63 (describing a defense closing not as a story, but rather a series of "mini-stories" or "vignettes," which "have neither the familiar form of narratives . . . nor the Aristotelian benchmarks of a narrative . . . nor the structure that has been found to characterize even short and humble narratives").

56. *See, e.g.*, LISA J. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 143 (1987):

> [I] could see myself as a defendant. Sometimes you get angry enough at somebody to take a swing at them—if you had a gun, to take a shot at them. I could see myself doing that. . . . Just because somebody was arrested and charged with a crime doesn't mean they are some kind of evil person."

57. *See* Amsterdam & Hertz, *supra* note 50, at 75-77 (noting that the defense counsel seeks to engage the jury in an imaginative dialogue and in the "creation of meaning," while the prosecutor seeks to avoid dialogue, suppress imagination, and stick with "the facts"); *Nightline: Is Abuse an Excuse?* (ABC television broadcast, Feb. 4, 1994) (Past President of the National Assoc. of Criminal Defense Lawyers, Jeffrey Weiner, commented on the evidence of abuse in the trials of Lorena Bobbitt and of Erik and Lyle Menendez: "The jurors should consider everything, not consider a case with blinders on in a vacuum.").

On the other hand, defense lawyers do not always appreciate context when it reveals prior crimes of defendants, explanations of inconsistent testimony by rape complainants, and victim impact statements. *See* Kim L. Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 145 (1992) (arguing that women who have been victims of sexual violence are discredited in court when they fail to present a crisp, chronological, and consistent account of what happened to them, notwithstanding the complex nature of sexual abuse).

on the date of the incident. Similarly, they tend to point out the context of a witness' point of view: the witness' relationship to the defendant, the witness' role in the incident, the witness' overall credibility.[58]

If the entire home movie can't be shown at trial, how does a court determine, in a principled way, which evidence is allowed and which is not? How should a jury determine who is criminally responsible and who is not? In a time when "everybody, because they're born, suffers from post-traumatic stress disorder,"[59] are we going too far? Novel defenses seem to be cropping up everywhere: urban psychosis,[60] steroid-induced psychosis,[61] anti-abortion psychosis,[62] a variety of cultural defenses,[63] "homosexual

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58. *See generally* Amsterdam & Hertz, *supra* note 50, at 110:

> Notwithstanding their complete agreement about the events before, during, and after the shooting... the [prosecutor and defense lawyer] told completely different stories, with completely different plots, completely different themes, completely different narrative structures.... Despite their acceptance of the same legal and logical canons—or perhaps because of it—they created different worlds that gave those canons different meanings.

59. Woo, *supra* note 54, at B1, B7 (quoting Karil S. Klingbeil, Professor of Social Work and Psychology at the University of Washington, who often testifies about battered-woman, battered-child and battered-person syndromes). *See generally* Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1415 (1993) (discussing the "flood of contemporary claims of victim status"); ALAN DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994) (criticizing the defenses raised in a number of highly-publicized cases—an odd endeavor for a criminal defense lawyer).

60. Woo, *supra* note 54, at B1, B7 (referring to a mental condition caused by the trauma of inner-city life). *See also* Rogers Worthington, *"Urban Psychosis" Rejected as Slaying Defense*, CHI. TRIB., Nov. 5, 1992, at 8 (reporting that a jury took less than three hours to reject the "unique defense of 'urban psychosis' " and find 18-year-old Felicia Morgan—whose violent upbringing included rape at a young age by a landlord, physical abuse at the hands of her mother and grandparents, her mother shooting her boyfriend in her presence, and the slayings of several relatives and friends—guilty of murdering another teenage girl and robbing her of a patchwork leather coat); *Dateline NBC: Urban Survival* (NBC television broadcast, Oct. 19, 1994) (reporting about the assertion of an "urban survival defense" in a Texas homicide prosecution).

61. *See* Gary Oakes, *"Thug" Gets 8 1/2 Years for Slaying over Drugs*, TORONTO STAR, Mar. 19, 1991, at A18 (reporting that a 310-pound bouncer who killed a man over a drug debt claimed that his protracted use of steroids resulted in "steroid psychosis"); Jane E. Brody, *Personal Health: Keeping on the Alert for Abnormal Behavior Caused by Reactions to Drugs*, N.Y. TIMES, June 14, 1990, at B12 (reporting that "[a]ggression, mania, depression and psychosis have occurred in otherwise normal body-builders who use anabolic steroids...."); Rob Stein, *Athletes Tell of Mental Havoc from Steroids*, L.A. TIMES, June 28, 1987, at 3 (reporting Harvard Medical School professor Dr. Harrison G. Pope's finding that athletes who use anabolic steroids may hear imaginary voices, hallucinate, and experience violent mood swings, calling the reaction "body builder's psychosis").

62. *See* Larry Rohter, *Trial to Start in Abortion Doctor's Death*, N.Y. TIMES, Feb. 21, 1994, at A11 (reporting that Michael F. Griffin, accused of killing Dr. David Gunn outside a Florida abortion clinic on March 10, 1993, will claim that he was "turned into a killer by constant exposure to a barrage of anti-abortion literature, videos, and sermons that produced hallucinations and delusions."). *But see* Larry Rohter, *Man Guilty of Murder in Death of Abortion Doctor*, N.Y. TIMES, March 7, 1994, at A15 (reporting Griffith's murder conviction).

63. *See generally* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) (tracing the history of shaming as punishment and weighing its limitations and effectiveness); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L.

panic,"[64] and post office post-traumatic stress.[65] A recent addition to the list is the "Falling Down"[66] syndrome, which seems only to afflict "middle-aged men who crack under financial and emotional pressure."[67]

Some novel defenses are not so novel anymore, such as post-traumatic stress disorder, especially as it relates to Vietnam veterans,[68] and battered women's syndrome raised in conjunction with self-defense.[69] Some

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REV. 1293 (1986) (examining how cultural defenses are developed and what role they should play in the criminal justice system); Julia P. Sams, *The Availability of the "Cultural Defense" As an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986) (reviewing problems associated with recognizing cultural defenses); John C. Lyman, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87 (1986) (concluding that the cultural defense is not a viable substantive doctrine in American criminal law); Rorie Sherman, *Double Standard?: "Cultural" Defenses Draw Fire*, NAT'L L.J., Apr. 17, 1989, at 3 ("The decision to give a Chinese immigrant five years' probation for the beating death of his wife has sparked a furor in New York about the use of 'cultural defenses' in criminal law.").

64. *See Carr*, 580 A.2d at 1364 (rejecting homosexual panic as a defense to murder). *See also* Note, *Developments: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1542 ("Homosexual panic is premised on the theory that a person with latent homosexual tendencies will have an extreme and uncontrollably violent reaction when confronted with a homosexual proposition.").

65. *See Postal Study Aims to Spot Violence-Prone Workers*, N.Y. TIMES, July 2, 1993, at A9 ("Faced with 34 deaths resulting from a wave of shootings within its ranks over the last 10 years, the Postal Service is conducting an extensive study to determine what type of employee is most prone to violence."); Peter T. Kilborn, *Inside Post Offices, the Mail Is Only Part of the Pressure*, N.Y. TIMES, May 17, 1993, at A1 ("[P]ostal workers say their tensions fester within an archaic, Army-like environment in which many top managers communicate by directive and front-line supervisors often hover over their charges, waiting for a mistake and timing workers' trips to the bathroom."); Felicity Barringer, *Postal Officials Examine System After Two Killings: Hostility on Job Is Cited As Fostering Violence*, N.Y. TIMES, May 8, 1993, at A7 ("[S]ome psychologists described much of postal work today as a treadmill of angry monotony, with labor-management hostility making many post offices mine fields of carefully nurtured grievances.").

66. The term comes from the 1993 movie by the same name. *See* FALLING DOWN (Warner Brothers 1992).

67. *See Victims of Chance in Deadly Rampage*, N.Y. TIMES, July 7, 1993, at A10 (describing a shooting spree in a San Francisco law firm by a 55-year-old mortgage broker and real estate speculator who, angry about investment advice he had received, killed eight people and injured several others before taking his own life). This defense may actually be a latter-day version of the "Twinkie Defense," *see infra* note 70. Although they call it a syndrome, it looks more like a tantrum.

68. *See, e.g.*, C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C. L. REV. 305, 306 (1984) (noting the increased attention that post-traumatic stress disorder is receiving in the legal community). Post-traumatic stress disorder has also been called "Vietnam Veterans' Defense." *See* Justin W. Schulz, *Trauma, Crime and the Affirmative Defense*, 11 COLO. LAW. 2401, 2403 (1982) (discussing the characteristics of post-traumatic stress disorder and potential approaches to developing an affirmative defense based on the disorder); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 123 n.61 (1990) (discussing post-traumatic stress disorder defenses raised by women defendants).

69. *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 421 (1991) (noting that an overwhelming number of jurisdictions now have evidentiary rules admitting social and individual context evidence offered by battered women claiming self-defense); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 137 (1985) (commenting on the new legal stereotype of the "battered woman");

defenses have been so discredited that few defendants would raise them anymore.[70]

I have mixed feelings. No doubt my ambivalence is borne of conflicting perspectives: I am a feminist criminal defense lawyer[71] who teaches and practices criminal law. I am a sometime-scholar who likes to connect practice and theory. I am a clinical teacher who wants her students to be both zealous and thoughtful. I am someone who admires creativity in criminal court and life.

All of these defenses taken together make me wonder whether anyone is *ever* responsible anymore and whether anyone ever makes choices, takes the heat for those choices, learns something from the process, and makes different choices next time.

But I also wonder whether we as a society have ever really taken responsibility for the sorry state of things. Urban devastation, violence, fear, and hopelessness are increasingly a part of this nation's landscape. For many, the American Dream has been replaced by the American Nightmare,[72] yet, like pedestrians who dodge the outstretched hands of the

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Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 645-46 (1980) (commenting on the use of expert testimony concerning battered women); Abigail Trafford, *Why Battered Women Kill: Self-Defense, Not Revenge, Is Often the Motive*, WASH. POST, Feb. 26, 1991, (Magazine), at A6 (commenting on the growing movement in many states to re-examine murder cases resulting from domestic violence).

70. Two examples are the "Twinkie defense," raised by San Francisco ex-supervisor Dan White in his 1978 murder trial for killing Supervisor Harvey Milk and Mayor George Masconi, in which White claimed diminished mental capacity triggered by junk foods; and "premenstrual syndrome," in which women claim that premenstrual hormones cause less self-control and greater irritability. *See* John Taylor, *Don't Blame Me! The New Culture of Victimization*, N.Y. MAG., June 3, 1991, at 26, 28-29 (commenting on the growing culture of victimization in America); *Nightline*, *supra* note 57; Blake Freetwood, *From the People Who Brought You the Twinkie Defense: The Rise of the Expert Witness Industry*, WASH. MONTHLY, June 1987, at 33, 36 (commenting on the use of expert witnesses on the infamous "Twinkie Defense" case); Elizabeth Holtzman, *Premenstrual Symptoms: No Legal Defense*, 60 ST. JOHN'S L. REV. 712, 715-16 (1986) (noting the absence of any well-defined condition which can be called "premenstrual syndrome"). *But see* Alan Dershowitz, *The PMS Defense: Feminist Setback*, BOSTON HERALD, June 24, 1991, at 23 (discussing successful defense of premenstrual syndrome to charges of drunk driving and assaulting a police officer).

71. *See* Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1 (1993).

72. ELLIOTT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 11 (1993). *See also id.* at 9-35 (describing the American drug problem, the misguided "War on Drugs," and the resulting massive incarceration of minority youth); JAMES GARBARINO, NANCY DUBROW, KATHLEEN KOSTELNY & CAROLE PARDO, CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE xi-xiv, 1-21 (1992) (examining the significance of community violence in the lives of children); ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (1991) (recounting two years in the lives of two young African-American brothers in the Henry Horner Homes in Chicago).

homeless on crowded city streets, barely breaking stride, we continue to avoid our worsening social problems.[73]

The causes of crime are not so mysterious.[74] The roots usually take hold during childhood. Hundreds of thousands of children in America's cities are surrounded by violence: domestic violence, street violence, and violence at the hands of the police. For many children, membership in a street gang, many of which engage in violence, provides economic advancement, social order, and a sense of family.[75]

In this article, I attempt to distinguish between individual and social responsibility for crime through the admission at trial of evidence of a defendant's personal history. The distinctions I propose are not hard and fast. Determinations about admissibility of evidence must necessarily be made on a case-by-case basis, with enormous discretion retained by the trial judge. These determinations turn on questions of relevance, a highly value-laden evidentiary concept.[76] My aim is to provide guidance for and

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73. *See* Jason DeParle, *Report to Clinton Sees Vast Extent of Homelessness*, N.Y. TIMES, Feb. 17, 1994, at A1:

> [R]epublican Administrations had said that about 600,000 Americans were homeless on any given night, with the majority suffering from drugs, drink or mental illness. The [Clinton] Administration's report, by contrast, endorses recent estimates that as many as seven million Americans were homeless at some point in the late 1980's.... [I]t also argues that poverty, racism and past budget cuts are pushing many families into the ranks of the dispossessed.

See also CHRISTOPHER JARICKS, THE HOMELESS (1994) (examining homelessness in America, the social and political factors underlying homelessness, and strategies to reduce it); URBAN BUSH WOMEN, SHELTER (a dance/theater work about homelessness, produced in Boston, Massachusetts by Dance Umbrella, February 19, 1994).

74. *See generally* ELLIOTT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE (1985) (identifying family violence, the loss of community, and social inequality as the chief causes of crime).

75. *See* GARBARINO, DUBROW, KOSTELNY & PARDO, *supra* note 72, at xi.

76. Consider, for example, the evolution of law as it relates to the admissibility of the sexual history of rape complainants. Prior to the enactment of rape shield laws, judges routinely allowed evidence of a complainant's sexual past and reputation to be introduced as probative of a defendant's guilt. Then, in the mid-1970s, largely as a result of the women's movement, courts began to regard a woman's sexual history as having less to do with whether a defendant committed rape and more to do with sexism in law. However, the 1992 Glen Ridge rape case, in which four young men charged with sexually assaulting a mildly retarded 17-year-old girl were allowed to introduce evidence that she had consensually performed sex acts in the past, illustrated that the debate over the relevance of this sort of evidence is not over. *See* Tamar Lewin, *Rape and the Accuser: A Debate Still Rages On Citing Sexual Past*, N.Y. TIMES, Feb. 12, 1993, at B16 ("Despite the proliferation of the state laws [prohibiting the use of an accuser's sexual history or reputation as evidence in rape cases] . . . a debate is still simmering over when a man charged with rape should be able to tell the jury about the sexual past of the woman accusing him."). *See generally* SUSAN ESTRICH, REAL RAPE 47-48 (1987) (discussing the courts' treatment of victims' sexual histories under the common law and the minimal impact of many modern statutes); *McCormick on Evidence*, §§ 184-185 (John W. Strong ed., 4th ed. 1992) (discussing the concept of probative value with respect to relevant evidence); Berger, *supra* note 5, at 69-100 (explaining traditional approaches to admission of sexual history evidence and proposing a model rape shield statute); David Haxton, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1220 (1985) (suggesting that rape shield

raise questions about the recurring issue of responsibility in criminal trials.[77]

This article was born of a number of competing pulls. I worry as I write that I may not practice what I am about to preach. Law professors and judges, not defense lawyers, are obsessed with line-drawing. When I represent a client accused of a crime, I do whatever I can to win—or at least to cut my client's losses. I believe strongly that this is what criminal defense lawyers must do.[78] My assessment of what is good for the law may be not so good for a particular client.

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statutes may unconstitutionally exclude relevant evidence, and that standard rules of evidence fully protect complainants when properly applied).

77. Note, for example, the recent criminal trials of Lorena Bobbitt and Lyle and Erik Menendez, during which extensive information about the history of abuse of the defendants was introduced at trial. *See Nightline*, *supra* note 57 (addressing the "abuse excuse" in the Bobbitt trial, the Menendez trial, battered women's self-defense cases, and other criminal trials); Kaminer, *supra* note 49, at D1 (arguing that there ought to be a difference between claims of personal misfortune by Bobbitt and the Menendez brothers and assertions of innocence); David Margolick, *Lorena Bobbitt Acquitted in Mutilation*, N.Y. TIMES, Jan. 22, 1994, at A1 (reporting that the jury found Bobbitt not guilty by reason of temporary insanity for severing her husband's penis, after hearing evidence about the abusive history of the relationship); *Violence and the Bobbitts*, N.Y. TIMES, Jan. 22, 1994, at A14 ("According to her own witnesses, she is a pitiable woman of limited, childlike intelligence who endured years of abuse and finally struck back."); Seth Mydans, *Menendez Trials' Collapse Discourages Both Sides*, N.Y. TIMES, Jan. 30, 1994, at A16 (citing Lyle Menendez's "tearful, emotionally compelling testimony" about his history of abuse as critical to jurors believing that he killed his parents in self-defense); Seth Mydans, *Jury Stymied in Brother's Trial*, N.Y. TIMES, Jan. 26, 1994, at A13 (reporting that both brothers "admitted to the slayings but testified that they had acted in self-defense").

Though some suggest there is something unusual, novel, and "unruly" about the results in a number of recent, highly publicized cases, *see* George P. Fletcher, *Convicting the Victim*, N.Y. TIMES, Feb. 7, 1994, at A17, my view is that there is nothing new about defendants using their personal history to mitigate guilt. Clarence Darrow earned his reputation as a brilliant trial lawyer by doing just that. *See, e.g.*, ATTORNEY FOR THE DAMNED 16-88 (Arthur Weinberg ed., 1989) (1957) (Darrow's closing argument in the murder trial of Richard Loeb and Nathan Leopold); *Nightline*, *supra* note 57 (Lisa Kemler, Lorena Bobbitt's attorney arguing that Ms. Bobbitt's defense was not novel but was instead a "classic form of insanity defense"); Leonard Bernstein & Stephen Sondheim, *Gee, Officer Krupke! on* WEST SIDE STORY: ORIGINAL SOUNDTRACK RECORDING (Columbia Records 1960) (1957) (poking fun at the idea that juvenile delinquents are "sociologically sick" through the voice of one young gang member, who announces, "Hey, I'm depraved on account of I'm deprived!").

78. *See* STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 145-46 (American Bar Ass'n Tentative Draft 1970) (stating that the primary duty of the criminal defense lawyer is to be her client's "champion" against a "hostile world"); *cf.* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1707-22 (1993) (questioning traditional notions of zealous criminal defense advocacy). *But see* DERSHOWITZ, *supra* note 59, at 42 (arguing that certain criminal defenses ought not be allowed).

II
THE CONTEXT OF THE STORIES

A. The Immediate Context: A Hostile Criminal System

> At about noon, the jury went out to begin its deliberations. They had an hour off for lunch, another hour to smoke and get comfortable in the jury room. It took them about an hour and a half more to reach a verdict. . . . Their verdict was guilty as charged on all three counts, but with a recommendation of mercy, or life imprisonment.
>
> Life? . . . It would have been more merciful to shoot me down on the spot.
>
> —Rubin "Hurricane" Carter, *The Sixteenth Round: From Number 1 Contender to # 45472*[79]

> I look at the T.V.
> Your America's doing well
> I look out the window
> My America's catching hell. . . .
> I change the channel
> Your America's doing fine
> I read the headlines
> My America's doing time.
>
> —Living Colour, *Which Way to America*[80]

More and more, the trial is the crucial moment in the adversarial process. While the criminal defense attorney must raise constitutional issues, litigate pretrial motions, and preserve trial errors for appeal, it is foolish to look for salvation in these proceedings. These days, criminal lawyers must tell it to a jury, sometimes fighting like hell to get the evidence past the judge.

Recently, the *New York Times* displayed a startling—and seemingly startled—front page headline: *High Court Defines One Error by Judges It Will Not Tolerate.*[81] The editor who penned the headline may have been genuinely surprised that the Rehnquist Court would overturn a criminal conviction (indeed, a murder conviction) because of an improper jury instruction. For the first time in years, the United States Supreme Court held that a mistaken jury instruction was not merely harmless error, even if the mistake itself did not cause the guilty verdict.[82]

79. RUBIN "HURRICANE" CARTER, THE SIXTEENTH ROUND: FROM NUMBER 1 CONTENDER TO # 45472, 307 (Penguin Books 1991) (1974).

80. LIVING COLOUR, *Which Way to America, on* VIVID (CBS Records 1988).

81. Linda Greenhouse, N.Y. TIMES, June 2, 1993, at A1.

82. *Id. See* Sullivan v. Louisiana, 113 S. Ct. 2078, 2082 (1993) (holding that a constitutionally deficient reasonable doubt instruction required reversal of conviction).

It is not incidental that the case, *Sullivan v. Louisiana*,[83] involved a mistaken instruction on proof beyond a reasonable doubt, the standard of proof in every criminal case.[84] The *Sullivan* Court acknowledged the reasonable doubt standard as follows:

> [T]he essential connection to a "beyond-a-reasonable-doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. . . . Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly a [structural defect in the constitution of the trial mechanism], the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. . . . The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered."[85]

One had reason to worry that the Court might not necessarily view the reasonable doubt standard as sacred. Since *Chapman v. California*[86] first held that certain constitutional errors would not require reversal of the conviction if the state could show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,"[87] few cases have passed the harmless error threshold.[88]

The *Sullivan* case and its treatment in the press paint an accurate picture of the state of affairs for defendants and criminal law. We celebrate

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83. 113 S. Ct. 2078 (1993).

84. *See In re* Winship, 397 U.S. 358, 364 (1970); Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam); Cage v. Louisiana, 498 U.S. 39, 41 (1990) (per curiam).

85. Sullivan v. Louisiana, 113 S. Ct. 2078, 2082-83 (1993) (quoting Rose v. Clark, 478 U.S. 570, 577 (1986) and Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).

86. 386 U.S. 18 (1967).

87. *Id.* at 24.

88. *See generally* Arizona v. Fulminante, 499 U.S. 279, 280 (1991) (holding that admission of coerced confession may be harmless error); Clemons v. Mississippi, 494 U.S. 738, 756 (1990) (holding that unconstitutionally overbroad jury instructions at the sentencing stage of a capital case were harmless error); Satterwhite v. Texas, 486 U.S. 249, 258 (1988) (holding that harmless error analysis applies to the psychiatric testimony at sentencing stage of a capital case obtained in violation of Sixth Amendment Counsel Clause); Carella v. California, 491 U.S. 263, 266 (1989) (holding that jury instructions containing erroneous conclusive presumptions may be harmless error); Pope v. Illinois, 481 U.S. 497, 503 (1987) (holding that jury instruction misstating element of the offense may be harmless error); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (holding that restriction of defendant's cross-examination in violation of the Confrontation Clause was subject to the harmless error rule); United States v. Hasting, 461 U.S. 499, 512 (1983) (holding that improper comment on defendant's silence at trial, in violation of the Fifth Amendment, was harmless error); Kentucky v. Whorton, 441 U.S. 786, 789-90 (1979) (holding that failure to instruct jury on presumption of innocence may constitute harmless error); Moore v. Illinois, 434 U.S. 220, 232 (1977) (holding that admission of identification evidence in violation of Sixth Amendment may be harmless error); Chambers v. Maroney, 399 U.S. 42, 52-53 (1970) (holding that admission of evidence obtained in violation of the Fourth Amendment was harmless error); Coleman v. Alabama, 399 U.S. 1, 10-11 (1970) (holding that harmless error rule applies to the denial of

the resilience of the reasonable doubt standard because the Court has slowly eroded the sanctuary of constitutional protection elsewhere. The Fourth Amendment[89] and the exclusionary rule[90] seem to stare death in the eye, while the Court has methodically whittled away the Fifth Amendment's protection against double jeopardy[91] and self-incrimination,[92] the Sixth Amendment's right to counsel[93] and right to confrontation,[94] as well as the Eighth Amendment's protections against excessive bail[95] and cruel and unusual sentences.[96]

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counsel at preliminary hearing in violation of Sixth Amendment). *See also* Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 160 (1991) (providing a history of the harmless error rule and why its application to coerced confessions is wrong).

89. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 437 (1991) (holding that there was no seizure when armed police officers boarded an interstate bus, approached a young male without articulable suspicion, asked to see his ticket and identification, and then asked and purportedly received his consent to search his luggage); Minnesota v. Dickerson, 113 S. Ct. 2130, 2132 (1993) (creating a "plain feel" exception to the warrant requirement during a stop-and-frisk for weapons, so that police may conduct a further search if they come upon something that plainly feels like contraband); Linda P. Campbell, *Warrantless Searches Expanded But High Court Also Imposes Strict Rules on Frisking*, CHI. TRI., June 8, 1993, at 13 (reporting on Supreme Court ruling that warrants are not needed to seize drugs found on suspects when frisked but applied "plain feel" exception on how far officers may go in searches for weapons).

90. *See, e.g.*, United States v. Leon, 468 U.S. 897, 677 (1984) (creating "good faith" exception to the exclusionary rule in the context of defective search warrants).

91. Consider, for example, the state and federal prosecutions of the police officers who beat Rodney King. *See* United States v. Koon, 6 F.3d 561, 562 (9th Cir. 1993) (finding no double jeopardy violation in a federal civil rights prosecution for conduct previously prosecuted at the state level). *See also* U.S. v. Dixon, 113 S. Ct. 2849, 2864 (1993) (ruling that a man could be prosecuted for trying to kill his wife after having been held in criminal contempt for violating a court order based on the same conduct); Heath v. Alabama, 474 U.S. 82, 82 (1985) (holding that successive prosecutions under the laws of different states are not barred by the Double Jeopardy Clause).

92. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 280 (1991) (reviewing an erroneous admission of a coerced confession by the harmless error standard).

93. *See generally* David Rudovsky, *The Right to Counsel Under Attack*, 136 U. PA. L. REV. 1965 (1988). *See also* Moran v. Burbine, 475 U.S. 412, 421-34 (1986) (rejecting constitutional challenge to deceptive police interference with attorney's access to client); United States v. Gouveia, 467 U.S. 180, 187 (1984) (rejecting Sixth Amendment challenge to police placing inmates in administrative detention for 19 months without counsel, while government developed murder case against them); United States v. Mandujano, 425 U.S. 564, 581 (1976) (rejecting claim to right to counsel inside grand jury room).

94. *See, e.g.*, United States v. Inadi, 475 U.S. 387, 400 (1986) (holding that the Confrontation Clause does not require a showing of witness unavailability as a condition to admitting out-of-court statements of a nontestifying co-conspirator).

95. *See* United States v. Salerno, 481 U.S. 739, 754 (1987) (upholding constitutionality of pretrial detention provision of Bail Reform Act of 1984 (18 U.S.C. § 3142(e) (Supp. III 1982)).

96. *See* Rummel v. Estelle, 445 U.S. 263, 285 (1980) (upholding sentence of life imprisonment for man convicted of third nonviolent theft offense, the total value of which was less than $250); Hutto v. Davis, 454 U.S. 370, 375 (1982) (upholding forty-year sentence for possession with intent to sell nine ounces of marijuana and sale of three ounces of marijuana); Tison v. Arizona, 481 U.S. 137, 158 (1987) (upholding death sentences for two sons who helped their father escape from prison, during which the father, acting alone, killed

Even innocence is no longer a valid defense. On January 25, 1993, two days after the death of Justice Thurgood Marshall—the Supreme Court Justice who most conscientiously protected the constitutional rights of criminal defendants[97]—the Court denied federal habeas corpus relief to a petitioner who had evidence of actual innocence.[98]

Consistent with the erosion of constitutional protection in court, police on urban streets often act without respect or concern for individual rights and dignity. Rodney King is but one very public example.[99]

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four people). *But see* Helling v. McKinney, 113 S. Ct. 2475, 2481 (1993) (suggesting that Eighth Amendment may be implicated when an inmate is confined with a chain-smoking cellmate). While *McKinney* can be regarded as a refreshing departure from the Court's narrow view of the Eighth Amendment's prohibition against cruel and unusual punishment, the decision may simply be an example of how personal identification influences judicial outcomes. *Compare* Linda Greenhouse, *Court Offers Inmates a Way to Escape Prison Smokers*, N.Y. TIMES, June 19, 1993, at A8 ("[T]he 7-to-2 decision offered a notably generous interpretation of the Eighth Amendment. . . .") *with* James Vicini, *High Court Backs Parochial School Inmate Who Asked for Smoke-free Cell*, BOSTON GLOBE, June 19, 1993, at 3 ("Dissenting from the ruling were Justices Clarence Thomas and Antonin Scalia, both smokers. They said the decision improperly expanded constitutional protection. . . ."). *See also* United States v. Smith, 992 F.2d 327 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 243 (1993) (setting a constitutional limit on the government's power to seize the homes, businesses, and other property of convicted criminals and suspects); United States v. A Parcel of Land, 113 S. Ct. 1126, 1137 (1993) (interpreting a federal drug forfeiture law to provide an exception for "innocent owners" of property purchased with drug money).

The death penalty, arguably the most cruel and unusual punishment of all, is an increasingly popular, yet misguided, political solution to violent crime. *See* Anna Quindlen, *Public and Private: The High Cost of Death*, N.Y. TIMES, Nov. 19, 1994, at 23 (describing plans by the Governor-elect and the legislature of New York to restore the death penalty as "join[ing] a coterie of politicians in 37 states who have answered what they believe is the blood lust of a terrified and angry electorate with the ultimate illusory stop to violent crime"); Elliott Currie, *What's Wrong With the Crime Bill*, NATION, Jan. 31, 1994, at 118 (characterizing the extension of the federal death penalty to 52 crimes as "silly, purely symbolic posturing"); *Weld's Death Penalty Delusion*, BOSTON GLOBE, Feb. 9, 1994, at 14 (decrying Massachusetts Governor William Weld's statements in support of capital punishment—that executions are " 'the only way to ensure that . . . cold-blooded killers do not kill again' "—as "a cruel deception" and "hyperbole").

97. *See, e.g.*, *Bostick v. Florida*, 501 U.S. 429, 440 (Marshall, J., dissenting)("Our nation, we are told, is engaged in a 'war on drugs.' No one disputes that it is the job of law-enforcement officials to devise effective weapons for fighting this war. But the effectiveness of a law-enforcement technique is not proof of its constitutionality.")

98. Herrera v. Collins, 113 S. Ct. 853, 860 (1993) (holding that federal courts do not correct "errors of fact" when reviewing habeas corpus claims absent a constitutional violation in the state criminal proceeding).

99. *See generally* N.A.A.C.P. & CRIMINAL JUSTICE INSTITUTE, BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES (1994). *See also* Sam Howe Verhovek, *Man's Shooting by Texas Police Provokes Anger*, N.Y. TIMES, Feb. 21, 1994, at A10 (reporting a videotaped incident that occurred in Athens, Texas, during which two white police officers shot an unarmed black man in the back in an altercation following a routine traffic stop); ANDREW HACKER, TWO NATIONS 46 (1992) ("When white people hear the cry, 'the police are coming!' for them it almost always means, 'help is on the way.' Black citizens cannot make the same assumption . . . . If you are black and young and a man, the arrival of the police does not usually signify help. . . ."). Reverend Anthony Lee testified in Indianapolis as part of an investigation of police conduct in several American cities:

Sentencing guidelines, mandatory minimum sentences, and sentencing enhancement schemes all have considerably upped the ante for criminal defendants and leave little room for argument about anything other than whether the crime charged was proved.[100] A former chief judge of the Court of Appeals for the Eighth Circuit commented about the federal sentencing guidelines: "They have set such atrocious and unfair statutory minimum sentences that the result is there is often no relationship between the sentence received and the crime involved."[101]

In many ways, there is no meaningful sentencing anymore. Although, traditionally, the criminal system separates the question of guilt (the trial) from the question of appropriate punishment (the sentencing), guilt and punishment are increasingly presented as a package deal.[102] Upon conviction, a judge just plugs in the numbers: the crime is worth one number; the

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> Rodney King and his family . . . are blessed, because had they been in Indianapolis he would have been killed. They kill you here. They don't just beat you. He would have been killed. And his family would have been slapped in the face by giving the officer who shot him an award of valor.

Id. at xxi.

Jeannette Amadeo, a Hispanic woman from Miami, described her feelings about the police: "I have no . . . [respect for the police]. If something was happening to me, I wouldn't want [a] police officer to be called." *Id.* at 133 n.16.

100. *See generally* Gerald F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 AM. CRIM. L. REV. 899 (1992) (arguing that sentencing guidelines institutionalize greater injustice by shifting sentencing power away from a neutral and independent judiciary into the hands of government representatives with political agenda); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (finding federal sentencing guidelines have created excessive uniformity, which lacks flexibility and individual differentiation); Michael H. Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT. REP. 355 (1992) (arguing that guidelines can be fashioned to reduce sentencing disparities but to not routinely require judges to impose sentences they consider unjust); Albert W. Altshuler, *The Failure of the Guidelines Sentencing: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) (arguing that the movement from individualized to aggregated sentences represents a backward step in the search for just criminal punishment); Gerald W. Heaney, *The Reality of Sentencing Guidelines: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991) (recommending that the guidelines and sentencing processes be changed to improve efficiency and fairness).

101. Francis Wilkinson, *Can Janet Reno Bust the War on Drugs?*, ROLLING STONE, June 10, 1993, at 41 (quoting Donald Lay, former chief judge of the Court of Appeals for the Eighth Circuit); *see also* Gene Guerrero, *Beyond the Drug War*, NATION, July 19, 1993, at 115 (quoting federal district court judge Jack Weinstein, one of two New York federal judges who recently refused to preside over any drug cases because of the harsh sentencing guidelines: "Until we can address and deal with the rotten aspects of our society that lead to drug dependence we will not deal effectively with the drug problem."); Honorable Jack B. Weinstein, *The War on Drugs Is Self-Defeating*, N.Y. TIMES, July 8, 1993, at A19 ("As a judge . . . I have become increasingly despondent over the cruelties and self-defeating character of our war on drugs. . . . Is there an overlooked moral dilemma in our penal approach that results, for example, in one in four black males in their 20's being under the control of the criminal justice system?").

102. *See generally* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 1-13, 113-86 (5th ed. 1989) (examining the structure of the criminal justice system and different philosophies of and justifications for punishment).

defendant's criminal history is converted to another number; the presence of weapons adds one more. The once impassioned sentencing argument, during which a lawyer tells the court something about the nature and circumstances of the crime and something about the defendant, has been replaced by mathematical formulas.[103] The newest mathematical model for sentencing comes from baseball. "Three strikes and you're out"—three felony convictions and you serve a life sentence—has become the favorite slogan of the anticrime (and who isn't?) politician.[104]

So we build more and more prisons.[105] The United States now has the highest per capita imprisonment rate in the world, surpassing the former record, held by South Africa.[106] Federal spending on corrections increased

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103. For the best example of criminal defense advocacy at sentencing, *see* ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM 16-88 (Arthur Weinberg ed., 1957) (presenting Darrow's sentencing argument in the *Loeb* and *Leopold* cases).

104. *See* Gwen Ifill, *State of Union Message Has Veto Threat*, N.Y. TIMES, Jan. 26, 1994, at A1 (in his State of the Union address, President Clinton endorsed the anti-crime bill passed by the Senate, which would mandate a life sentence without parole for defendants convicted of a third violent felony); Gwen Ifill, *Clinton Embraces Crime Measure, Ever So Vaguely*, N.Y. TIMES, Feb. 21, 1994, at A13 (" 'Three-strikes-you're-out is a very powerful statement to the American people. . . ,' said Stanley Greenberg, the President's pollster. 'This is not just about putting people behind bars. This is about values.' "); Timothy Egan, *A 3-Strike Law Shows It's Not as Simple as It Seems*, N.Y. TIMES, Feb. 15, 1994, at A1 ("In the fight against violent crime, perhaps no idea is more popular than 'three strikes and you're out'—locking up repeat offenders for life without parole. With 30 states considering some version of this concept, it is proving to be a bipartisan prescription by politicians from President Clinton on down."). A Jeff Danziger cartoon appropriately lampoons the new trend as more about political soundbites than sound criminal justice policy: One Congressperson, gesturing emphatically, says, "OK. Let's get tough on crime! 3 strikes and you're in for life!" The other Congressperson says, "Not tough enough . . . I say 2 strikes and you're in for life!" To which the first responds, "OK . . . 1 strike!" To which the other responds, "*No* strikes!" The first, startled, asks, "What? *No* strikes?" The second answers, "You wanna talk tough or you wanna fool around. . . ." N.Y. TIMES, Feb. 6, 1994, at E4.

The 1994 federal crime bill, with its three-strikes-and-you're out provision, became law in September of 1994. *See* Anthony Lewis, *Abroad at Home: Crime and Politics*, N.Y. TIMES, Sept. 16, 1994, at A31 ("The better known provision of the crime bill, such as 'three strikes you're out,' have their own flaws. How did such a misgotten piece of legislation become law? The answer is simple: politics.").

105. *See* Chris Reidy, *Crime and Punishment: It Costs to Lock 'Em Up But Jailing May Not Pay*, BOSTON GLOBE, June 27, 1993, at 67 (reporting the recent opening of two new jails in Boston and a plan to add 2,500 cells to the Massachusetts prison system); Francis X. Clines, *Prisons Run Out of Cells, Money and Choices*, N.Y. TIMES, May 28, 1993, at B7 (describing the dilemma faced by state lawmakers, judges, and criminal justice officials over tougher sentences, prison overcrowding, and strained budgets). *See also* Russell Baker, *Bullish on Prisons*, N.Y. TIMES, Feb. 1, 1994, at A17 ("Get into plastics," the dreary old grown-up advised Dustin Hoffman in 'The Graduate'. . . . Nowadays if I wanted to point him to a sure-fire growth industry, I'd say, 'Dustin, get into prisons.' The intense political pressure to lock up bad characters forever is going to create business opportunities that most people, including the politicians, have not yet foreseen.").

106. Steven A. Holmes, *Ranks of Inmates Reach One Million in a 2-Decade Rise*, N.Y. TIMES, Oct. 28, 1994, at A1 ("This summer the number of inmates in America topped one million for the first time, the Justice Department said today, releasing a survey that reflected decades of demands for tougher punishments."). *See* MAUER, AMERICANS BEHIND BARS, *infra* note 116, at 3; *see also* Elliott Currie, *What's Wrong With the Crime Bill*, NATION, Jan.

44 percent from 1989-1992, when it reached $2.2 billion a year.[107] While we're building prisons, we're cutting school budgets and laying off teachers.[108] While we're building prisons, we're not even close to providing meaningful drug treatment for those who need it. While we're building prisons, we're cutting social services.[109] Elliot Currie, an enlightened scholar of the criminal justice system, has noted that "jail has become the social service agency of first resort."[110]

Some people seem more targeted for these new prison berths than others.[111] On a given day, 23 percent of African-American men between the ages of twenty and twenty-nine are in prison, in jail, on probation, or on parole.[112] The number of young African-American men under official control (609,690) is greater than the number of African-American men of all ages enrolled in college (436,000).[113] In Massachusetts, although blacks constitute only 5 percent of the population, they make up about 30 percent of the inmates in the state prison system.[114] In New York state, 24,000 African-Americans are incarcerated in penal institutions, while only 23,000 are enrolled in state colleges or universities.[115]

31, 1994, at 118 (criticizing the crime bill's failure to address the extremely high incarceration rate in the United States).

107. Wilkinson, *supra* note 101, at 41.

108. Reidy, *supra* note 105, at 67, 70 (quoting sociologist Richard Jones, who studies criminal justice issues at Marquette University: "We're locking more people up at the same time we're cutting teachers and school budgets, and all with no apparent effect on the crime rate.").

109. *See id.*

110. *Id.* at 70; *see also* CURRIE, *supra* note 72, at 19, 20 (examining American handling of the drug epidemic through punishment, rather than rehabilitation); ELLIOTT CURRIE, DOPE AND TROUBLE: PORTRAITS OF DELINQUENT YOUTH (1991); CURRIE, *supra* note 74 (describing the get-tough-on-crime approach). *See generally* Reidy, *supra* note 105, at 70 (quoting Robert Cordy, chief legal counsel to Governor William Weld of Massachusetts, who summarizes the governor's view toward criminals: "First send them to jail, then help them.").

111. Reidy, *supra* note 105, at 70 (quoting Jerome Miller, director of the National Center on Institutions and Alternatives, who believes that the drug war and related prison and jail construction was "an assault on the black community. . . . No one is arguing about locking up murderers, rapists and muggers. . . . But these aren't the ones peopling the local jails. . . . It's a large number of first-time offenders. . . . Most people are not in for anything serious. They're there for the want of 500 bucks."); *see also* Howard Manly & Zachary Dowdy, *Where Prison is 'A Fact of Life'*, BOSTON GLOBE, July 7, 1993, at 1 (describing life in lower Roxbury, where pawn shops sell a steady quantity of small, inexpensive television sets with earphones, suitable for jail).

112. MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990).

113. *Id.*; *see also* MAUER, AMERICANS BEHIND BARS, *infra* note 116, at 3 (1991) ("Black males in the United States are incarcerated at a rate four times that of black males in South Africa, 3,109 per 100,000, compared to 729 per 100,000.").

114. Manly & Dowdy, *supra* note 111, at 1, 24. In Suffolk County, which includes the city of Boston, blacks account for 60 percent of the prison population. *Id.*

115. James M. Doyle, *"It's the Third World Down There": The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71, 75 n.12 (1992) (quoting from *Harper's Index*, 282 HARPER'S 19 (Feb. 1991)).

Nobody likes crime and nobody likes criminals. That's not new. But the "War on Crime," the "War on Drugs," and the "War on Gangs"[116] have created a painfully uneven tug-of-war, with police, prosecutors, judges, and the public on one side, the defendant and overextended public defender on the other, and the dank dungeon below. These are particularly unfriendly times to be accused of crime.

This is the context. If there is a war out there, it is a war on criminal defendants and, some say, a "war on the Constitution."[117] The stakes are high and getting higher. What more important time is there for truly zealous criminal defense advocacy? What more important time is there for resourcefulness and creativity?

With the current state of criminal justice conduct as a backdrop, I will turn to questions of individual and social responsibility in criminal law.

B. The Broader Context: Individual Responsibility in an Out-of-Control Society

> When you were a chubby-cheeked baby and I stood you upright, supporting most of your weight with my hands but freeing you just enough to let you feel the spring and bounce of strength in your new, rubbery thighs, when you toddled those first few bow-legged, pigeon-toed steps across the kitchen, did the trouble start then? Twenty-odd years later, when you shuffled through the polished corridor of the Fort Collins, Colorado, courthouse dragging the weight of iron chains and fetters, I wanted to give you my hands again, help you make it across the floor again. . . .
>
> —John Edgar Wideman, *Brothers and Keepers*[118]

> Bucky was the only guy I knew who could stay out all night and not be missed. Sometimes he would go out and stay for days and still get home before his mother. Sometimes Bucky would go home and there would be nobody there. . . . [T]he Children's Shelter . . . was a second home to Bucky. He liked it more than his first home. At the Shelter, he always got three meals a day, and three meals beats none any way you look at it.
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> —Claude Brown, *Manchild in the Promised Land*[119]

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116. *See generally* CURRIE, *infra* note 72; MARC MAUER, THE SENTENCING PROJECT, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION, *in* THE SENTENCING PROJECT 9-16 (1991) [hereinafter MAUER, AMERICANS BEHIND BARS].

117. Doyle, *supra* note 115, at 70. ("Mandatory minimums, along with criminal forfeiture laws giving police and prosecutors broad powers to seize defendants' assets, even in lieu of convictions, has led some defense attorneys to refer to the war on drugs as the war on the Constitution.")

118. JOHN EDGAR WIDEMAN, BROTHERS AND KEEPERS 19-20 (1984).

119. CLAUDE BROWN, MANCHILD IN THE PROMISED LAND 32 (1965).

> I guess it's hard to know what options are correct when you're . . . a desperate, disowned teen-ager. You don't want to get hit with hammers anymore but the police and courts won't make it stop and you have no money or family or wise adviser and no escape. But you do have these two friends, see.
>
> —Margery Eagan, *Battered Wife Took Only Way Out & Is Looking for Way Back*[120]

What is the nature of choice? Is everything determined before we arrive at the point of "choice," or do we all enjoy unfettered free will? Must determinism and intentionalism be mutually exclusive? When a child is abused and then becomes an abused or abusive adult, is that person acting out of free will as we know it? What is the nature of individual responsibility when there is less and less freedom? What is the social cost when we lay the blame for crime on individuals who often themselves have been victims of crime, and what is the individual cost when we lay the blame for crime on society?

I think choice lies on a spectrum,[121] and criminal and moral responsibility should reflect where a person falls on that spectrum. It is wrong to evaluate responsibility—criminal, moral, and social—from the point of view of *either* free will *or* determinism, as if they are incompatible and as if the free will/determinism calculus sufficiently answers the responsibility question.

Marion Smiley, in her insightful book *Moral Responsibility and the Boundaries of Community*, argues that we should turn our attention away from the free will/determinism controversy and the question of individual responsibility.[122] Instead, we should focus on the nature of moral

120. Margery Eagan, *Battered Wife Took Only Way Out & Is Looking for Way Back*, BOSTON HERALD, Nov. 17, 1992, at 6.

121. For a similar view of choice, see generally Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093, 2094 (1992) ("It is a mistake to say someone has a choice when he or she does not. Yet it is also a mistake to say someone has no choices when he or she does. . . . [There is] an erroneous view that choice is either all-present or all-absent. Instead, I suggest a more fruitful conception locates human choices within varying degrees of constraints."). I approach the question of free will from the perspective of law and society, not philosophy. Though I've read Foucault, I'd rather watch Truffaut. *See, e.g.*, MICHELE FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1979). *Cf.* LOIS MCNAY, FOUCAULT AND FEMINISM: POWER, GENDER, AND THE SELF (1993). One of the best films ever made about a child's turn to crime is Truffaut's *The 400 Blows*. *See Les Quartre Cents Coups* (Les films du Carross/SEDIF 1959). For another excellent film about children and crime—street urchins in Latin America—*see Pixote* (Embrafilme 1981).

122. *See* MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY: POWER AND ACCOUNTABILITY FROM A PRAGMATIC POINT OF VIEW 4, 17 (1992):

> [There are] two controversial assumptions about the nature of responsibility. One is that individuals are blameworthy not in virtue of a decision on our part that they are worthy of our blame, but in virtue of their having themselves caused that for which they are being held responsible. The other is that responsibility is a fact about individuals—that they caused that for which they are being blamed—rather

responsibility itself.[123] Individual blame has traditionally been at the heart of criminal law, determined largely by a narrow construction of causation: did the accused cause the harm?[124] Broader questions of morality—would it be *right* to hold an individual culpable under all of the facts and circumstances?—have seemed dangerous.[125] Smiley's alternative notion of moral responsibility is rooted in context and has an explicit social and political dimension[126] that I share. We must insure that our assessments of criminal responsibility are not completely disconnected from the context in which people commit crime.

But I think we must also critically examine the nature of choice. And we must admit what we know to be true: all those who come before the law are not situated the same. As we strive toward equality, we should recognize difference[127] and seek, above all, justice. H.L.A. Hart wrote:

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than a judgment that we make about the individual after she has acted. Both assumptions . . . are part of a metaphysical understanding of moral responsibility that locates the source of blameworthiness in an individual's own free will. . . . By . . . zeroing in on . . . free will and determinism, libertarians and determinists alike manage to provide us with several very important insights into the nature of both free will and determinism. But they do not contribute to our understanding of moral responsibility itself. Indeed, they may do just the opposite by associating moral responsibility so closely with free will that we no longer remember what else moral responsibility entails.

123. *Id.* at 17.

124. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.12 (2d ed. 1986).

125. *See* SMILEY, *supra* note 122, at 3. *See also* William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969) (surveying the long history of jury nullification in Anglo-American jurisprudence and the fundamental importance to the protection of liberty of permitting jurors to follow their conscience); Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 166 (1991) (suggesting that "our judicial system would be better served if judges instructed jurors of their true powers."); Honorable Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice?*, 30 AM. CRIM. L. REV. 239, 253 (1993) (examining jury nullification in light of a "society . . . so sick that urgent remedial steps outside the courthouse are needed"); Katherine Bishop, *Diverse Group Wants Juries to Follow Natural Law*, N.Y. TIMES, Sept. 27, 1991, at B16 (describing the Fully Informed Jury Association, an organization that has lobbied several state legislatures to require judges to inform juries of their power to nullify); Seth Mydans, *Claims of Bias Are Coloring 2 Los Angeles Beating Cases*, N.Y. TIMES, July 9, 1993, at B6 (quoting Professor Peter Arenella's suggestion that a defense strategy in the Reginald Denny police brutality case in Los Angeles might be "to foster sufficient anger at prosecutorial charging policies [which favor police officers over black defendants] that some members of the ultimate jury might nullify the law to send a message").

126. *See* SMILEY, *supra* note 122, at ix ("[There are] two rather troublesome aspects of the prevailing view of responsibility. The first [is] its dependence on a notion of free will that probably does not exist. The second [is] its rejection of social and political considerations as irrelevant to responsibility."). *See also id.* at 225-54 (examining "private blame and public accountability").

127. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) (examining how the law treats the differences and boundaries between people); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992) (examining moral accountability in criminal law).

"Justice requires that those who have special difficulties to face in keeping the law which they have broken should be punished less."[128]

Some people have plenty of choices. They are the lucky ones. It is relatively easy for them to keep and obey the law. Some people have very little choice. They are the not-so-lucky ones. Sometimes they break the law.[129]

III
WHEN SHOULD EVIDENCE OF PERSONAL HISTORY BE HEARD?

A. Poverty, Deprivation, and Racism

> What happens to a dream deferred?
> Does it dry up
> like a raisin in the sun?
> Or fester like a sore—
> And then run?
> Does it stink like rotten meat?
> Or crust and sugar over—
> like a syrupy sweet?
> Maybe it just sags
> like a heavy load.
> *Or does it explode?*
>
> —Langston Hughes, *Harlem*[130]

> In one afterschool program in a Chicago public housing development . . . the children played funeral every day for weeks. They would build a casket with blocks and take turns lying in the casket. The children took on roles of preacher, family member, and mourners. They would weep and cry out for the person who died, saying, "Don't take him!"
>
> —James Garbarino, Kathleen Kostelny & Nancy Dubrow, *No Place to Be a Child: Growing Up in a War Zone*[131]

The not-so-lucky include scores of poor urban youth who, when asked where they imagine themselves in five years, answer without emotion or

128. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 24 (1968).

129. For a moving and insightful examination of choice, chance, hardship, and criminal responsibility, *see generally* CURTIS BOK, STAR WORMWOOD (1959) (telling the story of a crime, trial, and execution during the Great Depression and delineating Bok's personal theories of crime, culpability, and justice).

130. LANGSTON HUGHES, *Harlem*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES 426 (1959).

131. JAMES GARBARINO, KATHLEEN KOSTELNY & NANCY DUBROW, NO PLACE TO BE A CHILD: GROWING UP IN A WAR ZONE 149 (1991).

pause: "Dead or in jail."[132] There is no future in the urban ghetto—only decay. Kids grow up amid ancient tenements, housing projects, torched and vacant buildings, and abandoned factories. They get used to seeing other kids in wheelchairs because they were victims of drive-by shootings and gang violence. They know by heart the visiting hours of local jails. They know many kids their own age who have died on the street.[133] They have seen more violence and despair in their tender years than most of us encounter in a lifetime.

In the four years since I began teaching at Harvard Law School's Criminal Justice Institute, at least two of our clients—alleged misdemeanants without extensive criminal records—have been shot to death in their neighborhoods. I know of these two because their stories were reported in the newspaper; who knows how many others have died under less newsworthy circumstances?

Those locked into ghetto life live moment to moment. Fernando, a sixteen-year-old drug dealer and runaway from a juvenile jail, not only agreed to be interviewed by a *New York Times* reporter, but asked that a photographer come, too. He wanted to have his picture in the newspaper. " 'I'd love to have me holding a bundle [of drugs] right there on the front page so the cops can see it,' " he boasted, as his buddies looked on with a "certain admiration."[134] Maybe Fernando didn't realize that publicity might not be a wise move for a fugitive drug dealer, or maybe his cockiness was sensible under the circumstances. "He was living his life according to a common assumption on these streets: There is no future."[135]

In the urban streets, boys are not the only kids without a future. I have had many clients like Jerina Gervais, an eighteen-year-old young woman:

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132. John Tierney, *Children of the Shadows: Fernando, 16, Finds a Sanctuary in Crime*, N.Y. TIMES, Apr. 13, 1993, at A1 (describing the life of Fernando Morales, a 16-year-old drug dealer in Bridgeport, Connecticut). *See generally* GARBARINO, DUBROW, KOSTELNY & PARDO, *supra* note 72 (describing the psychological and physical effects of violence on children); GARBARINO, KOSTELNY & DUBROW, *supra* note 131 (describing the psychological and physical effects of violence on children); KOTLOWITZ, *supra* note 72 (describing the psychological and physical effects of violence on children).

133. *See* Tierney, *supra* note 132, at B6. *See also* GARBARINO, KOSTELNY & DUBROW, *supra* note 131, at 141 ("During one four-month period in 1987 in Detroit, 102 children aged sixteen and younger were shot by other children."); Peter T. Kilborn, *Children of the Shadows: Finding a Way: The Quest of Derrick, 19*, N.Y. TIMES, Apr. 22, 1993, at A1, B10 (describing the struggle for Derrick White to finish his education and provide a better life for himself and his family); KOTLOWITZ, *supra* note 72, at 46-51 (describing the death and burial of "Bird Leg"); ROBERT SAM ANSON, BEST INTENTIONS: THE EDUCATION AND KILLING OF EDMUND PERRY (1987) (recounting the shooting death of Edmund Perry, a Harlem teenager and honor student at Phillips Exeter Academy, by a police officer who alleged that Perry had tried to mug him).

134. Tierney, *supra* note 132, at B6.

135. *Id.*

> Her father, whose heart gave out in a welfare hotel, was a pimp, and his associates were the extended family of her childhood. Her mother, who drops in and out of Jerina's life, is a drug abuser. And the girls she grew up with, but for a few, have babies now. . . .[136]

Jerina "remembers the 'rush' of running from the police and sometimes from gang members' bullets."[137] And Jerina remembers funerals. If people are killed in her neighborhood, she is sure to know them.[138] She is not unique in this regard.[139] These teenagers are the youth of America. They will be this nation's future.

Somewhat surprisingly under the circumstances, there are kids in the projects and in the tenements who *don't* deal drugs and *don't* join gangs and *don't* commit acts of violence. Yet these children rarely reap rewards for their restraint.

Take the Jason Browns of the world. Jason[140] was a client of mine, a seventeen-year-old African-American high school senior. He was a good student, the captain of the high school track team, a teenager who counselled younger kids against gangs and drugs. He was being wooed by several colleges. He had never been in trouble with the law.

On a Saturday night, Jason attended a party at a church, during which a fight broke out. Someone was shot, someone was stabbed. Jason had nothing to do with any of the fighting, and he spilled out of the church along with maybe a hundred others. The crowd became angry when the police arrived and began arresting young people arbitrarily. Some shouted their disapproval; some even threw objects at the police.

Jason played no part in this scene. His parents had taught him to respect and obey police officers. Because the police had told the crowd to disperse, Jason was walking home with two school friends. Suddenly a police officer ordered him to get down on the ground, yelling, "I'll blow your fucking brains out." Though he had never been arrested before, Jason lay down in what he knew to be the spread-eagle position of surrender. The

136. Jane Gross, *Children of the Shadows: Boys and the Street: Tempting Jerina, 18*, N.Y. TIMES, Apr. 15, 1993, at A1, A18.

137. *Id. See also* Bob Herbert, *Killing 'Just for Whatever'*, N.Y. TIMES, Aug. 11, 1993, at A15 ("Young killers don't need much in the way of motives. With guns as easy to come by as Popsicles, and in an atmosphere of ever-weakening moral restraints, large numbers of kids have enthusiastically embraced the concept of blowing away another human being 'just for whatever.' ").

138. Gross, *supra* note 136.

139. *See generally* GARBARINO, KOSTELNY & DUBROW, *supra* note 131. *See also* Bob Hohler, *Classmates' Deaths Take Toll on City's Students*, BOSTON GLOBE, June 28, 1993, at 1 (describing the impact of the violent deaths of 16 Boston public school students in the past year on the "surviving" students); Bob Herbert, *Violence and the Young*, N.Y. TIMES, Aug. 15, 1993, at E15 (citing a study of first and second graders in Washington, D.C., which found that 45 percent of the children said they had witnessed muggings, 31 percent said they had witnessed shootings, and 39 percent said they had seen a dead body).

140. To protect his privacy, I have changed his name.

officer approached him from behind and kicked him hard in the groin, then got on Jason's back and struck him once on the back of the head with a flashlight.

Jason was charged with assault with a deadly weapon and disorderly conduct for throwing stones at a police officer. He denied the charges. He insisted that he did not throw anything at anyone and did not act in any way disorderly.[141]

He went to trial after taking and passing a polygraph exam, which seemed to irritate rather than impress the prosecutor. He refused the prosecutor's offer of pretrial probation instead of prosecution. Although the case was resolved so that Jason walked away without a criminal record, he was not vindicated.[142]

Jason's story illustrates the point about control and choices. Jason made all the right choices. He was a good kid: the party he left had been at a *church.* He left the area when he was told to leave. He got down on the ground when he was told. None of this mattered. A black kid doing everything right got kicked in the balls by both the cops and the courts.

Leroy, the fourteen-year-old rapist,[143] didn't even have a chance to be Jason. He didn't have two good parents who loved him—his parents didn't bother to raise him at all. His earliest life experience was abuse. How much choice or control could Leroy possibly possess under those circumstances?

The relationship of racism, deprivation, and degradation to choice and responsibility has been discussed by several noteworthy thinkers.[144] No matter how scholars resolve the issue, they share a belief in one of the

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141. *See* Abbe Smith, *A Youth's Loss of Faith in the Justice System*, BOSTON GLOBE, Apr. 21, 1993, at 19.

142. At the time of Jason's trial, there was a de novo trial system in Massachusetts, in which a defendant facing misdemeanor charges was allowed a bench trial before proceeding to a jury trial. At the bench trial, the judge found Jason not guilty of assault, but guilty of disorderly conduct. The judge said he had a reasonable doubt about the rock throwing, but since the police officer probably saw Jason in the crowd and the young man probably had contributed to the overall disturbance, a jury probably would find him guilty of something—hence, the judge found him guilty of disorderly conduct. However, because Jason had no record, the judge was willing to withdraw his finding of guilty and continue the case without a finding for nine months. If Jason paid $130 in court costs and stayed out of trouble for those nine months, the case would be dismissed. *See id.* A defendant cannot appeal to the jury session from a "continuance without a finding." Mass. Ann. Laws ch. 276A, § 6 (Law. Co-op. 1994)

143. *See supra* notes 40-49 and accompanying text.

144. *See generally* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976) (arguing for expanding the types of excuses recognized by the criminal law and asserting that environmental factors limit the exercise of an individual's free will so that a defendant from a disadvantaged background may not be reasonably expected to "conform his behavior to the demands of the law," and thus cannot be truly responsible for his criminal act) [hereinafter Bazelon, *The Morality of the Criminal Law*]; Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976) (challenging Bazelon's model of criminal behavior and suggesting instead that while certain individuals may face greater pressures to commit crimes, the choice remains a free one, so

theoretical foundations of the criminal law: no one should be held criminally blameworthy if she acted without free choice.[145] When a person can't help herself—"where the choice whether to act unlawfully is eliminated or greatly diminished"—there can be no criminal responsibility.[146]

Scholars differ on the definition of voluntary choice.[147] Skeptics of the notion that some people exercise little choice in committing crime ask, "What about all the sexually abused people who don't go out and rape? What about all the people with the rotten social backgrounds who go on to become Supreme Court Justices?"[148] Some warn about a slippery slope:

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that responsibility and punishment should be assigned to each offender regardless of environmental circumstances); David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976) (emphasizing that expanding the "inquiry into culpability" will allow juries to determine whether, in light of the entirety of circumstances, a defendant should be held responsible for his criminal act) [hereinafter Bazelon, *Rejoinder*]; Delgado, *supra* note 44. *See also* GARBARINO, DUBROW, KOSTELNY & PARDO, *supra* note 72, at 67-99 (discussing how inner-city violence causes post-traumatic stress in children, resulting in symptoms such as difficulty modulating anxiety and aggression and a crushing sense of loss, which leads to "damage, trouble, disadvantage, and deprivation"); Hohler, *supra* note 44, at 1, 20 (" 'A lot of kids are coming to school suffering from post-traumatic stress,' said Phillip Jackson, a crisis intervention counselor for the Boston School Department. 'They're losing sleep. They can't eat. They can't focus on their school work. And some just start crying uncontrollably.' ").

145. *See, e.g.*, HART, *supra* note 128, at 35-40 (arguing that the legal system should require voluntary action as a condition of responsibility and that to do otherwise would be unfair and unjust); PACKER, *supra* note 46, at 108-13 (suggesting that excuses recognized by the criminal law are important, not because they prevent antisocial behavior, but because they protect and validate other social values, including the ability to exercise free choice); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 798-817 (1978) (arguing that allowing limited excuses for criminal behavior ensures that only voluntary wrongdoing is punished, and this demonstrates society's commitment to individualized justice); HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 317-23 (1979) (noting that while an individual cannot be excused for what he has done, certain conditions can excuse her from liability for a criminal act if these conditions restrict her ability to conform her conduct to the requirements of the law).

146. Delgado, *supra* note 44, at 17.

147. *See, e.g.*, Glenn C. Loury, *"Matters of Color"—Blacks and the Constitutional Order*, 86 THE PUB. INTEREST 109, 120 (Winter 1987).

> [S]uch a posture [of black victimhood, suffering, helplessness] in the political arena can inhibit the attainment of genuine freedom and equality, for it militates against an emphasis on personal responsibility it induces within the group, inducing those group members who have been successful to attribute their accomplishments to fortuitous circumstance, not to their own abilities and character, and encouraging those who fail to see their failure as the inevitable consequence of historic wrongs. It is difficult to overemphasize the self-defeating dynamic at work here. The dictates of political advocacy require that personal inadequacies among blacks be attributed to the "system," and that emphasis by black leaders on self-improvement be denounced as irrelevant, self-serving, and dishonest. Individual black men and women simply cannot fail on their own, they must be seen as never having had a chance. But where failure at the personal level is impossible, there can also be no personal success.

148. *See generally Roundtable: Doubting Thomas*, TIKKUN, Sept./Oct. 1991, at 23 (Kimberle Crenshaw, Harold Cruse, Peter Gabel, Catharine A. MacKinnon, Gary Peller, and Cornel West discuss the nomination of Clarence Thomas to the United States Supreme Court). *See also* Neil A. Lewis, *Thomas's Journey on Path of Self-Help*, N.Y. TIMES, July 7,

"Where will it stop? Everyone in prison had lousy childhoods; that's how they got there, that's why we gotta keep 'em there. We can't say they had no choice; we'd have to change the whole social structure."[149]

But I am not advocating automatic acquittal for all who have endured poverty, deprivation, and racism. I am arguing that jurors hear more than just the prosecutor's version of the story. They should hear evidence of a defendant's "rotten social background" and decide for themselves whether it mitigates her culpability.[150] They may reject the evidence or accept it. Either way, it will be the jury's decision.[151]

B. Battered Women

> He beat me like he beat the children. 'Cept he don't never hardly beat them. He say, Celie, git the belt. The children be outside the room peeking through the cracks. It all I can do not to cry. I make myself wood. I say to myself, Celie, you a tree.
>
> —Alice Walker, *The Color Purple*[152]

> Her dress it was a snowy white
> A rose tied to her wrist
> The words her daddy preached to her
> Were softened with a kiss
> They'll judge you by your company
> They cannot see beyond
> Be careful who you choose in life
> And stay where you belong
>
> —Kate and Anna McGarrigle, *Leave Me Be*[153]

Battered women who become criminal defendants are punished long before the question of responsibility is addressed. They're physically abused, psychologically tormented, sexually assaulted, and then arrested

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1991, at 12 (chronicling the professional and personal journey of Justice Clarence Thomas, with an emphasis on his distrust of all varieties of racial preference); Neil A. Lewis, *From Poverty to U.S. Bench*, N.Y. TIMES, July 2, 1991, at A1.

149. *See, e.g.*, Dressler, *supra* note 45, at 355 (arguing that Delgado's broad "coercive persuasion defense" lacks the necessary clarity of existing excuses recognized by the criminal law and gives juries little guidance); Morse, *supra* note 144, at 1263 (challenging a correlation between poverty and crime and arguing that programs designed to eradicate poverty are useless as crime-prevention strategies).

150. *See* Delgado, *supra* note 44, at 9, 11 (using the terms "rotten social background" and "severe environmental deprivation" interchangeably).

151. For an insightful exploration of the relationship of the American jury to democracy theory, *see* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994).

152. ALICE WALKER, THE COLOR PURPLE 30 (Washington Square Press 1983) (1982).

153. KATE MCGARRIGLE & ANNA MCGARRIGLE, *Leave Me Be*, *on* HEARTBEATS ACCELERATING (Garden Court Music 1990).

and prosecuted.[154] The system functions like something out of *Alice in Wonderland*: they're punished first, then tried, and then sentenced.[155]

The central problem with battered women's self-defense cases is that society imposes on these women an especially powerful presumption of choice. Once women make a romantic choice, they must literally live (or die) with it, as the above song by Kate and Anna McGarrigle suggests. Society attributes a number of choices to battered women who kill: first they choose the wrong guy, then they choose to marry (or live with or date) him, then they choose to be beaten (or accept it or fail to successfully resist it), then they choose to stay, and then they choose to kill him. Some jurors may think the killing was the worst choice; others may condemn her most for staying.[156]

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154. *See generally* ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING & HOW TO STOP IT (1994) (recommending a stricter police agenda for domestic violence, the problems of which are distorted by the media's identification of domestic violence as "crimes of passion"); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW (1988) (arguing that although the laws governing justifiable homicide apply equally to men and women, women do not receive equal treatment when defending themselves against domestic violence); ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987) (arguing that when battered women kill, it is a reflection of their husband's personality deficiencies, not those of the woman).

155. *See* LEWIS CARROLL, THROUGH THE LOOKING GLASS 244-245 (Puffin Books 1962) (1872):

> 'Oh, things that happened the week after next,' the Queen replied in a careless tone. 'For instance, now,' she went on, sticking a large piece of plaster on her finger as she spoke, 'there's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all.'
>
> 'Suppose he never commits the crime?' said Alice.
>
> 'That would be all the better, wouldn't it?' the Queen said, as she bound the plaster round her finger with a bit of ribbon.
>
> Alice felt there was no denying *that*. 'Of course it would be all the better,' she said: 'but it wouldn't be all the better his being punished.'
>
> 'You're wrong *there*, at any rate,' said the Queen. 'Were *you* ever punished?'
>
> 'Only for faults,' said Alice.
>
> 'And you were all the better for it, I know!' the Queen said triumphantly.
>
> 'Yes, but then I *had* done the things I was punished for,' said Alice: 'that makes all the difference,'
>
> 'But if you *hadn't* done them,' the Queen said, 'that would have been better still; better, and better, and better!' Her voice went higher with each 'better,' till it got quite to a squeak at last.
>
> Alice was just beginning to say 'There's a mistake somewhere—,' when the Queen began screaming so loud that she had to leave the sentence unfinished.

156. *Compare* Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 23 U. CHI. LEGAL F. 1989 (discussing the economic and familial constraints on battered women) *and* JONES, *supra* note 154, at 129 (challenging the question "Why doesn't she leave?" as an example of blame shifting) *with Nightline*, *supra* note 57 (Alan Dershowitz arguing that victims of abuse should not be allowed to introduce evidence of prior abuse in claiming self-defense:

> Why should they [victims of abuse] be able to tell the jury that they were abused, if the vast majority of people who are abused don't kill? Of what relevance is the abuse. . . . Why didn't she leave? Why didn't she leave? . . . Most people leave. . . . These [expert witnesses] aren't psychologists, these are advocates, and

When a battered woman kills and claims self-defense, she is often held responsible for her original "choice" in men. A litany of culture-driven cliches rain upon the defendant: She made her bed, now let her lie in it. She didn't try hard enough to get away. She should have left him. She didn't go through the proper channels.[157]

The chief legal obstacle for women who claim self-defense after killing their abusers is establishing the element of imminent danger.[158] Somehow, the way women kill never quite comports with prevailing notions of appropriate self-protection:

> Killing in self-defense is a fundamental right for men and nations. . . . But when women kill their husbands because they are afraid for their lives and those of their children, it's considered shocking—and criminal. According to the popular myth, a wan, mousy wife suddenly loses it and kills the hapless guy in his sleep. Or she hires a friend to blow him away and stuffs his body in a garbage can. It's all very weird and female.[159]

In 1993, the United States launched missiles to attack Iraq. It claimed the action was justifiable self-defense under the United Nations Charter, because it learned of an alleged Iraqi plot to assassinate former President George Bush six months before.[160] Even though the United States *waited*

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this is advocacy psychobabble. What we're hearing is people . . . who have a political agenda. . . . The one message I'd like to send to women who are battered is do something about it, leave, call 911, don't get yourself in a position where you kill a spouse or hurt somebody. . . .)

But note Dershowitz's (and the rest of the Simpson defense team's) stand against the admissibility of the 911 call by Nicole Brown Simpson in the O. J. Simpson case. *See* David Margolick, *Prosecutors Win Key Simpson Fight*, N.Y. TIMES, Jan. 19, 1995, at 1 (reporting Judge Ito's ruling that the jury may hear evidence of Simpson's "repeatedly abusive treatment" of his former wife, rejecting defense arguments to exclude such evidence).

157. *See generally* JONES, *supra* note 154; LENORE E. WALKER, THE BATTERED WOMAN (1979) (describing the patterns in abusive relationships: learned helplessness and the cycle of violence); Eagan, *supra* note 120, at 6:

> Lisa Grimshaw got court restraining orders and called police dozens of times. Sometimes police came. Mostly they didn't. Usually they told her the same thing: They had to catch Thomas Grimshaw in her home, in the act. But then they didn't arrest him even when they saw her face bloodied from the hammer, her teeth dangling. . . . [A]sked parole board member Joyce Hooley . . . yesterday, 'Is that how you see your life, going from one bad relationship to the next?' Asked parole board member Michael Albano, 'Do you know who you spoke to' when she called the police back in '82?. . . . '[D]id you go back to court and advise them that these violations occurred?. . . . Did you call any community agencies?'

158. *See* Maguigan, *supra* note 69, at 414-16.

159. Abigail Trafford, *Why Battered Women Kill: Self-Defense, Not Revenge, Is Often the Motive*, WASH. POST HEALTH MAG., Feb. 26, 1991, at 6. *See generally* Stephen Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 116-30 (1990) (discussing the tension between feminism and criminal law in battered women's self-defense cases).

160. *See The Comeback Kid*, NATION, July 19, 1993, at 87-88 ("Clinton invoked Article 51 of the U.N. Charter, which allows states to act unilaterally in self-defense. . . ."); Douglas Jehl, *U.S. Says it Waited for Certain Proof Before Iraq Raid*, N.Y. TIMES, June 29, 1993, at

for "certain proof" before striking,[161] nobody had problems with this sort of self-defense, or with the lack of imminent danger. Retaliatory self-defense is somehow not a contradiction in terms for the United States government.[162]

The reaction is different when it comes to women who kill their batterers, whether or not they kill in the course of a confrontation and when the danger is most imminent.[163] The only time battered women seem to draw wide public support and approval is when they die at the hands of their abusers.[164] Only then do people lament, "Gee, she was telling the *truth*, she really *was* in danger." When the man is the dead one, though, suddenly no one is sure.

I must confess that I am not crazy about the term "battered woman." I do not want to think of women who are assaulted by men as a psychological subgroup of "normal" women.[165] We do not think of people assaulted

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A1, A6 (describing the U.S. investigation which concluded that Iraq was responsible for the plot against George Bush).

161. *See* Jehl, *supra* note 160, at A6.

162. *See id. See also* Thomas L. Friedman, *The Missiles' Message*, N.Y. TIMES, June 28, 1993, at A1 (explaining that the U.S. retaliatory attack on Iraq was intended to warn Iraq and other countries of the consequences of terrorism, and to deter future acts). *But see In Baghdad, Residents Condemn the U.S.*, N.Y. TIMES, June 29, 1993, at A6 ("Baghdad residents railed against the United States today over its missile strikes on Sunday morning, which were aimed at the Iraqi intelligence headquarters but also killed civilians. 'As soon as we heard the explosion, we knew it was the Americans,' said a 16-year-old girl, standing amid the debris of a ruined house."); *The Comeback Kid*, *supra* note 160, at 88 ("At the United Nations, Ambassador Madeleine Albright's self-righteous defense of the bombing reminded old-timers of a similar episode in the first few months of the Kennedy Administration.... Certainly [Article 51 of the U.N. Charter] cannot justify indiscriminate bombing (a third of the missiles missed their mark) two months after the fact.").

163. *See generally* Maguigan, *supra* note 69. *See also* GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 21 (1988):

> In cases of interpersonal as well as international violence, the outbreak might be neither defensive nor preemptive. It could be simply a passionate retaliation for past wrongs suffered by the person resorting to violence.... Retaliation, as opposed to defense, is a common problem in cases arising from wife battering and domestic violence. The injured wife waits for the first possibility of striking against a distracted or unarmed husband.... There is no way, under the law, to justify killing a wife batterer or a rapist as retaliation or revenge, however much sympathy there may be for the wife....

164. *See, e.g.*, John Ellement, *Quincy Man, Accused of Killing Dorchester Woman, Surrenders*, BOSTON GLOBE, Aug. 7, 1993, at 20:

> [Robert] Murphy had appeared in Dorchester District Court four times since 1991 to answer domestic abuse charges lodged by Gordon. He last appeared June 15 and was given a suspended sentence and placed on probation by Judge Linda Giles, who ordered him to attend a program for batterers. Murphy did not attend the sessions, but was warned he would be sent to prison if he did not comply by mid August.... On another occasion, Murphy was acquitted.

165. *See* JONES, *supra* note 154, at 83 (suggesting that the terms "battered women," "domestic violence victim," and "abused woman," which emphasize a woman's situation as the victimized object of another's actions, also obscure her subjectivity and actions. They suggest that "battered" is *all* she is, that "victim" is her identity.). *See also* Stephen J. Morse, *The Misbegotten Marriage of Soft Psychology and Bad Law*, 14 LAW & HUM.

on the street as a psychological subgroup of "normal" people. I think "battered women's syndrome" makes the women being beaten sound like the sick ones, rather than the men who are doing the beating. Although child abuse and elder abuse conjure images of nasty perpetrators preying on innocent victims, spousal abuse conjures images of pathetic, masochistic women, suffering from, at best, a "syndrome." Why do we hold battered women responsible for being beaten? Why do we think there's a difference between women who defend themselves against men with whom they have been intimate and women who defend themselves against relative strangers?[166] Maybe it has something to do with the mythology of love. We think that women whom men have "loved" have the power to make things better. The existence of some sort of "love" relationship suggests the possibility of reconciliation, even redemption. Or maybe we think that women bring these things upon themselves.

I think the onus should be on the batterers, not the battered: we should investigate the existence of a battering men syndrome. The problem, of course, is that the battering men syndrome, a product of cultural socialization and individual disorder, will probably never make it into the *DSM IV*.[167]

I feel the same way about the capacity of abused women to choose to kill as I do about choice in general: it lies somewhere on a spectrum.[168] Some battered women have more choices than others. Some battered women have some choices but not others. Some battered women have some choices, sometimes. Some battered women have used up all their choices

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BEHAV. 595 (1990) (arguing that "psychological self-defense" is neither good policy nor scientifically based).

166. It may not be coincidental that two early cases in the evolution of law involving claims of self-defense by women, those of Joanne Little and Yvonne Wanrow, involved homicides of men *not* in intimate relationships with the defendants. Little, a prisoner, killed a prison guard who had raped her. Wanrow, a mother, killed a reputed child molester who posed a threat to her children. *See* State v. Wanrow, 88 Wash. 2d 221, 226, 559 P.2d 548, 551 (1977).

167. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994). *DSM IV* is the widely used and accepted encyclopedia of mental disorders and diseases. Battered women's syndrome is not specifically included in *DSM IV*, though post-traumatic stress disorder is. *Id.* at 111.

168. *See* MINOW, *supra* note 127, at 2102. ("Both sides in this debate treat choice as all or nothing. More plausible are descriptions of the actual exercise of agency by battered women who aim to reduce the violence against them or their children while constantly assessing the risks of doing so. This richer description depends upon a recognition that choices are situated within constraints."); Susan Brownmiller, *Hedda Nussbaum, Hardly a Heroine . . .*, N.Y. TIMES, Feb. 2, 1989, at A25 (attacking the notion that Hedda Nussbaum, who was battered by Joel Steinberg, lacked choice when she failed to protect their daughter, Lisa, from Steinberg's abuse). *But see . . . But You Can't Imagine*, N.Y. TIMES, Feb. 2, 1989, at A25 (defending Nussbaum from the perspective of a battered woman) (the N.Y. Times withheld the author's name at her request).

and have none left. Sometimes these women kill.[169] Juries ought to hear why.

C. *Reflections on the Connection between Power and Violence*

1. *Gender and Violence: "The Perps Are Almost Always Male"*[170]

> "I was so spooked that day," [Gary L.] Monday said of the day he raped and strangled Amy Jo Harris. "I'm surprised I stayed as calm as I did."
>
> Asked if he thought he would get away with his crimes, Monday said, "I wasn't thinking that far."
>
> He said he had been "getting fed up with the secretive relationship" with Amy. "It was time to choose: Me or her friends. . . ."
>
> Monday said he still struggles to understand the rage that fueled the violent assault that ended when he had choked the life out of Amy with his bare hands. . . .
>
> "At that moment . . . I just got tired of it. I was angry. . . ."
>
> —Diane Frederick, *The Question is Why? The Motive Remains a Mystery 7 1/2 Years After Gary Monday Killed Classmate Amy Jo Harris*[171]

> "She's ragging me and saying if I had some real shoulders I could have pushed harder. . . . So I hand her the jack to put away since it didn't work, and she calls me something choice, I don't even remember, a turkey or something, a dweeb, some kind of a loser, I don't know, but it was, like, one thing too many and I lost it. I slapped her." He sighed. ". . . And when I slapped her she grabbed me and hit me in the face, first with her hand, then, I suppose I was trying to get her off me, we were sort of fighting—about to fight—and she swung at me with the jack. . . .

169. *See generally* ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987) (chronicling the stories of women who kill their husbands through a series of in-depth interviews). *See also* Charles P. Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579, 588 (1990) ("Faced with the extremely limited options of killing herself, killing the batterer, or resigning herself to a fate sometimes not much better than physical death, the battered woman has little in the way of true choice. To the extent that she 'chooses' to kill her batterer, her 'choice' is basically the 'choice that other people would make under the same circumstances.' "); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 856 (1978) (arguing that necessity should constitute an excuse in a criminal trial).

170. Beryl Lieff Benderly, *The Perps Are Almost Always Male*, N.Y. TIMES, June 20, 1993, § 7 (Book Review), at 10 (reviewing ANNE CAMPBELL, MEN, WOMEN, AND AGGRESSION (1993)).

171. Diane Frederick, *The Question is Why? The Motive Remains a Mystery 7 1/2 Years After Gary Monday Killed Classmate Amy Jo Harris*, INDIANAPOLIS NEWS, July 10, 1993, at A1, A2.

> "She swung and she just missed me and I just—grabbed it, she was screaming at me and I pulled it out of her hands and then. . . . The thing is . . . you say *murder*, you say *dead*, *bludgeoned to death*, and it sounds so—mysterious. And so huge. It sounds so—impossible to imagine. But it wasn't. It wasn't something I was trying to do, it wasn't something I thought about."
>
> —Rosellen Brown, *Before and After*[172]
>
> Men are violent. That's all there is to it.
>
> —Jeanette Winterson, *The Passion*[173]

Tales of white, middle-class teenage boys killing and raping their female counterparts can be found in newspapers (and reenacted in works of fiction) all over the country, accompanied by a yearbook picture of the slain girl and comments by neighbors of the recently apprehended boy that he had always been a pretty good kid.[174] The youth of the offender, the youth of the victim, and the setting of the killing in white, middle-class America all contribute to the newsworthiness of these stories. The gender of the offender does not. But when a teenage *girl* bludgeons her *boyfriend* to death, now there's a story. That's not something you find in newspapers every day.[175]

Maleness and violence seem to be linked. A ritual that has become common at municipal swimming pools in New York City illustrates this connection. It's called "the whirlpool."[176] A group of teenage boys lock arms and move in circles through the pool, "chanting rap lyrics and fondling girls at will."[177] Girls who see the whirlpool coming either jump out of the pool or "stand by their boyfriends for protection."[178] Girls who don't see it coming—or who don't move fast enough, or who don't have boyfriends—are in trouble. On Monday, July 5, 1993, at the Crotona Pool in the South Bronx, a circle of boys surrounded a fourteen-year-old girl and ripped off her bathing suit top; one of them inserted his finger in her vagina. While the seven lifeguards and one lieutenant police officer were figuring out how to react, the girl was rescued by her mother.[179] "All boys are

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172. ROSELLEN BROWN, BEFORE AND AFTER 239-40 (1992) (a novel about a a teenage boy who kills his girlfriend and the impact on his family).

173. JEANETTE WINTERSON, THE PASSION 109 (1987) (a wildly imaginative historical novel about the nature of passion).

174. *See, e.g.*, Frederick, *supra* note 171, at A2 (describing 16-year-old Gary Monday's raping and killing 15-year-old Amy Jo Harris).

175. A search revealed *no* examples of teenage girls bludgeoning their boyfriends to death.

176. Michel Marriott, *A Menacing Ritual is Called Common in New York Pools*, N.Y. TIMES, July 7, 1993, at A1.

177. *Id.*

178. *Id.*

179. *Id.*

dogs," commented Leslie Alvira, a sixteen-year-old girl who saw the attack.[180]

At around the same time in Houston, the dead bodies of two teenage girls were found in the woods along the White Oak Bayou after a four-day search. The bodies were tossed there by six teenage boys, all gang members, who beat the girls, raped them repeatedly, strangled them, stomped on them to make sure they were dead, and then dragged their naked bodies into the woods. None of the boys knew the girls; the girls had apparently stumbled upon an "informal gang initiation rite" while taking a shortcut home after a pool party.[181]

I don't know if these incidents are coincidental, or extraordinary. Maybe they merely reflect the fact that "many teen-age boys are becoming sexually active younger and have little understanding about how to express their sexuality appropriately."[182] Maybe we engage in the worst kind of feminist hyperbole to suggest that these incidents say anything about a male tendency toward violence.[183]

But it is not just that men *seem* to be the violent ones; they *are* the violent ones.[184] Males commit approximately 89 percent of violent

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180. *Id.* at B2.

181. Sam Howe Verhovek, *Houston Knows Murder, But This . . .*, N.Y. TIMES, July 9, 1993, at A8.

182. Marriott, *supra* note 176, at B2 (quoting 19-year-old Hipolito Castro, who was swimming with his brother, Eric, at the time of the whirlpool incident in the Bronx).

183. But consider, for example, the attack on the Central Park jogger by several boys out "wilding," Ronald Sullivan, *Brutality of Rape Detailed as Jogger Trial Opens*, N.Y. TIMES, June 26, 1990, at B1 ("A Manhattan prosecutor described in graphic detail yesterday how a group of youths attacked a woman jogging last year in Central Park and 'brutally beat and raped her, and then left her to die . . . ."); Katha Pollitt, *Rough Times: Somehow the Victim Seems to Suffer the Blame*, CHI. TRIB., July 16, 1989, Tempo/Woman Section, at 5 ("We talk, in this case, about 'wolfpacks' and 'wilding.' What we don't talk about is the way this attack upon a woman resembles other, less famous ones: fraternity gang-rapes . . . or the daily assaults upon black and Hispanic women in their own neighborhoods."); the gang-rape at Big Dan's in New Bedford, Massachusetts, immortalized in the film *The Accused*, *see* Ellen Goodman, *Incident in New Bedford*, BOSTON GLOBE, Mar. 17, 1983, at A19 ("[I]n March of 1983, in a New Bedford bar, more than a dozen men watched as a woman was assaulted and not one of them called the police. Because it appears they were . . . enjoying the show."); and the brutality of alleged serial killer Joel Rifkin, *see* Diana Jean Schemo, *Suspect Described as a Loner Who Never Left Home*, N.Y. TIMES, June 30, 1993, at B6 ("Mr. Rifkin has gone from a nondescript unemployed landscaper . . . to a suspected serial killer who, the police said, has confessed to killing 17 prostitutes.").

184. *See* MYRIAM MIEDZIAN, BOYS WILL BE BOYS: BREAKING THE LINK BETWEEN MASCULINITY AND VIOLENCE xxiii (1991). *See also* Benderly, *supra* note 170, at 10:

> From street-corner muggings through drive-by shootings and terrorist bombings, all the way up to full-scale military engagements, accounts of aggression fill the headlines and airwaves. And no matter how diverse the circumstances, no matter how varied the mayhem, one regularity holds: the perpetrators are almost always male. For every Lizzie Borden, we can count dozens of Richard Specks; for every Joan of Arc, scores of Caesars. To most people, in fact, the image of females ambushing pedestrians, gunning down gang rivals or storming Vietnamese villages violates something deep in their understanding of human behavior.

crimes.[185] Husbands and boyfriends physically assault 1.8 million women a year.[186] And then there is war, which has always been a male rite of passage and continues to be initiated and fought almost exclusively by men.[187]

Two recent books shed light on the relationship between gender and violence. Myriam Miedzian's *Boys Will Be Boys: Breaking the Link Between Masculinity and Violence*[188] critiques traditional notions that male aggression, a term she finds problematic, and violence, a term she prefers, are instinctive. She instead argues that male violence is largely the product of socialization.[189] Miedzian decries the false dichotomy of nature and nurture in this context, stating that violence is "best understood as developing out of an interaction between a biological potential and certain kinds of environments."[190] Miedzian finds that there is greater potential for violence in males than in females, due to a combination of factors: higher testosterone levels; certain physical and learning disabilities; the effect of peer pressure to assert dominance and prove "manhood" through fighting, which can lead some groups of boys to commit violent acts they might not commit on their own; and a violent reaction to emotional and physical abuse.[191]

Still, this potential for violence need not translate into actual violence; there is no reason why the precursors to violence—frustration, irritability, impatience, impulsiveness, a tendency to physically act-out—could not be expressed in other ways.[192] Miedzian argues that the link between maleness and violence must be broken and *can* be broken. The problem is that we have accepted violence as a way of life for boys and men.[193] She argues that we need to change the way we raise male children, the way we educate them, and the way we acculturate them through sport, television, film, music, and toys.[194] I would add that we need to recognize male violence when

185. MIEDZIAN, *supra* note 184, at 5.

186. *Id.*

187. *See, e.g.*, GUY GOODWIN-GILL & ILENE COHN, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICTS (1994) (exploring why children —meaning boys—participate in armed conflict). *See also* ARMAND EISAN, OY VEY! THE THINGS THEY SAY (1994) (quoting Mel Brooks: "Usually when a lot of men get together, it's called war.")

188. MIEDZIAN, *supra* note 184.

189. *Id.* at 39-74. A recent study by the American Psychological Association's Commission on Violence and Youth supports Miedzian's findings. The study found that violence is learned in the family, in the community, and through the media. The report singled out parents who regularly and harshly punish their children physically, because this perpetuates a cycle of violence. The report pointed also to parental rejection, parental neglect, and violent fights between the mother and father as contributing to youth violence. *See also* Daniel Goleman, *Hope Seen for Curbing Youth Violence*, N.Y. TIMES, Aug. 11, 1993, at A10 (detailing successful culture-based strategies for reducing violence as a learned response).

190. MIEDZIAN, *supra* note 184, at 72-73.

191. *Id.* at 73-74.

192. *Id.* at 73.

193. *Id.* at 3-38.

194. *Id.* at 79-280.

we see it in the criminal courts as a cultural as well as individual problem, and we should develop ways to address it.[195]

Anne Campbell's *Men, Women, and Aggression*[196] breaks new ground in our understanding of gender and violence. Campbell argues that men and women differ in their aggressive and violent behavior because of "differences in how they come to understand the meaning of aggression:"

> Women see aggression as a temporary loss of control caused by overwhelming pressure and resulting in guilt. Men see aggression as a means of exerting control over other people when they feel the need to reclaim power and self-esteem. . . . Women's aggression emerges from their inability to check the disruptive and frightening force of their own anger. For men, it is a legitimate means of assuming authority over the disruptive and frightening forces in the world around them.[197]

Campbell argues that our gendered understanding of aggression is learned. Girls learn to respond to their aggression with a sense of shame, not release or purification.[198] When boys and men aggress—especially against someone who has insulted them—they feel good.[199] Their blood pressure even drops.[200] Campbell finds that, generally speaking, women do what they can to avoid aggression and violence. Women prefer calm control to even righteous displays of temper. Women hold in anger like they hold in their stomachs; to do otherwise would court madness.[201] Like Miedzian, Campbell sees male violence largely as the result of male socialization. As part of the socialization process, boys and men are rewarded for violent behavior: the gang member who wins the respect of his peers by beating up a rival gang member is Everyman.[202] For some men, the reward for aggressive behavior may simply be a "boost to their shaky sense of self-worth, since it is a public demonstration of their manliness, about which they have profound doubts."[203]

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195. *See supra* part IV.

196. ANNE CAMPBELL, MEN, WOMEN, AND AGGRESSION: FROM RAGE IN MARRIAGE TO VIOLENCE IN THE STREETS (1993).

197. *Id.* at viii, 1.

198. *Id.* at 78-83.

199. *Id.* at 8.

200. *Id.*

201. *See* ANITA BROOKNER, BRIEF LIVES 147 (1990) ("Eventually I would become an object of pity, if I were lucky enough not to become an object of derision, one of those mad old women in broken shoes who mutter to themselves in public places. Whenever I thought of women like this I would take a deep breath and pull in my stomach.").

202. CAMPBELL, *supra* note 196, at 125-40.

203. *Id.*

While there is no question that there are subcultures of violence in blighted, urban areas,[204] most members of the subculture are male.[205] Although not unheard of, stories like that of the eighteen-year-old Milwaukee woman who stabbed another teenager to steal her jacket are relatively rare.[206] Stories like that of Ellie Nesler, the California woman who walked into a courtroom and fired a gun five times into the head of a man accused of molesting her son, are extraordinary.[207] Stories about men stabbing people over jackets (or sneakers or gold chains or "boom boxes"), however, are a dime a dozen in criminal courtrooms all over the country. Bernhard Goetz, the "subway vigilante,"[208] and Rodney Peairs, the Louisiana man who shot to death a Japanese exchange student on Halloween in 1993 for not "freezing" fast enough when ordered to do so, are also comparatively commonplace.[209]

I'm not entirely sure what all of this means. It doesn't mean that all men are violent. There are plenty of nonviolent men. It doesn't mean that all women are either victims or would-be victims. Plenty of us are just fine, thank you. It also doesn't mean that violence is an immutable characteristic of men or of American culture; I believe in social change. And it definitely doesn't mean that we ought to continue this country's misguided policy of locking up all the violent men—the black ones, I mean. That

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204. *See* Thomas J. Bernard, *Angry Aggression Among the "Truly Disadvantaged"*, 28 CRIMINOLOGY 73, 73-95 (1990) (providing empirical evidence to support theories of violence by the disadvantaged); Anne Campbell, *The Streets and Violence*, *in* VIOLENT TRANSACTIONS: THE LIMITS OF PERSONALITY 115, 122 (Anne Campbell & John J. Gibbs eds., 1986) (detailing the escalation of violence); MARVIN E. WOLFGANG & FRANCO I. FERRACUTI, THE SUBCULTURE OF VIOLENCE 95-120 (1967) (arguing that subcultural norms account for patterns of violence in response to trivial events). *See also* CAMPBELL, *supra* note 196, at 12 (1993) (finding that homicide in poor, urban neighborhoods—where people are socially isolated, economically deprived, and plagued by drugs, illness, poor schools, and bad housing—often results from tempers flaring during trivial disputes, an indication that "[v]iolence [has] become normalized as a routine part of everyday life").

205. CAMPBELL, *supra* note 196, at 12.

206. *See* Junda Woo, *Urban Trauma Mitigates Guilt, Defenders Say*, WALL ST. J., Apr. 27, 1993, at B1.

207. *See* Associated Press, *Trial Opens Today for Woman Who Shot Suspected Molester*, BOSTON GLOBE, July 13, 1993, at 9. Nessler, who claimed to have been molested as a teenager, was convicted of manslaughter on August 12, 1993. At trial, her lawyer described Nessler's son vomiting uncontrollably the morning before he was to testify against the man who had allegedly molested him. The lawyer then recounted the alleged molester smirking at Nessler's son in the courtroom, which caused Nessler to "snap" and fall into a "temporary ... morally blind ... condition ... like a bear or lioness protecting a cub." N.Y. TIMES, Aug. 13, 1993, at A20.

208. FLETCHER, *supra* note 163, at 2.

209. *See* Peter Applebome, *Verdict in Death of Student Reverberates Across Nation*, N.Y. TIMES, May 26, 1993, at A14 ("[R]ecent cases include a Vermont homeowner's fatal shooting of a teenager who was allegedly trying to steal alcohol from his garage, a Florida businessman who killed an armed robber with a shotgun after chasing him for a half mile and a Maryland jeweler who killed two robbery suspects after chasing them through downtown Bethesda.").

policy does nothing to reduce violent crime, and it perpetuates our most regressive social tendencies.

I acknowledge the problems that come with allowing proof of rotten social background and other related claims as a defense to largely male violence. However, I think that if we expose inequality and deprivation and work to end it, we can alter some of the circumstances that breed violence. But currently, the law's violence on the streets, in courtrooms, and in the prisons is *perpetuating* male violence.[210]

Though some men overall may benefit from allowing evidence of severe environmental deprivation—or urban psychosis, or urban survival syndrome, or inner-city post-traumatic stress—women defendants will also have the opportunity to introduce such evidence.[211]Indeed, a woman was one of the first to raise deprivation as a defense.[212] And let us not forget the mothers who post bail, attend court, plead for mercy, and weep when their sons go off to prison in "iron chains and fetters."[213] They are women, too.

None of this is to say that I have abandoned my desire to change the way gender intersects with criminal law. To the contrary, criminal law too often legitimizes male acting-out without anyone seeming to notice. Take provocation, for example. Criminal law, usually pretty judgmental about intentional acts of violence, is suddenly lenient when a man finds his wife in bed with another and kills. The law offers the heat-of-passion defense to the guy as a gift: it's a freebie for jealous, homicidal rage. The law even calls it reasonable.[214] When a woman learns of a lover's infidelity, on the

210. *See generally* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow, Michael Ryan & Austin Sarat eds., 1993); LAW'S VIOLENCE 11 (Austin Sarat & Thomas R. Kearns eds., 1992) (suggesting that the relationship between law and violence is "central to the understanding of the history, nature, and purpose of law.").

211. *See* GARBARINO, DUBROW, KOSTELNY & PARDO, *supra* note 72, 48 (1992) (discussing the developmental toll of inner-city life on children, where "violence is an almost daily occurence.").

212. *See* Woo, *supra* note 54:

> The [urban psychosis] defense apparently was first used, with only some success, last October [1992] in the case of a Milwaukee teenager who shot a girl in order to steal her patchwork leather trenchcoat. A psychologist testified that the teenager, Felicia 'Lisa' Morgan, was assaulted routinely while growing up and that her parents pulled guns on each other in her presence. Ms. Morgan's mother once shot her father, and her father shot the family dog for no apparent reason. In addition, numerous friends and relatives had been shot and several killed, including a favorite uncle.

213. WIDEMAN, *supra* note 118.

214. *See generally* MODEL PENAL CODE § 210.3 (1962); Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679 (1986) (discussing the concept of reasonableness and the idea that the provocation defense favors men); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 470 (1982) (arguing that prior rationales for the heat of passion defense are flawed and instead claiming that the defense is in fact a partial or full excuse, not a justification, depending upon the defendant's capability for self-control); Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man*

other hand, she'd sooner grab a pint of Haagen-Dazs than a gun; jealous heart break for women leads to weight gain, not homicide.[215] Yet the truth is that violent crime is more complex than gender. It is even more complex than power. And we can't get to the grand causes of violent crime without exposing the individual causes of criminality.

2. *Lest the Mighty Destroy the Weak: Cultural Defenses, Cultural Offenses, and Angry Young Men*

> You decide. I became a vicious animal and if you think that is so terrible, I just wish anyone could have been there in my place. Anyone who is going to judge me, fine, I was vicious. My intent was to kill 'em, and, and you just decide what's right and wrong.
>
> —Bernhard Goetz, upon his arrest.[216]

> "If I tell you the truth, you'll put me away for a long time."
>
> —Stephen Roy Carr, to a police investigator.[217]

> There's a place in the world for the angry young man,
> With his working class ties and his radical plans
> He refuses to bend, he refuses to crawl,
> He's always at home with his back to the wall. . . .
> And he'll go to his grave an angry old man.
>
> —Billy Joel, *Angry Young Man*[218]

The term "cultural defense" has spawned a variety of meanings.[219] The term came to light in the mid-1980s, in the context of immigrants who engaged in conduct said to be culturally acceptable in their homelands but criminal here.[220] Although consideration of cultural factors as evidence of

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Obsolete? A Critical Perspective on Self-Defense and Provocation, 14 LOY. L.A. L. REV. 435 (1981) (arguing that the reasonable man standard is inappropriate for these defenses).

215. *But see* Susan Lehman, *A Woman Scorned*, MIRABELLA, Sept. 1991, at 120 (discussing the Betty Broderick case in which a woman defendant raised provocation as a defense to first degree murder: Broderick killed her ex-husband and his new wife after her ex-husband told her she was "old, fat, ugly, boring, and stupid," had her jailed twice, committed her to a mental institution and sent her the bill, and repeatedly sent her wrinkle-cream advertisements and pamphlets on how to lose weight); *Marriage Gone Bad, Double Slaying and Hung Jury Leave a City Divided*, N.Y. TIMES, Sept. 20, 1991, at A17 (Betty Broderick's defense was that she killed in "the heat of passion . . . 'provoked . . . [by] a covert, methodical and discreet assault' " by her ex-husband).

216. FLETCHER, *supra* note 163, at 17 (quoting Bernhard Goetz).

217. David Morris, *Women Teased Me, Mountain Man Testifies*, ITHACA J., June 24, 1988, at 2A (quoting a police investigator reporting inculpatory statements made to him by Stephen Roy Carr).

218. BILLY JOEL, *Angry Young Man*, *on* TURNSTILES (CBS Records 1976).

219. Mark Kelman calls these defenses "subcultural defenses." Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798, 809 (1991).

220. *See generally The Cultural Defense in the Criminal Law*, *supra* note 63.

state of mind in criminal cases was not new, the assertion of a formal cultural defense was.[221]

Since that time, the term cultural defense has sometimes been used broadly to include all sorts of pleas for individualized justice in the name of cultural pluralism.[222] The common thread of these cultural defenses is that the culture asserted has tended to look more like a negative, male stereotype than a source of ancestral pride.[223]

In the mid-1980s, several Hmong men were prosecuted for kidnap and rape. The cultural defense raised was that kidnapping and raping women is part of *zig poj niam*, a Laotian form of marriage.[224] In 1989, a cultural defense was raised on behalf of a Chinese man in Brooklyn, who beat his sleeping wife to death with a hammer after learning of her infidelity.[225] The defense was that in Chinese culture, a wife's infidelity is a source of shame of cosmic proportions for the husband.

Though cultural defenses have occasionally been raised on behalf of individual women, the cultures behind these defenses still appear to be misogynistic. In 1985, a Japanese-American woman drowned her children and was attempting to drown herself when she discovered her husband's infidelity. Her defense was that she was attempting to commit *oyako-shinju*: parent-child suicide.[226] Interestingly, this Japanese suicide tradition has one end-result in common with the Chinese tradition of husbands killing unfaithful wives: in both cultures, it is the women who die.

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221. *See generally* Julia P. Sams, *The Availability of the "Cultural Defense" As an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986); Katie K. Hayashi, *Understanding Shinju, and the Tragedy of Fumiko Kimura*, L.A. TIMES, Apr. 10, 1985, pt. II, at 5 (explaining that in Japan, parent and child suicide is common and even expected under certain circumstances); Spencer Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, at 1 (exploring recent situations in which Asian immigrants have raised cultural defenses); Mark R. Thompson, *Immigrants Bring the Cultural Defense into U.S. Courts*, WALL ST. J., June 6, 1985, at 28 (discussing the problems associated with cultural defenses to crimes committed in the United States).

222. *The Cultural Defense in the Criminal Law*, *supra* note 63, at 1300. Bernhard Goetz's demand for individualized justice may be seen as a kind of cultural defense. His self-defense theory relied heavily on both the larger culture of urban violence and victimization and the smaller culture of people mugged two or more times on a New York City subway. *See generally* FLETCHER, *supra* note 163.

223. *See* Kelman, *supra* note 219, at 809 ("[D]efendants asserting subcultural defenses—discerning a 'truth' that the dominant culture decries—have most typically been men claiming that what the dominant culture discerns as criminal is a permissible form of male prerogative in their subculture. . . .").

224. *See, e.g.*, People v. Moua, No. 315972-0 (Cal. Super. Ct. Fresno County Feb. 7, 1985), *cited in* Sams, *supra* note 221, at 336 (reporting that defendant pleaded guilty to misdemeanor of false imprisonment and received a sentence of 90 days in jail).

225. People v. Chen (N.Y. Sup. Ct. Kings County 1989), *cited in* Sherman, *supra* note 221, at 3.

226. *See* People v. Kimura, No. A-091133 (Cal. Super. Ct. Los Angeles County Apr. 24, 1985), *cited in* Sherman, *supra* note 221, at 1 (reporting that defendant plead guilty to voluntary manslaughter and received five years probation). Apparently, *oyako-shinju* allows the wife to avoid the humiliation of living with her husband's betrayal and the children the humiliation of living as orphans upon the mother's suicide.

In the early 1990s, a cultural defense was raised in the two criminal obscenity trials that grew out of the release of the controversial 2 Live Crew album *As Nasty As They Wanna Be.*[227] The defense was that, as a cultural matter, (black male) rap is nasty about women.[228] To advance this defense in the criminal trial of a record store owner charged with selling an obscene cassette tape, expert testimony was introduced that 2 Live Crew's lyrics were the product of the "street culture" and "oral tradition" of young African-American men; this testimony played off the "stereotypes of black men—as oversexed [and] hypersexed in an unhealthy way."[229]

One could easily characterize the defenses raised by both Mike Tyson in 1991 and William Kennedy Smith in 1992 as cultural defenses. Both defendants urged the same "bedrock suggestion that a woman who goes to a private spot with a man in the early morning hours should know that sexual contact is inevitable and any story of force incredible."[230] That the Tyson case was covered largely in the sports sections of many newspapers and the Smith case covered in the society pages reveals how much a part of our culture these cases were.[231]

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227. Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd*, 960 F.2d 134 (11th Cir. 1992). *See* Robert D. McFadden, *Shock Greets Banning of a Rap Album*, N.Y. TIMES, June 8, 1990, at A10 (reporting a Florida federal judge's finding that an album by the rap group 2 Live Crew was obscene); Sara Rimer, *In Rap Obscenity Trial, Cultures Failed to Clash*, N.Y. TIMES, Oct. 22, 1990, at A12 (reporting that Luther Campbell, the leader of 2 Live Crew, was acquitted of obscenity charges by a jury of five whites and one black in Florida).

228. *See generally* Michel Marriott, *Hard-Core Rap Lyrics Stir Black Backlash*, N.Y. TIMES, Aug. 15, 1993, at A1, A42 ("When asked why some rappers denigrate women in their music, Richard Shaw, better known as Bushwick Bill of the rap group the Geto Boys, defended his lyrics. 'I call women bitches and hos because all the women I've met since I've been out here are bitches and hos,' he said."). However, there is a growing resistance in the African-American community to the notion that hard-core rap reflects black culture. *See id.* at A1. ("An emerging backlash to hard-core rap is growing among blacks, many of whom had appeared reluctant to criticize a popular form of black expression."). bell hooks, a feminist writer and professor, compares misogynous rap to crack cocaine. "[Those who listen to rap and those who take crack get] a sense that they have power over their lives when they don't." *Id. See also* BELL HOOKS, OUTLAW CULTURE: RESISTING REPRESENTATIONS 115-23 (1994) (discussing "gansta" rap and misogyny): *id.* at 125-43 (bell hooks talking with Ice Cube, a popular rap singer).

229. Robert T. Perry & Carlton Long, *Obscenity Law, Hip Hop Music and 2 Live Crew*, N.Y.L.J., July 13, 1990, at 5, 6.

230. Anna Quindlen, *Tyson Is Not Magic*, N.Y. TIMES, Feb. 9, 1992, § 4, at 17. The different results in the two cases may have more to do with race and class than with gender. African-American prize-fighter Mike Tyson is the stereotypical personification of rape in America. The defense theory at trial, that everyone knew Tyson was sexually aggressive, only corroborated the complainant's allegation. Meanwhile, William Kennedy Smith—white, affluent, well-educated—is, after all, a *Kennedy*.

231. *See id. See also* Michael Madden, *Accuser Victim of Double Standard?*, BOSTON GLOBE, Jan. 30, 1992, at 37 (reporting the view of the attorney representing the 18-year-old woman that the defense used unfair tactics); Dan Shaughnessy, *Tyson Verdict Delivers a Message; the Victim is Vindicated; Celebrity Held Accountable*, BOSTON GLOBE, Feb. 11, 1992, at 25 (noting that Tyson continues to receive support from fans, despite his conviction for rape).

Like many criminal defense lawyers, when I represent less famous men accused of rape and other crimes deeply rooted in culture, I often raise a kind of cultural defense, if the facts allow. I'm likely to suggest that my client's intent was seduction, not rape, and that his ungentlemanly method was the product of machismo and bravado, not a criminal state of mind. I'm likely to argue that my client was simply overexuberant, like so many other post-adolescent males, not purposely violent. While it's true he wasn't paying much attention to the complainant, what man pays attention?[232]

Perhaps I am exploiting cultural stereotypes,[233] as opposed to raising a formal cultural defense, but I'm not sure the two are so different. The cultural defenses raised on behalf of newly arrived immigrants and accused rapists sound alike: my client did not intend to commit a crime; he thought he was doing what was expected of him in his cultural milieu; my client didn't do it, the *male culture* did.

With few exceptions, cultural defenses dredge up the worst aspects of the culture at large.[234] They seem instead to describe cultural *offenses.* These crimes, or cultural offenses, are committed by a member of a dominant group which asserts its domination through criminal conduct, encouraged at every turn by various cultural influences that support its power, victimizing those who are already subordinated within the culture.

In his ground breaking article *The Morality of the Criminal Law*,[235] David Bazelon identifies a central premise in criminal law, one accepted by those who value order over social justice as well as those who value social justice over order: "[T]here can be no moral development in a society in which the mighty prey on the weak."[236] This basic premise, coupled with

232. This is very similar to what defense counsel suggested about William Kennedy Smith: his behavior was "caddish, but not criminal." *See* Quindlen, *supra* note 230, at A17.

233. *See* Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice,* 8 GEO. J. LEGAL ETHICS 1 (1994) (examining defense counsel's exploitation of bigotry as part of zealous advocacy). *Cf.* Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 186 (1983-84) ("[In Clarence Darrow's summations, t]here is clearly an appeal to the prejudices, passions, and sympathy of the jury. . . .").

234. *But see* United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1973), (Bazelon, C.J., dissenting), *cert. denied*, 409 U.S. 1044 (1972) (discussing argument by defendant, who killed white marine after the marine called him a "black bastard," that long-standing racist treatment led him to fear and hate whites, and resulted in emotional and environmental deprivation); David Talbot, *The Ballad of Hooty Croy*, L.A. TIMES, June 24, 1990, (Magazine), at 16 (reporting that Native American, charged with killing a white police officer in Northern California, successfully argued that he did not believe he could surrender during a confrontation with 28 armed police officers in view of long-standing police hostility toward Native Americans).

235. Bazelon, *The Morality of the Criminal Law*, *supra* note 144.

236. *Id.* at 386. *Compare* William O. Douglas, *Foreword, in* ATTORNEY FOR THE DAMNED, *supra* note 77, at vii ("[I]n his prime, [Darrow] . . . was a fearless liberal, representing many lost causes. But he never . . . represented the strong against the weak, the mighty against the masses. When those lines were drawn, he was always on the side of the underdog. . . .").

an examination of the nature of the defense raised in a specific case, provides a framework for judges to distinguish those defendants who ought to be able to raise personal history in order to mitigate criminal culpability.

The criminal law should not allow the mighty to continue to prey on—and eventually destroy—the weak by admitting defenses that themselves perpetuate bigotry and inequality. The defense of provocation in the Appalachian Trail case, which claimed that the defendant should be considered less responsible for an intentional killing since the victims were gay, is one example. The self-defense claim in the Bernhard Goetz case may not be so different. Doesn't Goetz's claim of self-defense—which asserts that Goetz was *justified* in shooting the four boys, not merely that he was less responsible—accept a racist stereotype of the young, black, male victims? Is the critical question whether the boys were in fact armed?

The harder question is which defendants ought to be allowed to introduce personal history and which should not. How do we decide who are the mighty and who are the weak? I propose that judges consider issues of social injustice when they make evidentiary rulings. I ask judges to re-evaluate long-held notions of relevance where questions of criminal responsibility are raised. The evidentiary effect would be one of degree, rather than the absolute admission or exclusion of evidence.

It is tempting to draw a line between self-defense—with generally accepted notions of self-preservation at its root—and provocation—with its built-in sexism and forgiveness of violence in the name of passion—and to propose liberal evidentiary rulings for the former but not the latter. Such a proposal would no doubt be more popular that what I propose.[237] Indeed, it may have been easier to draw lines in the cases of Stephen Roy Carr, Lisa Grimshaw, and Leroy Williams based on the defenses raised—provocation, self-defense, and environmental deprivation—than to make individual assessments of culpability based on social context. But if the Lorena Bobbitt case—in which provocation, self-defense, and insanity were all raised—has taught criminal law scholars anything, it is that defenses can sometimes be used interchangeably.[238]

Judges have always had enormous discretion to allow or limit this sort of evidence relating to responsibility. Eighty years ago, Clarence Darrow built his reputation as a trial lawyer by speaking at length—sometimes for hours in his summation—about the defendant as an individual, the social conditions that produced the crime, the philosophical difficulty of determining right from wrong, and the common humanity the jury shares with

237. *See, e.g.*, Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798 (Summer 1991) (arguing that women's self-defense cases and a hypothetical Goetz scenario are indistinguishable).

238. *See* David Margolick, *Lorena Bobbitt Acquitted In Mutilation of Husband: Jury Accepts Her Defense: Abuse Led to Insanity*, N.Y. TIMES, Jan. 22, 1994, at A1 (reporting the verdict in the Bobbitt case, which reflected juror sympathy for the defendant as an abused woman and antipathy for the complainant as an abuser).

the accused.[239] Later, the pendulum swung the other way, with courts allowing only evidence of the "facts" of the crime.[240]

Though my heart is with Darrow, I don't think most judges are with either of us, so a balance must be struck. I suggest that judges be more generous in their evidentiary rulings where defendants are members of a subordinated group, and harder on defendants who are not. I propose that judges give severely deprived defendants—those who have suffered as a result of an increasing divide in our society—an opportunity to present their deprivation to a jury. Knowledge of a defendant's background is necessary to determine whether she is a member of a subordinated group.

The criminal law has long recognized the "weak" when they are victims, in statutes that penalize crimes against children, the elderly, and the disabled more harshly than crimes against others. A more recent development has been the enactment of state hate crime statutes.[241] Such laws, which enhance the penalty for crimes motivated by bias based on race, religion, ethnic origin, and sexual orientation, are now codified in most states.[242]

Stephen Roy Carr committed a hate crime—a crime of the mighty—by preying on two women simply because of their sexual orientation. Though there is nothing simple about the psychology of bigotry, his conduct nonetheless reflects the worst aspects of a dominant, homophobic, misogynistic culture. Carr may have come upon his bigotry "culturally,"[243] but bigotry is not a source of cultural pride. This is not what America is supposed to be about.[244]

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239. CLARENCE DARROW, THE STORY OF MY LIFE 336, 346 (1932). *See also* IRVING STONE, CLARENCE DARROW FOR THE DEFENSE 383, 403 (1941) (describing Darrow's defense of Loeb and Leopold for the murder of a 14-year-old, in which he emphasized that man is a product of heredity and the state of his society); Babcock, *supra* note 233, at 185-87 (describing Darrow's defense of Doctor Ossian Sweet and his "human values").

240. *See supra* note 50-54 and accompanying text.

241. *See* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993) (upholding enhanced penalty schemes for hate crimes). *See also* GREGORY M. HEREK & KEVIN T. BERRILL, HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN (1992) (analyzing trends in violent crimes against lesbians and gay men and proposing public policy responses to address the problem).

242. *See, e.g., Cal. Penal Code* § 13519.6 (Derring 1995); *Fla. Stat. Ann.* § 877.19 (West 1994); *Ill. Ann. Stat.* ch. 720 § 5112-7.1 (Smith-Hurd 1995); *Mass. Gen. Laws Ann.* ch. 22C, § 32 (West 1994); *R.I. Gen. Laws* § 42-28-46 (1994); *Vt. Stat. Ann.* tit. 13, § 1455 (1994).

243. If he had killed the women today, we might point to the 1994 "compromise" on lifting the ban on gays in the military as evidence that gay life is apparently not worth much in this culture. The compromise, "Don't Ask, Don't Tell," was later codified in a more restrictive form by statute and regulation and perpetuates to a large degree the discriminatory policies against gays and lesbians. *See* National Defense Authorization Act For Fiscal Year 1994, Pub. L. No. 103-160 (to be codified at 10 U.S.C. § 654); Memorandum from Secretary of Defense Les Aspin to Secretaries of the Army, Navy, Air Force, and the Chairman of the Joint Chiefs of Staff (July 19, 1993). The regulations are presently in turmoil.

244. *But see* James Sterngold, *Killer Gets Life as Navy Says He Hunted Down Gay Sailor*, N.Y. TIMES, May 28, 1993, at A1 ("[T]he Navy released documents today describing how Airman Apprentice Terry M. Helvey . . . had stalked the victim [Radioman Allen R.

Thus, the emotional, physical, and spiritual deprivation that may have led Carr to commit this crime is not the product of unjust social forces, but individual misfortune and pathology. No doubt Stephen Roy Carr had some sort of mental disability that, coupled with intense homophobia, exploded into homicidal violence. But no one suggested that he was insane. He clearly knew that what he did was wrong:[245] he buried the evidence and told the officers who arrested him that, if he told the truth, they would "put [him] away for a long time."[246]

Stephen Roy Carr's suffering is more similar to that of Bernhard Goetz and Rodney Peairs. Though Goetz claimed he acted in self-defense, when he emptied his five-shot Smith & Wesson .38 revolver into the bodies of four young African-American men on a New York City subway at 1:00 in the afternoon, there is a real question about whether he reasonably believed himself to be in danger of death or serious bodily injury[247] or whether he was "provoked" by these "noisy and boisterous . . . drifters—and others like them."[248] Was Goetz in fear, or had he simply *had it* with brazen black kids? When Rodney Peairs shot and killed the Japanese teen at close range from the door of his home on Halloween, was he reasonably in fear of the high school exchange student, or had he simply *had it* with foreigners and other strangers who just keep coming, no matter how much

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Schindler], then punched and kicked him furiously, at least in part because he hated homosexuals."); James Sterngold, *Slaying of Gay Sailor is Admitted; Shipmate Says It Was Unplanned*, N.Y. TIMES, May 4, 1993, at A1 ("In a case that has focused attention on attitudes toward homosexuals in the military, an American sailor admitted at a hearing today that he beat a gay shipmate to death . . . ."); Eric Schmitt, *Inquiry on Sailor's Killing Tests Navy in Dealing With Gay Issues*, N.Y. TIMES, May 10, 1993, at A11 ("When Allen R. Schindler was beaten to death in a public restroom in Japan last October, the Navy told his mother that he had fallen on his head in a fight."). I can't help but wonder how many senators and joint chiefs of staff would share Stephen Roy Carr's alarm at a public display of same-sex sexuality in view of their opposition to allowing gays in the military. *See, e.g.*, Chris Reidy, *Just Saying No*, BOSTON GLOBE, Jan. 31, 1993, at 65 (exploring the opposition to gays serving in the military).

245. Pennsylvania is a *M'Naghten* state: it requires cognitive impairment in order to establish insanity. *See* Daniel M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843) ("[I]t must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.").

246. Morris, *supra* note 217, at 2A.

247. *See* FLETCHER, *supra* note 163, at 18-62 (discussing passion and reason in self-defense). *See also* David Dunlap, *H.I.V. as a Defense in a Murder Trial*, N.Y. TIMES, Dec. 6, 1994, at A14 (reporting about a murder prosecution of a man who shot two unarmed gay men in Laurel, Mississippi, in which the defense is urging that the H.I.V. status of the victims—which was unknown to the defendant and has not yet been publicly revealed—is relevant to whether the defendant acted in self-defense).

248. FLETCHER, *supra* note 163, at 1.

he wants them to stop?[249] If he was scared, why didn't he lock the door and pick up the phone instead of storming out the door with his gun?[250]

I disagree with Mark Kelman, Stephen Schulhofer, and others who liken Bernhard Goetz to a battered woman, calling him a victim of "Battered New Yorker Syndrome."[251] I do not agree that, simply because Goetz had been mugged before and his assailant had not been prosecuted, and because Goetz had been denied a license to carry a gun, he had no other choice but to arm himself and shoot the next black youth who annoyed him.[252] I do not believe that Goetz "had no practicable way to escape what he saw as an ever-present threat; unable to afford the regular use of a taxi, he had no choice but to use the streets and subways of New York."[253]

Goetz's crimes do not result from a lack of choices. Bernhard Goetz was a nuclear engineer, raised by a middle-class, intact family in Rhinebeck, New York.[254] He was a racist who had been known to rant and rave about "cleaning up the 'spics and niggers' on 14th Street" in New York.[255] He urged the distribution of 25,000 guns to "properly trained private citizens."[256] When he fired a second shot into the (now paralyzed) body of Darrell Cabey, he looked down at the bleeding youth and said, " 'You seem to be [doing] all right; here's another.' "[257]

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249. A Doonesbury cartoon by Gary Trudeau makes this point. In the cartoon, a radio talk-show host is taking calls. Talk-show host: "The topic—a Japanese exchange student, looking for a Halloween party with a friend, is shot to death by a Louisiana homeowner. Japan is stunned, and struggles to understand a country where such things are possible. Our lines are open and our first call is from Baton Rouge. Go ahead, caller." Caller: "Yeah, I just want to say that the Japanese aren't alone. A lot of law-abiding gun owners are struggling to understand, too." Talk-show host: "Understand what, caller?" Caller: "Why he didn't pop the other kid, too. Makes no sense. . . ." BOSTON GLOBE, May 31, 1993, at 23.

250. *Cf.* MARY GAITSKILL, TWO GIRLS, FAT AND THIN 75 (1991):

> "Territory is very important," said my father. Somebody had thrown a paper cup on the edge of our yard, and he'd brought it in and put it on the kitchen table. "That's why people have yards and fences and decorations and flowers in their yards. To establish a territory and mark it. Whatever bastard threw this on our yard has violated our territory, and if I see him do it again I'll kill him."

251. Stephen J. Schulhofer, *supra* note 68, at 123. *See also* Kelman, *supra* note 219. I am only somewhat embarrassed to report that I share the view of Mark Kelman's "mainstream leftist students"—that "the subway killer and the abusive husband, not the respective defendants, [are] the clearly parallel characters in the scenarios." *Id.* at 799.

252. *See* Albert W. Altschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986) (critiquing as overly complex and unworkable the current American criminal and civil trial procedure and citing as one cost of such a system the anger and despair felt by an individual seeking vindication of her rights).

253. Schulhofer, *supra* note 68, at 123 n.60.

254. *See* FLETCHER, *supra* note 163, at 10.

255. *Id.*

256. *Id.*

257. *Id.*

Goetz had many more options than Lisa Grimshaw, the battered woman whose story I told in the beginning of this article.[258] I think that, in light of the choices each had, Grimshaw's conduct is far more defensible than Goetz's. Lisa Grimshaw knew her assailant's potential for danger, since he had brutally beat on, threatened, and stalked her for years. She had left him, called the police, and obtained restraining orders. She had nailed her windows shut.[259]

Goetz could have done what the other passengers did: move to the other end of the subway car and ignore the four kids.[260] He had choices.

Carr, too, had choices; he made choices. He pursued and sought out the source of his disturbance; he stalked the two women lovers, waiting for a spark to ignite his explosion. Like Goetz and Peairs, Carr overreacted with violence to something that *disturbed* him.[261] Like Goetz and Peairs, Carr chose to assert control over the disturbance by killing.[262] Unlike Lisa Grimshaw, he did not explore every possible avenue before engaging in violence out of desperation.[263]

Evidence such as that proffered by Stephen Roy Carr—that his mother "may [have been] involved in a lesbian relationship," that he had been sexually abused by a male prisoner while in a Florida prison, and that he had been rejected by every woman he had ever approached[264]—is prejudicial evidence in every sense of the word. It plays on jurors' biases about homosexuality. Evidence such as that proffered by Bernhard Goetz—that he had been mugged by other African-American males—is similarly prejudicial. It plays on jurors' prejudices about black youth.[265]

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258. *See supra* notes 16-38 and accompanying text.

259. Additionally, unlike Bernhard Goetz's victims, Lisa Grimshaw's abuser had plenty of notice that he was dealing with someone with a lengthy history of abuse both before and during their relationship. This might suggest that he knew—or should have known—that continuing to abuse her was potentially explosive.

260. Consider my brother-in-law, Gary. Raised in Queens, New York, Gary was mugged at least four times commuting by subway to and from high school. Instead of arming himself, he endured. He has since moved to the Chicago suburbs.

261. *See, e.g.*, Kelman, *supra* note 219, at 804 (describing a hypothetical defendant modeled after Goetz as "a hypersensitive multiple-mugging victim and/or a product of a particularly racist subculture that led him to overestimate the risk of violence by young black males").

262. *See generally* CAMPBELL, *supra* note 196, at 7 (characterizing male violence as an attempt to control).

263. *See* CAMPBELL, *supra* note 196, at 7 (characterizing female violence as loss of control and "a cry for help born out of desperation").

264. *See* Commonwealth v. Carr, No. CC-385-88, slip op. at 3-4 (Pa. C.P. Adams County Apr. 3, 1989) (unpublished opinion on post-verdict motions). Interestingly, both Stephen Roy Carr and Bernhard Goetz may have been sexually abused as children. This was expressly raised in Carr's case, *see id.*, but not in Goetz's, *see* FLETCHER, *supra* note 163, at 11 ("[T]he elder Goetz . . . [was] accused and tried for allegedly abusing two young boys when Bernie was 13 years old.").

265. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 73-74 (1991):

> When Bernhard Goetz shot four black teenagers in a New York subway, J., an acquaintance of mine, said she could 'understand his fear because it's a fact that

However, introducing evidence about Lisa Grimshaw's experience of brutality at the hands of her father, a boyfriend, and the decedent, which would come in as relevant to self-defense, is not prejudicial. In fact, it may help undo some misguided stereotypes about battered women and how they come to kill. Introducing evidence about Leroy Williams' abuse, neglect, and deprivation might similarly help undo some prejudice—and ignorance—about what causes violent crime.

IV
COMPLEX PROBLEMS, IMPERFECT SOLUTIONS

> "Nature, Mr. Alnutt, is what we were put on this earth to rise above."
>
> —Katherine Hepburn to Humphrey Bogart in *The African Queen*[266]

> Dear, kindly Sergeant Krupke, you gotta understand,
> It's just our bringing-upke that gets us out of hand.
> Our mothers all are junkies, our fathers all are drunks.
> Golly, Moses, naturally we're punks.
> Gee, Officer Krupke, we're very upset;
> We never had the love that every child ought to get.
> We ain't no delinquents, we're misunderstood.
> Deep down inside us there is good. . . .
> Officer Krupke, we're down on our knees,
> 'Cause no one wants a fellow with a social disease. . . .
>
> —Leonard Bernstein and Stephen Sondheim, *Gee, Officer Krupke!*[267]

> blacks commit most of the crimes.' Actually U.S. Bureau of Justice Statistics for 1986 show that whites were arrested for 71.7 percent of all crimes. . . . What impressed me, beyond the factual inaccuracy of J.'s statement, was the reduction of Goetz's crime to 'his fear,' which I translate to mean *her* fear; the four teenage victims became all blacks everywhere; and 'most of the crimes' clearly meant . . . that most blacks commit crimes. . . . What struck me, further, was that the general white population seems, in the process of devaluing its image of black people, to have blinded itself to the horrors inflicted by white people. One of the clearest examples of this socialized blindness is the degree to which Goetz's victims were relentlessly bestialized . . . images of the urban jungle, with young black men filling the role of 'wild animals,' were favorite journalistic constructions.

Id. at 73-74 (emphasis in original). *See also* Yaroshefsky, *supra* note 5, at 149 ("At trial, defense counsel blamed the victims, describing them as 'savages' and 'vicious predators,' emphasized their criminal histories, which reinforced the racially biased assumption that black men are threatening and violent, and suggested and relied upon negative racial stereotypes by subtle and overt tactics.").

266. THE AFRICAN QUEEN (Romulus-Horizon 1951).

267. Bernstein & Sondheim, *supra* note 77.

I admit that the solution I propose is imperfect. I might not propose it if sentencing were a meaningful part of the criminal process.[268] I am nostalgic for the kind of sentencing that takes into account why a crime occurred and what the context was. I think the criminal law and the notion of criminal *culpability* serve important social functions. The criminal law is supposed to be "judgmental . . . demanding . . . [and] *pacifist*."[269] It is supposed to set a standard. It is supposed to make us control our violent, anti-social tendencies. It is supposed to make us an orderly society, no matter how disorderly our individual lives may have been and may still be. The criminal law has always demanded "compliance even from those (and one could say *particularly* from those) for whom compliance is extremely difficult."[270]

I, too, have some concerns about individual accountability. Not every criminal offense by a disadvantaged person is a "crime of compulsion," an event that person is "helpless" to control.[271] Commentator Wendy Kaminer believes that the argument that criminal defendants are driven to crime by drugs, mental disability, or post-traumatic stress is an example of "victim syndrome."[272] Though she acknowledges that conflicting claims of victimization have always been part of criminal cases, Kaminer increasingly finds that "[d]istinguishing victims from oppressors seems merely a matter of perspective."[273]

Maybe so. But with neutral direction and narrow instruction, why shouldn't a jury decide who's who?[274] Let the prosecutor point out the

268. *See supra* notes 100-04 and accompanying text. *See also* Kaminer, *supra* note 49, at D1 ("Unless sentencing laws are reformed and made more flexible, it would be unjust to reform determinations of guilt."); David Margolick, *Janet Reno at Bar Convention: A Conquering Hero*, N.Y. TIMES, Aug. 9, 1993, at B10 (quoting Attorney General Janet Reno speaking at the American Bar Association convention, who "urged that sentencing be better tailored to punish the truly wicked and spare those who merely lose their way . . . [and s]he hinted at unhappiness with mandatory minimum sentences and said she was re-evaluating the much-criticized Federal sentencing guidelines").

269. Stephen J. Schulhofer, *supra* note 68, at 105, 112.

270. *Id.* at 114.

271. ATTORNEY FOR THE DAMNED, *supra* note 77, at 88 (quoting Clarence Darrow's summation in the capital murder trial of Richard Loeb and Nathan Leopold).

272. Kaminer, *supra* note 49, at 152, 154. Others point to a kind of "radical individualism" which has replaced traditional notions of community. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 444 (1993). *See also id.* at 435-65 (1993) (arguing that American culture, which changed during the twentieth century from an emphasis on order, discipline, and "character" to an emphasis on "personality" and the idiosyncratic self, now suffers from a different culture of crime); MERCER L. SULLIVAN, GETTING PAID: YOUTH CRIME AND WORK IN THE INNER CITY 247-49 (1989) (commenting that young men in a number of city neighborhoods who commit crime refer to successful endeavors as "getting paid" and "getting over," terms that "convey a sense of triumph and . . . irony," and that young men steal not only to obtain money, but to fulfill a sense of self and to participate in the youth culture portrayed by the mass media).

273. Kaminer, *supra* note 49, at D1.

274. *See Nightline*, *supra* note 57 (Clay Cogalis, foreperson of the Lorena Bobbitt jury, commenting, "I think the jury system is actually a very good system, ... [A]lthough we have the benefit of expert testimony, we're still . . . 12 people who have common sense. . . . I

problems with defenses raised and expose the crimes that result from abuse of power, rather than lack of it; that's what prosecutors are supposed to do. Let a jury hear the evidence and context and decide; that's what a trial is for.[275]

Social responsibility and individual accountability need not be mutually exclusive. Jurors can strike a balance.[276] The question will be whether, under all of the circumstances, an individual ought to be held blameworthy and, if so, how blameworthy.

I recognize that most poor people of color don't commit crimes and that most battered women don't kill. I do not wish to patronize either group[277] or render either pathetic. But I agree with Judge Bazelon that "[t]he fact that some persons are resigned to their plights and that their miseries cause us no trouble is hardly a justification for allowing them to continue to suffer."[278] Moreover, locking them up hardly enhances their self-determination.

I also recognize that this paper reveals both a love and a fear of juries. On the one hand, I consider juries to be the shining light of our legal system, the conscience of the community. On the other hand, I don't entirely trust jurors.[279] I'm afraid of jurors reflecting majoritarian views. I'm wary of juror prejudice and fickleness.[280] I'm worried that juries will only give a break to those defendants most like the jury.

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don't have to be a lawyer . . . to sit . . . and decide for myself. . . . Each case has individual facts that need to be decided upon, and I feel . . . that that's the beauty of our justice system."). *See also* Ellen Goodman, *Changing Venues, Changing Values in the Jury Room*, BOSTON GLOBE, Feb. 20, 1994, at 83 ("In 1964, the man accused of killing Medgar Evers was let off by two hung juries of white men. It took 30 years and a racially mixed jury before Byron De La Beckwith was found guilty this month. Justice may emerge over time.")

275. *See* FLETCHER, *supra* note 163, at 7 ("In a criminal trial, two pitted advocates urge contradictory perspectives on the truth, and a neutral judge presides over the battle; the 12 members of the jury must come to a verdict one way or another.").

276. *See* Goodman, *supra* note 274, at 83:

> In the not-so-distant past, a husband who killed his wife when he found her in bed with another man was rarely charged with more than manslaughter. It was considered a crime of passion. Now a battered woman or a battered child can present abuse as a mitigating circumstance. It's why one jury decided Lorena Bobbitt had gone *nuts* when she took the knife to her husband. It's why two other juries got hung up on the level of the Menendez brothers' guilt. . . . However many doubts there are about these verdicts, there are fewer doubts about the legitimacy of this line of defense. In the words of Diane Wiley of the National Jury Project: 'This is how community standards evolve. We have decided that crimes of passion can include things that happen to women and children.'

Id. (emphasis added).

277. *See* Delgado, *supra* note 44, at 22 (summarizing a critique of Bazelon's article, which argues that it "skirts paternalism").

278. Bazelon, *The Morality of the Criminal Law*, *supra* note 144, at 403.

279. *See* ABRAMSON, *supra* note 151, at 1 ("Trial by jury is about the best of democracy and about the worst of democracy.").

280. *See, e.g.*, Seth Mydans, *Menendez Lawyer Enlists Sympathetic Jurors to Defend Client*, N.Y. TIMES, Feb. 1, 1994, at A10 ("[T]he men [on the Menendez jury] . . . were

Unfortunately, looking at recent jury verdicts, there is good reason to worry. The recent hung juries in the prosecution of the Menendez brothers for killing their parents have as much to do with who the defendants were—white, affluent, good-looking, articulate—as it did with the brothers' alleged abuse. Many of the jurors both liked and felt for the brothers.[281] Would this even be imaginable if the defendants were poor, black drop-outs, with drugs and gangs in their pasts?

Nevertheless, I want juries to hear about the social misery that underlies crime, because it will help move us forward as a society. Hearing about the conditions under which deprived inner-city youth and battered women live may enlighten us and force us to consider the hard questions that give rise to change.

Making choices about what juries are allowed to hear is not a radical notion. Under our system of law, relevant evidence is excluded from trial if the "danger of unfair prejudice" outweighs the probative value of the evidence.[282] There is no question that distrust of jurors underlies this practice. We believe that jurors can sometimes be misled, confused, inflamed, and distracted by certain kinds of evidence.[283] Though I am a great believer in juries, there have been an alarming number of examples of jurors being swayed by prejudice.[284]

There are hard calls in line-drawing. The distinction between Stephen Roy Carr and the fourteen-year-old African-American rapist, Leroy Williams, may feel harsh to criminal defense lawyers who urge empathy for all criminal defendants.[285] Carr's rotten social background may be different from Williams' only in degree. Carr may be a sympathetic guy once you get to know him (off the Appalachian Trail, safe in the confines of the

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boorish, insensitive and biased against both women and homosexuals. During the trial prosecutors suggested that Erik Menendez might be gay.").

281. *See* Mary B. W. Tabor, *Stereotyping Men, Women and Juries by Trial and Error*, N.Y. TIMES, Feb. 6, 1994, at E3 ("One female juror described Mr. Menendez as 'bright' and 'a nice guy.' Another called out to the defendant, 'Hang in there, Erik.' "); *Dateline NBC* (NBC television broadcast, Feb. 1, 1994) (interviewing the Menendez jurors).

282. FED. R. EVID. 403. *See generally* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE §§ 184-185 (3d ed. 1984) (discussing the meaning of relevancy and counterweights); Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497 (1983) (attempting to identify what constitutes unfair prejudice).

283. *See* CLEARY, *supra* note 282.

284. For a harrowing account of jurors in a child abuse case who were influenced more by innuendo, fear, and impatience than by the evidence presented—and convicted an apparently innocent person—*see Frontline: Innocence Lost: The Verdict* (PBS Boston affiliate WGBH television broadcast, July 21, 1993). *See also Female Jurors Assert Sexism Hurt Menendez Deliberations*, N.Y. TIMES, Jan. 31, 1994, at A13 (reporting that the hung jury on the Erik Menendez trial had split on gender lines, and that sexism and homophobia had permeated the deliberations).

285. *See* Schulhofer, *supra* note 68, at 114 ("[I]n criminal law, empathy for the defendant is not the strong suit."). *But see* Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) (arguing that empathy and heroism motivate those who defend the indigant accused).

lawyer-client interview room in the local jail). Good people sometimes do bad things.[286]

The distinction between Stephen Roy Carr (and Bernhard Goetz and Rodney Peairs) and Leroy Williams may seem arbitrary or, worse, "political." Is it because Carr is white and Leroy Williams is African-American? Is it because Carr's victim was a lesbian and Williams' victim was merely female? What if Carr had killed another white guy in the mountains? Would he then be permitted to raise the issue of his background?

I stand by the distinction as a starting point, despite these questions. Racism is relevant in determining disadvantage and in weighing deprivation. Sexual orientation, race, religion, class, and ethnicity are relevant in assessing whether the criminal conduct is a "crime of the mighty."[287] Judges should consider these issues when deciding what evidence to allow. It should be harder for defense lawyers to raise the issue of the rotten social background of a defendant who is a member of a relatively advantaged social group than one from a relatively disadvantaged group.

I do not mean to draw lines based solely on suffering,[288] though certain kinds of suffering are relevant. It is not that suffering makes one's decisions reasonable within the bounds of the criminal law. I agree with Mark Kelman that "[s]uffering is . . . as compatible with paranoia as insight, bitterness as well as compassion, self-centeredness as well as altruism."[289] However, the suffering of those who lack resources and power as a result of material conditions in the social structure—the severely deprived urban poor and battered women—ought to be distinguished from the suffering of those experiencing individual, idiosyncratic discontent—Stephen Roy Carr and Bernhard Goetz.[290]

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286. *See* MCINTYRE, *supra* note 56, at 143 (quoting defender's response to the question of how public defenders "sleep nights": "Just because somebody [is] arrested and charged with a crime doesn't mean they are some kind of evil person."). It may be that, like many other criminal defense lawyers, I am not terribly bothered by the dissonance of good people—or at least people I like—doing bad things. I still have a large poster of Woody Allen in my office, despite the fact that he's dating his former wife's adopted daughter, bad behavior for which he's been roundly castigated. *See* Richard Perez-Pena, *Woody Allen Tells of Affair as Custody Battle Begins*, N.Y. TIMES, Mar. 20, 1993, at A25 (reporting Allen's testimony in which he admitted giving "little thought to how the affair [with Mia Farrow's daughter, Soon Yi Previn] would affect the children."). *See also* Caryn James, *And Here We Thought We Knew Him*, N.Y. TIMES, Sept. 6, 1992, at B7 (discussing the parallels between the real life saga of Woody Allen and Mia Farrow and the movie *Husbands and Wives* (TriStar Pictures 1992)).

287. Bazelon, *The Morality of the Criminal Law*, *supra* note 144, at 386.

288. *See* Kelman, *supra* note 219, at 810-11 ("[T]he notion that suffering is intrinsically both (morally) ennobling and (cognitively) clarifying—a notion vaguely derivative of liberation theology—seems appealing to many. . . .").

289. *Id.* at 811.

290. *But see* FRIEDMAN, *supra* note 272, at 443 ("The American system of criminal justice has always professed a deep concern for the self, for individual responsibility. The system makes the claim that every person accused of crime is a unique individual, uniquely treated; guilt, innocence, and dessert are cut to the order of the individual. A criminal trial is by and large tailored to this end.").

And then there are the victims. Even victims with compassion seem to need those who commit crimes against them to be held responsible, which often translates into a demand for punishment.[291] Maybe there is a natural limit to one's capacity for commiseration. The English poet Phillip Larkin once wryly observed, "Yours is the harder course, I can see. On the other hand, mine is happening to me."[292]

The argument on behalf of victims can be quite poignant. In the middle of writing this article, a newspaper reporter called to ask my response to a judge giving a defendant a suspended sentence in a digital rape case, in which the defendant used a finger, not a penis, to penetrate the victim. The defendant was learning disabled, had been sexually abused as a youngster, and had no prior record. The probation department and two defense psychologists had advised against the defendant being sent to prison.[293] The victim was a thirty-four-year-old woman, who was jogging near her home on a bright Sunday afternoon. The defendant apparently jogged up to the woman and asked if he could jog with her. When the woman did not respond, the defendant grabbed her and said, " 'I asked you a question.' "[294] The defendant then picked the woman up and shoved his finger into her vagina through her jogging suit, "repeating a sordid sexual phrase over and over again."[295]

Suspended sentence? You have to be kidding. Upon hearing the story, my heart was with the woman jogger, not the defendant, learning disabled or not. I am a jogger, three years older than the victim, and probably more careless about where I jog. When the reporter told me that the defendant had said he was sorry in court, I said, "Sorry? He was sorry? And then what?"[296] It didn't sound to me as if the defendant did what he did because in the sixth grade some kids had messed with him. It sounded

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291. *See generally* SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE (1983) (discussing the role of revenge in the criminal justice system); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77 (discussing the appropriateness of victim impact statements in criminal trials). *See also* Tom Coakley, *Judge Gives Rapist Suspended Sentence*, BOSTON GLOBE, June 24, 1993, at 29 (citing a rape victim pleading for a prison sentence for her attacker: " 'I'm not heartless and this kid has his whole life in front of him . . . but I want him to look at four walls in jail and realize the conduct that got him there.'"). *But see* Claudia Dreifus, *Joycelyn Elders*, N.Y. TIMES, Jan. 30, 1994, § 6 (Magazine), at 16 (Surgeon General Joycelyn Elders described a man who killed her brother as having a "very serious mental illness" and denied a wish for vengeance, saying, "[M]y brother was always so kind . . . we felt strongly that he would never want anybody put to death. Never!").

292. Martin Amis, *Don Juan in Hull*, NEW YORKER, July 12, 1993, at 74, 80 (quoting from PHILLIP LARKIN, SELECTED LETTERS).

293. *See* Coakley, *supra* note 291, at 29.

294. *Id.*

295. *Id.*

296. *See id.* ([The defendant] told the victim '[I am] very, very sorry for upsetting you when I grabbed you that day.' ").

like he got mad when the woman didn't respond to him. It sounded familiar. As a result of the woman's "rejection" of him, and perhaps his perceived rejection by other women, he had no recourse but to shove his finger into the woman's vagina.[297]

After a moment or two of reflection, I became more measured.[298] But I still wonder whether the defendant's pitch for leniency was successful because of judicial bias: Might judges be more willing to consider low mental capacity, a history of sexual abuse, and a characterization of the crime as "an impulsive act that [the defendant] did not know how to control"[299] in sex crimes than in other crimes? Do judges suddenly become enlightened about the complexity of what causes individuals to commit crime when the crime is sexual assault upon a woman?

CONCLUSION: TOWARD SOCIAL RESPONSIBILITY

> To have doubted one's own first principles is the mark of a civilized man.
>
> —Oliver Wendell Holmes, Jr.[300]

> I denounce and defend. . . . I condemn and affirm, say no and say yes, say yes and say no. I denounce because though implicated and partially responsible, I have been hurt to the point of abysmal pain, hurt to the point of invisibility. And I defend because in spite of all I find I love.
>
> —Ralph Ellison, *Invisible Man*[301]

> I ain't lookin' for prayers or pity
> I ain't comin' 'round searchin' for a crutch
> I just want someone to talk to
> And a little of that human touch
> Just a little of that human touch
>
> —Bruce Springstein, *Human Touch*[302]

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297. *See supra* notes 2-6 and accompanying text (discussing Stephen Roy Carr). *See also* Diana Jean Schemo, *Suspect Described as a Loner Who Never Left Home*, N.Y. TIMES, June 30, 1993, at B6 (describing a Long Island man accused of one murder and claiming to have killed 17 prostitutes as "the boy next door who grew up but never left home" and " 'the kind of person that, maybe, if he went out with someone would get rejected' ").

298. *See* Tom Coakley, *Rapist's Family, Victim Go Public*, BOSTON GLOBE, June 26, 1993, at 1, 8 (quoting Abbe Smith: " 'The question for me is whether [the defendant's] choice was truly a result of a mental disability or whether instead it was a kind of cultural male acting out.' "). I hope my progression from intense identification with the victim to more objective fact-finder is something most jurors undergo.

299. *Id.*

300. DORIS M. LESSING, PRISONS WE CHOOSE TO LIVE INSIDE (1987) (citing Oliver Wendell Holmes, Jr. in acknowledgment).

301. RALPH ELLISON, INVISIBLE MAN 570 (Modern Library 1992) (1947).

302. BRUCE SPRINGSTEEN, *Human Touch*, *on* HUMAN TOUCH (Columbia 1992).

"[T]he law's aims must be achieved by a moral process cognizant of the realities of social injustice," David Bazelon wrote in 1976.[303] Bazelon's recent death means the loss of an important voice in criminal justice and a rare perspective on the bench.[304] When David Bazelon talked about law as a "moral process" or a "moral force,"[305] he was talking about basic "human decency."[306] He thought the criminal law ought to embody the admonition to do unto others as you would have them do unto you.[307]

In order for the criminal law to be a moral force, it must be mindful of the circumstances under which the accused come before it. Some are truly disadvantaged. Some are unlucky.[308] Some have run out of choices. Some are unwitting lawbreakers, notwithstanding the ease with which intent may be proved at trial.

Those of us who want to see the law as a moral force believe that the "law should not convict unless it can condemn."[309] Before we sit in condemnation, we ought to assess whether society's own conduct in relation to the actor entitles us to do so.[310] If moral condemnation were the basis for criminal punishment, we would have to consider whether fourteen-year-old Leroy Williams, raped before he could formulate the words to express the horror of what it means to be raped, freely chose to do wrong. If moral condemnation were the basis for criminal sanctions, we would have to consider whether twenty-year-old Lisa Grimshaw, physically and psychologically abused by every man in her life from her father on, freely chose to do wrong.[311]

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303. Bazelon, *The Morality of the Criminal Law*, *supra* note 144, at 386.

304. Bazelon was a judge on the Court of Appeals for the District of Columbia Circuit for three decades, serving as Chief Judge from 1962 to 1978. He wrote a number of landmark opinions protecting the rights of the accused. He died on February 19, 1993. *See* Marilyn Berger, *David Bazelon Dies at 83; Jurist Had Wide Influence*, N.Y. TIMES, Feb. 21, 1993, at B38 (reporting Judge Bazelon's death, his life-long compassion for the underdog, and his many achievements).

305. Bazelon, *The Morality of the Criminal Law*, *supra* note 144, at 387.

306. *Id.*

307. *Id.*

308. *See id.* at 405 ("[I]t is time—long past time—to confront the relationship between crime and the accident of birth.").

309. *Id.* at 388.

310. *See id. See also* WILSON H. GRIER & PRICE M. COBBS, BLACK RAGE 59 (1968) ("[T]he black boy in growing up encounters some strange impediments. . . . In time he comes to see that society has locked arms *against* him, that rather than help he can expect opposition to his development, and that he lives not in a benign community but in a society that views his growth with hostility.").

311. *See* Bazelon, *The Morality of the Criminal Law*, *supra* note 144, at 389:

> [I]f moral condemnation was the basis for criminal sanctions, we would have to consider—to take some contemporary examples from cases that have come before me—whether a free choice to do wrong can be found in the acts of a poverty-stricken and otherwise deprived black youth from the central city who kills a marine who taunted him with a racial epithet, in the act of a 'modern Jean Valjean' who steals to feed his family, in the act of a narcotics addict who buys drugs for his own use. . . .

Society needs to hear about the suffering. If it doesn't—if we simply lock our problems up instead of confronting their source—we will suffer all the more. My concern is for the victims as well as the defendants. And the truth is that the distance between victims and defendants is not always so great.[312] Both Leroy Williams and Lisa Grimshaw could have been criminal complainants before they became defendants; after all, they were victims first.

We must take responsibility for the hurt, the unfortunate, the forgotten. We must not keep throwing people away. It is heartening that the Attorney General of the United States recognizes the connection between

(citing United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1044 (1973)); Everett v. United States, 336 F.2d 979 (D.C. Cir. 1964); United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 980 (1973).

312. *See, e.g.*, Yaroshefsky, *supra* note 5, at 141-45 (viewing both the victim and the defendant as powerless in the criminal system). *See also* Don Terry, *Boy's Short, Troubled Life Ends with Violence in Chicago*, N.Y. TIMES, Sept. 2, 1994, at A1 (reporting about the shooting death of an 11-year-old murder suspect and the reaction by community members, "stunned by the loss of its children, one an innocent bystander, the other a child robbed of his innocence a long time ago"); Jervis Anderson, *The Public Intellectual*, NEW YORKER, Jan. 17, 1994, at 39 ("The quest for truth, the quest for the good, the quest for the beautiful, for me, presupposes allowing suffering to speak, allowing victims to be visible, and allowing social misery to be put on the agenda of those with power."). On the question of innocent victims, *compare* Kelman, *supra* note 219, at 803-04 (arguing that, from a defendant's perspective, a batterer and a group of black teenagers are aggressors, not victims) *with* WILLIAMS, *supra* note 265, at 74-75 (arguing that, regardless of Goetz's proven motives or conduct, the black teenagers were seen as predators, not victims). *See also* Yaroshefsky, *supra* note 5, at 149 ("Depending upon the prosecution or defense perspective, this was either unjustified violence due to racial bias against four black youths who had not threatened Goetz, or self defense by a frightened victim accosted by four black muggers in a subway car."). As most criminal defense lawyers know, truly innocent victims are a rarity. However, such a distinction is inevitably loaded with culture-bound value judgments about the relative worth of different people. I don't want to perpetuate those ideas.

criminal responsibility and social responsibility.[313] Janet Reno's observations about the misguided nature of a crime policy that looks only to punishment and not to prevention are refreshing.[314] Sadly, the causes of crime usually have *not* been the concern of lawyers or judges.[315]

We must start asking *why* and not simply *what*. I am asking for what David Bazelon calls "decency"[316] and what Bruce Springsteen calls a "human touch."[317] I am asking that we all consider what separates us from Leroy Williams and Lisa Grimshaw and countless others locked up in prisons across the country. I am asking that we all consider who we might be if we had been born into their lives.[318]

After visiting a client in prison, I often jump in my car, turn the music up high, and tear past the guard shack faster than I ought to, contemplating what separates me from my client. Not much. I feel like giving an Academy Award acceptance speech: I want to thank my family, my friends, my colleagues. I feel like celebrating. I feel lucky. And that's exactly the point. There but for the grace of God.

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313. *See* Margolick, *supra* note 268, at B10 (quoting Reno when she spoke extemporaneously at the American Bar Association Convention, urging lawyers to "look beyond their allotted roles in the adversary system and work for the social good"). Yet, Janet Reno has been noticeably silent about the Republican attempts to revise the 1994 Crime Bill consistent with their "Contract with America." *See* Katharine Q. Seelye, *Anti-Crime Bill in a Political Dispute*, N.Y. TIMES, Feb. 21, 1995, at A16 (examining the Republicans' 1995 crime bill and the Clinton administration's response to it).

314. *See, e.g.*, *John Harvard's Journal*, HARVARD MAGAZINE, July-August 1993, at 51, 53-54 (quoting Reno's speech at Harvard Law School in June, 1993):

> Today, 21 percent of the children in America live in poverty . . . a terrifying indictment of a nation that is supposed to care, that is supposed to be so prosperous. . . . The concept of reward and punishment is learned in the first three years of life. If a child doesn't understand punishment, what difference is it going to make what we do with that child when he puts a gun up beside someone's head at age 14. . . . The time is for bold and new ideas. . . . Somehow or other, if we can send men to the moon, we can develop a system that puts families and children first . . . .

315. *See* ATTORNEY FOR THE DAMNED, *supra* note 77, at 80 (Clarence Darrow's summation in the defense of Loeb and Leopold: "Crime has its causes. Perhaps all crimes do not have the same cause, but they all have some cause. And people today are seeking to find out the cause. We lawyers never try to find out. Scientists are studying it; criminologists are investigating it; but we lawyers go on and on, punishing and hanging, and thinking that by general terror we can stamp out crime."). *See also* Barry Krisberg, *Are You Now or Have You Ever Been a Sociologist?*, 82 J. CRIM. L. & CRIMINOLOGY 141 (1991) (calling for a renewed inquiry into the causes of juvenile delinquency and crime).

316. Bazelon, *The Morality of the Criminal Law*, *supra* note 144, at 387. *See also* Anderson, *supra* note 312, at 40.

317. BRUCE SPRINGSTEEN, *Human Touch*, *on* HUMAN TOUCH (Columbia 1992).

318. *See, e.g.*, WIDEMAN, *supra* note 118, at 23, 25 (1984) (contemplating the difference between his brother, serving a life sentence in a Pennsylvania prison, and himself, a highly regarded African-American writer: "When I think of the distance between us in terms of miles or the height and thickness of walls or the length of your sentence or the deadly prison regimen, you're closer to me, more accessible than when I'm next to you in the prison visiting room trying to speak and find myself at the edge of a silence vaster than oceans. . . . The strong survive. The ones who are strong and *lucky*. You can take that back as far as you want to go.").

There may be some people we can never help. But there are many others for whom we could do so much more.[319] When they become criminal defendants, we should all have to confront the reasons why.

319. This paper necessarily raises questions concerning aspects of punishment in this country which are better left for another paper. In short, I would argue for, at the very least, meaningful treatment for convicted defendants with histories of abuse and addiction, and opportunities for rehabilitation for all convicted defendants. *See, e.g.*, Mimi Silbert, *Wrong Way to Get Tough*, N.Y. TIMES, Jan. 29, 1994, at A19 (citing the president of the Delancey Street Foundation, the country's largest self-help organization for felons and drug addicts, who denounced the idea that building more prisons will enhance safety and proposes instead "a tightly structured community to control criminals, hold them responsible, get them off drugs and alcohol and teach them to be decent citizens"). But rehabilitation—frequently dismissed as a failed policy of the sixties, though we have never really tried it—is simply not a politically expedient approach to crime. *See generally*, CURRIE, *supra* note 74, at 235-36, 244.

> [There are] vast numbers of people who appear before the courts suffering from a wide variety of personal and social problems. Our current practice is generally to let them go until they do something bad enough or often enough to justify imprisoning them. Once they are behind bars, little or nothing is done with them before they get out, at which point they are either resolutely neglected by the larger society or, if they cause enough further damage, are thrown back behind bars with much self-righteous headshaking. This is one tragic consequence of a world-view that cannot envision a significant role for public authorities other than the reactive power to coerce and punish. . . . Rehabilitative programs . . . can indeed work . . . .).

A Dan Wasserman cartoon says it all: Two Congressmen stand before the Capitol, discussing crime. One says, "To combat crime, we need more *police* and more *prisoners*." The other asks, "We say that year after year—when does it stop?" The first replies, "When every person in this country . . . falls into one category or the other." Dan Wasserman, BOSTON GLOBE, Nov. 15, 1993, at A10.