

# A WAY OUT OF THE “ROTTEN SOCIAL BACKGROUND” STALEMATE: “SCARCITY” AND STEPHEN MORSE’S PROPOSED GENERIC PARTIAL EXCUSE

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*Dissenting in United States v. Alexander nearly 45 years ago, Judge David Bazelon famously asserted that, as a matter of basic morality, evidence that a criminal defendant had suffered a life of severe economic deprivation (a “Rotten Social Background,” or “RSB”) ought to be factored into the assessment of that defendant’s guilt. But though the moral arguments for a poverty defense are strong, no court or legislature has ever recognized RSB. Certainly, political and utilitarian considerations have played a role in obstructing RSB’s recognition, but the most significant obstacles are likely epistemic: a criminal justice system organized around individualized conceptions of agency and responsibility lacks reliable tools for evaluating the degree to which socioeconomic conditions are responsible for any given crime.*

*The emerging theory of “scarcity,” a hybrid with roots in both cognitive psychology and behavioral economics, reveals a direct causal relationship between urgent financial need and the sorts of cognitive impairment that the Anglo-American criminal law has traditionally recognized as excusing. This Article argues that, in light of these new social-scientific insights, the moral goals of RSB’s proponents might be substantially advanced by means of a relatively minor expansion of traditional excuse doctrine, which would permit triers of fact to factor evidence of socioeconomic disadvantage into the assessment of guilt using epistemic techniques and language familiar to the criminal law. The Article frames out the practical mechanics of such a scarcity defense, and further shows how the logic of scarcity might yield new approaches to the political and utilitarian objections that dogged classic RSB.*

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\* J.D., 2018, Marquette University Law School; B.A., 2004, Harvard College. I am very grateful: to Professor Michael O’Hear for his rigorous and generous mentorship at all stages of this article’s development; to Professors Daniel Blinka, Patricia Bradford, Alan Madry, Kali Murray, Megan O’Brien, and Chad Oldfather, for their inspiring teaching and their help at various stages of this project; and to my parents Katherine and Ian Lambert, my daughters Elsie and Hallie, and my friends Kelly Saunders and Nate Oesch, for their faithful support. This article is dedicated to the memory of my grandfather, Robert B. Wilcox.

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## INTRODUCTION

It is widely understood that poverty is a risk factor for criminal justice system involvement. Individuals living in poverty are more likely to be arrested, more likely to be convicted, and more likely to be incarcerated than individuals who are more financially secure.<sup>1</sup> For many observers, this correlation is a source of deep moral unease. If a person’s socioeconomic circumstances put him or her at a higher risk of performing acts that our legal system labels “crimes,” is it morally defensible to hold that person criminally responsible for those acts?<sup>2</sup> Shouldn’t some part of the responsibility be borne by the social structure that shaped the individual’s circumstances in ways that made him or her unfairly prone to criminally-punishable behaviors?<sup>3</sup>

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<sup>1</sup> See, e.g., Bernadette Rabuy and Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned* (2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/LV9E-MBP5>] (finding that in 2014, incarcerated people had a median annual income of \$19,185 prior to their incarceration, “which is 41% less than non-incarcerated people of similar ages”); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1259 (1976) [hereinafter, Morse, *Reply*]; Andrew Karmen, *Poverty, Crime and Criminal Justice*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 25, 26-31 (William C. Heffernan & John Kleinig eds., 2000).

<sup>2</sup> See, e.g., David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 401-02 (1975-1976) [hereinafter, Bazelon, *Morality*] (“In my opinion, it is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, ‘Behave—or else!’”); Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQ. 9, 54 (1985) [hereinafter Delgado, *Rotten Social Background*] (“In some cases, a defendant’s impoverished background so greatly determines his or her criminal behavior that we feel it unfair to punish the individual. This sense of unfairness arises from the morality of the criminal law itself”); Nicola Lacey, *Socializing the Subject of Criminal Law? Criminal Responsibility and the Purposes of Criminalization*, 99 MARQ. L. REV. 541, 556 (2016) (asking “whether failures of education, socialization, or other external factors undermine the basis of a subject’s fair opportunity to conform his behavior to criminal law, and hence an attribution of criminal responsibility”); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado’s Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 128-129 (2011); R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459, 463 (1994).

<sup>3</sup> See Bazelon, *Morality*, *supra* note 2, at 388 (If law is viewed as a moral force, a decision for conviction requires, *inter alia*, a determination that “society’s own conduct in relation to the actor entitles it to sit in condemnation of

Working from this moral intuition, legal scholars and advocates have mounted a sustained effort over at least the last several decades to develop a theory under which criminal defendants might present evidence of socioeconomic hardship to judge or jury as a means of reducing the degree to which they are held liable for their acts or the severity with which they are punished. Perhaps the most significant intellectual source point for this effort has been Judge Bazelon’s 1973 dissent in *United States v. Alexander*,<sup>4</sup> which both sketched the outlines of the now-dominant model for a theoretical poverty defense, and introduced the evocative phrase “Rotten Social Background” (RSB) by which such theoretical defenses have come to be widely known.<sup>5</sup> This dissent, and subsequent expansions upon it by Judge Bazelon and Professor Richard Delgado, are also notable for their explicit expression of the hope that, by holding society responsible for criminal acts that result from socioeconomic inequality, a formally recognized RSB defense might prompt government to take a more assertive role in alleviating poverty through redistributive policies in order to prevent crime.<sup>6</sup> This underlying interest in promoting aggressive anti-poverty policy remains a persistent theme in the scholarly discussion of poverty defenses.<sup>7</sup>

Despite the scholarly interest it has generated, RSB has failed utterly to gain any real world traction.<sup>8</sup> It has never been adopted by a court or legislature.<sup>9</sup> There are at least three likely reasons for this failure. The first of these is a shift in American political culture away from broad acceptance of the social welfare state and toward a neoliberal worldview that combines skepticism of government’s ability to effectively intervene in socioeconomic inequality with a perceived need for the criminal justice system to exercise increased control over marginalized populations.<sup>10</sup> The

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him with respect to the condemnable act.”). See also, Lacey, *supra* note 2, at 556; Wright, *supra* note 2, at 480-90.

<sup>4</sup> *United States v. Alexander*, 471 F.2d 923, 957-65 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).

<sup>5</sup> Professor Delgado has noted that the name “Rotten Social Background” has a distancing effect, highlighting the class divide between the individual doing the naming and those individuals the namer thinks likely to have need for such a defense. Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1, 7 (2011) [hereinafter, Delgado, *Wretched*]. Professor Morse, echoing Professor Delgado’s critique, abjures the RSB moniker altogether and uses the term “Severe Environmental Deprivation” (SED) to identify the defense. Stephen J. Morse, *Severe Environmental Deprivation (AKA RSB): A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147, 147 n.1 (2011) [hereinafter, Morse, *Severe Environmental Deprivation*]. While I am sympathetic to the reasons why SED might be a preferable term, I will nevertheless use the term RSB throughout this article, both because RSB is the more widely recognized term and because use of RSB will allow me to engage more seamlessly with my sources. I will, however, use the term SED when quoting from sources that use it.

<sup>6</sup> *Alexander*, 471 F.2d at 965 (Bazelon, C.J., dissenting); Bazelon, *Morality*, *supra* note 2, at 404 (“The first step down the long road to moral order is to provide a form of guaranteed income to every family as a matter of right”); Delgado, *Rotten Social Background*, *supra* note 2, at 77-78.

<sup>7</sup> Wright, *supra* note 2, at 500-01 (“Creating the conditions in which the legal system can reasonably hold persons morally responsible . . . would involve a politically awkward egalitarian redistribution of opportunities”); Taslitz, *supra* note 2, at 121.

<sup>8</sup> See Taslitz, *supra* note 2, at 80.

<sup>9</sup> *Id.*

<sup>10</sup> See generally, Angela P. Harris, *Rotten Social Background and the Temper of the Times*, 2 ALA. C.R. & C.L. L. REV. 131 (2011). Harris notes that this shift towards neoliberalism occurred in the early 1970s, at the same time that Judge Bazelon was writing about RSB. *Id.* at 137. In the context of a culture increasingly organized around neoliberal ideology, Harris writes, “[Judge] Bazelon’s framing of the RSB defense sounds hopelessly naïve” because “RSB seems to offer the dangerous classes a ‘get out of jail free’ card, in direct conflict with the notion that they need punishment and

second is a matter of more practical politics: an elected official who endorses RSB risks being labeled “soft-on-crime” by electoral opponents.<sup>11</sup> The third is a problem of incoherence with existing criminal law. The theory of shared social responsibility upon which RSB relies is incompatible with a criminal justice paradigm that emphasizes individual responsibility and autonomy.<sup>12</sup> It is telling that many of those who advocate most passionately for versions of RSB conclude their arguments by raising the possibility of a fundamental shift in the criminal justice paradigm.<sup>13</sup> Recognizing the incompatibility of RSB with existing doctrine, and yet unwilling to give up on the moral urgency of RSB, they suggest that perhaps RSB’s deepest significance is as an invitation to structural change.

Beginning with a 1976 exchange with Judge Bazelon in the pages of the *Southern California Law Review*,<sup>14</sup> and throughout the decades since, Stephen J. Morse has been among the most staunch and influential voices articulating the “incompatibility” argument against RSB.<sup>15</sup> His reasoning begins with the premise that the sole purpose of criminal law is retributive justice, the deterrent effect of which promotes social order and protects individual interests.<sup>16</sup> It is not, Morse asserts, an appropriate role for criminal law to attempt to promote *social* justice; such an effort would dilute the criminal law’s retributive function, and other legal mechanisms exist that are better suited to that purpose.<sup>17</sup> The question then becomes, for Morse, whether RSB can be reconciled with the understandings of responsibility and excuse that underpin our criminal law as practiced.<sup>18</sup> His answer is “no,” as examination of our practices reveals a system organized around conceptions of personhood and agency that the logic of RSB would directly undermine, at great risk to the deterrent potency of the criminal law.<sup>19</sup> Morse further warns of a number of undesirable

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control.” *Id.* at 139, 142. In such a climate, legislators or judges who advocate RSB (if RSB is understood as an acknowledgement of society’s responsibility in failing to ameliorate the conditions that give rise to criminal behavior) make themselves vulnerable to damaging attack by electoral opponents.

<sup>11</sup> *Id.*

<sup>12</sup> Taslitz, *supra* note 2, at 100.

<sup>13</sup> See, e.g., Lacey, *supra* note 2, at 557 (calling for an increased role for history and social science in criminal law scholarship); Taslitz, *supra* note 2, at 128-29; Delgado, *Wretched*, *supra* note 5, at 19 (“The first thing to note is that consistency with settled criminal-law principles and doctrines is not a strong point here. . . . For we could change our system of defenses”). See also Paul H. Robinson, *Are We Responsible For Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and “Rotten Social Background,”* 2 ALA. C.R. & C.L. L. REV. 53, 55 (2011) (arguing that, if criminal liability were to be assessed using a normative crime-control principle of empirical desert, as opposed to the principle of deontological desert that underpins traditional excuse theory, then some RSB cases might qualify for excuse as a form of coercive indoctrination).

<sup>14</sup> See generally Morse, *Reply*, *supra* note 1, at 1247; Stephen J. Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. CAL. L. REV. 1275 (1976).

<sup>15</sup> See generally Stephen J. Morse, *Excusing and the Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUSTICE 329 (1998) [hereinafter Morse, *Excusing*]; Stephen J. Morse, *Deprivation and Desert*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 114, 115 (William C. Heffernan & John Kleinig eds., 2000) [hereinafter Morse, *Deprivation and Desert*]; Morse, *Severe Environmental Deprivation*, *supra* note 5, at 173.

<sup>16</sup> *Id.* See also Morse, *Deprivation and Desert*, *supra* note 15, at 115.

<sup>17</sup> Morse, *Severe Environmental Deprivation*, *supra* note 5, at 158.

<sup>18</sup> *Id.* at 148-53.

<sup>19</sup> Morse, *Deprivation and Desert*, *supra* note 15, at 153-54.

secondary consequences that might result from the adoption of RSB: it would undermine ideas of responsibility that give a sense of identity and worth to all members of society<sup>20</sup>; it would particularly stigmatize those in poverty, marking them as “less than full moral agents”;<sup>21</sup> and it would require government to take intrusive, liberty-burdening action to protect victims (who also tend to be people in poverty) from offenders less likely to be deterred or incapacitated by criminal sanctions.<sup>22</sup>

Morse’s approach does, however, leave open a narrow avenue by which evidence of a defendant’s poverty might be adduced to diminish criminal responsibility. In a 1998 paper on excuse defenses, Morse surveys the excuse doctrines that have been recognized in courts and concludes that excusing, when allowed, is justified either because the defendant’s capacity for rational thought was impaired at the time of the criminal act, or because the defendant faced a hard choice.<sup>23</sup> Morse argues that the excuse doctrine would be more flexible and coherent if, rather than a piecemeal accumulation of excusing conditions, courts instead recognized a single generic doctrine of partial excuse, which would apply whenever the defendant could demonstrate the presence of diminished rationality or hard choice.<sup>24</sup> In the 1998 paper and subsequent writings, Morse has been adamant that this generalized excuse would not enable a poverty defense—unless it could be demonstrated that the poverty actually diminished a defendant’s rationality at the time of the offending act.<sup>25</sup> The result has been a kind of stalemate: on one hand, a *per se* poverty defense like RSB justified only by moral intuition is incompatible with the deep logic of existing criminal law; on the other hand, until recently, no evidence had been discovered of any connection between poverty and the excusing conditions actually recognized by law.

Breakthrough social science research about the short-term impact of poverty on cognition offers a way out of the stalemate. The theory of “scarcity,” developed by behavioral economist, Sendhil Mullainathan, and cognitive scientist, Eldar Shafir, describes a relationship between poverty, cognitive overload, and diminished capacity for rationality and executive function that may allow some defendants to adduce evidence of deprivation in order to demonstrate that their criminal acts were committed under an excusing condition.<sup>26</sup> In this article, I argue that, in light of these new understandings about human behavior, adoption of Morse’s generic partial excuse may be a powerful way for courts and legislatures to make the criminal law fairer and more responsive to the circumstances of the poor.

The paper will proceed as follows. Parts II, III, and IV contextualize my argument by outlining the current legal and moral stalemate over poverty and criminal responsibility. In Part II, I present a historical and conceptual overview of RSB and related poverty defenses. I discuss the legal and moral arguments for a “classic” RSB model—in which evidence of a life of severe deprivation would automatically reduce criminal liability—as well as objections to such a model. I also discuss the various political and conceptual sticking points that scholars have identified in

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<sup>20</sup> *Id.* at 154.

<sup>21</sup> *Id.* See also Morse, *Severe Environmental Deprivation*, *supra* note 5, at 172.

<sup>22</sup> Morse, *Deprivation and Desert*, *supra* note 15, at 154.

<sup>23</sup> Morse, *Excusing*, *supra* note 15, at 341.

<sup>24</sup> *Id.* at 391.

<sup>25</sup> Morse, *Severe Environmental Deprivation*, *supra* note 5, at 173.

<sup>26</sup> See generally SENDHIL MULLAINATHAN & ELДАР SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013).

an effort to explain RSB's failure to find any traction in courts or legislatures. Finally, I consider alternative poverty-defense models that have been advanced in the wake of RSB's failure. Part III develops the concepts of responsibility and excuse as they are conceived of within the rational actor paradigm of criminal law, identifying the core assumptions of the theory and highlighting several moral and conceptual challenges within the theory.

In Part IV, I take up Professor Morse's proposal for a doctrine of generic partial excuse. I review the theory of criminal responsibility and excuse that underlies his proposal, as well as his objection to the proliferation of discrete syndrome-based excuses. I explore the practical mechanics of Morse's generic excuse proposal. Finally, I consider how the proposal might be received by proponents of classic RSB.

In the remaining Parts, I turn to the theory of "scarcity" and how it might break the stalemate over poverty and responsibility. In Part V, I explain how scarcity draws a direct situational link between poverty and cognition, and I survey the research that underlies the model.

Then, in Part VI, I advance the central argument of this article. I argue that, because (given appropriate facts) the psychological dynamics of scarcity establish a direct link between poverty and diminished rationality, Professor Morse's proposed generic excuse doctrine takes on new potential as a means to make the criminal law more responsive to the uniquely challenging circumstances of the poor, without threatening the underlying conceptual integrity of the criminal code. I also consider how a generic excuse doctrine that allows for diminished responsibility based on evidence of "scarcity" might fit into a broader landscape of anti-poverty policy. To the extent that a scarcity defense shifts criminal responsibility onto society at large, it does so in a way that invites preemptive interventions that can be far more targeted—and thus, perhaps, more politically viable—than blunt redistribution. Drawing on the same body of cognitive science research that gave rise to the theory of scarcity, governments might implement non-intrusive "nudge" strategies that minimize cognitive burdens on the poor, thus reducing the likely incidence of crimes that might be partially excused based on diminished rationality. Changes in sentencing policy might also reduce the long-term cognitive burdens that some forms of criminal sanction impose on the poor.

Finally, by way of conclusion in Part VII, I revisit the lessons learned from the failure of classic RSB, showing how a scarcity defense rooted in the generic excuse of impaired rationality might succeed, as both a political and a practical matter, where RSB failed. This approach draws the link between poverty and rationality in a manner that alleviates the concerns about diminishing the personhood of the poor and diluting the deterrent effect of the criminal justice system that burdens classic RSB.

## I. POVERTY DEFENSES AND PARADIGM CHANGE

Reflecting on RSB nearly 40 years after Judge Bazelon's *Alexander* dissent, Andrew Taslitz suggested the RSB concept failed because it cast doubt on certain assumptions fundamental to the "rule of criminal law," thus jeopardizing the entire conceptual architecture of the criminal justice system.<sup>27</sup> This characterization of RSB's impact is reminiscent of historian of science Thomas Kuhn's concept of the "paradigm shift."<sup>28</sup>

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<sup>27</sup> Taslitz, *supra* note 2, at 100.

<sup>28</sup> See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996). Though Kuhn's focus is on epistemic change in empirical science, the dynamic he identifies has been extended to knowledge

A paradigm, in Kuhn’s sense, is an epistemic object, the result of a previous scientific achievement, comprising theory, empirical observation, and methodology.<sup>29</sup> It provides the fundamental outline for an understanding of a world “too complex and varied to be explored at random.”<sup>30</sup> Within the boundaries of an established paradigm, the production and application of knowledge is logical, methodical and rule-governed, and consists in “extending the knowledge of those facts that the paradigm displays as particularly revealing, by increasing the extent of the match between those facts and the paradigm’s predictions, and by further articulation of the paradigm itself.”<sup>31</sup> A paradigm dictates problems and assures the existence of solutions, creates meaning, and defines a worldview.<sup>32</sup>

Problems arise, however, when the knowledge community encounters a problem or phenomenon that cannot be explained by the paradigm.<sup>33</sup> A paradigm can break down in the face of overwhelming inconsistencies, and thereby cast much taken-for-granted knowledge into doubt.<sup>34</sup> Ad hoc alterations and alternative articulations of the paradigm proliferate, such that, even as they cling to the dying paradigm, “few practitioners prove to be entirely agreed about what it is.”<sup>35</sup> The knowledge community disintegrates into a state of crisis, which is resolved only by the adoption of a new paradigm.<sup>36</sup> Epistemic progress, for Kuhn, is not a steady accumulation of knowledge, but rather a series of periodic institutional self-reinventions precipitated by disruptions in the process of paradigm articulation.<sup>37</sup>

The classic Kuhnian paradigm shift was the Copernican Revolution, during which the Sun displaced the Earth at the center of the consensus model of the solar system—at the cost of some astronomers’ heads. We might recast Taslitz’s observation about RSB’s threat to the rule of criminal law in Kuhnian imagery as follows. Much like the Ptolemaic model situated the Earth at the center of the solar system, the now-dominant criminal justice system centers on the rational individual actor, with other concepts of responsibility, the legitimacy of punishment and so on orbiting that main idea like so many planets and moons. Like the systematic inaccuracies in the Ptolemaic model’s predictions regarding the location of the moon and planets, which alerted the astronomers to the geocentric paradigm’s fragility, the moral discomfort that many observers feel when we note the disproportionate impact of criminal justice on the poor is the anomaly alerting us that we are reaching the limit of the dominant paradigm’s ability to usefully shape our interactions with the realities of crime and punishment.<sup>38</sup> And, much like Galileo and Copernicus

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communities of many kinds. *See id.* at 176-81 (discussing the applicability of paradigm theory to knowledge communities beyond the empirical sciences).

<sup>29</sup> *Id.* at 23.

<sup>30</sup> *Id.* at 109.

<sup>31</sup> *Id.* at 24.

<sup>32</sup> *Id.* at 37.

<sup>33</sup> *Id.* at 52.

<sup>34</sup> *Id.* at 66-68.

<sup>35</sup> *Id.* at 83.

<sup>36</sup> *Id.* at 77.

<sup>37</sup> *Id.* at 160-173.

<sup>38</sup> *See* Wright, *supra* note 2, at 463-64 (arguing that the criminal law’s systematic punishment of “substantial numbers of the most deprived who, despite their failure to fall into any currently recognized legal exception to the category of moral blameworthiness, cannot reasonably be said to bear moral responsibility for their charged conduct” reflects a logical “self-contradiction in legal practices regarding responsibility”).

reorganized our entire understanding of the mechanics of the spheres by treating the Sun as the center, Delgado and Bazelon offered to transform our conception of responsibility, punishment and the rest by thrusting the concept of societal responsibility into a central position in our criminal law cosmology.

As first formulated by Judge Bazelon and Professor Delgado, the Rotten Social Background defense would have treated the finding that a defendant had suffered extreme socioeconomic deprivation as *per se* absolving that defendant of at least some portion of his guilt. The defense would have shifted some portion of blame to society, with two logical mechanisms accounting for the shift.<sup>39</sup> The first of these might be termed the “societal standing” argument; it posits that society cannot justly impose blame on an individual unless society itself is blameless with respect to its treatment of that individual.<sup>40</sup> Judge Bazelon formulated societal standing as a factual determination necessary to a judgement of conviction:

A decision for conviction requires the following three determinations: (1) a condemnable act was committed by the actor-defendant; (2) the actor can be condemned---that is, he could reasonably have been expected to have conformed his behavior to the demands of the law; and (3) society’s own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act.<sup>41</sup>

The second argument for inculcating society might be termed the “societal fault” argument; it suggests that by unjustly subjecting the individual defendant to criminogenic deprivation, society itself bears a portion of the responsibility for the crime itself.<sup>42</sup>

Both Bazelon and Delgado were transparent about their desire that the RSB defense be tied to a broader anti-poverty social agenda.<sup>43</sup> They argued that adoption of the RSB defense might promote investment in the poor as a means of crime prevention (though Bazelon makes clear that the true justification for such investment would be basic moral principle, and not merely crime control).<sup>44</sup> Certainly, adoption of the defense would highlight the moral urgency of confronting socioeconomic inequality.<sup>45</sup> Indeed, Delgado has gone so far as to argue that the *refusal* of our criminal justice system to recognize a criminal defense that takes a defendant’s deprived background into account likely in and of itself contributes to rates of poverty and

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<sup>39</sup> Taslitz, *supra* note 2, at 82; Morse, *Deprivation and Desert*, *supra* note 15, at 150-53.

<sup>40</sup> Bazelon, *Morality*, *supra* note 2, at 387-88 (to be a legitimate “moral force in the community,” the law “should not convict unless it can condemn.”).

<sup>41</sup> Bazelon, *Morality*, *supra* note 2, at 388.

<sup>42</sup> Delgado, *Rotten Social Background*, *supra* note 2, at 89; Delgado, *Wretched*, *supra* note 5, at 20.

<sup>43</sup> Bazelon, *Morality*, *supra* note 2, at 403.

<sup>44</sup> *Id.* at 403-04.

<sup>45</sup> See generally *id.* at 404 (“The first step down the long road to moral order is to provide a form of guaranteed income to every family as a form of right, *not* grace or benevolence.”) (emphasis in original). See also *id.* at 403 (“The real problem is that because of our limited knowledge the only apparent solution to the poverty-causes-crime problem is to alleviate the suffering of all deprived people, including non-criminals. If physical order is the only goal, this solution is undeniably wasteful since it directs resources to persons who pose no danger of physical disorder to society. But if moral order is the aim, this solution is a necessity.”).



therefore crime.<sup>46</sup>

Their paradigm-shifting proposal, however, met vehement resistance, with arguments against RSB taking many potent forms. Many of these objections were quite pragmatic. For example, some detractors expressed concerns that the criminal justice system would lose its deterrent power (especially in poor communities already beset by crime) if individuals who were known to have committed criminal acts were seen to be receiving light judgments.<sup>47</sup> That RSB would curtail the criminal justice system’s power to incapacitate dangerous individuals was another grave concern; the specter was raised of involuntary psychiatric treatment or indefinite preventive detention of dangerous individuals found not guilty on RSB grounds.<sup>48</sup>

Further extending the civil liberties concern, some commentators suggested that RSB’s weakening of deterrence and incapacitation would likely result in a need for intrusive anti-crime surveillance and aggressive policing in poor communities — an outcome that might be considered more unjust and oppressive of the poor than a criminal justice system without RSB.<sup>49</sup> Finally, opponents of RSB also targeted the broader redistributive agenda that had been advanced by proponents of the defense, arguing that redistributive investment in the poor would not be a cost-effective anti-crime measure.<sup>50</sup> Reduction in crime among the poor might be achieved at far less cost, they argued, by means of targeted reform in police and prosecutorial practices.<sup>51</sup>

But the most powerful objections to RSB were rooted in concern for the integrity of the Anglo-American criminal justice paradigm itself. Again, much of the architecture of the criminal justice system rests on the foundational assumptions that individual human beings have the general capacity to be guided by reason, and that human acts reflect the intent of the actor.<sup>52</sup> Within this paradigm, volition and the capacity for reason are the criteria of responsibility.<sup>53</sup> The fundamental RSB premise that some portion of criminal responsibility should be displaced from the individual actor onto society is irreconcilable with the criminal justice system’s individual-agency paradigm.<sup>54</sup> It requires a conception of responsibility that can be applied to an abstract entity (society) as well as to individual human actors;<sup>55</sup> it also requires (or at least the societal guilt argument requires) acceptance of an unusual and normally disfavored criterion for responsibility: the nature of the offender’s relationship with society.<sup>56</sup> Finally, it means asking

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<sup>46</sup> Delgado, *Wretched*, *supra* note 5, at 8-9.

<sup>47</sup> Morse, *Deprivation and Desert*, *supra* note 15, at 154.

<sup>48</sup> *See generally* Morse, *Reply*, *supra* note 1, at 1256-57; *see* Morse, *Deprivation and Desert*, *supra* note 15, at 153.

<sup>49</sup> Morse, *Reply*, *supra* note 1, at 1262.

<sup>50</sup> *See generally id.* at 1261.

<sup>51</sup> *Id.* at 1264.

<sup>52</sup> *Id.* at 1249-54.

<sup>53</sup> *See generally* H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 6 (2d. ed. 2008) [hereinafter Hart, *Prolegomenon*].

<sup>54</sup> Morse, *Reply*, *supra* note 1, at 1249-54. *But see, e.g.*, Taslitz, *supra* note 2, at 109-11 (discussing the corporate criminal liability analogy, an example of the ideologically-dominant individual-agency paradigm not being rigorously followed in existing doctrine).

<sup>55</sup> Taslitz, *supra* note 2, at 109-11. *See also* Morse, *Severe Environmental Deprivation*, *supra* note 5, at 157.

<sup>56</sup> *See, e.g.*, Sanford Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 285 (1987) (“The strongest case for the

juries to answer sweeping moral questions unanchored to any paradigmatic legal standard, thus inviting inconsistent and arbitrary results.<sup>57</sup>

So the most powerful objections to RSB were those that exposed this paradigmatic fault line. RSB's opponents argued that to adopt the defense would be to stigmatize and dehumanize the poor, impermissibly tarring those in poverty as somehow deficient in the capacity to be guided by reason.<sup>58</sup> RSB's opponents also strongly challenged any implication that poverty should excuse simply because, statistically speaking, it predisposes people to criminal behavior.<sup>59</sup> Causation does not excuse, they argued: as Professor Morse has pointed out, men commit more crimes than women, such that maleness might be termed a condition that predisposes individuals to crime—but we do not treat maleness as an excusing condition.<sup>60</sup>

The common deep structure of these arguments is a claim that the premises and results of the new paradigm appear illogical when viewed from squarely within the logic of the paradigmatic status quo. The newly proffered paradigm fails by the standards of the old. If criminal responsibility were a matter of empirical science, one supposes an accumulation of compelling facts might eventually have led to a widespread consensus around one paradigm or the other. Facts certainly get most of the credit for the successful careers of heliocentrism, natural selection and quantum physics—all scientific paradigms that encountered stiff resistance when first introduced.<sup>61</sup> But law is less accountable to the empirical world, and rule-of-law ideology favors tradition and consistency. In the words of Professor Taslitz:

The rotten social background defense is thus not inconsistent with the idea of the rule of law or with conceivable variants of that idea. Rather, the defense is inconsistent only with our current governing conception of the criminal law's rule. The rotten social background defense calls us to a more inclusive, realistic,

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social deprivation defense is that a state which fosters or tolerates such deprivation forfeits its right to condemn its victims. But the question “Who has the legitimate authority to judge and punish?” is a different question from “Who should be blamed for individual crimes?” The social deprivation defense may be a fair vehicle for accusing the society responsible for the deprivation, but it is not a ground for excusing the deprived defendant, because by itself it fails to establish the defendant's lack of responsibility.”); Morse, *Reply, supra* note 1, at 1258 (“We might also wonder how many reforms will have to be instituted before it becomes moral to convict criminals”).

<sup>57</sup> Morse, *Reply, supra* note 1, at 1254-55.

<sup>58</sup> See, e.g., Kadish, *supra* note 56, at 284-85 (“The reason [social deprivation] fails to make out a moral excuse, as insanity does, is that it fails to establish the breakdown of rationality and judgment that is incompatible with moral agency. It may be conceded that cultural deprivation contributed to making the defendant what he is (though, of course, only some people so brought up end up committing crimes). But what is he? He is a person with wrong values and inclinations, not a human being whose powers of judgment and rational action have been so destroyed that he must be dealt with like an infant, a machine, or an animal. Those who propose this defense are plainly moved by compassion for the downtrodden, to whom, however, it is nonetheless an insult.”). See also Morse, *Severe Environmental Deprivation, supra* note 5, at 172-73; Morse, *Reply, supra* note 1, at 1259. But see Delgado, *Wretched, supra* note 5, at 19-21 (“To say, as some conservatives do, that most poor people do not violate the law, is simply untrue. Most of them do. Many rich people do, as well, but they get away with it.”); Wright, *supra* note 2, at 485 (“[T]hat an obstacle can be surmounted by some or many similarly situated people does not mean that failure to overcome that obstacle is, even in a nonmoral sense, blameworthy, or the fault or responsibility of those who fail.”).

<sup>59</sup> See, e.g., Morse, *Deprivation and Desert, supra* note 15, at 140; Morse, *Reply, supra* note 1, at 1259.

<sup>60</sup> Morse, *Deprivation and Desert, supra* note 15, at 140.

<sup>61</sup> See Kuhn, *supra* note 28, at 67.

compassionate, and equal form of moral and legal rule. That is its strength, and that is its fatal flaw.<sup>62</sup>

Of course, the alternative to forcing a paradigm shift is to formulate an alternative poverty defense that would be less disruptive of the paradigmatic regime of individual agency than classic, societal-responsibility RSB. I have only found one example of a proposed alternative to RSB that stays entirely within the traditional excuse framework, and it is quite limited in reach. Mirko Bagaric has argued that poverty limits choice and freedom in a manner analogous to duress or to what Morse would term hard choice.<sup>63</sup> Bagaric’s proposal is to treat deprivation as a mitigating factor at sentencing. Under his formulation, poverty does not change the fundamental determination of guilt or innocence, but only affects the severity of punishment (and, moreover, only at the discretion of the sentencing judge). Given the logic of duress, Bagaric would limit the discount only to those defendants who can “establish a direct causal link between the crime and [their] disadvantage.”<sup>64</sup> Such links, he asserts, can only be convincingly made when the charge is a property or drug offense; defendants charged with sexual or violent offenses would be ineligible for the poverty discount.<sup>65</sup> While the logic of this restriction is apparent, it severely restricts the reach of the reform.<sup>66</sup>

Still, the fact that RSB and other poverty defenses retain such a hold on the imaginations of social-justice oriented legal thinkers suggests a persistent moral longing for a mechanism that would enable courts to factor evidence of economic deprivation into the assessment of a defendant’s guilt. Furthermore, I think it is possible to distill from the history of RSB and other poverty defenses some significant insights about the issues likely to make or break such a mechanism’s success. These are key features needed for the mechanism to be politically viable, paradigmatically compliant, and powerful enough to result in fairer outcomes for a meaningful number of poor defendants. Much like market researchers give designers a list of specifications for a new consumer product, I offer this list of “specs” for a pragmatic and attainable solution to the problem of the poverty defense:

#### Spec List for a Practical and Attainable “Poverty Defense” Mechanism

1. The mechanism must factor poverty into the determination of guilt and innocence (rather than merely mitigating punishment) in order to effectively

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<sup>62</sup> Taslitz, *supra* note 2, at 129.

<sup>63</sup> Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 *LAW & INEQ.* 1, 34-35 (2015).

<sup>64</sup> *Id.* at 41. Bagaric would also limit the discount to those “offenders who, at the time of the offence, live in poverty and have done so for the majority of their lives.” *Id.* I assume that this second restriction is intended to make the reform more politically palatable as it does not seem to be required by the logic of duress.

<sup>65</sup> *Id.* at 39 (“Rich or poor, all rational people know that it is wrong to strike another person or to sexually coerce them.”).

<sup>66</sup> See MICHAEL O’HEAR, *THE FAILED PROMISE OF SENTENCING REFORM 56-57* (2017) (arguing that reform efforts focused only on de-escalating the War on Drugs are unlikely to have a broader impact in reducing mass incarceration).

capture the moral stakes of the issue.<sup>67</sup>

2. The mechanism must be broadly available to defendants accused of many kinds of crimes (i.e. not just drug and property crimes). Again, this is in order to fully capture the moral significance of the defendant's poverty.<sup>68</sup>

3. The mechanism must be reasonably straightforward for courts to apply.<sup>69</sup>

4. The mechanism must not stigmatize or dehumanize poor people (or even appear to do so).<sup>70</sup>

5. The mechanism must be responsive to legitimate concerns about deterrence and incapacitation.<sup>71</sup>

6. The mechanism must be compatible with the criminal justice system's dominant paradigm for responsibility (as classic, societal-guilt RSB failed to be).<sup>72</sup>

7. The mechanism must also be *compatible* with an assertive anti-poverty social justice agenda, but it must not derive its theory of responsibility from that agenda.<sup>73</sup>

The proposal that I will develop in the remaining sections of this paper will go some way towards satisfying each of the specifications on this list.

## II. A CLOSER LOOK AT THE RATIONAL ACTOR PARADIGM

Because I suggest that an attainable poverty defense must be compatible with the now-dominant criminal justice paradigm, I move now to a closer examination of that paradigm – the core tenets of which may be distilled as follows.

Law is a system of rules that guides human behavior.<sup>74</sup> As such, it depends logically on

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<sup>67</sup> See *supra* notes 39-46 and accompanying text. It is also valuable that the jury, as the representative of the community, make the normative determination about the degree of responsibility. See also Morse, *Excusing*, *supra* note 15, at 398.

<sup>68</sup> See *supra* notes 64-66 and accompanying text.

<sup>69</sup> See *supra* notes 54-57 and accompanying text.

<sup>70</sup> See *supra* notes 58-60 and accompanying text.

<sup>71</sup> See *supra* note 49 and accompanying text.

<sup>72</sup> See *supra* notes 52-54 and accompanying text.

<sup>73</sup> See *supra* notes 43-46 and accompanying text.

<sup>74</sup> See Morse, *Excusing*, *supra* note 15, at 340 (“Unless human beings were creatures who could understand and follow the rules of their society, the law would be powerless to affect human action. Rule followers must be creatures who are capable of properly using rules as premises in practical reasoning. It follows that a legally responsible agent is a person who is so capable, according to some contingent, normative notion both of rationality itself and of how much capability is required.”). See also Hart, *Prolegomenon*, *supra* note 53, at 6.

the presumption that human beings have the capacity to be guided by rules.<sup>75</sup> In the Anglo-American system, this capacity to be guided by rules is understood to entail a highly individualized capacity for practical reason, which encompasses both volitional and cognitive powers.<sup>76</sup> The volitional power is the power to control and direct one’s own actions. The cognitive powers are the power to understand the rules, to understand the nature of facts and circumstances, and to understand the likely consequences of conduct.<sup>77</sup> When it is a *criminal* law that has been violated, the legal consequence is that the state has the power to punish the violator.<sup>78</sup> According to the dominant paradigm, the legitimacy of punishment depends upon the individual offender’s status as a practical reasoner.<sup>79</sup> Punishment is legitimate because humans (1) have the capacity to understand that punishment is a likely consequence of those violations of widely accepted moral norms that the law identifies as crimes, and (2) have the capacity to direct their own behavior in light of this understanding.<sup>80</sup>

*A. Competing Models of Excuse Within the Paradigm of Human-as-Practical-Reasoner*

The theory of excuse derives from the core conception of criminal responsibility as rooted in the capacity for practical reason. Put broadly, excuses are the type of defense that applies when a defendant’s conduct was objectively wrong, but the defendant cannot be held fully morally responsible.<sup>81</sup> Insanity and infancy are the paradigmatic excuse defenses<sup>82</sup>; the theory is that a defendant who commits a criminal act while his rational and volitional capacities are not fully developed or while in a deluded or irrational state is by virtue of that condition less than fully blameworthy and does not deserve to be punished to the extent that might otherwise be considered an appropriate societal response to the act committed.<sup>83</sup> Excuse is thus an offender-centered doctrine (in contrast with the act-centered doctrine of justification, which applies when otherwise wrongful conduct was right or at least permissible under the specific circumstances—as, e.g., in situations of self-defense).<sup>84</sup>

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<sup>75</sup> Morse, *Excusing*, *supra* note 15, at 340; Lacey, *supra* note 2, at 544; Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 195 (1983).

<sup>76</sup> Hart, *Prolegomenon*, *supra* note 53, at 13-14; Delgado, *Rotten Social Background*, *supra* note 2, at 15-17.

<sup>77</sup> Morse, *Excusing*, *supra* note 15, at 340; Lacey, *supra* note 2, at 544.

<sup>78</sup> Hart, *Prolegomenon*, *supra* note 53, at 13-14.

<sup>79</sup> *Id.*

<sup>80</sup> *See generally* Morse, *Excusing*, *supra* note 15, at 341.

<sup>81</sup> Morse, *Excusing*, *supra* note 15, at 333.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* Jeremy Waldron has explained that, despite its apparent symmetry with self-defense as justification for a violent offense, indigence (i.e., necessity) is unlikely to succeed as a justification for property crimes because, to do so, it would need to “unravel the whole system of property.” Jeremy Waldron, *Why Indigence Is Not a Justification*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW* 98, 105 [Heffernan & Klenig, eds., 2000]. Whereas a plea of self-defense is an “appeal to the values underlying the laws of . . . society,” *id.* at 106, a plea of justification on grounds of indigence “is, in effect, a claim that important dimensions of value and principle . . . that morally *ought* to underlie the society’s property system are missing, and that these missing dimensions of value and principle would in fact be routinely responsible to (or better still prevent the occurrence of) [instances of

I do not mean to suggest that there is universal consensus that the law *should* recognize deficiencies of volitional control or in the capacity for normative reason as excusing conditions.<sup>85</sup> Rather, whether and to what degree the law should recognize excusing conditions is very controversial. But, as I hope to show, these controversies unfold *within* the framework of the human-as-practical-reasoner paradigm. They are controversies about paradigm *articulation*, not paradigm *change*. In this sense, they are analogous to disagreements among pre-Copernican astronomers over how best to model a planet's trajectory around the Earth. The controversy was real and significant, but the underlying assumptions about the Earth's centrality remained unquestioned.

In the paragraphs that follow, I will address the competing models of excuse in more depth. I leave aside those excusing conditions like necessity and duress, where the actor's failure to conform her actions to normative expectations results not from intrinsic deficiencies in the actor's capacity for reason but instead from the circumstances surrounding the offending act.

#### i. The Model Penal Code's Approach

At the expansive end of the spectrum of insanity excuse doctrines is the Model Penal Code (MPC), which recognizes both defects in cognition and defects in volitional capacity as grounds for excuse. The MPC formulates the criteria for excuse as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."<sup>86</sup> Under the MPC's formulation, an individual might be excused if his capacity for rational thought was severely impaired (the "cognitive prong" of the defense) or if his capacity for self-control was impaired (the volitional prong)—provided that the impairment was rooted in mental disease or defect.<sup>87</sup>

The MPC approach is appealing because it attempts to be morally "complete" by accounting for the entire moral framework of responsibility, including the volitional prong. As Richard Bonnie has said, "few people would dispute the moral predicate for the control test—that a person who 'cannot help' doing what he did is not blameworthy."<sup>88</sup> However, though the MPC rule has been widely adopted,<sup>89</sup> critics allege that the rule is a source of ambiguity and incoherence in the criminal justice system.<sup>90</sup> And it is precisely this effort at moral

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starvation or extreme need] like [the defendant's]." *Id.* at 105-106.

<sup>85</sup> Morse recognizes only deficiencies in rational capacity as excusing and argues that most legitimate claims of deficiency in volitional control are better understood as deficiencies in rational capacity. Morse, *Deprivation and Desert*, *supra* note 15, at 139.

<sup>86</sup> MODEL PENAL CODE § 4.01(1).

<sup>87</sup> *Id.*

<sup>88</sup> Bonnie, *supra* note 75, at 196. On the other hand, Norval Morris sees the attempt at moral completeness as disingenuous: "I see the special defense of insanity as a somewhat hypocritical tribute to a feeling that we had better preserve some rhetorical elements of the moral infrastructure of the criminal law. In that regard it is a tribute to hypocrisy, not an operating doctrine." Richard Bonnie & Norval Morris, *Debate: Should the Insanity Defense Be Abolished?*, 1 J. L. & HEALTH 113, 118-19 (1985-87).

<sup>89</sup> Bonnie, *supra* note 75, at 195.

<sup>90</sup> In earlier writings, Bonnie had criticized the MPC approach for inviting experts and juries to scientifically-ungrounded speculation about the defendant's capacity for self-control—thus inviting fabrication. Bonnie,

“completeness” that results in the confusion. As Bonnie explains, the volitional prong creates epistemic challenges with which our criminal justice system is ill-equipped to deal:

Unfortunately . . . there is no scientific basis for measuring a person’s capacity for self-control or for calibrating the impairment of that capacity. There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment.<sup>91</sup>

The requirement that the excusing condition be rooted in mental disease or defect creates its own separate difficulties. This requirement is intended to prevent fabrication; it gives the excusing condition at least some ontological substance beyond the defendant’s own claims about his thoughts and experiences.<sup>92</sup> However, tying an essentially moral determination about responsibility to a medical determination about disease is not a perfect solution.<sup>93</sup> The conflation of the moral and the medical has led to strange courtroom scenes in which psychiatrist expert witnesses are called upon to issue conclusory statements about a defendant’s capacity for moral agency in terms far removed from any scientifically-grounded diagnostic meaning.<sup>94</sup> It is properly the function of the jury to express the normative moral intuitions of the community by determining when moral categories, like reasonableness or responsibility, have been breached.<sup>95</sup> If an excusing condition is too closely tied to the presence of mental disease, one risk is that the jury’s moral-evaluation function will be displaced onto expert witnesses whose competency should properly extend only to scientific and not moral issues.<sup>96</sup>

Another problem with using disease as an “objective” stand-in for excusing condition is that it has resulted in a proliferation of essentially *ad hoc* syndromes — battered woman syndrome, urban survivor syndrome, and so on — that lawyers and expert witnesses have identified and put before the court in order to establish new grounds for excuse.<sup>97</sup> As Professor Morse has noted, the deep moral and logical structure of excuse gets lost in the details of the various proposed conditions.<sup>98</sup> Rather than asking whether the individual lacked the capacity required for responsibility under the dominant paradigm, courts get sidetracked into questions about whether a particular syndrome is legitimate and has been recognized by other courts.<sup>99</sup>

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*supra* note 75 at 196. Morris focused on the hypocrisy he perceived in a system that incarcerated an enormous number of mentally ill in ordinary prisons and jails, and that locked those few individuals who successfully mounted an insanity defense into psychiatric institutions not so very different from prisons. Bonnie & Morris, *supra* note 89, at 118-19.

<sup>91</sup> Bonnie, *supra* note 75, at 196.

<sup>92</sup> Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477, 500-03 (1982).

<sup>93</sup> *Id.*

<sup>94</sup> Bonnie, *supra* note 75, at 196.

<sup>95</sup> Morse, *Excusing*, *supra* note 15, at 400; Bazelon, *Morality*, *supra* note 2, at 390-91.

<sup>96</sup> Morris, *supra* note 93, at 502.

<sup>97</sup> Morse, *Excusing*, *supra* note 15, at 363.

<sup>98</sup> *Id.* at 383.

<sup>99</sup> *Id.* at 384.

## ii. The M’Naghten Approach

In reaction to the problems with the MPC, Richard Bonnie advocated a narrowing of the scope of excuse. Bonnie located the MPC’s failings in its volitional prong which, he argued, could not be empirically or objectively assessed.<sup>100</sup> On the other hand, Bonnie argued a test of diminished capacity that focused exclusively on the defendant’s ability to rationally assess the wrongness of his own conduct would (1) support objective analysis of facts leading to case outcomes “congruent with the community’s moral sense;” (2) encompass most of the cases where the harder-to-evaluate volitional prong of the MCP might also lead to a finding of not guilty by reason of insanity; and (3) preserve the “moral core” of the diminished capacity defense and thus the moral integrity of the criminal law.<sup>101</sup> Thus Bonnie proposed, in effect, a return to the M’Naghten test<sup>102</sup> as the sole basis for exculpation on grounds of diminished capacity; the criterion, he argued, “should be whether the defendant was unable, as a result of mental disease, to appreciate the wrongfulness of his conduct at the time of the offense.”<sup>103</sup>

Notably, Bonnie’s proposed reform preserved the requirement that the defendant’s cognitive disorder be rooted in mental disease or defect; indeed, he further defined the term “disease” to include “only those severely abnormal mental conditions that grossly and demonstrably impair a person’s perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances.”<sup>104</sup> As with the MPC, the requirement of evidence of disease or defect is likely in part a means of preventing fabrication. Furthermore, the inclusion of the reference to alcohol and substances suggests that the disease requirement performs the additional function of accounting for the defendant’s own possible role in creating or failing to prevent a possibly-excusing condition. People do not generally have discretionary control over whether or not they will be affected by a mental disease. Thus, making disease an element of the defense is one way of limiting the likelihood that a defendant might evade responsibility for a crime based on an excusing condition that the defendant himself might have controlled or avoided.<sup>105</sup>

iii. *The Mens Rea* Approach

Narrower still is the *mens rea* approach, which treats cognitive defects as excusing only when they preclude finding of a mental state that is a definitional element of the accused crime.<sup>106</sup>

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<sup>100</sup> Bonnie, *supra* note 75, at 196.

<sup>101</sup> *Id.* at 194, 196-97.

<sup>102</sup> The original M’Naghten test was framed as follows: “[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring 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.” M’Naghten’s Case [1843] 8 Eng. Rep. 718 (HL) 722.

<sup>103</sup> Bonnie & Morris, *supra* note 88, at 124. *See also* Bonnie, *supra* note 75, at 195.

<sup>104</sup> Bonnie, *supra* note 75, at 197.

<sup>105</sup> Professor Morse makes a similar point about the excuse of extreme emotional disturbance: “Extreme mental or emotional disturbance is partially excusing because it compromises the defendant’s rationality, and once again, because there is reasonable explanation or excuse for the disturbance, it is not fully the defendant’s fault that she is in such a state.” Morse, *Excusing*, *supra* note 15, at 336.

<sup>106</sup> Bonnie & Morris, *supra* note 88, at 123.



In contrast with Bonnie, who argued that recognition of diminished rational capacity as an excusing condition was essential to the moral infrastructure of the law, advocates of the stricter *mens rea* approach argued that the special defense of diminished capacity relied on an overconfident assumption about human beings' capacity to draw subtle moral distinctions between degrees of offender responsibility, and thus had the effect of morally *compromising* the institution of criminal law.<sup>107</sup> This is essentially the same critique that Bonnie had leveled against the MPC's volitional prong: though soundly rooted in the dominant paradigm for responsibility, the criterion for diminished rational capacity was, as a practical matter, too vague and subjective to apply with fairness or consistency.<sup>108</sup>

The moral problem of what the state ought to do with those found not guilty of crimes by reason of diminished capacity animated a separate line of attack against the more expansive MPC and M'Naghten approaches.<sup>109</sup> For example, Norval Morris argued that the conflation of criminal and psychiatric conceptions of responsibility and state power created a morally insupportable situation for the “criminal-patient” who might “suffer the worst of both worlds — imprisonment for what he did with the duration of the imprisonment limited only by predictions of his continuing dangerousness.”<sup>110</sup> Morris suggested that the criminal law would be more consistent, fair, and ethical if evidence of mental illness were to have the same consequence for criminal responsibility as evidence of “blindness, deafness, or being a foreigner not speaking the language” might have: i.e., relevant if, as may well be, it affects the determination regarding the presence of a requisite *mens rea*, but not independent grounds for a finding of diminished responsibility.<sup>111</sup> Said Morris, “[t]he best criminal law doctrine that we have been able to devise says that guilt exists when you do a prohibited act with a defined *mens rea*. . . . Once we have established that standard, it is desirable to hold all adults, for their sakes as well as our own, responsible before the law.”<sup>112</sup>

#### iv. The Strict Liability Approach

Most narrow of all is a strict liability approach that predicates criminal liability exclusively on the presence of all the act elements of the crime, with no factual consideration of the offender's capacity as a practical reasoner.<sup>113</sup> Many of those who advocate this approach do so on the Kantian grounds that moral consideration for the dignity and humanity of the offender requires a presumption that the offender acted as a practical reasoner.<sup>114</sup> On this theory, it is a

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<sup>107</sup> *Id.* at 127. *But see* Morse, *Excusing*, *supra* note 15, at 397 (“The criteria for normative competence I have suggested are by necessity imprecise. No precise, formal definition could conceivably guide the normative judgments that morality and the law require. . . . And such soft criteria, which both admit and require normative interpretation, are a common feature of acceptable legal standards, such as reasonableness . . . . The imprecision in the definition of the capacity [for normative competence] is, paradoxically, a virtue because it give proper latitude for such interpretation.”).

<sup>108</sup> *See supra* note 91 and accompanying text.

<sup>109</sup> *See generally* Morris *supra* note 92.

<sup>110</sup> *Id.* at 479.

<sup>111</sup> Bonnie & Morris, *supra* note 88, at 129.

<sup>112</sup> *Id.*

<sup>113</sup> *See, e.g.*, ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 45-55 (1975) (arguing for desert-based liability on Kantian grounds).

<sup>114</sup> Herbert Morris, *Persons and Punishment*, in *ON GUILT AND INNOCENCE* 46 (1976).

matter of fundamental respect to hold individuals responsible for their own actions, without regard for mental conditions or deprived circumstances.<sup>115</sup> One who violates a moral expectation must be blamed and punished as a matter of fundamental human dignity. To do any less would be to deprive humans of their essential dignity—indeed, it would mean a double humiliation for the mentally ill and the poor, because in addition to the suffering caused by their condition, they would also suffer the indignity of being treated as less than full moral agents.<sup>116</sup> Indeed, it might be said that people, even poor or mentally ill people, have a *right* to be punished for their crimes.<sup>117</sup> To hardline proponents of this approach to responsibility, excuse is rarely justified.<sup>118</sup>

This approach is harsher than the other models, but it is squarely within the dominant criminal justice paradigm that predicates responsibility and the legitimacy of punishment upon a conception of humans as capable of practical reason. As further evidence of this model's consistency with the dominant paradigm, consider that applying this approach would not require our criminal justice system to answer any questions that it does not already know how to answer. Indeed, the approach would only *simplify* the existing epistemic processes of the criminal justice system, limiting the inquiry to an examination of whether the act elements of the crime were present. (In contrast, adoption of the social-responsibility paradigm implied by RSB would require the criminal law to come up with ways of answering entirely new forms of question: To what extent did society cause the crime? Has this individual suffered so much that it would be immoral to blame or punish him?)

#### *B. Paradigmatic Concerns Running Through the Competing Models of Excuse*

I have argued that, despite their variety and their obvious tension with each other, the various approaches to excuse described above are all firmly rooted in the humans-as-practical-reasoners paradigm of criminal law. I have also argued that, to have any chance at gaining traction in the near term, any proposed poverty defense must be rooted in the same paradigm. My goal in this section is to tease some thematic threads out of the discussion of the various approaches in order to identify paradigmatic concerns that proponents of poverty defenses should be prepared to address.

One set of concerns that arises throughout the various proposals is purely epistemic. The requirement in some of the proposals that the excusing condition be rooted in disease or defect is relevant here. What must a defendant do in order to establish that a claimed excusing condition is objectively real—or at least was so at the time of the offending act? How does the criminal justice system protect against fabricated excusing conditions? If an expert witness is to be involved, how can that expert establish the factual basis for an essentially moral determination about a particular defendant's blameworthiness, while leaving the actual moral judgment in the hands of the jury?

Another set of fundamentally epistemic concerns has to do with the balancing of the criminal law's interest in moral integrity against its interest in objective and consistent application of rules to facts. Both the volitional prong of the MPC and the M'Naghten test for diminished rationality have been critiqued on grounds that, though the questions they ask are morally

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<sup>115</sup> Michael Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER AND THE EMOTIONS* 179, 215-16 (F. Schoerman ed., 1987).

<sup>116</sup> Morris, *supra* note 114, at 41.

<sup>117</sup> *Id.* at 45.

<sup>118</sup> See, e.g., Michael S. Moore, *Causation and the Excuses*, 73 *CAL. L. REV.* 1091 (1985).

appropriate, they are not questions of a sort that human beings are equipped to answer—at least not to the standards of consistency and empirical objectivity preferred by the law. Part of what was threatening about RSB was that it challenged the criminal law to answer questions that it did not know how to answer. To gain traction *within* the dominant paradigm, a poverty excuse must frame moral questions in ways that the law can address using its existing epistemic techniques and standards.

A third set of concerns has to do with culpability, which is to say with the scope of the inquiry into the defendant’s responsibility. To what extent was the defendant responsible for her own otherwise excusing condition? In the MPC and the M’Naghten approaches (notably the more expansive of the models discussed above), the disease or defect requirement was in part a means of ensuring that the individual not be culpable in causing the otherwise excusing irrationality. It should be possible, however, to achieve the same goal simply by making non-culpability an explicit part of the rule, rather than by attaching it to a requirement that the excusing condition be caused by disease.

A fourth set of concerns relates to disposition. What should the law do with people found not guilty by reason of an excusing condition—particularly when the excusing condition is still present making the individual dangerous? When an individual is found guilty, punishment is justified, which in turn serves the utilitarian purposes of incapacitating the potentially dangerous individual and deterring other possible offenders. Absent the finding of guilt, the law is left with a hard choice between risking both re-offense and reduced deterrence by releasing the individual, or potentially violating the civil liberties of the individual or community through unjustified detention or invasive policing.

A fifth set of concerns relates to the moral responsibilities of the legal system that derive from the embrace of the practical reasoner model as the foundation of criminal responsibility. How can the law recognize excusing conditions without stigmatizing the individual who asserts the excuse as a less than full moral agent? If an entire community or group (i.e., the mentally ill or the poor) were to be singled out as eligible for a special excuse, does that deprive that group of its humanity or dignity?

### III. STEPHEN MORSE’S PROPOSAL FOR A GENERIC PARTIAL EXCUSE AND THE VERDICT “GUILTY BUT PARTIALLY RESPONSIBLE”

Professor Stephen Morse intervened in the excuse controversy in 1998 with an argument that, while the theoretical structure underlying the law’s recognition of excuse was fair in principle, the specific excuses that the law recognized were too limited.<sup>119</sup> He argued that, rather than creating new syndrome-based excuses wholesale, the better approach would be to make reasonable modifications to existing excuse doctrine such that the new claims might be brought within its ambit.<sup>120</sup> Many crimes are committed when the defendant’s capacity for normative reasoning is impaired by factors that the criminal law does not currently recognize, and fairness requires that the judgment of culpability not be tied to whether a particular syndrome or factual circumstance has been recognized as ‘excusing,’ but rather to the underlying, normative excusing condition that is consistent across syndromes and circumstances.<sup>121</sup> Morse’s proposal, then, was

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<sup>119</sup> Morse, *Excusing*, *supra* note 15, at 332.

<sup>120</sup> *Id.* at 329.

<sup>121</sup> *Id.* at 400.

for the criminal law to adopt two generic excuses based on the underlying theories justifying current excuses: one of impaired capacity for normative reasoning, and the other of hard choice.<sup>122</sup> This, he argued, would “enable the law more rationally to consider any reasonable claim and relevant evidence that might satisfy the underlying reasons for excusing, and it would permit defendants to avoid the unreasonable strictures of existing excusing doctrine, which is generally tied to a medical model of abnormality.”<sup>123</sup>

Morse further argues that the law’s “bright-line, all-or nothing tests for responsibility” is inadequate to capture the continuum of degrees of normative competence and thus of responsibility that an inquiry into excusing conditions might yield.<sup>124</sup> Only in cases of homicide does the law currently allow the jury to consider mitigating factors in determining the defendant’s degree of culpability.<sup>125</sup> There is no doctrinal reason not to recognize degrees of responsibility in the context of other types of crimes.<sup>126</sup> Consideration of mitigating factors only at sentencing is an inadequate solution, as it displaces the culpability determination from jury to judge.<sup>127</sup> As the community’s representatives, the jury should be responsible for explicitly normative judgments such as partial responsibility.<sup>128</sup>

For these reasons, Morse advocates the adoption of a verdict of “guilty but partially responsible” (GPR), which would function as an affirmative defense and would ask juries to determine whether an underlying, normative excusing condition was present at the time of the offense without relying on a limiting medical model of why the individual suffered from the condition.<sup>129</sup> Morse further proposes that legislatures set a fixed reduction in sentence for GPR; ideally this would take the form of an “inverse sliding scale between the seriousness of the crime and the amount of the reduction.”<sup>130</sup> This approach would go some way to address incapacitation concerns because “[d]efendants who commit more serious crimes and are therefore more dangerous would be incarcerated longer.”<sup>131</sup>

Interestingly, in an essay published just a few years after the piece proposing GPR, Professor Morse raised (with some apparent concern) the possibility that poverty defense advocates might seize upon GPR as a means of advancing their agenda, if they were able to establish a link between poverty and diminished rationality.<sup>132</sup> Some points from Morse’s discussion merit special consideration here. Certainly GPR is not inherently a poverty defense: “it is possible that more deprived people than non-deprived people would raise [GPR] successfully,”<sup>133</sup> but it is also true that “many life history variables can non-culpably create similar

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<sup>122</sup> *Id.* at 397. For present purposes, it is not necessary that legislatures adopt the generic excuse of hard choice.

<sup>123</sup> *Id.* at 390-91.

<sup>124</sup> *Id.* at 397.

<sup>125</sup> *Id.* at 398, 400.

<sup>126</sup> *Id.* at 398.

<sup>127</sup> *Id.* at 398-99.

<sup>128</sup> *Id.* at 398.

<sup>129</sup> *Id.* at 400.

<sup>130</sup> *Id.* at 401.

<sup>131</sup> *Id.*

<sup>132</sup> See Morse, *Deprivation and Desert*, *supra* note 15, at 153-154.

<sup>133</sup> *Id.* at 145

feelings of rage [or stress, or other rationality-compromising conditions] and consequent behavioral predispositions among non-deprived people.”<sup>134</sup> As Morse notes, the fact that the application of GPR would not be limited to poor people might be seen as both a weakness and a strength: it is a weakness in that it does not single out economic deprivation as a uniquely significant factor in the moral calculus of guilt; it is a strength in that it does not stigmatize the poor as morally “different” from other human actors.<sup>135</sup>

But Morse seems more concerned about certain policy implications of GPR when the focus is narrowly on poverty as a cause of diminished rationality than when the excusing condition originates in other conditions or circumstances. Whereas in the initial essay proposing GPR, Morse argued that fairness should outweigh concerns about deterrence and incapacitation, he seems to assign more weight to those public safety concerns when the excusing condition is rooted in a defendant’s poverty.<sup>136</sup> And whereas in the earlier GPR-proposing essay Morse had expressed confidence in the trial system’s ability to distinguish legitimate from illegitimate claims, in the poverty-focused essay he expresses a fear that courts will be flooded with potentially bogus claims for poverty-based partial excuse.<sup>137</sup>

The point of this comparison is not to suggest that Professor Morse is engaged in some sort of hypocrisy or inconsistency. Neither should it be taken to imply that GPR and poverty are somehow incompatible. Rather it is to emphasize the need for defendants advancing a GPR defense rooted in poverty to show exactly *how* the poverty created a condition of diminished rationality or hard choice. One cannot raise a claim of GPR solely on grounds that one is poor; there must be some further link to an excusing condition.

#### IV. “SCARCITY”

In the preceding Parts, I have mapped the landscape of moral and legal arguments that, for the last several decades, have surrounded the question of the poverty excuse. I turn now to an emerging body of social scientific knowledge with the potential to transform that landscape by bridging the paradigmatic chasm between an excuse theory premised on social justice values and one premised on coherence with extant criminal justice practices.<sup>138</sup> I refer to the science of “scarcity.”<sup>139</sup>

The product of a collaboration between behavioral economist (and MacArthur genius) Sendhil Mullainathan and cognitive scientist Eldar Shafir, the science of scarcity draws upon both

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<sup>134</sup> *Id.* at 144.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 145 (“Defendants with diminished rationality may be less morally responsible and blameworthy, but they may be more dangerous than fully rational criminals. If a reduced rationality partial excuse led to shorter periods of incarceration or other forms of less onerous response, as it surely would, diminished deterrence and incapacitation of more dangerous people would result.”).

<sup>137</sup> *Id.*

<sup>138</sup> Though the criminal law is resistant to paradigm shifts, the social sciences (particularly psychology) are in the midst of a revolutionary shift in focus away from disease and abnormality, and towards a more descriptive analysis of “normal” human cognition. Though legal concepts and categories may remain in relative stasis, paradigm changes in social science may lead to great progress in law by changing how we understand the facts to which those legal concepts apply.

<sup>139</sup> See generally MULLAINATHAN & SHAFIR, *supra* note 26.

disciplines. Its scope extends far beyond the question of poverty and responsibility, but its implications for that question are profound. In the next few pages, I will discuss the science of scarcity using a strategy of progressively narrowing focus. I will first survey the broad outlines of the theory; then I will narrow the focus to scarcity as a theory of poverty; then I will narrow the focus further to scarcity theory's explanation of the relationship between poverty and cognition in order to develop a possible new understanding of the relationship between poverty and crime.

In their introduction to the book that serves as the first comprehensive statement of the theory of scarcity, Mullainathan and Shafir issue a kind of invitation. They write: “[This book] raises a new perspective on an age-old problem, one that ought to be seriously entertained. Anytime there is a new way of thinking, there are also new implications to be derived, new magnitudes to be discovered, and new consequences to be understood.”<sup>140</sup> It is in the spirit of collaborative exploration and discovery captured in these words that I embark upon this discussion.

#### *A. Defining Scarcity*

“Scarcity,” as the term is used by Mullainathan and Shafir, is the subjective experience of “having less than you feel you need.”<sup>141</sup> Scarcity occurs across cultures, economic conditions, political systems, and individual human circumstances.<sup>142</sup> Busy professionals experience “time scarcity”—the sense of having not enough time to do everything they are committed to do.<sup>143</sup> Dieters experience “calorie scarcity”—they do not have enough calories in their daily calorie “budget” to enjoy all the foods they want.<sup>144</sup> Lonely people experience friendship scarcity.<sup>145</sup> And poor people experience financial scarcity—meaning they experience the feeling (and for good reason) that they do not have enough money to adequately meet their needs.<sup>146</sup>

But though the circumstances that cause people to experience scarcity are diverse, the psychological and behavioral consequences of scarcity are remarkably consistent.<sup>147</sup> Scarcity triggers certain ways of thinking and acting—a “mindset” with certain distinctive features that can be identified, to varying degrees, in the busy, the hungry, the lonely, and the poor.<sup>148</sup> The critical feature of scarcity is this: it captures the attention of those experiencing it.<sup>149</sup> It causes people to focus intensely on managing their most urgently felt and immediate needs.<sup>150</sup> Mullainathan and Shafir use the verb “tunneling” to describe this kind of hyper-focused attention on the source of the sense of scarcity.<sup>151</sup> A busy person “tunnels” on meeting the next deadline; a poor person

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<sup>140</sup> *Id.* at 16.

<sup>141</sup> *Id.* at 4.

<sup>142</sup> *Id.* at 5.

<sup>143</sup> *See id.* at 12-14.

<sup>144</sup> *See id.* at 12.

<sup>145</sup> *Id.* at 14.

<sup>146</sup> *Id.* at 12.

<sup>147</sup> *Id.* at 12-14.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 27.

<sup>150</sup> *Id.* at 14-15.

<sup>151</sup> *Id.* at 29.

“tunnels” on making their next urgent payment. This leaves less mental capacity available for other important kinds of cognition.<sup>152</sup> As a result, people experiencing scarcity become less effective at managing other aspects of life.<sup>153</sup>

Specifically, the scarcity mindset diverts mental energy from two related components of mental function that are of critical importance to human thriving.<sup>154</sup> The first of these is cognitive capacity, which Mullainathan and Shafir describe as “the psychological mechanisms that underlie our ability to solve problems, retain information, engage in logical reasoning, and so on.”<sup>155</sup> The second is executive control, which “underlies our ability to manage our cognitive activities, including planning, attention, initiating and inhibiting actions, and controlling impulses.”<sup>156</sup> Mullainathan and Shafir use the broad term “bandwidth” to encompass these two forms of cognition.<sup>157</sup> “Cognitive bandwidth,” then, refers to the capacity for rational thought and the capacity for self-regulation—both key elements of the criminal law’s paradigmatic account of responsible personhood.<sup>158</sup> We use bandwidth “to judge other people’s facial expressions, to control our emotions, [and] to resist our impulses.”<sup>159</sup> It is perhaps the central claim of the theory of scarcity that scarcity directly reduces cognitive bandwidth.<sup>160</sup> Mullainathan and Shafir label this phenomenon as the “bandwidth tax.”<sup>161</sup>

#### *B. Poverty as Non-Discretionary Scarcity*

At this point, readers may be wondering if I intend to argue that criminal defendants should be able to use evidence of dieting or loneliness to advance an excuse of diminished rationality. The answer is maybe: in certain unusual situations, a time-, calorie-, or friendship-scarcity defense might be both viable and morally appropriate. But, as a general principle, poverty belongs in a different moral category from other forms of scarcity.<sup>162</sup> Mullainathan and Shafir draw two key qualitative distinctions between poverty and other forms of scarcity—distinctions directly relevant to the questions of individual agency and culpability with which the doctrine of excuse is concerned.<sup>163</sup> I will address these distinctions in a moment, but first, in the interest of context and precision, I explain how the concept of poverty is defined within the scarcity model.

Anandi Mani and Jiaying Zhao, along with the *Scarcity* authors, “define poverty broadly as the gap between one’s [economic] needs and the resources available to fill them.”<sup>164</sup>

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<sup>152</sup> *Id.* at 35-38.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 47.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 41.

<sup>158</sup> See notes 76-81 *supra*, and accompanying text.

<sup>159</sup> Mullainathan & Shafir, *supra* note 26, at 160.

<sup>160</sup> *Id.* at 47.

<sup>161</sup> *Id.* at 64-66.

<sup>162</sup> *See id.* at 147-50.

<sup>163</sup> *Id.*

<sup>164</sup> Anandi Mani, Sendhil Mullainathan, Eldar Shafir & Jiaying Zhao, *Poverty Impedes Cognitive Function*, 341 SCIENCE 976 (2013).

Furthermore, the *Scarcity* authors neither offer nor insist upon an objective definition of “need”; what one “needs” may be determined subjectively.<sup>165</sup> What sets poverty apart from other types of scarcity is that the *sense* of need is beyond the individual’s control.<sup>166</sup> Generally, Mullainathan and Shafir define “poverty” as “cases of economic scarcity where changing what you want, or think you need, is simply not viable.”<sup>167</sup>

They do recognize that there can be qualitative differences in economic needs. For example, some needs, such as hunger, are of biological origin, while others, such as “needing” a car to access work in certain communities, result from social practices.<sup>168</sup> Nevertheless, they do not distinguish between these kinds of needs in developing their theory of poverty-as-scarcity; they recognize that there is little empirical evidence to evaluate whether poverty rooted in different kinds of needs can have different psychological effects.<sup>169</sup>

So, how is poverty different from other kinds of scarcity? First, in contrast to other forms of scarcity, poverty does not generally permit those experiencing it to make discretionary choices in order to reduce its psychological effects.<sup>170</sup> A busy but well-to-do professional can choose to take on fewer projects and thus control her experience of scarcity.<sup>171</sup> Similarly, a dieter who finds himself consumed by thoughts of food and calorie counting can simply choose to back off from the diet for a few days without ill effect.<sup>172</sup> Discretion thus functions as a “safety valve that can limit scarcity’s stress and damage.”<sup>173</sup> Poor people do not have that discretion.<sup>174</sup> One cannot simply choose not to be poor.<sup>175</sup> Nor can one simply choose not to desire basic needs like clothing or medical care in order to moderate scarcity.<sup>176</sup> The unavailability of discretion to moderate the damaging effects of scarcity is a definitional element of poverty-as-scarcity.<sup>177</sup>

Poverty is also distinctive in that it *compounds* the effects of other kinds of scarcity.<sup>178</sup> A person who is experiencing time scarcity but has financial resources can use those resources to

<sup>165</sup> Mullainathan & Shafir, *supra* note 26, at 149.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* See also Shafir, *Poverty and Civil Rights: A Behavioral Economics Perspective*, 2014 U. ILL. L. REV. 205, 222-26 (2014).

<sup>169</sup> Mullainathan & Shafir, *supra* note 26, at 149.

<sup>170</sup> *Id.* at 148-149.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 148.

<sup>174</sup> Mullainathan and Shafir do note that it is possible for individuals experiencing other kinds of scarcity to lack the safety valve of discretion. For example, a person who is working two jobs in order to avoid financial calamity may not have the discretion to manage her time scarcity. Similarly, an individual hewing to a strict diet in order to manage a dangerous medical condition does not have the discretion to relax her adherence to the diet. *Id.* at 148-49.

<sup>175</sup> *Id.* This is, admittedly, a controversial proposition; some cases of poverty are certainly the consequence of discretionary choices. In the criminal justice context, it seems reasonable to require some evidentiary showing that the individual’s poverty is non-culpable, if the poverty is to serve as an excusing condition. The question of culpability will be addressed in Section VI.C, *infra*.

<sup>176</sup> Mullainathan & Shafir, *supra* note 26, at 149.

<sup>177</sup> See *id.*

<sup>178</sup> *Id.* at 149-150.



free up time—for example by hiring a nanny to cut-back on time that would otherwise be spent on child care, or by purchasing a vehicle and a parking permit to save the time that would be otherwise spent on a daily public-transit commute.<sup>179</sup> In contrast, a time-scarce person who is also poor is less able to take action to control the effects of the time scarcity.<sup>180</sup> As Mullainathan and Shafir explain, “poverty means scarcity in the very commodity that underpins almost all other aspects of life.”<sup>181</sup>

Poverty is therefore distinct from other forms of scarcity in both quality and degree. The qualitative distinction has to do with agency. In many cases, poor people have little agency in creating their condition of scarcity and little agency to mitigate or escape it.<sup>182</sup> Furthermore, poverty reduces people’s agency to manage other forms of scarcity. The qualitative difference of agency leads to another difference, this one of degree. Poverty’s psychological effects are more extreme and more damaging than the effects of other forms of scarcity.<sup>183</sup>

### C. Poverty, Scarcity, Cognition, and Crime

So how, exactly, does poverty affect cognition? We know that it reduces cognitive bandwidth, meaning that it reduces both rational thinking and executive control. But what does that look like in the real-world thoughts and behaviors of the poor? Here I begin to address this question by describing two experiments that were fundamental to the development of the theory of scarcity.

Mullainathan, Shafir and their colleagues conducted the first of these experiments in a suburban mall in New Jersey.<sup>184</sup> The researchers asked mall-going subjects to describe how they would respond to hypothetical financial problems, such as a car needing repair.<sup>185</sup> Some subjects were assigned to a “hard” condition in which the amounts at stake in the hypothetical situation were high (e.g., the car needing \$1500 to fix); other subjects were assigned to an “easy” condition with lower amounts (e.g., \$150) at stake.<sup>186</sup> After responding to the scenario, subjects were asked to perform a computer-based task that tests fluid intelligence.<sup>187</sup>

The researchers analyzed the results of these fluid intelligence tests based on the subjects’ reported annual household incomes.<sup>188</sup> They found no significant difference in performance between poorer and wealthier mallgoers when they had been assigned to the easy condition (i.e., when they had responded to hypothetical financial problems involving lower dollar amounts).<sup>189</sup> The researchers also found that wealthier mall-goers showed no significant change in

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 150

<sup>182</sup> *See* Section VI.C, *infra*.

<sup>183</sup> Mullainathan & Shafir, *supra* note 26, at 150.

<sup>184</sup> *Id.* at 49-51; *see also* Mani, *supra* note 164, at 977 (for technical description of the research methods).

<sup>185</sup> Mullainathan & Shafir, *supra* note 26, at 50.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* For description of the test, *see id.* at 48.

<sup>188</sup> *Id.* at 49. Note that the “poorer” subjects in this study are not necessarily objectively poor. They just fall below the median household income.

<sup>189</sup> *Id.* at 49.

performance when they were assigned to the hard condition.<sup>190</sup> However, the performance of poorer subjects dropped dramatically when they took the test after having been assigned to the hard condition.<sup>191</sup> The difference was equivalent to a drop of 13 IQ points, which was *greater* than the drop in performance that the same tests reveal when the subject has gone a night without sleep.<sup>192</sup> The authors hypothesize that by posing scenarios with dollar amounts in a range that would be authentically difficult for poorer subjects to scrape together, they triggered a scarcity mindset in the poorer subjects.<sup>193</sup> Their subsequent performance on the fluid intelligence test was significantly worse because they were preoccupied with financial concerns.<sup>194</sup>

In a modified version of the same study, the researchers followed the hypothetical financial problems with a computer-based test for impulse control (replacing the test for fluid intelligence).<sup>195</sup> The test was designed to directly measure the subjects' ability to inhibit initial, impulsive responses in favor of a different response.<sup>196</sup> Again, when the subjects had been exposed to financially easy scenarios, the subsequent cognitive tests revealed no significant difference in performance between poor and well off subjects.<sup>197</sup> And again, when the subjects had been exposed to financially hard scenarios, the well-off subjects showed no change, but the poorer subjects did significantly worse.<sup>198</sup> Poorer subjects had successfully controlled their automatic impulses 83% of the time following exposure to the financially easy scenarios; that number dropped to only 63% when they had been asked to respond to financially hard scenarios.<sup>199</sup>

The studies in the New Jersey mall separated subjects into socioeconomic groups in order to assess the cognitive effects of scarcity. In contrast, in a separate study, the researchers followed individual subjects over time, tracing how changing degrees of scarcity affected their cognition.<sup>200</sup> Using the same tests of fluid intelligence and executive function described above, the researchers compared the cognitive performance of individual sugar cane farmers in India in the period immediately before the harvest, when financial resources were most scarce, and in the period immediately after the harvest, when resources were plentiful.<sup>201</sup> They identified dramatic changes in performance: when resources were tight, cognitive performance was significantly below average, but when resources were plentiful, the same individuals' cognitive performance improved to be indistinguishable from that of the financially more secure.<sup>202</sup>

These findings emphasize one critical point: the scarcity model is suggestive only of a

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<sup>190</sup> *Id.* at 50.

<sup>191</sup> *Id.* at 51.

<sup>192</sup> *Id.* at 51-52.

<sup>193</sup> *Id.* at 50.

<sup>194</sup> *Id.* See also Mani et. al., *supra* note 164, at 980.

<sup>195</sup> *Id.* at 55-56.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 55-56.

<sup>199</sup> *Id.* at 56.

<sup>200</sup> *Id.* at 57.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 58-59.

*short-term, situational* relationship between an *experience* of poverty and impaired cognition.<sup>203</sup> Bandwidth is not permanently compromised by poverty; “when income rises, so, too, does cognitive capacity.”<sup>204</sup> Thus, the findings do not mark poor people as fundamentally different from non-poor people on a cognitive level.<sup>205</sup> The findings about the relationship between poverty and cognition are “not about poor people, but about any people who find themselves poor.”<sup>206</sup>

Though Mullainathan and Shafir do not directly address the relationship between poverty, scarcity and crime, they show that the scarcity model elegantly explains several other perceived behavioral “failures” of the poor.<sup>207</sup> For example, nonadherence to medical treatment, e.g. by failing to take prescription medicines that would control chronic conditions, is far more common among poor people than non-poor people.<sup>208</sup> Mullainathan and Shafir suggest that this phenomenon is a predictable consequence of overtaxed bandwidth.<sup>209</sup> Similarly, social science has consistently shown that the poor are often less effective parents than the non-poor: poor parents are more likely to be harsh, inconsistent, and disengaged.<sup>210</sup> Mullainathan and Shafir juxtapose these results with research on the parenting behavior of air traffic controllers.<sup>211</sup> On days with high volumes of air traffic, when their job has been more cognitively taxing, air traffic controllers are significantly more likely to display the same adverse parenting practices that have been identified in the poor.<sup>212</sup> Thus, Mullainathan and Shafir suggest that the difference in poor people’s parenting styles should properly be attributed not to some failure of culture or character, but to the bandwidth tax imposed by poverty.<sup>213</sup> Patient, responsive parenting requires bandwidth, but instead of spending their bandwidth on their children, parents in poverty must spend their bandwidth to manage scarcity: “juggling rent, loans, late bills, and counting days to the next paycheck.”<sup>214</sup>

#### V. PROPOSAL: A “SCARCITY” DEFENSE UNDER THE RUBRIC OF GPR

In this section, I demonstrate that legislative adoption of the GPR verdict as proposed by Professor Morse would create space for a viable poverty defense if defendants use the theory of scarcity to establish a connection between severe financial need and impaired normative capacity.

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<sup>203</sup> Mani et. al., *supra* note 164, at 977 (explaining that the proposed mechanism for the impact of poverty on cognition “does not operate through brain development at early childhood but through an immediate cognitive load caused by financial concerns.”). *See also id.* at 980 (“Being poor means coping not just with a shortfall of money, but also with a concurrent shortfall of resources. The poor, in this view, are less capable not just because of inherent traits, but because the very context of poverty imposes load and impedes cognitive capacity.”).

<sup>204</sup> Mullainathan & Shafir, *supra* note 26, at 160.

<sup>205</sup> *Id.*

<sup>206</sup> Mani et. al., *supra* note 164, at 980.

<sup>207</sup> Mullainathan & Shafir, *supra* note 26, at 150-61.

<sup>208</sup> *Id.* at 151.

<sup>209</sup> *Id.* at 157.

<sup>210</sup> *Id.* at 152-53.

<sup>211</sup> *Id.* at 156.

<sup>212</sup> *Id.* at 155.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 156.

It's important to note here that evidence of poverty would not be the only means of satisfying the elements of GPR: evidence of other cognition-impairing circumstances—including, conceivably, other forms of scarcity like time- or friendship-scarcity—might equally well be put before juries as relevant to a finding of GPR.<sup>215</sup> But that GPR is not a poverty-specific defense is a strength of the proposal: its political appeal is likely to be broader, and it does not stigmatize the poor as belonging to a separate moral category.<sup>216</sup>

#### A. Formulating the GPR Statute

How is the statutory language of GPR to be formulated? Professor Morse has endorsed the language of the MPC's doctrine for reducing murder to manslaughter. Under this formulation, a GPR verdict would be appropriate for the defendant whose offense was committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."<sup>217</sup> The key feature of the MPC's extreme mental and emotional distress provision ("EMED") is its expansiveness: it frees the question of excuse from rigid factual categories and frames it instead in normative terms, to be evaluated by the trier of fact case-by-case and in light of all relevant circumstances.<sup>218</sup> At its core EMED is an invitation to the defendant to present a coherent and credible moral narrative. The MPC's drafters explain it in these terms: "In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen. [EMED] faces this issue squarely and leaves the ultimate judgment to the ordinary citizen in the function of a juror assigned to resolve the specific case."<sup>219</sup>

Morse's reasons for endorsing EMED as a model for GPR certainly align with the intentions of EMED's drafters, in at least two key ways. First, like the Code drafters, Morse seeks to separate questions of responsibility from arbitrary categorization of conduct and instead focus the inquiry on the essential normative issue.<sup>220</sup> This is why he advocates a generic excuse of impaired normative capacity that sweeps in all reasonable and non-culpable causes of the

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<sup>215</sup> Morse, *Severe Environmental Deprivation*, *supra* note 5, at 171; Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 299 (2003).

<sup>216</sup> I acknowledge the possibility that legislative adoption of GPR might work to the benefit of wealthy defendants as much as to poor ones. My hope is that disciplined enforcement of the "reasonable explanation or excuse" or non-culpability standard would weed out frivolous invocations of the GPR defense and reserve its use for those defendants who truly lacked discretionary control over the circumstances giving rise to their normative impairment.

<sup>217</sup> MODEL PENAL CODE § 210.3(1)(b) (AM. L. INST. 1962), cited in Morse, *Excusing*, *supra* note 15, at 336. (This provision of the MPC is an expansion and modernization of the traditional doctrine of provocation); *See generally*, MODEL PENAL CODE § 210.3, Comment 60 (1980) [hereinafter "Comment"].

<sup>218</sup> EMED is an expansion upon and modernization of the traditional doctrine of provocation. That doctrine had permitted mitigation only in those cases in which the victim of the homicide had provoked the defendant to act, and in which the killing had followed the provocation without an intervening "cooling off" period. EMED was designed to "sweep away" these "rigid rules," and reframe the question of mitigation in expansive and fundamentally normative terms, to be evaluated by the trier of fact, case-by-case and in light of all relevant circumstances. Comment, *supra* note 217, at 61. The MPC drafters also introduced a subjective element into the analysis of the reasons for the defendant's claimed emotional distress: the code provides that "the reasonableness of [the] explanation or excuse is to be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." MODEL PENAL CODE § 210.3(1)(b) (1980).

<sup>219</sup> Comment, *supra* note 217, at 63.

<sup>220</sup> Morse, *Excusing*, *supra* note 15, at 400.

impairment, whether medical, situational, or a hybrid of the two.<sup>221</sup> This is also the thrust of his argument that the theory of impaired rationality that partially excuses some homicide charges ought to be generalized to other crimes.<sup>222</sup> Second, like the drafters, Morse emphasizes that normative determinations are properly a jury function and favors mechanisms (a plain language formulation of the central moral question, and a low bar to admission of evidence relevant to the excuse) that empower the jury in that role.<sup>223</sup> A jury’s sympathy or intuition is not a finely tuned moral instrument, but it can and should be treated as a reliable tool for gross moral discernments of the sort demanded by EMED.<sup>224</sup>

Furthermore, from the perspective of advocacy for impoverished criminal defendants, there’s much to recommend the EMED language as the standard for GPR—or, at least, EMED as Morse and the Code drafters intended it to function.<sup>225</sup> A tremendous challenge in seeking justice

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221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 Some state legislatures and courts have resisted implementing EMED in the expansive manner intended by the MPC’s framers, and have instead narrowed the defense in ways that would be disadvantageous to poor defendants if they were imported into an EMED-based GPR statute. One such distortion arises when courts define “extreme” against a benchmark of the defendant’s own typical level of emotional arousal. *See, e.g.*, *State v. Shelton*, 385 N.Y.S. 2d 708, 718 (N.Y. 1976) (“The term ‘extreme’ refers to the greatest degree of intensity away from the norm for that individual”). This definition yields confusing results. Is the highly-excitabile defendant more likely to be treated leniently? Or is he less likely to secure EMED mitigation because his emotional disturbance at the time of the crime is not ‘extreme’ for him? Paradoxically, in at least one case, a court has used the fact that a defendant was usually “cool” to ground a finding that he was not emotionally aroused at the time of his crime. *Id.* at 718 (“It was proved that the defendant, as he described himself, had always been very ‘cool’ and in the last analysis, he knew it was his word against hers, a 14-year-old student. This does not spell out such an extreme and unusual stress to account for his reactions.”) More importantly, defining “extreme” relative to the defendant’s own benchmark might make the defendant’s prior offenses or bad acts admissible character evidence to show that his level of emotional arousal at the time of the charged offense was not unusual for him. The impoverished defendant mounting an EMED defense has likely experienced scarcity in the past and, in consequence, displayed emotional disturbances and maladaptive behavior — but this should not be treated as evidence of his emotional “benchmark.” It’s a reflection, rather, of the persistent resource shortage to which he’s been subject.

A second set of interpretive distortions center on the “reasonable explanation or excuse” requirement. In light of the MPC drafters’ intention that EMED enable the defendant to tell the jury a story that might invite its sympathy, I think the “reasonable explanation or excuse” element essentially requires narrative integrity: a reasonable explanation is one that is grounded in credible facts (or at least facts as the defendant perceived them, if there’s credible good reason for that perception), and that spells out some form of coherent, convincing cause-and-effect relationship between those facts and the claimed mental or emotional disturbance. But many state legislatures have not included the MPC’s subjectivizing explanation of “reasonableness” in their EMED statutes, thus inviting courts to read into the statutes a “reasonable person” standard likely to be unfriendly to impoverished, culturally marginalized defendants. State courts have also imposed limits on the kinds of cause-and-effect narratives that might explain the excusing condition. For example, Kentucky’s EMED case law requires the defendant to identify a specific “triggering event” that brought about the excusing loss of self control, thus narrowing the scope of the defense to something much closer to traditional provocation. *Wheeler v. Commonwealth*, 121 S.W.3d 173, 184 (Ky. 2003).

Legislators concerned that a GPR statute framed in the broad terms of EMED might fall prey to these sorts of judicial distortions may wish to draft a statute that more precisely describes the excusing concept (which would mean accepting that this increased precision may exclude some defendants who do have a legitimate moral claim to excuse). Legislators pursuing this approach may find the language of Joshua Dressler’s proposed provocation statute a helpful starting point:

for the poor is getting non-poor people to understand exactly how and why poverty shapes people's lives and behaviors.<sup>226</sup> The EMED formulation, especially in light of its subjective qualification of the reasonableness standard, invites the defendant to engage in the kind of narrative teaching that inspires empathy.<sup>227</sup> And its inclusive description of the excusing mental condition would accommodate defendants whose cognition and behavior has been affected by poverty in a host of newly-understood ways that straddle the line between situational response and persistent mental impairment.<sup>228</sup>

*B. Using Scarcity to Satisfy the GPR Requirements.*

With an appropriately expansive GPR statute in place, the defendant seeking the verdict would attempt to present to the jury a coherent three-part moral narrative. First, the defendant would need to establish the existence of the factual condition or circumstance that will serve as the objective foundation for her claim of cognitive impairment.<sup>229</sup> This objective standard performs approximately the same function as the "mental disease or defect" requirement in the MPC's insanity provision: it ensures that the defendant's claim to excuse is rooted in something more substantial than her own subjective description of her experience, thus guarding against fabrication.<sup>230</sup> Second, the defendant must convince the jury that the factual condition or circumstance actually caused the defendant to experience a cognitive impairment. And third, the defendant must establish a causal relationship between the normative impairment and the actual offense. The value of scarcity theory in this context is that it enables the defendant to draw a clear narrative line linking factual evidence that she was experiencing financial distress at the time of the offense to an excusing cognitive state.

The objective threshold of severe financial distress might be met in any number of ways. A defendant might, for example, introduce bills, lease agreements showing rent amounts, or documentation related to payday loans or legal financial obligations. Unbanked defendants who participate in a cash- or barter-based shadow economy may need to rely more upon testimonial evidence: their own, or that of others with whom they transact. In certain cases, scarcity may be triggered not by the defendant's own urgent financial need but by that of a close friend or family member.<sup>231</sup>

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mitigation would be appropriate when the crime occurs under circumstances "that might cause a reasonable [ordinary] person, of average disposition, to lose self-control and act rashly and without due deliberation." Joshua Dressler, *Why Keep the Provocation Defense: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 998-99 (2002).

<sup>226</sup> See Wright, *supra* note 2, at 487-88; Delgado, *Wretched*, *supra* note 5, at 14.

<sup>227</sup> See Delgado, *Wretched*, *supra* note 5, at 21 (discussing the value of storytelling at trial).

<sup>228</sup> See, e.g., Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 Am J. of Preventive Medicine, 245-58, (1998) (Discussing the relationship between health risk behavior and disease in adulthood with exposure to trauma as a child).

<sup>229</sup> Because GPR would be a partial affirmative defense, the Constitution would permit the state to put the burden of persuasion on either the prosecution or the defense. Morse, *Excusing*, *supra* note 15 at 400. Most likely, the defendant will bear the burden of production; once evidence supporting the defense has been produced, the burden will shift to the prosecution to disprove the defense beyond a reasonable doubt.

<sup>230</sup> See note 93 *supra* and accompanying text.

<sup>231</sup> See notes 287-288, *infra* and accompanying text.

Next, the defendant will need to establish the connection between the financial distress and the excusing cognitive impairment. An expert witness is not strictly necessary for this purpose; the defendant might ask the jury to find the connection between financial distress and impairment based only on the jurors’ memories of their own direct experiences of financial distress. But as a practical matter, the jury is more likely to be convinced of the nexus between financial distress and cognitive impairment if an expert is brought in to educate the jury about scarcity theory. This will be admissible “social framework” testimony, its purpose to provide the fact finder with context needed to decide the fact in issue (i.e., whether the defendant in fact experienced cognitive impairment as a result of financial need).<sup>232</sup> Recall that, in the context of a mental disease or defect defense, expert witnesses often risk supplanting the jury’s role in making the moral determination about whether the individual was responsible for his actions.<sup>233</sup> That risk is reduced in the GPR-Scarcity context. The expert does not need to assess or diagnose the defendant’s mental state.<sup>234</sup> Instead, the expert’s role is simply to inform the jury about the scarcity model, and the jurors may draw on their own lay understanding and experiences to determine whether the defendant’s story maps onto that model.<sup>235</sup>

Prosecutors may attempt to counter this portion of the defense with character evidence. Their argument would be that the defendant is attempting to invite jury sympathy by casting himself as an ordinarily cool-headed person who only became emotionally aroused by the circumstances. They might adduce evidence of prior bad acts or other character evidence to show that the defendant is not ordinarily cool-headed. To forestall this, it is critical that defense counsel and expert witnesses frame the scarcity narrative not as about the defendant’s unique character traits, but instead as about financial distress severe enough to cause cognitive impairment in an ordinary person of normal disposition.

Finally, the defendant would need to show some sort of causal relationship (or “influence”) between the cognitive impairment and the offense committed. I think the most effective, convincing way to do this will require the defense to be quite precise about the nature of the defendant’s cognitive impairment. For example, Mullainathan and Shafir suggest that the “tunneling” effects of scarcity can lead people to misread or overlook other people’s social cues.<sup>236</sup> A misread social cue might be a logical explanation for an act of otherwise inexplicable violence. Scarcity also inhibits impulse control and the ability to appropriately moderate emotional responses.<sup>237</sup> These particular impairments might logically explain certain crimes of recklessness, or crimes of violence driven by emotional overreactions. As a third example, scarcity has been shown to cause steep time discounting, meaning that the individual inappropriately prioritizes the present over the future, focusing on meeting the present need or drive without adequate consideration for future consequences.<sup>238</sup> Steep time discounting might logically explain some theft and property crimes.

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<sup>232</sup> See Morse, *Excusing*, *supra* note 15, at 388.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> See *id.* at 389 (“Once juries receive framework information, courts hold that issues such as the defendant’s credibility and whether she met the legal criteria are lay inferences that are well within the ability of jurors to decide without expert assistance.”).

<sup>236</sup> Mullainathan & Shafir, *supra* note 26, at 160.

<sup>237</sup> *Id.*

<sup>238</sup> Mullainathan & Shafir, *supra* note 26, at 109.

It must be acknowledged that the defense I have outlined here, with its reliance on expert testimony and extensive fact-gathering, is likely to require time and resources beyond the reach of the typical indigent defendant.<sup>239</sup> Elaboration of the practical contours of the defense may be slow and difficult at first, probably requiring the involvement of pro bono lawyers or some of the more capable and better-funded public defense organizations. However, once practitioners develop a feel for which defendants are likely to have a successful scarcity defense at trial, then the defense can be worked (in a quick and dirty sort of way) into the routine give-and-take of plea bargaining.<sup>240</sup> In this way, defendants may be able to take practical advantage of the defense even though resources are not available for a full-blown trial presentation of the defense in many cases. This is precisely the way that every affirmative defense is given life in the real world. There are not the resources available to litigate even the most mundane defenses (e.g., alibi) in every case in which they come up.

### C. Proving Non-Culpability

Some state legislatures have modified the EMED formulation to bar the excuse in cases where the defendant was culpable in creating the circumstances that led to his mental or emotional disturbance.<sup>241</sup> If GPR is to track EMED, many courts will likely read the same non-culpability requirement into GPR. Professor Morse also makes clear that non-culpability is part of his vision for GPR.<sup>242</sup> In the EMED context, there is significant variation in the level of culpability required to disqualify the defendant from mitigation, with some courts entirely disqualifying those defendants who acted with a criminal *mens rea* in causing their own emotional or mental disturbance.<sup>243</sup> But even if culpability is understood only as a component of the moral narrative that the defendant must present to the jury, the defendant seeking to use evidence of scarcity to support a claim for GPR should anticipate a need to demonstrate to the court that the scarcity was not (or at least not entirely) under the defendant's discretionary control.<sup>244</sup> This may pose a challenge as widespread prejudicial beliefs about the poor (e.g., that they are lazy, irresponsible,

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<sup>239</sup> See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF CRIMINAL JUSTICE* (2011) (Arguing that the criminal justice system as currently structured provides inadequate resources for indigent defendants to raise fact-based claims of innocence).

<sup>240</sup> Morse, *Excusing*, *supra* note 15, at 398.

<sup>241</sup> See, e.g., N.D. Cent. Code § 12.1-16-02 (1983) (defense is permitted "if it is occasioned by substantial provocation, or a serious event, or situation for which the offender was not culpably responsible"); Or. Rev. Stat. § 161.135(1) (1981) (defense is permitted "when such disturbance is not the result of the person's own intentional, knowing, reckless or criminally negligent act . . .").

<sup>242</sup> Morse, *Excusing*, *supra* note 15, at 394 ("If responsibility requires normative competence, . . . justice requires that defendants should be allowed to demonstrate that they nonculpably lacked this competence for any reason"). See also Morse's interpretation of the "reasonable explanation or excuse" language in the MPC's EMED provision: "Because there is reasonable explanation or excuse for the disturbance, it is not fully the defendant's fault that she is in such a state." *Id.* at 336.

<sup>243</sup> See, e.g., *State v. Ott*, 297 Or. 375, 397 (Ore. 1984) ("The jury must determine whether the extreme emotional disturbance was the result of the defendant's intentional, knowing, reckless, or criminally negligent act, and the meaning of those adjectives must be explained. If the jury finds that this causal relationship existed, it need not further consider the mitigation issue. If the jury finds this causal relationship not to exist, it must then consider the reasonableness of the explanation for the disturbance.").

<sup>244</sup> *Id.*



or complicit in their dependency on the social safety net) may lead some jurors to assume a degree of culpability on the defendant's part.

One way to counter a prejudicial presumption of culpability might be to emphasize the defendant's lack of options in dealing with financial need. Recall that Mullainathan and Shafir distinguish poverty from other forms of scarcity on precisely the grounds that poverty does not offer a discretionary “safety valve.”<sup>245</sup> Nevertheless, there is hazard here for the defendant, because financially secure people often misunderstand—and thus unfairly mischaracterize—the financial decisions of the poor.<sup>246</sup> A recent, highly public example of this manner of thinking about poverty was the statement by Representative Jason Chaffetz (R-UT) that individuals concerned about higher health-care costs that might accompany the Republicans' proposed Obamacare replacement plan might need to think twice about “getting that new iPhone . . . they just love and want to go spend hundreds of dollars on that.”<sup>247</sup> As commentators were quick to point out, a smartphone can be a necessary and responsible purchase for many poor people.<sup>248</sup> Internet access is a basic necessity to function in contemporary America; it is vital to tasks as critical in the life of a low-income person as banking, job searching, comparison shopping, and homework.<sup>249</sup> For many poor people, it is economically impracticable to pay for both telephone service and internet service (not to mention the computer, modem, and router that would be necessary to make use of a home internet hookup).<sup>250</sup> The purchase of a smartphone is an economical way to compress all these functions into a single monthly bill.<sup>251</sup> In response to these criticisms, Chaffetz has walked back the comment.<sup>252</sup> What's pertinent here, though, is the concern that a court or jury assessing a defendant's claim of scarcity might unfairly treat the recent purchase of a smartphone (or something like it) as an irresponsible financial choice that renders the defendant culpable for the scarcity and thus ineligible for the excuse of diminished rationality.

Compounding the concern about culpability is the fact that scarcity itself can cause individuals to make financial choices that in the long run make financial hardship more severe and that appear irresponsible to the financially secure.<sup>253</sup> A prime example, and one that Mullainathan and Shafir address at length, is the use of high-interest payday loans as a quick solution to urgent financial need.<sup>254</sup> Though most people who take out payday loans are able to pay them back before too much interest accumulates, the loans can create a “trap” for the deeply poor, who may

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<sup>245</sup> See notes 171-178 *supra* and accompanying text.

<sup>246</sup> Mullainathan & Shafir, *supra* note 26, at 224.

<sup>247</sup> Brian Fung, *The luxury of telling poor people that iPhones are a luxury*, WASHINGTON POST, March 8, 2017, [https://www.washingtonpost.com/news/the-switch/wp/2017/03/08/the-luxury-of-telling-poor-people-that-iphones-are-a-luxury/?tid=sm\\_fb&utm\\_term=.306f383fd435](https://www.washingtonpost.com/news/the-switch/wp/2017/03/08/the-luxury-of-telling-poor-people-that-iphones-are-a-luxury/?tid=sm_fb&utm_term=.306f383fd435) [<https://perma.cc/A44C-Z55S>].

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Eugene Scott, *Chaffetz walks back remarks on low-income Americans choosing health care over iPhones*, CNN (Mar. 7, 2017), <http://www.cnn.com/2017/03/07/politics/jason-chaffetz-health-care-iphones/index.html> [<https://perma.cc/IE6L-3HKG>].

<sup>253</sup> Shafir, *supra* note 176, at 216-222.

<sup>254</sup> *Id.* at 214. See also Mullainathan & Shafir, *supra* note 26, at 105-21.

find themselves “rolling over” the loan from month to month, with interest compounding at exorbitant rates, until in some cases the monthly interest payment exceeds the individual’s monthly income.<sup>255</sup> It seems irrational to enter into such a financial arrangement. Consider, though, that the choice to take out a payday loan is often made when the individual’s bandwidth is already compromised by financial scarcity.<sup>256</sup> Imagine an individual who takes out a payday loan to meet an urgent and unexpected financial need—say to release an impounded vehicle that is needed for transportation to work. Though she is working, she cannot make the monthly payments and so rolls over the loan for several months leading to mounting debt and a pervasive sense of scarcity. In this impaired condition, the individual commits a crime. Is her excusing condition non-culpable? What if the initial loan had been taken out to help a relative pay an outstanding traffic fine and thus avoid arrest? What if it was to pay an unexpected doctor’s bill following a medical emergency?

Perhaps culpability is the true nexus between the scarcity defense and the spirit of the societal responsibility concept that preoccupied Bazelon and Delgado. One crucial difference between the poor and the secure is that poor people lack a cushion of resources to ease the impact of unanticipated financial hardships.<sup>257</sup> A financially secure person who faces an unanticipated traffic fine or medical bill can draw on savings, borrow from a relative, or simply forego discretionary spending (like entertainment or restaurant meals) in order to make up the difference—thus avoiding a debilitating bandwidth tax.<sup>258</sup> For poor people who lack such a cushion, such unanticipated expenses are likely to trigger scarcity thinking, which can result in compounding problems.<sup>259</sup> How does the lack of a financial cushion factor into the assessment of a poor person’s culpability in creating or failing to avoid a situation of rationality-diminishing financial need?

Consider, further, that for many poor people (and especially poor people of color) the lack of “cushioning” accumulated wealth can be attributed to oppressive and often racially-motivated social policies and practices, in some cases dating back several generations. For example, Richard Rothstein has shown that government-supported residential segregation in the mid-20th century enabled white families to purchase affordable homes, which grew tremendously in value and were then transferred to the next generation, but denied black families that opportunity.<sup>260</sup> This historical inequity, he argues, goes a long way to account for the present fact that “while the median family income of African Americans is about 60 percent of whites’

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 210-13.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> Richard Rothstein, *The Making of Ferguson*, ECONOMIC POLICY INSTITUTE (Oct. 15, 2014), <http://www.epi.org/publication/making-ferguson>. See, e.g., Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331 (1994); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence and Community through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001); Reid Kress Weisbord, *The Connection Between Unintentional Intestacy and Urban Poverty*, [http://www.rutgerslawreview.com/wp-content/uploads/archive/commentaries/2012/Weisbord\\_TheConnectionBetweenUnintentionalIntestacyAndUrbanPoverty.pdf](http://www.rutgerslawreview.com/wp-content/uploads/archive/commentaries/2012/Weisbord_TheConnectionBetweenUnintentionalIntestacyAndUrbanPoverty.pdf) [<https://perma.cc/MT37-TP2N>]; Carol Necole Brown, *Intent and Empirics: Race to the Subprime*, 93 MARQ. L. REV. 907 (2010).

income, the median household wealth of African Americans is only about 5 percent of whites' wealth.”<sup>261</sup> As a consequence, African Americans are far more likely to experience severe bandwidth tax when they face unanticipated financial hardships. To honestly and completely address the question of culpability as applied to scarcity may require some reckoning with history.

*D. Sentencing the GPR-Scarcity Offender*

Disposition presents a thorny challenge.<sup>262</sup> As Professor Morse would have it, the outcome of a successful GPR defense would be a reduction in sentence, its extent in inverse proportion to the severity of the defendant's crime as prescribed by a legislatively-enacted sliding scale.<sup>263</sup> This certainly seems an appropriate means of rendering the *moral* calculation underlying GPR concrete as a criminal consequence. But is it adequate as a utilitarian matter? Does it offer society sufficient protection from the individuals thus partially excused? The impoverished offender who uses scarcity evidence to secure a GPR verdict will more than likely emerge from prison still poor, still vulnerable to financial scarcity and concomitant normative impairment.<sup>264</sup> If anything, given the financial burdens and barriers to employment that often follow from criminal conviction, the offender is likely to be at greater risk of scarcity than before her initial offense.<sup>265</sup> In this light, it may seem ill-advised to simply release the individual sooner without doing anything to reduce the risk of another crisis.

One way to clarify the issues here is to ask whether the disposition of the GPR/scarcity defendant is better analogized to the disposition of the EMED defendant, or to that of the defendant found not guilty by reason of insanity (NGRI). The NGRI verdict imposes no *moral* responsibility, but because the individual is still presumably dangerous, the state retains authority to hold her in custody indefinitely on utilitarian grounds.<sup>266</sup> In contrast, the reduced moral responsibility of an EMED verdict leads to a concrete reduction in sentence—suggesting, to some extent, the state's belief that it is *safe* to release the defendant early.<sup>267</sup> The underlying assumption of EMED is that the offender's normative impairment was situational and unlikely to recur.<sup>268</sup> This assumption is most evident in traditional provocation situations, where the victim's behavior in light of her unique relationship to the offender is recognized as a *cause* of the offender's loss of control.<sup>269</sup> In provocation cases, the offense is understood as victim-specific, and is thus not an

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<sup>261</sup> Rothstein, *supra* note 261.

<sup>262</sup> See *Alexander*, 471 F.2d at 961-64 (discussing the challenge of disposition in the context of classic RSB).

<sup>263</sup> Morse, *Excusing*, *supra* note 15, at 401.

<sup>264</sup> See Alexes Harris et. al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1778 (2010).

<sup>265</sup> *Id.*

<sup>266</sup> Morris, *supra* note 93, at 478-9.

<sup>267</sup> Joshua Dressler, *Why Keep the Provocation Defense*, 86 MINN. L. REV. 959, 963 (2002) (“A more plausible utilitarian claim might be that the defense [of provocation] is recognition of the fact that one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence. Presumably what is meant is that those who kill under provocation have not only a different, but a less serious, character deficiency than the ordinary intentional killer.”) (Internal quotes omitted).

<sup>268</sup> Model Penal Code and Commentaries, § 210.3 at 55.

<sup>269</sup> Paul H. Robinson, 1 Crim. L. Def. § 102(a)(1).

indication that the offender is particularly dangerous with respect to anyone else.<sup>270</sup>

The GPR/scarcity defendant has characteristics of both the EMED and the NGRI defendant. As described by Mullainathan and Shafir, scarcity is situational: address the resource shortage, end the scarcity.<sup>271</sup> To experience cognitive and volitional impairment under circumstances of extreme resource shortage is a normal human response and not indicative of any inherent dangerousness. In this sense, the GPR/scarcity defendant looks more like the EMED defendant. On the other hand, a very real and enduring danger inheres in the socioeconomic situation to which the GPR/scarcity defendant will return. Again, if anything, the time in custody is likely to make the person's financial situation worse and the risk of scarcity higher.<sup>272</sup> Looking, then, at the totality of the circumstances and not just at the offender's character, the analogy to NGRI seems more apt and a preventive detention approach seems to have greater utility. The result, though, is that society confines the individual not because of his own inherent dangerousness, but because of the inherent dangerousness of the social world he inhabits. That is not defensible.

Of course, the logic of scarcity theory suggests that the best way to achieve society's utilitarian goals and reduce the risk of scarcity-rooted recidivism would be simply to ensure that the individual has consistent, sustainable access to needed financial resources. One imagines a "sentence" to a quality job-training program, with living-wage employment guaranteed upon release. Unfortunately, the political non-viability of such a "commit a crime, get a job" approach is so obvious that it warrants no further discussion.

On the other hand, subtler forms of intervention might be more palatable, and might combine with sentence reductions of the sort proposed by Professor Morse to produce a dispositional outcome that deftly threads the desert/utility needle. For example, GPR/scarcity offenders might, while imprisoned, receive intensive cognitive-behavioral therapy (CBT), designed to help them recognize situations that tax bandwidth, identify their own symptoms of scarcity, and moderate maladaptive responses.<sup>273</sup> Or, as a condition of parole or probation, a GPR/scarcity offender might be required to meet regularly with a social worker for support in establishing and maintaining financial stability (which might include budgeting, support in job-seeking, and support in securing appropriate public benefits).<sup>274</sup> Such interventions would empower the offender with tools to avoid scarcity, while leaving agency and responsibility in the offender's own hands.

It is important to note here, again, that I am not proposing a standalone "scarcity" defense; I argue, instead, that scarcity might be used as powerful evidence in the context of a more expansive generic partial excuse defense. The issues and suggestions discussed in this section on disposition apply only to those defendants who use scarcity to establish GPR, and they might be irrelevant or inappropriate if applied to defendants who establish GPR on other grounds.

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<sup>270</sup> See generally *id.*

<sup>271</sup> Mullainathan & Shafir, *supra* note 26, at 160

<sup>272</sup> Harris, *supra* note 264, at 1778.

<sup>273</sup> See *infra* notes 297-298 and accompanying text.

<sup>274</sup> Mullainathan & Shafir, *supra* note 26, at 167-81.

*E. GPR-Scarcity and Anti-Poverty Policy*

My proposed approach to the poverty defense does not *per se* require a finding that society, not the individual, was responsible for the crime. The scarcity excuse as I have formulated is grounded in the individual’s impaired normative capacity at the time of the offense. However, because my proposed defense requires the offender to present evidence that she was experiencing non-culpable resource scarcity at the time of the crime, and that she did not have discretionary agency to control or escape the scarcity, it is fair to say that the defense will still often locate the *cause* of the offender’s diminished capacity in her social and economic circumstances. While the scarcity excuse does not explicitly require society to take responsibility for the crime, it will nevertheless often implicate society as a but-for cause of the offender’s temporary diminished capacity for rationality.

It is far too optimistic to hope that even an established pattern of successful scarcity defenses under the rubric of GPR might spur any revolutionary shift in anti-poverty policy (though I do share in Professor Taslitz’s perhaps-idealistic belief “that cumulatively many instances of greater justice can contribute in minor ways to social change.”)<sup>275</sup> However, the new understanding of the relationship between poverty, cognition and crime defense might naturally point to some narrow but meaningful reforms in criminal sanctioning practices and in the administration of existing anti-poverty programs. The goal of these reforms would be to better manage the cognitive load such practices impose upon the poor, with an eye to reducing incidences of scarcity mindset and resultant crime.<sup>276</sup>

In the area of criminal sanctions, much has been made in recent years of the burden that Legal Financial Obligations (LFOs), such as fines and fees, impose on the poor.<sup>277</sup> Ex-offenders living on limited incomes can find even a small monthly LFO payment to be a significant burden, reducing the funds available for other pressing needs like housing, food, healthcare, and child care.<sup>278</sup> People with criminal histories often owe amounts of legal debt that are very substantial relative to their earning power, meaning that the debt becomes a long-term financial burden even for those who manage to make regular payments.<sup>279</sup> Furthermore, when individuals fail to make regular payments on their LFOs, they often experience criminal justice sanctions, including warrants, arrest and re-incarceration.<sup>280</sup> On these grounds, a strong argument can likely be made that LFOs contribute substantially to the cognitive load of poor ex-offenders and their families.

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<sup>275</sup> Taslitz, *supra* note 2, at 129, n.357.

<sup>276</sup> Mullainathan & Shafir, *supra* note 26, at 167-81.

<sup>277</sup> See, e.g., American Civil Liberties Union, *In For a Penny: The Rise of America’s New Debtors Prisons* (2010); Laura I Appleman, *Nickel and Dime Into Incarceration: Cash Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016); Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN L. REV. 1837 (2015); Claire Greenberg, Marc Meredith, & Michael Morse, *The Growing and Broad Nature of Legal Financial Obligations: Evidence from Alabama Court Records*, 48 CONN. L. REV. 1079 (2016); Harris, *supra* note 264; Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175 (2014); Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPECTIVES ON POLITICS 638 (2015); Neil Sobol, *Charging the Poor: Criminal Justice Debt and Modern Day Debtors Prisons*, 75 MD. L. REV. 486 (2016)

<sup>278</sup> Harris, *supra* note 264, at 1778.

<sup>279</sup> *Id.* at 1786.

<sup>280</sup> *Id.* at 1777.

One obvious reform would be to insist upon and enforce rigorous ability-to-pay inquiries at the time of sentencing. In 1983, in *Bearden v. Georgia*, the Supreme Court held that in proceedings to revoke probation for failure to pay a fine or fee, sentencing courts “must inquire into the reasons for the failure to pay”:<sup>281</sup> no individual might be imprisoned for failure to pay a fine that he lacked the resources to pay.<sup>282</sup> Thus, in theory, as Jessica Eaglin has noted, economic sanctions should be limited by an offender’s ability to pay.<sup>283</sup> However, in practice, states take very different approaches. In some states, courts do not make ability-to-pay assessments before imposing LFOs; rather, they make the assessment only after the LFO has been imposed and the defendant has challenged it based on ability to pay.<sup>284</sup> Furthermore, the standards for when a defendant is “able to pay” are unclear. Some courts look at present ability to pay; others make predictions about the offender’s likely ability to pay after incarceration; still others wait until the offender fails to make a payment to determine whether the offender should be punished for that failure.<sup>285</sup> A policy of conducting ability-to-pay assessments based on present ability to pay and prior to imposing any LFO seems best suited to managing the cognitive load of low-income offenders.

A related reform might be for courts to make clear that an offender need not attempt to borrow money from friends and family members in order to demonstrate that she has made a good faith effort to pay her LFOs.<sup>286</sup> When courts treat borrowing as an expected part of clearing an LFO, the result is that a poor offender who does not have the independent resources to clear an LFO may be compelled to draw on the resources of his friends and family, who are also likely to be poor, in order to avoid imprisonment.<sup>287</sup> Thus, excessive LFOs spread the experience of scarcity beyond the offender himself and into the broader community. If the expectation of borrowing were eliminated, poor communities might be relieved of a significant source of cognitive load.

Looking beyond the criminal justice system, administrators of social benefits programs can manage the cognitive load on the poor by reducing poor people’s experiences of economic volatility.<sup>288</sup> For example, poor families usually receive food stamps once a month. By the end of the month, families often run short, negatively impacting cognitive load. As noted previously in this paper, there is evidence that children whose families receive food stamps are more likely to act out in school at the end of the month, when family resources are low and the family members are experiencing scarcity.<sup>289</sup> This volatility might be controlled if food stamps were distributed more frequently, perhaps twice a month. Families would still receive the same total monthly amount, but they would receive half that amount at the beginning of the month and half midway through the month. Though families might still experience some scarcity towards the end of the interval between distributions, the extremes of scarcity and plenty would be less dramatic, and the

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<sup>281</sup> 461 U.S. 660, 672 (1983)

<sup>282</sup> *Id.* at 672-73.

<sup>283</sup> Eaglin, *supra* note 277, at 1853.

<sup>284</sup> *Id.* at 1854.

<sup>285</sup> *Id.* at 1855.

<sup>286</sup> Katzenstein & Waller, *supra* note 277, at 647.

<sup>287</sup> *Id.*

<sup>288</sup> Mani et. al., *supra* note 164, at 980.

<sup>289</sup> Mullainathan & Shafir, *supra* note 26, at 157.

wait time for the next infusion of resources would be shorter and more manageable.<sup>290</sup> Thus, the cognitive burdens imposed by times of scarcity would be less severe.

Reforms in the enrollment process for public benefits programs could also have an impact.<sup>291</sup> Those who depend on such programs often have to complete a series of long, bandwidth-taxing forms.<sup>292</sup> These forms further burden people who are already cognitively taxed; it is often during this recertification period that people drop out of benefits programs.<sup>293</sup> Bandwidth taxes on poverty might be reduced — and with them the risk of crime — by making these forms more simple or by providing on-site support to help people complete them.<sup>294</sup> Policymakers might also respond to natural variation in the same person’s cognitive capacity by timing bandwidth-taxing tasks and high-stakes decisions to correspond with periods of relative abundance, such as immediately after benefits are distributed.<sup>295</sup>

Finally, policymakers might also reduce the impact of scarcity on the poor by providing opportunities for education about the cognitive effects of scarcity and training in metacognitive strategies to counteract scarcity’s effects. One such approach proposes to reduce crime and dropout rates by providing every impoverished teenager with a year of cognitive behavioral therapy, thus enabling them to avoid relying on maladaptive, automatic thought processes in high-stakes situations.<sup>296</sup> The ethics of such an approach are challenging: the risk of stigma is high, and I worry that a young person’s having completed such a program might, perversely, be used *against* her if she asserts non-culpable impaired rationality as a defense to a criminal charge. Further, it will be essential that the individuals charged with providing the therapy be carefully chosen (perhaps on the basis of a background in education or youth psychology) and capable of “get[ting] youths to engage in the programming and participate in discussion and other activities.”<sup>297</sup> So long as therapy is conducted thoughtfully and respectfully, and participation is not later viewed as a kind of inoculation against an otherwise viable defense, this approach would seem a reasonable use of the insights of behavioral science to improve the lives of youth struggling under the cognitive weight of scarcity.

Reforms such as these would certainly be conceptually coherent with the scarcity defense I have described. I submit that they would be morally coherent as well. Like the scarcity defense, reforms to reduce the cognitive burden of poverty would use insights derived from contemporary social science to subtly but powerfully refine our institutions, making them more fair, humane, and responsive to the lived experiences of the poor.

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<sup>290</sup> Mani et. al., *supra* note 164, at 980; Mullainathan & Shafir, *supra* note 26, at 179.

<sup>291</sup> Mani et. al., *supra* note 164, at 980.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> See generally Jens Ludwig and Anuj Shah, *Think Before You Act: A New Approach to Preventing Youth Violence and Dropout* (May 2014), [http://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/v10\\_THP\\_LudwigDiscPaper.pdf](http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v10_THP_LudwigDiscPaper.pdf) [<https://perma.cc/P5X6-JUDM>].

<sup>297</sup> *Id.* at 19.

## VI. CONCLUSION: REVISITING THE “SPEC LIST”

I have argued that, by adopting Stephen Morse’s proposal for a generic partial excuse defense of diminished rationality, legislatures might clear the way for criminal defendants to advance evidence that they were operating under a condition of poverty-induced “scarcity” mindset at the time of their offense, thus reducing criminal responsibility. This, I have argued, would make the criminal law more fair and responsive to the uniquely challenging circumstances of the poor.

In Part II, above, I suggested that a “Spec List” for a practicable and attainable poverty defense mechanism might be distilled from the history of RSB and subsequent poverty defense proposals. I will conclude this article by showing how my proposal for a scarcity defense under the rubric of GPR satisfies each of the specifications set forth on that list.

1. The mechanism must factor poverty into the determination of guilt and innocence (rather than merely mitigating punishment) in order to effectively capture the moral stakes of the issue.

As structured by Professor Morse, whether GPR applies is a question to be determined by the jury.<sup>298</sup> Thus, GPR creates a mechanism for the introduction of scarcity evidence (i.e., poverty evidence) at trial, inviting the jury to grapple with the moral question of how the defendant’s poverty should influence the assessment of her guilt.

2. The mechanism must be broadly available to defendants accused of many kinds of crimes (i.e. not just drug and property crimes).

One of the benefits of GPR for the overall coherence of the excuse paradigm is that it applies a uniform moral logic to all sorts of crime and not just to homicide.<sup>299</sup> Furthermore, by tying evidence of poverty to the standard of diminished rationality, scarcity liberates the poverty defense from the narrow focus on property and drug crimes that hampers proposed poverty defenses that rely on theories of duress and necessity as grounds for excuse. A scarcity defense under the rubric of GPR is a flexible approach that can be applied with rigor and consistency to a variety of defendants and crimes.

3. The mechanism must be reasonably straightforward for courts to apply.

Classic RSB would have asked juries essentially to determine whether the defendant had suffered so much that he could not morally be made to suffer more, thus inviting sweeping courtroom investigation of the defendant’s entire history of deprivation.<sup>300</sup> In contrast, the scarcity defense focuses the investigation on the cognitive effects of deprivation experienced at the time of the crime. The greatest risk I see in this area is that the state might challenge the scarcity defense on culpability grounds; it is easy to imagine how investigations into the *cause* of a particular

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<sup>298</sup> Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, *supra* note 15, at 398.

<sup>299</sup> *Id.*

<sup>300</sup> See notes 39–42 *supra* and accompanying text.



incidence of financial hardship might spiral into a sweeping examination of a defendant’s personal history.<sup>301</sup> The most accurate and honest counter to the examination of the defendant’s personal history would be an examination of the *societal* history that gave rise to the condition of scarcity (for example, by creating structural barriers to the intergenerational accumulation of wealth, thus leaving the individual defendant more vulnerable to extreme bandwidth tax when faced with unanticipated financial hardship).<sup>302</sup> In contrast to classic RSB, however, even this sweeping examination of history would remain anchored to a legal criterion of rational capacity that courts have long asked juries to apply. Though expert testimony may be necessary to educate the jury about scarcity theory, there will be no need for an expert to examine or diagnose the defendant. The scarcity defense would thus be no more, and probably a bit less, difficult to apply than the common-law insanity defense. This doesn’t mean it would be easy, but it is within the tolerable range of difficulty.

4. The mechanism must not stigmatize or dehumanize poor people (or even appear to do so).

The logic of my proposed scarcity defense also goes some way to alleviate the reasonable concern that some earlier versions of poverty defenses might stigmatize both the individual defendant, and poor people in general, as deficient moral agents. First, GPR itself is not a poverty-specific verdict. Its application depends exclusively upon the presence of the excusing condition at the time of the crime, irrespective of that condition’s cause. Thus, legislative adoption of GPR makes a new approach available to the poor without singling out the poor for special treatment.<sup>303</sup>

Second, the use of scarcity evidence to support a finding of diminished capacity does not rely on blanket claims about poor people’s rational or moral constitution.<sup>304</sup> Scarcity mindset is not unique to poor people: it is a fairly universal human phenomenon. Poverty (at least as described by the scarcity model) does not fundamentally change the cognitive makeup of poor people or mark them as differently constituted from non-poor people. Thus, no stigma should attach to the poor person who successfully employs a scarcity defense. If there is any shaming to be done, it should be directed not at any individual but rather at the social conditions that triggered the scarcity response.

5. The mechanism must be responsive to legitimate concerns about deterrence and incapacitation.

My proposal responds to these concerns in two ways. First, as proposed by Professor Morse, the GPR verdict is attached to a sliding scale of sentence reductions, such that offenders who commit more serious offenses and are therefore likely more dangerous receive less generous sentencing discounts, resulting in more robust deterrence and incapacitation.<sup>305</sup> Second, the

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<sup>301</sup> See notes 250-262 *supra* and accompanying text.

<sup>302</sup> See notes 263-267 *supra* and accompanying text.

<sup>303</sup> See notes 221-222 *supra* and accompanying text.

<sup>304</sup> See notes 209-212 *supra* and accompanying text.

<sup>305</sup> Morse, *Excusing*, *supra* note 15, at 401.

scarcity model describes a cognitive response to circumstances of financial hardship.<sup>306</sup> A person whose criminal actions occur under conditions of diminished rationality caused by scarcity is not inherently any more dangerous than any other human. If there is a heightened risk of re-offense, it is because the individual's life circumstances may make it more likely that he or she will experience scarcity again. The prevention of scarcity-related re-offense does not necessarily require incapacitation of the offender; it might be more readily achieved by taking steps to protect the offender against re-occurrences of scarcity.<sup>307</sup>

6. The mechanism must be fully coherent with the criminal justice system's dominant paradigm for responsibility.

In contrast to classic RSB, which would have re-centered the determination of criminal responsibility on societal rather than individual factors, my proposal preserves the concept of the rational individual actor at the center of the analysis. Legislative adoption of the GPR verdict would be no threat to the rational actor paradigm; rather, it would *strengthen* the paradigm by making it more coherent and consistent in its application.<sup>308</sup> The scarcity model opens up new evidentiary possibilities for developing connections between poverty and diminished rationality, but it does not alter the legal structures themselves.

7. The mechanism must also be compatible with an assertive anti-poverty social justice agenda, but it must not derive its theory of responsibility from that agenda.

I address this final "spec" — and conclude this article — by returning to the question of *societal* responsibility that was so central to the concept of the RSB defense as initially formulated by Judge Bazelon and Professor Delgado. While the concept of holding society responsible for its criminogenic inequities and oppressions gave the original RSB proposal much of its moral force, that same displacement of responsibility from individual to society was so incompatible with the criminal law's fundamental assumptions about personhood, responsibility and agency that it effectively doomed RSB to insignificance. In contrast, the GPR defense locates the question of responsibility entirely in the normative capacity of the individual actor. But when we recognize scarcity as a non-culpable, non-stigmatizing *cause* of normative impairment, we understand, in a new way, why a disproportionate number of poor people are swept up in the criminal justice system. We are called to seek concrete ways to reduce the cognitive burdens of poverty and afford the poor a full, fair opportunity to conform with the behavioral norms codified in the criminal law.

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<sup>306</sup> See notes 209-212 *supra* and accompanying text.

<sup>307</sup> See notes 279-280 *supra* and accompanying text.

<sup>308</sup> Morse, *Excusing*, *supra* note 15, at 397-401.