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RSB, the Social Contract, and a Bridge across the Gap: Delgado Talks to Rawls

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“RSB,” the Social Contract, and a Bridge Across the Gap: Delgado Talks to Rawls

Frank I. Michelman[†]

CONTENTS

I.	INTRODUCTION	417
A.	<i>The Question of an “RSB” Defense to Criminal Charges . . .</i>	418
B.	<i>Confession and “Social Forfeit,” Philosophy and Legality . .</i>	420
C.	<i>A Rawls-Inspired View: Basic Structure, Fair Equality, and Intolerable Injustice</i>	422
II.	A DELGADIAN MAP OF DEFENSES IN THE GENERAL CRIMINAL LAW	425
A.	<i>Excuse</i>	427
B.	<i>Justification</i>	429
C.	<i>A Non-Exculpatory Defense</i>	431
III.	WHAT IT “SAYS ABOUT US”	433
IV.	RAWLS AND LEGAL SOURCES	435
A.	<i>A Further Look at Rawls: Justice, Legitimacy, and Constitutional Law</i>	435
B.	<i>Toward Social Forfeit As a Matter of Law?</i>	437
C.	<i>Against Secondary Constitutional Essentials?</i>	439

I. INTRODUCTION

From the moment when I first began plotting a contribution to this celebration of the scholarly arc of Richard Delgado, I had the sense of a predestined part to fill. As Professor Delgado has taught by precept¹ and by example,² through stories we make

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1. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

2. See RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1996).

meanings. I could spin you a story from thirty years ago, about a then still-youngish Rodrigo (as I might name my story's "outsider" protagonist)³ banging on the consciousness of a smug-looking coterie of liberal legal scholars. You can read some bare historical facts in Professor Perea's contribution to this *festschrift*.⁴ The story I make from them starts up in my mind a fantasy subtitle for my contribution here; but more on that later.

What follows below is not a story, exactly, but then neither is it a treatise. It is a speculative essay by which I hope to convey an appreciation for the learning, balance, weight, care, and clarity—yes, and objectivity, too, without the scare quotes⁵—that are no less the markers of Richard Delgado's scholarship than the humanely iconoclastic spirit that animates it. Richard's writing has stood out from the pack for qualities both of substance and of style. The work I have picked out for examination here is one of his notable substantive contributions, his pressing of the question of a so-called "RSB" or "SED" defense to criminal liability.⁶

A. *The Question of an "RSB" Defense to Criminal Charges*

Briefly to explain: "SED" stands for "severe economic deprivation." "RSB" stands for "rotten social background." In what I take to be a purposefully ironic double twist, Professor Delgado has latched onto the latter, more acidulous handle for his writings on this topic, and I will follow suit.⁷ A person stands

3. See Mary Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 685 (1992) ("[O]utsider scholarship is characterized by a commitment to the interests of people of color and/or women, by rejection of abstraction and dispassionate 'objectivity,' and by a preference for narrative and other engaged forms of discourse.").

4. See Juan Perea, *Of Word Grenades and Impermeable Walls: Imperial Scholarship Then and Now*, 33 LAW. & INEQ. 443, 446 (2015) (recalling the list of "imperial" legal scholars taken to task in Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 562 & n.2, 563 (1984)).

5. See Coombs, *supra* note 3.

6. See Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1 (2011) [hereinafter Delgado, *Wretched*]; Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Economic Deprivation?, 3 LAW & INEQ. 9 (1985) [hereinafter Delgado, *Rotten*].

7. The phrase seems first to have been used, in the relevant connection, by an expert witness in the case of *United States v. Alexander*, 471 F.2d 923, 959 n.100 (D.C. Cir. 1973). See *id.* at 957–65 (Bazelon, C.J.) (repeating and then adopting the phrase, sometimes enclosing it in quotation marks and sometimes not). Bazelon's opinion objected to a trial judge's instruction because it might have barred the jury from considering evidence of the defendant's severely deprived background, offered in support of a partial defense of diminished responsibility. See *id.* Delgado has construed the judge's adoption of this "derisive and ironic" term, to name a social

charged with a crime, say, of drug-dealing or theft from a convenience store. The evidence says he did it, maybe as part of a gang. The evidence also shows that the person has spent his life, from birth on down to the present, in conditions of material and educational deprivation, constricted mobility and opportunity, societal isolation and estrangement, and deviant surrounding moral culture that we might associate with a poverty-stricken, urban ghetto existence.⁸ How, if at all, should a biographical background fact of that kind affect the disposition of criminal charges against that person?

Thirty years ago, thoughts were leaking into the American legal conversation about possibly allowing proof of a defendant's "RSB" to serve at least as a plea in mitigation, if not a plea in bar, to criminal charges.⁹ Richard Delgado stuck in his oar with a sterling, searching, scholarly lawyer's treatment of the question—still to this day a Baedeker in the field—insisting that such thoughts deserve to be taken with utmost seriousness. Delgado's ambition was cautiously stated: to open minds to possibilities, even in the face of "many troubling questions."¹⁰ The result was a candid, guarded assessment, both of the tactical chances of getting defendants off on a general showing of rotten or deprived social background and of the deeper legal and moral merits of the idea. Guarded or no, though, Delgado's demand to take the question seriously was and remains rock-hard.¹¹ No such proposal has come close to adoption anywhere that I know of, but still Richard's work lives on, haunting the precincts of the law with an issue that refuses to die.¹² And for good moral and political reasons refuses,

condition to which he was in the same breath inviting the law's sympathetic response, as a "distancing move," meant to signal to his audience his own awareness of the oddness of what he was proposing. See Delgado, *Wretched*, *supra* note 6, at 7.

8. See Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, 35 PHIL. & PUB. AFF. 126, 134–43 (2007) (explaining these factors in depth and drawing connections among them).

9. See *Alexander*, 471 F.2d at 923. Judge Bazelon's proposal drew attention from others and quickly became a topic of scholarly debate. See, e.g., Stephen Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976) (mounting arguments in opposition to Bazelon's proposal).

10. Delgado, *Rotten*, *supra* note 6, at 12.

11. See Delgado, *Wretched*, *supra* note 6, at 7 (asking what it "say[s] about us" that we impose punishments and continue to incarcerate people who live under predictably criminogenic conditions).

12. See Symposium, *Rotten Social Background in the 21st Century: Reconsidering the Role of Socio-Economic Deprivation in Criminal Justice*, 2 ALA. C.R. & C.L. L. REV. 1 (2011) [hereinafter Symposium].

as I hope what follows will help to confirm. And yet not every good reason may be legally pliable.

B. Confession and Social Forfeit, Philosophy and Legality

No writer that I know of has yet really claimed to close the deal on showing how the moral and political reasons I have in mind can be made to register and count also as convincing *legal* reasons to support what Delgado treats as a key aim for law reform in this field. Because Delgado's project, you see, is not limited to showing defense lawyers how to get some fraction of "RSB" defendants off by using facts of their life histories to instantiate currently recognized categories of legal exculpation such as insanity,¹³ necessity,¹⁴ or duress¹⁵—although that surely is a part of it. In addition, and more ambitiously, Delgado has sought an establishment of "RSB" as a self-standing, separately named, doctrinal category within a standard legal protocol of criminal case disposition. It would be, as he says, a defense "based on socioeconomic deprivation *simpliciter*."¹⁶ Justification for its adoption might lie, in part, in a contribution it would make toward full and fair assessments of case-specific criminal guilt.¹⁷ Or the defense might be supported, at least in part, on the quite different ground of its filling a need for some kind of legal rule that attaches attention-grabbing consequences to a finding of the state's failure of performance of obligations of just and respectful treatment that the state—and society through the state—owes generally to all citizens at all times.

13. See MODEL PENAL CODE § 4.01(1) (Official Draft and Explanatory Notes 1985) ("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.")

14. See *id.* § 3.02(1) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."); *id.* § 3.01 ("In any prosecution based on conduct which is justifiable . . . justification is an affirmative defense.")

15. See *id.* § 2.09(1) ("It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.")

16. Delgado, *Rotten*, *supra* note 6, at 9; see *id.* at 55 (remarking that "the criminal law does not [currently] recognize a rotten social background, as such, as relevant to the issue of guilt" and asking, rhetorically, "why *not* permit a defense of dwelling in a ghetto?")

17. See *infra* Part II.A.

The point then would be that a recognized “RSB” defense would provide society with a regularly scheduled stop, along the performative track from criminal charge to trial verdict, for facing up to the moral blight of basic structural injustice.¹⁸ In the spirit of keeping a safe, ironical distance between proposition and proposer, we could call that the “confessional” function of a freestanding “RSB” defense in the criminal law. The call would thus be for legal-doctrinal adoption of some variation on what has been called a “social forfeit” defense against criminal liability.¹⁹

We shall soon begin our examination of one typical path of philosophical reasoning toward a social-forfeit deduction.²⁰ We will also eventually see, though, how such reasoning must always also compose a standing embarrassment and rebuke to the entire daily sweep of the always more-or-less coercive operations of the legal order of any society to which its premises are found to apply.²¹ And that fact should warn us away from any expectation to find an incipient social-forfeit claim already curled up within the standard legal sources—the materials from which everyday lawyers hope credibly to construct their legal contentions and everyday judges their legal explanations—ready to spring forth convincingly at the touch of a “good” legal argument no matter how smartly or sympathetically devised.²² If so, then a project of constructing a sturdy legal argument toward recognition of a confessional “RSB” defense would face trouble from the start—caught, as it were, in a conventional discursive gap between law and philosophy.

What the proposer then might want would be a causeway across the gap. Such a bridge might extend from the law side,

18. See Delgado, *Rotten*, *supra* note 6, at 54 (“If a distinct RSB defense were adopted, the societal deprivation which results in crime among the poor would be exposed . . .”); see also *id.* at 67 (remarking that a trial on RSB “will expose the public to the RSB conditions . . . in a way that summary conviction would not,” and society may then take corrective measures); Delgado, *Wretched*, *supra* note 6, at 21 (suggesting that scheduling the trial in a way that invites the RSB defendant to “tell his story” will help to “prompt us to resolve to build a better society”); *infra* Part II.B.

19. See Stephen J. Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147, 149 (2011) (“social forfeit”); *id.* at 151 (same); *id.* at 153 (“social moral forfeit”) (“The claim is that our society is immensely unjust and . . . at fault for individual criminal acts, and we do not have the moral right to punish the individual wrongdoer.”).

20. See *infra* Part I.C.

21. See *infra* Part III.

22. See Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1928–33 (2004) (treating law as a domain of discourse using sources and inputs substantially narrower than those otherwise accepted within the society for, say, moral and policy debates).

insofar as law-talk seemingly always has the choice to open itself expressly to influence from philosophical reflection on political morality.²³ Or it might extend from the philosophy side, insofar as philosophy stands ready to offer conclusions, more-or-less convincing as we may find them, regarding what specifically the laws and legal institutions (not just the dispositions and practices in general) require of a morally supportable state.²⁴

C. A Rawls-Inspired View: Basic Structure, Fair Equality, and Intolerable Injustice

Minded as I am to play my own proper part in this celebration of Richard Delgado's scholarly career, I choose to start with philosophy and specifically the liberal political philosophy of John Rawls. I will suggest how a Rawlsian framework might fit persuasively around Professor Delgado's own most advanced hopes for the RSB defense, not only on the supportive side, but meshing too with cautions and reservations that also apparently are a part of Delgado's own mindset.²⁵ I will thus call to Delgado's aid an authority (should we agree to treat it as such) whose provenance you might think of as not only "imperial," but as "ethereal" to boot.²⁶ (Fantasy subtitle: *The Empire Strikes Back!*) Along the way, I will show how the Rawlsian frame points us toward some part of an answer to Delgado's challenge: what does it say about us as a society that we shape our laws in ways that we must know are bound to end by incarcerating people whom we avoidably allow to live under such bad conditions that they predictably turn to crime?²⁷

A large part of the Rawlsian setup has already been done, in a paper authored in 2007 by Tommie Shelby of the Harvard

23. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986) (maintaining that a true proposition of law is one that "figure[s] in or follow[s] from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice"); *Legal Positivism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2003), available at <http://plato.stanford.edu/entries/legal-positivism/#3> (describing a widely held contention that "[moral] merit-based considerations may indeed be part of the [positive] law, if they are explicitly or implicitly made so by source-based considerations").

24. See, e.g., *infra* Part IV.A.

25. See *infra* Parts IV.B–C.

26. See Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 301–04 (1987) [hereinafter Delgado, *Ethereal Scholar*] (raising a series of concerns about a distancing of the theoretical and methodological dispositions of Critical Legal Studies ("CLS") from minorities' experiences and their felt needs from the law).

27. See Delgado, *Wretched*, *supra* note 6, at 7; see *infra* Part III.

University philosophy department. Professor Shelby's paper, *Justice, Deviance, and the Dark Ghetto*,²⁸ raises directly, and raises sympathetically, the suggestion to treat society's perpetration of systemic distributive injustice upon a fraction of its citizenry as a reason for total or partial release of that fraction from full answerability in that society's courts to that society's laws.²⁹ Shelby builds out from the work of John Rawls, in ways we will look at more closely later on.³⁰ For now, I just want to get quickly out on the table Professor Shelby's Rawls-inspired bottom line regarding the question before us here.

According to Rawls, any politically organized society can be tellingly described and morally appraised in terms of what he calls its "basic structure," by which he means the society's "main political and social institutions [and the way they] fit together into one system of social cooperation, [and] assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time."³¹ The components of the basic structure "fix a person's initial position within society," so that individuals are then more or less "favored . . . over the course of their lives depending on their starting places within the social arrangement."³² A society, as Rawls maintains, cannot be deemed to be in a fully just condition—it cannot pretend to represent "a fair system of social cooperation between citizens as free and equal"—unless its basic structural features are geared to an assurance to all citizens of the condition's "fair" equality of opportunity.³³ We may accept that social and economic inequalities are inevitable and even welcome in an otherwise free and just society,³⁴ but those inequalities are nevertheless themselves a site of injustice unless, as Rawls writes, they are "attached to offices and positions open to everyone under conditions of fair equality of opportunity."³⁵

28. See Shelby, *supra* note 8.

29. The paper seems to have gone unnoticed, though, in the legal scholarly exchanges over the RSB defense. I did not find a single pointer to it in the six substantial papers by leading scholars in a 2014 symposium on our topic. See *generally* Symposium, *supra* note 12.

30. See *infra* Part IV.A.

31. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 10, 51 (Erin Kelly ed., 2001) [hereinafter RAWLS, RESTATEMENT].

32. Shelby, *supra* note 8, at 129–30 (elaborating on Rawls's view).

33. RAWLS, RESTATEMENT, *supra* note 31, at 56.

34. See *id.* at 55.

35. JOHN RAWLS, *POLITICAL LIBERALISM* 363 (1993); see *id.* at 291 (laying out principles of justice as fairness).

I emphasize, as Rawls did, *fair* equality, as opposed to barely formal or legal equality.³⁶ Rawls meant by “fair” opportunity the availability to all of the material economic and social conditions that normal people need in order to be or become competent participants in a country’s established ways of life, respected and self-respecting contributors to political exchange and contestation and to social and economic life at large. “In all parts of society there [should] be roughly the same prospects of culture and achievement for those similarly motivated and endowed,” regardless of conditions of family origin.³⁷ Political, legal, and social arrangements geared to the fulfillment of such an aim were, in Rawls’s view, strict requirements of justice in a society’s basic structure.³⁸

Professor Shelby concurred, and he furthermore proclaimed a major American default on that commitment.³⁹ The default on which Shelby particularly focused has to do with the stunted conditions of life and opportunity, which the rest of us allow to be confronted by those born into the “dark ghettos” to which his article’s title refers.⁴⁰ It is a default so grave, in Shelby’s view, so intolerable to justice, as to vitiate a full answerability by its victims to our system of laws.⁴¹ As Shelby writes (expressly in tandem with Rawls):

Within a liberal framework, civic obligations are rooted in the political value of reciprocity. As a beneficiary of the . . . goods afforded by the scheme of cooperation, each citizen has an obligation to fulfill the requirements of the basic institutions of . . . society when these institutions are just . . . [But Rawls] also correctly maintains that we do not have obligations to submit [ourselves] to unjust institutions, or at least not to institutions that exceed the limits of tolerable injustice.⁴²

For us right now, the takeaway is this: Shelby’s Rawls-inspired argument chimes obviously and closely with what legal writers on an “RSB” defense have named—and I think pretty uniformly

36. See RAWLS, RESTATEMENT, *supra* note 31, at 41–42.

37. *Id.* at 44.

38. See *id.* at 42–52; Frank I. Michelman, *Poverty in Liberalism: A Comment on the Constitutional Essentials*, 60 DRAKE L. REV. 1001, 1013–14 (2012) (remarking on the scope and depth of the Rawlsian principle of fair equality of opportunity).

39. See Shelby, *supra* note 8, at 129.

40. See *id.* at 126, 135.

41. See Shelby, *supra* note 8, at 150–51 (concluding that “the existence of the dark ghetto—with its combination of social stigma, extreme poverty, racial segregation (including poorly funded and segregated schools), and shocking incarceration rates—is simply incompatible with any meaningful form of reciprocity among free and equal citizens”).

42. *Id.* at 145.

rejected—as a “social forfeit” grounding for allowance of such a defense.⁴³

I offer one last prefatory word: the question of a social forfeit type of objection to criminal prosecution supports a vast and complex debate, which I make no pretense of entering here.⁴⁴ My focus is on a virtual conversation specifically between Rawlsian ideas and Richard Delgado’s argumentation in support of recognition of RSB as a self-standing criminal defense. If it works, the result should be to shed some light not only on Delgado’s thought but on Rawls’s.

II. A DELGADIAN MAP OF DEFENSES IN THE GENERAL CRIMINAL LAW: WHERE, IF AT ALL, DOES THE CONFESSIONAL FUNCTION FIT?

The Map

As I have already mentioned, Delgado’s work seeks possibilities both for “accommodat[ion of] RSB factors” within currently recognized criminal defenses and for establishment of a “new, independent RSB defense[.]”⁴⁵ Delgado thus necessarily works from a map of an extant doctrinal terrain, on which any set of arguments for favorable application of current law must navigate, and from which any replacement configuration must depart. His map also will be my map, in keeping with my undertaking here: to test the fit of a Rawlsian frame around Delgado’s own expositions and appraisals of the available possibilities.

The map is both standard and simple. Delgado lays it out in four pages under the heading “Locating RSB Within Criminal Theory: Preliminary Survey.”⁴⁶ Let us mean by “defense” a legally allowable claim in bar of conviction or in mitigation of guilt, where the defendant’s performance of an act in a category legally defined as criminal is admitted.⁴⁷ Defenses fall under the two major

43. See *supra* note 19 and accompanying text.

44. For a recent compilation of contributions to the debate, see Stephen P. Garvey, *Injustice, Authority, and the Criminal Law*, in *THE PUNITIVE IMAGINATION: LAW, JUSTICE, AND RESPONSIBILITY* 42 (Austin Sarat ed., 2014).

45. Delgado, *Rotten*, *supra* note 6, at 12.

46. *Id.* at 12–16.

47. See *id.* at 37–38 (citing WAYNE LAFAYE & AUSTIN SCOTT, *HANDBOOK ON CRIMINAL LAW* 268–413 (1972)). That way of putting the matter leaves open the possibility that some of the claim-types we treat as “defenses”—say “automatism,” *id.* at 41–43, or “diminished capacity,” *id.* at 43–45—might be covered by a general denial because they overlap with an express or implied *mens rea* element in the

headings of “exculpatory” and “nonexculpatory.”⁴⁸ Exculpatory defenses bar conviction on the ground of the defendant’s personal lack of blameworthiness for the specific act in question.⁴⁹ Nonexculpatory defenses are different. They bar conviction of undoubtedly blameworthy defendants in deference to “other considerations . . . public policy, morality, or jurisprudential ideals”⁵⁰—that are deemed to override, in the circumstances of the case at hand, the purposes or values served by conviction.⁵¹

Exculpatory defenses fall under two general heads.⁵² *Excuse* is a plea—“coercion,” say, or “duress”—that the defendant is not criminally blameworthy because she could not (sufficiently) help doing what she did,⁵³ or a plea—“insanity,” say—that she could not (sufficiently) appreciate or know that it was wrong.⁵⁴ *Justification*, by contrast, is a plea that the defendant’s act, although rightly classed as wrongful when viewed as a type, is not aptly punishable in this particular instance because here, exceptionally, it “furthered an important social interest” in a way that society has reason, on balance, to welcome.⁵⁵ “Emergency” or “necessity” would be examples (“a driver speeding to transport a critically injured person to the hospital”).⁵⁶

The mapping is very rough—rougher than Delgado’s rendition—but sufficient for our purposes here. It allows us to stack up Delgado’s three main heads of criminal defenses—excuse, justification, and (non-exculpatory) public policy—against a quest for service to the confessional function by establishment of “RSB” as a new category in the doctrinal vocabulary of criminal-law defenses.⁵⁷ By Delgado’s own assessments, “[e]xculpatory defenses accommodate RSB defendants more easily than do nonexculpatory

legal definition of the crime. There is no need to address here a pleader’s distinction between general denial and affirmative defense.

48. *See id.* at 13 (citing HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 318–28 (1979)).

49. *See id.* (“An exculpatory defense defeats or mitigates fault.”).

50. *Id.*

51. *See id.* at 13 n.20 (citing WAYNE LAFAVE & AUSTIN SCOTT, HANDBOOK ON CRIMINAL LAW 268–413 (1972) (giving as examples “diplomatic immunity, entrapment, infancy, double jeopardy, and statutes of limitation”)).

52. *See id.* at 15 (citing HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 105–08 (1968)).

53. *See id.* at 16.

54. *See id.* at 15.

55. *Id.* at 15. As Delgado later recapitulates: “Generally, justification asserts that conduct is not wrongful, while excuse asserts that although the conduct is wrongful, the actor cannot be blamed for it.” *Id.* at 56.

56. *Id.* at 47; *see id.* at 15–16.

57. *See supra* notes 18–19 and accompanying text.

defenses.”⁵⁸ Furthermore, within the exculpatory field, “excuse” defenses do so more readily than “justification” defenses.⁵⁹ The problem then will be that the order of service to the confessional function would seem to be exactly the reverse: non-exculpatory first, then justification, and last in line excuse.

A. *Excuse*

Delgado’s work is relatively confident and upbeat about the application of recognized categories of excuse to cover a substantial fraction of cases where exposure to RSB conditions would arguably cast a doubt upon the defendant’s full ability to control his conduct or appreciate its wrongness. At length and with flourish, Delgado compiles a seemingly exhaustive list of currently recognized categories of excuse, then carefully pinpoints the potential causal environmental factors and the causal channels through which they might work to produce instantiations of the various excuses. Environmental factors include poverty, chronic unemployment, substandard living conditions, bad schools, bad treatment by police, inculcation of alternative value systems, bad homes and families, and racism.⁶⁰ Causal channels include “[p]hysiology of rage,” malnutrition, environmental poisoning, alcoholism, and substance abuse.⁶¹ Existing defenses to take up these factors and channels include “insanity,” “subnormality,” “automatism,” “diminished capacity,” “self-defense,” “necessity,” “duress,” and “provocation.”⁶² A later list of excuse-types, shortened and generalized for the accommodation of RSB, includes “involuntary rage,” “isolation from dominant culture,” and inability to control conduct.”⁶³

Notice, now, that “RSB” is not the name of any one of the environmental factors or causal channels which, by Delgado’s masterful demonstration, might often be fed convincingly into a claim for application, in a particular case, of one of the law’s currently recognized categories of excuse. “RSB” is rather meant to name a comprehensive social status or condition in which the

58. Delgado, *Rotten*, *supra* note 6, at 15; *see id.* at 13 (“Though both types of defense may incorporate RSB considerations, exculpatory defenses do so more readily than nonexculpatory defenses.”).

59. *See id.* at 65 (“Focusing on an RSB defendant as an individual seems more appropriate than focusing on the justifiability or legality of his or her acts . . .”); *infra* Part II.B.

60. *See* Delgado, *Rotten*, *supra* note 6, at 23–34.

61. *Id.* at 34–37.

62. *Id.* at 38–52.

63. *Id.* at 75–77.

likelihood is exceptionally high that one or more of those factors and channels will be found in operation. And then what would be the use of inserting the locution "RSB" into the work of proving or disproving the operation of any of those factors or channels in a particular case? A major part of Delgado's answer is that a legally established, general recognition of that escalated likelihood (or call it a presumption that those factors and channels apply to RSB defendants) will assist the responsible administrators of the law—counsel, judges, and juries—in arriving at the correct answers, both legally and morally speaking, to pleas of excuse to which they might otherwise be insufficiently sensitive or receptive.⁶⁴ It is largely in *that* way, I understand, that Delgado means to redeem his suggestion of a potentially close fit between the legal notion of excuse to situations of RSB defendants. I fully accept the suggestion.

What I want to point out, though, is that *that* way is not the way of the confessional function, nor will it directly serve the latter function at all. When the background conditions are brought into the case *in that way*, to help explain why conduct legally defined as criminal is covered by an excuse like diminished capacity, the question of the systemic injustice of those conditions is not spotlighted; indeed, it is not at issue at all. To say by way of excuse that RSB conditions have caused or led to a failure of the defendant's self-control is no more to speak of social-structural injustice than to say that mental illness or a random seizure led to such a failure.⁶⁵ A plea of special excusing or justifying conditions simply does not, as such, put the spotlight on the systemic or structural injustice of society's toleration and exploitation of the dark ghetto. As Delgado writes himself, a successful insanity defense "does little to focus attention on the underlying conditions responsible for the . . . impairment . . ."⁶⁶ Insofar, then, as he seeks establishment in the law of a confessional defense, one that

64. "If all or most meritorious RSB defenses could be raised through existing channels, creating a new RSB defense would be an unnecessary challenge to a legal system committed to incrementalism." *Id.* at 38. "If a distinct RSB defense were adopted, . . . defense counsel would no longer have to sift through a haphazard array of traditional defenses . . ." *Id.* at 54.

65. *See* United States v. Alexander, 471 F.2d 923, 959 (D.C. Cir. 1973) (Bazelon, C.J.) ("We are not concerned with a question of whether or not a man had a rotten social background. We are concerned with the question of his criminal responsibility.")

66. Delgado, *Rotten*, *supra* note 6, at 40; *see id.* at 66 (noting that an RSB-connected excuse defense "does not excuse merely because one has suffered privation, insult, and unequal treatment," but rather the background of privation "is relevant only in that it can *cause* an excusing condition").

flows from and declares the social-systemic injustice—not the mere existence—of RSB, Delgado has a compelling reason to push beyond excuse-based defenses. The latter can affirm the existence-in-fact and the resulting causal effects of dark-ghetto conditions, but it leaves the matter of injustice neither here nor there.

Excuse-based defenses thus do not directly serve the distinctive social and moral purposes that Delgado associates with the idea of an “independent” defense of RSB—those confessional purposes I mentioned of societal acceptance of responsibility for structural injustice and self-incentivization to cure it.⁶⁷ Of course it is true that RSB is one possible cause and explanation of a defendant’s diminished rational or evaluative capacity, but still (to quote from one of Delgado’s steadfast adversaries in this debate) “it is the [fact of the diminished capacity], not [the injustice of the RSB], that is doing the excusing work.”⁶⁸ The same defense will be available to any accused whose conduct flows from a comparable impairment, regardless of whether the efficient causes lie in RSB or entirely elsewhere—even including (as another critic has naughtily suggested) the accused whose twisted sense of right and wrong might have stemmed from an excessively privileged and pampered childhood.⁶⁹ In sum: with an excuse-based defense, RSB appears merely as a contingent fact in a chain of causation. The evaluative classification of RSB as rankly *unjust* is doing no work at all as a reason to absolve the crime. To that extent, excuse-based defenses simply fail to give Delgado what he seeks.

B. Justification

Justification conceivably could come closer. Not, I grant you in the standard, easy case of “necessity” *à la* Jean Valjean, an otherwise harmless theft of food with which to feed one’s starving children. That would be, once again, merely pointing to a reason otherwise morally neutral (social perceptions of the evil of starvation being not dependent on injustice in the chain of causation) to conclude that the act, although of a sort that is properly held blameworthy as a type, was not blameworthy in this exceptional instance.⁷⁰

67. See *supra* notes 18–19 and accompanying text.

68. Morse, *supra* note 19, at 162.

69. See Erik Luna, *Spoiled Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 23, 25 (2011) (“It involves the mirror image of the RSB defense—an imagined doctrine that I will call ‘spoiled rotten social background.’”).

70. See *supra* note 51 and accompanying text.

We can imagine other claims of justification, though, that would bring us to the verge of social forfeit. A person might claim to be justified in the use of some forms of criminal conduct as a necessary means to the rescue of her self-respect or dignity from the ravages of RSB, or to exercise her right of political protest when other channels are closed.⁷¹ We could construe the ostensibly criminal act as the defendant's reclamation of her human dignity from impairments of it wrought by RSB conditions, and furthermore propose that such a reclamation merits positive approval and support from society—just as, say, we would approve the technical assault committed by a citizen forcibly seizing back his wallet from the hand of a purse-snatcher.⁷² The RSB defendant could then be seen as acting on behalf of values presumably prized by society, either the fulfillment of personal dignity needs whose special urgency society affirms, or the protection of society against a trap it presumably wishes to avoid, that of being “lulled into the belief that the existing system operates effectively for all members.”⁷³

The defense would be classed as exculpatory—the accused was only doing as we would have preferred, given the exceptional circumstances—but the close affinity with a *nonexculpatory*, “social forfeit” type of defense would be hard to miss. Delgado sympathetically and diligently considers such possibilities.⁷⁴ He stops short, though, of adopting them. He points to difficulties posed by doctrinal requirements (to which he voices no objection) of necessity and proportionality: that there be no realistic non-criminal alternative means by which the personal or societal interests at stake can be sufficiently redeemed.⁷⁵ He takes note (again without objection) of a prevailing sense of caution against free passes for politically motivated civil disobedience. “The effect of justification,” he writes, “is to condone and encourage the RSB defendant's conduct, a result that may seem morally and prudentially wrong.”⁷⁶ And so, in the end, although “[w]ith some

71. See Delgado, *Rotten*, *supra* note 6, at 60 (“[A RSB individual] might be justified in committing an illegal act rather than complying with the unjust system and thereby reinforcing it.”).

72. See *id.* at 61 (“[T]he RSB defendant can be seen as acting to protect important personal interests.”).

73. Delgado, *Rotten*, *supra* note 6, at 60.

74. See *id.* at 57–61.

75. See *id.* at 61.

76. *Id.* at 63. Delgado writes: “A justification defense is unlikely to win acceptance beyond extreme cases . . . because of the implication that justified behavior is correct, or at least permissible. The latter argument is difficult to make, particularly where violent acts are concerned.” *Id.* at 46.

ambivalence,” Delgado concludes against a justification model for an RSB defense: “[a]lthough there is appeal in the claim that an oppressed and exploited person who reasserts humanity through a criminal act is justified in doing so, the moral, practical, and political hurdles in the way of such a new defense seem insurmountable.”⁷⁷

C. A Non-Exculpatory Defense

Early on, Delgado takes note of contentions that those who suffer unjust deprivation of “the benefits of the ‘social contract’” are thereby released from obligations imposed by the contract,⁷⁸ or that society as a wrongful contributor to causal conditions of the crime is estopped (as it were) to complain of the result.⁷⁹ Postponing further discussion, Delgado does note at this early stage that these nonexculpatory defenses “rely on controversial political premises and lack the clearly defined boundaries associated with currently recognized nonexculpatory defenses.”⁸⁰ Passing them in sympathetic review, he explains that he does so in order to “clear the way for discussion of the more important [i.e., exculpatory] kind of defense for RSB purposes.”⁸¹

Delgado nevertheless returns to these questions later. “One can argue,” he writes, “that a society which permits social and economic decisions to steal the self-respect of large numbers of identifiable citizens has little claim to the allegiance of these citizens,”⁸² and it is a “separate question” whether “a society which is itself unjust is entitled to enforce standards of morality between human beings”⁸³ These prompts to further reflection are left hanging inconclusive, though, as are suggested possible analogies to entrapment (“the argument would be that society brings about crime by ignoring or permitting intolerable living conditions that make crime inevitable”)⁸⁴ and to tort-law doctrines of contributory fault (“it is plausible to argue that society’s responsibility for the causes of crime make it a ‘contributor,’ and should bar or limit

77. *Id.* at 78.

78. *Id.* at 14.

79. *See id.* at 14–15.

80. *Id.* at 15.

81. *Id.* at 13.

82. *Id.* at 59 n.331.

83. *Id.* at 63 n.352.

84. *Id.* at 77.

attachment of responsibility to the defendant.”)⁸⁵ Again Delgado refrains from pressing home these suggestions.

Delgado’s most vigorous argumentative deployment of the injustice of RSB occurs in the course of his examination of the applicability of the standard trio of reasons for criminalization—retribution, deterrence, rehabilitation—to the prosecution of RSB defendants. Insofar as the defendant lives outside of a shared community of values with his accusers, Delgado suggests, the latter would lack entitlement to punish him or her “on the basis of a debt [he or she owes] the community,” and so “retribution theory provides little moral basis to punish him or her for those acts.”⁸⁶ Again, though, it remains less than clear how far Delgado means to endorse this line of thought as a fully convincing reason for the law to adopt an independent RSB defense. It does not fit neatly with succeeding wrap-up statements: “Evidence of a rotten social background . . . is relevant in criminal trials because with this evidence, society *can acknowledge blamelessness* where appropriate, and [so] avoid punishing those it does not have the right to punish.”⁸⁷ Hence “[t]he societal fault model is more a means of scaling down the defendant’s responsibility than the basis for a separate, complete defense.”⁸⁸

In sum, Delgado’s work is unabashed and upbeat about the application or moderate extension of recognized categories of excuse to cover some substantial fraction of cases where exposure to RSB or “dark ghetto” conditions would arguably cast a doubt upon the defendant’s full ability to control his conduct or appreciate its wrongness.⁸⁹ When it comes to defenses that smack of social forfeit, he is markedly more hesitant and cautious. He hits, as we might say, a block.

Why might this be so? Delgado’s material itself suggests an answer. The social-forfeit defense is like the pot at the end of the rainbow. It is alluring but apparently very hard to get to by pathways of reason that can overcome predictable strong hesitations in the minds of conscientiously responsible guardians of the law and the legal order, a group from which few readers of law reviews are likely to separate as total outsiders.⁹⁰ Consider

85. *Id.* at 77–78.

86. *Id.* at 70.

87. *Id.* at 74–75 (emphasis added).

88. *Id.* at 89.

89. *See supra* Part II.A.

90. As Delgado observes, “courts and legislatures are conservative, especially with respect to criminal law innovation” Delgado, *Rotten, supra* note 6, at 37.

again Delgado's wrap-up line regarding a defense of justification-for-the-sake-of-human-dignity—"the moral, practical, and political hurdles in the way of such a new defense seem insurmountable"⁹¹—and do not overlook that little word "moral."

III. WHAT IT "SAYS ABOUT US?"⁹²

What does non-adoption of the RSB defense say about us? Delgado himself has had the idea of setting the question into a Rawlsian frame. Place yourself, he suggests, behind "a Rawlsian veil of ignorance."⁹³ You are called upon to choose a set of binding principles for your society's basic structure—the "main political and social institutions," remember, that "regulate the division of advantages . . . over time,"⁹⁴ and thus distribute the chances that any given person will be born into a relatively advantaged or disadvantaged position. You have to make your choices without knowing which of the resulting positions the person you turn out to represent will occupy. Would you or would you not choose to have society recognize RSB as a criminal defense?⁹⁵ That is the question.

Delgado then proceeds with a discussion apparently designed to show why you most likely would opt for recognition of the defense. Societies, he very plausibly suggests (citing European experience as evidence), can expect to achieve a near avoidance of RSB conditions by relatively modest expenditures on education, health care, and other social services.⁹⁶ By committing your society in advance to do just that, you would of course be subjecting your future self to higher taxes. In return you would obtain "the security that if [you] were born black, brown, or very poor [you] would have a reasonable chance to grow up healthy, sane, educated, and intact."⁹⁷ Delgado, Rawls-like, believes that most of us would admit to thinking we should "hedge our bets and opt for the society with social supports and slightly higher taxes."⁹⁸ And so, he concludes, we invite a bad conscience for putting up with our currently prevailing, contrary social arrangements, when

91. *Id.* at 78.

92. Delgado, *Wretched*, *supra* note 6, at 7.

93. *Id.* at 15 (citing JOHN RAWLS, A THEORY OF JUSTICE 11–15, 60–62, 100–02, 303 (Revised ed. 1971)).

94. *See supra* note 31 and accompanying text.

95. *See* Delgado, *Wretched*, *supra* note 6, at 15.

96. *See id.* at 16.

97. *Id.* at 17.

98. *Id.*

we see that “[w]e only acquiesce in them because we are in a favored position.”⁹⁹

It looks like a good Rawlsian argument as far as it goes. And we can easily see, then, what it must say about us that we nevertheless fail to take the feasible, moderate measures that apparently could extirpate the dark ghettos from our midst. It says either that we do not, as a society, cotton to Rawlsian ideas about justice, fairness, and reciprocity¹⁰⁰ or, alternatively, that we do but that a controlling fraction of us allow self-interest, convenience, or apathy to beat back justice.¹⁰¹

When we look again, though, we might wonder whether the argument skips a beat. The instigating question, remember, was whether, behind the veil of ignorance, we would choose for or against recognition of a freestanding RSB defense to criminal charges.¹⁰² Delgado argues in response that most of us, imagining ourselves behind the veil, would choose in favor of a basic-structural commitment to share socially the costs of avoidance of RSB conditions. It may well follow that current societal toleration of our dark ghettos is deeply unjust.¹⁰³ It would not yet follow that we have in hand a complete moral argument—and much less a “good” legal argument—for establishing in the law a freestanding criminal defense of “RSB.”

A further look at Rawls will show a way that we could try to finish off such a claim within the argumentative space provided by our stock of legal sources. I will end, however, by suggesting why, strictly within a Rawlsian conception, that argumentative path must remain a troubled one at best—in sympathy, then, with Delgado’s own apparent sense of blockage on this point.

99. *Id.* at 18.

100. *See supra* Part I.C.

101. *See* Delgado, *Wretched*, *supra* note 6, at 12–13 (citing JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007)) (recounting the view that society tolerates the dark ghetto, including its resultant imprisonments, as “a convenient means of manipulating the labor pool, taking numbers out of the pool when society does not need workers and preserving others in a stand-by status”).

102. *See id.* at 15 (“Society could either recognize a defense of rotten social background or not. Ponder your choice . . .”).

103. Such an inference would accord with the well-known proposal of Rawls to use such a thought experiment as a “heuristic device” for generating and testing proposed principles of justice for a society’s basic structure. RAWLS, *RESTATEMENT*, *supra* note 31, at 99; *see id.* at 14–16 (proposing “the idea of the original position” as a way to “extend the idea of a fair agreement to an agreement on principles of political justice for the basic structure”).

IV. RAWLS AND LEGAL SOURCES

A. *A Further Look at Rawls: Justice, Legitimacy, and the Constitution*

In democratic countries, it happens all the time that citizens call upon each other to accept in good spirit the compulsion of laws that many citizens find—and not crazily find—to be outrageous and oppressive. A major question for Rawls was how such demands can be justified to supposedly free and equal citizens.¹⁰⁴ He proposed in response that enactments by democratic political majorities can be justified to dissenters in any given case (regardless of which side of the case you might think true justice and policy would favor) by a showing that the winners have acted within the terms of a good-enough constitution.

The coercive deployment of law by democratic majorities, Rawls wrote, should be acceptable to all—is “justifiable to other[s]” “as free and equal”—as long as it is done “in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse”¹⁰⁵ The thought could be described as quasi-contractual: reasonable citizens in an up-and-running democratic political order, knowing they are fated to disagree intractably over the ultimate rightness and goodness of many specific policies from time to time enacted into law by political majorities, can nevertheless agree to accept the results as long as those are kept within bounds set by a constitutional higher law that itself contains an adequate and proper set of “essential” guarantees. If a country’s constitution is adequately democratic in design, and if the constitution broadly guarantees due respect for certain core rights and interests of persons, then—but only then—it will be fair to call on everyone for compliance with approximately all of the further laws, rulings, and decrees that issue in accordance with the procedures, requirements, and limitations laid down by that constitution.

Rawls called that a “liberal principle of legitimacy,”¹⁰⁶ and—as you can see from my account—he meant by legitimacy the justified claim of a political order to call upon its citizens for a general disposition of loyalty to its duly enacted laws. As you can

104. See RAWLS, *supra* note 35, at xx (posing what Rawls called “the problem of political liberalism” to explain how it might be possible that “deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime . . .”).

105. *Id.* at 137 (positing a “liberal principle of legitimacy”).

106. *Id.* at 137, 217.

also see, the principle depends on the effective presence and operation not just of any old constitution but of a “legitimation-worthy” constitution (as we may call it): one that really does contain each and every one of the commitments—the constitutional “essentials,” as Rawls called them—that any constitution would have to contain in order to carry the moral load of legitimation. But then what in substance are these constitutional essentials, which any and every legitimation-worthy body of constitutional laws must contain?

We saw above that political, legal, and social arrangements geared to the fulfillment of fair equality of opportunity—and so, it easily follows, to the prevention of dark-ghetto conditions—were, in Rawls’s view, strict requirements of justice in a society’s basic structure.¹⁰⁷ Many of us will furthermore concur with Professor Shelby’s judgment that subjection of sizeable fractions of citizens to such conditions is an especially grave deviation from justice. Put that together with Shelby’s inference of a resulting dissipation of a mutuality of obligation between the sufferers and society, and we might neatly summarize Shelby’s position, in the terms of the Rawlsian liberal principle of legitimacy, as follows: a commitment to assurance to all of fair equality of opportunity (“FEO”) rightly belongs among the requisite components—the “constitutional essentials”—of any liberally legitimation-worthy, basic-structural political practice, as represented in a country’s constitutional laws. It would follow that, in a dearth of committed legal-systemic resistance against continued subjection of citizens to dark-ghetto conditions (when the means of avoidance are readily at hand), the conditions of legitimacy are in abeyance, at least in relation to the directly aggrieved fraction of the country’s population. (Thus to read Shelby actually turns out also to read him as a friendly critic of Rawls, although in no respect will that get in the way of our purposes here.)¹⁰⁸

107. See *supra* Part I.C.

108. Very briefly to explain: Rawls himself stopped short of treating the FEO guarantee as an essential component of a legitimation-worthy constitution (even though he did emphatically include it as an ideal principle for the basic justice of a political regime). Shelby, in effect, is pushing toward that very step, which Rawls had found sufficient reason to decline to take. See Shelby, *supra* note 8, at 150 (concluding that Rawls’s own list of constitutional essentials, omitting FEO, would “allow too much inequality” if used as a test for tolerable injustice). For a discussion of Rawls’s grounds for declining to treat FEO as a constitutional essential (which Shelby finds “respectable,” see Shelby, *supra* note 8, at 145), see Michelman, *supra* note 38, at 1016 (presenting Rawls’s reasons of urgency and transparency for omitting FEO from the constitutional essentials).

B. Toward Social Forfeit As a Matter of Law?

The Rawlsian principle of legitimacy sets up, as the acid test of the legitimacy of a country's laws and legal order, compliance with all of the "essential" components of a legitimation-worthy constitution. Notice, then, the opposite side of that same coin. A *failure* of such compliance means a denial to the country's citizens of any clear moral license to collaborate in support of the system's demands for a regularity of compliance with its laws by everyone. That point carries an implication for lawyers and judges engaged in construing and applying the laws that in fact we have on the books. It means the law people work in the shadow of the country's urgent moral interest in having those laws in their totality construed so as to bring and keep that totality in line with whatever we hold to be the essential components of a legitimation-worthy constitution. It seems that implication must also cover *constitutional* interpretation: within limits of fidelity to law, we law folks should be doing our best to steer the meanings of clauses in the constitution we have toward our deepest convictions about political morality and legitimacy.¹⁰⁹

Professor Delgado's work on the RSB defense has dealt with general criminal law, not constitutional law, but still these points might be of interest to him. Any American jurisdiction's general criminal law already contains an established list of excuse-type defenses. Suppose your goal is to achieve expanded or modified applications of these legal items to RSB cases, noticeably beyond their hitherto accustomed applications. What will be your argument in favor? You will start by trying to show—as Delgado very ably does¹¹⁰—how each of these defenses is motivated by larger principles of responsibility and blame and how those larger principles are engaged by facts of RSB. We might then add, in a rather different vein, that a generous application of the excuse defenses to RSB defendants is a way for society to recognize and requite for the systemic injustice of RSB. Delgado, it appears, has been trying to combine those two veins of argument into one. He wants society to commit to looking especially hard at the standard

109. See Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3 (1992) (defending moral reading approach to constitutional interpretation, in part on the basis of the philosophy of John Rawls); Samuel Freeman, *Political Liberalism and the Possibility of a Just Constitution*, 69 CHI.-KENT L. REV. 619, 661 (1994) ("[I]n applying the political values of public reason as the basis for constitutional interpretation, the supreme court [. . . brings] to public awareness the principles of justice underlying the constitution, while developing and refining constitutional essentials in publicly acceptable terms.").

110. See *supra* Part II.A.

excuses in (particularly) *RSB* cases, to see how many of *such* cases really do, after all, engage the larger principles that motivate the itemized list of excuses. And he wants society to do that visibly—confessionally—in declared response to recognition and admission of the structural injustice of *RSB*.

The constitution-centered Rawlsian principle of legitimacy shows how it might be done. We here in America—so would run the line of thought—rely on our supposedly legitimation-worthy Constitution as a bulwark of political legitimacy. (Perhaps we are, in that respect, a model for Rawls's principle of legitimacy.) We therefore badly need to have our Constitution contain all it needs to contain in order *truly to be* a guarantor of legitimacy. But a political regime—this is where Professor Shelby's Rawls-inspired argument comes in—is *not* legitimate, *not* worthy of the loyalty of all its citizens, if it does not include commitments and safeguards and remedies against the emergence in its midst of *RSB* or dark-ghetto conditions. Put that all together, and it leaves us having the strongest kind of reason to construe our Constitution so that it *does* include such commitments and safeguards and remedies.

Our Constitution contains clauses purporting to secure all persons against deprivations of life, liberty, or property without due process of law.¹¹¹ It should not be staggering to the legal mind to read those clauses to call for a practice of generous application—not mindless but generous application—of criminal-law excuses to *RSB* cases. A convention of thus invoking constitutional law when mooting the application of one or another of the excuse items to an *RSB* defendant's case would garner some measure, at least, of the confessional effects Delgado seeks: a regular reminder to society of its default in the matter of fair opportunity and a goad to a better corrective effort. Therefore—so the argument would go—due process is best construed to require generous applications of criminal-law excuses in *RSB* cases. In sum: under pressure of recognition of the gross structural injustice of *RSB*, we morally read two clauses in our Constitution to commit us always, whenever an “*RSB*” defendant is in the dock, to look hard and harder at the standard excuses to see how their motivating principles might rightly apply, with exculpatory effect, to that defendant's case.

“Morally read,” he said. Aye, there's the rub? Well, yes and no. The idea of morally inflected constitutional interpretation obviously meets some stiff resistance in American legal circles, no

111. See U.S. CONST. amends. V, XIV, § 1.

citations necessary. Just as plainly, though, and however much the fact might bother some people, the argumentative practice of morally inflected constitutional interpretation falls comfortably within and not outside the pale of what is say-able by and between properly socialized American lawyers engaged in a courtroom contest. So *if* the Rawlsian moral arguments are sound, and *if* they apply to our question as the exposition so far might indicate, then the Constitution can figure as the source for a respectable *legal* argument to support a practice of confessional, categorical reference to a criminal defendant's RSB profile in the ordinary course of trial.

C. *Against Secondary Constitutional Essentials*

A difficulty remains, though, with the second of the two premises in that deduction. The exposition so far works by treating as a constitutional essential what is really a secondary, instrumental policy, and Rawlsian thought will not easily allow for that.

Suppose we agree with Professor Shelby: FEO is indeed an American constitutional essential, a commitment indispensable from a legitimation-worthy constitution for this country.¹¹² How does a compliant government provide for FEO? It does so most directly by adopting and executing active *policies*: antidiscrimination policies, educational policies, jobs policies, family policies, land-use policies, health and health-care policies, and so on. A policy of trying to avoid conceptions of criminality that end up incarcerating and criminalizing large fractions of a troubled community's male population might well make it onto the list. A policy of immunizing criminal actors holding "RSB" credentials against punishment and incapacitation most likely does not. However apt that latter policy might seem as an in-your-face to a culpably callous and negligent society, it is not plainly and directly contributory to the fulfillment of FEO. In that regard, the best that can be said for it is that a steady adherence to it sooner or later might "make" society clean up its act, although even that much seems speculative.¹¹³ Relative to the accomplishment of a commitment to FEO, that policy would be distinctly secondary not primary, instrumental not direct; quite

112. *See supra* notes 107–108 and accompanying text.

113. Some doubt the likelihood of the substantiality of such benign moral and social effects from recognition of an RSB defense. *See, e.g.*, Morse, *supra* note 19, at 158 (calling the hope of such effects "a pipedream").

arguably too much so to allow for its constitutionalization, at least in a Rawlsian view.

To see why, we must recall a dire-seeming consequence of a failure of legitimacy: that such a failure carries with it a denial to the county's citizens of any clear moral license to carry on a collaboration in support of the system's demands for a regularity of compliance with its laws by everyone. We thus have reason to take care not to set the legitimacy bar too high, or in a way that makes credible claims of failure too likely to come up. The constitutional essentials must accordingly be limited to a relatively few such that all can be honored simultaneously, fulfillment of one will not get unduly in the way of fulfillment of others, and endlessly debated conflicts among them will not too often arise.¹¹⁴ Such considerations quite plainly enter into Rawls's judgment that FEO should not be classed as a constitutional essential.¹¹⁵

These cautionary considerations against overpopulating the register of constitutional guarantees would seem to apply with a particular poignancy to the thought that among the guarantees might be a commitment to special tickets of criminal-legal immunity for RSB survivors. On the one hand, the core commitment to FEO cannot be said to be directly jeopardized or clouded by a refusal of that sort of constitutional supplement (and indeed the positive contribution of the supplement is itself far from clearly established). On the other hand, a commitment to the protection of every person's basic safety and security *is* undoubtedly in itself a Rawlsian constitutional essential, and there inevitably would be some degree of apprehension of a conflict between that and constitutional dictation of a broad-gauged "RSB"

114. See RAWLS, *supra* note 35, at 296–97.

115. See Michelman, *supra* note 38, at 1016–17 (reviewing Rawls's reasons of transparency and relative urgency for denying FEO the status of a constitutional essential). Rawls does, it should be noted, include among the constitutional essentials a commitment to what he calls a "social minimum," defined as a package of material goods and services up to the levels required for a person's capability to "take part in society as [a] citizen," and "to understand and to fruitfully exercise" his or her capacities as a self-actuating person. RAWLS, *supra* note 35, at 7, 166. As Shelby's and Delgado's discussions plainly disclose, however, FEO and the extirpation of dark-ghetto conditions from American life call for a lot more than that. *Exactly* what they call for, though, remains a deeply contested matter, and Rawls suggests that citizens who know their basic (mainly negative) liberties are guaranteed as a part of a democratic political system, along with assurance of access to that system on fair terms, and along with a social safety net, can reasonably agree to take their chances on working within that political framework to achieve the effective pursuit of the more complex, demanding, and debatable remainder of fair equality of opportunity. Michelman, *supra* note 38, at 1017.

defense. Delgado himself sums up the Rawlsian case against such a constitutional dictation. As he writes, the apparent effect of “condon[ing] and encourag[ing] [. . . criminal] conduct” will seem “morally and prudentially wrong.”¹¹⁶ Rawls provides some support and explanation for that Delgadian impulse of caution.

116. Delgado, *Rotten*, *supra* note 6, at 63.

