

## **The Ethics of Punishing Indigent Parents**

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### 1. Introduction: The Relationships between Poverty and Crime

How should the criminal justice system address the disproportionate number of poor people who are punished for crime? The answer depends on the nature of the relationship both between poverty and crime and between criminal punishment and social justice. Scholarly debate on this issue has focused on the claim that deprivation provides an excuse for crime because it impairs moral responsibility for criminal conduct.<sup>2</sup> Crime, punishment, and poverty are connected in other ways, as well, and these connections also have implications for the culpability of indigent offenders. In this essay, I consider the associations between poverty and the crimes of child abuse and neglect to explore the ethics of punishing indigent lawbreakers and to evaluate approaches to the relationship between poverty and criminal justice. Punishing indigent parents reflects a deep bias in the detection and definition of child maltreatment, and

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<sup>2</sup> A prominent example is the debate on this topic between District of Columbia Court of Appeals Judge David Bazelon and law professor Stephen Morse. See David Bazelon, "The Morality of Criminal Law" *Southern California Law Review* 49 (1976): 385; David Bazelon, "The Morality of Criminal Law: A Rejoinder to Professor Morse," *Southern California Law Review* 49 (1976): 1,269; Stephen Morse, "The Twilight of Welfare Criminology: A Reply to Judge Bazelon," *Southern California Law Review* 49 (1976): 1,247.

helps to absolve lawmakers of responsibility for eradicating conditions of poverty that harm children.

Although most child maltreatment is handled by civil child protection proceedings, child abuse and neglect are also prosecuted criminally. Most of the parents who lose custody of their children in civil child welfare proceedings and who are convicted of criminal child neglect and abuse are poor. Many cases fall within the scope of criminal statutes of general applicability, such as those punishing assaults, homicides, sexual assaults, and incest.<sup>3</sup> In addition, many states have passed special criminal child abuse and neglect statutes. It appears that states may increasingly deal with child abuse and neglect by prosecuting parents in criminal courts rather than crafting protective remedies in family courts. In New York City, for example, misdemeanor arrests for endangering the welfare of minors have risen by 60 per cent in the last several years.<sup>4</sup> Although criminal prosecution for child neglect remains relatively rare, the message of culpability that criminal convictions convey is significant.

Crimes committed by poor parents often involve three types of associations between indigence and crime: these crimes may be caused by parental poverty, detected because of parental poverty, or defined by parental poverty. A recent criminal case arising out the fatal starvation of a 6-week-old baby in Brooklyn, New York, illustrates all three categories.<sup>5</sup> The mother, Tatiana Cheeks, a 21-year-old black woman on public assistance, was charged with criminally negligent homicide for failing to nourish her infant daughter. Ms. Cheeks was breastfeeding the baby, who weighed only 6 pounds 5 ounces when she died. Although relatives

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<sup>3</sup> Leslie J. Harris, Lee E. Teitelbaum, & Carol A. Weisbrod, *Family Law* (Boston: Little, Brown & Company 1996), 1318.

<sup>4</sup> Rachel L. Swarns, "In a Policy Shift, More Parents Are Arrested for Child Neglect," *New York Times* (October 25, 1997): A-1.

<sup>5</sup> See Rachel L. Swarns, "Baby Starves and Mother Is Accused of Homicide," *New York Times* (May 29, 1998): B3.

noticed that the baby was small and always seemed hungry after feeding, no one suspected that the baby was starving.

Poverty probably played an important role in Cheeks's arrest. First, poverty appears to be a causal factor in the baby's death. Mothers who breast-feed often have trouble determining whether their infants are getting adequate nutrition and rely on regular evaluations of the infant's weight by health care professionals.<sup>6</sup> Cheeks had taken her daughter to a hospital clinic in Brooklyn several weeks before the death, but was turned away because she did not have \$25 to pay for the visit. Cheeks reports that her welfare caseworker ignored her subsequent effort to apply for Medicaid coverage for her daughter.<sup>7</sup>

Second, Cheeks had previously come to the attention of child welfare authorities when she left her son home alone while she shopped for cigarettes. As a result, she was referred to a social service agency for counseling. It is possible that, having already been identified as a negligent parent, Cheeks feared losing custody of her daughter if she reported the weight loss to child welfare workers. It is also possible that state authorities detected the first instance of negligence because Cheeks was receiving public aid and was therefore subject to surveillance by welfare case workers.

Third, Cheeks's status as a black woman on welfare may have influenced prosecutors' perception of the baby's death as a crime. Was Cheeks's failure to get medical help for her baby an instance of criminal negligence or a tragic but innocent mistake? Reaching a conclusion depends not only on application of the criminal law, but also on stereotyped assumptions about the fitness of different classes of women to be mothers.<sup>8</sup> The dominant culture in this country

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<sup>6</sup> Id.

<sup>7</sup> Nina Bernstein, "State Faults Hospital in Death of Baby Who Was Denied Care," *New York Times* (Oct. 26, 1998): A21. Prosecutors were persuaded by lactation experts to drop charges against Cheeks and the State Department of Health found that the hospital violated regulations when it turned Cheeks and her baby away. Id.

<sup>8</sup> See Donald Black, *Sociological Justice* (New York: Oxford University Press, 1989), 59 (describing a sociology of cases in which "the social structure of a case predicts how it will be handled" and "*legal variation is a direct function of social diversity*").

has long presented images of poor black women as incompetent, uncaring, and even pathological mothers.<sup>9</sup> White middle-class women, on the other hand, benefit from the presumption that they are nurturing and careful toward their children. These presumptions help to shape the public's understanding of unintended harm to children and its attitude toward mothers who let the harm occur.<sup>10</sup>

Finally, poverty, criminal justice, and social justice are related in this story because Cheeks's criminal punishment for the death of her baby may obscure the social causes of the tragedy — inaccessible medical care, inadequate education, and poor nutrition in inner-city neighborhoods. Some people reading the news reports of her arrest may believe that making poor mothers criminally liable is a solution to poor infant health in these communities. Holding parents accountable for poverty-related harm to children may replace efforts to relieve children's poverty.

This essay considers the effect these various associations between poverty and child maltreatment have on the criminal culpability of indigent parents. I conclude that, although poverty should not provide a general excuse for these crimes, poverty should not enhance parents' culpability or be excluded as a basis for mitigation. Poverty-induced stress may be a mitigating factor in serious child abuse cases. In many cases of neglect, parents' culpability depends so much on harms to children that stem from family poverty that it is both unethical and unwise to treat these as criminal cases. I reject the position that questions of criminal culpability

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<sup>9</sup> Dorothy E. Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (N.Y.: Pantheon, 1997), 8-19 (describing the images of Jezebel, mammy, matriarch, and welfare queen).

<sup>10</sup> In her study of twenty-five cases of women charged with endangering newborns during unassisted births, anthropologist Anna Lowenhaupt Tsing found that courts viewed mothers as different kinds of criminals, depending on their race and class. See Anna L. Tsing, "Monster Stories: Women Charged with Perinatal Endangerment," in *Negotiating Gender in American Culture*, eds. Faye Ginsburg & Anna L. Tsing (Boston: Beacon, 1990), 282. The courts treated young college women leniently because judges viewed them as innocent products of a distorted maturation process. On the other hand, poor white women and women of color were sentenced harshly because judges perceived their crimes as obstinate and cunning refusals of obstetrical expertise. *Id.*, 286.

can be determined apart from questions of social justice. Holding parents criminally responsible for harm to children caused by poverty deters the struggle to achieve social equality and to improve the living conditions of poor families. This connection between criminal and social justice should be considered in deciding whether or not to punish indigent parents for mistreating their children.

## II. Crimes Caused by Parental Poverty

Many scholars describe the relationship between poverty and crime as a causal one: poverty causes criminal conduct. When the relationship is framed in this way, the ethical question raised is whether poverty should provide an excuse for crime. Excuses in criminal law are typically explained by a causal theory: “when an agent is caused to act by a factor outside his control, he is excused.”<sup>11</sup> Stephen Morse, for example, begins his essay in this book by assuming that “deprivation causes crime,” by which he means that “holding all other causal variables constant, deprivation is a variable that increases the probability that an agent subject to it will engage in criminal conduct.”<sup>12</sup> He then asks whether this causal nexus between poverty and criminal conduct should affect criminal responsibility. William Heffernan posits this causal relationship as one of the ties between social and criminal justice: “If someone suffers a social wrong (as defined by a specific conception of social justice), should that person be excused from liability if his conduct is traceable to the wrong he suffered?”<sup>13</sup>

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<sup>11</sup> Michael S. Moore, “Causation and The Excuses,” *Cal. L. Rev.* 73 (1985): 1091. See, e.g., Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* (St. Paul, MN: West, 1986), 433 (defining duress in terms of causation). Moore rejects causal theories of excuse because they fail to explain established excuse doctrine and because they are based on flawed moral principles.

<sup>12</sup> Stephen J. Morse, *Deprivation and Desert*, p. 1.

<sup>13</sup> William C. Heffernan, “Social Justice/Criminal Justice,” p. 10. Heffernan presents three connections between versions of social justice and some facet of criminal justice, all of which are informed by the question: “Does the fact that someone has not received what he deserves from society affect the calculation of what he deserves in criminal justice?”. *Id.* at 9.

We could ask this question about most crimes involving child maltreatment. There is a high correlation between poverty and cases of child abuse and neglect.<sup>14</sup> Most parents who are convicted of these crimes are poor and receiving public assistance. The studies showing an association between poverty and child maltreatment are legion. A 1977 examination of a random sample of cases from a New Jersey child protection agency revealed that 81 % of the families involved had received welfare benefits at some time.<sup>15</sup> Statistics collected by the 1985 National Family Violence Survey show that, while child abuse occurs in families across income levels, severe violence toward children is more likely to occur in households with annual incomes below the poverty line.<sup>16</sup> A 1996 study of census figures and state child protective services data revealed that high-poverty zip codes had three times as many substantiated physical abuse cases as did median-poverty zip codes.<sup>17</sup> Another group of researchers found that “living in areas of localised high unemployment (particularly male) is likely to put families, otherwise vulnerable, at greater risk of child physical abuse and neglect.”<sup>18</sup> Indeed, poverty is a better predictor of child maltreatment than the parent’s personality traits.<sup>19</sup>

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<sup>14</sup> Kristine E. Nelson, Edward J. Saunders, & Miriam J. Landsman, “Chronic Child Neglect in Perspective,” *Social Work* 38 (1993): 661; Richard J. Gelles, “Child Abuse and Violence in Single-Parent Families: Parent Absence and Economic Deprivation,” *59 Am. J. Orthopsychiatry* 59 (1988): 492; Leroy H. Pelton, “Child Abuse and Neglect: The Myth of Classlessness,” *Am. J. Orthopsychiatry* 48 (1978): 608.

<sup>15</sup> Leroy Pelton, “Child Abuse and Neglect and Protective Intervention in Mercer County, New Jersey: A Parent Interview and Case Record Study” (Bureau of Research, New Jersey Division of Youth and Family Services, 1977), cited in Pelton, “Child Abuse and Neglect: The Myth of Classlessness,” 610.

<sup>16</sup> Richard J. Gelles, “Poverty and Violence Toward Children,” *Am. Behavioral Scientist* 35 (1992): 258, 263.

<sup>17</sup> Brett Drake and Shanta Pandey, “Unraveling the Relationship between Neighborhood Poverty and Child Maltreatment,” *Child Abuse and Neglect* 20 (1996): 1003.

<sup>18</sup> Bill Gillham, et al, “Unemployment Rates, Single Parent Density, and Indices of Child Poverty: Their Relationship to Different Categories of Child Abuse and Neglect,” *Child Abuse & Neglect* 22 (1998): 79, 88.

<sup>19</sup> Joyce E. Everett, Sandra S. Chipungu, & Bogart R. Leashore, eds., *Child Welfare: An Africentric Perspective* (New Brunswick, NJ: Rutgers University Press, 1991), 184 (“Studies indicate strong correlations between the incidence of child neglect and lack of the basic elements of what is considered a minimal standard of living for all Americans and less correlation with the psychological makeup of the caretaker.”)

The existence of a strong correlation between poverty and cases of child abuse and neglect alone does not establish a causal relationship. As I discuss more fully in Parts III and IV, government authorities are more likely to detect child maltreatment in poor families because these families are more open to inspection by social and law enforcement agencies. Child neglect is also defined in a way that is more likely to encompass poor parents' behavior than that of wealthier parents. The disproportionate representation of poor parents in criminal cases, then, might reflect a higher incidence of reporting of child maltreatment in poor families rather than a higher incidence of maltreatment itself. There is substantial evidence, however, that parental indigence plays a causal role in severe child abuse.

In *Child Abuse and Neglect: The Myth of Classlessness*, Leroy Pelton challenges the belief that child maltreatment occurs without regard to class and is distributed evenly across socioeconomic levels.<sup>20</sup> Pelton argues that heightened public scrutiny of poor families and class bias in reporting could not account for most of the class disparity in child maltreatment report statistics for several reasons: new mandatory reporting laws have not yielded an increased proportion of reports from wealthier families; among the reported cases, the most serious injuries occur in families living in the most severe poverty; and most homicides of children, which are difficult to conceal, are committed by extremely poor parents.<sup>21</sup> Pelton concludes that the myth of classlessness supports ineffective remedies for child abuse and neglect that focus on psychological treatments rather than eliminating hazards stemming from poverty.<sup>22</sup> Conservative writers, such as William Bennett and James Q. Wilson, dismiss *economic* poverty as a cause of crime, blaming violence instead on the "*moral* poverty" of perpetrators.<sup>23</sup>

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<sup>20</sup> Pelton, "The Myth of Classlessness,"

<sup>21</sup> Id. at 610-12.

<sup>22</sup> Id. at 616. A more recent study similarly found no empirical data suggesting that higher levels of child abuse and neglect among the poor arise solely from bias in the reporting system. Brett Drake & Susan Zuravin, "Bias in Child Maltreatment Reporting: Revisiting the Myth of Classlessness," *Am. J. Orthopsychiatry* 68 (1998): 295.

<sup>23</sup> See, e.g., William J. Bennett, John J. DiIulio, Jr., and James P. Walters, *Body Count: Moral Poverty and How to Win America's War Against Crime and Drugs* (New York: Simon & Schuster, 1996).

Many researchers explain the association between poverty and child abuse as the product of stress.<sup>24</sup> A study examining the data from the 1976 National Violence Survey discovered a direct relationship between stressful life events and severe violence toward children.<sup>25</sup> After surveying studies establishing an association between poverty and child abuse, Robert Hampton concludes, “[c]hild abuse may thus be a second-order indirect effect of social impoverishment, which, in this instance, is greatly influenced by factors that operate outside the parent/child dyad.”<sup>26</sup> The extreme stress related to economic hardship and social isolation makes some parents more aggressive toward their children and less able to care properly for them. Parents consumed by the effort to meet their children’s basic needs, moreover, may find it difficult to address other family problems.

Living arrangements characterized by overcrowding and dilapidated housing, for example, exacerbate family friction.<sup>27</sup> Household crowding is associated with the increased use of corporal punishment by parents.<sup>28</sup> Inadequate food, clothing, health care, and other necessities of the good life, combined with the despair that stems from stifled opportunities, are other contributing factors. Not only is stress a regular product of deprivation, but poor parents lack the financial resources that more affluent parents have to alleviate stress, such as seeking counseling or taking a vacation. The convergence of damaging conditions in inner-city neighborhoods creates pressures “that would be hard for even the strongest and most concerned

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<sup>24</sup> See, e.g., Pelton, “The Myth of Classlessness,” 614-15; Robert L. Hampton, “Child Abuse in the African American Community,” in *Child Welfare: An Africentric Perspective*, eds. Everett, Chipungu & Leashore, 220, 230; Elliott Currie, *Crime and Punishment in America* (New York: Henry Holt & Company, 1998): 138-39.

<sup>25</sup> See Murray A. Strauss, Richard Gelles, & Susan K. Steinmetz, *Behind Closed Doors: Violence in the American Family* (Garden City, N.Y.: Anchor, 1980).

<sup>26</sup> Hampton, “Child Abuse in the African American Community,” 240.

<sup>27</sup> Alan Booth, *Urban Crowding and Its Consequences* (N.Y.: Praeger, 1976), 13.

<sup>28</sup> *Id.* at 81.

parents to fight.<sup>29</sup> Although these forces are often seen as negative influences on children, they simultaneously place stress on parents trying to raise children in this devastating environment.

Given this evidence, should poverty provide an excuse for indigent parents who mistreat their children? The prevailing answer is that indigence does not diminish parents' culpability for such criminal acts. Poor offenders are morally responsible for the crimes they commit because poverty does not render them incapable of conforming to the law. Poverty is no more excusing than other causes of criminal conduct; nor does it constrain an individual's free will to the same extent as the excusing conditions of coercion or duress. Indigent criminals are not passive victims of social forces, which divest them of moral agency. Thus, Morse concludes that "[n]o convincing theory suggests that deprived offenders are less morally responsible simply because they are deprived and therefore deserve excuse or mitigation on that basis alone."<sup>30</sup> The fact that most poor parents are not neglectful or abusive proves that it is possible for parents to overcome the stresses of poverty and to care properly for their children. It is ethical, therefore, to impute moral culpability to those parents who fail, and to punish them.

The New Jersey Supreme Court held a poor couple responsible when their inadequate care resulted in their children being developmentally delayed.<sup>31</sup> Although this is a civil case involving termination of parental rights rather than criminal punishment, it helps to illustrate the view that poor parents who neglect their children are morally responsible for the harm that results.<sup>32</sup> The supreme court overturned the trial judge's refusal to terminate the couple's

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<sup>29</sup> David T. Ellwood, *Poor Support: Poverty in the American Family* (N.Y.: Basic Books, 1988), 200.

<sup>30</sup> Morse, "Deprivation and Desert," 2. Michael Moore agrees that excusing defendants who suffer from rotten social background would show them inadequate respect as moral agents. See Moore, "Causation," 1146-47. See also Herbert Morris, "Persons and Punishment," in *Theories of Punishment*, ed. Stanley E. Grupp (Bloomington: Indiana University Press, 1971), 76. (discussing the relationship between responsibility and respect for persons).

<sup>31</sup> *New Jersey Division of Youth and Family Services v. A.W.*, 103 N.J. 591, 512 A.2d 438 (1986).

<sup>32</sup> Many parents probably experience civil remedies to protect children as punishment; indeed losing custody of one's children may seem far more punitive than a fine or even a jail term. Moreover, child welfare proceedings are more akin to criminal trials than most

parental rights because the judge incorrectly viewed the parents' economic and social

disadvantages as an excuse for their neglect. As the higher court explained,

We can share the concerns of the trial court that there not be any cultural bias. Still, we cannot avert our eyes to the grave injury that these children have suffered. We are sympathetic to the plight of these parents, who may suffer because of the larger faults of society. Nevertheless, we do not believe that their economic or social circumstances were proven to be the cause of their children's condition. The regrettable injury to the growth and development of the children was due not to economic deprivation or lack of resources but to a fundamental lack of the most precious of all resources, the attention and concern of a caring family.<sup>33</sup>

We might question whether the Court could distinguish between developmental problems stemming from parental neglect and those stemming from poverty. We might also question whether the court's standard for a "caring" family was based on an image of a middle-class home with greater resources. Moreover, the court overlooked the possibility that the parents' neglect was indirectly caused by their poverty: perhaps the parents failed to provide the attention and concern of a caring family because of stress produced by their impoverished living conditions. This possibility raises the question whether an indirect connection between deprivation and neglect should at least mitigate the parents' liability in criminal cases.

The fact that most poor parents manage to take care of their children and are not criminals does not resolve the issue. While it is true that most indigent parents do not abuse their children, it is also true that most indigent parents who abuse their children probably would not have committed these acts if they enjoyed the resources and comforts of affluent parents. How, then, can we separate their moral culpability for parental crimes from their indigence? As Candace McCoy puts it, "[i]t is the question of how it can be ethical to punish people for committing crimes that are acts that a much greater proportion of middle-class people would

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civil adjudications because they pit individuals against the state and involve moral condemnation of neglectful parents. The United State Supreme Court recognized similarities between proceedings to terminate parental rights and criminal trials. See *Lassiter v Dep't of Social Services*, 452 U.S. 18 (1981) (holding that parents have a due process right to counsel in complex proceedings to terminate parental rights); *Santosky v Kramer*, 455 U.S. 745 (1982) (holding that termination of parental rights must be justified by clear and convincing evidence).

commit if they were in the social and economic circumstances that members of the underclass are.”<sup>34</sup> Parents who seriously abuse their children under extreme stress that results from chronic poverty are suffering from a condition beyond their control that interferes with their ability to conform to the standard of care the law demands. When this stress is extreme, it should mitigate the punishment of indigent parents who mistreat their children.

Other scholars have concluded that the causal connection between poverty and crime may provide an excuse. Richard Delgado, for example, engages in a similar causation analysis in “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Emotional Deprivation?*.<sup>35</sup> In departing from the dominant view, Delgado contends that some defendants can show that their deprived background amounts to a disability falling within established excusing conditions. R. George Wright explains further why imputation of moral responsibility to very deprived individuals violates the logic of the concept of moral responsibility itself.<sup>36</sup> The most oppressed people in our society often miss “a reasonable and realistic opportunity to grasp or absorb the majority’s relevant legal and moral norms.”<sup>37</sup> Persons who are so deprived lack control over their choice-making process in the same way as people who are victims of direct forceful coercion, involuntary drugging, or insanity.

It is critical to distinguish the association between poverty and child maltreatment I discussed above from this argument about “rotten social background” and moral responsibility. My argument differs from the rotten social background argument in two ways. First, my argument is based on poverty-induced stress and not poverty alone. Stress may impair the ability of parents to take care of their children properly, but poverty does not render people morally

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<sup>34</sup> Candace McCoy, “Sentencing (and) the Underclass,” *Law & Society Review* 31 (1997): 589, 601 (review essay).

<sup>35</sup> Richard Delgado, “‘Rotten Social Background’: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?,” *L. & Inequality* (1985): 9, 66.

<sup>36</sup> R. George Wright, *Does the Law Morally Bind the Poor? Or What Good’s the Constitution When You Can’t Afford a Loaf of Bread?* (N.Y.: New York University Press, 1996); R. George Wright, “The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived,” *Catholic U. L. Rev.* 43 (1994): 459.

<sup>37</sup> *Id.* at 474.

incapable of caring for their children. Second, my argument focuses on parents' current living conditions, not on parents' upbringing. It concerns an immediate impairment, not a long lasting psychological defect. This mitigation recognizes that poor parents often struggle to take care of children under extremely difficult conditions that would challenge the very best of parents.

A comparison of my argument with the defense in *United States v. Alexander*<sup>38</sup> will illustrate these distinctions. *Alexander* affirmed the second-degree murder conviction of a black man who shot and killed two white marine lieutenants in a restaurant after one of the marines called him racial epithets. Although there was insufficient evidence to establish adequate provocation or mental disease, the defendant, Murdock, argued that he lacked control of his conduct as a result of his "rotten social background." A psychiatrist testified that Murdock suffered from an emotional disorder rooted in his deprived childhood in the Watts section of Los Angeles. The psychiatrist concluded that, because of this emotional impairment, the marine's racial remarks triggered an irresistible impulse to shoot. As Judge Bazelon explained it,

The thrust of Murdock's defense was that the environment in which he was raised — his "rotten social background" — conditioned him to respond to certain stimuli in a manner most of us would consider flagrantly inappropriate. Because of his early conditioning, he argued, he was denied any meaningful choice when the racial insult triggered the explosion in the restaurant.<sup>39</sup>

In his dissenting opinion, Judge Bazelon reasoned that the trial judge erred in instructing the jury to disregard this defense because Murdock's argument fell within existing doctrines of criminal responsibility.

Judge Bazelon's argument asserts that poverty and other forms of deprivation may damage a defendant's psyche by creating an enduring inability to control his conduct. This disability makes the defendant more likely to commit crimes and less responsible for his behavior. Judge Bazelon compared social deprivation to insanity: both misfortunes are

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<sup>38</sup> 471 F.2d 923, 957-65 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).

<sup>39</sup> Id. at 960.

“criminogenic.”<sup>40</sup> Delgado similarly stated, “[w]here extreme social and economic disadvantage demonstrably creates a defendant’s *criminal propensity*, punishment may be inappropriate.”<sup>41</sup> In contrast, I do not argue that a deprived background creates a *propensity* to mistreat children. I endorse the resistance to viewing poor people who commit crimes as incapable of conforming to the law. Denying people’s moral agency treats them as less than human. It also supports repressive social policies, including tougher criminal sanctions, that are defended precisely by the claim that poverty and the culture it breeds make people dangerous. The notion that oppression strips its victims of the faculties of responsible, autonomous beings perversely legitimates their continued subjugation.

This distinction reflects the difference between Michael Moore’s categories of status excuses, such as insanity, infancy, and intoxication, and true excuses, such as duress. According to Moore, status excuses “make a claim about the accused’s general status, not about his state of mind at the time he acted.”<sup>42</sup> Murdock’s defense was in the nature of a status excuse because its exculpatory effect depended on his status of having a rotten social background. My argument is in the nature of a true excuse because its exculpatory effect depends on the impact of poverty-induced stress on the defendant at the time of the criminal act. People who claim status excuses are exculpated because they are not capable of being moral agents. Poor parents are capable of acting as moral agents, but their present ability to conform to the law is impaired by the difficult circumstances in which they live.

Even if social causes should not create an excuse where other causes do not, social conditions should not be categorically exempted from mitigating defenses when other conditions qualify. The criminal law recognizes that provocation and extreme emotional disturbance may

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40 David Bazelon, “The Morality of Criminal Law,” *S. Cal. L. Rev.* 49 (1976): 385, 394-97.

41 Delgado, “Rotten Social Background,” 55. Delgado clarified that rotten social background does not constitute an excusing condition by itself, but becomes relevant only because it can cause an excusing condition. *Id.* at 66-67.

42 Moore, “Causation,” 1098.

mitigate an intentional homicide from murder to manslaughter. Extreme stress induced by poverty should be a similarly mitigating circumstance in the case of child abuse or neglect.<sup>43</sup> Current notions of mitigating circumstances focus on episodic, traumatic events that cause the defendant to become temporarily despondent or enraged, such as the loss of a job or the discovery of one's spouse in an adulterous affair. Research shows, however, that difficult life conditions, as well as discrete events, also cause psychological trauma: "A considerable amount of stress comes not from the necessity of adjusting to sporadic change but from steady, unchanging (or slowly changing) oppressive conditions that must be endured daily."<sup>44</sup>

Of course, we would want to distinguish between everyday stress that may be a causal influence and extraordinary stress that impairs the actor's capacity to act legally.<sup>45</sup> But juries are already asked to make these kinds of determinations in criminal cases involving provocation or extreme emotional disturbance. Excluding poverty-induced stress from the types of emotional disturbance allowed to mitigate culpability reflects a bias in the criminal law that disadvantages people living in poverty.

### III. Crimes Detected Because of Parental Poverty

The preceding Part described the predominant assumption about the association between poverty and criminal conduct: indigence *causes* poor parents to mistreat their children. This way of thinking about indigent offenders misses other critical connections between poverty and crime, which also provide grounds for reexamining poor offenders' culpability. In Parts III and IV, I describe additional bases for the association between poverty and maltreatment cases that are also relevant -- and more important -- to the ethics of punishing indigent parents.

One of the reasons for the disproportionate number of poor parents convicted of child maltreatment is the higher rate of detection of these crimes among poor families. As I discussed

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<sup>43</sup> See Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America* (New York: Oxford University Press, 1995), 163-80 (proposing that social adversity be considered a mitigating defense).

<sup>44</sup> Hampton, "Child Abuse in the African American Community," 230.

<sup>45</sup> See Moore, "Causation," 1040.

in Part II, this bias in the reporting system cannot explain all of the class disparity in child abuse statistics. Nevertheless, the heightened monitoring of poor families results in the discovery of a great deal of child maltreatment that would have gone unnoticed had it occurred in middle-class homes. Statutes passed in every state require certain professionals, such as health care workers and school employees, to report suspected child abuse or neglect to the police or the state child welfare agency.<sup>46</sup> Receiving social services and welfare benefits subjects poor parents to

additional state supervision. Indigence opens families' lives to public inspection:

... The state must have probable cause to enter the homes of most Americans, yet women receiving aid to families with dependent children (AFDC) are not entitled to such privacy.... [R]ather than visiting private doctors, poor families are likely to attend public clinics and emergency rooms for routine medical care; rather than hiring contractors to fix their homes, poor families encounter public building inspectors; rather than using their cars to run errands, poor mothers use public transportation.<sup>47</sup>

Because poor parents are in closer contact with government agencies than wealthier families, their neglect is more likely to be detected and reported.<sup>48</sup>

Race appears to exaggerate this bias in the reporting system and has led to the over representation of black children in reported cases of abuse and neglect. Studies show that the actual incidence of child maltreatment among black families is no greater than the incidence among other groups.<sup>49</sup> Yet in 1985 black children made up over 25 percent of children involved in reports of abuse and neglect, compared to 15 percent of the total children's population in the United States.<sup>50</sup> Gelles and Cornell conclude that "Blacks are more likely to be recognized and reported [but] the link between race and abuse is probably tenuous and quite limited."<sup>51</sup>

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<sup>46</sup> Mark A. Small, "Policy Review of Child Abuse and Neglect Reporting Statutes," *Law & Pol.* 14 (1992): 129.

<sup>47</sup> Annette R. Appell, "Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System," *S.C. L. Rev.* 48 (1997): 577, 584.

<sup>48</sup> Hampton, "Child Abuse in the African American Community," 229.

<sup>49</sup> Toshio Tatara, "Overview of Child Abuse and Neglect," in *Child Welfare: An Africentric Perspective*, eds. Everett, Chipungu & Leashore, 187, 190.

<sup>50</sup> Id.

<sup>51</sup> R. J. Gelles & C. P. Cornell, *Intimate Violence in Families* (Beverly Hills, CA: Sage, 1985), 56.

The reporting of drug use during pregnancy illustrates this bias.<sup>52</sup> Between 1985 and 1995, at least two hundred women in thirty states were charged with crimes after giving birth to babies who tested positive for drugs. The vast majority of the defendants were poor black women addicted to crack cocaine. Part of the reason for the racial disparity in the prosecutions is that substance abuse by indigent black women is more likely to be detected and reported than substance abuse by other women. The government's main source of information about prenatal drug use is hospitals' reporting of positive infant toxicologies to child welfare or law enforcement authorities. This testing is performed almost exclusively by public hospitals that serve poor minority communities. Moreover, private physicians who treat more affluent women tend to refrain from testing their patients for drug use and reporting them to the police. A study of pregnant women in Pinellas County, Florida, found that despite little difference in the prevalence of substance abuse along either racial or economic lines, black women were ten times more likely than whites to be reported to government authorities.<sup>53</sup>

Does the class and race bias in detecting and reporting child maltreatment affect the culpability of parents who are caught? An increased likelihood of apprehension does not diminish actors' responsibility for criminal conduct. Excusing guilty parents on this basis seems no more acceptable than excusing incompetent burglars on the grounds that they are more likely to be detected than competent one.<sup>54</sup> Moreover, failing to punish culpable parents will impede state protection of poor children. The logical remedy for inequities in the reporting system that does not compromise children's welfare is to increase the surveillance of middle-class and wealthy parents and to ensure prosecution of those who mistreat their children.

The bias in child abuse detection raises concerns beyond issues of parental culpability, however. The reporting system balances two competing interests: protection of children from

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<sup>52</sup> See Roberts, *Killing the Black Body*, 153-80.

<sup>53</sup> Ira J. Chasnoff, Harvey J. Landress, & Mark E. Barrett, "The Prevalence of Illicit-Drug or Alcohol Use during Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida," *New England Journal of Medicine* 322 (1990): 1202, 1204.

<sup>54</sup> John Kleinig suggested this analogy.

parental abuse and protection of families from state intrusion. The government does not monitor all families to the full extent possible, even though such monitoring would uncover many additional cases of child neglect and abuse. Instead, concern for family privacy constrains the level of government surveillance the public will tolerate.

The level of tolerable state surveillance of families differs according to family social status, however.<sup>55</sup> The Elizabethan Poor Law established a dual legal system for families based on wealth that foreshadowed contemporary distinctions between poor and affluent parents.

For the poor, state intervention between parent and child was not only permitted but encouraged in order to effectuate a number of public policies, ranging from the provision of relief at minimum cost to the prevention of future crime. For all others, the state would separate children from parents only in the most extreme circumstances, and then only when private parties initiated court action.<sup>56</sup>

Government agents inspect the homes of poor families in search of evidence of child maltreatment while preserving the privacy of wealthier families. Courts assume that parents who receive public assistance require state supervision to ensure that benefits are devoted to their children's welfare.<sup>57</sup> Most Americans would probably protest the universal application of the level of government scrutiny to which poor families are subjected. This resistance to extending the current system of surveillance from poor families to wealthier ones is reason to question whether the disregard of poor parents' privacy is warranted.

Perhaps the extra scrutiny of poor families is justified by a higher risk of severe child maltreatment in poor homes. There is still reason to question this practice. Excessive government surveillance of families has an adverse impact on children. The reason for limiting state intrusion in the home is not only a concern for parental privacy but also the recognition that

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<sup>55</sup> Jacobus tenBroek, "California's Dual System of Family Law: Its Origin, Development and Present Status," *Stanford Law Review* 16 (1964): 257; Jacobus tenBroek, "California's Dual System of Family Law: Its Origin, Development and Present Status," *Stanford Law Review* 17 (1965): 614.

<sup>56</sup> Judith Areen, "Intervention between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," *Geo. L.J.* 63 (1975): 887, 899.

<sup>57</sup> See *Wyman v. James*, 400 U.S. 309 (1971) (holding that the Fourth Amendment does not protect welfare recipients from mandatory, unannounced home inspections by government caseworkers).

children suffer harm when unnecessarily separated from their parents.<sup>58</sup> When the state seeks to protect children,

it takes on the exquisitely difficult task of deciding when intervention is reasonably necessary to the physical or emotional well-being of a child and when it is destructive, both of the bonds upon which the child depends for healthy nurturance and of the child's right to grow in a community that is open, flexible, and self-defining, rather than state-controlled.<sup>59</sup>

Decisions about the optimal level of state surveillance must take into account the harm to children from family disruption and the risk that government agents will make erroneous removal decisions. This risk is especially great in poor families because officials are unlikely to receive negative feedback as a result of a mistaken decision to intervene.<sup>60</sup> Given the historical devaluation of poor families' autonomy, there is little outrage when poor children are needlessly taken from their parents.

Fear of unwarranted state intervention in the home may deter some poor parents from seeking help when their children are endangered by domestic violence or a medical emergency. In *State of Louisiana v. Scott*,<sup>61</sup> the parents were convicted of cruelty to a juvenile when their two-year-old son died of severe grease burns. Although the injury was accidental, the parents were found criminally negligent for failing to take their son to the hospital. The court rejected a poverty defense because the parents knew from previous contact with welfare agencies that free medical assistance was available. The dissenting judge noted, however, that the parents probably failed to get medical treatment for their son to because of "fear of reprisal from the welfare

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<sup>58</sup> See Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1979), 32-34.

<sup>59</sup> Peggy Cooper Davis and Gautum Barua, "Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law," *University of Chicago Law School Roundtable 2* (1995): 139, 141-42.

<sup>60</sup> *Id.* at 152.

<sup>61</sup> 400 So. 2d 627 (1981).

department, which had previously investigated the defendant's family life."<sup>62</sup> The dissenter concluded that this unfortunate mistake in judgment should not be punished as a crime.

Similarly, in *State v. Williams*,<sup>63</sup> a Shoshone Indian couple with limited education were convicted of manslaughter for negligently failing to give their 17-month old boy necessary medical attention for an abscessed tooth. The boy died when he developed an infection of the mouth and cheeks, which eventually turned gangrenous. The couple refrained from taking the baby to the doctor for fear of being reported to child welfare authorities who might remove the baby from their custody. Instead, they gave the baby aspirin in hopes that the swelling would go down. The husband testified that "the way the cheek looked, ... and that stuff on his hair, they would think we were neglecting him and take him away from us and not give him back." He had heard that his cousin lost a child under similar circumstances. Tragically, the parents' fear of losing custody of their child resulted in his death.

Of course, the motive to avoid punishment for wrongful conduct should not mitigate liability. Given the bias in the reporting system, however, some parents may be motivated by a desire to protect their relationship with their children from unfair state intervention. They may genuinely believe that the harm of unjustified removal of their child from the home outweighs the harm caused by the current threat to their child's health. In such cases, state bias becomes relevant to judging the defendant's culpability for failing to provide care. Generally, poverty's association to crime detection does not affect parents' moral culpability for the crimes they commit. This association does reveal, however, an inequity in the prosecution of child maltreatment that should be corrected. The detrimental effects of excessive state involvement suggest that increased surveillance of middle-class families will not eliminate problems caused

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<sup>62</sup> 400 So. 2d at 632.

<sup>63</sup> 4 Wash. App. 908, 484 P.2d 1167 (1971). The manslaughter statutes involved *Williams* were repealed in 1975 and the state no longer permits a manslaughter conviction based on ordinary negligence. See Wash. Rev. Code § 9A.32.060; Wash. Rev. Code (1992) §9A.32.070.

by bias in the system. Rather, we need to develop greater respect for the autonomy of poor parents.

#### IV. Crimes Defined By Parental Poverty

Poverty has another, more direct relationship to child abuse and neglect. In contrast to cases where poverty *indirectly* causes parents to mistreat their children or leads to detection, poverty *directly* creates harms for which parents are held responsible. In addition, poor parents are more likely to be convicted of mistreating their children because their status helps to make their behavior seem criminal. Although the criminal law no longer imprisons parents just for being poor, it continues to punish them for failing to protect their children from the effects of family deprivation.

Child neglect is sometimes a direct result of the parents' financial inability to provide for their children. Parents may be guilty of neglect because they are unable to afford adequate food, clothing, or shelter for their children. These cases can be distinguished from those discussed above where stress resulting from poverty causes parents to harm their children. This type of neglect is better classified as a crime *defined* by poverty rather than a crime *caused* by poverty. Parents who experience stress may be held liable for hurting their children because they are nevertheless capable of conforming to the law. Parents who have no money to provide for their children's needs, however, are incapable of conforming to the law.

Some states acknowledge indigent parents' lack of culpability by including an economic exemption in their child neglect statutes. The New York law, for example, defines a neglected child as one whose parent "does not adequately supply the child with food, clothing, shelter, education, or medical or surgical care, *though financially able or offered financial means to do so*."<sup>64</sup> It has been suggested that convicting parents or terminating their rights because of neglect resulting from their impoverished condition would impermissibly infringe their constitutional

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<sup>64</sup> Ch. 686, art III, § 312 (a) N.Y. Laws 3066. See also Florida Statutes (Supp. 1980) § 39.01 (27) (also containing "though financially able" requirement).

rights on the basis of individual wealth.<sup>65</sup> As the New Jersey Supreme Court ruled, however, this economic defense applies only to the failure to provide the child's material and not emotional needs.

Although poverty is a de jure defense to neglect, it also works as a de facto enhancement of culpability. Parental conduct or home conditions that appear innocent when the parents are affluent are often considered to be neglectful when the parents are poor. Robert Hampton notes that "[s]everal studies have found that children from poor and minority families are more likely to be labeled 'abused' than children from more affluent and majority homes with comparable injuries."<sup>66</sup> Race and class help to determine whether a child's condition fits the legal definition of abuse or neglect.

*In re Juvenile Appeal (83-CD)*,<sup>67</sup> a civil case, involved a mother and her six children living in New Haven, Connecticut, who received services from the child welfare department and were supported by Aid to Families with Dependent Children. The caseworker assigned to the family noted that the children were not abused or neglected and that they were happy and enjoying a "very warm" relationship with their mother. When nine-month old Christopher died from an undetermined cause, however, the child welfare department immediately seized custody of the mother's five remaining children. The authorities then filed a petition of neglect for each of the children. What was the evidence of neglect apart from their brother's unexplained death?

The petitions alleged that:

the defendant's apartment was dirty, that numerous roaches could be found there, that beer cans were to be found in the apartment, that the defendant had been observed drinking beer, that on one occasion the defendant may have been drunk, that a neighbor reported that the children once had been left alone all night, and that the two older children had occasionally come to school without having eaten breakfast.

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<sup>65</sup> See *In the Interest of S.H.A.*, 728 S.W.2d 73, 94 (1987) (McClung, J., dissenting).  
<sup>66</sup> Hampton, "Child Abuse in the African American Community," 222.  
<sup>67</sup> 455 A.2d 1313 (Conn. 1983).

On the basis of these allegations, a juvenile court judge issued an *ex parte* order granting temporary custody of the children to child welfare authorities. The Connecticut Supreme Court eventually overturned the decision, but only after the children had been removed for three years.

It is doubtful that a judge would have perceived the same facts as child neglect if they took place in a middle-class home. Indeed, the unexplained death of a baby would elicit sympathy for an affluent family, not draconian state intervention. We would overlook an affluent mother's poor housekeeping skills and occasional consumption of beer. When middle-class parents send their children to school without breakfast as they rush off to work in the morning it is not seen as neglect. The baby's death triggered a punitive response not only because this family was already supervised by the child welfare department, but also because the mother's poverty made the death seem suspicious. Thus, being poor did more than bring the mother's inherently wrongful conduct to the attention of the authorities. It was her indigence that made the conduct seem wrongful in the first place.

Poverty and race play a similar defining role in the construction of drug use during pregnancy as a crime. I discussed above how prenatal substance abuse by poor black women is more likely to be detected and reported than the same conduct by white women. The very conception of this conduct as criminal (rather than as a health problem) is tied to the race and poverty of the women who are punished for it.<sup>68</sup> Prosecutors targeted women whom the dominant society views as undeserving to be mothers in the first place. They rarely brought charges against middle-class or white women who smoked marijuana, drank alcohol, or popped pills while pregnant. In *Killing the Black Body*, I contrasted the punitive response to poor black mothers' drug abuse with most Americans' sympathetic response to the same problem in white middle-class families:

Americans view white mothers who use drugs in a completely different light. The lovable Meg Ryan played an alcoholic mother, Alice Green, in the 1994 movie *When a Man Loves a Woman*. Alice's addiction makes her a dreadful mother: she forgets the kids' appointments, leaves most of the parenting to her husband and nanny, and smacks her daughter across the face when the eight-year-old catches her guzzling vodka from a

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Roberts, *Killing the Black Body*, 178-80.

bottle. No doubt Alice drank while she was pregnant. At one point, Alice arrives home drunk after running errands only to realize that she has misplaced the younger daughter somewhere along the way. What struck me most about the movie was that the mother remains the sympathetic heroine throughout the movie, despite her atrocious care for her children. While audiences knew Alice desperately needed treatment for her drinking problem, it probably never occurred to them that she should be arrested or that her daughters should be taken away from her. The ending is what we would expect for a white, middle-class mother: she overcomes her addiction at a pastoral rehabilitation clinic and is reunited with her children.<sup>69</sup>

Judges and juries also import biases against the poor in applying the reasonable person standard used to determine neglect. Poor parents' behavior is sometimes misinterpreted as neglect according to a middle-class standard, when it is reasonable given the parents' situation. Some states make it a crime to leave a child unattended "for such period of time as may be likely to endanger the health or welfare" of the child.<sup>70</sup> Low-income parents sometimes leave their children alone at home while they go to work because they cannot afford a babysitter and fear that they will lose their job if they stay home with the child. Their judgment that leaving the child causes less harm than becoming unemployed and possibly homeless may be reasonable, given their limited options.

The black community's cultural traditions of sharing parenting responsibilities among kin have been mistaken as parental neglect.<sup>71</sup> Black mothers who cannot afford nannies or licensed day care centers often depend on relatives and neighbors for child care. Carol Stack's research in the "Flats" revealed that many children there moved back and forth between households of close female relatives.<sup>72</sup> Three or more women related to a child often formed a cooperative domestic network, taking turns assuming parental responsibility toward the child. Because these

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<sup>69</sup> Id. at 179.

<sup>70</sup> Ohio Revised Statutes § 163.545.

<sup>71</sup> Carol B. Stack, "Cultural Perspectives on Child Welfare," *New York University Review of Law and Social Change* 12 (1983-84): 539.

<sup>72</sup> Carol B. Stack, *All Our Kin: Strategies for Survival in a Black Community* (New York: Harper & Row, 1974).

mothers do not fit the middle-class norm of a primary care-giver supported by her husband and paid childcare, they seem to have abrogated their duty toward their children.<sup>73</sup>

Poverty itself creates dangers for children -- poor nutrition, serious health problems, hazardous housing, inadequate heat and utilities, neighborhood crime. Children in low-income families are exposed to residential fires, rat bites, windows without guardrails, and lead poisoning at higher rates than children from other families.<sup>74</sup> Criminal liability sometimes results because parental neglect increases the likelihood that these dangers will result in harm.<sup>75</sup> Moreover, indigent parents do not have the resources to avoid the harmful effects of their carelessness. Thus, the same parental behavior and careless attitude is more likely to lead to harm to children, and punishment of parents, in poor families than in wealthier ones.

Poor parents cannot afford to pay nannies, baby sitters, counselors, and nurses to care for their children when the parents are unable to, because they have to go to work, they are distraught, they are high on drugs or alcohol, or their children have behavioral or health problems. It is more likely that poor children left at home or in a park with inadequate supervision will experience a calamity because their houses and neighborhoods are more dangerous. In addition, poor parents have less money to pay for services to rehabilitate their own neglectful behavior. Affluent substance-abusing parents, for example, can check themselves into a residential drug treatment program. The detrimental impact on the fetus of maternal drug use can be reduced by good prenatal care and nutrition.<sup>76</sup> As Pelton puts it, “[i]n middle-class families there is some *leeway* for irresponsibility, a luxury that poverty does not afford.... [P]oor people have very little margin for irresponsibility or mismanagement of either time or money.”<sup>77</sup>

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<sup>73</sup> Appell, “Protecting Children or Punishing Mothers,” 586.

<sup>74</sup> LeRoy Pelton, *For Reasons of Poverty: A Critical Analysis of the Public Child Welfare System in the United States* (N.Y.:Praeger, 1989), 146.

<sup>75</sup> Pelton, “The Myth of Classlessness,” 615.

<sup>76</sup> Scott MacGregor et al., “Cocaine Abuse During Pregnancy: Correlation between Prenatal Care and Perinatal Outcome,” *Obstetrics & Gynecology* 74 (1989): 882, 885.

<sup>77</sup> Pelton, “The Myth of Classlessness,” 615.

Wealth insulates children from many harmful effects of having irresponsible parents, who themselves avoid criminal punishment.

A New Jersey criminal neglect case, for example, arose when a mother, Lucille Lewis, put her 13-year-old son in charge of his four younger siblings while she went out to purchase cigarettes.<sup>78</sup> Before she left, Lewis turned on the top burners and oven of the electric stove to warm the unheated apartment. Lewis met some friends while on her way to the store and accompanied them to a tavern. While Lewis was away, a faulty wire leading to the electric stove started a fire in the apartment and three of her children were killed. A trial judge sentenced Lewis to a 6-month jail term after Lewis plead guilty to charges of neglect, abandonment, and cruelty. Lewis's decision to leave her children in the care of a 13-year-old only became criminal as a result of the fire. The fire was related to the family's poverty: the lack of heat in the apartment caused Lewis to use a dangerous alternative method of heating her home.<sup>79</sup>

It might be argued that uncaring middle-class parents avoid punishment because they have not neglected their children, not because they have hidden their neglect. Without the resulting harm or danger to children, no crime was committed. Equally uncaring poor parents, on the other hand, are more negligent because they disregard greater risks to their children. Nevertheless, the difference in the culpability of these two sets of parents hinges on their socioeconomic status. The conclusion that the same parental omissions may constitute neglect when they occur in poor homes but not in wealthy ones identifies another way in which poverty helps to define crime against children. Poverty effectively raises the standard of care the criminal law requires parents to meet.

It is often unethical to punish parents who failed to exercise sufficient care to protect their children from the dangerous conditions of poverty. When the crime consists of harm to children stemming from poverty and the parent's negligent mens rea alone, the parent's culpability may

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<sup>78</sup> Pelton, *For Reasons of Poverty*, 153, citing *State of New Jersey v Lucille Lewis*, Superior Court of New Jersey, Docket No. A-4686-76 (May 16, 1978).

<sup>79</sup> Pelton, *For Reasons of Poverty*, 154.

be too minimal to impute criminal responsibility. The harm depends too much on the family's impoverishment and not enough on the parent's behavior or mental state to have a just bearing on the parent's liability.<sup>80</sup> Moreover, most children in these cases suffer additional harm when their parents are treated as criminals. The state would protect these children far better if it provided the means for their parents to avoid the harmful effects of poverty.

Finally, parents may be convicted of crimes based on omission liability in cases where indigence makes them incapable of performing the underlying legal duty of care — parents who fail to get medical care, who fail to protect the child from another's abuse, and who fail to control their delinquent children. Judges have been more attentive to the constraints of poverty in cases involving inadequate medical treatment than in the other two examples. Numerous mothers have been convicted of serious crimes for failing to protect their children from another's abuse.<sup>81</sup> Several states have recently passed laws that make it a crime for a child's custodian recklessly to permit the child to be injured or assaulted by another. Overwhelming evidence of the connection between men's battering of women and the battering of children reveals that power struggles in the home, rather than mothers' failures, are responsible for family violence. Studies show that in most families in which the father batters the mother, he also batters the children.<sup>82</sup> Courts, however, rarely consider how this web of violence affects the mother's culpability for failing to protect her children from harm. The law isolates the woman's maternal duties from her own experience of violence in the home and from the reasons she has been unable to escape the violence. In many cases, the mother's indigence or economic dependence on the batterer may make it extremely difficult and even unreasonable to leave the home.

Parents may also be punished for failing to prevent their children from becoming delinquent. A number of criminal statutes hold parents responsible for their children's wrongful

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<sup>80</sup> I borrow the test, having a "just bearing on the actor's liability," from the Model Penal Code's rule for causal relationships between conduct and result. Model Penal Code, sec. 2.03.

<sup>81</sup> Dorothy E. Roberts, "Motherhood and Crime," *Iowa Law Review* 79 (1993): 95.

<sup>82</sup> *Id.* at 111-112.

actions. Early laws held parents criminally liable for contributing to the delinquency or endangering the welfare of a minor.<sup>83</sup> Parents convicted under those laws actively aid or encourage their children's delinquent behavior. In a 1928 California case, for example, a mother who had been convicted several times of bootlegging instructed her 15-year-old daughter "to clean up the house and take care of the customers" while she was away.<sup>84</sup> The parents' complicity would have been punishable as a crime if the principal actors -- the children -- were adults.

In the last decade, however, states and municipalities have enacted statutes that impose an affirmative duty on parents to control their children.<sup>85</sup> The first of these laws, passed by California in 1988 as part of an effort against gang violence, provides for criminal liability when parents who fail to exercise "reasonable care, supervision, protection, and control over their minor child."<sup>86</sup> Some jurisdictions hold parents strictly liable for their children's delinquency. These laws do not examine the moral culpability of individual parents for their harmful acts or omissions. Rather, they presume that children's misbehavior is the result of parental neglect.<sup>87</sup> Proof that a child has committed an offense establishes a presumption that the violation was the parents' fault.

Making parents criminally responsible for juvenile delinquency is related to poverty in two ways. First, juvenile delinquency is highly correlated with poverty.<sup>88</sup> As a New Jersey court reviewing Trenton's ordinance observed, "If there is consensus at all in the field, it is on

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<sup>83</sup> Frederick J. Ludwig, "Delinquent Parents and the Criminal Law," *Vand. L. Rev.* 5 (1952): 719.

<sup>84</sup> *People v. Ferello*, 92 Cal. App. 683, 268 Pac. 915 (1928).

<sup>85</sup> Naomi R. Cahn, "Pragmatic Questions about Parental Liability Statutes," *Wisc. L. Rev.* 1996 (1996): 399, 405; Paul W. Schmidt, "Note, Dangerous Children and the Regulated Family: The Shifting Focus of Parental Responsibility Laws," *N.Y.U. L. Rev.* 73 (1998): 667.

<sup>86</sup> Cal. Penal Code (West Supp. 1996) § 272.

<sup>87</sup> *Doe v. City of Trenton*, 362 A.2d 1200 (N.J. App. Div. 1976) (holding that presumption of parental fault in municipality's parental responsibility ordinance was unconstitutional).

<sup>88</sup> Dennis Stott, *Delinquency: The Problem and Its Prevention* (1982), 8.

the proposition that children growing up in urban poverty areas are those most likely to be identified as juvenile delinquents.”<sup>89</sup> Moreover, poor parents lack the resources that middle-class parents have to avoid liability: poor parents cannot afford to keep their children out of the juvenile justice system by hiring a lawyer or paying for alternative therapies. Parents who work may be unable to afford after-school care to supervise their youngsters.

Second, judges and prosecutors are more likely to place poor children, especially those who are black, in the juvenile justice system, making their parents susceptible to prosecution. Caseworkers in Florida, for example, attribute the racial disparity in that state’s juvenile detention population to policies that focus on family support and cooperation in disposing of delinquency cases.<sup>90</sup> Florida’s Department of Health and Rehabilitative Services (“DHRS”), which initially reviews all juvenile arrests and complaints, refuses to recommend delinquent youth for diversion programs if their parents or guardians cannot be contacted, are unable to be present for an intake interview, or are perceived to be uncooperative. Black parents are often single mothers working at low-paying jobs who cannot take off from work to be interviewed, or single mothers on welfare with small children at home who cannot afford child care, do not have telephones, or must rely on inconvenient public transportation to get to the DHRS office. Juvenile justice officials also refer black children to court rather than informal alternatives because of stereotypes about black families. They perceive single mothers as incapable of providing adequate supervision for their children and therefore feel justified in placing these children under state control.

Because most of the children who are charged with juvenile delinquency are poor, most of the parents charged under parental responsibility laws will be poor. This disparity goes beyond unequal enforcement of the law; it stems from the very definition of the crime. The crime itself -- having a delinquent child -- is related to being poor. Committing this crime

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<sup>89</sup> *Doe v. City of Trenton*, 1203.

<sup>90</sup> Donna M. Bishop & Charles E. Frazier, “Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis,” *J. Crim. L. & Criminology* 86 (1996): 407.

depends far more on socioeconomic status than on individual moral culpability. Parental responsibility laws are designed as a response to juvenile crime in *poor* communities.<sup>91</sup>

While the definition of child neglect punishes poor parents' failures, it ignores much harmful behavior on the part of middle-class and wealthy parents. Sending children away to boarding school, depriving them of emotional support, or using them as pawns in a bitter custody battle are not considered evidence of neglect. No one suggests that the state should hold affluent parents criminally liable when their children spend years in psychotherapy to treat family traumas.<sup>92</sup>

A possible step in correcting the unfairness to poor parents is to eliminate criminal punishment for misdemeanor child neglect or endangerment. The penal approach to child protection would be reserved for more serious cases of child abuse and neglect. The abolished crimes typically involve negligent failures to protect children from the hazards of living in an impoverished environment. The most effective remedy for the resulting harm to children is to devote needed resources to the family, while continuing to seek a more systemic reduction of poverty. The harm of punishing these parents — obscuring social responsibility for children's poverty, the disparate treatment of parental irresponsibility based on socioeconomic status, and the disruption of poor families — outweighs any benefit criminal punishment might achieve. Treating these cases through child protective services or civil proceedings gives caseworkers and judges greater latitude to craft appropriate remedies, such as home visits, housing repairs, cash assistance, or social services, and avoids the automatic removal of children to foster care and the stigma of criminal culpability.

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<sup>91</sup> See Schmidt, "Dangerous Children and the Regulated Family," 687-88.

<sup>92</sup> See, e.g., Lois Gould, *Mommy Dressing: A Love Story, After a Fashion* (New York: Anchor/Doubleday, 1998) (describing the severe emotional deprivation the author experienced in her relationship with her mother, the dress designer Jo Copeland); *Allen v. Farrow*, 197 A.D. 2d 327, 611 N.Y.S. 2d 859 (New York Supreme Court, Appellate Division, 1994) (denying Woody Allen custody of his daughter because "even if [sexual] abuse did not occur, it is evident that there are issues concerning Mr. Allen's inappropriately intense relationship with his child that can be resolved only in a therapeutic setting").

The distinction between these misdemeanors (that would not be prosecuted) and felonies (that would be prosecuted) can be illustrated with the case, *State of North Carolina v. Harper*.<sup>93</sup> The defendant, Edward Harper, was convicted of both felonious child abuse, arising from his mistreatment of his five-year-old son, Edward, Jr., and three charges of misdemeanor contributing to the neglect of Edward Jr. and his two other children, Timothy, age four, and Montoya, age three. The family received public assistance and lived in a mobile home without a functioning toilet. The evidence of child abuse established that the father struck Edward, Jr., repeatedly with a board and had failed to give the child medication for a kidney disease. There was no evidence that Harper physically abused Timothy and Montoya or failed to give them medical attention. Rather, the misdemeanor conviction for Harper's neglect was based on the "the evidence that they lived in a room that had a bad odor, that there was a bucket in the room which was filled with urine, feces, and worms, that the children were dirty and that they were poorly clothed."<sup>94</sup> Although Harper should be held criminally responsible for beating Edward, there is less justification for punishing him for his failure to care properly for his children.<sup>95</sup> The misdemeanor was tied to the family's poverty: the father was too poor to afford a toilet or a larger home. The father's socioeconomic status also made the children's poor hygiene and clothing appear to be criminal. If Harper were guilty of the misdemeanor alone, his children would probably be better off if their father were not convicted of a crime.

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<sup>93</sup> 72 N.C. App. 471, 325 S.E. 2d 30 (1985).

<sup>94</sup> 72 N.C. App. at 475, 325 S.E. 2d at 33. Other examples of parents charged with misdemeanor counts of child endangerment include: Carole Taylor, a 30-year-old Chicago woman, who allowed her children "to live in an unkempt apartment with no food ... [and] no furniture except for some soiled mattresses," "Mom of 6 Charged with Endangerment," *Chicago Tribune* (February 24, 1995); Sourette Alwysh, a 34-year-old Haitian immigrant in New York City, who "was arrested for living with her 5-year-old son in a roach-infested apartment without electricity or running water;" and Sidelina Zuniga, a 39-year-old Mexican immigrant in New York, who was charged for leaving her sons, ages 10 and 4, at home for an hour and a half while she shopped at a grocery store. Swarns, "In a Policy Shift, More Parents Are Arrested for Child Neglect," A-1.

<sup>95</sup> Of course, the father's brutal treatment of Edward, Jr., raises questions about his fitness to care for the other two children; his abuse should trigger an investigation into the possibility of abuse of the others.

Decriminalizing misdemeanor child neglect would not create the problem of protecting society from “dangerous deprived offenders in the interim until justice permits punishing all offenders.”<sup>96</sup> If lawbreakers are excused because they are poor, the worry goes, they will be free to continue to cause social harm. When parental crimes depend so heavily on family poverty, however, it is unlikely that offenders pose a threat to their children or the rest of society. The predominant threat to children in these cases stems from their impoverished living conditions.

V. Criminal Law and Justice for Poor Families

In the preceding Parts, I described three ways in which parental crimes may be related to family poverty: poverty helps to cause crime, to detect crime, and to define crime. While debates about poverty’s role in criminal culpability have focused on causation, I argued that the very meaning of criminal child endangerment unfairly blames poor parents for their children’s deprived circumstances. Thus, beyond providing a mitigation, the association between poverty and crimes against children may be grounds for rejecting criminal punishment altogether as a means of addressing the harms to children. Underlying these conclusions is the view that criminal law is related to social justice. Underlying the dominant conclusion that the association between poverty and crime does not affect culpability is the opposite view that disconnects the operation of criminal law from imbalances of social power. Its proponents assert that the criminal justice system merely *reflects* existing social inequalities: criminal law does not create poverty and it can do little to alleviate it. Rather, the criminal justice mission is to apprehend offenders, to provide them with due process, and to exact just punishment:

Conventional wisdom holds that the system is working as well as can be humanly expected if it pursues these goals impartially, and that is all that can realistically be expected of it. The result? Given great inequality between classes and races, the criminal justice system’s fair and even application of neutral substantive law will inevitably produce punishments that are themselves unequal, because they simply mirror the inequalities evident among criminal arrestees at the outset.... Economic structure and

social attitudes cause inequality, and the justice system simply reacts to what is already there.<sup>97</sup>

It would be both futile and unfair to structure criminal punishment with the goal of redressing offenders' deprivation.

Thus, Morse argues that the criminal law need not equalize wealth because its purpose is "specially to condemn the most outrageous forms of injury and specially to protect society from it."<sup>98</sup> Blame and punishment for harmful conduct, in other words, are at best tangentially related to issues of social justice. Just because someone has not received what she deserves from society does not mean that she does not deserve criminal punishment for her harmful behavior. Trying to fix social inequalities by adjusting criminal culpability is like plugging a round hole with a square peg. By this logic, scholars like me who incorporate social justice concerns in criminal justice ethics seem misguided by their political objectives. Morse cautions that those who advocate reducing poor people's criminal liability may be furthering a "political agenda."<sup>99</sup>

By disengaging criminal blame from social justice, this dominant approach wrongly assumes that the determination of what to punish is neutral and unrelated to inequalities of wealth. It ignores the impact politics has on notions of moral responsibility<sup>100</sup> and how the criminal justice system helps to preserve the status of powerful people.<sup>101</sup> The relationship

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<sup>97</sup> Candace McCoy, "Sentencing (and) the Underclass", *L. & Soc. Rev.* 31 (1997): 589, 591 (review essay).

<sup>98</sup> Morse, p. \_\_\_\_.

<sup>99</sup> Id., \_\_\_\_.

<sup>100</sup> Critical scholars have shown that ascriptions of criminal responsibility typically depend as much on arrangements of power as on rational choices. See, e.g, Marion Smiley, *Moral Responsibility and the Boundaries of Community: Power and Accountability from a Pragmatic Point of View* (Chicago: University of Chicago Press, 1993) (arguing that ascriptions of responsibility reflect political power); J.M. Balkin, "The Rhetoric of Responsibility," *Va. L. Rev.* 76 (1990): 197, 201 (arguing that "existing views of human responsibility are merely constructs that are alternatively adopted and discarded in successive situations"); Mark Kelman, "Interpretive Construction in the Substantive Criminal Law," *Stan. L. Rev.* 33 (1981): 591 (arguing that attributions of criminal responsibility are typically biased by nonrational choices of framework).

<sup>101</sup> See Tonry, *Malign Neglect* (describing racist aspects of the criminal justice system); Richard Quinney, *Critique of Legal Order: Crime Control in Capitalist Society*

between poverty and parental crimes suggests, however, that punishing indigent offenders and promoting social justice cannot operate as parallel but unrelated processes. Blaming parents for harm to children that results from poverty obscures the social causes of that harm. Punishing poor parents takes the place of correcting the social inequalities that are responsible for the bulk of poor children's problems. Parental responsibility laws promote the premise that juvenile delinquency is caused by poor parenting. Prosecuting poor black mothers for prenatal drug use or failing to nourish their babies implies that poor infant health results from the deprived behavior of individual mothers. The widespread criminalization of poor parents, moreover, makes them appear less deserving of public assistance. In this way, treating indigent parents as criminals hinders progress toward social justice.

This does not mean that we can eradicate economic inequality through the criminal justice system. It would be perverse to confront the detrimental effects of family poverty only after parents are charged with child maltreatment. There is no way that even the most compassionate sentencing of poor offenders can transform the unequal social structure that helped to produce their criminal conduct. Achieving economic justice not only would eliminate class bias in the criminal justice system, it would eliminate most crimes against children. Achieving economic justice, however, requires changing the criminal justice system that helps to preserve the unjust economic structure.

Those who defend the dominant approach ask whether poor people should be excused on the grounds that poverty caused them to commit crimes. Instead of asserting that deprived offenders are less morally responsible simply because they are deprived, my discussion points out that offenders are sometimes considered criminally

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(Boston: Little, Brown & Company, 1973) (arguing that the criminal justice system supports the class structure of capitalist society); Jeffrey Reiman, *The Rich Get Richer and The Poor Get Prison: Ideology, Class, and Criminal Justice* (Boston: Allyn & Bacon, 1979) (arguing that the criminal justice system serves the interests of the powerful by creating the image that crime is almost exclusively committed by poor people). Jeremy Waldron argues that poverty does not provide a justification for theft because the criminal law upholds (a possibly unjust) property scheme.

culpable or more culpable because they are deprived. Poverty does not operate as a *psychological* disability that predisposes indigent people to *crime*, but as a *political* disability that predisposes them to *punishment*. In the case of parental crimes, poverty is unfairly disregarded as a cause of stress, poverty makes parents more vulnerable to detection, and poverty helps to define parents' actions and omissions as criminal.

This discussion suggests that finding excuses in criminal law concerns more than the question, what caused the defendant to act? Excuses, as well as the decision whether to criminalize conduct, also concern the question, which causes should we consider in deciding whether or not to hold the defendant accountable? Moral accountability also depends on normative judgments about the relative importance of causes in producing the criminal behavior and political judgments about the impact of defining crimes or recognizing an excuse. Not every action that causes harm is treated as a crime. Not every cause that makes moral action difficult qualifies as a legal excuse or mitigation. Thus, the definition of crimes and excuses involves the attribution of responsibility, as well as the determination of causation.<sup>102</sup> It is clear that the maltreatment of poor children typically results from both poverty and parental behavior. Pelton observes, “[T]hese impoverished families are submerged in such a morass of living problems, and the negative consequences to their children are the result of such an entanglement of multiple causes and situations, that it is often difficult to determine if the dangers to the children are attributable to lapses in parental responsibility or societal responsibility.”<sup>103</sup> When poor children are injured, then, we must decide who should shoulder the blame for that harm.

Why are lawmakers, judges, and scholars reluctant to mitigate, excuse, or abolish parental crimes based on poverty? I suspect the reasons have to do with the widespread impact of excuses based on poverty and the assumption that they would harm innocent children. Perhaps

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<sup>102</sup> See Richard C. Boldt, “The Construction of Responsibility in the Criminal Law,” *U. Pa. L. Rev.* 140 (1992): 2280 (“The criminal law is the most visible and explicit institutional setting for the working out of questions of individual responsibility.”).

<sup>103</sup> Pelton, “For Reasons of Poverty,” 144.

their reluctance stems not from finding indigent offenders morally blameworthy but from the consequences of excusing them.<sup>104</sup> Because nearly all criminal defendants are poor, providing excuses based on poverty might decimate the criminal justice system as we know it.

A second reason for ignoring poverty as a basis for defending abusive or neglectful parents has to do with people's understanding of wealth inequality. Many Americans blame poor people for their poverty and therefore find it difficult to see poverty as an exonerating condition. Scholars of the American welfare system have argued that this moral construction of poverty explains most Americans' refusal to support generous public assistance to the poor.<sup>105</sup> If it is parents' own fault for living in an environment that is dangerous to children, then it is perfectly ethical to hold these parents accountable. On the other hand, the view that people are poor largely as a result of systemic inequalities that are beyond their control is more receptive to defenses based on indigence.<sup>106</sup>

Blaming parents for their impoverished living conditions ignores the special social burdens confronting parents, particularly mothers, as well as structural explanations for poverty. Families headed by women are more likely to be poor than families with a man present.<sup>107</sup> Single mothers face numerous systemic difficulties in raising their children, including the expectation that mothers will be primary caretakers of children, sex discrimination and

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<sup>104</sup> See *United States v. Carter*, 436 F.2d 200, 210 (D.C. Cir. 1970) (Bazelon, C.J., concurring) ("It is to me intolerable that persons already crippled by an almost hopeless cycle of poverty, ignorance, and drugs should be further burdened by the moral stigma of guilt, *not* because they are blameworthy, but merely because we cannot afford to treat them as if they are not."). Cf., Boldt, "The Construction of Responsibility," 2249-50 ("[A]cceptance of a loss-of-control defense for addicts and alcoholics could fundamentally undermine the system's capacity to articulate an ideology of individual responsibility."). "Fear of too much justice" has been an obstacle to the elimination of race discrimination in the criminal justice system. See *McKlesky v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

<sup>105</sup> See, for example, Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare* (New York: Free Press, 1994); Joel F. Handler & Yeheskel Hasenfeld, *The Moral Construction of Poverty: Welfare Reform in America* (Newbury Park, CA.: Sage, 1991).

<sup>106</sup> Cf. Heffernan (arguing that different conceptions of social justice generate different, and often irreconcilable, policy conclusions for criminal justice).

<sup>107</sup> Maxine Baca Zinn, "Family, Race, and Poverty in the Eighties," *Signs* 14 (1989): 856.

segregation in employment, a workplace that does not accommodate child care responsibilities, and diminishing social supports, such as cash benefits and publically-funded child care.<sup>108</sup> All of these obstacles are intensified for Black single mothers in America, who are even more likely to be poor than whites.

Finally, the reluctance to see poverty as a defense to parental crimes stems from the peculiar vulnerability of the victims: children depend on their parents for care and need special protection by the state. It is easier to advocate an economic necessity defense for indigent parents (for example, the mother who steals to feed her starving children) because the parents' acts benefit the children. Still, criminal punishment is not the only means, or even the most effective means, of protecting children, especially when poverty plays a significant role in the crime. Indeed, the focus of criminal prosecution on the possible wrongdoing of the defendant may blind state actors to other factors affecting the welfare of the child. Social considerations, along with legal rules governing criminal responsibility, help to determine who will be held accountable for harm to poor children. There is a political reason to hold parents criminally responsible: it points the finger at parents rather than at social inequality as the cause of poor children's deprivation. Punishing indigent parents often obscures the social causes of child neglect and the public's responsibility for remedying them.

### Conclusion

In this essay, I gave an account of the relationship between poverty and criminal culpability that is more complicated than the focus of the dominant scholarly debate. Instead of presenting poverty as a general excuse for parental crimes, I argue that poverty often unfairly subjects parents to criminal liability. In some cases, parents' mistreatment of their children is too closely tied to family poverty to justify punishment. More fundamentally, holding parents responsible for the harmful effects of poverty hinders the struggle for social justice. Criminal punishment can obscure the social causes of children's poverty as well as social responsibility

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See Martha A. Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth-Century Tragedies* (New York: Routledge, 1995), 101-142.

for change. Because “[t]he conditions of poverty pose greater dangers to children than does child maltreatment,”<sup>109</sup> it is a grave mistake to punish poor parents at the risk of impeding efforts to alleviate children’s deprivation.

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Pelton, “For Reasons of Poverty,” 145.