Negrophobia and Reasonable Racism

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Finally, the argument that “[i]t is difficult to resolve [the problem of determinism and responsibility] except by noting that we all blame and criticize others, and in turn subject ourselves to blame and criticism, on the assumption of responsibility for our conduct,” merely asserts that “‘our culture’ (whose culture?) holds certain people accountable because that’s what we have always done.” When all else fails, appeal to complacency as cavalierly as possible and disdain further discussion. Disadvantaged and socially marginalized groups have especially good reason to regard such arguments with suspicion, for “what we have always done” has produced and continues to perpetuate their desperate plight.

**Ideological Agendas**

In the end, one must wonder what it is about deterministic perspectives that compels otherwise able writers like Fletcher to lapse into empty tautologies and proudly complacent assertions in seeking to refute them. This zealous advocacy of antideterminist perspectives along with the inconsistent but vociferous denunciations of determinist ones serves and reflects a host of ideological agendas.

First, it is easier to rationalize the cruelty of our current practices if we self-righteously condemn the men and women we either lock up or kill. To self-righteously condemn, however, we must first convince ourselves that we can divine the “true character” of the accused. If we humbly admit that we lack the omniscience to divine a person’s “true character,” especially when that person has lived through oppressive or brutally dehumanizing circumstances, we could give a more human face to criminals (“there but for the grace of god go I”) rather than demonizing
them. Although we could still incarcerate individuals who harm others for the sake of deterrence or rehabilitation, we could no longer applaud hanging, shooting, electrocuting, or lethally injecting other human beings in the name of justice.

Notwithstanding the lust for revenge that largely drives the “victims’ rights” bandwagon on which many politicians and academics have recently jumped, a growing number of former victims of serious crimes are publicly advocating compassion, humility, and healing. Anne Coleman, for example, held a vigil in the cold outside the Delaware Correctional Facility on January 25, 1996 when a double-murderer, Billy Bailey, died at the end of a rope. She was joined by one hundred other opponents of the death penalty. Mrs. Coleman prayed and protested for Mr. Bailey even though she lost her own daughter at the hands of an anonymous murderer eleven years earlier. She could never forget the stench of her own daughter’s blood in the car where she was shot, or the sight of her body in the county morgue. Nevertheless, she cannot condone killing in the name of justice. “I’ve always been horrified by violence,” Mrs. Coleman said in an interview hours before the hanging. “No matter if it is a stranger or the state doing the killing, it is wrong.”

Mrs. Coleman is one of three thousand members of a nationwide group, Murder Victims’ Families for Reconciliation, that actively opposes the death penalty even though most members have had a loved one murdered. Group members have buried their children but not their capacity for compassion and mercy. Their personal experiences with murder and grief foreclose attempts to label them as “bleeding hearts.” For the last few years the group has conducted speaking tours, sharing their message of forgiveness with a country clamoring for bloody vengeance. A few days after the state hanged Billy Bailey, Mrs.
Coleman and fellow members of Murder Victims Family were standing outside of the prison in the cold again, praying and protesting the imminent execution of yet another inmate. “We’ll be back again and again,” Mrs. Coleman said, “until we break this cycle of violence and replace it with healing.”

Astonishingly, although Mrs. Coleman and other members of Murder Victims Family seem heroic in their capacity for compassion, some defenders of popular punitive approaches to blame and punishment contend that our feelings of sympathy for the disadvantaged persons whom Judge Bazelon would excuse actually grow out of a sense of “elitism” and “condescension” rather than altruism. One leading mainstream critic argues that our sympathy for the disadvantaged defendant “betokens a refusal to acknowledge the equal moral dignity of others.” In not condemning the “unhappy deviant” from a disadvantaged background, he asserts, we imply that he is not expected to live up to the same “high moral standards” by which we judge ourselves and that he is a less complete human being than ourselves. Similarly, another prominent critic attacks Judge Bazelon’s proposal on the ground that such an excuse treats the accused person as “an infant, a machine, or an animal.” “Those who propose this defense,” he continues, “are plainly moved by compassion for the downtrodden, to whom, however, it is nonetheless an insult.”

The problem with this critique of the social deprivation excuse is that it proves too much. For the logic of this critique applies just as well to the defenses of duress and provocation—determinist doctrines that mainstream commentators fully endorse. Thus, why not attribute our feelings of sympathy for the “unhappy deviant” who, in the heat of passion, kills his spouse—or who runs over three unconscious individuals to save
his own neck—to a sense of “elitism” or “condescension” that implies “the unhappy deviant” is not expected to live up to the same “high moral standards” by which we judge ourselves?

One circular and self-serving response to this question would be: “We do expect the person who violates the law under duress or provocation to live up to the same ‘high moral standards’ by which we judge ourselves. It’s just that the ‘high moral standards’ by which we currently judge ourselves—and according to which we carve out our currently recognized legal excuses—make allowances only for short-run pressures that immediately precede the crime for which the defendant stands accused. Long-term background pressures of the kind generated by a bleak and oppressive social background simply do not count in our ‘high moral standards’ and corresponding legal excuses.” The problem with this response is that the “official” expositors of “our” “high moral standards,” and especially those officials who determine which excuses are legally valid, are neither impartial nor objective. They do not stand behind a Rawlsian veil of ignorance that masks information about the their own background when deciding which excuses to recognize. They already know that they do not have to worry about the emotional and psychological effects of a desperately impoverished and brutal social background, because the vast majority of them already have reached adulthood without having to face “nightmare worlds of filth and hunger and violence and extreme pain.” In contrast, they are as likely as anyone to surprise a cheating spouse *in flagrante delicto* or encounter the various other short-run immediate pressures of the kind that constitute duress and provocation. Thus, it is in their interest to defend the excuses that may benefit them while dismissing excuses that require pressures that are beyond their reach.
Anytime a body of rules drawn to protect certain interests but not others (as all rules inevitably are) is administered by people who already know what their interests are and where they lie, it can come as no surprise to find rampant definitional gerrymandering in favor of the administrators’ own interests. Mark Kelman, an important critical legal thinker, nicely illustrates the dynamics of such gerrymandering with the following loose analogy:

A large social group is setting up a massive health insurance, risk-pooling plan. Should treating hemophilia be included? Since hemophilia is a purely hereditary ailment, everyone will know whether he faces high bills for the disease. Purely selfish insurance purchasers will exclude the disease from coverage. If the defense of duress is “insurance” against being blamed or incarcerated, the dominant social group will exclude “long-term pressures” as a covered syndrome since they already know they will not be afflicted.43

What is so disturbing about this gerrymandering dynamic at the heart of the law is not so much that it happens at all (because line drawing lies at the heart of any body of rules, any legal system is liable to definitional gerrymandering), but that it is so insistently denied. If mainstream commentators admitted that our blaming and excusing practices turn not on objective moral truth, but rather on political, ideological, and even social psychological grounds, we could honestly reevaluate the fairness of our current approaches to crime and punishment. Central to this reevaluation would be recognition of our tendency systematically to ignore or undervalue the interests of socially marginalized groups in framing laws and meting out punishment. I have confidence, born of empirical research, that once we admit
our discriminatory tendencies, we can combat them. But we cannot combat what we deny or ignore.

It is striking and revealing to note the parallels between the rhetoric employed by the mainstream critics who attacked Bazelon’s social deprivation excuse and the rhetoric employed by many critics of affirmative action. Recall the first critic’s admonition that in not condemning the “unhappy deviant” from a disadvantaged background, we imply that he is not expected to live up to the same high standards by which we judge ourselves. And recall the other critic’s contention that those who propose that we make allowances for a person’s disadvantaged social background “are plainly moved by compassion for the downtrodden, to whom, however, it is nonetheless an insult.” This same rhetoric is often employed by opponents of affirmative action who argue that public policy intervention to rectify Black mobility difficulties deviates from the pure-merit or just-deserts approach to allocating opportunities and thereby demeans its beneficiaries.

These rhetorical similarities are more than coincidental. They reflect a common ideological anxiety by the dominant group about the coherence of “just deserts” justifications for the prevailing social distribution of rewards as well as punishments. For once we admit that our ordinary conventions for attributing blame to others are biased and logically incoherent, we start to suffer nagging doubts about whether the ones we use for attributing merit are just as biased and self-serving. Put differently, one implication of a decision to excuse wrongdoing on the ground that our misconduct may be determined (at least partially) by environmental factors is that our achievements also may be attributed (again, at least partially) to those same factors rather than simply to personal choice and
hard work. This relation between popular conceptions of blame and self-congratulatory conceptions of merit is aptly described in the following passage by Nathan Caplan and Stephen Nelson:

Person-blame interpretations reinforce social myths about one’s degree of control over his own fate, thus rewarding the members of the great middle class by flattering their self-esteem for having “made it on their own.” This in turn increases public complacency about the plight of those who have not “made it on their own.”

The affirmative action debate also provides another illustration of the dominant group’s tendency to condone practices that promote its own interests while hypocritically condemning analogous practices that primarily promote the interests of marginalized groups. For example, arrangements that go beyond considerations of “pure merit” in job recruitment and job entry are endemic to the American job market. (To flesh out this point, I will assume the extremely dubious proposition that currently accepted tests and credentials actually measure “merit.”) These arrangements include “a buddy network among, say, lawyers, managers, academics; assistance from upper-class status networks or cliques; the assistance of an ethnic-bloc congressional network; and even government policies [including tax cuts and subsidies] favoring targeted groups like veterans, businesses, or agricultural producers.” Rarely are these pervasive forms of preferential assistance criticized as assaults on the pure-merit paradigm. Occasionally one hears grumblings about “corporate welfare,” but such subsidies are only the tip of the iceberg—the other forms of preferential assistance that disproportionately benefit White males consti-
tute the vast but unacknowledged antarctic of White affirmative action.\textsuperscript{46}

In stark contrast, affirmative action programs that help women, Blacks, and Hispanics gain access to certain job markets and educational institutions from which they were undemocratically excluded are singled out for condemnation as cases of “reverse discrimination.” Moreover, Black conservatives insist that the Black beneficiaries of affirmative action should feel self-doubt and moral ambiguity, yet innumerable White male businessmen, farmers, builders, bankers, and arms manufacturers have gained affirmative assistance benefits without expressing the slightest self-doubt about having gained such benefits. In the end, the hypocritical denouncement of affirmative action for socially marginalized groups reflects political interests, not objective moral judgments.

The debate over affirmative action in college admissions is also shrouded in hypocrisy. Affirmative action for women and minorities in college admissions is routinely characterized by critics as “reverse discrimination.” Yet one rarely if ever hears these same critics level their righteous indignation about violations of the pure-merit paradigm at the other large group of beneficiaries of special consideration in college admissions—namely, “legacies.” “Legacies” are the children of alumni, and they enjoy a huge edge in the admissions process. According to the \textit{Wall Street Journal}, “The percentage [of legacies] accepted at most selective colleges is often more than twice that of the general pool of candidates.”\textsuperscript{47} To convey an idea of how admissions decisions are made at selective schools, one selective college agreed to let a staff reporter for the \textit{Journal} sit in on deliberations. The reporter’s description of the operation of this predominately and \textit{disproportionately White} form of affirmative action is telling:
At Amherst, each [legacy] receives a “pink sheet” rating for the parents’ support of the college in work such as admissions interviewing and fund-raising, and also for financial contributions. Problems occur when the pink sheet is “hot” and the candidate isn’t.

In late February, as the staffers winnow the stack of applications prior to committee work, they are already struggling. “She’s a dull kid. She wasn’t so bad in interview, but these essays . . . ,” Mr. Thiboutot says of one applicant. “The only reason she’s staying in is she’s a.d.,” he adds, using office shorthand for “alumni daughter.”

In committee, rejecting an applicant with “hot pink” is more difficult. “We’ve got one that’ll have to go up the hill,” Mr. Bedford says, meaning that the staff will talk to the college president before making a decision likely to draw angry protests. “You can’t let the head office get blindsided,” Mr. Bedford explains.48

The irony here is that foes of affirmative action for historically marginalized groups vigorously contend that the marginalized status of one’s ancestors should not matter in the present-day allocation of opportunities. Yet in the well-established and prevalent practice of legacy admissions, decision makers directly review the privileged status of the applicant’s ancestors (who must have been enrolled in host institution) for purposes of allocating scarce opportunities. To be sure, these decision makers also consider the ancestors’ current efforts to help the host institution, but these considerations only come into play after the ancestors have satisfied the threshold status requirement of having graduated from the school. With legacies, the selfishly selective condemnation process seems to boil down to this: If allocating benefits on the basis of the status of a person’s ances-
tors primarily benefits the dominant group, the principle of allocation escapes serious criticism; but if the primary beneficiaries are from subordinate groups, the principle of allocation comes under withering attack as “reverse discrimination.”

I must note a twist in the story of the University of California regents’ assault on affirmative action that underscores the first-degree hypocrisy practiced by many antiaffirmative action activists. After many regents sanctimoniously denounced affirmative action in higher education and voted it out of existence in the California system, a *Los Angeles Times* investigation revealed that several regents— as well as state politicians vocally opposed to affirmative action—used their influence to get relatives, friends, and the children of their business associates into UCLA. (See, e.g., “UCLA Chief Admits Possible Favoritism; Chancellor Charles Young Acknowledges Applicants Sponsored by Regents and Other Officials May Have Been Given Admissions Preferences,” *Los Angeles Times*, March 17, 1996, at page 3.)

Another reason many shrink at determinist perspectives is that such perspectives shift the focus in a case from the individual actor to the harsh circumstances in which she found herself and to the fact that her crime may be (at least partly) attributable to those circumstances. Many start to squirm when responsibility for a problem is traced to social, economic, and political circumstances, because this implies that responsibility may ultimately rest with those of us who help maintain those circumstances. Many of us would rather scapegoat the victims of untoward circumstances than share any responsibility for their victimization and its consequences. An instructive example of this scapegoating tendency comes from a borrowed exercise I go through with my students.
Consider the following thought experiment created by Judge Guido Calabresi. Imagine you are the most powerful decision maker in a large community and that I am an Evil Deity. As the Evil Deity, I propose to you a Faustian exchange: You can choose anything you want (I care not how hedonistic or idealistic, so long as it does not save lives), and in return I get to randomly execute one thousand of your most robust citizens in gruesome ways. Do you accept my offer? When I offer this deal to my students, I generally get no takers and a measure of indignation that I could even make such an indecent proposal. Then I ask them to distinguish between the boon I just hypothetically offered and the automobile, which every year takes over forty thousand lives, usually in gruesome, excruciating ways.

Students strive mightily to come up with distinctions, none of which really hold up under scrutiny, but one of which is directly relevant to choice and scapegoating. “In the hypothetical situation,” they argue, “the powerful decision maker is responsible for the deaths rather than the victims because the decision-maker alone cuts the deal with the devil and chooses the boon for everyone. But with cars the victims choose the boon for themselves; the decision to get behind the wheel is a voluntary one. When people freely choose to run certain risks, they have to live with the consequences of their choices. If they are killed or injured, they have assumed those risks.”

Assuming free choice entails full responsibility, the problem is that choice can be so limited by circumstances as to be more illusory than real. We as a society cannot escape responsibility for maintaining circumstances that allow for only illusory choice. For example, social and economic existence in this society is now predominately organized around motor vehicles. Shopping, employment opportunities, and other core commu-
nity activities are located in places that most people cannot reach without using some kind of motor vehicle. How real is a choice between gainful employment on the one hand, and not using motorized transportation on the other? Theoretically, a person could forswear all contemporary social and economic institutions, bid adieu to friends and family, and revert to a preindustrial existence herding sheep. However, we must stretch the meaning of “meaningful choice” beyond recognition to say that such options are consistent with free choice.

Moreover, we as a society are responsible for the limited range of options available to people who do not want to accept the boon of motor vehicles. Through our elected representatives (including zoning boards) and consumer behavior, we make collective decisions about the construction and expansion of highways, the location of business districts, and the placement of shopping malls. How fair is it to create collectively a situation in which an individual’s choice is so limited as to border on illusory and then point to that illusory “choice” as grounds for imposing full responsibility on the individual? To do so is to indulge in scapegoating.

Ugly scapegoating also infects popular perceptions of battered women. Hearing that a woman repeatedly “chose” to return to or stay in a battering relationship, some (perhaps many) conclude that she masochistically invited further beatings, or at least “assumed the risk” of them. In either case, she—and not her circumstances—is held fully responsible for her “choice” not to leave. And she alone is held responsible for the fatal consequences of her “choice.” To consider the possibility that her choice was severely constrained or illusory requires us to factor her circumstances into our assignment of responsibility, which may ultimately mean accepting some responsibility
ourselves for what happened to her and the person she killed. For example, assume that (as often happens in these cases) the battered woman kept going back because of economic dependency, or out of fear for her safety and the safety of her children: Who is responsible for the discrimination against women in the workplace that breeds such economic dependency? Who is responsible for the failure of courts and police to protect battered women who want to leave—a failure that results in thousands of stalkings and deadly separation assaults each year? Perhaps we as a society bear responsibility. But owning up to our collective responsibility for the plight of battered women deprives us of the moral purchase self-righteously to condemn them for their so-called choices.

Our collective flight from responsibility also explains our punitive attitude toward lawbreakers from Black and Latino communities. We as a society are currently running pell-mell from our collective responsibility for the plight of the oppressed and the crime that oppression demonstrably breeds. Numerous studies link crime rates to poverty and unemployment. Corroborating this link—and destroying any genetic explanations of the disproportionate involvement of minorities in crime—is that Blacks who move into the middle class in this country have crime and delinquency rates indistinguishable from those of Whites of the same socioeconomic circumstances. In a racially discriminatory and increasingly zero-sum economy, the privileges many of us enjoy are purchased at the price of the social and economic oppression of others. Further, people saddled with such oppression, those left behind in our bleak and cynically deindustrialized inner-city neighborhoods, “have crime rates and suffer victimization rates grossly higher than the rest of us.” Admitting these truths to ourselves would require us to
accept some responsibility for the orgy of violence that dominates the nightly news. But like a confederation of deadbeat dads, we want to revel licentiously in the spoils of a casino economy that robs the working poor and deepens the plight of socially marginalized people, and then disown the inevitable consequences of our excesses when they come home to roost.