Dislocated and Deprived: A Normative Evaluation of Southeast Asian Criminal Responsibility and the Implications of Societal Fault

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DISLOCATED AND DEPRIVED: A NORMATIVE EVALUATION OF SOUTHEAST ASIAN CRIMINAL RESPONSIBILITY AND THE IMPLICATIONS OF SOCIETAL FAULT

Jason H. Lee*

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“I believe that there can be no truly just criminal law in the absence of social justice—in other words, you can’t have one without the other.”

—Judge David Bazelon

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On August 10, 1995 five members of the Tiny Rascals Gang, composed primarily of young Cambodian men, broke into the San Bernardino home of Henry Nguyen and held all of his family members hostage. This home-invasion robbery, typical of Southeast Asian gangs, began as a quest to steal the valuables hidden within the Nguyen household, but ended up in a violent encounter that led to the deaths of five members of the Nguyen family. Run Chhoun and Samreth Pan, two of the gang members involved in the incident and high-ranking members of the Tiny Rascals, were later arrested for this crime. They were found guilty on multiple counts of first degree murder, sentenced to death, and are now two of one hundred and twenty-three foreign nationals on death row in the United States.

The strategy pursued by the attorneys for Chhoun and Pan included the presentation of evidence during trial that described the tragic upbringing of the boys under the Khmer Rouge as well as the difficult lives—economically, culturally, and educationally—that they led after they were resettled in the United States. The boys' families were victimized during and after the Vietnam War, witnessed the daily murder of their peers in the "killing fields" of Cambodia, were detained in poorly run internment camps and came to the U.S. as "boat people." As such, the boys' lawyers argued that Chhoun and Pan carne

2. I use the term "Southeast Asian" to refer to the community of individuals in the U.S. who emigrated from Vietnam, Cambodia, and Laos. I understand that these nations and their peoples each possess distinct histories and may not necessarily identify themselves with one another. Indeed, some historically-based animosities may even exist among these communities. Nevertheless, I refer to them commonly as Southeast Asians because they still have much in common, including the experiences that form the foundation of this Note's investigation. That is, the Vietnamese, Cambodians, Laotians, and Hmong living in the United States all suffered the ravages of the Vietnam War, were forced to flee their homelands, and currently share a number of socioeconomic characteristics in common. These communities also share the current challenge of confronting the rising number of their youths joining gangs and involving themselves in delinquent behavior.

3. See infra Part I for a detailed discussion on Southeast Asian gangs and youth involvement in crime.


6. Grenda, supra note 5. The term "boat people" refers to the thousands of Southeast Asian refugees, many from Vietnam, who escaped the post-war persecution of their former homelands by boarding small boats and sailing desperately into the South China Sea. See Mary Terrell Cargill & Jade Quang Huynh eds., Voices of Vietnamese Boat
from very tragic backgrounds framed by their families' refugee experiences. These arguments were presented in an effort to mitigate the defendants' sentences, but as both young men are currently waiting on death row, it is clear that this strategy was not successful.

Chhoun and Pan committed a series of terrible acts up to their points of capture, including not only the San Bernardino murders, but also other execution-style killings and robberies along the Pacific coast. This probably contributed to the jury's lack of sympathy for their life stories and refugee experiences. However, by telling these stories and raising them as a defense, Chhoun and Pan have touched upon an interesting aspect of criminal law, raising a set of polemical questions about the morality of the criminal justice system as well as the criminal responsibility of Southeast Asian defendants: how should Southeast Asians' emigrant legacy of war-torn lives, necessitated evacuation, and generally poor socioeconomic statuses in America influence the determination of their degree of criminal responsibility? How about the American government's role in initiating or perpetuating some of these conditions? The evidence provided by Chhoun and Pan was not unique to their families. Rather, these two young men presented the stories of hundreds of thousands of refugees and war-affected emigrants who have come to the United States over the last three decades. Though Chhoun and Pan's crimes were shocking to the conscience, so are the struggles of their families and those of many other Southeast Asians, both in their postwar homelands and in the United States.

This Note argues that certain Southeast Asian defendants should be able to use their families' refugee experience as well as their own economic and social marginalization in the U.S. as a partial excuse for their criminal acts. This argument draws its strength from both the socioeconomic deprivation of much of the Southeast Asian community and the linking of this reality to a careful analysis of the moral foundations of the criminal law. In essence, the American criminal justice system, which draws much of its moral force to punish from the theory of retributivism, cannot morally justify the full punishment of a large portion of the Southeast Asian community. It is precluded from doing so by American society's contribution, in one form or another, to many of these defendants' criminal conduct.

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PEOPLE: NINETEEN NARRATIVES OF ESCAPE AND SURVIVAL 4 (2000); JEREMY HEIN, FROM VIETNAM, LAOS, AND CAMBODIA: A REFUGEE EXPERIENCE IN THE UNITED STATES 35-37 (1995). These individuals hoped to find shelter in refugee camps and eventually make their way to new host countries. Thousands, however, died at sea from starvation, sickness, and attacks by pirates. CARGILL & HUYNH at 4. According to one report, the number of deaths of boat people from Vietnam ranged up to 142,000. HEIN at 37.

7. Id.
8. Id.
More than just arguing for the mitigated conviction or sentencing of Southeast Asian defendants, this Note seeks to reveal and draw mainstream America's attention to the severe economic and social deprivation of hundreds of thousands of Southeast Asians across the country. By highlighting the way that the American government has historically mistreated poor and immigrant populations in general, and the Southeast Asian community in particular, it becomes clear that the only way that society can regain its moral prerogative to punish is by implementing reform programs that will provide Southeast Asian emigrants and their families with a real, as opposed to a circumscribed, opportunity to achieve various types of social, economic, and political success in America.

In Part I, I provide some context on Southeast Asian involvement in crime. In attempting to reveal the reality behind the myth of the model minority, I examine the rising rates of Southeast Asian delinquency and involvement in gangs, focusing primarily on the behavior of Southeast Asian youths. Part II examines the U.S. government's role in creating a large community of poor Southeast Asians, the most vulnerable of which are currently living in highly criminogenic environments. This section links the present condition of many Southeast Asians to the Vietnam War and subsequent government policies regarding refugees, immigrants, and the distribution of welfare benefits. Finally, in Part III, I connect the Southeast Asian experience to a discussion of the morality of the criminal law, and lay out the justification for a partial excuse for Southeast Asian defendants based on societal fault. This discussion draws on retributivist notions of just deserts and proportionality in punishment. It also highlights the work of intellectuals such as Judge David Bazelon, as well as Richard Delgado and his Rotten Social Background (RSB) defense, in arguing that a truly moral criminal justice system allows for a defense based on societal fault and society's contribution to the conditions which lead to an individual's decision to break the law.

I. The Rising Rate of Southeast Asian Crime and Youth Delinquency

In the United States today, an Asian American youth is arrested for a violent crime every seven hours. Many of these young men and women are Southeast Asian. This section discusses the involvement of Southeast Asians, and particularly Southeast Asian youths, in gangs and other forms of delinquent and criminal behavior. It examines contemporary trends and statistics, provides a detailed description of how a Southeast Asian gang operates, and explores some of the literature on why Southeast Asian

youths become involved with crime. In doing so, this section establishes that, despite common public perceptions, Southeast Asian crime is a serious problem both within the Southeast Asian community and for American society at large.

A. Crime Among Southeast Asian Youths

Due to the prevalence of popular stereotypes, and the image of Asian Americans as the model minority, the problem of Asian American youth involvement in crime and other forms of delinquency have gone unnoticed by much of the country, as well as within the academic literature on criminology and the law. Delinquency among young Asian Americans, however, is a real problem. Over the last twenty years, the number of Asian American youths within the juvenile justice system has increased dramatically while national arrest rates for all other racial groups have decreased substantially. During this period, the arrest rate for Asian American youths increased by 11.4%.

Within the greater Asian American umbrella, Southeast Asians have been particularly affected by the involvement of their young men and women in various types of criminal conduct. While large scale national studies that collect and disaggregate data on individual Asian ethnic groups are non-existent, due in large part to the conception of Asian America as an undistinguishable mass of similar peoples, smaller studies focused on specific Southeast Asian communities are available. These studies reveal much of the differences among Asian American subgroups and their involvement in crime.

One of these studies focused on Asian Americans in Alameda County, California. It reported that between 1991 and 2000, of all of the Asian ethnic groups, Vietnamese youths were the most represented in arrest.

10. This common and much discussed stereotype presents the Asian American experience as a model success story and the epitome of the “American Dream.” It identifies all Asian Americans as intelligent, obedient, and hard working. It also pits Asian Americans against other racial and ethnic minorities by comparing the supposed successes of the Asian American community with the struggles of others. Like all stereotypes and heuristic devices, however, the image of the model minority over-simplifies the realities of the diverse peoples that make up the greater Asian American community, and masks the numerous struggles that Asian Americans continue to face today. See, e.g., RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 474–84 (1998).


12. Id. at 57.


14. See Le, supra note 11, at 58.

15. MOVING BEYOND EXCLUSION, supra note 13, at 1.
adjudication and institutionalization statistics. It also found that Laotian and Vietnamese juveniles ranked among the top four groups for the number of unique individuals arrested per thousand at 73.8 and 41.9 respectively, behind only the rates for Samoans and African Americans.

Meanwhile, a study conducted in Oakland found similarly alarming results concerning the Southeast Asian community. After disaggregating data by specific Asian ethnic groups, it became clear that Southeast Asian, along with Pacific Islander youth in Oakland, were noticeably more involved in the juvenile justice system than other Asian ethnic groups such as the Chinese or Japanese. Vietnamese and Laotian youths had among the highest arrest rates in the city, behind only that of young African Americans. Consistent with records from other jurisdictions, felony property crimes made up the large majority of offenses for which Asian American and Pacific Islander youths were arrested.

The two localized studies discussed above reveal that, contrary to common perceptions, a large number of Asian American youths are engaged in criminal activities, starting from a very early age. While the mainstream discussion on youth involvement in crime focuses prominently on African Americans and Hispanics, it improperly excludes and marginalizes the problem of juvenile delinquency among Asian Americans, especially within the Southeast Asian community. Although the studies on Alameda County and the City of Oakland have a seemingly local nature that may not be generalizable to the national Asian American population, the fact that a large number of Asian Americans in general, and Southeast Asians specifically, live in California suggests that the two innovative studies present a realistic and much needed description of the criminal lifestyles of Southeast Asians beyond just Northern California. However, less formal data from around the country are available, which nicely complement the findings from the two studies above.

In just about every part of the country where there is a sizeable Southeast Asian population, one will find problems of youth involvement in crime and gangs. Minnesota has one of the largest Southeast Asian communities in the country outside of California, and has a particularly large population of Cambodians, Laotians, and Hmong. Consequently, it

17. Id.
19. Id. at 3.
20. Id.
has also witnessed a rapid boost in Southeast Asian gang membership and violence over the last ten years. In 1999, in little more than a month, the Minnesota Gang Strike Force recorded roughly twenty-seven different drive-by shootings and one beating involving Asian gangs in the Twin Cities area, which led to the deaths of two people and the wounding of several more.  

These shootings, and others, involved primarily young members of the Hmong community. As evidenced by these drive-bys, the growing numbers of Hmong, Laotian, and Cambodian gangs in Minnesota have been accompanied by a growing tendency for violence as well. Indeed, youth workers in the area report that gang members often carry and fire handguns, steal, do drugs, drink alcohol, and run prostitution rings.

The growth of Southeast Asian crime is not only measurable by the number of young men and women joining gangs and entering detention centers, but can also be seen as a geographical phenomenon. That is, not only has the number of Southeast Asians involved in criminal behavior increased, so has the number of cities and locations where these delinquent youths gather. Southeast Asian gang activity in Minnesota has spread across various parts of the state, and has even begun to move into Wisconsin. In California, intrastate migration has occurred. As recently as 2002, a number of the members of the Tiny Rascals Gang moved from Long Beach to Fresno, becoming one of about eighteen Southeast Asian gangs in that city. This move created an “unbalance of power,” a rivalry with another local gang, and led to a series of shootings and deaths. Finally, it is important to note that a number of Southeast Asian gangs have developed national affiliates and a national presence. They have become more than just local phenomena and spread to all parts of the country. The Easy Boys Gang, which originated as a street gang in Long Beach has mobilized enough support to establish a presence in Massachusetts and make it onto a list of “security threat groups” compiled by the Massachusetts Department of Correction. Similarly, the Tiny Rascals Gang has extended its membership beyond just Long Beach, Fresno, and other parts of California, and has been known to frequent cities such as Lawrence

Additionally, it has an estimated Hmong population, both foreign and U.S.-born, of 60,000. Id.


23. Id.


25. Id.


27. Id.

and Brockton, Massachusetts; Brattleboro, Vermont; Portland and Sanford, Maine; as well as towns throughout Connecticut.  

In short, Southeast Asian crime, youth delinquency, and gang involvement are on the rise. This has been a national rather than just a local trend, and has not been limited to areas such as Northern California where a large number of Southeast Asians have traditionally settled and migrated over the years.

B. A Closer Look: Bui Doi Southeast Asian Gangs and “Home Invasions”

In order to obtain a stronger understanding of the severity and pressing nature of the problem of crime within the Southeast Asian community, it would help to take a closer look at the basic structure and strategies employed by *bui doi* Southeast Asian gangs. While certainly not representative of all Southeast Asian criminal defendants, members of *bui doi* gangs have been responsible for a large number of crimes over the last two decades and provide a great deal of insight on the unique and violent nature of most Southeast Asian gangs.

In California, *bui doi* (translated as “dirt in the wind” in Vietnamese) gangs operate rather differently from other ethnic groups. Rather than seeking to obtain and defend local turf from other gangs, the *bui doi* follow a delocalized set of practices. They move from place to place where fellow Southeast Asians are located, spend a large part of their lives sleeping and planning robberies in motels, and oftentimes pick up and

29. *Id.*

30. While this section provides a quick overview of *bui doi* gangs, it is important to keep in mind the basic fact that not all Southeast Asians that commit crimes are members of gangs. This distinction is important for two reasons. First, it helps mitigate some of the negative effects of a newly developing media image that depicts Southeast Asian youths, who somehow failed to live up to the expectations of the model minority, as part of a rising “Southeast Asian crime wave.” Michael Peter Smith & Bernadette Tarallo, *Who Are the “Good Guys”? The Social Construction of the Vietnamese “Other”,* in *THE BUBBLING CAULDRON: RACE, ETHNICITY, AND THE URBAN CRISIS* 64-65 (Michael Peter Smith & Joe R. Feagin eds., 1995). Second, and more importantly, this distinction reminds society that the problem of crime within the Southeast Asian community runs deep and goes far beyond just organized criminal behavior to also include the activities of thousands of young Southeast Asians who engage daily in independent delinquent behavior.

31. *Bui doi* Southeast Asian youths were given the name “dirt in the wind” in order to reflect many of their life experiences as “rootless vagabonds[, separated from household social structure and ‘normal’ family life by war, migration, and an orphaned existence in violent, chaotic, and unsafe refugee camps.” See *id.* at 65–66.

32. *Id.* at 69.


34. Smith and Tarallo, *supra* note 30, at 69.
drop off members as they move from one town to another.\(^{35}\) \textit{Bui doi} gangs consist primarily of Vietnamese and ethnic-Chinese Vietnamese members, but some of these gangs have come to include Cambodians, Laotians, and Amerasians.\(^{36}\)

\textit{Bui doi} gangs are known most for their home invasion robberies of other Southeast Asian families. During these invasions, oftentimes violent, the gang breaks into a family’s household or small business, ties up and takes hostage all of the family members present, and terrorizes them until they produce valuables or money.\(^{37}\) The tactics used include beatings, torture, and rape.\(^{38}\) Home invasions are carefully planned out, taking into account such diverse considerations as the number and placement of phones in the target home, the acquisition of “cold” backup cars, and the placement of lookouts throughout the neighborhood.\(^{39}\) \textit{Bui doi} gangs have had high levels of success because they prey on members of their own ethnic communities by exploiting their knowledge of the cultural misunderstandings that make the least adapted segments of these communities extremely vulnerable to crime.\(^{40}\) Unfamiliar with or untrusting of banks and the local police, the victims of most home invasions have the dual disadvantage of keeping large amounts of valuables stored within their homes and being afraid to seek police protection.\(^{41}\) Southeast Asian gangs draw on their knowledge of these facts to quickly and brutally stage a robbery and then move on to another target neighborhood as quickly as they arrived to the first.

\section{C. The Environmental Roots of Southeast Asian Crime}

A number of researchers have tried to explain the involvement of Southeast Asian youths in criminal and other forms of delinquent behavior.\(^{42}\) Amongst these, the most compelling arguments have been offered by

\begin{itemize}
\item \textbf{35.} DOUGLAS D. DAYE, \textsc{A Law Enforcement Sourcebook of Asian Crime and Cultures: Tactics and Mindsets} 244 (1997).
\item \textbf{36.} \textit{Id.}; The term “Amerasian” refers to the offspring of Southeast Asian women and American men stationed in Southeast Asia during the Vietnam War. This Note talks more about Amerasians and their difficult lives after the evacuation of American troops in Part III(A), infra.
\item \textbf{38.} \textit{Id.}
\item \textbf{39.} DAYE, \textit{supra} note 35, at 244–45.
\item \textbf{40.} Smith & Tarallo, \textit{supra} note 30, at 69.
\item \textbf{41.} Le, \textit{supra} note 37.
\item \textbf{42.} See generally Le, \textit{supra} note 37 (assessing the wide range of approaches that have been used to explain delinquency among Asian American youths including: psychological factors, victimization, acculturation and cultural conflict, peer and family relations, psycho-cultural elements, integration failure, ecology and social structure, the immigration process, and resiliency and protection).
\end{itemize}
those who believe that Southeast Asian criminality results primarily from environmental factors such as social and economic inequality, as well as racial discrimination. According to Bankston and Zhou, Southeast Asian adolescents choose to behave antisocially and commit crimes because they live in frustrated, low income neighborhoods where their opportunity structures are limited, and they frequently come into contact with and learn from existing criminogenic subcultures. Kent and Felkenes reach a similar conclusion through a series of multivariate analyses based on data gathered from the Little Saigon area of Westminster, California, the largest local community of Vietnamese Americans in the country. In their study, Kent and Felkenes conclude that the presence of gangs in residential neighborhoods and positive attitudes toward gangs among youths are the two strongest factors that explain Vietnamese gang involvement. Both the work of Bankston and Zhou, and Kent and Felkenes, show that by living in low-income neighborhoods and possessing generally low socioeconomic statuses, Southeast Asian youths encounter a circumscribed opportunity structure (poor public schooling and limited job opportunities) that makes them vulnerable to the pressures of local gangs and their concomitant subcultures of crime.

Research conducted for the use of law enforcement agencies also supports the conclusion that Southeast Asian youth involvement in crime derives largely from environmental factors. Consistent with the work of Kent and Felkenes, this research finds that Asian youths who join gangs

43. In making this claim I do not mean to suggest that social and economic deprivation are the sole factors responsible for criminal conduct among Southeast Asians and among America's poor population generally. Indeed, other factors such as acculturation issues and cultural conflict almost definitely also play a role in Southeast Asian emigrant struggles, and the choice to join a gang or commit a criminal act. Hien Duc Do, *The Vietnamese Americans* 61 (1999); See Le, *supra* note 37, at 60-62. What I argue is that theories and research based on the link between America's social structure and crime provide the strongest and most compelling explanation for Southeast Asian criminal behavior. Moreover, detailed studies have found that non-cultural factors are more predictive of Southeast Asian gang involvement than culturally based ones. Douglas R. Kent & George T. Felkenes, U.S. Dep't of Justice, *Cultural Explanations for Vietnamese Youth Involvement in Street Gangs* 82 (1998).


47. The socioeconomic struggles of the Southeast Asian community will be discussed in detail infra, in Part II(B).
typically grow up within or near gang subcultures.\textsuperscript{48} It also explains that most Asian gang members are poorly educated, have few qualifications for most jobs, have serious socioeconomic deficiencies, and have been exposed to racism and cross-cultural violence.\textsuperscript{49}

These findings discussed above provide empirical support for two powerful theories often advanced to explain the different levels of criminal conduct among and within different ethnic and racial groups. These two theories, Robert Merton's social strain theory and Edwin Sutherland's theory of differential association, point to the social structure and to an individual's socioeconomic standing in order to account for different frequencies of criminality across groups.

According to the social strain theory, society has a set of dominant values and goals, but not everyone has the ability to achieve these values and goals.\textsuperscript{50} A number of factors may stand in the way of an individual's ability to meet society's expectations including unemployment, the lack of a good education, and various forms of racial discrimination.\textsuperscript{51} When there is a gap between society's values and an individual's circumstances, he will respond in any of a number of antisocial ways—rebellion, retreatism, or innovation—oftentimes resorting to criminal conduct.\textsuperscript{52} With respect to many Southeast Asian youths, their upbringing in low-income neighborhoods, substantial educational deficiencies, and lack of highly sought after work skills frustrate their abilities to achieve the values and goals advanced by mainstream society. As such, Merton's theory suggests that they will react negatively and pursue alternative methods of fulfillment or retreatism that will often lead them into trouble with the law.

Sutherland's differential association theory argues that criminal behavior is learned behavior.\textsuperscript{53} The more contact a person has with people who are already involved with crime (e.g. gangs or non-gang affiliates of criminogenic youth sub-cultures), the more likely that person will choose to engage in criminal activity himself.\textsuperscript{54} This theory is consistent with Kent and Felkenes' finding that growing up in disadvantaged communities that have strong gang presences or positive attitudes toward criminal behavior explains much of the involvement of Southeast Asian youths in crime.

\textsuperscript{48} DAYE, supra note 35, at 98.
\textsuperscript{49} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 73–74. Professor Walker relates Robert Merton's definition of "retreatism" as a rejection of both society's goals and the accepted means of achieving them. The term "rebellion" is explained in a similar manner except with the added caveat that those who rebel also attempt to create a new society with its own set of goals and values. Finally, Walker describes Merton's use of "innovation" as "an acceptance of society's goals but a rejection of the accepted means of attaining them." Id. at 74.
\textsuperscript{53} Id. at 74.
\textsuperscript{54} Id.
In summary, research on Southeast Asians has found that many members of this community commit crimes not because of any unique cultural or individual factors that predispose them to such action, but as a consequence of their very low socioeconomic statuses and difficult lives of deprivation. These explanations rest on theories of necessity, frustration, and sub-cultural rebellion. Social scientists have made such observations for over a century with communities of all different ethnicities and races, linking social and economic deprivation to criminal behavior. Within the context of immigrant populations, they have consistently presented the following set of arguments:

(1) The economic and social marginality of ethnic newcomers, as compared to natives or more settled immigrants, resulted in a greater likelihood of their engaging in criminal conduct.

(2) Such marginality (due to poverty, deprivation) rather than any persisting social characteristics unique to a given ethnic population accounts for the comparative over-involvement in crime found among some groups.

(3) As members of various ethnic/immigrant groups improve their comparative economic status, their rate of involvement in crime will be reduced, thus reducing the gap between their ethnic grouping and others who preceded them.55

Research on Southeast Asian youths and their involvement in crime is consistent with these observations.

Certainly, not all Southeast Asian criminal defendants come from broken homes or live in poverty.56 In reality, though, far more Southeast Asian defendants come from backgrounds of economic and social struggle than from backgrounds of privilege or middle-class status. As such, this section has argued that socioeconomic deprivation and life in criminogenic environments are the paramount factors that explain Southeast Asian criminality. In conjunction with the next part of this Note, which identifies American society’s role in placing many Southeast Asian emigrants within such environments of deprivation and erecting barriers to upward mobility, the arguments presented here suggest that society should share part of the blame for the Southeast Asian defendant’s criminal acts and, in fact, must do so in order to legitimately claim that its system of criminal law is moral and just.

55. Hawkins, supra note 44, at 98.
56. Gonzalez, supra note 33. The author provides the following example: “David Evangelista, an Asian Boyz [gang] member, got straight A’s in school, volunteered at a hospital and delivered jewelry while he was involved in a five-month crime spree in 1995 that left seven people dead.” Id. at A10.
II. SOUTHEAST ASIAN CRIMINAL RESPONSIBILITY AND 
SOCETY'S TENUOUS MORAL AUTHORITY TO PUNISH

Having discussed the contemporary involvement of Southeast Asians in both organized crime and unorganized delinquent behavior, I will now explain how the U.S. government is responsible—directly and indirectly—for the emigration of over a million Southeast Asians to the U.S. over the last twenty-five years,\(^5\) and for the settlement of many of these individuals in criminogenic environments. I will then argue that because of these facts, a truly moral system of criminal law, based on the retributivist concepts of just deserts and proportionality, requires that Southeast Asian defendants negatively affected by America's foreign and domestic policies receive mitigated punishments based on the use of a societal fault defense. Such a thesis is supported through an assessment of the U.S. government's role in uprooting Southeast Asians from their homelands and then subsequently leaving them to fend for themselves in a new country where many of them lacked and still lack the financial resources, education, and language skills to lead a life outside of poverty and away from crime-plagued neighborhoods.

A. Life in America as a Necessity, Not a Choice

By choosing to wage an ideological war in Southeast Asia, and then evacuating after nearly three decades of fighting, the United States bears a large degree of responsibility for both the destruction of the economy and traditional life of Vietnam, Laos, and Cambodia, and for the forced exodus of millions of Southeast Asian refugees and immigrants. Immediately after the fall of Saigon in 1975, roughly 130,000 Southeast Asians fled their devastated homelands to the United States.\(^8\) Having fought on the side of the American forces that lost the war, many of these refugees...
left their homes in order to avoid persecution from the new Communist regimes. This was the case with the Hmong, who aided the Central Intelligence Agency in an illegal war in Laos by serving in paramilitary units and rescue teams. But for the presence of American forces in Southeast Asia and their recruitment of Hmong villagers, the Hmong would not have faced the type of extreme genocidal persecution that they did at the hands of the postwar Laotian government. Similarly, in Vietnam many of the individuals associated with the South Vietnamese government and military were sent to re-education camps that were, in reality, prison and labor centers.

Similarly, in Vietnam many of the individuals associated with the South Vietnamese government and military were sent to re-education camps that were, in reality, prison and labor centers. In addition, many Southeast Asians had no choice but to emigrate because their homes and prewar lives were destroyed, and their countries' economies were in shambles. The war left Vietnam, Cambodia, and Laos among the three poorest countries in the world. In Vietnam, the war led to mass poverty and food shortages. Extensive malnutrition became a national problem, affecting over 40% of Vietnamese children even as late as the 1990s. The nearly three decades of fighting also internally displaced a third of the South Vietnamese population, eliminated over half of South Vietnam's forest area, left the residue of over 11 million gallons of the toxin Agent Orange, uprooted a third of the Hmong population in Laos, and contributed to the deaths of as many as a quarter of the people of Cambodia. Those who did not die from gunfire, starvation, or napalm suffered the consequences of years of almost continuous bombing raids that placed large craters into the Southeast Asian countryside and eliminated entire towns. One estimate found that over a nine year period, more than two million tons of bombs were dropped on Laos, with an average of one bombing raid every eight minutes. Thus, with their governments fallen, their homes destroyed, and their local economy in shambles, hundreds of thousands of refugees came to the United States, not because they wanted to, but out of necessity created by an American war fought on Southeast Asian soil.

60. Do, supra note 43, at 61.
61. Rumbaut, supra note 58, at 236.
62. James M. Freeman & Nguyen Dinh Huu, Voices From the Camps: Vietnamese Children Seeking Asylum 7 (2003). The problem with food shortages was enhanced by the policies of the new Communist government, which included confiscation of private property; the reduction of wages to below the minimum needed for survival; and attempts to nationalize major businesses and agriculture. Id.
63. Id. at 7.
64. Rumbaut, supra note 58, at 235–36.
65. Hwang, supra note 59, at 91.
The U.S. is not just responsible for the forced exodus of refugees immediately following its evacuation from Vietnam in 1975. Rather, its responsibility for uprooting Southeast Asian lives extends to those individuals who migrated to the U.S. throughout the 1980s and 90s as well. From 1980 to 1990, roughly 412,500 Vietnamese came to the U.S. as refugees, as did 133,768 people from Cambodia, and 163,919 from Laos. These individuals were affected by the war and had their prewar lives destroyed just like those who had the privilege or luck to flee during the first wave of immigration. Many of these later refugees and immigrants, left behind in their war-torn and now hostilely run countries, led lives of poverty, separation from family, and political harassment by the new regimes. They would have emigrated earlier, but were restricted either by barriers imposed by the new Communist governments or by quotas enacted by the United States. Concerned with the ad hoc nature of the government’s refugee policy, Congress passed the 1980 Refugee Act, which placed ceilings on the number of refugees that could be admitted to the U.S. each year. In 1980, President Carter reserved 169,000 places for Southeast Asia. By 1985, the total number of spaces reserved for all refugees dropped to 70,000, with 50,000 reserved for all of East Asia. This number for East Asian refugees stabilized around 50,000 to 52,000 up and through 1992.2 Thus, although there was a large demand among Southeast Asians for entry into the United States as refugees, caps created by the United States government significantly limited the supply of spots available each year.

The ability of Southeast Asians dislocated by the war to enter the U.S. was also hindered by disagreements between the State Department

66. See Rumbaut, supra note 58, at 241.
67. Bill Ong Hing, Making and Remaking Asian America Through Immigration Policy, 1850-1990 126–27 (1993). Prior to the passage of the 1980 Refugee Act, the attorney general had the ability to “parole” into the U.S. any alien seeking to emigrate to America for “emergent reasons or for reasons deemed strictly in the public interest.” Id. at 124. This parole authority stemmed from the McCarran-Walter Act enacted by Congress in 1952. Between 1975 and 1980, the attorney general used this authority to allow over 400,000 Southeast Asian refugees to enter the country. Id.
68. Id. at 127. A strong restrictionist wave bent on limiting the number of Southeast Asian refugees and immigrants accepted into the United States began to gain strength and political clout throughout the 1980s. These restrictionists included INS District Director Joseph Sureck, several members of Congress, members of the Office of Management and Budget and the Department of Health and Human Services, and the Office of Legal Counsel of the Department of Justice. These individuals listed the costs of maintaining a large refugee program, the overcrowding of public schools and medical facilities, public health concerns, and the threat that Southeast Asian refugees posed to the established laboring classes as reasons for limiting the rates of acceptance. Their advocacy resulted in the Reagan administration’s reduction of the number of Southeast Asians admitted into the United States by 75% of the number admitted in 1980. See Loescher & Scanlan, supra note 57, at 198–205.
69. See Hing, supra note 67, at 127.
and the Immigration and Naturalization Service (INS) over who qualified as a refugee for admission under the language of the 1980 Refugee Act. A large debate erupted over whether individual Southeast Asian emigrants were political refugees or merely "economic migrants," uncovered by the 1980 legislation. As a consequence of this discourse, thousands of emigrants had to wait for years before gaining entry into the U.S., while many others never even got this chance. Between 1981 and 1982, the rejection rate of Vietnamese boat people living in first asylum refugee camps in Hong Kong rose from 20% to 65%. In another example, in April of 1982, the INS vetoed the acceptance of 23,000 Cambodian emigrants living in holding centers in Thailand even though these individuals had worked for the U.S. government or had close relatives in the U.S., and had already been told that they were accepted for entry and bound for America.

Due to the above discussed restrictions, many Southeast Asians who needed to flee to the U.S. had no choice but to stay and continue to be persecuted in their home countries or live in squalid refugee camps in nations of first asylum such as Malaysia and Thailand. These refugee camps were poorly maintained, and had high levels of crime and violence, adding to the trauma of those already weakened by the war. Many refugees died within these camps. The U.S. government is responsible for the uprooting and emigration of these refugees who entered its borders throughout the 1980s and 90s in addition to those who emigrated in the mid to late 70s.

Included amongst those uprooted by the consequences of war have been thousands of young children, many of which were orphaned through abandonment or separation during the chaos of battle and evacuation. For example, a large number of Amerasian youths—the off-
spring of American servicemen and Southeast Asian women—left behind by their fathers, spent the years immediately following the war living in the streets in makeshift shelters while earning money by selling gum, cigarettes, and candy. Other abandoned youths, who managed to escape to refugee camps, had to quickly learn how to fend for themselves, and obtain food and shelter, in an environment of distrust. Researchers who visited a refugee camp in Hong Kong as recently as 1991 described the situation for Southeast Asian youths in the following manner:

The children showed the greatest effects; they were pale, undersized for their age, listless, and lethargic. They lived in a world of physical violence, drugs, prostitution, teenage pregnancies and sexual abuse, abortions, and depression. Most of them received little or no education or job training. They were lonely and anxious over an uncertain future. . . . They lived in an emotionally starved environment with little or no parental or adult guidance.

Many of these youths within the refugee camps joined gangs for protection and survival. Thus, they arrived in the United States already jaded by their experiences and familiar with lives of crime and violence.

B. The State’s Role in Creating and Perpetuating the Socioeconomic Deprivation of Southeast Asians in America

After initiating a war that led to the dislocation and forced emigration of hundreds of thousands of Southeast Asians, the U.S. government provided some initial aid to help the refugees that it accepted within its borders transition to their lives in a new country. This initial sense of obligation, however, soon gave way to a wave of conservative politics regarding both immigrants and the poor in the U.S. that has continued from the early 1980s up until the present. Thus, not only did the state create the conditions that forced countless Southeast Asians to come to the United States as refugees, but it also provided a relatively cold welcome for these emigrants, offering limited amounts of aid that did not even come close to what was necessary to help a poor community without

74. In addition to their poverty, the bi-racial identity of Amerasians, and particularly their half American genes, caused these youths to suffer from racial discrimination and ostracism in their postwar homelands. See Hing, supra note 67, at 128. To many, they were considered “the lowest of the low,” especially those with African American fathers. Dave, supra note 35, at 247.
76. Freeman & Nguyen, supra note 62, at 22.
77. Dave, supra note 35, at 248.
English language skills, and often without formal educational backgrounds, successfully adapt to life in America. It is not surprising then that many Southeast Asians in the U.S. were forced into lives of deprivation carried out in criminogenic communities throughout the nation.

Beginning from the early 1980s, the U.S. has consistently cut back on the amount of government aid that it is willing to provide for recently arrived refugees and immigrants from Southeast Asia, much to the detriment of these individuals. Professor Bill Hing provides an excellent account of this pattern and its effects:

Under the 1980 Refugee Act, refugees were given 36-month stipends of special refugee cash, medical assistance programs, and other support services. But in 1982 amendments to the act reduced the stipends to 18 months to pressure refugees to become economically independent more quickly... Most refugees are unable to acquire the skills that would qualify them for anything other than minimum wage jobs in 18 months... Restrictions on federal assistance thus help to account for increased Vietnamese American concentration in entry-level, minimum wage jobs requiring little formal education or mastery of English.

Almost all of the Vietnamese emigrants who came to the United States after the first wave, mostly South Vietnamese government personnel and other members of the educated and professional classes, were poor, unfamiliar with English, and lacked formal education. Emigrants from Laos and Cambodia shared similar characteristics. Without employable skills or a reserve of economic resources to holdover on, most Southeast Asian refugees depended on government assistance in order to support their families. Once this assistance ended, refugees working minimum wage jobs or as undocumented laborers quickly fell deeper into poverty, with little hope for upward mobility. Conservative discourse during the 1980s lamenting the development of the "welfare queen" and dependency on government handouts by the urban poor served as the driving force behind reforms that reduced the amount of government assistance available to refugees. Though they meant to encourage Southeast Asians receiving public assistance to find work, the amendments to the 1980 Refugee Act functioned only to doom the Southeast Asian emigrant population to perpetual lives in poverty.

To make things even worse, the place of residence for Vietnamese and other Southeast Asian refugees brought into the U.S. under official resettlement policies was initially determined by the need of resettlement

78. Hing, supra note 67, at 137.
79. Rumbaut, supra note 58, at 233.
agencies to find available and inexpensive housing. As such, the government originally placed many Southeast Asians into low-income neighborhoods, which were congested and often crime-infested, where access to quality public schools and jobs was unlikely, as was the possibility for economic advancement. Indeed, rather than having access to quality schools and jobs, Southeast Asian refugees were often placed into neighborhoods ripe with racial tension, and in the more extreme cases, exposed to toxic waste (Richmond, California) and homes without heat or glass windows (West Philadelphia).

As a consequence of this government neglect, by 1985 roughly 50% of all Southeast Asian refugees were living below the poverty line, and by 1987, 64% of Southeast Asian households headed by refugees arriving after 1980 were on welfare. Southeast Asian emigrants fled their homelands in order to escape lives of war-induced poverty and persecution only to immediately begin new lives of extreme deprivation in the United States. By the start of the 1990s, things still had not improved much, as over 90% of the Southeast Asian community lived in urban areas and over 80% of those who actually obtained jobs worked in the service or blue-collar sectors due to limitations of language classes, job training, and other programs. In 1994, Vietnamese, Cambodians, and Laotians had the highest welfare dependency rate of any racial group in the country.

Throughout the 1990s and up until today, the U.S. government has not improved on the way that it welcomes Southeast Asian emigrants into its borders. Instead, it has even enacted legislation harmful to Southeast Asians. Welfare reform during the mid-1990s has removed much needed benefits for many legal residents and other, more vulnerable immigrant communities. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 proposed to save roughly $23.8 billion by "denying basic food, shelter, medical care, and old age/disability benefits to lawful immigrants even though they constituted only five percent of the total population of welfare recipients." It did so by limiting access to government benefits to only those immigrants who fell under one of three enumerated exceptions. Many Southeast Asian emigrants either do not qualify for any of these exceptions or, more commonly, face a number

81. Id.
82. Tan, supra note 5.
84. HING, supra note 67, at 137.
85. Id. at 138.
86. DAYE, supra note 35, at 248.
87. Hwang, supra note 59, at 95.
88. Id.
89. Id.
of challenges in trying to prove their qualification. Without the ability to access government assistance, these particularly vulnerable refugees and immigrants are left with few resources to carve out a decent life outside of poverty.

Even for the Southeast Asians who do qualify for government benefits—naturalized citizens and exempted legal residents—the Welfare Reform Act threatens to eliminate a much needed source of financial support. By limiting the amount of money available to welfare recipients, the U.S. government has forced an increasing number of people off of the welfare roles but into a deeper state of poverty. This trend has occurred both within the general population and within the Southeast Asian community. Many Southeast Asians, pressured by reform deadlines to find any sort of employment, have been forced to take on jobs below their skill levels as well as forego opportunities to pursue an education. Most of these dead-end jobs pay only minimum wage and have no insurance benefits. As such, large potentials of human capital have been stunted and prevented from manifesting due to the enforcement of federal legislation. Welfare reform has not created an incentive for Southeast Asians to seek employment and develop self-sufficiency. Rather, it has predestined a community—uprooted by war and welcomed into the U.S. by poor public schools, racial discrimination, low-income housing, and minimum wage jobs—to lives of deprivation. It is this sad reality that drove one Southeast Asian youth living in a housing project in the Bronx to remark: “The government is not helping the poor at all. It’s just punishing the poor. My dad helped (the U.S.) in the war.... The government should help us instead of punishing us more.”

The greatest irony of the welfare reforms aimed at immigrants is that the rhetoric behind their enactment claims that immigrants are “morally undeserving” of government benefits because they have not contributed enough to American society. Sadly, this polemical discourse does not take into consideration the fact that most Southeast Asian emigrants are living in the United States as a direct consequence of the U.S. government’s waging of a war that destroyed their former homelands. In—

90. For an excellent discussion on the three exemptions, the challenges that immigrants must overcome to prove their qualification for one of them, and the despair that many Southeast Asians experienced upon learning about the welfare reforms, see id. at 95–97.


92. Id.

93. Id.

94. Id.

95. See Hwang, supra note 59, at 102.
deed, it seems evident that the U.S. government is morally compelled to take care of its Southeast Asian community. At the very least, the government has a moral obligation to provide Southeast Asian emigrants with the means to lead lives outside of poverty and away from criminogenic environments. Through its lack of adequate refugee aid programs as well as its cutting back of welfare benefits, both to specific groups of immigrants and to the country's poor in general, the state has failed to fulfill this moral obligation.

As a consequence of this failure, the Southeast Asian population in the U.S. continues to suffer from high levels of economic and social hardship. The 2000 Census reports that 22.5% of Cambodians, Laotians, and Hmong are living in poverty and roughly 10% receive public assistance. This dependency on government aid is the highest out of all racial and ethnic groups, including Blacks and Latinos, two groups commonly portrayed as forming the bulk of America's "underclass." The numbers for the Vietnamese are slightly better, reflecting a drastic improvement in the socioeconomic condition of many Vietnamese Americans throughout the 90s, but still reveal enduring socioeconomic struggles as 13.8% of Vietnamese respondents are living in poverty while 4.8% receive public assistance. Perhaps the most alarming statistics for the Southeast Asian community are those related to educational attainment and English proficiency, for these two areas are the keys to helping Southeast Asians attain well-paid jobs and achieve upward mobility. By the year 2000, 52.5% of Cambodians, Hmong and Laotians had less than a high school education, 44.3% lacked a proficiency in English, and only 9.2% had college degrees. These education and language statistics were the worst out of all Asian ethnic groups, as well as all racial categories recorded by the Census. Meanwhile, a no less concerning 40.4% of Vietnamese reported a lack of English proficiency and 37.8% had not graduated from high school. The impoverished backgrounds of the Southeast Asian emigrants who have

96. See C.N. Le, Socioeconomic Statistics & Demographics, ASIAN-NATION: THE LANDSCAPE OF ASIAN AMERICA, Jan. 23, 2006, available at http://www.asian-nation.org/demographics.shtml. Some observers have noted that Southeast Asians in certain regions have been provided with a strong support system by local aid agencies, which has enabled them to achieve significant amounts of success. One reporter for the Washington Times has written: "The majority of Hmong have prospered in the United States, gaining elective office or becoming successful entrepreneurs. In this part of the heartland [Minnesota], they have benefited from the open-hearted nature of locals." Miller, supra note 21. The contemporary socioeconomic data on Southeast Asians presented in this section, however, strongly invalidate such claims. Even in the state of Minnesota, poverty remains a serious problem for many members of the Southeast Asian community. Art Hughes, Census: Poverty Still A Problem For Some Minorities, MINN. PUB. RADIO, Sept. 25, 2002, http://news.minnesota.publicradio.org/features/200209/25_hughesa_census/.

97. Le, supra note 96.

98. Id.

99. Id.
continued to come to the United States throughout the 1990s accounts for these troubling statistics,\textsuperscript{100} as do America’s inadequate public schools within low-income neighborhoods and the lack of quality programs designed to facilitate refugee and immigrant adjustment to this country. Low levels of educational achievement and weak language skills are particularly troubling because most Southeast Asians will not be able to establish themselves economically, and thus avoid lives in criminogenic environments, until they acquire the skills and credentials needed to land good jobs outside of the manual labor and blue collar areas.

Of course, not all Southeast Asians lead lives of deprivation, and not all of those who have been placed or are living in criminogenic environments end up doing poorly in school or have trouble obtaining financial stability. There have been success stories just as there have been struggles. A number of more established Southeast Asians, particularly the Vietnamese, have opened their own small businesses such as restaurants and nail salons.\textsuperscript{101} They have used these enterprises, built up through years of hard work, to achieve upward mobility. This business success helps explain the improvement in poverty levels and family incomes among Vietnamese Americans between 1990 and 2000. The key, though, is to realize that many Laotians, Hmong, and Cambodians have not had as much small business success as the Vietnamese, and that even among the Vietnamese, the successes of part of the community only mask the extreme difficulties and poverty of another significant part of the community. Even for those who do manage to achieve economic stability, this usually takes a number of years to achieve during which their families—children, brothers and sisters, nieces and nephews—remain vulnerable and exposed to the challenges of life in criminogenic environments.

Some might also argue that the education and employment statistics reported for Southeast Asians by the 2000 Census do not accurately reflect the future prospects for the Southeast Asian community. It is a fair observation to note that as more and more Southeast Asians are born and raised in the United States, and thus have the strong language skills

\textsuperscript{100} From 1990 to 1993, 42.6% of immigrants coming into the United States reported their employment prior to arrival as “laborer.” Another 29.7% came from service backgrounds and 23.1% worked in crafts. Meanwhile, only 1.3% of Vietnamese immigrants had managerial backgrounds, and only 1.3% and 2.1% came from professional and technical backgrounds. UCLA ASIAN AMERICAN STUDIES CENTER, 1998-99 NATIONAL ASIAN PACIFIC AMERICAN POLITICAL ALMANAC 84 (8th ed. 1999).

\textsuperscript{101} According to Cynthia Drummey, editor-in-chief of Nails magazine, the trade journal for nail salons, roughly 50% of the nation’s manicurists are of Vietnamese descent. Many Vietnamese have entered this business because it does not demand the formal education and English language proficiency that most well-paying jobs require. As recently as 1998, the salon services market in the U.S. was worth $6.4 billion. Janet Dang, A Hand For Vietnamese Americans: Discount Nail Salons Bring Success To Their Fingertips, ASIANWEEK, Nov. 25, 1999, http://www.asianweek.com/1999_11_25/feature_nails.html.
needed to succeed within the classrooms, an increasing number of Southeast Asians will attain college degrees and well-paid jobs. This argument assumes that the current statistics on Southeast Asians overrepresent the foreign-born population and thus mask large amounts of current and potential educational and professional success. Indeed, some studies have found that Southeast Asian, and particularly Vietnamese American, children have had a great deal of success in American primary and secondary schools. One of these studies that included over 1,300 Southeast Asian students—Vietnamese, Laotian, and ethnic Chinese—from all over the country reported that 27% had a grade point average in the “A” range, 52% in the “B” range, while only 4% had below a “C” average.\footnote{1}

In reality, though, the academic success of a portion of the young Southeast Asian community only works to conceal the academic and employment struggles of many others, particularly because the accomplishments of those who have been successful only contribute to the myth of the model minority. This is true both for the Southeast Asian community as a whole, and among the different Southeast Asian ethnic groups as well. The same author who pointed to the study above as a sign of Southeast Asian academic achievement admits later in his work that there is a large number of underreported Southeast Asian youths who are facing academic difficulties.\footnote{2} Others have noted the extremely high dropout rates of Southeast Asian high school students.\footnote{3} A 1997 report authored by the Educational Testing Service (ETS), the group that administers the SAT I, SAT II, GRE, and Advanced Placement credit examinations, found that the high school dropout rate for schools with large concentrations of Southeast Asians hovers around 50 percent.\footnote{4} This finding was presented within a larger article that suggested that the failure of mainstream America and policymakers to recognize the educational and economic struggles of Southeast Asian students has led to the systematic neglect of a vulnerable community, and the failure to create much needed programs and services. These essential services include more vocational and job training for Southeast Asian youths, assistance with learning English, and parent support programs.\footnote{5} Crime and gang intervention programs are two other types of services that would greatly benefit the Southeast Asian community but have slipped under the current political radar.

Bankston and Zhou provide evidence of the difficult reality of many Southeast Asians through their research which demonstrates that

\footnote{1}{Do, supra note 43, at 90.}
\footnote{2}{Id. at 96.}
\footnote{4}{Id.}
\footnote{5}{Id.}
Vietnamese youths are moving in two contrary directions with respect to their interaction with American social and educational life. Even while a large number of Vietnamese Americans have excelled within the classrooms, many have not, and have instead developed a wide range of delinquent behavior, including drug and alcohol use, and having run-ins with the police. Youths from other Southeast Asian communities have often fared even worse as a group than their Vietnamese counterparts.

As a consequence of U.S. foreign policy, hundreds of thousands of Southeast Asians have been displaced and uprooted. As a result of American domestic policy, this same emigrant community has been thrust into a new country without the proper resources and support necessary to adapt successfully to life in America. In several ways, the U.S. government is responsible for a number of the struggles that the Southeast Asian community is currently facing. But for the actions of the U.S. government, many Southeast Asians and the criminal defendants that come from this community would not be living in criminogenic neighborhoods across the nation today.

III. THE MORALITY OF THE CRIMINAL LAW AND A DEFENSE OF SOCIETAL FAULT

Based on the historical and current treatment of Southeast Asians by the U.S. government discussed above, I will now posit that Southeast Asian defendants who have been significantly influenced by life within criminogenic environments ought to receive mitigated punishments based on the partial excuse of societal fault. I will argue that, in many instances, the state is at least partially responsible for Southeast Asian criminal behavior. This is certainly a radical idea when looked at from the perspective of traditional, but not necessarily accurate, views of human agency and criminal responsibility. As the following discussion will reveal, however, it is supported by an honest examination of traditional justifications for punishment in our society, as well as powerful criminal law and moral theories proposed by intellectuals such as Professor Richard Delgado and Judge David Bazelon. Additionally, it accomplishes the critically important function of harmonizing the rarified and abstract notions underpinning our system of criminal law with the realities of life and social inequality.

108. Id. at 356–57.
A. Toward a True Notion of Just Deserts: In the Abstract and Applied

Out of the three main theories historically used to justify criminal punishment—deterrence, rehabilitation, and retribution—a strong consensus of criminal law scholars, the retributivist school, has come to recognize retribution as the primary driving force behind a truly moral system of criminal justice.\(^\text{110}\) In addition to criticizing the implications of a system of punishment based solely on deterrence or rehabilitation, one retributivist has even argued that the concepts of retribution and just deserts underlie and serve as "tacit assumptions" for the moral legitimacy of the other theories.\(^\text{111}\)

The retributivist theory of punishment requires that an individual be punished only as much as he deserves.\(^\text{112}\) This is the so-called just deserts doctrine. As a foundational principle of criminal law, retribution focuses on the moral blameworthiness of a defendant, and establishes the importance of proportionality when determining what punishment, if any, an individual deserves for his actions.\(^\text{113}\) According to retributivist theory, the punishment should fit the crime and should not be disproportionately severe or lenient.\(^\text{114}\)

Retributivist conceptions of just deserts, often associated with the work of Professor Herbert Morris, posit that when an individual has committed an act proscribed by the community, he has taken unfair advantage of the agreed-upon sharing of benefits and burdens.\(^\text{115}\) The

\(^{110}\) See Joshua Dressler, Understanding Criminal Law 16–18 (3d ed. 2001). Of course, the debate between retributivism, utilitarianism, and other theories of criminal punishment still continues today. Some commentators have even suggested a mixed theory of punishment. Id. at 19–23.

\(^{111}\) Alison Dundes Renteln, A Justification of the Cultural Defense as Partial Excuse, 2 S. CAL. REV. L. & WOMEN’S STUD. 437, 441–42 (1993). Professor Renteln argues:

I believe the fundamental justification for punishment to be retribution. Deterrence cannot stand alone, because general deterrence would be achieved by punishing the innocent. But deterrence is only valid if others are deterred by the punishment of one who is deserving of it. By like token, rehabilitation only succeeds if the prisoner accepts that he is blameworthy.

Id. at 442.

\(^{112}\) E.g., id.


\(^{114}\) Id.

\(^{115}\) Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9, 68 (1985). This notion of retributivism advanced by Morris is also referred to as protective retribution, or retribution based on the principle of personhood. Dressler, supra note 110, at 17. It is presented in contrast to two other iterations of the retributivist theory—assaultive retribution and victim vindication. All three forms of retributivism believe in the same underlying principles of just
"wrongdoer [now] owes something to society as a result of renouncing the burden of self-restraint which others have assumed."\textsuperscript{116} Justice, gained through punishing this wrongdoing individual, "restores the equilibrium of benefits and burdens by taking from the individual what he owes; that is, by exacting the debt."\textsuperscript{117}

Society, however, loses its ability to punish and to exact a wrongdoer's debt when it is itself responsible for some or all of the conditions that have contributed to the wrongdoer's criminogenic behavior.\textsuperscript{118} That is, if the law is to act as a true moral force, it should not convict unless it is in a position to condemn.\textsuperscript{119} Richard Delgado draws upon this idea with his advocacy for a Rotten Social Background (RSB) defense. This defense argues that when society has contributed to the creation or aggravation of a poor and deprived environment, conducive to the development of criminal conduct, individuals raised and living in these environments should not be held completely responsible for their legally proscribed actions.\textsuperscript{120} This argument relies on a number of theoretical and empirical studies that have identified a correlation between deprivation/poverty and criminal behavior. These studies identify a host of factors that contribute to the formation of criminogenic environments including, amongst others, chronic unemployment, substandard living conditions, inadequate schooling, poor treatment by the police, inadequate homes, and racism.\textsuperscript{121}

When society is responsible for the creation of any combination of these factors, or guilty of not taking effective steps to ameliorate them, it should share part of the blame for criminal acts committed by defendants raised or living in communities heavily impacted by such factors. Many of these defendants are forced to live in criminogenic environments due to reasons

\begin{footnotes}
\footnotetext[116]{Delgado, supra note 115, at 68.}
\footnotetext[117]{HERBERT MORRIS, ON GUILT AND INNOCENCE 33–34 (1976).}
\footnotetext[118]{Bazelon, supra note 1, at 388.}
\footnotetext[119]{Id.}
\footnotetext[120]{See Delgado, supra note 115, at 18–20. By using the word "deprived" and referring to "deprived environments" I do not, in any way, offer a value judgment on the lives and decisions made by those living in the criminogenic environments discussed throughout this paper. Indeed, vibrant local cultures and strong social bonds often develop in the most economically and socially marginalized communities. My reference to the deprivation in such communities is strictly structural.}
\footnotetext[121]{See id. at 23–34. A large body of interesting research continues to demonstrate the existence of a strong link between different types of crime and various forms of deprivation. See, e.g., Jens Ludwig, Greg J. Duncan & Paul Hirschfield, Urban Poverty and Juvenile Crime: Evidence from a Randomized Housing-Mobility Experiment, 116 Q.J. ECON. 655, 674–76 (2001); Morgan Kelly, Inequality and Crime, 82 REV. ECON. & STAT. 530, 530 (2000); Lauren J. Krivo & Ruth D. Peterson, Extremely Disadvantaged Neighborhoods and Urban Crime, 75 SOC. FORCES 619, 640–42 (1996).}
\end{footnotes}
outside of their control. Most are born, by chance, into poor families with histories of inequality, while others are prevented from escaping the difficulty of lives of deprivation by socially engendered barriers such as racism and the unavailability of working-class jobs in post-industrial American society. As a consequence of their difficult life circumstances and their hyper-exposure to racist and criminal sub-cultures, such defendants often lack the relevant freedom, control, and knowledge necessary to make them morally, and thus criminally, responsible for their behavior.

Delgado and other commentators who have spoken on behalf of the RSB or other socioeconomic deprivation based defenses, focus primarily on the lives of African Americans and the plight of Black and ethnic individuals within urban centers. They criticize the legacy of slavery in America—racism, poorly educated African American communities, and high levels of poverty—as well as the government’s weak efforts to aid socially disadvantaged people generally, and conclude that justice demands that society share some of the blame for criminal offenses committed by RSB defendants. Clearly, though, arguments for a defense based on societal fault extend to all classes of individuals adversely affected by government policies, regardless of race or ethnicity. A link to institutional slavery need not be made, nor would a defense of societal fault presented on behalf of contemporary African Americans be based principally on the historical treatment of their community. Rather, the point is that society has played a role in creating, perpetuating, or ignoring major inequalities in the U.S., and this has circumscribed its ability to judge and cast blame on some of its members. The case of Southeast Asian refugees and emigrants serves as a powerful example of this phenomenon.

Through its participation in the Vietnam War and its inability to adequately provide for those dislocated and negatively impacted by this participation, the U.S. government has diminished its capacity to punish and cast moral blame. As discussed above, the great majority of Southeast Asians living in the U.S. are in this country as a consequence of America’s involvement in the Vietnam War. These individuals were literally forced to

122. Wright, supra note 113, at 480.
123. Id. at 481–83. Of course, some individuals live in poverty and have few resources as a consequence of their own direct actions. This paper stresses, though, that amidst the conservative backdrop of the 1980s and 90s, it is important not to ignore the large number of people living in the U.S. who live in deprivation as a consequence of their birth or despite their efforts to craft a decent lifestyle from their limited means. Unless one is prepared to accept the argument that people are poor because they are lazy, one must open one’s eyes to the realities of the U.S.‘s post-industrial capitalist social structure, its legacy of racial discrimination, as well as the policy shortcomings of the federal and various state governments when assessing a socio-economically deprived individual’s true capacity to achieve upward mobility.
124. Id. at 482–83.
125. Delgado, supra note 115, at 23–24.
flee their homelands. Then, after arriving in the U.S., many of these emigrants were placed in low-income neighborhoods; received minimal government aid relative to their poor, uneducated, and war-torn backgrounds; and have been the victims of government cut-backs and conservative discourse on welfare dependency and self-sufficiency. As such, over the years the U.S. government has ushered hundreds of thousands of Southeast Asians into lives of poverty within criminogenic environments where they have been exposed to a number of different factors that contribute to the development of criminal behavior. This helps explain the rising rate of Southeast Asian youth delinquency and participation in gangs, which were documented in the studies conducted by Kent and Felkenes as well as Bankston and Zhou. Thus, when a Southeast Asian from one of these criminogenic environments breaks the law, he is entitled to draw upon a defense based on societal fault and force society to take responsibility for its contribution to the factors that helped lead to his criminal behavior. Put another way, the state must account for its role in making the Southeast Asian defendant’s choice to obey the law much harder than the same choice for a member of a less economically and socially marginalized class of individuals. It must account for its affirmative role in placing certain groups at a disadvantage with regard to the criminal law and its application.

When examining the case of Southeast Asian defendants, it is helpful to keep the wise and ultimately simple words of Judge Bazelon in mind. Bazelon notes that in order for the criminal law to make a truly moral decision on an individual’s degree of criminal responsibility, it must determine that “society’s own conduct in relation to the actor entitles it to sit in condemnation of him...”126 This is to say that, in certain situations, the discussion on blameworthiness and culpability ought to shift away from the individual defendant or defendants, such as in cases involving environmental deprivation. In such cases, the focus ought to be on society, the system of criminal law that it uses to render justice, and its moral prerogative, if any, to punish and cast blame onto others. A truly moral legal system does not punish those whose lives and choices it has circumscribed as a result of its foreign and domestic policy. As Bazelon explains:

In my opinion, it is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, ‘behave—or else!’... We cannot produce a class of desperate and angry citizens by closing off, for many years, all means of economic advance-

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126. Bazelon, supra note 1, at 388.
ment and personal fulfillment for a sizeable part of the population, and thereafter expect a crime-free society.\footnote{127}

B. Mitigation Rather Than Exoneration: Societal Fault as a Partial Excuse

The societal fault defense introduced above and its application to the Southeast Asian defendant must be further refined in order to justify its existence. Additionally, the construction of a more refined theory helps to better delegitimize the current state of the law as it relates to individuals from criminogenic environments.

In order to allow for truly individualized justice, the criminal law must create space for a middle ground between the traditional binary of complete innocence and absolute culpability.\footnote{128} Some commentators who have suggested complete exculpation for criminal acts based on a pure environmental determinist theory do a wonderful job highlighting the moral issue surrounding the punishment of defendants affected by criminogenic environments. At the same time, though, they propose an impractical and theoretically imprecise solution. For example, drawing on classical liberal theories of social contract, a number of theorists argue that societies are formed upon a system of mutuality.\footnote{129} As such, they posit that "if some segments of society are deprived of the benefits of the 'social contract,' they are also excused from the obligations imposed upon them by it."\footnote{130} Similarly, Delgado draws an analogy between his RSB defense and the existing defense of entrapment. He notes that under the rules of entrapment, "when a government agent is responsible for the defendant's \textit{mens rea}, criminal punishment is inappropriate."\footnote{131} However attractive, these theoretical models discussed by Delgado and others, when taken to their logical extremes, would lead to the mass acquittals of thousands of individuals a year. This is an impractical result that community members, even sympathetic ones, would almost certainly reject.\footnote{132} More importantly, mass exculpations would not lead to the most accurate or just results either. The cases in this discussion involve defendants who have actually committed the \textit{actus reus} of certain criminal offenses, and strictly speaking, with the proper \textit{mens rea} as well. A defendant who has grown up in poverty and steals out of both necessity and pent up frustration caused by unfair living conditions, has nevertheless committed the proscribed act of

\begin{itemize}
  \item \footnote{127}{Id. at 401–02.}
  \item \footnote{128}{See Renteln, supra note 111, at 443.}
  \item \footnote{129}{Delgado, supra note 115, at 14.}
  \item \footnote{130}{Id.}
  \item \footnote{131}{Id. at 77.}
  \item \footnote{132}{See Sanford H. Kadish, \textit{Fifty Years of Criminal Law: An Opinionated Review}, 87 Cal. L. Rev. 943, 962 (1999).}
\end{itemize}
stealing with the intention of doing so. Thus, the defendant still retains some degree of blameworthiness for his actions. Most people choose their behavior, no matter how difficult these choices are, and should thus be held accountable for their actions. It is the degree of culpability of a defendant that this discussion calls into question, not the complete lack of it. Full exculpation is not the correct remedy in cases of environmental deprivation, and would lead to a disproportionately lenient outcome.

While societal fault and contribution to criminogenic environments should not serve as a complete defense to criminal behavior, they should act as a partial excuse. When society shares part of the blame for a defendant's actions, the defendant ought to receive either a mitigated conviction or a reduction in his punishment. This would allow for the true fulfillment of the retributivist goals of just deserts and proportionality. A distinction must be drawn between moral guilt and legal guilt.

Even though a defendant's actions may meet the actus reus and mens rea requirements for a proscribed act, thus making him legally guilty of a crime, this does not necessarily mean that he is also completely morally guilty as well. The state must share some of the moral guilt with the actor for failing to provide him with the proper resources and life chances to avoid turning to crime. Put another way, the state must share part of the moral guilt of a defendant when it is responsible for making the choices and opportunities to conform to the law much harder for individuals from criminogenic environments than for individuals from other communities.


134. In theory, just deserts demands that defendants who successfully launch a societal fault defense receive a mitigated conviction or sentence because they do not bear the full moral blame for their proscribed conduct. In practice, though, the best place to work the distinction between moral and legal guilt, and a defense based on societal fault, into the current system of criminal law is in the sentencing phase of a trial. One reason for this is that downward adjustment of a conviction (as opposed to a sentence) would tend to be arbitrary and stunt the definitional goals of the relevant penal code. Strictly speaking, defendants would be convicted of an offense that they did not commit and get off for one that they did. These lesser convictions, then, would really only be operating as a proxy for shortened sentences or alternative forms of punishment. Thus, the more direct, and perhaps most pragmatic, way of providing for just deserts is to seek mitigated punishment during the sentencing phase rather than the liability phase of trial.

135. Renteln, supra note 111, at 443. Professor Renteln discusses the need for a middle ground between moral and legal guilt within the context of her argument in favor of an officially recognized cultural defense and the recognition of the role of motive in determining criminal liability. Although she does not directly discuss defenses based on societal fault, her distinction between the different types of culpability are clearly applicable to the arguments presented in this paper.

136. It is prudent to note here that the United States does not have a tradition of recognizing a defendant's socioeconomic background or life within a criminogenic
A nice way to conceptually view this argument is by analyzing cases involving defendants influenced by societal neglect along the same lines as civil law cases of contributory negligence. In a societal fault model, as with most contributory negligence schemes, the fault associated with a specific incident is divided between all of the parties involved according to the extent of each party's contribution. Under this framework, a defendant is partially exonerated if he can show that criminogenic environmental conditions resulted in his criminal act and that these conditions are chargeable to society. Retributivist and individualized justice are served through this approach, as the defendant is found culpable to the true extent that he deserves—no more, and no less. By allowing for a societal fault defense, and for the mitigated convictions and/or punishments of the individuals qualified for its use, analyses of criminal responsibility properly shift away from only examining the defendant and also take a good look at the role of the state in creating environments of neglect as well.

With the specific example of Southeast Asians, a defendant could establish a partial defense of societal fault in several different ways. He can point to any of the issues discussed throughout this Note such as resettlement by the government within poor and crime-stricken neighborhoods, limited educational and employment opportunities, and insufficient amounts of refugee and general welfare aid to implicate the U.S. government as a contributor to his criminal behavior.

C. Addressing Potential Criticisms

It would be prudent here to examine some of the possible objections that could be leveled against a defense of societal fault. Accordingly, in what follows, I will lay out and respond to two different sets of critiques. First, I

environment as mitigating factors during sentencing. In fact, multiple sections of the Federal Sentencing Guidelines specifically prohibit consideration of such environmental factors by judges. See, e.g., United States Sentencing Commission, Guidelines Manual, § 5H1.12 (Nov. 2004) ("[L]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure [from the otherwise prescribed level of punishment] is warranted.").

Such rules, however, do not affect the moral strength behind a defense based on societal fault. Moreover, several countries, including Sweden and Canada, do allow for the use of environmental deprivation-type defenses as a means to mitigate an individual's sentence. See The Swedish Penal Code, ch. 29 § 3(3) (Regeringskansliet 1999) (allowing for mitigation in cases where "the actions of the accused were connected with his manifestly deficient development, experience or capacity for judgment"); Canadian Criminal Code, Part XXII § 718.2(a) (Thomson & Carswell 2005) (enumerating five specific aggravating factors but placing no limits on what can constitute a mitigating factor). This suggests that such a defense is, in fact, practical and perhaps not as radical as some critics might feel.

137. Delgado, supra note 115, at 89.
138. Id.
will address criticisms based on notions of human agency. Second, I will respond to a number of challenges raised by Supreme Court Justice Clarence Thomas in one of his past publications discussing punishment and the implications of a societal fault defense. In doing all of this, I will discuss both abstract principles and also provide concrete examples through the Southeast Asian case study that I have been examining throughout this Note.

1. Agency Critique

In opposition to the criminal defense proposed above, it has been argued by Professor Stephen Morse that a person’s behavior is a matter of harder choices and easier choices, but that behavior is still always a matter of choice and individual agency. This line of thought posits that the environment is not all-determinative, pointing out that the majority of persons in the most criminogenic subcultures follow the law, while many people living in more privileged positions choose to break the law. Thus, individuals should be held responsible for all of their actions even if they grew up or live in conditions statistically shown to lead to criminal behavior. As Herbert Packer, another criminal law scholar has explained, “We regard those [environmental] constraints [on an individual’s actions] as too remote to justify an excuse on the ground that the person could not have helped acting as he did.”

However, even if growing up in a criminogenic environment does not in and of itself make an individual completely irresponsible for any criminal acts that he might commit, justice still requires that the state mitigate his conviction or criminal sentence in order to accomplish the retributivist goal of providing just deserts. Society’s contribution to criminogenic environments sharply limits its moral right to punish, as it is really partially responsible for the criminal acts of a defendant influenced by such an environment. It is true, as Morse argues, that some choices in life will always be harder than others. It is easier to refrain from committing robbery when one is rich and not poor. It is easier not to attack an individual for using a racial slur when one has never experienced racial discrimination than when one has grown up as a racial minority and experienced the various abuses of racism from an early age.

139. Morse, supra note 133, 1252.
140. Id.
141. Delgado, supra note 115, at 55.
143. In some instances, the established criminal law has even recognized and accepted this reality of easier and harder choices, as reflected by the provocation (reasonable heat of passion) excuse, which allows for the mitigation and partial relief of criminal responsibility.
government and society are to blame for creating the factors that make the choice to adhere to legally accepted norms of behavior significantly harder for one class of individuals than for another, though, they ought to take responsibility for this contribution. Punishing an individual completely for a criminal act he committed, in part because of his social conditioning within an environment of deprivation created or perpetuated by society, would violate the retributivist principle of proportionality. The defendant would be punished more than justice demands.

This idea is consistent with the philosophy of soft determinism. Soft determinists posit that although human actions are caused, they are not compelled. That is, while people usually retain some degree of agency and control over their actions, their ability to conform to the law and to make choices consistent with socially sanctioned codes of conduct can oftentimes be compromised or made much harder due to contact with various types of external restraints. As such, situations arise where an individual's actions, while not compelled by environmental factors, are nevertheless rendered not completely free either. In these cases, it might not be fair to hold such an individual 100% liable for his criminal conduct, particularly if the state is responsible for creating or perpetuating the external constraints that made the existence of a set of truly free choices unavailable to the defendant.

This discussion need not remain in the abstract. Much research on the Southeast Asian community has illustrated the very real ways that environments can affect an individual's agency. This research reveals that, for many Southeast Asians, and especially Southeast Asian youths living in criminogenic environments, it is often much easier to conform to local pro-crime norms than to the dictates of the law. In the study conducted by Bankston and Zhou, the authors found that the limited opportunity structures and strong presence of criminal sub-cultures in several Southeast Asian neighborhoods contributed significantly to the choice by the community's youth to behave antisocially and commit crimes. For these youths, their circumscribed educational and professional opportunities, as well as their early and consistent exposure to criminal elements, make it difficult for them to refrain from deciding to break the law.

144. Dressler, supra note 110, at 16-17 n.19.
145. Id.
146. Id.
147. See, e.g., Kent & Felkenes, supra note 43 (discussing the social and environmental roots of Southeast Asian gang activity).
148. See Bankston & Zhou, supra note 44, at 347.
In addition to the potential agency critique of a societal fault defense, Supreme Court Justice Clarence Thomas has raised a number of concerns, including one about the ability to define and limit the class of individuals that would be qualified to use such a defense. He argues:

Once our legal system [has] accepted the general premise that social conditions and upbringing could be excuses for harmful conduct, the range of cases that might prevent society from holding anyone accountable for his actions become potentially limitless. Do we punish a drunk driver who has a family history of alcoholism? A bigoted employer reared in a segregationist environment, who was taught that blacks are inferior? A thief or drug pusher who was raised in a dysfunctional family and who received a poor education? ... Which of these individuals, if any, should be excused for their conduct? 149

Although Justice Thomas' comment raises some legitimate concerns, he conflates cases based on the moral strength of societal fault with cases that lack this crucial factor. A defendant cannot just point to any set of social conditions that have influenced his upbringing, blame these conditions for his behavior, and expect to be exonerated for breaking the law. Rather, he must establish the presence of societal fault and some form of direct societal contribution to the creation of a criminogenic environment that has influenced his life and worldview, as well as society's role in placing him into, or erecting barriers to his exit from, such an environment. This is what distinguishes some hard choices to refrain from committing legally proscribed acts from others. For example, a White supremacist, with similar attitudes to the bigoted employer referred to by Justice Thomas above, might argue that it is extremely difficult for him not to commit crimes such as robbery, arson, or homicide when these actions involve Black or other non-White victims. He might argue that even though he recognizes that these acts are prohibited by state and federal law, his hatred toward non-White individuals is so strong that sometimes he cannot help himself. While this hypothetical individual can definitely point to his upbringing in a segregated community whose values conditioned him at an early age to maintain racist attitudes to explain his criminal conduct, he cannot, with any real legitimacy, blame society and the state for this upbringing. The link between this hypothetical indi-

individual's guilt in committing any of the above described crimes and any degree of societal fault is far too tenuous to allow for mitigated culpability based on the sharing of blame.

Society's contribution to Southeast Asian criminality, on the other hand, presents a different case, one which implicates a much more direct role on the part of the U.S. government. The U.S. government contributed significantly to the event—the Vietnam War—that virtually forced hundreds of thousands of Southeast Asians to flee their homes, many to the United States. Then, it effectively ensured that these Southeast Asian refugees and emigrants would lead lives of deprivation within criminogenic environments by placing them within economically depressed and crime-ridden communities. Additionally, it failed to establish effective English language or job skills training programs, and provided only the most limited forms of financial assistance to help the transition to life in America. As such, the U.S. government has played a direct role in creating a community of individuals whose characteristics have been statistically shown by social science research to contribute to criminal behavior.

In a different line of argumentation, Justice Thomas contends that a society that allows for a defendant who commits a harmful act to escape from punishment actually tends to condone or even endorse such behavior. Moreover, he suggests that a criminal justice system that does not hold people fully accountable for their harmful actions "treats them as less than full citizens." He asks: "When we demand something from our oppressors—more lenient standards of conduct, for example—are we merely going from a state of slavery to a more deceptive, but equally destructive, state of dependency?" In making these statements, Justice Thomas seeks to take the moral imperative away from those who advocate for the reconciliation of criminal and social justice through the adoption of a societal fault defense. Contrary to Thomas' argument that society would be condoning and even endorsing harmful conduct by allowing for the use of such a defense, the defense proposed by this Note would only act as a partial excuse. It does not seek to completely exonerate a defendant who has committed a proscribed act with the proper mental state required by the law. Rather, it simply wishes to provide for just deserts by allocating the degree of fault amongst those who deserve to share responsibility for the behavior of the defendant. The defendant does not "get away" with his crime. Thus, society does not condone and certainly does not encourage criminal conduct by choosing to take responsibility for its failures and shortcomings.

150. Id.
151. Id.
152. Id.
153. A detailed discussion on the partial nature of a defense based on societal fault was provided in Part III(B), supra.
Also, despite Justice Thomas’ claim that allowing for a societal fault defense would denigrate the human dignity and autonomy of the defendants involved by not treating them as individuals who are capable of taking full responsibility for their actions, it is really the way that contemporary American society treats its poor and uneducated population, most of whom live in criminogenic environments, that condemns them to second-class citizenship. Moreover, the way that socioeconomic inequalities currently circumscribe the realistic choices and opportunities available to the nation’s most needy communities certainly does not enhance or promote any realistic sense of individual autonomy.

Thomas tries to turn the societal fault argument around by saying that individuals are not truly free and dignified unless they take responsibility for all of their freely made actions. By doing so, he merely tries to mask the real moral issue: it is time for society to finally take responsibility for its actions. Individuals using a societal fault defense are not so much asking to be held to a lower standard, but rather are asking society to follow its own dictates and hold itself to a standard of moral responsibility as well. In the case of Southeast Asians discussed throughout this Note, defendants are not asking to be accorded special treatment. Instead, they only ask that society pay closer attention to the factors contributing to Southeast Asian criminality and take into account the various ways that it has contributed to the existence or salience of such factors.

D. The Criminal Trial as a Forum for Reform

One final argument in support of a criminal defense based on society’s contribution to criminogenic environments is that the presentation of evidence in line with such a defense would draw attention to America’s troubling social problems, including poverty, racism, and delinquency among ethnic youths.154 Most Americans do not understand the complexity of the criminal responsibility issue, nor do they appreciate the community’s degree of responsibility for the criminal acts and for the rehabilitation of an actor.155 Allowing defendants to utilize a defense premised upon societal fault addresses these problems. With the case of Southeast Asians, it would help deconstruct the myth of the model minority and bring into the public conscience the needs of a community whose struggles in the U.S. have been largely marginalized and ignored.

As Delgado notes, “if the criminal law reflects and reinforces a system of morality, then a criminal trial is an obvious and appropriate place to apply, test, and develop that morality.”156 Or put another way, the crimi-

154. Delgado, supra note 115, at 21; See Bazelon, supra note 1, at 396.
155. See Bazelon, supra note 1, at 391.
156. Delgado, supra note 115, at 79.
nal justice system has "first line responsibility" for inquiring into and educating the public about the intricacies of criminal responsibility and the various causes of crime. Accordingly, trials should allow for the probing of issues that reveal to the community the mental agonies and difficult circumstances that produce antisocial and violent behavior. A truly moral criminal justice system does not aim solely to punish criminal acts but also to promote social justice as well. Thus, a powerful reason for allowing for a criminal defense based upon societal fault is that it would allow the court and society to take a good look at the community that they are living in and that they have helped create, either directly or through inaction. This, in turn, might serve as an impetus for reform.

Use of a societal fault defense can educate the community on the difficult conditions of those living in criminogenic environments by directly influencing the jury or judge in a trial, and through public exposure provided by media coverage of such trials. It can help lead to the advancement of public policies designed to ameliorate the various problems plaguing the poor—overcrowded housing, inadequate education, unemployment, and other similar crises. The use of a societal fault defense will force society to ask itself this difficult question posed by Professor Kadish: "What policies would the nation be obliged in good conscience to pursue toward ameliorating the criminogenic conditions of life for inner city offenders in order to make punishing them morally sustainable?"

The educational element of a societal fault defense would apply perfectly to the struggles of many Southeast Asians. Mainstream society has often viewed all Asians as a monolithic model minority community. Consequently, most Americans are not fully aware of the plight of a large segment of the Southeast Asian population living in the U.S. These individuals often read or hear stories about Asian American academic success. More rarely do they learn about the rising rates of Southeast Asian juvenile arrests over the last decade; the large number of Southeast Asians living in poverty, struggling in schools, and dependent on limited welfare assistance; or the growing involvement of Southeast Asian youths in gangs. While not a perfect solution, permitting defendants to tell their stories within the courtrooms will allow for the education of at least the local community where a case has drawn some public attention. As one Laotian youth intervention worker from Minneapolis has noted: "The Southeast Asian community is not seen in the newspaper, [or] on TV, so you think they are OK. They are not OK."

158. Id.
159. See Bazelon, supra note 1, at 385.
160. Kadish, supra note 142, at 962.
It is discouraging that one of the only ways that Southeast Asians can make it into the public conscience, and have their community issues discussed within the media, is through the criminal trial of one of their members. Nevertheless, if telling the Southeast Asian emigrant experience through the use of a societal fault defense can serve the purpose of educating the public, this is just one more reason why it is important to encourage the use of such a defense among Southeast Asian defendants and why the criminal law should recognize its validity.

**CONCLUSION**

The criminal defense discussed in this Note is not, and should not be viewed as relating only to Southeast Asians. Rather, the Southeast Asian experience serves as just a prime example of what a strong case of societal fault would look like. Adding the notion of societal fault into the determination of an individual’s degree of criminal responsibility will affect people from all different groups and communities defined by race, socioeconomic status, nationality, social geography, and the like. To some critics, this is the critical flaw with this Note’s suggestions and arguments. The American experience will be a moral failure, though, if it succumbs to the notion that a defense based on societal fault cannot practically be implemented because too many people would be able to use it. What sort of society does such a critique reflect? Simply because a large number of people could potentially take advantage of a societal fault defense to mitigate their punishments does not mean that this defense, or the normative concepts behind it, should be dismissed. Rather, the best way that the U.S. can prevent the societal fault defense from ever being used is by providing more adequately for all Americans’ social well being. This is not to say that everyone living in America ought to be equal in standing and stature; this Note does not present an argument in favor of a modern day utopia. It merely suggests that the U.S. needs to do a better job at addressing the very real problems that millions of Americans suffer from each day, many of which derive from poverty and the lack of basic resources. A good faith effort is all that is required. In many instances, however, this simple effort has not been provided.

In the end, the criminal defense presented here does not just attempt to correct a flaw within the criminal law. Its deeper mission is to attack and expose the more general problems with American society's attitude and treatment of its marginalized communities. Today, roughly 35.9 million Americans live in poverty. At the same time, the American

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prison population has swelled to over 2 million.\textsuperscript{163} One out of every 142 U.S. residents now lives in a prison cell.\textsuperscript{164} Despite all of the prosperity that this country enjoys, much is left to be desired. Both poverty and prison statistics will only continue to rise unless America decides to finally address its problems straight on with real solutions, rather than just the politically exigent ones. Perhaps tending to the issues confronting America's poor and socially deprived will produce a more effective, \textit{ex ante}, solution to crime. It would definitely reduce the number of people living in poverty. Americans need to closely examine the society that they live in and realize how much better off they could be. At the very least, they could be living in a community where crime is not such a major issue, and where more people can live in homes rather than on the streets or behind bars.


\textsuperscript{164} \textit{Id.}