

ADOLESCENCE, CONTEXT, AND CULPABILITY: SOME
THOUGHTS ON THE NEXT ESSAY

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After reading “Context and Culpability in Adolescent Violence,” it is extremely difficult to deny the case that Professor Jeffrey Fagan has made for the integral nature of violence in the lives of adolescents—especially young males—in the inner city. Professor Fagan makes clear that violence is not only a daily occurrence in the lives of these young people, but he also explains persuasively that participation in violence is practically unavoidable. Professor Fagan’s work demonstrates that violence is “normative” in the lives of inner city adolescents in many contexts. This means that in many cases violence by inner city teens is *typical*.

Demonstrating the typicality of inner city teen violence is only the first part of Professor Fagan’s thesis, as the demonstration inevitably leads to the next question. Once we are convinced that violence is normative for adolescents in many contexts, what do we do about it? Professor Fagan explores in part IV of his essay one potential answer: The possibility of excuse from criminal liability in cases where it can be shown that violence is a typical and predictable response for teens in certain contexts. He concludes that a case can be made for excusing these teens from criminal liability.

Excusing a criminal offender because of his “rotten social background” (RSB) is not a novel concept. The notion gained prominence about twenty-five years ago.¹ Thus, in making his case, Professor Fagan covers some familiar ground. But, importantly, Professor Fagan adds something new to the argument that revives the debate surrounding the excuse. Specifically, he constructs an argument for the validity of considering an offender’s

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¹ See *infra* notes 2-19 and accompanying text.

background in determining whether the offender should be excused.

By using the framework of context, Professor Fagan refines the analysis behind RSB and makes a much stronger case for considering RSB (or “Social Toxins,” as he refers to the refined framework) in determining whether an excuse should be available to an offender. But has Professor Fagan developed a strong enough case to overcome the flaws that have already been identified with respect to RSB as an excuse? This Comment explores that question in three parts.

The first part of the Comment summarizes excuses from criminal liability based on RSB. Part I then discusses the important distinctions between RSB and Professor Fagan’s Social Toxins model. The Comment next considers the primary arguments against implementing RSB as an excuse in order to determine whether the Social Toxins model can overcome these arguments. The Comment concludes that while the Social Toxins model is superior to RSB as a theory of excuse, it still fails to clear the biggest hurdle to implementing an excuse based on the link between social and economic conditions and violence-promoting norms—concern for public safety. However, while an excuse from criminal liability based on the Social Toxins framework, like an excuse based on RSB, deals inadequately with very real public safety concerns, the Social Toxins framework as explained by Professor Fagan provides a compelling argument for diminished punishment for juveniles, as distinct from an excuse from criminal liability. I conclude the Comment by exploring this point.

I. ROTTEN SOCIAL BACKGROUND AND SOCIAL TOXINS

Professor Fagan’s exploration of violence in context covers somewhat familiar ground. He marshals a wealth of information to establish the interactionist dynamic between the actor and his surroundings that lead to violent incidents in the inner city.

Judge David Bazelon covered similar ground in the now-famous case *United States v. Alexander*.² In *Alexander* the defendant, Murdock, an African-American, shot and killed an unarmed,

² 471 F.2d 923 (D.C. Cir. 1973).

uniformed, white Marine after the Marine and his colleagues abused Murdock and his friends with racial slurs.³ The defense offered evidence to demonstrate that Murdock's conduct was not a product of deliberate choice, but rather was the product of an emotionally and economically deprived childhood in which he was commonly subject to racist incidents and was conditioned to hate white people. As a result of this background, the defense sought to argue that Murdock was psychologically incapable of committing the charged crime.⁴ The jury disagreed, however, and found Murdock guilty of murder in the second degree. Murdock appealed.

Specifically relevant here is Murdock's appeal of the trial court's instructions which seemed to instruct the jury to disregard evidence relevant to Murdock's "rotten social background," a factor that Murdock considered critical to his case. Over the defense's objection, the trial judge instructed the jury:

We are not concerned with a question of whether or not a man had a rotten social background. We are concerned with the question of his criminal responsibility. That is to say, whether he had an abnormal conditional of the mind that affected his emotional and behavioral processes at the time of the offense.⁵

A majority of the appellate court found no error in the trial court's decision.⁶ Judge Bazelon, however, dissented. He argued that the trial judge's statement had the effect of telling the jury to disregard testimony offered by the defense concerning the defendant's economic and social background and to consider only evidence relating to "mental illness" before it could find diminished responsibility for the crime on Murdock's part.⁷

³ Id. at 928-29.

⁴ Id. at 958-59.

⁵ Id. at 959.

⁶ The majority stated:

The bare words used [by the court] are not a faulty statement of the law. They remind the jury that the issue before them for decision is not one of the shortcomings of society generally, but rather that of appellant Murdock's criminal responsibility for the illegal acts of which he had earlier been found guilty.

Id. at 968.

⁷ Id. at 960.

Judge Bazelon noted that the court's test demanded an "abnormal condition of the mind," but nothing about that demand required an organic condition or psychosis.⁸ Murdock asked the jury to conclude that his RSB impaired his mental processes and behavioral controls, and Judge Bazelon concluded that his claim was one that should not be excluded by an "artificial and misleading excursion into the thicket of psychiatric diagnosis and nomenclature."⁹

By framing the issue in this way, Judge Bazelon opened up the diminished responsibility defense. Rather than making mental illness the primary consideration, Bazelon adopted a more psychosocial approach, arguing that Murdock's background may well have impaired his ability to control himself, much in the same way that a paranoid schizophrenic might find herself unable to exert meaningful control over her actions.

Although Judge Bazelon sympathized with Murdock's reasoning, he was less certain about what should be done if it were found that a defendant affected by RSB actually lacked of self-control such that he could not be held responsible for his actions. Judge Bazelon concluded there were four unattractive alternatives. The first was simply to impose narrow limits on the responsibility defense to insure that defendants such as Murdock will not be acquitted on a theory of diminished responsibility.¹⁰ Second, we could allow defendants such as Murdock to assert the defense and be released from custody in spite of their apparent dangerousness.¹¹ Third, we might conclude that even though defendants such as Murdock clearly are not insane in the conventional sense, it might be necessary to confine them for therapeutic reasons because they are too dangerous to be released.¹² And last, assuming there is no way to "cure" someone affected by RSB, we might decide it best to detain involuntarily such persons for their own good—and ours.¹³

⁸ *Id.*

⁹ *Id.* at 961.

¹⁰ *Id.* at 962.

¹¹ *Id.* at 963.

¹² *See id.*

¹³ *See id.* at 964.

Judge Bazelon came to no definitive conclusion in *Alexander* about what should be done with defendants such as Murdock, other than to muse about whether income redistribution and social reconstruction are the only real answers to the problem of violent crime.¹⁴ Neither did he come to a definitive conclusion in his subsequent writings on the issue.¹⁵ He did argue in these writings that punishment was not justified when a person cannot be morally condemned, and he used the example of Murdock to illustrate a case in which society should not be entitled to punish.¹⁶

Judge Bazelon's articulation of RSB as an excuse from criminal liability was subject to criticism,¹⁷ which will be addressed below in greater detail. The criticisms of RSB as a basis for excuse are useful to evaluate Professor Fagan's Social Toxins framework as a basis for an excuse. However, it is first necessary to distinguish the notion of an excuse based on RSB from an excuse using Professor Fagan's notion of Social Toxins.

The primary distinction between RSB and Social Toxins is the greater specificity of the Social Toxins claim and its tighter connection to particular violence producing contexts. The defendant who claims an excuse based on RSB relies on a presumed connection between environmental adversity and criminal behavior. However, because there need not be a direct connection between environmental adversity and the criminal act in question—a point which the facts in *Alexander* clearly demonstrate—an excuse theory based on RSB impels explanation of the many law abiders who are exposed to the same conditions on which the claimant of RSB would like to rely to demonstrate that he had no control over his actions. This is obviously a difficult proposition.

Professor Fagan's Social Toxins argument is more restrictive. As Professor Fagan explains, the Social Toxins framework re-

¹⁴ Id. at 965.

¹⁵ See David L. Bazelon, *Questioning Authority: Justice and Criminal Law* (1988); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. Cal. L. Rev. 385 (1976) [hereinafter Bazelon, *Morality of the Criminal Law*]; David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. Cal. L. Rev. 1269 (1976).

¹⁶ See Bazelon, *Morality of the Criminal Law*, supra note 15, at 389.

¹⁷ See Michael S. Moore, *Law and Psychiatry: Rethinking the Relationship* 224 (1984); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. Cal. L. Rev. 1247 (1976).

quires attention to: “(1) the characteristics and dynamic processes of the context itself; (2) the status and position of the individual within that context; (3) and the interactions of the two.”¹⁸ In contrast, RSB clearly implicates the first factor, but not necessarily the latter two factors. The Social Toxins claim is much more specific and, therefore, winnows out more cases. As it is much less widely available to just anyone exposed to social and economic adversity, it is presumably a better predictor of those who really do not have a “choice” about engaging in violence in the relevant context.

Professor Fagan’s explanation of guns as social toxins makes clear the greater specificity of the Social Toxins framework as compared to RSB as an excuse from criminal liability. Professor Fagan explains that inner city gun violence presents immediate threats to those caught up in the relevant context, a reasonable belief that use of a gun is necessary in the situation, and a reasonable belief that withdrawal from the situation without resorting to violence is impossible. In this way, Professor Fagan suggests, all of the prerequisites to a legal excuse under the Model Penal Code have been met if the Social Toxins framework is fulfilled. And so it follows that those exposed to social toxins should have access to such an excuse in cases in which they have been charged with a serious crime.

This discussion is useful—and persuasive. If the primary objection to the use of RSB as an excuse is the perceived inability to validate the social science that lies behind it, as Professor Fagan suggests in his article, Professor Fagan’s work demonstrates that this concern should be much less pressing. However, validity of the social science underlying RSB as an excuse is not the only concern that has been lodged against the theory. It is only one of the objections to the use of RSB as a defense. And one suspects it is very possibly a chimera.

II. OBJECTIONS TO THE NOTION OF ROTTEN SOCIAL BACKGROUND AND THEIR APPLICATION TO THE SOCIAL TOXINS FRAMEWORK

When Judge Bazelon’s defense of RSB was introduced, there were, predictably, a number of critical responses. The objections

¹⁸ Jeffrey Fagan, *Context and Culpability in Adolescent Violence*, 6 *Va. J. Soc. Pol’y & L.* 507, 573 (1999) (citations omitted).

to the RSB proposal addressed arguments of principle and practical concerns.¹⁹

There are at least two arguments based on principle against the use of an excuse based on RSB: (1) such a position assumes that the defendant asserting that he is affected by RSB lacks free will, and (2) treating competent persons as if they are not capable of autonomy and choice is to treat them as less than human. How does the framework fare against these arguments? Much better, I think, than the original RSB theory does.

Professor Michael Moore, the primary proponent of the Free Will critique, argues that an assumption of lack of free will is inconsistent with the "larger set of judgments about responsibility [of adults] that we make in daily life."²⁰ To the extent that there are objections to RSB because it is inconsistent with an assumption of free will on the part of human beings, Professor Moore may just be wrong. It *may well be* that the ability to make free choices of those who grow up in extremely deprived conditions *has* been compromised and deformed. Whether or not this is the case, Moore's argument is certainly stronger when the decision-maker in question is an adult and not an adolescent.

According to Professor Fagan's framework, the fact that the decision-maker in question is an adolescent is a critical factor to consider in deciding whether the situation in question presents the proper context to find that the actor was compelled to act violently. RSB is not similarly restrictive, and, therefore, is much more easily subject to Moore's criticism. It is difficult to believe that Moore's argument would remain the same if the decision-maker he imagines in his critique is not an adult, as Moore's assumptions about the free will of the decision-maker are simply inconsistent with what Professors Laurence Steinberg and Elizabeth Cauffman make clear about the developmental capacities of children and adolescents.²¹ Adolescents are *not* adults, and we do

¹⁹ See generally Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* 136-39 (1995); Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 *L. & Ineq. J.* 9 (1985).

²⁰ Tonry, *supra* note 19, at 142 (quoting Moore).

²¹ See Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 *Va. J. Soc.*

not—or we should not—ascrbe to them the same level of free will that we ascribe to adults.

Note, however, that in order for the Social Toxins framework to overcome the Free Will critique that excuses based on RSB seem unable to surmount, one must be convinced that the developmental component is a critical piece of Professor Fagan's argument. Professor Reppucci takes up this issue in greater depth in his Comment, so I will not belabor the point here. But one might think that the demand for actors in the inner city to act violently is not confined to adolescents. Certainly the descriptions that Professor Fagan offers as to the prevalence of guns and the demand for certain behaviors in order to protect oneself in public are just as pressing for older youths and young adults as they are for adolescents.²² If this is right, then the Social Toxins framework is not as confined as Professor Fagan claims that it is, which undermines its validity. To stop here would prevent exploration of the rest of the arguments. With this caveat, I will continue my discussion on the assumption that the developmental link is strong and that there are few strong arguments against the validity of the framework.

The next argument of principle to be addressed is the idea that treating competent persons as if they are not capable of autonomous choice is to treat them as less than human. This is the "paternalism" critique against an excuse based on RSB. The strength of the paternalism critique depends, however, on whether one is talking about adults or children.

The repugnance of treating a competent person as if he or she lacks the autonomy to choose even in situations in which social and economic deprivation affect decision-making certainly depends on whether the competent person is an adult or a minor. Professor Kadish, arguing against an excuse on the basis of RSB says as much in the following statement:

It may be conceded that cultural deprivation contributed to making the defendant what he is
But what is he? He is a person with wrong values

Pol'y & L. 389 (1999).

²² See, e.g., Elijah Anderson, *StreetWise: Race, Class, and Change in an Urban Community* (1990) (explaining that the streetwise code of conduct is adopted by both youth and older men).

and inclinations, not a human being whose powers of judgment and rational actions have been so destroyed that he must be dealt with like an infant, a machine, or an animal.²³

In this Volume we begin with a persuasive explanation of how adolescents are different from adults.²⁴ To the extent that these findings are true, the paternalism arguments evaporate because adolescents *are* more like “infants” than adults.

The fact that the Social Toxins framework, as Professor Fagan presents it, deals primarily with adolescents weakens the arguments of principle against the RSB defense. But what about the practical arguments against an excuse based on RSB?

The main practical argument originally lodged against RSB when Judge Bazelon first introduced it is very much related to the validity problem that Professor Fagan spends a great deal of time addressing in his paper. For example, according to Professor Stephen Morse, an excuse based on RSB, is incoherent when so many individuals do not commit crime even though they are exposed to the same background as those who attempt to claim the RSB excuse.²⁵ Professor Fagan acknowledges this problem (the ecological fallacy), but he demonstrates how the Social Toxins argument works to help us better distinguish between those individuals who can't control their actions and separate them from those who won't.

Interestingly, even without the detailed work that Professor Fagan has done to seriously undermine the claim that a majority of those who are exposed to RSB end up being law abiders, there is broader data available that should make us skeptical of such a claim. For example, Michael Tonry observes that when the objections to Judge Bazelon's arguments were first lodged in the 1970s, the data supported the assumption that a majority of persons exposed to RSBs were law-abiding persons.²⁶ Today these data are much more accessible, and they present a different picture. It is still true that a majority of the residents of high crime neighbor-

²³ Sanford H. Kadish, *Blame and Punishment: Essays in Criminal Law* 103 (1987).

²⁴ See Steinberg & Cauffman, *supra* note 21.

²⁵ See Morse, *supra* note 17, at 1259.

²⁶ Tonry *supra* note 19, at 138-39.

hoods are “lawabiders,”²⁷ but this claim depends on considering *every* resident of the neighborhood whether old or young, male or female. If we confine our inquiry to the group we are really concerned about—young minority males—evidence suggests quite high levels of criminal involvement. As Michael Tonry suggests there is a distinct possibility that 80 percent of the young men in certain inner city neighborhoods will be arrested for a nontrivial offense by the time they are 18 years old.²⁸

Of course, once we can demonstrate that there *are* quite high levels of criminal involvement among certain subsections of populations affected by RSB or Social Toxins, we have undermined one of the practical complaints against excuses based on these theories. To this point, then, the case for an excuse based on Social Toxins appears to be stronger than the case for an excuse based on RSB.

Nevertheless, there is one last practical argument typically lodged against the use of RSB as the basis of an excuse from criminal liability. It is the public safety argument, and it is, I fear, fatal to *both* RSB and the Social Toxins framework as bases for excuses. Although Professor Fagan suggests that the primary hurdle to adoption of RSB as an excuse from criminal liability has been the inability of researchers to validate the argument, I believe that the public safety argument, and the political considerations that are bound up with it, are the real story behind the reluctance to adopt RSB (and by analogy Social Toxins) as an excuse.

The essence of the public safety argument is this: Suppose we can show with great certainty that many adolescents charged with violent crimes were forced into violent conduct such that it becomes very difficult to argue that they should be blamed for the conduct under typical criminal liability principles. What then? In the paradigmatic lack of capacity case, a case of legal insanity, we would conclude that the offender should not be punished because

²⁷ The notion of law abiding in the inner city is a complex phenomenon. Many of those who do not technically break the law both encourage and rely on those who engage in lawbreaking in the more technical sense of the word—often out of perceived necessity. See Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 *Am. Crim. L. Rev.* 191 (1998); Tracey L. Meares, *Place and Crime*, 73 *Chi.-Kent L. Rev.* 669 (1998).

²⁸ Tonry, *supra* note 19, at 139.

of her lack of capacity. However, any concerns that her inability to control her actions would impact public safety would be minimal because this offender would also be subject to civil commitment, as Judge Bazelon aptly notes in *Alexander*.²⁹

Certainly that analysis does not apply to the adolescents Professor Fagan describes in his detailed exposition of the Social Toxins framework. There is no argument that social toxins completely deprive them of reason or makes them insane. In fact, the conclusion is quite the opposite. Following Professor Fagan's argument, one must conclude that a very rational adolescent affected by social toxins will very reasonably, in the right circumstances, resort to violence in a way that is very predictable. Once a person like this is acquitted, it seems that the only alternative is to send him or her back home—and back to the streets—to engage, predictably, in violence again.

Recall that a major problem that Professor Fagan identifies regarding the success of an excuse based on RSB is the weakness of the theory in predicting criminality given exposure of the defendant to terrible social and economic background condition. Of course, our ability to predict criminal behavior based on someone's exposure to an RSB is directly correlated to the strength of our concerns about public safety. If we are unsure that exposure leads to criminality in the first place, we must also be unsure that acquittal will lead to more criminality. The paradox of the Social Toxins argument, however, is that its greater validity in separating those who are compelled to engage in violence from those who wantonly choose to engage in violence is the very reason why the public safety argument comes into play. Demonstrating that the defendant's conduct is normative is not the same as demonstrating that it is reasonable.

If the problematic nature of this paradox is not already obvious, consider the excuse doctrine of battered women's syndrome (BWS), which Professor Fagan argues is very similar to an excuse based on his Social Toxins framework. Professor Fagan argues that the reason why battered women's syndrome is accepted and RSB (and perhaps his Social Toxins argument) is not is simply a

²⁹ See 471 F.2d at 961.

matter of crude politics. Battered women, he says, are a politically attractive group, while the minority inner city teens who will be able to take advantage of the RSB/Social Toxins argument are not.

There is no doubt some truth in Professor Fagan's statement that the willingness of the criminal justice system to accept BWS is in part due to the political attractiveness of women victims as a group. But we should consider why this might be so besides the obvious racial and gender differences between the two groups. The public safety concern helps to illuminate the substance behind the likely political resistance to Social Toxins as a defense.

In the public's mind there is simply less to fear from the woman released as a result of BWS than there is to fear from youth affected by social toxins. There are data to back up this assumption. First, women, as a group, tend to be less involved in violent crime than the typical offender who would benefit from social toxins (young men).³⁰ Second, consider the very nature of the crimes for which women who are able to avail themselves of BWS are excused. The violence of the woman who claims BWS is both situation *and* person-specific—unlike the violence of the youth affected by social toxins. That is, women who are battered typically try to avail themselves of an excuse when they have been charged for a crime against their batterer—a person who is obviously easily identifiable, as the very definition of the crime presumes that the offender (the battered woman) and the victim (the batterer) had a previous relationship. In fact, one suspects that once a woman in a domestic violence situation extricates herself from that situation through violence, there is little need to fear that she will be violent again.

I anticipate that Professor Fagan's response would be that the adolescents to which Social Toxins apply, like women who avail themselves of BWS, *do* engage in person and situation specific violence. It is true that *categories* of situations and victims are identified by the Social Toxins framework, but categorical specificity is not the same as the individual specificity present in BWS cases. The spectrum of people who threaten violence to the individual affected by social toxins is certainly much broader than a

³⁰ See generally U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1997* (Kathleen Maguire & Anne L. Pastore, eds. 1998).

single domestic partner, and the situations and contexts are also more varied. There are, therefore, many more possible violent events and many more persons that are potentially exposed. Adolescents affected by social toxins almost certainly will be involved in violence again if we are to accept Professor Fagan's argument. Given the outlines of the argument, we cannot be sure whether the released youth will be an offender or a victim in the future. All we know for sure is that the youth is very likely to be involved in violence in future. It seems very irresponsible to ignore this reality.

This brief exploration of the public safety issue suggests that the predicted lack of political acceptance of an excuse from criminal liability is about much more than perceived political unattractiveness of the defendants. Instead, the resistance to such an excuse is much more likely based on simple fear of crime. Given high crime rates in inner cities, we might expect those who are the most resistant to complete acquittal based on a Social Toxins excuse to also be the potential victims of the adolescents affected by social toxins—and the families who try to protect them.

These issues are complex. They also are value laden. Unlike Professor Fagan, I cannot conclude that we must resort to neutral judgments—such as social science—more than moral judgments or political movements to sort them out. Ultimately, the neutral judgment grounded in social science is too mechanistic and too thin to do the complicated work of dissecting judgments of reasonableness. Social science demands only that we conclude that a particular defendant lacks voluntary choice in making the decision about whether to engage in violent conduct before we hold him accountable. Professor Fagan is correct that such a conclusion is all that the Model Penal Code appears to require, but there are numerous cases that suggest that application of the “law on the ground” does not accord completely with the Code.

III. SOCIAL TOXINS AND THE CASE FOR MERCY

Professors Kahan and Nussbaum have provided an excellent account of the limitations of the Model Penal Code's mechanistic

conception of excuse defenses.³¹ They demonstrate that a richer account of emotional behavior is necessary in order to explain what happens in cases involving excuse as a result of duress. They note, for example, that a mechanistic view, which focuses primarily on voluntariness, does not adequately explain why courts will treat differently a defendant in a case in which she is threatened with a severe beating if she fails to participate with her domestic partner in an armed robbery differently from the defendant in a case in which she is threatened with a severe beating if she attempts to shield her child from physical abuse by her domestic partner.³² Courts have provided the first defendant with a legal excuse from criminal liability, but not the second.³³

Looking to a pure voluntary choice model, it is difficult to see why these cases should come out differently. In each case the woman in question faces the exact same amount of pressure—pressure that could lead to a finding of duress. But when evaluative judgments of the choices made in each case are taken into account, it is easier to see that society believes it appropriate to consider not only the voluntariness of actions, but also the levels of self-love and love for family members that the defendants in the cases I have just described demonstrate. If such evaluations typically take place in BWS cases, it is difficult to see why they would not—or should not—take place in cases involving defendants affected by social toxins.

Does the previous argument mean that consideration of social toxins have no place in assessment of criminal responsibility and punishment? I do not believe so. Importantly, Professors Dan Kahan and Martha Nussbaum suggest that the best place to take into account the concerns that Professor Fagan raises is at sentencing rather than the liability stage.³⁴ The authors explore at least three reasons why the evaluative conception of criminal suggests that those who are not completely responsible for their own characters—individuals not unlike the adolescents Professor Fagan describes as being affected by social toxins—should be granted

³¹ See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269 (1996).

³² *Id.* at 333-337.

³³ *Id.* at 335 (comparing two cases).

³⁴ See *id.* at 368-69.

mercy at sentencing rather than, as Professor Fagan suggests, at the liability stage. Kahan and Nussbaum use the particularly poignant case of Bigger Thomas, the main character in Richard Wright's *Native Son*, to illustrate their point.

We understand clearly that Bigger has committed two terrible crimes, and we also understand very clearly how Bigger came to be what he is. Kahan and Nussbaum argue that *we*, not Bigger, created his situation, so how can we blame him for his bad character?³⁵

The authors argue for a two-step process that they claim is common in both legal and non-legal contexts. In the first stage, they state, we appraise the quality of a person's actions, including her emotional motivations, without much concern for issues of responsibility.³⁶ At the second stage—where we are concerned about her responsibility—we become much more intensely interested in issues of character formation.³⁷

Why two stages? At least three reasons are relevant to this discussion. First, and foremost, to excuse from liability the adolescent who commits serious violent acts in the inner city—often against other teens, who are sons, brothers, and fathers of others in the community—expresses a negative view of the value of the victim. Certainly, if the same teen were killed outside a neighborhood in which social toxins were rampant, the offender would suffer some punishment. It seems repugnant that the inner city teen should escape any official condemnation at all. Second, basic deterrence theory suggests that punishment might encourage youths to avoid the situations in which violence often is inevitable. This alternative appears especially likely given Professor Fagan's persuasive argument that adolescents affected by social toxins *rationally* choose violence. Third, and finally, extending mercy, while condemning acts as inappropriate, is an unambiguous signal that the defendant has compromised choice and does not deserve the type of punishment we might think appropriate were he completely responsible for forming his character himself.

³⁵ Id. at 366-67.

³⁶ Id. at 366.

³⁷ Id. at 366-67.

Importantly, extending mercy in sentencing to the youth affected by social toxins can be accommodated fairly easily by the existing juvenile justice structure. No doubt proponents of the Social Toxins framework as an excuse doctrine will find it most attractive in those cases in which a juvenile is likely to be transferred to adult criminal court. Certainly the doctrine would seem to have its greatest applicability there, as youth homicides are the category of cases most likely to be transferred.³⁸

Professor Franklin Zimring has offered a very persuasive argument that such cases are the most likely to be transferred precisely *because* transfer is really a sentencing option as opposed to a judgment about a youth's amenability to treatment. In light of Professor Zimring's work, let me suggest that although Professor Fagan has not made a complete case for the use of Social Toxins as a legal excuse from liability, he has made a persuasive case for mercy in sentencing. A sentence reduction for the youths in question here would mean retention in juvenile court, rather than transfer out of it.

The next step is development of treatment programs that help teens extricate themselves from situations that promote violence. But exploration of that issue is for the *next* essay.

³⁸ See Franklin Zimring, *The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts*, 6 Va. J. Soc. Pol'y & L. 437 (1999).

CONTEXT, BUT NOT DEVELOPMENT: COMMENTS ON
FAGAN'S "CONTEXT AND CULPABILITY IN
ADOLESCENT CRIME"*

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As a community psychologist, I am truly delighted to see the emphasis that Professor Fagan has put on context as a critical variable in human behavior. It is an emphasis that community psychology has advocated since the field's development in the 1960s, in no small part because of community psychology's birth from sociology and social and clinical psychology. Moreover, as a developmental psychologist, I consider it of the utmost importance to understand the impact of context at various developmental periods, in this case, adolescence. Also, the descriptions of life on the streets in the neighborhood are extraordinarily rich in ethnological detail that provide much justification for all that Professor Fagan theorizes. The purpose of this Comment is to consider the most important strengths and weaknesses of his arguments. Let me begin by providing a brief historical account of the importance to psychology of what has been called the ecological perspective, which emphasizes the concept of person-environment fit.¹ I do this in an attempt to show how Professor Fagan's ideas about context fit into this stream of psychological thought. Kurt Lewin, considered by many to be the "father of social psychology", more than 50 years ago suggested the need for a "psychological ecology" that was based on one of the simplest but most important general formulations in psychology; that is, behavior is a function of the per-

* The Remarks in this Comment are based on Professor Fagan's conference paper, not the published essay.

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¹ See Kurt Lewin, *Field Theory in Social Science: Selected Theoretical Papers*, 170-171 (1951).