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DELGADO REPLIES

by: Richard Delgado*

In *Outside Inside*, Frank Michelman gives me a pat on the back for two articles setting out the case for a rotten social background (“RSB”) defense.¹ Ultimately, however, my efforts, in his eyes, at best amount to the proverbial good old college try. Because of a host of “establishment concerns,”² mainstream judges will shy away from it, even in the most compelling cases. Unless criminal defendants qualify for an accepted defense such as insanity or diminished capacity, judges will see a severely deficient childhood as bearing only on the morality of punishment, not its legality.³

Michelman’s tone is friendly and sympathetic, with a leavening of amused doubt.⁴ He misreads the times. Society—although perhaps not at Harvard—is engaged in a thoroughgoing reappraisal of the criminal justice system, ranging from punishment for drug offenses,⁵ aggressive policing,⁶ racial profiling,⁷ sentence lengths,⁸ prison conditions,⁹ and even criminalization itself,¹⁰ starting with recreational

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1. Frank I. Michelman, *Outside Inside*, 10 TEX. A&M L. REV. 619 (2023) (discussing Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1 (2011) [hereinafter Delgado, *Wretched*], and Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985) [hereinafter *Rotten*]).

2. Michelman, *supra* note 1, at 626.

3. *Id.* at 625.

4. *See, e.g., infra* notes 27, 30, 41, 44, 48, 52 and accompanying text (discussing Michelman’s bemused tone). This is the second time Michelman has had a go at it. *See* Frank Michelman, “RSB,” *the Social Contract, and a Bridge Across the Gap: Delgado Talks to Rawls*, 33 LAW & INEQ. 417 (2015). “RSB” is a frequently used abbreviation for “rotten social background.”

5. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 59–62 (rev. ed. 2012).

6. *E.g.,* PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 47–56 (2017).

7. *See* *United States v. Leviner*, 31 F. Supp. 2d 23, 24–33 (D. Mass. 1998) (declining to apply a federal three-strikes law to an African-American defendant whose prior convictions were automobile-related and possibly tainted by overzealous police enforcement).

8. *See* *2014 Rule Shortens Sentences for 26,000 Inmates*, U.S. CTS. (Apr. 14, 2016), <https://www.uscourts.gov/news/2016/04/14/2014-rule-shortens-sentences-26000-inmates> [https://perma.cc/7U5V-3PPD]; *see also* Phillip Atiba Goff, Essay, *The Root Cause of Violent Crime Is Not What We Think It Is*, N.Y. TIMES (Dec. 12, 2022), <https://www.nytimes.com/2022/12/12/opinion/crime-policies-cities.html> (urging shorter sentences).

9. *See* JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* (2014).

10. *See* Richard Delgado, Essay, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 517–31 (1994) (pointing out structural inequities in treatment of white-collar and ordinary offenses).

drugs and lifestyle offenses such as loitering on street corners.¹¹ Reformers like Michelle Alexander are writing books like *The New Jim Crow* that sell a million copies.¹² Others are questioning the very basis of policing and incarceration.¹³

My two articles take as springboard Judge David Bazelon's dissenting opinion in *United States v. Alexander*,¹⁴ in which a prominent federal judge¹⁵ considered a defense counsel's plea on behalf of a Black man convicted of killing a white Marine after a late-night fight at a hamburger joint. Bazelon reviewed Alexander's background of severe environmental deprivation and called for consideration of a new defense in cases like his.¹⁶ My first article did much the same, and with lots of footnotes for good measure.¹⁷

The second article begins by inviting readers to consider two young men brought up in different circumstances, one of them resembling those of the defendant in *Alexander*.¹⁸ Here is what I said about them:

Imagine two young men born on opposite sides of town on the same day. One, Rashon, grows up in a run-down apartment in a housing project, the son of a [B]lack single mother who was sixteen years old at the time of his birth. The apartment in which he spent his childhood years was drafty, the plumbing leaked, and the smeared windows looked out on a common yard littered with trash, discarded bicycles, and other urban detritus. The peeling wallpaper exposed walls painted many years ago with faded lead-based paint which the infant had ingested. Rats scurried everywhere, especially after dark. On a given day, you might see furtive groups of young men, hoods pulled low over their faces and keeping a weather eye

11. See *12.1 Quality-of-Life Crimes*, MINN. LIBRS., <https://open.lib.umn.edu/criminallaw/chapter/12-1-quality-of-life-crimes/#:~:text=the%20quality%2Dof%2Dlife%20offenses,novel%20criminal%20and%20civil%20responses> [<https://perma.cc/N4WE-6K87>].

12. ALEXANDER, *supra* note 5.

13. See Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019).

14. *United States v. Alexander*, 471 F.2d 923, 957–66 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

15. Earlier, Judge Bazelon wrote the majority opinion in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), which introduced a new theory of insanity as a legal defense. The new approach departed from the M'Naghten knows-right-from-wrong test and substituted one with mental disease or irresistible impulse as the touchstone. See Lawrence Meyer, *Judge Bazelon*, WASH. POST (May 15, 1979), <https://www.washingtonpost.com/archive/politics/1979/05/15/judge-bazelon/f7fa5790-2178-4498-bdef-cfd953302bf/> [<https://perma.cc/P7Z3-LWAO>] (discussing the judge's career and influence on the fields of psychology and criminal law defenses).

16. *Alexander*, 471 F.2d at 957–66; see also David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976) (examining the role moral concepts should play in the administration of criminal justice); David L. Bazelon, *The Crime Controversy: Avoiding Realities*, 35 VAND. L. REV. 487, 490 (1982) (discussing many of the same questions).

17. Delgado, *Rotten*, *supra* note 1, at 12–23 (discussing the applicability of existing defenses to cases like *Alexander* or *Rashon*).

18. Delgado, *Wretched*, *supra* note 1, at 1–2; *Alexander*, 471 F.2d at 957–66.

out for approaching police. Rashon was a low birthweight baby whose mother did not take vitamins or supplements when pregnant with him, but did take drugs when they were available.

During his early years, Rashon was in the care of a series of neighbors and relatives while his mother struggled to hold a series of dead-end jobs. At other times, she was home with him, which he liked. When he was six, Rashon started at the local elementary school, a short walk away through noisy, cluttered streets occupied by urban gangs, some engaged in dealing drugs. His teachers were young, inexperienced, and in almost all cases marking time while waiting for the opportunity to transfer to a better school. Every student in his class was [B]lack or Latino, with the exception of a single Vietnamese immigrant child. At the start of the year, none knew how to read, could count beyond three or four, or knew about the world of books and stories. Like most of his classmates, Rashon had spent most of his days watching TV or playing in the asphalt area surrounding his apartment building. The school lacked a library, a play field with grass or sports equipment, a science laboratory, or a fulltime nurse or counselor.¹⁹

By contrast (I wrote), a different youngster,

Matthew grew up on the other side of town. His neighborhood was one of gracious homes and neat lawns lining clean, well lighted streets. Nearly all of the families were white, like Matthew and his parents, or Asian, and worked in professional jobs, such as physician or lawyer, or in management positions in large corporations. A few owned their own businesses. Matthew grew up in a cheerful home with an intact family that included a stay-at-home mother, a father who commuted daily to a well-paid job, and one other sibling. Both parents were married to each other and were college graduates.²⁰

Rashon soon landed in trouble for a minor offense—he and a friend stole some candy bars from a corner store and were caught—and, a few years later, a much more serious one, after which the same judge threw the book at him.²¹

Michelman and I saw his comeuppance and that of similar youths in quite different terms. For Michelman: “[A]n independent social-for-

19. Delgado, *Wretched*, *supra* note 1, at 1–2.

20. *Id.* at 2; see also, e.g., *Darius Dugas II*, *B. 2010*, *Houston*, N.Y. TIMES MAG., Dec. 18, 2022, at 24 (one story in an entire special issue of the magazine, entitled *The Lives They Lived*, describing a series of youngsters who died at an early age from shootings and inadequate social supports).

21. He and a friend stole some small items from a local convenience store and were caught. The store owner filed a complaint, and Rashon, who was Black, received a tongue-lashing from the judge who told him that any more such behavior from him and his friends would receive stern punishment. The reader interested in what happened can read about it in Delgado, *Wretched*, *supra* note 1, 11–12, 17–18. Matthew and some of his friends also got into trouble and landed in court. Their treatment was much gentler. *Id.* at 12, 15–16.

feit defense most likely will not gain recognition,”²² noting that “‘the moral, practical, and political hurdles . . . seem insurmountable’”²³ and that “[m]ainstream judges expectably might find themselves hesitant to open such a door.”²⁴

As a writer, I had no such hesitancy:

At a minimum, we ought to permit Rashon, through his counsel, to tell his story. Perhaps hearing about the dispiriting circumstances of his upbringing and the near-total absence of community and parental supports that society provided him with during his critical years will prompt us to resolve to build a better society. Perhaps it will make Rashon feel better—at least someone listened to his story, heard what kind of life he led before his crime. If his lawyer tells that story well and fully, perhaps Rashon will be the better for hearing it. Perhaps he will gain a degree of self-understanding. Perhaps he will resolve to lead a better life once he gets out of jail Storytelling not only has the power to change the listener. Sometimes a story even touches the heart and mind of the one telling it.

Could not Rashon have shaken off the bonds that held him back in his early years? By the age of ten or eleven, might he not have been able to see the poor hand that fate dealt him and begun the process of emancipating himself from the malign forces of neglect, crime, and despair all around him? Some do. Literature is full of tales of boys, especially, who rose from impossible circumstances to become tycoons of industry or Lord Mayor of London.

The sad truth, though, is that our society exhibits very little upward mobility. Studies show that practically none of those born in the lowest echelon of society rise to anywhere near the top. And precious few rise at all. Why should they even try? All it takes is a few cases like Rashon’s second trial—or *United States v. Alexander*, for that matter—to send the signal that the rest of us don’t care. At a minimum, until we loosen the bonds that inhibit upward mobility, we have no business punishing the wretched of the earth who find themselves trapped in the bottom layers of society and, predictably, grow up without many controls or options.²⁵

All this seems to have struck Michelman as beside the point. Consider how he positions my efforts to grant Rashon a respectful hearing. He immediately deems those efforts “outsider scholarship.”²⁶ To

22. Michelman, *supra* note 1, at 626.

23. *Id.* (quoting Delgado, *Rotten*, *supra* note 1, at 78, but adding that “that little word ‘moral’ is not to be missed”).

24. *Id.* at 625 (warning of mainstream judges’ likely hesitation—yet adding “[b]ut maybe not quite”).

25. Delgado, *Wretched*, *supra* note 1, at 21–22.

26. Indeed, they are the first words of his essay: “‘Outsider scholarship,’ we hear, ‘is characterized by a commitment to the interests of people of color, and/or women’” Michelman, *supra* note 1, at 619 (quoting Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 685 (1992)).

be sure, he makes plain—one sentence later, actually—that he is all for outsider scholarship. Hats off, in fact.²⁷

But there are outsiders and *outsiders*, it seems. The really great ones, he says, still on page one, are those who can “meet and engage the mainstream on its own terms.”²⁸ Like a good student, I deserve, it seems, a high grade, because I took his style of discourse—the mainstream kind—seriously.²⁹ And in case the reader hasn’t gotten his point, he really lays it on. “Along with plaudits for his champion outsider career,” Michelman offers “appreciation for qualities of study, discernment, balance, care, and clarity” and even “objectivity . . . that are . . . the markers of Richard Delgado’s scholarship [and] the humanely iconoclastic spirit that animates it.”³⁰ After all, who could take issue with a reviewer who calls one humane and iconoclastic in the same breath? And calls his career a champion one, of the outsider variety, anyway?

On page two, however, he gets down to business. The case for the RSB defense, he says, comes down to this: “A person stands charged with a crime, say, of robbery.”³¹ The evidence indicates he did it and “that the accused has spent [his] life, from birth right down to the present, in conditions of severe economic stress and social deprivation How, if at all, should a general background fact of that kind affect the disposition of criminal charges against that person?”³²

I recount that sentence, which appears at the top of Michelman’s page two, in full, because it professes to be a short description of the social predicament I take as the subject of my two articles.³³

Let us consider that description. The first thing one notices, after its brevity, is that its subject matter appears as a *background* factor. Apparently the robbery is the foreground—that is, the main thing that all decent, law-abiding people ought to be concerned about. The severe stress, social deprivation, and all that, is just the background, like the painted set in a play or opera against which the real action takes place. But consider that background for a moment. What are we to make of

27. “Rightly, we raise our hats and cheer.” *Id.* In fact, we raise them “off the bat”—presumably automatically and with a good-natured grin—as though to forestall any inquiry into the writer’s motives. *Id.* For example, how could anyone accuse him of paternalism if he or she is smiling so broadly?

28. *Id.* (noting that my work fully “meets that description”).

29. If this strikes the reader as condescending, the thought occurred to me, too. Michelman and I are practically the same age and have been cited almost exactly the same number of times. See *ScholarRank’s Top 250 Authors in HeinOnline*, HEINONLINE, <https://home.heinonline.org/tools/author-profile-pages/scholarrank/> [<https://perma.cc/8MBD-JWYS>].

30. Michelman, *supra* note 1, at 619 (praising my “spirit”—not cogency, insight, originality, or scholarly impact).

31. *Id.* And indeed, the youth in my example actually did that, twice in fact. See Delgado, *Wretched*, *supra* note 1, at 11–12, 18.

32. Michelman, *supra* note 1, at 619–20.

33. Delgado, *Rotten*, *supra* note 1; Delgado, *Wretched*, *supra* note 1, at 5–6.

the life of “severe economic stress and social deprivation” of which Michelman speaks?

That description—severe stress and social deprivation—is *really* short, just a few words (six, actually) long. I told my readers, though, exactly what I meant by that life of severe economic stress and social deprivation. And my description was not short, but rather full of gut-wrenching detail. It’s recounted in full above in this Essay, if you want to review it.

My point is that those details, to me at least, were not mere “background.” They were foreground. The crime, which came later,³⁴ was, to my way of thinking, almost secondary, eminently predictable, and distressingly commonplace in the world of youngsters like Rashon.

What is background and what foreground is not just a play on words or a matter of writing technique, but actual perception. Consider the mental function known as a *gestalt shift*.³⁵ In a famous drawing by Max Escher, a reader might see a flock of birds flying to the right. But if cued appropriately (“Don’t you see the fish?”), the reader sees a school of fish swimming to the left. Both the fish and the birds are in the drawing. But what you see depends on what you are cued to see and attend to.³⁶

And so it is with Michelman’s foreground and background. If the readers hold a nameless bad-actor (Rashon) in the “background,” they get to focus on what should happen next in real life, meaning, of course, in court and in the pages of the law reviews. But if one considers thousands of similar cases of juvenile misbehavior—as I invited my readers to do—some committed by Rashon and others like him across the country, then one may well start asking questions about why they turned out that way, and Matthew, the upper-class kid, didn’t.³⁷ The background and the foreground switch places.

34. In my example, Rashon and a friend stole some candy from a corner store and were caught. The store manager filed a complaint and Rashon, a Black youth, received a stern lecture from the judge who told him that any more such misbehavior, he and his friends would receive harsh punishment. See *supra* note 21 and accompanying text. The reader interested in what happened when they did misbehave, years later, can read about it in Delgado, *Wretched*, *supra* note 1, at 1–2, 17–18.

35. See, e.g., *Escher’s Sky and Water I & Day and Night*, M.C. ESCHER: APPLICATION OF GESTALT PSYCH., <https://sites.google.com/a/brown.edu/m-c-escher-application-of-gestalt-psychology/home/figure-ground-ambiguity/escher-sky-and-water-i-day-and-night> [<https://perma.cc/SL6M-BZUX>] (containing the famous drawing by Max Escher discussed in the rest of the paragraph); see also Richard Delgado, Essay, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 823 (1992) [hereinafter Delgado, *Shadowboxing*] (discussing the role of gestalt shifts in legal scholarship); Richard Delgado, *Rodrigo’s Portent: California and the Coming Neocolonial Order*, 87 WASH. U. L. REV. 1293, 1331–38 (2010) (further discussing gestalt shifts in legal thought).

36. Delgado, *Shadowboxing*, *supra* note 35, at 823.

37. For a full description of the circumstances of Rashon and Matthew’s childhoods, see *supra* notes 19–20 and accompanying text.

Michelman's gestalt shift, beginning on page two of his commentary, enables him to write off criminalizing poor Black men like Rashon or Alexander with a stroke of the pen. With that shift in place, rather than tackling, much less seeing, the problem in its full awfulness—much less issuing a verbal scream of some kind—Michelman characterizes it as something irritating that just won't go away: It *haunts* the law,³⁸ he says, refuses to die,³⁹ and says something or other about us that we haven't, as a society, done much about it.

That's a major concession, so I paid careful attention to what he says about this background factor that haunts the law and refuses to die. And here, he enlists some heavy artillery, asking what John Rawls might say about the matter. And sure enough, the "Rawlsian frame," he says, "provides some part of an answer" to the question of why we go on "incarcerating people whom we avoidably let be forced to live under such bad conditions that they 'predictably turn to crime.'"⁴⁰ After all, we *could*, theoretically, do something about it, he concedes. (A second major concession). Beginning on the third page of his commentary, he tells us why we don't.⁴¹ And now we see where, after all this hemming and hawing, he ends up as he does.

Namely, by shifting the focus. On the second page of his piece, you may recall, the question for Michelman was what we—good, law-abiding, God-fearing, upright citizens—can and should do about Rashon's predicament, namely: nothing much.⁴² But only a little later the question becomes: What must Rashon and his ilk do to live up to our nice, law-abiding, God-fearing expectations?

Rashon, it seems, has very few friends in high places, not even in liberal theorists like John Rawls. "In democratic countries," Michelman tells us, "it happens all the time that citizens call upon each other to accept in good spirit the compulsion of laws that some, on sincere consideration, find to be outrageous and oppressive."⁴³ Suitably cued, we think, "How true!" That's what we mean by legitimacy, it seems. Everyone, even Rashon, owes a duty of loyalty to the country's "duly enacted laws even when the true justice . . . is reasonably in question."⁴⁴ If its constitutional system guarantees certain rights and interests, a country can fairly call on everyone to comply with those laws.⁴⁵ For so long as certain fairness-making conditions are

38. Michelman, *supra* note 1, at 620 (describing it as a "concern [that] lives on, haunting the precincts of the law").

39. *Id.* (describing it as "an issue that refuses to die").

40. *Id.* (quoting Delgado, *Wretched*, *supra* note 1, at 7).

41. *Id.* at 621.

42. *Id.* at 620.

43. *Id.* (citing JOHN RAWLS, *POLITICAL LIBERALISM* 227 (1993)).

44. *Id.* at 620–21.

45. *Id.*

met, the system's behavior is legitimation-worthy, and it may call on citizens to obey laws that they disagree with.⁴⁶

Courtesy of his gestalt shift, the real question becomes what Rashon owes us, not we him.⁴⁷ Rashon, it seems, has to get over it and learn to mind his manners. All in “good spirit,” we learn.⁴⁸

But since, even in business schools these days, those legitimation-making conditions are beginning to come under scrutiny,⁴⁹ Michelman devotes a few lines of attention to what society does owe Rashon and youngsters who, like him, occupy the Dark Ghetto.⁵⁰

This is important, you see, because subjecting young kids to dark-ghetto conditions, “when the means of avoidance by fair and reasonable political action are readily at hand, [might seem like] a stark violation of the liberal basic commitment . . . among the essential guarantees of a liberally justification-worthy constitution.”⁵¹

Are those means readily at hand for people like Rashon? For Michelman, the answer is no. He commends me, however, for going through what he calls the “map”⁵² in search of an answer. I’m a “highly accomplished mainstreamer,”⁵³ he says, at least when I am behaving myself. Unlike Rashon.

Thus it is in the next four pages—the meat of the article, probably, for many of his fans—Michelman summarizes, briefly but with care, my first article showing that the standard criminal law excuses and justifications come close to permitting an RSB defense but ultimately fail.⁵⁴

It’s a good summary as these things go, nice and succinct. But might Michelman’s brevity be an indication that he is eager to get to a differ-

46. *Id.*

47. See RAWLS, *supra* note 43, at 226 (“The point of the ideal of public reason is that citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood. This means that each of us must have, and be ready to explain, a criterion of what principles and guidelines we think other citizens (who are also free and equal) may reasonably be expected to endorse along with us.”).

48. Michelman, *supra* note 1, at 620.

49. See Emma Goldberg, *Have the Anticapitalists Reached Harvard Business School?*, N.Y. TIMES (Nov. 28, 2022), <https://www.nytimes.com/2022/11/28/business/business-school-social-justice.html>; see also *supra* text accompanying note 7 (describing the *Leviner* case, *United States v. Leviner*, 31 F. Supp. 2d 23, 24–33 (D. Mass. 1998)).

50. He borrows the metaphor of the dark ghetto from a Harvard colleague, see Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, 35 PHIL. & PUB. AFFS. 126, 129–30 (2007), and thereafter adopts it as his own, see Michelman, *supra* note 1, at 621–22.

51. Michelman, *supra* note 1, at 622 (referencing philosopher John Rawls through Shelby, *supra* note 50, at 145).

52. *Id.* at 623 (“Here’s the map. We mean by a criminal-law defense . . .”).

53. *Id.*

54. *Id.* at 623–25.

ent point that he wanted to make all along? Remember when he wrote, just a moment ago, about the Dark Ghetto?⁵⁵ Might this be Michelman and his colleague Tommie Shelby unconsciously inviting us—all God-fearing, law-abiding citizens like you and me—to perform yet another gestalt switch, this one entirely unconsciously? If so, we might, without compunction, leave Rashon’s upbringing out of the equation and resume focusing on what *he* owes *us*. After all, the map of criminal law does relegate him to outsider status, and definitively so. Close, but no cigar.

Perhaps Michelman’s alacrity is a product of a second gestalt switch that, consciously or not, he wants us to perform. Consider, why is it that Michelman’s dark ghetto is dark, and not, say, light or life-affirming or full of life and energy? Rashon probably found life there that way, at least some of the time, such as when his mother was behaving herself. And when I grew up in poor, working-class surroundings, I loved it—the music; the laughter; the bright colors; the jokes at the expense of hegemony, teachers, and bosses; the freedom to say what you thought, to sing, to shout.

People in Rashon’s neighborhood probably—and mine, for sure—found authority figures dark. Teachers who scowled at us when we asked impertinent questions struck us as dark. Police cruisers were dark. Their tinted windows even darker. Later, when I studied criminal and immigration law, I realized that prison cells and immigration detention centers were, too.

So in this painting, what portions are light and which ones dark? It’s important to know, because your answer helps you make—or resist—a second gestalt switch with really serious implications for Rashon and his friends.

Never mind the digression. It was as short as I could make it. My point is that Michelman reviews more or less exactly as I did how it is that criminal law on the books just can’t quite tolerate an RSB defense, despite my occasional efforts to be “upbeat” about it.⁵⁶

But that was my point exactly. If, as he says, the law of criminal defenses simply cannot accommodate a RSB defense, what does that say about us in the academic ghetto?

At a minimum, we ought to permit Rashon, through his counsel, to tell his story. Perhaps hearing about the dispiriting circumstances of his upbringing and the near-total absence of community and parental supports that society provided him with during his critical years will prompt us to resolve to build a better society. Perhaps it will make Rashon feel better—at least someone listened to his story, heard what kind of life he led before his crime.⁵⁷

55. See *supra* notes 46, 47 and accompanying text (discussing Michelman’s use of the term).

56. His term. Michelman, *supra* note 1, at 624.

57. Delgado, *Wretched*, *supra* note 1, at 21.

I went on to point out that storytelling can change listeners, maybe even judges, and open them to alternative worlds better than the ones we currently inhabit.⁵⁸ And I posited that if we show a defendant like Rashon even a modicum of respect and understanding, he may begin the process of shaking off the bonds that held him back in the first place.⁵⁹ With insight into the poor hand that life dealt him, might he not begin the process of emancipating himself from the malign forces of neglect, crime, and despair all around him? Might he indeed become a critical race theorist, an organic intellectual,⁶⁰ or a follower of Malcolm X?⁶¹ Or is this a nightmare and a reason why many mainstream writers quickly reject the idea of a defense of severe environmental deprivation?

All it takes [I wrote] is a few cases like *United States v. Alexander* to signal cases like Rashon's second trial—or *United States v. Alexander*, for that matter—to send the signal that the rest of us don't care. At a minimum, until we loosen the bonds that inhibit upward mobility, we have no business punishing the wretched of the earth who find themselves trapped in the bottom layers of society and, predictably, grow up without many controls or options.⁶²

And here, once again, is what Michelman said: “[A]n independent social-forfeit defense most likely will not gain recognition ‘[T]he moral, practical, and political hurdles . . . seem insurmountable,’”⁶³ and “[m]ainstream judges expectably might find themselves hesitant to open such a door.”⁶⁴

In the end, Michelman concludes that I tried mightily and worked “brilliantly” and with “sincerity.”⁶⁵ And the defense I argued for is “not beyond credibility.”⁶⁶ And a further benefit: My defense would at least give judges something to think about.⁶⁷

He's right. He writes wittily and with evident sincerity. So judges actually might one day start to think about defendants who grow up in a rotten social background. And when the first judge to take the de-

58. *Id.* at 21–22.

59. *Id.*

60. Antonio Gramsci, *Prison Notebooks*, in AN ANTHOLOGY OF WESTERN MARXISM: FROM LUKÁCS AND GRAMSCI TO SOCIALIST-FEMINISM 112, 113–14 (Roger S. Gottlieb ed., 1989) (explaining the term “organic intellectual”).

61. Delgado, *Wretched*, *supra* note 1, at 22 (noting that some do). Literature is full of tales of boys, especially, who rose from impossible circumstances to become tycoons of industry or impressive political figures. Others write books. See MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965); Gramsci, *supra* note 60.

62. Delgado, *Wretched*, *supra* note 1, at 22 (footnotes omitted).

63. Michelman, *supra* note 1, at 626 (quoting, in part, Delgado, *Rotten*, *supra* note 1, at 78).

64. *Id.* at 625.

65. *Id.* at 626.

66. *Id.* at 625.

67. *Id.* at 625–26.

fense seriously rules in favor of someone like Rashon, won't it be convenient to be able to cite such a fine scholar as Frank Michelman?

And when they do, readers of our exchange may, with a second shock of recognition, realize that they are seeing flocks of birds and schools of fish navigating forward at the same time. A suggestion raised by an outsider scholar has, by virtue of this very colloquy, entered into the legal mainstream. A good thing when it happens, as it does rarely—this time thanks to a retired professor, Frank Michelman, who led a long life and did much good during it.

