Should Valjean have been Punished for Stealing Bread? of Poverty and Criminal Responsibility

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A defence of poverty frontally questions liberal assumptions of freedom and equality of choice and therefore cannot be reconciled with the liberal model of criminal responsibility. Yet, if all of us are subject to constraints of varied degree and gradation, legal doctrines on criminal responsibility must also accommodate such differences in scale. Thus, a singular assessment of poverty as a defence must be eschewed in favour of a case-by-case analysis that takes into account, the nature of economic compulsion and its impact on the offence. It is further argued that the debate on poverty-defence is inextricably linked with criminalisation of poverty since empirical evidence on criminogenic risks of poverty discredits the basis for criminalisation of poor and their accommodative responses to impoverishment such as vagrancy and homelessness among others.

I. Introduction

> *"...The appellant had in fact intended to wipe out the whole family including himself on account of abject poverty...this aspect of the matter has not been properly appreciated by both the Sessions Court and the High Court..."*
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> —Kurian J, in *Sunil Damodar Gaikwad* v. *State of Maharashtra*[1]

Should poverty be considered a relevant factor in assessment of criminal responsibility? Should it be a defence? Should it only have a role in sentencing? Or would reference to poverty be an anathema to criminal responsibility? The recent reiteration by the Supreme Court of India of poverty as one of the

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[1] (2014) 1 SCC 129.

mitigating factors in converting a death sentence into a life sentence calls for renewed attention to these questions raised by Victor Hugo in his novel, *Les Misérables.*

At one level, contemporary empirical insights into the criminogenic consequences of poverty make a plausible case for recognition of poverty as an exculpatory factor.[2] Several scholars have sought to fit poverty or socio-economic deprivation within the defences like duress and necessity, defences that are firmly entrenched in criminal law. At another level though, as explained later, such recognition also poses a frontal challenge to the liberal legal model of individual responsibility. Can legal recognition of the criminogenic character of poverty be reconciled with the basic principles of criminal responsibility? If so, then what would be the precise contours of such reconciliation?

In this essay, I attempt to answer these questions through an examination of the arguments made in favour of references to socio-economic deprivation in assessment of criminal responsibility. My argument is that criminogenic risks of poverty can be better acknowledged in sentencing rather than in assessment of culpability of a person within the dominant liberal paradigm of criminal responsibility. Moreover, I argue that poverty does not meet the requirements of the recognised defences of duress or necessity. This position is supported by a survey of judicial dicta from four common law countries - India, United Kingdom, United States and Canada - where courts have been more receptive towards poverty as a mitigating than as an exculpatory factor. Nonetheless, I also argue that the liberal model of individual responsibility must be transcended and one must consider the gradation of circumstantial constraints and choice that individuals have. Thus, I emphasise on the need for a differentiated approach towards the poverty defence wherein poverty may be recognised as an exculpatory factor for some offences like victimless crimes.

II. Of Poverty Defence, Autonomy and Responsibility

The central claim of the poverty defence lies in the criminogenic consequences of poverty. Latest insights from behavioural and social sciences research validate the link between poverty and criminal behaviour and establish that poverty is both a risk factor and an immediate stressor.[3] It is argued, therefore, that punishing the poor would be unfair. As Richard Delgado had noted in his seminal piece on the Rotten Social Background excuse:

[2] I am using the world "exculpatory" in its general sense to refer to a defence. In this course of this paper, I would stay clear of the technical distinction between excuse and justification. For more on the difference between excuse and justification, *See generally* Kimberly Ferzan, *Justification and Excuse, in* The Oxford Handbook of Philosophy of Criminal Law 239 (Deigh & Dolinko eds., 2011); *see also* Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 Notre Dame L. Rev. 1551 (1999).

[3] Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 Hofstra L. Rev. 835, 856-865 (2008).

> *"An environment of extreme poverty and deprivation creates in individuals a propensity to commit crimes. In some cases, a defendant's impoverished background so greatly determines his or her criminal behavior that we feel it unfair to punish the individual."*[4]

This claim had earlier been recognized in the dissenting opinion of Judge David Bazelon of the United States Court of Appeals for the District of Columbia in the case of *United States* v. *Alexander*[5] wherein it was held that juries should be allowed to consider a defendant's "rotten social background".[6]

In other words, if criminal behaviour is determined by a person's impoverished background, then the very *raison d'etre* for criminal culpability crumbles. This is because individual autonomy is one of the core pillars of criminal liability. Criminal responsibility is predicated on the assumption that individuals in general have the capacity and the free will to make meaningful choices.[7] If poverty indeed pre-determines criminal behaviour, then the central assumption of free will and choice cease to apply and as a result, criminal responsibility would stand excluded.[8]

An additional argument made by Judge David Bazelon in a later work posited that there can be little moral justification for punishing the poor when the socio-economic inequities that lie at the root of such deviant behaviour are not addressed by state institutions.[9] In the same vein, it has been argued that recognition of a poverty defence may play a critical ideational role in as much as it may trigger sharper assessment of individual and social accountability and shift the focus from punishment to crime prevention through redressal of distributional inequities.[10]

These claims establish a plausible basis for poverty defence. Yet on a closer examination, it appears that many of these propositions cannot be squared with the fundamental tenets of criminal liability.

First of all, while there may indeed be correlation between poverty and crime, such correlation does not by itself establish causation. Indeed, there is little empirical evidence to support a deterministic link between the two.[11] As

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4 Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognise a Defense of Severe Environmental Deprivation?* 3 L. & INEQ. 9, 54 (1985).

5 471 F 2d 923 (DC Cir 1972).

6 *Id.*

7 ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 27 (1999).

8 Barbara Hudson, *Punishment, Poverty and Responsibility: The Case for Hardship Defence*, 8(4) SOCIAL & LEGAL STUDIES 584-585 (1999).

9 David Bazelon, *Morality of Criminal Law*, 49 S. CAL. L. REV. 385 (1976).

10 Barbara Hudson, *supra* note 8, at 589-590 (1999).

11 Paul Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background"*, 2 ALA. C.R. & C.L. REV. 53, 59 (2011).

Robinson argues, one can establish a correlation between gender and crime and yet, none would argue that the former makes the latter inevitable.

Secondly, mere causation cannot be the basis for an excuse. Indeed, if causation were to excuse criminal liability, no one would ever be responsible for their behaviour at all; for new insights from neuroscience on the constrained nature of free will and autonomy suggest that every person is a product of her genetic inheritance and environment.[12] Hutton forwarded a similar thesis in his claim that recognition of poverty as a defence because of the behavioural constraints that it imposes "would require some means of specifying which socially distributed constraints diminish culpability and which don't".[13]

Thirdly, poverty defence questions the very foundational belief of liberal theory that society is composed of free rational individuals who are equal before the law. Responsibility, liberal theory, mandates must be located at the level of the rational autonomous individual. In other words, a crime is regarded as entirely the product of free and autonomous choice-making by the perpetrator; he or she is seen as fully culpable for it, irrespective of the circumstantial constraints.[14] This conception of the autonomous individual bearing responsibility for his action has been key idea in the development of criminal laws.[15]

Just as the Supreme Court of Canada observed in *Perka* v. *R.*[16]:

> *"All individuals whose actions are subjected to legal evaluation must be considered equal in standing. Indeed, it may be said that this concept of equal assessment of every actor, regardless of his particular motives or the particular pressures operating upon his will, is so fundamental to the criminal law as rarely to receive explicit articulation...If the obligation to refrain from criminal behaviour is perceived as a reflection of the fundamental duty to be rationally cognizant of the equal freedom of all individuals, then the focus of an analysis of culpability must be on the act itself (including its physical and mental elements) and not on the actor".*[17]

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12 Michele E. Gilman, *The Poverty Defense*, 47 U. Rich. L. Rev. 495, 505 (2013). *See also* Stephen J Morse & William T Newsome, *Criminal Responsibility, Criminal Competence and Prediction of Criminal Behavior*, *in* A Primer on Criminal Law and Neuroscience 154 (Stephen Morse & Adina L Roskies eds., 2013).

13 Neil Hutton, *Sentencing, Inequality and Justice*, 8 (4) Soc. & Legal Stud. 571 (1999).

14 Craig Haney, *supra* note 3.

15 Andrew Ashworth & J. Horder, Principles of Criminal Law 23 (2013).

16 (1984) 2 SCR 232.

17 *Id*, 272.

A poverty defence, on the other hand, shifts the locus of responsibility away to social factors. In other words, individuals are not seen as equal but rather as unequal. Since unequal social distribution of opportunity constrains individual's choice differently, differential treatment of the groups become imperative - a proposition that can scarcely operate within the existing model of liberal legal theory.[18] Liberal theory prescribes that capacity and reason are the two essential elements of moral agency and it is only the absence of these elements that can create an exculpatory defence. In this context, critics of the poverty defence point out that while poverty and persistent deprivation impede choice, affect motivation and provide temptation, they do not suspend the capacity for rational judgment. Poor remain moral agents capable of reflection, albeit within constrained choices.[19] Moreover, many scholars have criticised the belief that all persons affected by poverty have impaired cognitive functioning.[20] It has been pointed out that such an assumption would contradict the normative element of the principle of autonomy that individuals should be respected and treated as agents capable of choosing their acts and omissions and held responsible for their behaviour and consequences thereof.[21]

Yet, can this conflict be a reason for not recognizing the poverty defence? This is particularly pertinent since the liberal legal assumption of equality of choice has already been assailed from several quarters. Contemporary findings from social and behavioural sciences render the philosophical discourse on liberty, rationality, equality, choice and personal responsibility empirically suspect, especially in view of persistent inequality of wealth and political power.[22] As Barbara Hudson wrote:

> *"The existential view of the world as an arena for acting out free choices is a perspective of the privileged, and that potential for self-actualization is far from apparent to those whose lives are constricted by material or ideological handicaps."*[23]

If this is true, then it is imperative that the gulf between the philosophical underpinnings of responsibility and empirical insights into human

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[18] Neil Hutton, *supra* note 13.

[19] ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 221 (2006).

[20] Stephen Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. REV. 148, 150 (2011).

[21] ANDREW ASHWORTH, *supra* note 19, at 28.

[22] Marie-Eve Sylvestre, *The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-Economic Context in Criminal Law and in Adjudication of Rights*, 42 OTTAWA L. REV. 389, 408 (2011). Feminist scholars have developed very sophisticated critique of autonomy. *See* RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY AND THE SOCIAL SELF (C. Mackenzie & A. Stoljar eds., 2000) & A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1985).

[23] B. Hudson, *Punishing the Poor: A Critique of the Dominance of Legal Reasoning in Penal Practice*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE 302 (W.C. Hefferman & J. Kleinigs eds., 2000).

cognition and behaviour is bridged and principles of criminal responsibility account for the multiple constraints that shape individual behaviour.

Admittedly, persons living under persistent poverty are not completely bereft of choice or the capacity to reason, howsoever constrained their actual choices may be in reality. However as Marie-Eve Sylvestre wrote:

> *"...philosophical debate should not be cast in two artificial categories with an autonomous human being who controls his destiny and makes rational choices on the one hand and an automaton that is pushed around by psychological forces or socio-economic disadvantages on the other."*[24]

Reduction of human behaviour into such absolute dichotomous categories does not reflect the complexity of human cognition and the variation in the degrees of choice that people are able to exercise. Thus, even as one can indeed argue that the justification for poverty defence does not fit within the liberal model of criminal responsibility, such an argument begs the real question that is at issue - the soundness of persisting with the empirically refuted assumption of equality of choice and autonomy.

III. Poverty, Duress and Necessity

As I have argued, that liberal objection to poverty-defence does not consider the different register of circumstantial constraints and variation in the degrees of choice that individuals have, if we do move away from the binary differentiation between choice and no-choice, then poverty-defence appears to have a persuasive case on its behalf. Nonetheless, I submit that operationalisation of a poverty defence within the existing general defences to crime would be untenable.

The two common law defences with which poverty has usually been sought to be bracketed are those of duress and necessity.[25] Despite their differences, both these defences constitute an acknowledgment of the notion that culpability of a perpetrator can be lessened by coercion and constrained choices.[26] Therefore prima facie, these two defences share the rationale for the defence of poverty.

Yet, it must be noted that not every coercion or necessity-based constraint attracts the defence of duress or necessity. An excuse from criminal liability arises only when there is a dysfunction that is so severe that it renders

[24] Marie-Eve Sylvestre, *supra* note 22.

[25] Antonia K. Fasanelli, *Note In re Eichorn: The Long Awaited Implementation of the Necessity Defences in a Case of Criminalisation of Homelessness*, 50 Am. U. L. Rev. 323, 324-325 (2000).

[26] Michele E. Gilman, *supra* note 12, at 507.

the offender blameless. The resultant dysfunction must be so severe that the actor could not reasonably have been expected to remain law abiding.[27]

To build on this theme, the defence of duress arises only when the actor is subjected to such coercion which no reasonable person would be expected to resist. For example in India, Section 94 of the Indian Penal Code is predicated on the condition that the accused must be subjected to such threats, "which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence." Where the threat of death though present, is to be realised at a point of time, the defence of duress cannot be pleaded.[28] It can be argued in this context, as Stephen Morse does, that the pressure of economic deprivation does not reach such a level where no reasonable person could be expected to resist or to suggest that death would be the immediate alternate consequence.[29] In other words, poverty does not fulfil the requirements of a defence of duress.

The defence of necessity involves cases where the evil of obeying the letter of the law is socially greater than the evil of breaking it. It is grounded in two factors: avoidance of greater harm and the difficulty of compliance with law in emergencies.[30] English common law restricts the threatened harm to death or serious physical injury.[31] In contrast, Section 81 of the Indian Penal Code, which incorporates the doctrine of necessity as a defence, does not restrict the specified types of actual or perceived harm. However, it also requires the harm to be avoided to be so imminent as to justify or excuse the act committed.[32] As stated in the last paragraph, the element of imminent harm cannot arguably be invoked in every case of poverty. Moreover, it is implicit in the defence of necessity that it can be invoked only in cases where the perpetrators were so limited in their choice of means to avoid the harm that they had no alternative but to commit the crime. This is a very high threshold for the defence of poverty to cross since it is doubtful that systemic poverty places a person in such a peril so as to leave her with no alternative at all other than to commit a crime.[33]

Not surprisingly, courts across major common law countries have been reluctant to recognise poverty as sufficient basis for the defence of necessity.

27 Paul Robinson, *supra* note 11, at 56.

28 K.N. Vibhute, Criminal Law 185 (2008).

29 Stephen Morse, *supra* note 20.

30 Stanley Yeo, Neil Morgan & Wing Cheong, Criminal Law in Malaysia and Singapore 565 (2007) citing Law Reform Commission of Canada, Working Paper No. 29, *Criminal Law, The General Part: Liability and Defences* 93 (1982).

31 *R* v. *Martin*, (1989) 1 All ER 652 (CA).

32 Stanley Yeo, Neil Morgan & Wing Cheong, *supra* note 30, at 570 [The same point was reiterated in the context of common law of crimes by the Supreme Court of Canada in *R* v. *Latimer*, (2001) 1 SCR 3 and *Perka* v. *R*., (1984) 2 SCR 232].

33 Stuart Green, *Just Desert in Unjust Societies, in* Philosophical Foundations of Criminal Law 357 (Duff & Green eds, 2011).

For example in the English case of *Southwark London Borough Council* v. *Williams*[34], Lord Denning clarified that squatters could not claim a defence of necessity because the peril they found themselves in was "an obstinate and longstanding state of affairs", rather than an immediate or emergent threat. He further observed:

> *"If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine they were in need or would invent a need, so as to gain entry. The plea would be an excuse for all sorts of wrongdoing. So the courts must refuse to admit the plea of necessity to the hungry and the homeless: and trust that their distress will be relieved by the charitable and good."*[35]

In United States, the Court of Criminal Appeals of Texas held in *Harris* v. *State*[36] that "economic necessity is no justification for a positive criminal offense." Similarly, the Colorado Court of Appeals noted in *People* v. *Fontes* that "while we are not without sympathy for the downtrodden, the law is clear that economic necessity alone cannot support a choice of crime."[37] These two cases reiterated the position stated in a decision from 1930s in *State* v. *Moe*[38] that "economic necessity is no defence to stealing because the state provides another alternative through welfare."

These cases reflect an unspoken consensus across common law countries that systemic poverty cannot be a sufficient ground for invocation of the defence of necessity. Admittedly, there are few decisions from the United States and India where economic necessity has indeed been endorsed as a defence.

The Court of Appeal in California found in *Eichorn, In re*[39] that a trial court should have allowed a homeless man cited for violating the City of Santa Ana's anti-camping ordinance to assert the necessity defence. Echoes of this proposition can be found in the observations of Justice Badar Durez Ahmed of Delhi High Court in *Ram Lakhan* v. *State*[40] where he held that a person who "takes to begging compelled by poverty and hunger" and charged under the Bombay Prevention of Begging Act "would be entitled to invoke the defence of necessity."

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34 1971 Ch 734: (1971) 2 WLR 467: (1971) 2 All ER 175 (CA).
35 1971 Ch 734: (1971) 2 WLR 467: (1971) 2 All ER 175 (CA).
36 486 SW 2d 573, 574.
37 No. 02CA0395 (November 6, 2003).
38 174 Wash 303 : 24 P 2d 638 (1933).
39 81 Cal Rptr 2d 535 (Cal Ct App 1998).
40 (2007) 137 DLT 173.

It must be noted however that these case related to status offences aimed at ostensible poverty - begging and homelessness. Given the victimless status offences that these cases dealt with, they cannot be read as providing a basis for a wider defence of economic necessity. My claim is supported by a later decision of the California Court of Appeals in *People* v. *Carter*[41] which distinguished Eichorn and clarified that "poverty does not constitute a necessity [defence] justifying the commission of burglary or armed robbery."

IV. Sentencing and Poverty

Even as courts from three different jurisdictions have recognised that poverty by itself does not satisfy the minimum threshold of the defences of duress and necessity; poverty and economic deprivation are well-accepted as relevant considerations in sentencing.

For example, Justice Sandra O'Connor of the United States Supreme Court ruled in her concurring opinion in *California* v. *Brown*[42] that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

More recently in *Miller* v. *Alabama*[43], the United States Supreme Court recognised the importance of a rotten social background as a mitigating factor in sentencing, while invalidating mandatory life sentences without parole for juvenile offenders. It observed:

> *"Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."*[44]

Supreme Court of Canada adopted a similar stance in *R.* v. *Gladue*[45] where it held that sentencing judges should take into account the "unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts" including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people.

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[41] No. E049455, 2010 WL 5232940, 8 (Cal Ct App December 23, 2010).
[42] 93 L Ed 2d 934 : 479 US 538 (1987).
[43] 183 L Ed 2d 407: 132 S Ct 2455, 2468 (2012).
[44] *Id.*
[45] (1999) 1 SCR 688.

In India, the Supreme Court on more than one occasion has emphasised on the importance of poverty as a mitigating factor in consideration of death penalty. In *Ediga Anamma* v. *State of A.P.*[46], the Court held that judicial commutation is permissible in cases where the offender suffers from socio-economic, psychic or penal compulsions that are insufficient to attract an exception or a less serious charge. The Court elaborated:

> *"Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty."*[47]

Later in *Sushil Kumar* v. *State of Punjab*[48], the Supreme Court reduced the sentence of death penalty to life imprisonment while referring to poverty among many other factors. The apex Court noted in this case: "Extreme poverty had driven the appellant to commit the gruesome murder of three of his very near and dear family members - his wife, minor son and daughter."[49]

The same principle was reiterated in the recent case of *Sunil Damodar Gaikwad* v. *State of Maharashtra*[50]. Another recent case where poverty was considered a relevant factor in sentencing is *Zindar Ali Sheikh* v. *State of W.B.*[51] where the Court referred to the poverty of an accused convicted of rape under Section 376 of the Indian Penal Code while holding that imprisonment of five years was sufficient.

Thus, poverty has been firmly entrenched as a mitigating factor in sentencing. This may be in stark contrast to the hostility towards inclusion of poverty as an exculpatory factor. But this mismatch can be explained by the difference in the logic of sentencing from that of conviction. Sentencing arguably reflects an individualised assessment of a person's culpability. Therefore, it not only permits but also mandates an inquiry into the background of the individual and a consequent departure from the idealized liberal model of treating everyone equally. For instance, Section 235 of Criminal Procedure Code ensures that the accused is given a chance to submit his views on the point of sentence. In this hearing, an accused may provide information on all possible factors which may mitigate the sentence, including his social and personal background.[52] The individuated nature of sentencing under Section 235

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46 (1974) 4 SCC 443.

47 *Id*, at 809.

48 (2009) 10 SCC 434.

49 *Id*, at 439.

50 (2014) 1 SCC 129.

51 (2009) 3 SCC 761.

52 Ratanlal and Dhirajlal, The Code of Criminal Procedure 1022-1023 (Manohar, Singhal et al eds., 2010); see also *Santa Singh* v. *State of Punjab*, (1976) 4 SCC 190; *Allauddin*

was clarified by the Supreme Court in *Suresh Chandra Bahri* v. *State of Bihar*[53] where it was held that "sentencing variation is bound to occur because of the varying degrees of seriousness in the offence and/or varying characteristics of the offender himself." If that is the case and sentencing does allow individualised assessment of personal background, then poverty and persistent economic deprivation would constitute one of those background factors that can be referred to.

It has been argued in this regard that "sentencing rhetorically promises to treat individuals equally by pursuing consistency in sentencing"[54], and at the same time, "allows variations in culpability at the level of the individual offender."[55] Thus, individuals are addressed by the law as equals and the responsibility is retained at the level of the individual. However, variation in the degrees of culpability is recognised.[56] Thus, it is evident that the narrative of poverty as a relevant variable can be better integrated with the logic of sentencing.

V. Conclusion: The Need for Differentiation and Decriminalisation

In this paper, I have shown that the liberal model of criminal responsibility cannot accommodate the defence of poverty which frontally questions liberal assumptions of freedom and equality of choice. On the other hand, the individualised nature of sentencing process permits reference to poverty as a relevant factor without displacing the presumption of equality and neutrality of law. This is reflected in the contrast between judicial hostility towards inclusion of poverty within the folds of defence of duress and necessity and judicial endorsement of poverty as a mitigating factor.

At the same time, if the correlation between crime and poverty and the criminogenic risks of poverty are empirically validated and the liberal presumption of autonomy and free will is shown to be a fiction, then an absolute opposition to the defence of poverty becomes unsustainable. As argued earlier, neurosciences and behavioural sciences tell us that all our actions are shaped by situational constraints - biological and environmental - of different degree. Yet, criminal responsibility is constructed around a binary dichotomy of choice and coercion, blameless and blameworthy. Given that all of us are subject to constraints of varied degree and gradation, legal doctrines on responsibility must also accommodate such differences in scale. Hence, I argue that we must eschew a singular assessment of poverty as a defence and adopt a case-by-case

Mian v. *State of Bihar*, (1989) 3 SCC 5.

53 1995 Supp (1) SCC 80.

54 1995 Supp (1) SCC 80.

55 *Id*.

56 Neil Hutton, *Sentencing, Inequality and Justice*, 8 (4) Soc. & Legal Stud. 571 (1999).

analysis taking into the account, the nature of compulsion and its impact on the offence. In other words, the fact that a person is impoverished may be relevant in determining blameworthiness for some types of offences and not for other types. Thus, the nature of offence and its nexus with the extent of disadvantage suffered may be as relevant for blameworthiness as it is for the purpose of sentencing.

An incipient recognition of this model can be discerned in judicial recognition of economic necessity as a defence in cases related to sleeping in public, vagrancy and child neglect in India and United States. In clarifying that such a defence would apply to homelessness but not violent robbery, courts have shown their inclination to differentiate between offences over a sweeping rejection of the defence of poverty. The force in the claim of *Ram Lakhan* v. *State*[57] that economic necessity must be a defence against conviction for begging certainly exemplifies the fact that poverty should indeed be considered as exculpatory for certain types of offences. A caveat that must be added here is that vagrancy and homelessness are only examples of the potential linkage between criminal responsibility and socio-economic deprivation. The precise contours of such a linkage would need to be thrashed out and is beyond the scope of the paper.

This leads us to my final claim that the debate on poverty defence cannot be divorced from the question of criminalisation of poverty. All over the world, poverty and manifestations of poverty - from begging, homelessness, street-vending - are being subjected to control of criminal laws.[58] If we recognise, as empirical evidence indicates, that poverty and persistent deprivation can substantially impair behavioural control and induce lawlessness, then the moral justification for criminalising behaviours that are direct consequence of such deprivation is very suspect. State and society have an obligation to ensure for its members an adequate standard of living. If this obligation is defaulted upon, then the state loses any moral and political legitimacy to criminalise and outlaw accommodative behaviour on part of the poorest of the poor who bear the brunt of such state and societal default. By using the sharp edges of criminal law to meet visible poverty, as Stuart P. Green wrote, "we run the risk of compounding the sins of socio-economic injustice with those of retributive injustice."[59] A more minimalist use of criminal law would perhaps be as, if not more effective, in addressing the interests that a defence of poverty seeks to serve.

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[57] (2007) 137 DLT 173.

[58] Usha Ramanathan, *Ostensible Poverty, Beggary and the Law*, 43 (44) Econ. & Pol. Wkly., 33 (2008); *see* Michele E. Gilman, *supra* note 12.

[59] Stuart P. Green, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders,* U. Chi. L. F. 43, 71 (2010).