

A LOOK INWARD: BLURRING THE MORAL LINE
BETWEEN THE WEALTHY PROFESSIONAL
AND THE TYPICAL CRIMINAL

You use my own words against me.

— Ebenezer Scrooge¹

This Note is about the moral judgments people make. Many of the most educated and privileged members of society — students and professionals — see a morally good person in the mirror but see a very different and immoral person when looking at someone who sells drugs or drives drunk. This Note suggests that they should take another look. Specifically, it argues that the characteristic spending and maintenance of excessive wealth by the educated and privileged is the moral equivalent of a number of criminal offenses.

To elaborate, certain crimes — such as manslaughter, drug distribution, and impaired driving — are morally premised on the harms associated with the prohibited behavior. The causal link between the behavior and its harms, however, can be quite indirect. Also, purposive action directly related to these harms is not required, nor is such specific intent typical. It is enough that the actor knew or should have known about the risks she was imposing and acted nonetheless. This decision to act is understood to result from an overly selfish focus on personal benefit, and this selfishness is partly why such actions are considered blameworthy. At the same time, a small percentage of the world's population maintains exclusive control over vast amounts of wealth and resources, while millions become sick and die due to a lack of basic goods. Billions more face constant struggles due to poverty. Individual choices to maintain excess wealth are indirect but very real causes of these harms. Wealthy individuals also make knowing and selfish choices to maintain resource control in spite of these harms. Despite these notable similarities to recognized criminal offenses, however, such economic behavior is entirely legal and rarely condemned.

Thus, society holds criminal and immoral certain knowing and selfish choices that indirectly cause harm but not others. This Note examines this inconsistency and considers the strongest counterarguments to the analogy between such criminal and economic behavior. But it also hopes to convince even those who find fault with the analogy that they ought to be far more concerned with their own spending and saving than most people are today. Thus, this Note is not about the appropriate economic or justice system; it is about individual choices and re-

¹ A CHRISTMAS CAROL (20th Century Fox 1984).

sponsibilities. Nor is it about demonizing the wealthy or the criminal; it is about seeing in each of us a person who is capable of being better.

I. RECOGNIZED CRIMES

A. *Intent and Selfishness*

Many crimes have only a “soft intent” requirement. People who commit these crimes do not act with the *purpose* of subjecting others to the harms caused by their actions. They are held morally and legally culpable, however, because they are or should be *aware* of the consequences and act nonetheless. For example, manslaughter is often explicitly set as a soft-intent crime: the only state of mind required is a level of negligence.² Negligence does not stem from any specific intent to cause harm, but rather involves a “fail[ure] to bring to bear one’s faculties to perceive the risks that one is taking.”³ The negligence can often be implied, as from drinking alcohol and driving before killing someone in a car crash:⁴ “Because driving requires care and diligence to avoid injury to others and intoxication impairs such care and diligence, the drunk driver should have made the decision not to drive.”⁵

The intent, *as related to the harm*, is just as “soft” for drug and impaired driving offenses. Drug dealers and intoxicated drivers choose to act in spite of the risks associated with their behavior, but not because they desire to impose these harms on others.⁶ Driving under the influence, of course, is identical to vehicular manslaughter, minus the actual harm: “[The drunk driver] risked great harm by his conduct, even if he intended none at all. . . . [T]he *possible* consequences are vaguely foreseeable, and the driver is culpable for taking the wheel while intoxicated.”⁷ These offenses are noteworthy as they represent a large portion of criminalized behavior: drug offenses and driving under

² The requisite state of mind is often characterized as “gross” or “criminal” negligence. See Katherine M. White, Note, *Drunk Driving as Second-Degree Murder in Michigan*, 41 WAYNE L. REV. 1433, 1443 (1995).

³ George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 415 (1971).

⁴ See, e.g., White, *supra* note 2, at 1448–49 (“One may infer gross negligence from drunk driving alone.”).

⁵ *Id.* at 1449. Depending on the particular statute, the implied negligence can even be sufficient for a finding of malice and, hence, second-degree murder. See 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 388 (1997). Recent laws also provide for an inference of negligence when a driver fails to get sufficient sleep. See, e.g., N.J. STAT. ANN. § 2C:11-5a (West 2005).

⁶ Drug dealers and drunk drivers certainly intend to sell narcotics and drink and drive, respectively. They may do so, however, for the purpose of making money or having fun, rather than to impose the harms associated with their actions on others.

⁷ Gerald S. Reamey, *The Growing Role of Fortuity in Texas Criminal Law*, 47 S. TEX. L. REV. 59, 90 (2005).

the influence accounted for over three million of the fourteen million arrests in the United States in 2004.⁸

For all of these offenses, the underlying selfishness is relatively straightforward. In vehicular manslaughter and impaired driving cases, the driver imposes the risks or harms of serious injury or death, usually for the sake of far lesser personal benefits — the driver may have wanted another drink at the bar to continue having fun with his friends, for instance. Drug dealers impose the equally serious harms associated with narcotics for personal profit.⁹

B. Indirect Cause

It is important to note that the potential or actual consequences of these acts, not the acts in and of themselves, provide the moral justification for their criminalization. With regard to impaired driving, neither most Americans nor the criminal justice system find drinking alcohol — or even drinking and driving on private property — inherently immoral; it is only because of the actual (manslaughter) or potential (DUI) effects of impaired driving on public roads that this behavior is criminalized. Similarly, the potential effects of selling or using drugs are what lead us to find such distribution and consumption morally and criminally blameworthy.¹⁰ Although drug crimes “don’t *inherently* involve any outright violence,”¹¹ they do “involve *the risk* of physical injury or even death to the drug users or to others.”¹²

These offenses also legally allow for and often inherently involve a substantial separation between the criminalized behavior and its consequences. This “indirectness” can include both intervening and simultaneous causes — later events/actors or surrounding circumstances that are necessary for or contribute to the end result of the initial ac-

⁸ FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2004, at 280 (2005), available at http://www.fbi.gov/ucr/cius_04/documents/CIUS2004.pdf.

⁹ *But see infra* note 73.

¹⁰ Some people, however, do believe in “a fundamental moral principle proscribing drug use which overrides all consequentialist considerations and which the government has a right to enforce.” Robert W. Sweet & Edward A. Harris, *Just and Unjust Wars: The War on the War on Drugs — Some Moral and Constitutional Dimensions of the War on Drugs*, 87 NW. U. L. REV. 1302, 1329 (1993) (reviewing THOMAS SZASZ, *OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET* (1992)).

¹¹ Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1969 (2004) (emphasis added); see also Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 83–84 & n.62 (2004) (noting that drug offenses involve “transactions in contraband or services where both parties [are] willing participants, like buyers and sellers,” and are “conceptually different” from crimes against people and property, where individuals are unjustly assaulted or deprived).

¹² Volokh, *supra* note 11, at 1969 (emphasis added); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 573, 573 (2001) (noting that such crimes generate “substantial social costs that tend to concentrate in poor communities”).

tion. In cases of vehicular manslaughter, this allowance for indirectness manifests itself in the low standard for proximate cause: the presumed causal link between impaired driving and death is *not* undermined by an intervening factor unless it constitutes “a superseding cause,” one which is both “abnormal and unforeseeable.”¹³ Courts have in fact allowed the causal chain between negligence and harm to be stretched quite far, permitting substantial intervention by outside actors. Guilt can be established, for instance, even if the defendant was neither driving nor present at the time of the accident, so long as she bears some responsibility for enabling the driver or his condition (for example, if the defendant provided the driver with drugs and alcohol¹⁴ or allowed an unskilled driver to operate her vehicle¹⁵). With regard to simultaneous causes, one can be convicted of vehicular manslaughter even if other factors contributed to the resulting harm — if one’s actions “were ‘a,’ rather than ‘the,’ substantial cause of death.”¹⁶

The distance between cause and effect is even more pronounced in drug cases. In general, drug law is not justified by appeal to the more immediate effects of drugs on the health of voluntary users,¹⁷ although even these harms often involve significant indirectness.¹⁸ Rather, most people and the government identify the adverse social consequences that result more indirectly from drug use as their principal concerns.¹⁹ First, there is the “dangerousness attributed to people who [use] illegal drugs.”²⁰ Some estimate that “as much as half the property crime in

¹³ 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 389 n.69 (1997).

¹⁴ See, e.g., *State v. Marty*, 801 P.2d 468, 472 (Ariz. Ct. App. 1990) (holding that providing drugs and alcohol to a driver who later dies in a car accident is sufficient for manslaughter).

¹⁵ See, e.g., *Armstrong v. State*, 289 P. 1115, 1116–17 (Okla. Crim. App. 1930) (holding that allowing someone unfamiliar with driving to operate one’s vehicle is sufficient for manslaughter).

¹⁶ 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 389 (1997).

¹⁷ See Drug Enforcement Agency, *Costs to Society*, <http://www.justthinktwice.com/costs> (last visited Apr. 9, 2006) [hereinafter DEA] (arguing that drug crimes are not victimless, in part because “[m]ost people affected by drugs aren’t users”).

¹⁸ For distribution offenses, the dealer sells narcotics to the user, who may die or become sick from drug use, but the user must actually take the drugs himself; the user thus acts as an intervening agent.

¹⁹ See 21 U.S.C. § 801 (2000) (stating that the illegal use and distribution of narcotics “have a substantial and detrimental effect on the *health and general welfare of the American people*” (emphasis added)); DEA, *supra* note 17 (“It’s sometimes hard to see the damage that drugs cause — there’s drug addiction, of course, but there’s a whole lot more.”). The actual motivation for criminalizing drugs is a matter of serious debate but is not directly relevant to our moral inquiry. See MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME* 111 (2002) (arguing that drug criminalization was and is motivated by a desire to suppress racial minorities and noting admissions by courts that opium laws were created to “vex and annoy the ‘Heathen Chinese’”); Sweet & Harris, *supra* note 10, at 1317 (positing that politics has inspired past and present prohibitions).

²⁰ See 21 U.S.C.A. § 802 (West 1999 & Supp. 2005) (defining a drug addict as anyone “who habitually uses any narcotic drug so as to *endanger the public morals, health, safety, or welfare*” (emphasis added)), amended by Pub. L. No. 109-162, § 1180, 119 Stat. 3126 (2006).

some major cities is committed by drug users.”²¹ Second, there are the even more indirect domestic and international harms associated with the drug trade²² — from illegal firearms and street violence between dealers in the United States to armed conflict in Latin America and terrorism in the Middle East.²³ Of course, there is much debate as to whether drug use or its criminalization is responsible for these tremendous but indirect harms,²⁴ and resolving this debate may be of the utmost importance in assessing the morality of drug laws; it may be that those responsible for the war on drugs are more culpable and deserving of punishment than the drug users and dealers themselves. But, for the purposes of this Note, it is enough that the justice system and most Americans hold the users and dealers responsible. For it is the decision to morally and criminally condemn this group of individuals, and not individuals responsible for causing similar harms in a similar fashion, that is deeply and disturbingly inconsistent.

II. ECONOMIC BEHAVIOR

“Spirit,” said Scrooge, with an interest he had never felt before, “tell me if Tiny Tim will live.”

“I see a vacant seat,” replied the Ghost, “in the poor chimney-corner, and a crutch without an owner, carefully preserved. If these shadows remain unaltered by the Future, the child will die.”²⁵

With his admonition not to “forget poor Tiny Tim,”²⁶ Bob Cratchit reached beyond the pages of Charles Dickens’s *A Christmas Carol* — thoughts of Tim and his fate stick powerfully in the reader’s mind. There is a reason for this saliency: Dickens makes a point of connecting Tiny Tim’s fate *directly* to the miserliness of Ebenezer Scrooge. Such a poignant example of immediate harm convinces the reader of

²¹ Conference, *Is Our Drug Policy Effective? Are There Alternatives?*, 28 FORDHAM URB. L.J. 9, 214 (2000) [hereinafter Conference] (David Boaz speaking).

²² See MICHAEL COYLE, THE SENTENCING PROJECT, RACE AND CLASS PENALTIES IN CRACK COCAINE SENTENCING 2–3 (2002), available at <http://www.sentencingproject.org/pdfs/5077.pdf> (observing that federal sentencing laws were designed in part to hinder the drug trade and noting a congressional commission’s findings that the drug trade, not the effects of the drug itself, is primarily responsible for crack-related violence).

²³ See DEA, *supra* note 17 (also noting the costs to society of environmental damage, higher taxes for health care, drugged driving, and children injured in “meth labs”).

²⁴ See Sweet & Harris, *supra* note 10, at 1311 (“Drugs are not an inducement to crime, rather prohibiting drugs is.”); *cf.* Conference, *supra* note 21, at 252–53 (Ethan Nadellmann speaking) (“The end of . . . Prohibition was crucially dependent upon people making the distinction between the problems associated with alcohol use and the problems associated with alcohol Prohibition.”).

²⁵ CHARLES DICKENS, A CHRISTMAS CAROL 96 (K.S. Giniger Company, Inc. 1967) (1843).

²⁶ *Id.* at 147. In *A Christmas Carol*, Tiny Tim is the very sick child of Ebenezer Scrooge’s accounting-house clerk, Bob Cratchit. Scrooge is extremely wealthy but pays Bob Cratchit little. Because of this stinginess, the Cratchit family cannot afford sufficient care for Tiny Tim.

Scrooge's causal role and moral culpability. But, as Dickens reminds us, the sufferings of the poor masses are also causally linked to Scrooge's hoarding of material resources. We simply forget (or fail to see) because the connection is more indirect, and thus the responsibility more easily diffused and less likely to give rise to feelings of personal and moral accountability.

Unfortunately, the characteristic and excessive spending and hoarding of the wealthy continues to cause immeasurable harms throughout the world. Moreover, this economic behavior is fundamentally similar to the significant subset of criminalized behavior discussed previously. The harms caused by such consumption and accumulation are as severe as those attributed to drug, impaired driving, and manslaughter offenses, and are no more indirect. The wealthy also know or should know about the harms they impose but act nonetheless, motivated by a similarly selfish focus on personal gain. Because of these fundamental similarities, it is troublingly inconsistent to treat these two types of behavior so differently in terms of moral and criminal culpability. At the least, the similarities are strong enough that we ought to give far greater consideration to our individual purchases and deposits.

A. *Wealth and Poverty*

To establish these points of analogy, it is important to briefly examine both the exorbitant hoarding and consumption by the wealthy and the overwhelming harms of poverty that confront the poor. First, consider the world's wealthiest, who are performing amazing (and devastating) feats of resource maintenance. From the computer wizards of Microsoft to the princes of the Middle East, there are 793 individual billionaires in the world, with an amassed wealth of \$2.6 trillion.²⁷ Perhaps more striking, though not as impressive in strictly monetary terms, are examples of extravagant consumption by American celebrities. Actor Jerry Seinfeld recently spent \$1.5 million on a New York City garage for 20 of his Porsches.²⁸ Paris Hilton, the now famous heiress to the Hilton hotel fortune,²⁹ celebrated multiple twenty-first birthday parties at an estimated cost of \$350,000.³⁰

²⁷ See *Billionaire Bacchanalia*, FORBES, Mar. 27, 2006, at 111. Much of this wealth is invested but could easily be converted into cash or other assets.

²⁸ Seinfeld built the garage on "prime Manhattan real estate" and included "a cushy 844-square-foot office, kitchenette and a bathroom and shower." Betsy Schiffman, *Seinfeld Gets A Parking Space*, FORBES, Mar. 8, 2002, <http://www.forbes.com/2002/03/08/0308movers.html>.

²⁹ The family's wealth is estimated at around \$600 million. See Extra, *Hilton Wealth* (Dec. 29, 2003), http://extratv.warnerbros.com/dailynews/extra/12_03/12_29c.html.

³⁰ See E! Online, *See How Socially Savvy Sisters Blow Their Trust Funds — and Then Make More!*, <http://www.eonline.com/On/ItsGoodtoBe/Episodes/Hilton> (last visited Apr. 9, 2006). Such extravagance, sadly, is not limited to Paris Hilton. *My Super Sweet Sixteen*, a show on MTV, features the less famous children of the wealthy who spend hundreds of thousands of dollars on their

More broadly, there were almost 5,000,000 millionaires in 1998 in the United States alone.³¹ But not only millionaires “have in superabundance”: “If you have money to spare for good restaurants, concerts, vacation travel, books, CDs, and keeping your clothing in fashion, you are, in a word, rich.”³² This certainly describes Americans with six-digit salaries, including law firm associates³³ and other professionals. A brief numerical overview of the almost unbelievable concentration of wealth that exists helps to illustrate these points: In the United States, 20% of the people own about 80% of the material and economic resources,³⁴ a disparity that has only been increasing.³⁵ Moreover, Americans spend over \$600 billion annually on consumer recreation,³⁶ with Christmas expenditures alone reaching \$40 billion each year.³⁷ The global wealth distribution is shockingly similar:³⁸ “You’ve got a \$30 trillion economy and \$24 trillion of it in the developed countries. The income of the top 20 is 37 times the income of the bottom 20, and it has doubled in the last decade.”³⁹

While a small percentage of the world literally enjoys lives of luxury and recreation, thousands of people living in poverty die each day from easily preventable causes. Dysentery and diarrhea kill malnourished children in Latin America, while malaria and famine-induced epidemics take lives in Africa.⁴⁰ The annual death toll from poverty-

sixteenth birthday parties. See Robert Bianco, *A Good Season, with Reason*, USA TODAY, Apr. 27, 2005, at 1D (“[The show is] about overprivileged, undermannered kids bullying their submissive parents into throwing over-the-top birthday parties . . . [and] makes a fairly compelling argument against inherited wealth . . .”).

³¹ John G. Steinkamp, *A Case for Federal Transfer Taxation*, 55 ARK. L. REV. 1, 73 (2002).

³² Peter Singer, “*The Bread Which You Withhold Belongs to the Hungry*”: *Attitudes to Poverty*, INTER-AM. DEV. BANK (2002), http://www.iadb.org/etica/documentos/dc_sin_elpan-i.htm.

³³ See *Associates Talk Back*, AM. LAW., Oct. 2005, at 119 (noting that the average annual salary for law firm associates nationwide is \$149,000, with a \$20,000 bonus).

³⁴ See Mark Buchanan, *Wealth Distribution and the Role of Networks*, HARV. BUS. SCH. WORKING KNOWLEDGE, Apr. 29, 2002, <http://hbswk.hbs.edu/item.jhtml?id=2906&t=finance>.

³⁵ See Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 71 (1995) (noting that the income gap is at its highest level since World War II).

³⁶ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 789 (2005).

³⁷ Joel Waldfoegel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328, 1328 (1993).

³⁸ See Singer, *supra* note 32 (quoting World Bank President James Wolfensohn) (noting that 20% of the world controls 80% of the gross domestic product).

³⁹ *Id.* (quoting James Wolfensohn). Moreover, rich countries are simply not taking significant steps to remedy such inequitable distribution. See Andrew Kuper, *More Than Charity: Cosmopolitan Alternatives to the “Singer Solution,”* 16 ETHICS & INT’L AFF. 107, 107 (2002) (“Almost every developed state lavishes over 99 percent of its resources (GNP) solely on ‘looking out for its own.’”); Press Release, Oxfam, Poor Are Paying the Price of Rich Countries’ Failure (Dec. 6, 2004) [hereinafter Oxfam], available at http://www.oxfam.org/en/news/pressreleases2004/pro41206_MDG.htm (“[R]ich countries’ aid budgets are half what they were in 1960 . . .”).

⁴⁰ See generally DOCTORS WITHOUT BORDERS, U.S. ANNUAL REPORT (2004), available at <http://www.doctorswithoutborders.org/publications/ar/us2004.pdf>.

related causes is around eighteen million, or one-third of all human deaths.⁴¹ Forty-five million children will die preventable deaths in the next ten years,⁴² including 30,000 children under the age of five each day.⁴³

The harms of poverty also go far beyond dying. About 2.7 billion people, almost half the global population, lack the basic goods needed for health and happiness, surviving on less than two dollars a day.⁴⁴ They live in makeshift houses, without clean water, basic sanitation,⁴⁵ proper nourishment,⁴⁶ or medication — to name only a few of the attendant harms.⁴⁷ And the problems are not just in developing countries: thirty-seven million Americans, 12.7% of the population, lived below the official poverty line in 2004.⁴⁸ Estimates of homelessness in the United States range from 192,000 to three million,⁴⁹ and many of those with housing “are forced to pay up to 70% of their monthly income for rent, typically leaving them with as little as \$100 a month for all other needs.”⁵⁰ Thus, countless mothers and fathers work multiple jobs but live without health care, in unsafe neighborhoods with inadequate schools, and without the time or money to look after their children or improve their situation.

The situation is even worse if one accepts some of the harms more controversially attributed to poverty. The vast majority of the millions in prison come from society’s poorest class, and research in several scientific fields suggests that poverty is a cause of crime.⁵¹ Scholars ar-

⁴¹ Thomas Pogge, *World Poverty and Human Rights*, 19 ETHICS & INT’L AFF. 1, 1 (2005).

⁴² Oxfam, *supra* note 39.

⁴³ Kuper, *supra* note 39, at 107.

⁴⁴ Pogge, *supra* note 41, at 1; *see also* Kuper, *supra* note 39, at 107 (“Some 1.2 billion people will try to subsist on less than one dollar a day . . .”).

⁴⁵ Kuper, *supra* note 39, at 1 (noting that 2.4 billion people lack access to basic sanitation).

⁴⁶ *Id.* (“163 million children who will survive this day are severely undernourished.”).

⁴⁷ For a more complete list, *see* Mildred Baxter, *Health Services as a Defence Against the Consequences of Poverty in Industrialised Societies*, 17 SOC. SCI. & MED. 1139, 1141 (1983), noting that the “dangers to health associated with poverty are many and well-known” and also include dangerous work, atmospheric pollution, overcrowded or inadequate housing, a lack of education and health knowledge, social instability, and a climate of hopelessness and conflict.

⁴⁸ CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 9 (2005), *available at* <http://www.census.gov/prod/2005pubs/p60-229.pdf>.

⁴⁹ Kenn, *supra* note 35, at 72; *see also id.* at 71 (noting that increasing poverty is the predominant cause of the current homelessness epidemic); *id.* at 72 (noting that homelessness “profoundly affects” the children involved, who tend to suffer from physical and mental health problems and fall behind in school). Millions more are “considered precariously housed or ‘pre-homeless’” and often “live doubled up with relatives or friends in overcrowded spaces that lack amenities such as hot or cold water, toilets, showers, bathtubs and electricity.” *Id.* at 72–73 (footnote omitted).

⁵⁰ *Id.* at 72.

⁵¹ Sociologists have documented numerous correlations between poverty and crime, and psychologists theorize that economic frustration can spill over into violence, while malnutrition and chemical exposure from environments of extreme poverty can “create[] in individuals a propensity

gue persuasively that poverty and economic inequality undermine democracy,⁵² limit free choice and autonomy,⁵³ contribute to environmental decline,⁵⁴ and even harm the wealthy.⁵⁵ Disturbingly, poverty also disparately affects minorities.⁵⁶ In summary, there is no doubt that the harms of poverty are comparable to — if not far greater than — the harms that result from drug, DUI, and manslaughter offenses.

B. The Analogy

1. *Indirect Cause (Or Its Moral Equivalent)*. — To establish the relationship between excessive wealth and the harms of poverty, it is helpful to start with some specific and salient examples. First, consider the example of United Fruit and the land that it has held in developing countries. In 1959, United Fruit and other foreign companies owned three-quarters of Cuba's arable land — including land used to grow sugar, which represented 80% of Cuba's exports.⁵⁷ Yet during this same period, Cubans faced serious shortages of the basic goods that Cuba traditionally imported with income received from sugar ex-

to commit crimes." Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQUALITY 9, 54 (1985); see also ARISTOTLE, POLITICS, bk. 2, reprinted in THE POLITICS AND THE CONSTITUTION OF ATHENS 30, 41 (Stephen Everson ed., 1996) ("[P]overty is the parent of revolution and crime."); Clarence Darrow, Address to the Prisoners in the Cook County Jail, in ATTORNEY FOR THE DAMNED 3, 10 (Arthur Weinberg ed., 1989) (1902) (pointing to Australia as evidence that criminals, provided land and opportunity, will become regular law-abiding citizens); cf. WILLIAM ADRIAN BONGER, CRIMINALITY AND ECONOMIC CONDITIONS 53 (Henry P. Horton trans., 1916) ("[M]ost criminals are in fact motivated by the personality traits which capitalist societies encourage as 'normal': self-interest, indifference to others, and acquisition.").

⁵² See Sarah E. Waldeck, *An Appeal to Charity: Using Philanthropy to Revitalize the Estate Tax*, 24 VA. TAX REV. 667, 679 (2005) ("[E]conomic inequality also undermines democracy, because concentrated wealth helps ensure that some citizens will have much more influence and power than others.").

⁵³ See Leonard J. Long, *Optimum Poverty, Character, and the Non-Relevance of Poverty Law*, 47 RUTGERS L. REV. 693, 696 (1995) (noting that the poor occupy a "republic of despair," in which "the zone of free choice is virtually nonexistent").

⁵⁴ See JAMES GUSTAVE SPETH, RED SKY AT MORNING 154 (2004) ("[P]overty contributes to environmental decline . . . [and] [e]nvironmental decline also contributes to poverty.").

⁵⁵ See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 439 (3d ed. 1986) (arguing that the major cost of poverty is "the disutility it imposes on affluent altruists").

⁵⁶ See Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 376 (2003) ("Scholars, politicians, economists, and civil rights activists have reached a consensus There is a substantial racial wealth division . . .").

⁵⁷ See Bob Sheak, Rural Action, The "Greening of Cuba": Notes and Comments, RURAL ACTION (Jan. 29, 2002), <http://www.ruralaction.org/readjan2002.html>. In 1944, United Fruit alone owned 42% of the land in Guatemala (one-half of the entire country). See Third World Traveler, A "Killing Field" in the Americas: U.S. Policy in Guatemala, http://www.thirdworldtraveler.com/US_ThirdWorld/US_Guat.html (last visited Apr. 9, 2006). The company (now Chiquita Brands International) still holds almost 300 square miles of farmland in Central America. Stephen Millies, Workers World, How United Fruit Robbed and Killed the People of Central America (Oct. 3, 1996), <http://www.workers.org/ww/1997/fruit.html>.

ports. Second, consider the fashionable Gap clothing corporation. CEO Paul Pressler receives millions of dollars in annual compensation.⁵⁸ At factories in developing nations, however, Gap employees work more than full time but live in extreme poverty.⁵⁹ A single mother in El Salvador, “Maria,” makes about \$144 a month,⁶⁰ which is not enough to feed and educate her two children.⁶¹ Finally, reflect on the janitors and parking garage workers at Harvard Law School. While students watch big-screen televisions in the cafeteria and enjoy a seasonal ice rink and professors are paid hundreds of thousands of dollars, many of the school’s contracted workers live on close to minimum wage without health insurance or other benefits.⁶² The same year plasma televisions were installed, one garage worker, “Chad,” was on the verge of homelessness because he was not going to be paid during the winter holiday.⁶³

It is beyond the scope of this Note to explore fully the philosophical complexities surrounding causal relationships and their moral implications. However, the Note’s *moral* analogy succeeds to the extent that the connection between excessive wealth and poverty is the *moral* equivalent of the causation involved in the crimes discussed earlier. There are two ways in which the reader might be convinced. First, there are reasons to view this economic relationship as involving a causal link no different from the one between the criminal behaviors and their attendant harms. Because economic and material resources are finite at any given point in time, excessive consumption or hoarding reduces the amount available to others such that many will be more likely to face serious poverty and its harms. This point is especially clear with respect to real property: because of the vast land holdings of United Fruit, there was not enough land for Cubans, who were unable to grow the crops they needed to exchange for basic goods.⁶⁴ Resources other than real property are not as limited in an absolute sense, but they are sufficiently limited within particular economic relationships for wealthy individuals to cause harms in the same way as

⁵⁸ See Michael Liedtke, *Gap Pays \$10M to Replace Exec Stock Options*, ABC NEWS, Dec. 23, 2005, <http://www.abcnews.go.com/Business/wireStory?id=1438666>.

⁵⁹ See UNITE, *THE GAP’S GLOBAL SWEATSHOP* 4–5 (2002), available at http://www.behindthelabel.org/pdf/Gap_report.pdf.

⁶⁰ See *id.* at 25.

⁶¹ *Id.* at 4; see also *id.* at 28 (noting that many workers have no running water or electricity).

⁶² Letter from Jesse Newmark, Co-Chair, Labor Law & Employment Action Project (Dec. 2, 2004) (on file with the Harvard Law School Library) (based on interviews with Harvard Law School workers and presented to various administrators at the law school).

⁶³ *Id.* To the Law School’s credit, it addressed this particular situation.

⁶⁴ Similarly, on an individual scale, consider the vacation homes and private resorts owned by the wealthy today. Such property could instead shelter the homeless domestically and provide opportunities for development abroad. The garage building for Jerry Seinfeld’s luxury cars, for instance, might have provided homes to New York families facing eviction.

drunk drivers or drug dealers. Corporations, for instance, have to limit total expenditures — including both executive and worker compensation — to less than gross income to remain profitable. Higher professional salaries make it less likely that a corporation will provide sufficient wages to keep all of its workers out of poverty. Thus, Paul Pressler's millions of dollars in compensation is a cause of Maria's poverty: the more he takes out of the Gap's profits, the less remaining profits the Gap will have and the more likely it will pay Maria so little that she or her children will suffer or die.⁶⁵

To complete this point, it is critical that the crimes discussed earlier allow for substantial indirectness, including simultaneous and intervening causes. With regard to the latter, Paul Pressler does not take money directly out of the hands of the Gap's workers, but neither does a street-level drug dealer directly send arms to Colombian drug cartels. Instead, the behavior of these actors only brings about such harms if certain intervening actions or events take place: the Gap must still decide that it has insufficient funds to provide adequate pay to its workers, just as the Colombian cartel has to decide it will use its funds to purchase weapons. Similarly, with regard to simultaneous causes, student demands for amenities may alone be insufficient to cause Harvard's workers to go without health insurance, but so might the intoxicated driver not be the sole cause of an attendant fatality. Rather, both our extravagances and his impaired driving ability may depend on combinations of contemporaneous circumstances for such harms to result. The drunk-driving victim may have survived if he had worn his seatbelt, just as the janitor might have avoided poverty by finishing high school. And the car accident may not have happened if the road had been well lit, just as the garage worker might not have faced homelessness if the government had provided an adequate supply of subsidized housing. Thus, there is a strong argument that Paul Pressler, Harvard Law students and professors, and United Fruit are as much causes of the poverty facing Maria, Chad, and Latin America as the drunk driver is the cause of a car accident or the drug dealer is the cause of violence in Colombia.

Beyond these examples of the most direct relationships, excessive resource consumption and maintenance by individuals cause poverty and its related harms on a broader scale.⁶⁶ Most wealthy Americans depend in large part on stock dividends or salaries from companies such as the Gap and Chiquita. The salaries of lawyers, advertising executives, and other corporate professionals, for instance, come directly

⁶⁵ The causal link between wealth and poverty is no different in this case than in *A Christmas Carol*, in which Scrooge's massive resources depended on his paying Cratchit so little for his labor.

⁶⁶ By analogy, the conceptual move is from the relationship between Scrooge and Tiny Tim to the relationship between Scrooge and the poor masses.

from the substantial amounts these companies pay for their services.⁶⁷ Diversified investors and professionals thus have the same causal impact and relation to poverty as the CEOs and corporations discussed above; the impact is simply spread across multiple companies. The more money these individuals derive from their corporate stocks and salaries, the less money is available to these companies, and the more likely that nonprofessional employees will be paid less. Moreover, even small amounts of excess resources translate into substantial harms, establishing (at least *prima facie*)⁶⁸ that the average investor or professional plays a significant causal role — or at least as significant a causal role as any individual drug dealer or drunk driver.⁶⁹ Scholars, for instance, conservatively estimate that \$200, the equivalent of two fancy dinners for most law firm associates, could free one life from poverty and its effects.⁷⁰ Thus, the poor are not merely dying; we are killing them. We are violating not only a positive duty to prevent harm but also a negative duty not to commit harm.⁷¹

Second, even someone who denies this causal argument might accept that simply *letting* these harms take place is as immoral as affirmatively causing them.⁷² It is easy to see that a wealthy individual at least allows others to suffer from poverty — for instance, by buying a second home for herself instead of buying one for a homeless family. And, to the extent one accepts the equivalence of this *moral* link between wealth and poverty, the *moral* analogy to recognized crimes remains intact. Finally, even rejecting both the causal argument and the full moral equivalence of failing to act would only weaken the strength of the analogy; so long as one accepts both the minimal claims that there is a relationship between wealth and poverty (such that resources can be shifted so as to reduce poverty) and that this relationship has

⁶⁷ The wealth of noncorporate Americans, such as doctors or professors, comes from the same sources, only after additional intervening steps.

⁶⁸ See *infra* section III.A, pp. 2178–79.

⁶⁹ Cf. White, *supra* note 2, at 1447 (“The conclusion is inescapable: most incidents of drunk driving do not result in injury.”).

⁷⁰ PETER UNGER, *LIVING HIGH AND LETTING DIE* 136–39 (1996). Consider also that the yearly tuition at Harvard Law School, \$35,010, is almost enough to raise two families of four with no income out of poverty. See DENAVAS-WALT ET AL., *supra* note 48, at 45. Moreover, the estimated deadweight loss of Christmas expenditures represents the equivalent of about 250,000 to 700,000 families of four living at the poverty line. See Long, *supra* note 53, at 736 n.131.

⁷¹ See Leif Wenar, Book Review, 17 *ETHICS & INT’L AFF.* 121, 122 (2003), available at <http://www.carnegiecouncil.org/viewMedia.php/prmID/1028>.

⁷² See Peter Singer, *Famine, Affluence, and Morality*, 1 *PHIL. & PUB. AFF.* 229, 231 (1972) (arguing that we have a moral obligation to act when “it is in our power to prevent something bad from happening” and we would not “thereby sacrific[e] anything of comparable moral importance”); Singer, *supra* note 32 (“[I]n the end, what is the difference between . . . sell[ing] a homeless child to people who might be organ peddlers and . . . upgrad[ing] to a better [TV] — knowing that the money could be donated to an organization that would use it to save the lives of street kids . . . ?”).

some moral implications (such that choosing not to reduce the harms of poverty makes one at least *somewhat* culpable), the comparison to recognized crimes is at least *somewhat* reasonable.

2. *Intent and Selfishness.* — Drug dealing, drunk driving, and manslaughter offenses only require — whether implicitly or explicitly — that the culpable individual knew or should have known of the risks associated with her action. It is clear that those who engage in excessive consumption and hoarding also at least *should* be aware of the consequences of their actions: we see commercials about starving children (while we watch our plasma televisions), we pass the homeless sleeping on our streets (while we drive our cars to work), and we read articles about failing public schools and families without health insurance (while we pay for LSAT prep courses and cosmetic surgery).

Also, people are held morally and criminally responsible for the aforementioned criminal offenses in part because of the perceived selfishness of their actions: drug dealers hope to “get rich quick” and drunk drivers want to “party it up,” even if their behavior puts the lives of others at risk.⁷³ This idea of selfishness supposes that the value to the offender of his action is greatly outweighed by harms it imposes on others.⁷⁴ With regard to material resources, the declining marginal utility of wealth helps to cement the analogy. Simply put, the idea is that one thousand dollars is worth far less to a millionaire — in terms of happiness or health, for instance — than to a person living on a regular salary.⁷⁵ Although critics reject strict formulations of this doctrine,⁷⁶ it seems hard to dispute that decreasing marginal utility kicks in at some point and, given current economic disparities, that some shift of resources from the rich to the poor right now would bring benefits to the latter that far outweigh the costs to the former.⁷⁷ It is hard to imagine, for instance, that one thousand dollars would not bring far greater happiness and well-being to any one of the millions of people living on less than a dollar per day than to Paul Pressler (or to almost any American for that matter).⁷⁸ Moreover, most people would

⁷³ Critics, however, might persuasively argue that drug dealers are not acting selfishly but rather are responding to a lack of legitimate work opportunities beyond their control.

⁷⁴ To put it another way, there is nothing wrong with wanting to make money (drug dealing) or have another drink (drunk driving), unless doing so costs others their lives or well-being.

⁷⁵ See Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7, 22 (1991) (“The utilitarian argument assumes that the marginal utility one draws from a given sum of wealth diminishes the more wealth one has.”).

⁷⁶ See POSNER, *supra* note 55, at 11–12 (focusing on ability to pay as a measure of utility).

⁷⁷ See John J. Donohue III & Ian Ayres, *Posner's Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791, 797–98 (1987) (reviewing POSNER, *supra* note 55) (“In a country where thousands of children are homeless and hungry, while others spend hundreds of dollars for a single meal, Posner's [argument] is, to say the least, problematic.” (footnotes omitted)).

⁷⁸ Consider, in particular, that “\$17 will provide immunization ‘to protect a child for life against the six leading child-killing and maiming diseases,’” and that “\$25 will provide ‘over 400

concede that a similar sum would mean more to a family that cannot afford health care than it would to an average law firm attorney. Thus, the wealthy act in the same selfish manner as drug dealers and drunk drivers: they compromise the lives, health, and happiness of others for the sake of things of far lesser value for themselves.⁷⁹

III. COUNTERARGUMENTS

That world poverty is an ongoing harm *we* inflict seems completely incredible to most citizens of the affluent countries. . . . [I]t is unthinkable to us that we are actively responsible for this catastrophe. If we were, then we, civilized and sophisticated denizens of the developed countries, would be guilty of the largest crime against humanity ever committed, the death toll of which exceeds, every week, that of the recent tsunami and, every three years, that of World War II, the concentration camps and gulags included. What could be more preposterous?⁸⁰

Parts I and II of this Note establish that certain important *criminal* offenses and a type of *lawful* economic behavior share fundamental characteristics. Without more, this point seems to identify troubling inconsistencies.⁸¹ There are, however, serious counterarguments to this analogy.

A. Practical Arguments: Line-Drawing

One problem is that difficult issues of scale present themselves: What about the middle-class American family that can afford to buy a car, a television, and maybe even take a vacation? Are these individuals blameworthy? As discussed earlier, their income is connected to poverty, and even commonplace nonessentials translate into dozens of lives. However, such problems arise equally when addressing recognized crimes. Agencies determine which drugs cause enough harm to be criminalized, and legislatures promulgate sentencing guidelines that take account of each drug's dangerousness and the quantity involved. Driving under the influence involves even more explicit line-drawing: exact levels of blood alcohol content determine criminal liability, de-

packets of oral rehydration salts to help save the lives of children suffering from diarrheal dehydration.” Peter Singer, *Poverty, Facts, and Political Philosophies*, 16 ETHICS & INT’L AFF. 121, 121 (2002) (quoting U.S. Committee for UNICEF’s 2001 fundraising material). It is hard to think of anything of comparable value the average American could get for around \$20.

⁷⁹ One might make the point that much individual investment is not intended for later personal consumption but to provide for future generations — one’s children and grandchildren. However, singling out one’s actual or potential genetic heirs for special future benefits, at the expense of the billions suffering from poverty today, is arguably quite selfish.

⁸⁰ Pogge, *supra* note 41, at 1–2.

⁸¹ The question then is: why is there freedom to move your money wherever you will, regardless of effect, but not your car?

spite the fact that alcohol consumption below these levels also impairs driving. Indeed, if society held culpable all behavior that makes car accidents more likely, it would condemn licensing teenage and elderly drivers and driving to work with a cold. Of course, it would never do so. Rather, it is always a matter of drawing lines, even when behavior on both sides presents some risk of serious harms. There is no reason to think the same could not be done for economic behavior. For some, the formula may be simple and quite strict: “[W]hatever money you’re spending on luxuries, not necessities, should be given away.’ Who should give how much exactly? The average American household should give away any annual income over \$30,000.”⁸² For others, it might only be millionaires that cause sufficient harms and manifest sufficient selfishness to be held accountable.⁸³

B. Economic Arguments: Cycling and a Bigger Pie

“But you were always a good man of business, Jacob,” faltered Scrooge, who now began to apply this to himself.

“Business!” cried the Ghost, wringing its hands again. “Mankind was my business. The common welfare was my business; charity, mercy, forbearance, and benevolence, were, all, my business. The dealings of my trade were but a drop of water in the comprehensive ocean of my business!”

...

“The Founder of the Feast indeed!” cried Mrs. Cratchit, reddening. “I wish I had him here. I’d give him a piece of my mind to feast upon, and I hope he’d have a good appetite for it.”⁸⁴

Economic arguments may provide the most intuitive and powerful counters to the analogy. First, at least for certain forms of wealth consumption and maintenance,⁸⁵ resources may be “cycled”: money spent and invested not only benefits the wealthy in the form of products and dividends, but also goes to the employees at the companies that make

⁸² Kuper, *supra* note 39, at 109 (quoting Peter Singer, *The Singer Solution to World Poverty*, N.Y. TIMES, Sept. 5, 1999, at SM60).

⁸³ On a related note, scholars have pointed to the role of “futility thinking” with regard to wealth-based morality. Futility thinking “plays an important role in our intuitive moral thinking” and results when one “focuses on the vastness of the serious losses that will still be suffered even if you do all that you can do.” Peter Singer, *Living High and Letting Die*, 59 PHIL. & PHENOMENOLOGICAL RES. 183, 185 (1999) (book review). In this case, making some effort to avoid excessive wealth may save many children, but many more will still die premature deaths from the same diseases and could be saved by greater efforts. *Id.* However, such thinking is flawed: “When we save the lives of ten or a hundred children, the good that we do to those children is not diminished by the fact that other children are still dying.” *Id.*

⁸⁴ DICKENS, *supra* note 25, at 33, 97.

⁸⁵ True hoarding may involve no cycling of wealth. For instance, land holdings (or estates built and purchased long ago) may not employ anyone, but simply prevent others from using these resources for potentially productive, poverty-reducing purposes.

the products and receive the investments. Second, concentrated wealth arguably *increases* the resources available to the poor. The classic metaphor is that of a pie representing wealth. Inequitable resource distribution means that people get bigger and smaller slices of this economic pie — if the slice is small enough, the person will live in poverty. Concentrated wealth, however, provides incentives for economic growth that make the whole pie bigger — so much so that the small slices will actually be larger than if we evenly distributed the original pie. For instance, only the very wealthy can afford to make the most risky but also the most potentially beneficial investments in new technologies and medicines.⁸⁶ Moreover, the potential for great wealth motivates productivity among the nonrich.⁸⁷ Inequitable distribution thus reduces poverty, completely undermining the moral analogy. As one author notes, “the sincere extreme neoliberal agent is deeply moral in his or her character and conduct, since he or she believes that conspicuous consumption and massive differentials in income are the most effective ways to alleviate the plight of the poor.”⁸⁸

However, there is one reason these arguments *may* fail to undermine our analogy, and another reason they almost certainly *do*. First, the bigger pie and cycling claims may be empirically false. Many economists reject the bigger-pie claim either in part or in its entirety.⁸⁹ Reducing inequitable distribution may bring increases in human capital from improved general health and education that more than compensate for any lost incentives, yielding greater economic growth.⁹⁰ Even conceding the bigger-pie claim generally, it may be that wealth is *too* concentrated.⁹¹ For instance, recent and dramatic surges in CEO compensation have been linked to a decline in company values, without any associated strengthening of management incentives.⁹² Moreover, it is tremendously important if even some of our current excesses are not market efficient, since it would only take skimming a little off

⁸⁶ See Waldeck, *supra* note 52, at 677 (noting some economists’ belief in “the ability of the very wealthy to shoulder the sunk costs . . . involved in establishing new enterprises or industries”).

⁸⁷ See *id.*

⁸⁸ Kuper, *supra* note 39, at 118.

⁸⁹ See James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 831 (2001) (“Economic studies are remarkably unanimous in suggesting that high concentrations of wealth correlate with poor economic performance in the long run.”).

⁹⁰ See Waldeck, *supra* note 52, at 677–78 (“Virtually all commentators agree that wealth inequality leads to underinvestment in both physical and human capital . . .”).

⁹¹ See Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 263 (2000) (“Disparities in means and opportunity between the poor and the prosperous yawn too wide to be shrugged off as the unpleasant but tolerable by-product of a market economy . . .”).

⁹² Stephen Labaton, *S.E.C. To Propose New Rules on How Executive Pay Is Reported*, N.Y. TIMES, Jan. 11, 2006, at C3 (citing Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 OXFORD REV. ECON. POL’Y 283 (2005)); see also Bebchuk & Grinstein, *supra*, at 297 (finding that CEO compensation reached 12.8% of corporate profits between 2000 and 2002).

the biggest slices to end many of the harms of poverty: “The aggregate income of the poorest quartile is less than 0.7 percent of the global social product A shift in global income distribution that would double (or triple) their incomes . . . would reduce the top tenth of incomes by a mere 1 or 2 percent”⁹³ Finally, even if economic growth is greatest with concentrated wealth, it may be that poverty is not alleviated because money does not “trickle down” to those in need (the pie gets bigger, but the smaller slices do not).⁹⁴

More importantly, the question of what economic system does the most good is arguably quite irrelevant to the analogy: even if a neoliberal system allowing for concentrated wealth is the best *system* for reducing poverty (and thus is not responsible for harming the poor), an *individual* who decides to maintain concentrated wealth within this system may still be personally culpable for contributing to the harms of poverty that remain. To elaborate, even the staunchest free market proponent should concede that voluntary *personal* decisions to redistribute excess wealth would not undermine the *system's* positive growth benefits or economic cycling. Because individuals retain control over their earnings, incentives to attain wealth should be largely unaffected. And, unless taken to its unlikely extremes, wealth would remain sufficiently concentrated to encourage risky but socially beneficial investment. Moreover, such voluntary decisions would avoid causing poverty. Even if it is the best system, neoliberal cycling and incentives still keep billions of people living and dying in poverty. For instance, capital investment may help the Gap to employ people; nevertheless, these employees still find themselves suffering from the harms of poverty, due in part to the large dividends that investors receive. Individuals that go no further than to cycle their excess wealth through investment and spending thus continue to cause poverty; to stop contributing to such harms, these investors and consumers would have to do more — refuse or redistribute excess dividends and material goods. By analogy, consider arguments for decriminalizing drugs. Proponents maintain that drug distribution should be legal because the system of decriminalization avoids the most harm, but they do not contend that individuals who choose to sell dangerous narcotics within this system will be acting morally. Rather, that decriminalization or neoliberalism may be the best systems to avoid the harms of drug distribution and poverty, respectively, does not determine individual morality — it does not mean that individuals are excused from taking further steps to avoid causing harms.

⁹³ Thomas W. Pogge, *The Moral Demands of Global Justice*, DISSENT, Fall 2000, at 37, 38. Relying on this second refutation alone does, however, have implications for line-drawing: to the extent only great excesses are problematic, only the very wealthy cause poverty and its harms.

⁹⁴ See Long, *supra* note 53, at 715–17.

C. Moral Arguments: I/They Deserve It

Even accepting the connection between maintaining concentrated wealth and the harms of poverty, one might still find a moral difference between such economic behavior and recognized crimes. The most powerful basis for such a distinction is the notion that wealthy and poor nations and individuals somehow *deserve* what they get. Wealth thus represents a “situation of earned privilege,” in which the rich deserve their wealth because they have “more ability and work harder than everyone else.”⁹⁵ However, there are a number of serious problems with this idea of desert. First, at the most basic level, it may be that no combination of personal traits or efforts can morally justify at least certain types or levels of wealth.⁹⁶ For some, land and natural resources cannot *belong* to anyone: “Nature put this coal in the ground for me as well as for them”⁹⁷ For others, there is no right to excess wealth in the face of poverty: “[W]hatever certain people have in superabundance is due, by natural law, to . . . the poor.”⁹⁸

Second, there is a powerful historical argument that the wealth we possess as individuals and nations was earned in an immoral manner and thus is not deserved. Professor Thomas Pogge puts this point eloquently on a global level:

I deny that the . . . citizens of the affluent countries are morally entitled to their 81 percent of the global product I challenge this sort of justification by invoking the common and very violent history through which the present radical inequality accumulated. Much of it was built up in the colonial era, when today’s affluent countries ruled today’s poor regions of the world: trading their people like cattle, destroying their political institutions and cultures, taking their lands and natural resources, and forcing products and customs upon them.⁹⁹

The same can be said on a domestic note. Most of the real property in the United States was forcibly taken from Native Americans and given to non-Indians,¹⁰⁰ and these unjustified takings explain to some extent

⁹⁵ Patricia Hill Collins, *African-American Women and Economic Justice: A Preliminary Analysis of Wealth, Family, and African-American Social Class*, 65 U. CIN. L. REV. 825, 826 (1997); see also Steinkamp, *supra* note 31, at 77 (noting that our sense of entitlement proceeds from the Lockean notion that each of us has a natural right to the wealth produced by our labor, which is based on the assumption “that income and wealth are primarily attributable to the individual’s innate abilities and effort”).

⁹⁶ See PIERRE-JOSEPH PROUDHON, *WHAT IS PROPERTY?* 13 (Cambridge Univ. Press 1994) (1840) (“Property is theft!”).

⁹⁷ Darrow, *supra* note 51, at 13.

⁹⁸ ST. THOMAS AQUINAS, 2 *SUMMA THEOLOGICA* Pt. II-II, Q. 66, Art. 7, at 232–33 (Fathers of the English Dominican Province trans., Thomas Baker 1918).

⁹⁹ Pogge, *supra* note 41, at 2.

¹⁰⁰ Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 5 (1991).

both Native American poverty¹⁰¹ and the relative wealth of colonial descendants today. Current wealth disparities between black and white Americans also had unbelievably immoral and racist beginnings: centuries of unpaid labor during the period of slavery, worth billions or even trillions of dollars, “have resulted in financial advantages for whites and disadvantages for blacks that have been transferred across generations.”¹⁰²

Third, arguments of moral desert are undermined to the extent that *current* political, economic, and military structures and institutions maintain inequitable wealth distribution without consideration for individual or national merit.¹⁰³ On an international level, the subsidies and trade barriers of rich countries preserve their own economic advantages at the expense of the economies of developing nations.¹⁰⁴ According to the World Bank, such barriers “cost developing countries more than twice what they receive in foreign aid.”¹⁰⁵ The current system of “state sovereignty,” in which rich nations extend borrowing, treaty, and arms privileges to any group able to seize power in a country, yields similar results — it greatly benefits rich countries, which seek inexpensive natural resources, but enables often brutal and corrupt rulers to exploit and oppress developing nations.¹⁰⁶ Finally, wealthy countries effectively control powerful international financial institutions, such as the World Bank and International Monetary Fund, and experts argue that they often impose policies that do more

¹⁰¹ See Gary C. Anders, *The Reduction of a Self-Sufficient People to Poverty and Welfare Dependence: An Analysis of the Causes of Cherokee Indian Underdevelopment*, 40 AM. J. ECON. & SOC. 225, 234 (1981) (arguing that Native American poverty is the direct product of this history). Also, too disgraceful to be called ironic, this theft was committed in spite of our own moral conceptions of property ownership based on first possession. See Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 739–40 (2003).

¹⁰² Watson Branch, Comment, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT’L L.J. 177, 186–87 (2002); see also Robinson, *supra* note 56, at 339 (noting that later “Forced Labor” also “facilitated the immense unjust enrichment by corporations, states, municipalities, and individuals at the expense of former African American slaves”).

¹⁰³ See Pogge, *supra* note 41, at 4–5 (arguing that wealthy nations preserve their great economic advantages by imposing unjust global institutional arrangements).

¹⁰⁴ See *id.* at 6 (noting that removing such barriers would greatly reduce unemployment while increasing both wages and export revenues in developing nations, and criticizing recent WTO negotiations, in which “affluent countries insisted on continued and asymmetrical protections of their markets through tariffs, quotas, anti-dumping duties, export credits, and huge subsidies to domestic producers”); *cf. id.* (arguing that rich-state overprotection of intellectual property rights prevents generic drug producers from saving millions of people in poor nations from disease).

¹⁰⁵ Dale Jamieson, *Duties to the Distant: Aid, Assistance, and Intervention in the Developing World*, 9 J. ETHICS 151, 168 (2005). Another striking example is that U.S. subsidies to its 25,000 cotton farmers are “greater than the entire economic output of Burkina Faso, a country in which two million people depend on cotton for their livelihoods.” *Id.*

¹⁰⁶ See Pogge, *supra* note 41, at 7 (noting that these leaders often exclude their people from the benefits of the country’s natural resources and leave them with huge debts).

harm than good to the economies of developing nations.¹⁰⁷ Thus, “the common thesis that world poverty can be attributed to corruption and incompetence in poor countries” fails to account for the global causes of these local factors.¹⁰⁸

Similarly, domestic structures undermine the notion that wealthy individuals have earned their fortunes through skill or hard work. First, inheritance, which is entirely unearned income, is a primary determinant of personal wealth.¹⁰⁹ Socioeconomic status has a similar effect, providing unequal starting points that are equally independent of individual merit.¹¹⁰ Moreover, resources provided by society as a whole,¹¹¹ biased background rules,¹¹² and arbitrary market factors¹¹³ play substantial roles in determining wealth. Thus, “a part of most incomes derives not directly from effort, but from luck, inheritance, or some other type of serendipity.”¹¹⁴

Lastly, on an intuitive level, it simply seems wrong to assign culpability to children dying of malnutrition in developing nations, even if one does hold their governments or parents partly responsible. Similarly, most of us do not blame parents who work more than full time

¹⁰⁷ See Jamieson, *supra* note 105, at 169 (discussing Malawi, a country that became heavily indebted to the IMF under an undemocratic ruler and where half of the population lives in poverty, yet which the IMF required both to spend almost one-third of its budget servicing this debt — more than it spends “on health, education, and agriculture combined” — and to eliminate subsidies, price controls, and grain stores that had been staving off famine).

¹⁰⁸ Wenar, *supra* note 71, at 122–23.

¹⁰⁹ See Steinkamp, *supra* note 31, at 73–74 (citing estimates that 50% of wealth is attributable to inheritance); Waldeck, *supra* note 52, at 675.

¹¹⁰ See Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1, 20–21 (2005) (noting that “the practical capacity to realize [the right to pursue happiness] might differ quite dramatically from individual to individual according to one’s birth, altogether faultlessly and arbitrarily, to different parents, into different educational and social opportunities”); Laurence J. Kotlikoff & Lawrence H. Summers, *The Role of Intergenerational Transfers in Aggregate Capital Accumulation*, 89 J. POL. ECON. 706, 730 (1981) (“[E]ven discounting inheritance . . . the economic status of parents is a key determinant in predicting the economic status of their children.”).

¹¹¹ Steinkamp, *supra* note 31, at 82 (“Financial success in our complex and interdependent economy is always attributable in part to . . . the important infrastructure and stable society provided by government.”). For example, Wal-Mart would have no shoppers in its stores or salesclerks to count money without public roads and schools, and “multi-millionaires from Michael Jackson to Bill Gates” would not have their fortunes without the protection of “patent, trademark and copyright laws.” Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1, 68–69 (1998).

¹¹² See Steinkamp, *supra* note 31, at 80 (noting that government action “often provides great assistance to particular participants in the economy”). For instance, while labor law arguably fails to protect union workers, corporate shareholders reap tremendous benefits from limited liability.

¹¹³ See *id.* at 78–79 (arguing that moral claims to marketplace earnings are limited by the fact that our talents and abilities have no value outside of complex and somewhat arbitrary market factors and social values, and noting, for example, that the now highly rewarded skill of hitting a ball with a stick (baseball) was entirely valueless historically).

¹¹⁴ Donna M. Byrne, *Locke, Property, and Progressive Taxes*, 78 NEB. L. REV. 700, 713 (1999).

but are still unable to maintain stable housing or health care.¹¹⁵ And, so long as one accepts that at least some people do not deserve poverty, methods of addressing poverty can be tailored to alleviate any lingering concerns: one can supplement the wages of poor working families in the United States, if one believes that people in developing nations and the unemployed are somehow blameworthy.

IV. CONCLUSION

“We are the happiest people in the world We have just enough of everything but not enough to make anyone else want to take it away.”¹¹⁶

To some extent, this Note intends to provoke and challenge. It suggests answers to difficult questions of morality and causation that are certainly vulnerable to attack — especially by the well-educated legal professionals and students who (may) read law reviews and may not like being implicated by its conclusions. However, even if some points of the analogy are dismantled, the broader claim stands firm: failing to make any significant sacrifices to help those suffering from poverty is “not simply the absence of charity, let alone of moral saintliness: It is wrong.”¹¹⁷ Thus, the aspiring firm partner, who insists that drug dealers and drunk drivers cause harm while the wealthy only allow poverty to happen, should ask himself: would I feel any better telling a father whose child’s belly is swelling from malnutrition that I am only *letting* him suffer by buying another luxury car? To borrow eloquent words from a similar context: “While the powerful and privileged continue the armchair philosophical debate,” millions suffer.¹¹⁸

It would also be easy, but entirely unfair, to dismiss the analogy by caricaturing possible solutions, especially the obvious: “You want us to send rich people to jail?” The inconsistency this Note establishes, while meaningful, carries with it no such implications. Policy choices to solve difficult social problems are never simple, and further inquiry might show criminalizing this economic behavior to be undesirable.¹¹⁹ Moreover, even if criminal uniformity were necessary to resolve the inconsistency, the recognized offenses could instead be *decriminalized*.¹²⁰

¹¹⁵ Also, any merit-based argument has a limited impact on the analogy, as many of the harms of drug offenses fall on arguably blameworthy users and these very same poor populations.

¹¹⁶ RENEE TAYLOR, HUNZA HEALTH SECRETS 26 (1964) (quoting the King of Hunza, a region in Pakistan known for its remarkable peacefulness and the longevity of its people).

¹¹⁷ Peter Singer, *Achieving the Best Outcome*, 16 ETHICS & INT’L AFF. 127, 127 (2002).

¹¹⁸ Kenn, *supra* note 35, at 95–96.

¹¹⁹ See Conference, *supra* note 21, at 173 (Attorney General Katzenbach speaking) (“Not all behaviors that we condemn should be subject to prison terms.”).

¹²⁰ Many consider criminalization undesirable, in part because it entirely fails to prevent such crimes. See, e.g., Norval Morris, *Race and Crime: What Evidence Is There That Race Influences*

There are, of course, a number of systemic ways to address these problems outside of the criminal justice system.¹²¹ But perhaps most unfair about any implementation-based criticism is that it jumps the gun. Right now, people do not even *think* about the two areas of behavior as having anything in common. According to our fundamental schemas, crime is bad and wealth is good. It is too much to expect that *any* suggestion to implement a serious policy change be taken seriously when people have yet to begin changing their personal beliefs. Maybe for now, just as parents remind their children to “say no” to drugs and friends “don’t let friends drive drunk,” people need to start by insisting to themselves and those around them that excess wealth is unacceptable — when a friend or family member suggests buying a new BMW, point out that a used car would do just fine and would avoid contributing to the substantial harms of poverty. Similarly, as has hopefully become clear, attacking *systemic* solutions does not make the moral problem go away; *individuals* can still take voluntary action to avoid immoral excesses of wealth.

This Note intends to reach educated and privileged individuals who question why someone would want to help or be friends with those who commit crimes. Even those who agree that situational factors play an important role in behavior still see criminals as very different from themselves — as the excusable but real wrongdoers in society. Hopefully, this Note shows that things are not so clear cut: that the educated and privileged are responsible for more suffering than they might like to believe. It is time to see ourselves as critically as we see them, or better yet, to see both ourselves and criminals as good people, making bad decisions, with opportunities to rise above their environments and make a change.

Results in the Criminal Justice System?, 72 JUDICATURE 111, 113 (1988) (“We’ve rarely been able to demonstrate any changes in crime rates by making . . . even relatively substantial changes in policing or in correctional practice.”). Retribution is also a problematic rationale to the extent that the culpability of those who commit crimes is mitigated by situational factors (just as drug dealers may be predisposed by poverty, *see supra* note 51, the wealthy may be predisposed by a culture of consumerism).

¹²¹ For drugs, public health approaches based on education and treatment are often advocated. *See Sweet & Harris, supra* note 10, at 1338; *see also* Conference, *supra* note 21, at 77 (Marc Mauer speaking) (noting that we would not call the police on our own children if they were involved with drugs). For wealth, taxation and other redistributive schemes have been the most popular alternatives, whether to reallocate money directly or to set up important poverty-avoiding infrastructure, such as public schools. But there are certainly more creative options available: wealthy and poor homes could be placed side-by-side to reduce the emotion-limiting effects of distance, *cf. Singer, supra* note 32 (noting that it is much easier not to help those we do not meet); government officials could lead by example, *cf. id.* (arguing that their “stated wish to end poverty w[ould] at last become credible” if they gave up such excesses as “caviar at receptions” and “limousines to drive around in”); or alternative forms of business could be promoted, with profits going to the poor, not wealthy owners or shareholders (consider, for instance, Newman’s Own food company or YMCA fitness centers).