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BEYOND HOMICIDE? THE FEASIBILITY OF EXTENDING THE DOCTRINE OF PARTIAL EXCUSE ACROSS ALL OFFENCE CATEGORIES

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ABSTRACT. Harboured between full excuses and mitigatory factors, with its application restricted to murder only, the doctrine of partial excuse presents as both a procedural irregularity and a theoretical outlier. Perhaps owing to its problematic nature and limited reach, the site and scope of the doctrine has received scant scholarly attention. This paper signals the potential of partial excuse as a means of addressing criticisms pertaining to moral injustice at the heart of responsibility attribution. In particular, it aims to set the scene for future theoretical development in this area by dismantling the three familiar arguments against expanding partial defences beyond homicide. First, it clarifies the nature of partial excuse by questioning the apparent dependency of the doctrine on the mandatory life sentence for murder, arguing that partial excuse can function independently of both penalty and offence. Next, it considers the conceptual challenge posed by the notion of “partial responsibility”, before attending finally to the practical obstacles facing an expansion of the doctrine. Ultimately, the paper concludes that the doctrine *can* apply to all offence categories, and that deeper consideration is needed on the question of whether or not it *ought* to apply universally.

I INTRODUCTION

With some notable exceptions, there is a lack of attention paid to the idea of expanding partial defences. Douglas Husak suspects that this situation is due to the fact that they are perceived as “less important than complete defenses” because they do not fully preclude liability.¹ Indeed, it could be said that partial excuses play a bit part in the overall production of the criminal law. Situated between excusing conditions amounting to complete defences at one end, and mitigatory factors at the sentencing stage at the other; their range extends to homicide offences only, acting to reduce an offence of murder to one

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¹ Douglas N. Husak, “Partial Defenses” (1998) 11(1) *Canadian Journal of Law & Jurisprudence* 167, fn7.

of manslaughter where certain conditions are met. Those conditions, too, are narrow, allowing for mental disorder under a diminished responsibility defence, loss of control/ provocation, or excessive use of force in certain circumstances.² Yet, for all its apparent bound- edness, a closer study of the objections to expanding the doctrine beyond homicide unearths issues that agitate core assumptions underpinning the criminal law, in terms of parity of treatment and proportionality of blame ascription. Perhaps, then, the reluctance to pull at the thread of the doctrine has more to do with a disinclination to disturb the *status quo* by unearthing an intellectual quagmire, rather than a perception of the doctrine as inconsequential.

Attending to the significance of the present doctrine, this paper paves the way for a deeper evaluation of the potential of a universal partial defence in the criminal law. A brief historical review in Part II highlights the flexible nature of the doctrine, which goes to informing a key theoretical justification for expanding the defence, as addressed in Part III. By identifying and unravelling three interrelated objec- tions to its expansion in Part IV, the paper uncovers penetrating issues that speak to the integrity of the law in blaming its subjects. The first objection derives from a reading of the doctrine as a type of mitigatory mechanism for murder which operates to offset the mandatory life sentence, as opposed to a form of excuse in the sub- stantive sense. The argument goes that if the fixed penalty were abolished there would be no requirement for the doctrine because such circumstances like diminished responsibility and loss of control could be dealt with in mitigation at the sentencing stage. The second objection relates to the conception of partial excuse as a member of the excuse family. A core challenge to the expansion of partial excuse from a theoretical perspective is found in the assumption that the notion of “degrees of responsibility” simply doesn’t exist when evaluating culpability in the criminal law because such a concept runs counter the dominant, compatibilist model. Third, even if all doc- trinal and theoretical obstacles are overcome, the problem of co- ordinating partial excuse across all offence categories remains a salient objection, because not all offences have a lesser alternative. Ultimately, the paper concludes that the doctrine *can* apply to all

² For instance, Irish criminal law offers a partial defence to murder where a person who is acting in self-defence exercises more force than is necessary, but no more than he or she honestly believes to be necessary, in the circumstances; (*AG*) v *Dwyer* [1972] IR 416.

offence categories, and that deeper consideration is needed on the question of whether or not it *ought* to apply universally.

In terms of scope, variations of partial excuse operate across the jurisdictions of Scotland, England and Wales, Northern Ireland and Ireland, and so, much of the commentary in this paper speaks to all four, except where indicated otherwise. In addition, the paper focuses largely on the diminished responsibility defence because it is the most useful prototype for a universal partial defence. Diminished responsibility has the farthest reach of the partial defences because it includes impairment of both rational and volitional capacities, and its basis is not necessarily related to the actions of other parties. (Provocation/loss of control, on the other hand, has a very particular origin and complex rationale,³ owing to its focus on the actions of the victim, and its categorisation as either partial justification or partial excuse.)⁴

II THE DEVELOPMENT OF THE DOCTRINE OF PARTIAL EXCUSE

There is little doubt that the capital sentence for murder played a significant role in the emergence of the doctrine of partial excuse in the Scottish courts.⁵ However, a closer reading of its development reveals a more complex landscape beset by a number of competing political, social and cultural forces, which tend to obfuscate the idea that the doctrine has one “true” purpose or function.⁶ Rather, a more

³ For example, see J. Dressler, “Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject” (2002) 86 MINN. L. REV. 959; A. Norrie, “From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer” (2002) 65(4) M.L.R. 538. On the new law in England and Wales, see B. Mitchell, “Loss of Control under the Coroners and Justice Act 2009: oh no!” in A. Reed and M. Bohlander (eds.), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Farnham 2011), 39-50.

⁴ For example, see M. Wasik, “Partial Excuses in the Criminal Law” (1982) 45(5) M.L.R. 516.

⁵ See further, G. H. Gordon, *Criminal Law of Scotland*, 3rd ed. (Green 2000) pp. 458–467; C. Kennedy, “‘Ungovernable Feelings and Passions’: Common Sense Philosophy and Mental State Defences in Nineteenth Century Scotland” (2016) 20(3) *The Edinburgh Law Review* 285, 307-309.

⁶ For instance, Kaye notes how both partial excuses appear to have emerged from the common law in the context of negating “evil intent” in establishing mental element of murder but without justifying an acquittal, see further; J. M. Kaye, “The Early History of Murder and Manslaughter” (1967) 83 L.Q.R. 365.

critical lens suggests that the doctrine is underpinned by an enduring impulse to recognise the fallibility of the human condition in the face of circumstances beyond an agent's control, and that the scope of that recognition expands and contracts in response to the institutional, cultural and socio-political drivers of a given time and place.⁷ This understanding of partial excuse lends itself to a more pointed re-evaluation of the doctrine in the present day, as explored further in Part III.

The doctrine of diminished responsibility originated in the Scottish courts as a form of mitigatory plea and had become well established by the mid-nineteenth century.⁸ Notwithstanding its relationship to the offence of murder in the present day, it is worth noting that, initially, the doctrine applied to both capital and non-capital charges,⁹ revealing an underlying instinct to acknowledge the complexity of assessments of culpability, notwithstanding the severity of outcome. This attitude is further reflected in the partial excuse of provocation, where the doctrine was characterised as a general expression of “tenderness to the frailty of human nature”.¹⁰ The case of *McFadyen* (1860) resulted in a more structured form of partial excuse with the introduction of the verdict of culpable homicide replacing the verdict of murder with a recommendation to mercy.¹¹ Though this decision brought the doctrine within judicial remit to decide upon a sentence in the face of an accused with a mental disorder, the scope of the defence remained generous. For instance, Lord Deas in *Dingwall* (1867) stated that culpable homicide included “murder with extenuating circumstances” and did not confine those circumstances particularly to an accused's mental condition.¹² Further, the decisions that followed entrenched the notion that the

⁷ For instance, see commentary of Lord Keith, “Some Observations on Diminished Responsibility” [1959] *Medico-Legal Journal* 109.

⁸ See G. H. Gordon, *Criminal Law of Scotland*, 3rd ed. (Green 2000) pp. 458–9, for further discussion of the early origins of the doctrine.

⁹ *William Braid* (1835) 1 Hume Com, ch. I; *Thomas Henderson* (1835) (Bell's Notes 5); and *James Ainslie* (1842) 1 Broun 25. For capital cases, mental disorder was taken into account only by way of the Royal Prerogative of Mercy, for example, see *Archd Robertson* (1836) 1 Swin 15.

¹⁰ *Commonwealth v Webster* (1850) 5 Cush 296.

¹¹ *John McFadyen* (1860) 3 Irv 650.

¹² *Alex Dingwall* (1867) 5 Irv 466, 479.

presence of various types of “mental weakness” could reduce a conviction of murder to one of culpable homicide.¹³

The flexible approach continued for some time until the doctrine’s popularity began to wane in the early twentieth century, owing to various cultural and institutional factors.¹⁴ In particular, there emerged the sense that those who availed of the defence successfully were being treated too leniently. Such defendants were avoiding the gallows by evading the mandatory sentence for murder at one end while, at the other end, they were avoiding the asylum by not having to rely on the insanity defence with its outcome of compulsory hospitalisation. Further, the rise of the psychiatric profession and the emphasis placed on expert opinion at trial saw a shift towards the medicalisation of the doctrine to the point where a recognised mental condition or disease was becoming a prerequisite.¹⁵ This changing course culminated in the decision of *H.M. Advocate v. Savage*,¹⁶ where Lord Alness’ judgment set a more restrictive, pathologised test,¹⁷ which was reinforced by the cases that followed and the adoption of the position that the test ought not to be widened further.¹⁸ With the passage of time the tide turned again, when concerns

¹³ *John McLean* (1876) 3 Coup. 334; *Andrew Granger* (1878) 4 Coup 86; *Thomas Ferguson* (1881) 4 Coup 552; *HM Advocate v Robert Smith* (1893) 1 Adam 34.

¹⁴ E.g. see G. H. Gordon, *Criminal Law of Scotland*, 3rd ed. (Green 2000), para 11.18; see L. Kennefick, “Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law” (2011) 62(3) NILQ 269, 270-272.

¹⁵ *HM Advocate v Aitken* (1902) 4 Adam 88 (per Lord Stormonth Darling), 94–5; *HM Advocate v Higgins* (1913) 7 Adam 229. For further discussion, see J. Chalmers and F. Leverick, *Criminal Defences and Pleas in Bar of Trial* (Green, 2006), pp. 224–5.

¹⁶ 1923 J.C. 49.

¹⁷ The classic definition of the defence was set out by Lord Alness: “that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility . . . that there must be some form of mental disease.” 1923 JC 49, 52.

¹⁸ Scottish Law Commission, *Report on Insanity and Diminished Responsibility* No 195 (Scottish Law Commission: Edinburgh July 2004), para. 3.2. The courts established that intoxications (*Brennan v HM Advocate* 1977 JC 38), psychopathic personality disorder (*HM Advocate v Carraher* 1946 JC 109), or a combination of immaturity and personality difficulty (*HM Advocate v Connolly* 1990 SCCR 505) would not be sufficient to establish diminished responsibility in the absence of a specific mental illness.

about the restrictive nature of the *Savage* approach, as outlined in the Millan Report,¹⁹ were eventually realised in the case of *H.M. Advocate v. Galbraith*,²⁰ and the subsequent legislative reform.²¹ Prior to *Galbraith*, it was assumed that diminished responsibility in Scotland depended upon a finding that the accused had a mental illness or disease, however, this was now no longer necessary,²² with the result that the reach of the plea has been considerably widened once more.²³

The origin story of diminished responsibility in England and Wales, and later Northern Ireland, displays a similar vulnerability to competing socio-historical factors. Indeed, as Alan Norrie notes in the context of England and Wales, the concept of diminished responsibility amounts to “a peculiar balance between a number of vectors of policy, principle and understanding.”²⁴ Many would argue that the doctrine was introduced to offset the harsh nature of the insanity defence under the M’Naghten Rules, while others assert that its purpose was to appeal the abolitionist faction of the death penalty debate.²⁵ In the wake of a number of controversial cases,²⁶ the Homicide Act 1957 was brought into force which incorporated the doctrine into law. The 1957 Act also abolished the capital penalty for about three quarters of capital crime, and so the doctrine was limited to an offence which had ceased to a significant extent to be a capital crime at all.²⁷ Similarly, the introduction of the doctrine to the

¹⁹ Rt. Hon. Bruce Millan (Chairman), *Report on the Review of the Mental Health (Scotland) Act 1984*, SE/2001/56, ch.29.

²⁰ 2002 J.C. 1.

²¹ *Criminal Justice and Licensing (Scotland) Act 2010*, s.51(B).

²² In so far as the cases of *Connelly v HM Advocate* (1990) SCCR 504 and *Williamson v HM Advocate* (1994) SCCR 358 required mental illness or mental disease as a critical element of a successful diminished responsibility plea, they were disapproved in *Galbraith*, 20G, para. 52.

²³ See further, G. H. Gordon, *Criminal Law of Scotland* 3rd edn, Supp. Service (Edinburgh: Green 2005), p. 49.

²⁴ A Norrie, *Crime, Reason and History: A critical introduction to criminal law* 2nd edn (London: Butterworths 2001), p. 185.

²⁵ L. Kennefick, “Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law” (2011) 62(3) NILQ 269, 272-275.

²⁶ For example, *R v Evans* [1950] 1 All ER 610; *R v Ellis*, *The Times*, London, 21 June 1955, p. 6, col. 3; *R v Craig*, *The Times*, London, 12 December 1952, p. 2, col. 4.

²⁷ Under ss. 5(1)(a)-(e) of the 1957 Act, capital murder was confined to murder in the furtherance of theft, by shooting, in the course of resisting arrest and related scenarios, and murder of a police or prison officer Murder in the course or furtherance of theft; s.5(1)(a).

Republic of Ireland in 2006,²⁸ appeared to be justified on the basis of competing purposes, as a means of addressing the shortcomings of the mandatory life sentence and the insanity defence, respectively.²⁹

Though its origin story may paint the doctrine as a haphazard solution to more fundamental problems with homicide and the insanity defence, we might also see that its early malleability signalled a deeper instinct to blame and punish those who offend in a morally justifiable manner. Overtime, with the development of a more formalised legal system, the influence of psychiatric profession and a more informed public, the structure of the doctrine solidified, and it became more difficult to make space for recognition of wider contexts that bear on individual culpability. With our evolving knowledge of human behaviour and our understanding of the impact of blame and punishment on the individual and wider society,³⁰ as well as a growing non-punitive movement in criminal justice research,³¹ we might take the opportunity to consider reclaiming the doctrine of partial excuse so that we can give formal acknowledgment to the difficult lived realities that can impact behaviour in the context of criminal blame.

²⁸ Criminal Law (Insanity) Act 2006, s.6.

²⁹ For discussion, see L. Kennefick, “Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law” (2011) 62(3) NILQ 269-89.

³⁰ E.g. evidence-based criminological studies have reached consensus on the detrimental collateral consequences of imprisonment, including psychological harm, dissolution of families and depression of local economies: T. R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighbourhoods Worse* (Oxford University Press, 2017); D. S. Kirk, “Prisoner Reentry and the Reproduction of Legal Cynicism” (2016) 63 *Social Problems* 222-243.

³¹ For example, a shift towards a trauma-informed public service response more generally is particularly evident in the Scottish jurisdiction; see E. Davidson, A. Critchley and L. H. V. Wright, “Making Scotland an ACE-informed nation” (2020) 29(4) *Scottish Affairs* 451. There is also a strong leaning towards restorative justice and desistance principles and policies within the Irish Probation Service, which is being realized through the planned introduction of the Irish Offender Supervision Framework; Durnescu, I., Griffin, M. and Scott, J. (2020) “Developing an Irish Offender Supervision Framework: A Whole System Approach” 17 *Irish Probation Journal* 24-42.

III THE POTENTIAL OF A UNIVERSAL PARTIAL DEFENCE

It is beyond the scope of this paper to provide a detailed examination of the justification for a universal partial defence. Rather, the purpose is to highlight one compelling argument that suggests the need for a more nuanced approach to how the criminal law blames people, and to signpost how a universal partial defence might go some way towards addressing a pervading moral injustice inherent in present criminal excuse doctrine. In particular, expanding partial excuse beyond homicide, to all offence categories, has the potential to respond to the issues arising from the hegemony of the rational agency paradigm by facilitating a more fine-tuned assessment of culpability.

Though scholarship addressing the idea of a universal partial defence is scant, one of the more prominent arguments suggests that such a defence is needed in order to offset the present restrictive structure of excuse which subverts the legitimacy of the law by undermining its obligation to render proportionate blame. For example, Stephen Morse asserts that the present “all-or-nothing”, “bright line” tests within excuse doctrine, as exemplified by the insanity defence and the defence of duress, are unfair because they are too narrow and do not facilitate mitigating claims at the point of culpability (what he terms “doctrinal mitigation”).³² This approach, he argues, is in contrast with the fact that those who offend (and, indeed, those who do not) are subject to a very broad range of rational and control capacities which go unrecognized in the criminal law. If it is accepted that blame (and punishment) ought to adhere to the principle of just deserts, which is a relatively uncontroversial claim, then excluding doctrinal mitigating claims and permitting discretionary mitigation at sentencing only is unjust.³³ Morse asserts the moral imperative of employing partial responsibility as a response to moral injustice,³⁴ as a means of facilitating the non-culpable reduction of the capacity for rationality.³⁵ For Morse, then, excuses

³² Stephen J. Morse, “Undiminished Confusion in Diminished Capacity” (1984) 75(1) *The Journal of Criminal Law and Criminology* 1 – 55; Stephen J. Morse, “Diminished Rationality, Diminished Responsibility” (2003) 1(1) *Ohio State Journal of Criminal Law* 289.

³³ For discussion, see Morse, *Diminished Rationality, Diminished Responsibility*, *ibid.* at 296 *et seq.*

³⁴ Morse, (n 32) at 290.

³⁵ Morse, (n 32) at 295.

are best explained by the idea that “a reasonable capacity for rationality is the fundamental criterion for responsibility.”³⁶ David O. Brink extends the basis of partial excuse to include impairment of volitional capacity where appropriate, in fulfilment of what he describes as “normative competence”.³⁷ Together with situational control, normative competence contributes towards Brink’s “fair opportunity to avoid wrongdoing” conception of criminal responsibility. And because this conception reinforces the idea of responsibility as scalar in nature, whereby both normative competence and situational control are “matters of degree”, partial excuse is warranted because the *impairment* of these factors is, conversely, a matter of degree.³⁸

Both Morse’s and Brink’s respective arguments are bolstered by findings to the effect that factors such as deprivation and addiction,³⁹ trauma,⁴⁰ and immaturity⁴¹ can impair cognition (both in terms of rationality and impulse control) and so make a significant contribution to criminogenic behaviour. Indeed, the case for a generic partial defence has been advanced further by Elisabeth Lambert as a means of making space in doctrine for emerging understandings about human behaviour and psychology. Lambert asserts that the psychological phenomenon of scarcity, a term used to describe a mindset deriving from a combination of “poverty, cognitive overload, and

³⁶ Morse, (n 32) at 294.

³⁷ D. O. Brink, “Partial Responsibility and Excuse” in HM Hurd (ed) *Puzzles in Criminal Law in Moral Puzzles and Legal Perplexities: Essays on the Influence of Larry Alexander* (CUP, 2019).

³⁸ Brink, (n 37) 45, see also; D. O. Brink, *Fair Opportunity and Responsibility* (OUP, 2021), ch. 15.

³⁹ For example, see A. Shaw, J. Egan and M. Gillespie, *Drugs and poverty: A literature review: A report produced by the Scottish Drugs Forum (SDF) on behalf of the Scottish Association of Alcohol and Drug Action Teams* (Scotland, 2007).

⁴⁰ For example, in the context of policing see, K. Bateson, M. McManus and G. Johnson, “Understanding the use, and misuse, of Adverse Childhood Experiences (ACEs) in trauma-informed policing” (2019) *The Police Journal: Theory, Practice and Principles* 131; in the context of probation practice see K. F. McCartan, “Trauma-informed practice” (2020) HM Inspectorate of Probation *Academic Insights*.

⁴¹ See discussion in C. McDiarmid, “An age of complexity: Children and criminal responsibility in law” (2013) 13(2) *Youth Justice* 145; K. Fitz-Gibbon, “Protections for children before the law: An empirical analysis of the age of criminal responsibility, the abolition of *doli incapax* and the merits of a developmental immaturity defence in England and Wales” (2016) 16(4) *Criminology & Criminal Justice* 391.

diminished capacity for rationality and executive function”, ought to form the basis of a partial excusing condition akin to Morse’s proposal.⁴²

The theories outlined share the desire to acknowledge the inherent imperfection of the human condition, as framed through the language of rational and volitional capacity. Leaving to one side the logistics for the moment, expanding the doctrine of partial excuse so that it applies to all offence categories has the potential to facilitate recognition of social problems that bear on an individual’s culpability. In so doing, there is an opportunity to bring a more fine-tuned apportionment of blame to the criminal law. Though drawing on aspects of these arguments, the subject of this paper sits largely at the gateway to these greater questions regarding the theoretical legitimation, justification and operation of a universal partial defence, and it is to these challenges that we now turn.

IV THREE OBJECTIONS TO EXPANDING PARTIAL EXCUSE BEYOND HOMICIDE

4.1 *“The doctrine is not an excuse but a form of mitigation for the mandatory life sentence”*

The operation of the fixed penalty for murder appears to hold to ransom the existence of partial excuse, and is often cited to counter expansion arguments. For example, Susanne Dell has remarked that diminished responsibility exists “... only to provide a means of escape from the mandatory penalty for murder”.⁴³ Similarly, Martin Wasik, citing the work of eminent authorities like Glanville Williams, writes, “[i]t is the general view of the commentators that the very existence of partial excuses is dependent upon the retention of the fixed penalty for murder, and that if the fixed penalty was abolished, partial excuses could go too.”⁴⁴ This view is reflected in the practices of some

⁴² E. W. Lambert, ‘A way out of the ‘Rotten Social Background’ Stalemate: “Scarcity” and Stephen Morse’s Proposed Generic Partial Excuse’ (2018) 21(4) *University of Pennsylvania Journal of Law and Social Change* 297 at 301. See generally, Sendhil Mullainathan and Eldar Shafir, *Scarcity: Why having too little means so much* (Penguin, 2013).

⁴³ S. Dell, “The Mandatory Sentence and Section 2” (1986) 12(1) *Journal of Medical Ethics* 28, 28.

⁴⁴ Wasik (n 4) 520; Glanville Williams, *Textbook of Criminal Law* (Stevens 1978) 447 and 501.

jurisdictions in Australia which have dispensed with the need for partial excuses where the mandatory life sentence of imprisonment for murder no longer applies. New Zealand too abolished the partial defence of provocation in light of its discretionary sentencing regime for murder cases. On this view, partial excuse is perceived merely as a mechanism for delivering standard sentencing mitigation (in limited circumstances) by reducing a murder sentence to one of manslaughter, and so it is not seen as an excuse in the “true” sense of the term.

Part II outlines how the evolution of the doctrine is enmeshed in the history of punishments for homicide. However, it suggests that partial excuse was used to fulfil other aims too, like compensating for the inadequacy of the insanity defence, and advancing the instinct to blame according to desert in the face of human fallibility. This more nuanced interpretation implies that there has always been more to partial excuse than mitigation alone and, more crucially, that further use can be made of the doctrine to advance moral justice in the context of all offence categories, as outlined in Part III. As such, the remainder of this section seeks to characterise the doctrine as a form of excuse, as distinct from informal mitigation. In doing so, it undermines the position that more fine-grained considerations of blame ascription ought to be reserved only for those who are charged with murder.

Conceptualising the doctrine as a type of mitigation is problematic because it fails to appreciate fully the differing roles, and normative weight, of excuses and mitigatory factors in the criminal justice process. This paper argues that, given its pre-verdict location, the nature of partial excuse is closer to an excuse (which deals with condemnation culpability) than a form of mitigation (which deals with punishment-phase culpability), but warrants greater recognition as a doctrine in its own right. Framing the doctrine as a member of the excuse family elevates its status as a general concept that reflects a simple moral intuition to blame according to desert. Unlike a full excuse, however, partial excuse has the potential to facilitate a more proportionate culpability evaluation. Husak recognises as much when he asks, “[o]n what possible grounds could anyone doubt that there are circumstances that render ... an agent less blameworthy, than ... he would have been in the absence of those circumstances – unless those circumstances preclude liability altogether?”⁴⁵ In terms of its site, then, I argue, with Wasik, that partial excuses have a

⁴⁵ Husak (n 1) 171.

“legitimate status” in and of themselves, in addition to a “wider significance than is generally recognised.”⁴⁶ Thus, there is an argument for recognising the concept of partial excuse as a distinct doctrine that sits on a scale between the two poles of excusing condition (formal full excuse) and mitigating excuse (factor at sentencing),⁴⁷ though a detailed account of how this might work in practice is beyond the scope of this paper.⁴⁸

The site of partial excuse within the criminal justice process is indicative of its nature. At a procedural level, the matter of excuse is dealt with during the condemnation stage (trial or otherwise). The condemnation stage is concerned with an individual’s criminal responsibility, and includes the process of evaluating culpability or desert in the context of the wrongdoing committed, which involves consideration of principles relating to both inculcation and exculpation, and the pronouncement of that evaluation through verdict.⁴⁹ Thus, condemnation is seen as a distinct criminal justice exercise to the imposition of punishment at sentencing, for, as Phyllis Crocker notes, it is generally accepted that a defendant’s culpability for wrongdoing happens prior to the punishment phase.⁵⁰ This view is reinforced by Brink, who points to the “division of jurisprudential labor” within the criminal trial, as between the guilt phase (where “a determination of offense creates a presumption of culpability for

⁴⁶ Wasik (n 4) 517.

⁴⁷ *ibid.*

⁴⁸ Wasik recommends a “scale of excuse”, “... running downwards from excusing conditions, through partial excuses to mitigating excuses./ Excuses towards the higher end of the scale are those where maximum moral pressure for exculpation outweighs reasons of policy and practicality for not permitting the excuse./ Those towards the lower end of the scale, while they may be morally significant, are outweighed by practical and policy considerations./ Partial excuses fall into the centre of this range, and exhibit a fine balance between rival considerations.” Wasik (n 4) 524-5.

⁴⁹ For instance, Cornford points to the fact that the conditions of condemnation (and consequently punishment) in criminal law rest atop a finding of guilt in the procedural sense; Andrew Cornford, “Rethinking the Wrongness Constraint on Criminalisation” (2017) 36 *Law and Philosophy* 615.

⁵⁰ Phyllis L. Crocker, “Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases” (1997) 66(1) *Fordham Law Review* 21, 27. See also, R. A. Duff, “Answering for Crime: Responsibility and Liability in the Criminal Law” (Hart, 2009) at 81: “the convictions that precede punishment are not mere neutral findings of fact, that this defendant breached this legal rule, but normative judgments that this defendant committed a culpable wrong.”

wrongdoing, which the defense can attempt to rebut, establishing an excuse”) and the sentencing phase (where “mitigation at sentencing can include both desert factors relevant to, but not sufficient for, excuse and nondesert factors, such as remorse or reform”).⁵¹ Therefore, the positioning of partial excuse prior to verdict suggests the doctrine of partial excuse relates primarily to a defendant’s culpability.

As eluded to in Brink’s definition of the sentencing phase above, the issue of culpability is not exclusive to the guilt phase, as it can also be relevant to punishment. Consequently, there is some confusion over the nature of the culpability imposed as between the two stages. The conflation of these forms of culpability tends to reinforce the perception of the doctrine as a type of mitigation, and so superfluous upon the removal of the mandatory life sentence. Reference to the Sentencing Guidelines for Crown Court judges in England and Wales is useful to distinguishing the two forms in order to highlight the significance of culpability at the guilt stage. The Guidelines dictate that assessing the level of culpability is the first step in evaluating severity of sentence.⁵² This structure tends to support the assumption that the condemnation stage is merely an exercise in evidentiary fact finding, with the issue of culpability being dealt with at sentencing. However, such a reading obscures the difference between a defendant’s culpability for the crime committed with a more general understanding of their culpability as it relates to the scope of the punishment inquiry.⁵³ Crocker clarifies the distinction between the two when she writes, “[t]he punishment-phase determination is not a recapitulation of the guilt-phase decision, but both a reconceptualization of the defendant’s guilt-phase culpability and the consideration of new factors relevant only to punishment.”⁵⁴ Rachael Hill further explains the distinction when she notes that mitigating factors such as family responsibilities, previous good deeds etc. are often more minor and remote from the circumstances of the crime, than issues such as “the emotions and motivations underlying the criminal

⁵¹ Brink (n 37) at 47, 48.

⁵² Sentencing Guidelines “Seriousness”; <https://www.sentencingcouncil.org.uk/crown-court/>.

⁵³ Crocker makes this point in the context of death penalty cases. Crocker (n 50) 26.

⁵⁴ Crocker (n 50) 26.

act itself.”⁵⁵ Similarly, Olaoluwa Olusanya, writing in the context of international criminal law, argues that the line between excuse and mitigation points to problems with the approach of “mixing relatively minor issues” with more fundamental issue relating to culpability, such as post-traumatic stress disorder.⁵⁶ The same could be said of partial excuse and mitigation in a domestic criminal law context. The point is that the nature of culpability assessed at the condemnation site differs from that assessed at the punishment site because the latter relates more directly to the blameworthiness of the offender in the context of the crime committed. As a result, viewing partial excuse as irrelevant upon the removal of the mandatory life sentence on the basis that pre- and post- verdict culpability are commensurate is conceptually misguided.

Morse highlights two further issues relating to the need to distinguish condemnation stage culpability from punishment stage culpability. He asserts that the characterisation of culpability as something that relates primarily to sentencing is problematic for two reasons. First, the discretionary nature of sentencing means that there is a risk that sentencing judges may give inadequate and/or inconsistent attention to the “mitigating force” of reduced rationality. In addition, a sentencing judge’s consideration of the purposes of sentencing (like rehabilitation, incapacitation, security, deterrence) may overshadow the need to attend to the circumstances leading to reduced culpability of the offender. The second reason concerns the potential gap between a judges’ theory of responsibility and community norms relating to blameworthiness. Leaving the question of reduced culpability primarily to the sentencing phase effectively removes the culpability evaluation from “the highly visible trial stage” to the “comparatively low visibility sentencing proceeding.”⁵⁷ For Morse, this approach is at odds with the Anglo-American justice system, which he claims “has a preference for making crucial culpability determinations that affect punishment at trial.”⁵⁸ Partial defences such as diminished responsibility are innately tied to the defendant’s explanation for the wrongdoing, and affect their culpa-

⁵⁵ Rachael A. Hill ‘Character, Choice, and “Aberrant Behavior”’(1998) 65 U Chi LR 975, 990. Hill makes the point in the context of her argument for a character based theory of judicial sentencing.

⁵⁶ Olaoluwa Olusanya, “Excuse and Mitigation Under International Criminal Law: Redrawing Conceptual Boundaries” (2010) NCLR 13(1) 23, 39.

⁵⁷ Morse, (n 32) at 289, 299.

⁵⁸ Morse, (n 32) at 299.

bility accordingly. Therefore, to frame partial excuse as mitigation only fails to attend to the doctrine's "intrinsic connection to moral blame".⁵⁹

If the doctrine is accepted as a form of excuse and so relevant to guilt stage culpability notwithstanding the presence or absence of the mandatory life sentence, it is difficult to justify its restriction to murder only. For, on this understanding, a moral discrepancy emerges whereby offenders who commit homicide would be subject to a closer culpability evaluation than their non-homicide counterparts. The offence of attempted murder is useful in illustrating the point.⁶⁰ Taking the partial defence of diminished responsibility, which is available in most common law jurisdictions, the principle of partial excuse in the criminal law would have it that if X killed somebody and they had a mental disorder that reduced their responsibility, the notion of scalar responsibility would be recognised and reflected in their conviction, through a lesser offence – from murder to manslaughter. However, if X attempted (and failed) to kill the person, and the case is proven against them, then they are guilty of attempted murder, as the law does not recognise a reduced version of this offence in the form of attempted voluntary manslaughter. This paper argues that there is cause to address the discrepancy of moral outcomes in relation to murder and non-murder offences by providing a more in-depth culpability evaluation not only to offenders who are charged with murder, but to those charged with lower tariff offences also. Such a position may be achieved by attending to the normative significance of partial excuse, and recognising that it is possible for the doctrine to stand independent of both the mandatory life sentence and the offence of murder.

The next section explores the problematic nature of the conception of scalar blame, and the challenge it poses to an argument for an independent and expanded doctrine of partial excuse.

4.2 *"An offender is either responsible for an offence, or they are not responsible; there is no space for an in-between position"*

A core theoretical obstacle to the expansion of the doctrine of partial excuse rests on the assumption that it would introduce the notion of scalar responsibility, contra the present compatibilist account of the criminal law, which perceives responsibility as absolute. The com-

⁵⁹ Hill (n 55) 995.

⁶⁰ Husak (n 1) 176.

patibilist view holds that determinism might exist but it is out with the purview of the criminal law where *actus reus* and *mens rea* are established, and the defendant's behaviour is not deemed to come within the narrow range of excuses available. Consequently, the criminal law takes it as legitimate to blame and punish an individual in circumstances where contextual factors (beyond formal excuses like insanity and duress) have overborn their will, for example, in the case of addiction. This approach works for the law because, as Anders Kaye observes, it is able to hold two distinct impulses: the attraction to causal explanation of recent times and the reactive desire to place blame on an individual in the face of a perceived wrong.⁶¹ This section undermines this position on the basis that the notion of absolute responsibility derives from semantic confusion across two distinct stages of criminal responsibility attribution. It argues that the question of scalar blame is ultimately a normative one, which facilitates a more malleable, (and perhaps more unpredictable), basis on which to evaluate culpability. Recognising the deep-seated nature of this obstacle, the aim here is to question the current orthodoxy in order to provide a springboard for future discourse to engage in a more authentic exploration of the potential and feasibility of a universal partial defence for the criminal law.

But how does the doctrine of partial excuse relate to the idea of scalar responsibility? This paper has argued that the doctrine, notwithstanding its reputation as “something of a misnomer”, is closer in nature to excuse than mitigation. Excuses are the environment from which criminal responsibility is forged.⁶² Brink frames excuse as the inverse or “flipside” of culpability or responsibility in criminal jurisprudence, just as justification pertains to wrongdoing.⁶³ Further, Michael Moore describes excuse as “the royal road” to responsibility.⁶⁴ In particular, the realm of excuse is critical to establishing the final stage of criminal responsibility, for example, in facilitating a denial of culpability, or in seeking to provide an explanation for behaviour. Therefore, if excuse is the converse of responsibility, it might also be said that partial excuse (perceived as a member of the excuse family, as opposed to a form of mitigation, as

⁶¹ For a detailed discussion, see A. Kaye, “The Secret Politics of the Compatibilist Criminal Law” (2007) *Kansas Law Review* 365-427.

⁶² Brink (n 37); David O. Brink, *Fair Opportunity and Responsibility* (OUP, 2021), ch. 15.

⁶³ Brink (n 37) 42.

⁶⁴ Michael Moore, *Placing Blame* (OUP 1997) 548.

discussed in the previous section) is the converse of partial responsibility. Now we find ourselves in the awkward space of recognising criminal culpability as having a scalar quality during the ascription of criminal responsibility stage which falls prior to verdict.

Characterising the doctrine as having a scalar quality is contentious because it strikes at the heart of the dualistic construct of the subject of the law as rational agent, where the individual is deemed either rational or not rational, with no space for recognition of the complexity of a person's psychological and social reality. Indeed, the notion of partial responsibility has a long tradition of being met with resistance both from the courts and the academy. For instance, Gerald Gordon⁶⁵ draws our attention to the case of *Kirkwood v. H.M. Advocate*,⁶⁶ wherein Lord Justice General Normand attacked the doctrine as offending against the principle of non-contradiction: "The defence of impaired responsibility" he said, "is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and, if not sane, is not responsible".⁶⁷ Criminal law scholarship, too, has been skeptical of the concept. For example, Anthony Kenny has argued against the idea of a "halfway house" between responsibility and non-responsibility in the context of a discussion of the partial defence of diminished responsibility.⁶⁸ Further, Richard Sparks highlights a similar sentiment as expressed in *R. v. Byrne*,⁶⁹ that if such a person has committed a crime, then he either could, or could not, have avoided or refrained from committing it, there is no third possibility, midway between the two.⁷⁰ Finally, Moore brings to light a greater, metaphysical, question underpinning resistance to the idea of partial responsibility through a curious pregnancy analogy in the context of free will versus determinism. He writes, "... to speak of being partly determined or partly

⁶⁵ Gerald H. Gordon, *Criminal Law of Scotland*, 3rd ed. (Green 2000) 452.

⁶⁶ [1939] JC 36.

⁶⁷ [1939] JC 36, 40. Normand's statement is also discussed by Wasik; Wasik (n 4).

⁶⁸ Anthony Kenny, "Can Responsibility be Diminished?" in R. G. Frey and Christopher W. Morris (eds), *Liability and Responsibility: Essays in Law and Morals* (CUP 1991) 25

⁶⁹ [1960] 2 Q.B. 396.

⁷⁰ Richard Sparks, "Diminished Responsibility in Theory and Practice" (1964) 27(1) MLR 9, 16.

free makes as much sense as it does to speak of being partly pregnant".⁷¹

There is not adequate space here to dedicate to the age-old question of free will and determinism, nor would it necessarily prove helpful. Suffice it to explain how the law continues to function notwithstanding the weight of this enduring riddle, and the place of partial excuse in this context.⁷² The rational construct of agency is based on a compatibilist understanding of the criminal law which adheres to the concept of free will in so far as it assumes that individuals have the capacity to control their actions except in the most extreme circumstances.⁷³ The law may be described as compatibilist because it concedes to situations which can be framed as deterministic, but only in cases where the will of the individual is overridden by virtue of a complete excusing condition, be it internal or external e.g. mental disorder under the insanity defence or external pressure under the defence of duress.⁷⁴ This position is deemed to reflect the fact that routine existence is largely based on the assumption that individuals are generally responsible for their own actions unless

⁷¹ Michael S. Moore, "The Determinist Theory of Excuses Reviewed Work(s): Madness and the Criminal Law by Norval Morris" (1985) 95(4) *Ethics* 909, 912.

⁷² For an interesting interpretation of the tension between compatibilism and causal theory, see the work of Anders Kaye. Kaye puts forward a political explanation as to why the criminal law adheres to compatibilism in terms of serving the advantaged as the status quo, *ibid.* (n 61). Elsewhere, he argues that the unpopular causal theory provides a more accurate explanation for excuses, and undermines objections to it, putting forward the notion that a partially deterministic criminal law is plausible through what he terms "provisional determinism", which he explains as follows: "...while we acknowledge that acts can be caused, we resist absolute determinism and evaluate causal accounts as they come to us, one by one. Justifiable prudence makes us provisional and thus partial-determinists." A. Kaye, "Resurrecting the Causal Theory of the Excuses" (2005) 83(4) *Nebraska Law Review* 1116, 1136.

⁷³ HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP 1968); N Lacey, "Responsibility and Modernity in Criminal Law" (2001) 9(3) *The Journal of Political Philosophy* 249, 255 (noting that most theorists agree that criminal responsibility is founded on capacity theory). Kane attests to the fact that compatibilism is the dominant view among philosophers, see Robert Kane, "Responsibility, Luck, and Chance: Reflections on Free Will and Indeterminism" (1999) 96(5) *The Journal of Philosophy* 217, 218.

⁷⁴ For an explanation of duress set in a social context rather than impaired rationality, see Alan Norrie, "Practical Reasoning and Criminal Responsibility: A Jurisprudential Approach" in Derek B. Cornish and Ronald V. Clarke (eds), *The Reasoning Criminal: Rational Choice Perspectives on Offending* (Routledge 2014), 217-228.

there is some superseding cause which detrimentally affects such responsibility.⁷⁵ Beyond such extreme circumstances, compatibilists assert the view that individuals may be held to blame for behaviour caused by factors beyond their control.⁷⁶ According to Andrew Ashworth, such an approach makes acceptable the fundamental proposition that behaviour is not so determined that blame is generally unfair and inappropriate, yet at the same time, in certain circumstances behaviour may be so strongly determined that the normal presumption of free will may be displaced.⁷⁷

The concept of agency is particularly significant in showing that it is not flying in the face of orthodoxy to maintain that criminal culpability is scalar in nature. Agency plays a central role at two key battle grounds where philosophical debate regarding the role of voluntarism and determinism in criminal responsibility discourse play out: inculcation and exculpation. And it is the conflation of the concept of agency, and the terminology surrounding criminal responsibility, at these two distinct junctures that inhibits discourses regarding the potential of partial excuse to advance justice in the criminal law.

The first stage of ascribing criminal responsibility involves the question of inculcation. Inculcation is the point at which an individual is deemed to meet the threshold of subject of the law as assessed through the application of the voluntary act requirement principle.⁷⁸ What we might term “inculcation agency” then, necessitates that an individual was acting freely when they committed a

⁷⁵ For example, see Michael Moore, *Law and Psychiatry: Rethinking the Relationship* (CUP 1984) 425 (“... in the fight about a radical rethinking of who we are, both law and psychiatry are on the same side in defending an intentional conceptualization of persons as rational and autonomous agents”); See also, Finbarr McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Roundhall 1993), 15.

⁷⁶ Anders Kaye, “Resurrecting the Causal Theory of the Excuses” (2005) 83(4) *Nebraska Law Review* 1116, 1118.

⁷⁷ Andrew Ashworth, *Principles of Criminal Law*, 5th ed. (OUP 2006), 26. An example of one philosopher who defends the theory that free will is compatible with one form of determinism is Kenny. According to Kenny’s compatibilism: “it is unjust to hold responsible for their actions those who lack the relevant freedom, those who could not have done otherwise than they did, but it does not follow from determinism that agents always lack the opportunity and ability to do otherwise than they do. Consequently it does not follow that it is unfair to hold people responsible for their actions”; Anthony Kenny, *Freewill and Responsibility* (London 1978).

⁷⁸ See generally, John J. Child, “Defense of a Basic Voluntary Act Requirement in Criminal Law from Philosophies of Action” (2020) 23(4) *NCLR* 437.

harm in order to justify their inclusion within the boundaries of criminal responsibility in the first instance. An “act” for the purposes of the voluntary act requirement is underpinned by the notion that a human action cannot be caused by a prior event but is a cause in itself.⁷⁹ John Child defines this brand of action theory as interpreting bodily movement as “causally basic”, in that “it represents the starting point in a causal chain which opens to include complex descriptions.”⁸⁰ Inculcation agency is therefore narrow in terms of its construction of the agent (i.e. not accounting for context) but broad in the sense that it casts a wide net of responsabilisation. The dominant legal paradigm maintains that the ability to choose freely is reliant on an individual’s capacity to reason. The bar is set low here because the capacity to reason relates to a *general* ability to act rationally and conform to the requirements of the law. It does not relate to the *specific* action of the accused on the occasion of the offence. As Tony Honoré puts it, “[w]hen we say that someone can do something (has the capacity to do it) we use “can” in a general, not a particular sense: we mean that the person will in general succeed in doing it if they try.’⁸¹

Once the bar of inculcation has been reached, it is the role of the court to establish whether or not sufficient evidence exists in order to find that an individual has committed the offence for which they stand charged. The evidentiary exercise is then followed by an exculpatory one; an assessment of an offender’s culpability, taking

⁷⁹ HLA Hart and Anthony M. Honoré, *Causation in the Law* (OUP 1959), 80: (“... human action is never regarded as itself *caused* or as *an effect*.”); Michael S. Moore, “Causation and the Excuses” (1985) 73(4) *California Law Review* 1091. Note opposing view of Joel Feinberg who argues against the contention that voluntary human action is “a new causal start, a kind of prime mover or an uncaused cause.”; Joel Feinberg, “Causing Voluntary Action” in *Doing & Deserving: Essays in the Theory of Responsibility* (Princeton UP 1970) 152.

⁸⁰ Child (n 78) 445. Note the distinction between non-causal libertarianism, (e.g. see Carl Ginet, “In Defense of a Non-Causal Account of Reasons Explanations” (2008) 12 *Journal of Ethics* 229 and “Reasons Explanation: Further Defense of a Non-causal Account” (2016) 20 *Journal of Ethics* 219), and agent-causal libertarianism, whereby actions are deemed to be caused but by the agent themselves, e.g. Randolph Clarke, “Toward a Credible Agent-Causal Account of Free Will” (1993) 27 *Noûs* 191. For discussion of each approach, see Nigel Pleasants, ‘Free Will, Determinism and the “Problem” of Structure and Agency in the Social Sciences’ (2019) 49(1) *Philosophy of the Social Sciences* 3.

⁸¹ Tony Honoré, “Being Responsible and Being a Victim of Circumstance”: Maccabean Lecture in Jurisprudence (1998) 97 *Proceedings of the British Academy* 169, 184.

into account broader relevant circumstances that bear on the commission of the wrongdoing in accordance with an established criminal defence category,⁸² including partial excuses. It is here that the evaluation of personal blameworthiness takes place when it is claimed by the defendant that their free will has been displaced. “Exculpatory agency”, then, might be used to describe the construct of the agent at the point of exculpation. This form of agency is more normatively loaded, and better placed to deal with the wider context of a crime once the basic question of inculcation is met. Indeed, as Child notes, conditions that impede freedom, like duress, for example, rather than being taken into account with a view to narrowing liability in the first instance, should be given space in the realm of excuse: “...it is contended that conditions of this kind, to the extent that they should be incorporated within the criminal law, are more appropriately defined and applied as defences (as they are within the current law): accepting that D has voluntarily acted, has possibly caused harm, but may be excused for that conduct as a result of surrounding circumstances.”⁸³

On this reading, it may seem that the law is approaching questions of free will and determinism differently at each stage, however, an operational interpretation lends coherence to this state of affairs for present purposes.⁸⁴ For, to conflate the notion of agency inherent at the inculcation and exculpation stages brings confusion because each stage has a distinct function, that is, criminalisation and culpability evaluation, respectively. A primary function of criminalisation is to make a decision on whether or not an individual is an agent for the purposes of holding them responsible for a particular crime, whereas the purpose of culpability evaluation is to assess whether and to what extent we *should* blame the individual for the act for which the law deems them responsible. It is the amalgamation of the two stages, whereby inculpatory agency is transposed onto the exculpation stage, which gives rise to the perception that criminal culpability is absolute,

⁸² Duff *et al* describe culpability as liability, and put the matter thus: “First, a determination that the defendant is responsible for the commission of the crime charge does not settle the issue: for responsibility is distinct from liability, and the trial also aims to determine whether the defendant is – that is whether she *should* be held – criminally liable for the commission of that offence.” Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial, Volume Three: Towards a Normative Theory of The Criminal Trial* (Hart Publishing 2007) 130.

⁸³ Child (n 78) 459.

⁸⁴ My thanks to one of the anonymous reviewers of this paper for this insight.

when it is, in fact, normative, and so innately contingent.⁸⁵ Because the normative aspect of criminal responsibility attribution is central to the expressive function of the criminal law, how it reflects on the defendant matters. Being held publicly responsible by the criminal law has stark consequences for an individual, as Victor Tadros notes, "... it communicates to the defendant, to the victim, to the public more generally, and to criminal justice officials, moral criticism about the agent."⁸⁶ As a result, criminal responsibility ought to "...reflect on him *in a way that makes the kind of criticism communicated by the imposition of criminal responsibility appropriate.*"⁸⁷

Partial excuse, if viewed as true to its name, may be read as quietly affirming that there can exist degrees of blameworthiness in certain circumstances largely owing to the innately imperfect nature of human rationality, meeting our moral desire to deliver just deserts in the context of holding people criminally responsible, and not just punishing them. But how can nuance in culpability evaluation be made manifest where there is no lesser offence category to reflect the reduced liability to punishment? This leads us to the final point of resistance to a general partial excuse: the problem of coordination.

4.3 "*An expanded doctrine could not be applied consistently because not all offences have lesser categories*"

The strongest and most frequently cited argument against a general partial excuse is that such a defence cannot be consistently applied because not all offences have lesser culpability categories related to them, for example, the offence of criminal damage. Wasik captures the extent of this obstacle when he writes: 'It has been suggested that partial excuses are unlikely to be extended much further in the criminal law because the benefits to be derived have to be balanced against the practical difficulties/In the end, it may well be that

⁸⁵ Wasik makes a similar point when he notes: 'When a jury returns a verdict on a criminal charge, they are not returning a decision on an abstract question of "responsibility"; what they are saying is that "X ought to be held legally responsible and liable to punishment for committing the offence charged."' The word "ought" here primarily signifies "appropriate in law" and involves a finding that *actus reus* and *mens rea* have both been established beyond reasonable doubt by the prosecution and no reasonable doubt remains about the existence of any legal defence. It is also, inevitably, a moral ought, because of the close relationship between legal and moral ascriptions of responsibility.' Wasik (n 4) 518.

⁸⁶ Victor Tadros, *Criminal Responsibility* (OUP 2007) 48.

⁸⁷ Victor Tadros, *Criminal Responsibility* (OUP 2007) 49.

partial excuses will be generally confined to the law of homicide because of the structure of the offences involved, their seriousness and the special stigma of “murder”.⁸⁸ This paper argues that this structural problem ought not to outweigh the need to reconsider the scope of the doctrine in light of the argument set out in Part III. At the very least, it is worth noting that an argument against extending the scope of partial excuse on the basis that it is too difficult to achieve consistency, misses the point that the doctrine is already inconsistently applied because, at present, it only applies to a single category of homicide offender, to the exclusion of all other offence categories. The significance of scalar blame in its own right was suggested in above, and so the hollow perception of the special nature of the mandatory life sentence for murder is arguably an insufficient reason to restrict the expansion of the doctrine. A thorough examination of solutions to the coordination issue requires its own space.⁸⁹ As such, the purpose of this part is to point to the more prominent responses to the coordination problem as a platform for the consideration of future directions into the most feasible way towards expanding the doctrine of partial excuse.

Let us imagine for a moment that there is consensus that the doctrine of partial excuse *ought* to be expanded across all offences. How best can the legal system manifest and communicate that reduced culpability in a way that not only delivers a more precise rendering of just deserts to the offender as a normative reflection of their blameworthiness, but also does not detract from the harm committed, nor how offences are communicated at the prohibition stage? And perhaps, most importantly, how can any such expansion be applied consistently across divergent offence categories? These issues may be borne out through proposals for expansion that have been considered over the years, though with little real impact. The proposals may be divided into three categories in accordance with where they take place in the criminal justice process: pre-verdict, post-verdict, and at the point of verdict itself. Solutions that are set in the first two stages are the most prevalent, and perhaps the most cumbersome in terms of achieving consistency, however, recent

⁸⁸ Wasik (n 4) 532-533.

⁸⁹ See generally, Wasik (n 4); Stephen J. Morse, “Undiminished Confusion in Diminished Capacity” (1984) 75(1) *The Journal of Criminal Law and Criminology* 1–55; Stephen J. Morse, “Diminished Rationality, Diminished Responsibility” (2003) 1(1) *Ohio State Journal of Criminal Law* 289; Lambert (n 1); Brink (n 37); David O. Brink, *Fair Opportunity and Responsibility* (OUP, 2021), ch. 15.

scholarship on the nature of verdict may prove a more promising avenue for future feasibility studies. As a starting point, Wasik's analysis provides one of the most comprehensive summaries of potential solutions that take place pre and post-verdict.

Pre-verdict, Wasik points to two ways in which to tackle the problem of coordinating an expanded partial excuse, first, in the creation of new offences, and second, in the use of existing offences. The formation of new, what he terms, "nominal" offence categories could be introduced to sit below related more serious offences, mirroring the present structure of voluntary homicide. The problem with this proposal is three-fold. First, it would involve the expansion of criminal offence categories at a time when the expansion of the criminal law through the introduction of new offences is proving unwieldy and harmful owing to its net-widening effect.⁹⁰ Second, introducing nominal offence categories is likely to add to the burden (and confusion) of the jury in terms of assessing whether a particular offence charged has been proved, not to mention public confusion as to the nature of offence categories.⁹¹ Third, the introduction of such complexity at the criminalisation stage runs the risk of violating principles pertaining to fair labelling, and the potential dilution of the harm factor of a specified offence.⁹² Wasik's second pre-verdict proposal sees the use of existing offence categories to reflect reduced culpability, for example, the reduction of murder to involuntary manslaughter, or assault causing harm to simple assault. If consistency is to stand as a core value of an expanded doctrine, then this suggestion is unlikely to prove a feasible option because there exists only a small number of distinct offences that have a related lesser version e.g. assault and assault causing harm, in an Irish context. Further, as Gordon notes, some such offences have diverging *actus reus* which makes the problem even more insurmountable. For in-

⁹⁰ See generally, Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2007); Stanley Cohen, *Vision of Social Control* (Polity Press 1985); James Austin and Barry Krisberg, "Wider, Stronger, and Different Nets: the Dialectics of Criminal Justice Reform" (1981) 18 *Journal of Research in Crime and Delinquency* 18 (1981), 165- 196.

⁹¹ See Wasik (n 4) 526 and CLRC quote therein.

⁹² Wasik (n 4) 527, discussing The Criminal Law Revision Committee observations in their Fourteenth Report on *Offences Against the Person* (1980).

stance, sexual assault may be framed as a lesser gradation of an offence of rape, but the *actus reus* for each offence is distinct.⁹³

The post-verdict suggestion of providing some form of formal mitigation, potentially through the introduction of sentencing guidelines, would see a specific reduction of sentence on a successfully argued partial excuse. This solution has the advantage of getting around the difficulties of creating lesser offence categories by offloading the burden of achieving a more particularised outcome to the sentencing stage. Such an approach may be the most feasible so far because it avoids the difficulties involved in seeking to restructure offences. However, aside from the complexity involved in calculating a discount,⁹⁴ and questions regarding the allocation of work as between judge and jury,⁹⁵ it is arguable that the post-verdict solution fails to grasp the spirit of an expanded partial excuse doctrine. This paper has argued for a form of partial excuse which stands to reduce culpability at the exculpatory stage of the trial, because it is at this point that a normative assessment of the accused's blameworthiness takes place. As discussed above, the type of culpability considered at the sentencing stage is more general in nature, and does not relate to the offender's behaviour in the context of their culpability for the offence charged. Further, the post-verdict solution takes place at a less visible stage in the criminal justice process. For, it is at the trial stage that normative communication is strongest as between the offender and the state, and the state to the people, about the offender's moral blameworthiness.⁹⁶

Therefore, neither the pre nor post-verdict proposals address adequately the problem of capturing and manifesting a more fine-grained culpability assessment, in a consistent way, and at a key didactic point in the criminal justice process for the offender.⁹⁷ In his

⁹³ Gerald H. Gordon, *Criminal Law of Scotland* (W. Green & Son Ltd. 1978) 383; Wasik (n 4) 527.

⁹⁴ For discussion, see Wasik (n 4) 529: ("Is a specific sentencing band to be created for such cases? Or is the sentencer to calculate the appropriate sentence without partial excuse and then make a specific reduction of one-half, one-third or whatever?").

⁹⁵ For discussion, see Wasik (n 4) 531-2.

⁹⁶ On the normative value of the trial, see generally, Duff *et al* (n 82).

⁹⁷ As Zehr writes: "The question of guilt is the hub of the entire criminal justice process. Establishing guilt is the central activity, and everything moves toward or flows from that event." ; H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1991) 66.

discussion of the criminal verdict, Brink frames this problem in terms of a “normative gap between scalar input and bivalent outcomes in the criminal law”,⁹⁸ and explores the possibility of a multivalent verdict approach as a means of delivering a more accurate just deserts.⁹⁹

The present verdict system is underpinned by a bicephalic construct of the person as either “Guilty” or “Not Guilty”, an outcome that does not accommodate any form of scalar blameworthiness. This understanding of the individual is at odds with the doctrine of partial excuse, if it is accepted that the latter recognises degrees of culpability within the criminal law as discussed above.¹⁰⁰ The present structure is further undermined by the enduring influence of mind sciences in assessments of capacity in law, for example, where mental disorders are framed as “extreme forms of differences of degree”, as distinct from the legal approach which sees only “differences in kind”, at least until the sentencing stage.¹⁰¹ If, as Brink asserts, retributivism (as the dominant characteristic of criminal law) “predicates censure and sanction on culpable or responsible wrongdoing”,¹⁰² then there is an argument for revisiting the present construct of verdict so that it aligns more closely with a more fine-grained culpability evaluation.¹⁰³

Verdict matters not only because it is a pronouncement on the evaluation of proof,¹⁰⁴ but because it is a decisive point in the criminal process that entails a formal, public performance of state

⁹⁸ Brink (n 37) 39.

⁹⁹ Brink (n 37); David O. Brink, *Fair Opportunity and Responsibility* (OUP, 2021), ch. 15.

¹⁰⁰ See further, Stephen J. Morse, “Diminished Rationality, Diminished Responsibility” (2003) 1(1) *Ohio State Journal of Criminal Law* 289.

¹⁰¹ Nigel Walker, *Crime and Insanity in England, Volume One: The Historical Perspective* (Edinburgh University Press 1968) 245.

¹⁰² Brink (n 37) 39. (He further notes how culpability plays two distinctive roles in the criminal law: “culpability in a *narrow* sense concerns the mental elements of wrongdoing – elemental *mens rea* – whereas culpability in the *broad* sense concerns the agent’s responsibility for her wrongdoing, without which she would be excused.”).

¹⁰³ For discussion, see Alice Ristroph, “Responsibility for the Criminal Law” in Robin. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011), ch.6, 107.

¹⁰⁴ E.g., Glanville Williams, *Textbook of Criminal Law*, 2nd edn, (Stevens & Sons Ltd. 1983) 686.

condemnation.¹⁰⁵ As Jackson highlights, notwithstanding its procedural purpose, the common or “lay” interpretation of verdict is concerned largely with establishing an accused’s narrative and the truth of the case, in addition to attributing social blame.¹⁰⁶ This reading of verdict is significant because a guilty verdict sees those subject to it evaluated through, what Nils Christie terms, “simplistic dichotomies”.¹⁰⁷ It communicates an “us” and “them” mentality in the community which reinforces labelling, stigmatisation, and the exclusion of the offender from the community, with an accompanying loss of any moral claim to justice.¹⁰⁸ And yet, the nature and impact of the bivalent verdict endures with very little scrutiny, largely for reasons of historical assumption and inertia.¹⁰⁹

A few notable works explore the possibility of a multivalent verdict system through various strategies.¹¹⁰ Over forty years ago, Herbert Fingarette and Ann Fingarette Hasse envisaged a “Disability of Mind” defence which would encapsulate any form of mental impairment active at the time of an offence, notwithstanding its aetiology, severity or duration.¹¹¹ The authors posited a defence that could result in four alternative verdicts of guilt that would predicate sentencing outcomes: Nonculpable Disability of Mind¹¹² (no punishment); Nonculpable Partial Disability of Mind¹¹³ (mitigation of punishment for the offence charged); Culpable Disability of Mind,¹¹⁴

¹⁰⁵ Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial, Volume 1: Truth and Due Process* (Hart Publishing 2004) 19.

¹⁰⁶ Bernard S. Jackson, “Truth or Proof?: The Criminal Verdict” (1998) XI(33) *International Journal for the Semiotics of Law* 227-273.

¹⁰⁷ Nils Christie, *Limits to Pain* (Universitetsforlaget, 1981) 45.

¹⁰⁸ E.g., see John Rawls’ discussion of the “mark of bad character” as evidenced by wrongful conduct; John Rawls, *A Theory of Justice: Revised Edition* (HUP 1999) 277.

¹⁰⁹ E.g., see Nigel Walker, *Crime and Insanity in England, Volume One: The Historical Perspective* (Edinburgh University Press 1968) 244.

¹¹⁰ E.g. Brink (n 37); David O. Brink, *Fair Opportunity and Responsibility* (OUP, 2021), ch. 15.

¹¹¹ Herbert Fingarette and Ann Fingarette Hasse, *Mental Disabilities and Criminal Responsibility* (University of California Press 1979).

¹¹² Equivalent to a NGRI verdict in terms of impact, though the accused is designated as “guilty”.

¹¹³ Impairment of rationality with a rationale similar to the doctrine of partial excuse, though with a universal application.

¹¹⁴ Envisages cases of voluntary intoxication that fully impair capacity.

and its partial variant, Culpable Partial Disability of Mind,¹¹⁵ which would both see potential mitigation for intent/knowledge offences, and no mitigation for negligence offences). It is also worth noting the contribution of Paul Robinson in this regard, who proposes a trivalent approach to verdict and notes that the language of guilt or responsibility, which focuses on the moral value of the person, ought to shift towards expressions that centre on the wrongdoing itself, for example, “violation”, “violation with reduced responsibility”, and “non-violation”.¹¹⁶

More recently, Brink’s extensive work in the area of responsibility and verdict explores the possibility of both a trivalent and tetravalent culpability assessment in order to “eliminate the sins of overpunishment.”¹¹⁷ The trivalent system would encompass verdicts ranging from full responsibility, to partial responsibility, to nonresponsibility.¹¹⁸ He goes further, and also presents the idea of a more refined, tetravalent system that would see culpability divided into quartiles and that, he maintains, would effectively achieve the elimination of over-punishment.¹¹⁹ Notwithstanding this appealing claim, it is likely that a trivalent approach would be a more plausible mechanism for facilitating a partial defence. For, Brink himself notes that tetravalence sits at “the limit of granularity that is psychologically realistic”,¹²⁰ and given that there is no such model in operation, considerable work would need to be done to investigate its reception in a practical sense. Conversely, a tripartite verdict structure is closest to the present systems in place across the British Isles, for example, were those jurisdictions to allow for the possibility of an expanded, generic form of partial excuse. Scotland, in particular, offers a third verdict of “not proven”, which results in an acquittal where there is insufficient evidence of guilt.¹²¹ Though differing in substance, having

¹¹⁵ Envisages cases of voluntary intoxication that partially impair capacity.

¹¹⁶ Paul H. Robinson, “Rules of Conduct and Principles of Adjudication” (1990) 57 *University of Chicago LR* 729.

¹¹⁷ Brink (n 37) 56.

¹¹⁸ Brink (n 37) 53-56; see *Fair Opportunity and Responsibility* (OUP, 2021) 394-397.

¹¹⁹ Brink (n 37) 57.

¹²⁰ Brink (n 37) 57.

¹²¹ See further, James Chalmers, Fiona Leverick and Vanessa E. Munro, “A modern history of the not proven verdict” (2021) 25(2) *Edinburgh Law Review* 151-172, and; Samuel Bray, *Not Proven: Introducing a Third Verdict* (2005) 72 *The University of Chicago LR* 1299.

a third option means that there is at least familiarity with the possibility of a non-binary verdict. A trivalent structure is also recognised in certain civil jurisdictions. For example, the German Criminal Code provides a complete excuse for a full lack of normative competence, and a partial excuse in response to impaired normative competence.¹²²

Though a trivalent structure might be the most plausible option, regardless the form a multivalent verdict might take, at its foundation, the approach acknowledges that culpability is not simply a matter of status, but it is a matter of scale. Even where a defence or partial defence is unsuccessful, the offender has had the opportunity to present factors that may have borne on their culpability for the crime, providing a richer and more authentic narrative account at the normative heart of the trial. And if successful, a reduced level of culpability, reflected in a scalar verdict, not only predicates a more accurate assessment of desert,¹²³ but promotes a richer perception of the person, beyond that of crude dichotomies that reinforce stigmatisation; guilty/not guilty, evil/innocent, one of them/one of us.

V CONCLUSION

The doctrine and practice of the criminal law is already overcomplicated, and so any argument for law reform requires strong justification. This paper signals the pursuit of a more accurate apportionment of blame as a worthy reason for at least considering how legal doctrine can do more to acknowledge the wider moral picture. An historical view has shown how partial excuse is underpinned by an enduring impulse to recognise the fallibility of the human condition in the face of circumstances beyond an agent's control, and that the scope of that recognition expands and contracts in response to the institutional, cultural and socio-political drivers of a given time and place. In light of its inherent versatility, and with the boon of our current knowledge of human psychology and lived experience in the context of crime, there is an argument in favour of

¹²² German Criminal Code, §§ 20– 21 StGB; for discussion, see Michael Bohlander, “When the Bough Breaks – Defences and Sentencing Options Available in Battered Women and Similar Scenarios under German Law” in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility* (Ashgate 1997) 247– 71.

¹²³ Stephen J. Morse, “Diminished Rationality, Diminished Responsibility” (2003) 1(1) *Ohio State Journal of Criminal Law* 289.

reclaiming the doctrine so that we can continue to pay heed to the reality of human struggle where it impacts criminogenic behaviour. To this end, the paper has taken the preliminary steps of outlining, and seeking to undermine, three key objections to the concept of an expanded doctrine of partial excuse, laying the groundwork for further discourse in the area. However, it must be noted that overcoming such obstacles requires not just a campaign of rigorous scholarship but the internal legal recognition of the impact of conviction and the didactic nature of verdict. It also requires something more evasive entirely; a shift in attitude towards a more realistic view of the individual in the law – from subject to person.

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