

Introduction

We cannot rationally decry crime and brutality and racial animosity without at the same time struggling to enhance the fairness and integrity of the criminal justice system. That system has first-line responsibility for probing and coping with these complex problems.

Judge David Bazelon, *United States v. Alexander*,
471 F.2d 923, 925 (DC, Cir. 1972)

This book is about how the state blames people who commit crime through its legal doctrine and principle. It is prompted by a concern that those who offend are blamed too much when they are held criminally responsible, suggesting that the law is running at a moral and social justice deficit. This concern is not a novel one; rather, it represents an enduring criticism of the criminal law which is variously characterised as a failure to recognise crime as a social problem, its subjects as real people, or its own role in perpetuating injustice through its doctrine and principles of responsibility. Judge Bazelon's remarks, therefore, capture an intuition that persists through the words of a significant contingent of critical scholars and in the hearts of many members of the moral community. His dissenting judgment in *Alexander* was one of the few (if not only) attempts by a criminal court to recognise social circumstance as a defence in evaluations of culpability, through his conviction that the jury should have been permitted to consider evidence of the accused's troubled childhood or 'rotten social background'.¹ This effort proved fruitless in court, but sparked a rich scholarly discourse which, among other things, sought to question the role of doctrine in reinforcing social injustice through its narrow

¹ *United States v. Alexander*, 471 F.2d 923, 958–959 (D.C. Cir. 1972). See, further, R. Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, *Law and Inequality*, 3(9): (1985), pp. 9–90.

excuse offering, and its bounded conception of the responsible person of the criminal law.

Decades have passed since Judge Bazelon's reproach, with the intervening period yielding empirical knowledge affirming the prevalence of factors like adverse childhood experiences, severe environmental deprivation, addiction, and trauma among those who offend, the destructive impact of state condemnation, and the growth of concerning trends like mass punishment and over-criminalisation. Further, during this time, more sophisticated accounts of human psychology have been established that bring into question the suitability and fairness of present blaming practices. Yet little has changed within the doctrine and principles of responsibility and excuse towards recognising the broader social significance of criminal conduct in assessments of culpability. An easy explanation for the law's reluctance to acknowledge the role of circumstance here is to say that questions of social justice simply fall outside the remit of responsibility attribution, which is neither designed nor equipped to address these issues so well as other facets of law and state. Notwithstanding, this book argues that the boundary placed around what factors can and cannot be included in assessments of culpability, and the apparent red line drawn between guilt and non-guilt, are both more permeable and less definitive than the law might have us think. Accordingly, the exigencies of justice demand further consideration of how the criminal law ought to respond to its subjects who offend. This enterprise is justified by two key developments in recent times: the emergence of an established psychological literature on human thinking and behaviour that brings into question the law's construct of personhood underpinning its blaming principles; and the maturation of a line of political theory that shows the significance that ideas of vulnerability and recognition of human agency and autonomy hold for the pursuit of social justice.

Taken together, these strands help to bring a social-justice consciousness to the tired business of holding people criminally responsible, through paradigmatic, theoretical, and doctrinal innovation. In short, the book identifies the present doctrine of partial excuse as a promising site for tackling the problem of over-blame, thereby advancing social justice within legal doctrine. The potential of partial excuse lies in the fact that, through defences like diminished responsibility, it appears to acknowledge that responsibility for crime may not be absolute, and that culpability evaluation in law can be a more nuanced, yet feasible, exercise at the pre-verdict stage, facilitating less blame where justice so demands. As such, a Universal Partial Defence (UPD) is proposed, that works by extending the application of the existing doctrine of partial excuse beyond homicide offences, to which it is currently confined,

across all offence categories, on the grounds that every accused ought to have the right to raise the defence. Further, the proposal expands the basis of the defence to facilitate a broader conception of personhood than is presently understood at culpability evaluation, in addition to the inclusion of social aetiologies. To meet its social justice objective, the UPD is informed by a guiding conceptual framework termed the Real Person Approach (RPA), calling on the criminal law to recognise its subjects as vulnerable agents.

To build a case for the proposed defence, the book is divided into four parts. Part I explores the overarching question of the purpose of the criminal law, and the responsibility ascription function, in particular, in order to establish the law's social justice duty towards those it blames. Part II pours this analysis through the paradigm and core principles of responsibility that bear on questions of culpability evaluation more broadly, and establishes the case for, and features of, the RPA. Part III channels the discussion towards partial excuse, considering this site from the perspective of doctrine and practice, and engaging with excuse theory in order to arrive at a suitable rationale for the proposed defence, in the form of a bounded causal theory. Finally, Part IV brings this groundwork to fruition by offering a blueprint for the implementation of a UPD within the criminal law. The remainder of this introduction provides a brief overview of each chapter.

As the sole chapter to Part I, the core aim of Chapter 1 is to settle the question of whether the criminal law *ought* to advance social justice within its realm. It establishes that as a form of public law, the criminal law is subject to social justice scrutiny like any other state institution, and so has a duty to offset social injustice where it arises. This duty applies to criminal law doctrine, and excuse doctrine, in particular, as the grammar of culpability evaluation. A core challenge to advancing social justice at this site is highlighted through the criminal law's apparent passivity to forms of social injustice through the depoliticisation of its doctrine. Drawing on literature that reignites the political credentials of criminal responsibility attribution, the chapter seeks to erode the impunity of culpability evaluation from social justice interrogation. Moreover, it introduces the concepts of vulnerability and recognition with a view to forging a pathway for the RPA.

Turning to Part II, with the criminal law's duty to advance social justice so established, the main task of Chapter 2 is to explain the substance of that duty for the purposes of culpability evaluation, through the RPA. The chapter introduces the target of the approach as the dominant construct of personhood represented by excuse doctrine, identifying its contribution to both moral and social injustice, through the subversion of core criminal law principles of proportionality and parsimony, respectively. Drawing on the work of

vulnerability and recognitive justice theorists, the RPA responds by offering a guiding framework which helps to identify and explain these injustices, and aids with the challenge of holding people to account for wrongdoing in a way that advances social justice. Finally, the chapter elucidates the core features of the approach in terms of understanding agency in the present context as inherently, situationally, and pathogenically vulnerable, and using this vulnerability as the grounds for a recognitive justice response from the criminal law, but in a way that maintains conceptual feasibility.

Chapters 3 and 4 of Part II expand on the moral and social justice deficits already introduced by engaging with central principles of the criminal law, proportionality and parsimony, respectively. Chapter 3 engages the proportionality principle to show how the dominant account of rational agency leads to the disproportionate delivery of desert in two key ways: by maintaining an overly narrow basis of the desert calculus, and by failing to recognise degrees of moral blameworthiness. It draws on key findings from social psychology to understand the lag between doctrinal expectation and the reality of human behaviour, and to show how proportionality can be reinvigorated at culpability evaluation by aligning it with a clear social-justice objective. Applying the RPA, the moral deficit is exposed as a failure to recognise inherent and situational vulnerabilities, and a recognitive doctrinal response is offered as a means of legitimising the UPD. To preserve feasibility, the chapter reconciles the RPA with retributivism, as the hegemonic paradigm, promulgating its supplementation with a broader construct of agency.

Chapter 4 expands the lens to wider justice concerns, relying on the parsimony principle to explain how the weight afforded to the dominant rational agency account contributes to a form of conceptual punitiveness at culpability evaluation, which is reinforced by a broader culture of responsibilisation in criminal law and justice spheres. Applying the RPA, the chapter conceptualises punitive excess at culpability evaluation as a form of pathogenic vulnerability, unearthing a discrete version of misrecognition at this site. In response, the recognitive justice feature of the approach is engaged to consider how we might ameliorate this particular variant of social injustice. Drawing on recent scholarship promoting a more modest approach to criminal responsibility attribution, the principle of parsimony is reauthenticating as a core tenet of the criminal law, supporting the call for a UPD at a doctrinal level.

Shifting pace for Part III, Chapter 5 marks the beginning of a more pointed analysis and justification of partial excuse, as the target site of the RPA, across Chapters 5–7. The chapter is concerned with exploring the nature and purpose of partial excuse through a historical overview, and with clarifying

the version of the defence used to underpin the UPD, through touring the divergent definitional and structural approaches of other common law jurisdictions. Key issues that bear on the definition of the proposed defence are introduced. This analysis forms the backdrop of the argument for universalising partial excuse across all offence categories and expanding its grounds beyond mental disorder and provocation/loss of control. Core challenges to universalisation are explained and responded to, concerning the application of partial excuse to homicide only, its characterisation as a form of mitigation at the pre-verdict stage, and issues relating to both coordination and the notion of partial responsibility.

Chapter 6 identifies the doctrine of diminished responsibility as the closest antecedent of the UPD, and a suitable template from which to forge the proposal. Taking a particularised theoretical approach, the chapter draws on case law and empirical studies to arrive at a more fine-grained account of the operation of the defence. It reveals a penumbral quality to its interpretation in the courts, through the subtle inclusion of factors that sit at the edge of what might be considered a recognised medical condition or mental disorder. The chapter contends that this flexibility suggests a stomach for moral complexity on the part of fact-finders, arguing for a broader, normative test that can include consideration of circumstance, as the basis of the UPD. The analysis considers the role of key decision-makers, and it serves to inform the development of a bounded causal theory of partial excuse in Chapter 7.

Transitioning to a more theoretical focus, Chapter 7 engages in greater depth with explanations of excuse in the criminal law, to offer a rationale of partial excuse that provides a closer reflection of the flexible nature of the defence in practice, and to legitimise the proposal for its expansion under the UPD. Echoing the pragmatism of the RPA, in terms of recognising both retributivism and recognition of vulnerability at a paradigmatic level, the bounded causal theory proposes the reinvigoration of the less popular causal account of excuse but in a way that accords with the dominant capacity-based approach. In doing so, it responds to three major objections to causal theory: the fear of universal legal excuse, the fact that not all those with a similar circumstance to the defendant commit crime, and the problem of proving the link between circumstance and criminal act.

Finally, Part IV sees the culmination of the case for reform, with Chapter 8 offering a blueprint for the UPD, based on an expanded version of the diminished responsibility defence. The proposal actualises the RPA in criminal law doctrine by facilitating consideration of a richer account of rational agency and a wider array of situations that may bear on culpability, in recognition of the vulnerable nature of personhood. In line with the features

of the RPA, the UPD expresses conceptual feasibility by relying on bounded causal theory to legitimise the expansion of doctrine, as outlined in Chapter 7. Key requirements of the proposal are explained, and the boundaries of the defence are tested, for example, with an analysis of the potential impact of a cultural defence, and the place of loss of control/provocation-type claims. The chapter concludes with consideration of practical challenges that may face the implementation of such a proposal, as well as discussing possible outcomes of a successful defence.

As might be apparent from this overview, most chapters engage with literature that is in itself the subject of considerable volumes of scholarship and, as signalled at relevant points, this book makes no claims to providing full accounts of vast areas such as vulnerability, recognition, punitiveness, situationism, and so on. Rather, the focus on these concepts is tailored to meet the very particular aim of justifying, legitimising, and executing the advancement of social justice in legal doctrine through a UPD that recognises the law's subject as a real person.