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 reauthenticated 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.

PART I

Purpose

1

Activating the Criminal Law

Establishing the Duty to Advance Social Justice

INTRODUCTION

A core claim of this book is that aspects of criminal responsibility doctrine perpetuate moral injustice through disproportionate blame, and social injustice through misrecognition. In response to this charge, Chapter 2 develops a conceptual tool in the form of a Real Person Approach (RPA) to guide reform at the site of culpability evaluation;[1] by promoting the recognition of the inherent, situational, and pathogenic vulnerabilities of those who are subject to state blame; and in a way that is feasible in light of the context of current paradigmatic, theoretical, and doctrinal frameworks. To actualise the RPA, the book works with excuse doctrine, as the converse of culpability, in order to develop the idea of a Universal Partial Defence (UPD). The UPD operates on two planes: first, it extends the application of partial excuse across all offence categories and, second, it deepens the conception of partial excuse in order to permit a broader understanding of mental functioning, in addition to the inclusion of social aetiologies, as the basis of a defence. This latter step is legitimised by a bounded causal theory of partial excuse which attends to the person as both a rational and vulnerable agent. The theory retains the

[1] Terminology used to describe the different stages of criminal responsibility ascription varies greatly. I use 'culpability evaluation' interchangeably with 'moral blameworthiness' to describe the stage where considerations of exculpation are taken into account with a view to assessing blameworthiness at the pre-verdict stage. Such considerations can include justifications and excuse, and I am concerned, in particular, with excuse doctrine. Though they term this stage 'liability', Duff and others provide a useful breakdown of the stages of criminal responsibility; A. Duff, L. Farmer, S. Marshall, & V. Tadros (eds.), *The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial* (Portland, OR: Hart Publishing, 2007), pp. 130–131.

dominant capacity-based approach to understanding excuses through holding the person (partially) responsible for wrongdoing. However, it supplements the traditional account with a causal explanation that recognises the possibility that both prior conditions and circumstances (like adverse childhood experiences, severe environmental deprivation, addiction, and trauma) can impair mental functioning to a degree that reduces, though does not remove, responsibility for criminal conduct.

This enterprise rests upon a rather weighty precondition that the criminal law *ought* to advance social justice within its realm, and particularly at the site of culpability evaluation, as an important point of communication between the state and the person who offends, and between the state and the community *about* the person who offends.[2] The task of this chapter, then, is to attend to this precondition by arguing that the criminal law, as a form of public law, is subject to social justice scrutiny like any other public institution, and so has a responsibility to act where it can to offset social injustice, including through its excuse doctrine. A core challenge to this undertaking is the criminal law's apparent passivity (both in doctrine and mainstream scholarship) in the face of experiences of social injustice, particularly at the point of condemnation. This disengagement with social justice concerns tends to be characterised as a feature of objectivity, resting upon an enduring presumption that such matters are extraneous to the assessment of moral (and therefore criminal) blame. Underpinning this presumption is another one; that the idea of social justice infers distributive justice only.[3] Consequently, there exists a chasm between social justice (understood as distributive justice) and retributive justice owing to their divergent objectives. Roughly, distributive justice aims to make society more just through the fairer distribution of resources, while retributive justice is concerned with ensuring that a rule-breaker receives the appropriate portion of blame and punishment on behalf of the victim/community. The task of establishing criminal responsibility presents as factual, blind to context, and so the question of distributive justice appears outside the scope of the exercise.

[2] E.g. Duff *et al.* describe conviction as both an expression of the defendant's conduct as a public wrong, in addition to 'condemnation of him, to his face, that is intended to be understood in the second person'; A. Duff *et al.*, *The Trial on Trial*, p. 148.

[3] E.g. Most scholars who discuss this question frame it as a retributive justice/distributive justice issue. For instance, Green asks, 'to what extent is the fairness of a given system of retributive justice dependent on the fairness of the system of distributive or socio-economic justice within which it is situated?', in S. P. Green, 'Just Deserts in Unjust Societies: A Case Specific Approach' in R. A. Duff & S. P. Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), p. 352; C. Knight & Z. Stemplowska (eds.), *Responsibility and Distributive Justice* (Oxford: Oxford University Press, 2011).

Indeed, while most criminal law scholars would acknowledge the fact that crime is a complex social problem often compounded by the unequal distribution of resources in society, few venture beyond a moral philosophical inquiry about blame ascription. There are perhaps two reasons for this reluctance. First, some may find it unnecessary to have to tackle a theory of state first, simply to justify one's theoretical tinkerings with the criminal law. For example, Schulhofer represents the position of many scholars of the 'golden half century'[4] of criminal law theory, when he says that 'there is rarely mileage to be gained, in terms of criminal law theory, from sorting out which is the appropriate theory of the state'.[5] Second, those who have sought to address the question of rendering justice in an unjust society have made little practical headway, largely because they are seen as attempting to use the criminal law to fix a problem that it has not been designed to fix, that is, economic inequality.[6] Therefore, many are likely to have been discouraged from engaging in this type of scholarship by the fact that the criminal law is simply the wrong tool for the job. This mood is shifting, however, owing to an increased focus on the public role of the criminal law in recent scholarship (often in response to the problems of overcriminalisation, mass incarceration, and mass supervision), which carries with it an opportunity to repurpose the tools of political theory to advance social justice from within criminal law doctrine.[7]

The chapter begins with an overview of the purpose of the criminal law which points to the intractable nature of the retributivist paradigm inherent in the idea of rendering justice, particularly at the point of culpability evaluation. A broader political perspective is then applied as a means of explaining the perception of criminal law as exempt from social justice scrutiny, and the consequent passivity of the law through the depoliticisation of doctrine and theory. Next, the chapter turns to a body of literature signalling a renewed focus on the criminal law as a species of public law, propelling the erosion of its impunity from social justice interrogation. Building on this trend, the chapter introduces the concepts of vulnerability and recognition with a view

[4] M. Davis, 'Punishment Theory's Golden Half Century: A Survey of Developments from (About) 1957 to 2007', *Journal of Ethics*, 13: (2009), pp. 73–100 at p. 97. See, further, S. Galoob, 'Criminal Law and/as Political Theory', *Tulsa Law Review*, 55(2): (2020), pp. 203–212 at p. 203.

[5] S. J. Schulhofer, 'The Mathematician, the Monk, and the Militant: Reflections on the Role of Criminal Law Theory', *California Law Review*, 88: (2000), pp. 705–710 at p. 707. See also Galoob, 'Criminal Law', p. 203.

[6] See discussion of relevant literature in Chapter 7.

[7] In this vein, see N. Lacey, 'Criminal Justice and Social (In)justice', *International Inequalities Institute Working Papers* 84: (2022).