Partial Responsibility and Excuse

David O. Brink*

The criminal law is broadly retributive insofar as it predicates censure and sanction on culpable or responsible wrongdoing.1 Wrongdoing for which the agent is not responsible and, hence, not culpable (in this sense) is excused. Responsibility and excuse are scalar phenomena, because the capacities constitutive of the normative competence required for responsibility can be had to different degrees and their impairment can be a matter of degree. Ideally, the criminal law would aim to deliver just deserts in cases of partial responsibility, making censure and sanction proportional to the degree of culpable wrongdoing. However, with some qualifications, American criminal law is bivalent about responsibility and excuse. It treats responsibility as all or nothing, and it is very stingy with excuse, in effect treating many cases of partial responsibility as if the individuals were fully responsible. It is normatively problematic to treat responsibility and excuse as bivalent when the underlying facts about them are scalar in nature.2 In this essay, I want to explain this concern about

* It is my pleasure to contribute an essay honoring Larry Alexander, who has been a friend for two decades and from whom I have learned so much about the philosophy of law, especially legal interpretation and criminal jurisprudence. My debt is all the greater because of our frequent disagreements.

1 Culpability plays two very different roles within 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. I distinguish these two roles in David O. Brink, “The Nature and Significance of Culpability” (manuscript, San Diego, 2014). In this essay, I am concerned exclusively with culpability as broad culpability.

the bivalent character of American criminal law, take partial responsibility seriously, and explore some realistic alternatives to bivalence about excuse.

My discussion will be abstract and conceptual, focusing on general features of the criminal law’s assumptions about desert, responsibility, and excuse. But it will nonetheless be helpful to have some potential examples of partial responsibility in mind. Thinking about insanity, immaturity, addiction, and provocation, we might identify the following cases of potential partial responsibility.

1. The mother experiencing severe postpartum depression who commits infanticide, though knowing it to be legally wrong.
2. The adolescent who commits a property crime under intense pressure from gang members in his neighborhood.
3. The addict who commits a nonviolent crime to support his addiction, which he acquired while taking medically prescribed pain medication.
4. The battered woman who kills her abuser while he sleeps.

Whether any of these cases would be best understood as cases of full responsibility, full excuse, or partial responsibility would, no doubt, depend on further details of the cases. But it shouldn’t be too hard to imagine ways of filling out the details that would raise issues of partial responsibility.

3.1 PREDOMINANT RETRIBUTIVISM

These issues about partial responsibility and excuse are framed by the broadly retributive character of the criminal law. Retributivism says that blame and punishment ought to be proportional to desert, which is itself the product of two independent variables – wrongdoing and culpability or responsibility.\(^3\)

\[ P \propto D = (W \times R) \]

In particular, for present purposes, I will assume that the best formulation of retributive ideas is predominant retributivism.\(^4\) Predominant retributivism is a mixed theory of punishment in which a backward-looking emphasis on desert predominates over forward-looking rationales for punishment, such as deterrence, rehabilitation, and the expression of community norms.

Any form of retributivism insists that culpable wrongdoing serves as a constraint on blame and punishment. Desert is a necessary condition for blame and punishment.


because both are impermissible in the absence of culpable wrongdoing, and desert places an upper limit on permissible punishment, which must not exceed what would be proportional to desert.

Predominant retributivism insists that desert is not just a constraint on blame and punishment but also provides an important rationale for these attitudes and practices. In particular, it claims that blame and punishment are fitting responses to culpable wrongdoing in the sense that culpable wrongdoing is sufficient for a strong pro tanto case for blame and punishment. Other things being equal, we should blame and punish culpable wrongdoers proportionately to their desert.

However, other things are not always equal. There can be non-desert-based reasons not to punish proportionately, in particular, to punish less than required by desert. Such nondesert factors can include the costs of punishment, the prospects for rehabilitation, and the value of mercy or forgiveness. The strong pro tanto case for blame and punishment based on desert must sometimes compete with these countervailing considerations and may not always carry the day. Because predominant retributivism allows that desert can compete with nondesert reasons against proportionate punishment, it is already a mixed theory of punishment.

Predominant retributivism is also a mixed theory of punishment insofar as it allows desert and nondesert factors to address different questions about punishment. A complete theory of punishment should address whom to punish, why we should punish, how much we should punish, and how we should punish. Retributivism offers a unified answer to the first three questions: We should punish culpable wrongdoers; we should do so, because they deserve punishment for culpable wrongdoing; and we should punish in proportion to the degree of their culpable wrongdoing. Though desert may constrain how we punish, because it constrains how much we should punish, it leaves the manner of punishment largely underdetermined. Provided that we punish all and only the guilty, punish them because they deserve punishment, and punish them in proportion to their just deserts, we are free to and should punish them in ways likely to promote various forward-looking values, such as rehabilitation, deterrence, and moral communication and education.

Another way to reconcile forward-looking rationales for punishment and the retributivist backward-looking focus on desert is to allow consequentialist considerations to supplement considerations of desert in the determination of precisely how much to punish. Despite the apparent precision of the retributivist formula for punishment, desert may determine only an interval, rather than a precise quantum, of punishment. Indeed, interval sentencing is reflected in various sentencing guidelines, including the United States Federal Sentencing Guidelines.

---

5 For a similar view, see Douglas Husak, “Kinds of Punishment,” in this volume.
Whether punishment intervals reflect genuine metaphysical indeterminacy in the desert basis of particular crimes or epistemological indeterminacy in our ability to track small but genuine differences in culpable wrongdoing is an interesting question, which we need not settle here. As long as there is limited indeterminacy in the desert basis for punishment, whether metaphysical or epistemological, there is a need to specify further a precise punishment value within the deserved interval. So, it is open to us to appeal to various consequentialist rationales to fine-tune the quantum of punishment within the space of punishments set by desert.

Something like predominant retributivism has considerable intuitive appeal and fits well with important parts of criminal jurisprudence. For instance, it explains well the two main kinds of affirmative defense a defendant can offer – justifications and excuses.7 Justifications and excuses deny the two independent variables in the retributivist desert basis for blame and punishment. Justifications, such as necessity, deny wrongdoing, whereas excuses, such as insanity or duress, deny culpability or responsibility.8 Just as justification is the flipside of wrongdoing, so too excuse is the flipside of responsibility.

3.2 THE FAIR OPPORTUNITY TO AVOID WRONGDOING

Because the denial of responsibility is an excuse, responsibility and excuse are inversely related. Those responsible for their wrongdoing lack an excuse, and excused wrongdoing is wrongdoing for which the agent is not responsible. This allows us to model responsibility by attending to excuses.9

The criminal law recognizes two main kinds of excuse – incompetence excuses such as insanity, and duress excuses. Incompetence involves impairment of an agent’s internal capacities. By contrast, duress involves a situational failing in which wrongful interference by another with the agent’s options deprives her of the fair opportunity to act on her own deliberations about how to behave. In this

---


8 A true justification concedes that the offense has been proven but claims that, in light of the circumstances and the law’s larger purposes, the conduct in question is nonetheless not wrong. We could acknowledge this fact by distinguishing between prima facie and all-things-considered wrongdoing, and claiming that the prosecution has the burden of proving prima facie wrongdoing and that justification is an affirmative defense that denies all-things-considered wrongdoing. That shows that the wrongdoing in the retributivist desert basis for punishment is all-things-considered wrongdoing.

9 Michael S. Moore, Placing Blame (Oxford: Clarendon Press, 1997), 548, describes excuse as “the royal road” to responsibility. It’s important to recognize that it is a two-way street.
way, standard excuses recognized by the criminal law reflect impairment of the agent’s capacities or opportunities. If we treat excuse as a window onto responsibility, this should lead us to factor responsibility and, hence, culpability into two main conditions—normative competence and situational control. This conception of responsibility draws on and synthesizes two traditions of thinking about responsibility—the reasons-responsive wing of the compatibilist tradition of thinking about free will and responsibility, and the fair choice approach to criminal responsibility.¹⁰

Normative competence involves reasons-responsiveness, which itself involves both cognitive capacities to distinguish right from wrong and volitional capacities to conform one’s conduct to that normative knowledge. It is important to recognize that responsibility is tied to competence, not performance. We do not excuse the weak-willed or the willful wrongdoer for failing to recognize or respond appropriately to reasons, but we do excuse the incompetent. If we excused for faulty performance, the fact of wrongdoing would itself be exculpatory, with the absurd result that we could never hold anyone responsible for wrongdoing.

Normative competence requires the cognitive capacity to make normative discriminations and recognize wrongdoing, as is reflected in the M’Naghten rule that excuses if the agent lacked the capacity to discriminate right from wrong at the time of action.¹¹ For instance, this cognitive conception of competence and insanity is reflected in the Federal insanity test.

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.¹²

¹¹ M’Naghten’s case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).
However, normative competence requires more than cognitive competence. It also requires volitional capacities to form intentions based on one’s practical judgments about what one ought to do and to execute these intentions over time, despite distraction, temptation, and other forms of interference. Volitional impairment might take the form of irresistible urges, paralyzing phobias, severe depression, or damage to the prefrontal cortex of the brain. Recognition of a volitional dimension of normative competence argues against purely cognitive conceptions of insanity, such as the M’Naghten test, and in favor of a more inclusive conception, represented in the Model Penal Code (MPC), which conceives of insanity as involving significant impairment of either cognitive or volitional competence.

A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

If so, normative competence involves both cognitive and volitional competence.

But excuse is not exhausted by denials of normative competence. Among the factors that may negate blameworthiness are external or situational factors that impair an agent’s opportunity to act on her practical reasoning. In particular, agents may be excused for wrongdoing that is the product of coercion or duress. The paradigm situational excuse is coercion by another agent, as when one is threatened with physical harm to oneself or a loved one if one doesn’t participate in some kind of wrongdoing – for instance, driving the getaway car in a robbery. The MPC adopts a reasonable person version of the conditions under which duress excuses, namely, when a person of reasonable firmness would have been unable to resist, provided the actor was not himself responsible for being subject to duress. Situational duress does not compromise the wrongdoer’s status as a responsible agent and does not challenge her normative competence, but it does challenge whether she is responsible for her wrongdoing.

For skepticism about the volitional dimension of normative competence, see Morse, “Uncontrollable Urges and Irrational People.” For a defense of the volitional dimension of normative competence, against volitional skepticism, see Brink and Nelkin, “Fairness and the Architecture of Responsibility,” 296–302.


Ibid., § 4.01(1).

Ibid., § 2.09.

Following the MPC, the conventional wisdom within the criminal law is that duress involves hard choice whose source is wrongful interference by another agent and that duress is an excuse, rather
So far, the conception of responsibility emerging here is a two-factor model twice over. Responsibility is factored into normative competence and situational control, and normative competence is factored into cognitive and volitional capacities. This kind of two-factor model seems plausible, in significant part because it promises to fit our practices of excuse in both moral assessment and the criminal law pretty well. Incapacity excuses deny normative competence, whereas duress excuses deny the opportunity to exercise those capacities free from inappropriate interference by others. But it would be nice if there were some unifying element to its structure.

One possible umbrella concept is control. Freedom from coercion and duress, cognitive competence, and volitional competence all seem to be aspects of an agent’s ability to control her actions. But control seems important, because it seems unfair to blame agents for outcomes that are outside their control. This suggests that the umbrella concept should be fairness – in particular, the fair opportunity to avoid wrongdoing – because failure of either normative competence or situational control violates the norm that blame and punishment be reserved for those who had a fair opportunity to avoid wrongdoing. If we treat the fair opportunity to avoid wrongdoing as the key to responsibility, we get the picture of the architecture of responsibility shown in Figure 3.1.

than a justification. Interesting questions can be raised about both assumptions. I cannot address these questions here, though I hope to do so elsewhere. For some relevant discussion, see Peter Westen, “Does Duress Justify or Excuse?” in this volume. I do believe that duress excuses, rather than justifies, in some, if not all, cases. In any case, my focus in this essay is on incompetence excuses, rather than duress excuses, so the main argument of this essay is not hostage to the resolution of these issues involving duress.
3.3 PARTIAL RESPONSIBILITY AND IDEAL THEORY

Intuitively, responsibility is *scalar*, admitting of degrees. This is reinforced by the fair opportunity conception in which both normative competence and situational control are matters of degree, because their impairment is a matter of degree.

Though partial excuse makes sense for both incompetence and duress excuses, I will focus on partial incompetence excuses. Normative competence involves reasons-responsiveness, which is itself a matter of degree. This can be measured counterfactually – one is more responsive the greater the range of circumstances in which one would recognize and conform to the relevant norms, and less responsive the greater the range of circumstances in which one would not recognize or conform to those norms. The more normatively competent agent is responsive cognitively and volitionally to the relevant norms in a greater range of possible circumstances, and the less competent agent is responsive in a smaller range of possible circumstances. Moreover, competence can be understood as ease or facility of performance and incompetence as difficulty of performance. The limiting case of difficulty is impossibility, and degree of incompetence can be understood in terms of comparative difficulty of performance.\(^\text{18}\)

If we hold the magnitude of wrongdoing constant, then, other things being equal, blame and punishment should be directly proportional to the degree of responsibility, as measured by the degree of normative competence, which is itself inversely related to degree of difficulty. So, as a matter of ideal theory, responsibility and excuse ought to be *continuously scalar* – analog – thereby achieving *proportionate* desert and justice, as shown in Figure 3.2.

Here, proportionate justice is represented by the diagonal. Punishment to the left of the diagonal is underpunishment, whereas punishment to the right of the diagonal is overpunishment. The degree of underpunishment or overpunishment can be measured by distance from the diagonal.

3.4 BIVALENCE

However, for the most part and with some qualifications, American criminal law treatment of responsibility and excuse is bivalent, recognizing a threshold of competence and responsibility below which one is fully excused and above which one is fully responsible.

An exception to this trend toward bivalence is the doctrine of provocation, under which intentional homicides committed with adequate provocation reduce to an

\(^{18}\) For one development of this view, see Dana K. Nelkin, “Difficulty and Degrees of Moral Praiseworthiness and Blameworthiness,” *Noûs* 50, no. 2 (2016): 356–78.
offense of voluntary manslaughter. But the scope of this exception is quite limited, restricted as it is to homicides resulting from provocation. Moreover, even in this limited domain, it is not clear if this is a true exception, inasmuch as it is unclear whether provocation is best conceptualized as a partial excuse (partial responsibility) or as a partial justification (lesser wrongdoing).\footnote{My own view, for which I cannot argue here, is that provocation cases bifurcate into partial justifications and partial excuses.}

A potentially significant qualification to this trend toward bivalence involves a division of jurisprudential labor within criminal trials. A criminal trial is \textit{bifurcated} into \textit{guilt} and \textit{sentencing} phases (Figure 3.3). The guilt phase combines determinations of wrongdoing and affirmative defenses, such as excuse. The prosecution bears the burden of proof (beyond a reasonable doubt) for the elements of wrongdoing – both the objective elements (\textit{actus reus}) and the mental elements (\textit{mens rea}). Once wrongdoing is established, the defense has the opportunity to prove affirmative defenses, such as justification or excuse, and it has the burden of proof (preponderance of the evidence or clear and convincing evidence). So,
in particular, a determination of offense creates a presumption of culpability for wrongdoing, which the defense can attempt to rebut, establishing an excuse. If wrongdoing is established and no excuse is proven at the guilt phase, the trial proceeds to sentencing. In principle, mitigation at sentencing can include both desert factors relevant to, but not sufficient for, excuse and nondesert factors, such as remorse or reform.

Even if the guilt phase of a trial is bivalent, one might claim that the sentencing phase is scalar, rather than bivalent. Indeed, one might claim that the scalar nature of the sentencing phase makes up for the bivalence of the guilt phase.

However, though the possibility of sentence mitigation can sometimes soften the edges of bivalence about excuse, it is an imperfect way to do so. First, there is often little or no discretion at sentencing. Mandatory minima and sentence enhancements often eliminate or severely restrict discretion at sentencing. Second, even when sentencing discretion exists and is wide, it is nonetheless discretionary. Failure to mitigate where there is lesser culpability is not seen as wronging the defendant. But from the perspective of a broadly retributivist jurisprudence that insists on proportional punishment, mitigation should be mandatory, rather than discretionary. Finally, sentence mitigation is imperfect conceptually as well as practically. Excuse is an affirmative defense denying one element of the retributivist desert basis for punishment and is determined at the guilt phase. But partial responsibility and excuse concern the same dimension of desert and ought to be assessed at the guilt phase, leaving nondesert considerations to inform sentencing.

With these qualifications in mind, it is fair to say that American criminal law is predominantly bivalent, rather than scalar, about responsibility and excuse, and that sentence mitigation is a very imperfect remedy for the concerns that bivalence at the guilt phase of a trial raises. For the most part, American criminal law treats responsibility and excuse as all-or-nothing, setting a fairly low threshold above which one is fully responsible (Figure 3.4).
It’s hard to know how best to operationalize the criminal law threshold for normative competence and responsibility. Given how many criminal offenders suffer from some form of mental illness and impairment, how infrequently defendants plead insanity, and how infrequently these pleas are successful, one might think that the threshold is quite low. If anything, I’ve understated how inclusive the bivalent conception of responsibility is by setting the threshold, for purposes of illustration, at 33 percent competence.

We can see how bivalence results in punishment that deviates significantly from just deserts by combining the first two graphs (Figure 3.5).

By comparing bivalent and proportionate verdicts, we can see that a bivalent system introduces regions of underpunishment and overpunishment, which reflect the degree of unjust deserts, because the distance between actual punishment and the diagonal is proportional to the degree of underpunishment or overpunishment. With a comparatively low threshold for responsibility, the region of overpunishment is large both absolutely and in relation to the region of underpunishment. This is bad enough. But if we agree with William Blackstone (1723–1780) that it is worse to overpunish than to underpunish (he thought it was
ten times worse), we should be especially troubled that the ratio of overpunishment to underpunishment is so high.\footnote{Blackstone’s version of this asymmetry involves a 10:1 ratio: “better that ten guilty persons go free than that one innocent party suffer.” William Blackstone, Commentaries on the Laws of England (London: Strahan & Woodfall, 1791), 4: 358. Benjamin Franklin is alleged to have thought the ratio is 100: 1. It might be tempting to think that Blackstone’s asymmetry is already recognized in the fact that the prosecution bears a high burden of proof (beyond a reasonable doubt). But that burden concerns proof of wrongdoing, not culpability or responsibility. Once wrongdoing is established, it is the burden of the defense to prove that the defendant is not culpable, because incompetent. So, the procedure for proving responsibility and excuse does not reflect Blackstone’s asymmetry.}

These comparisons hold all else being equal and make no assumptions about the frequency of cases at different points on the responsibility axis. If, as seems plausible, most offenders not qualifying for a full excuse have impaired competence to some degree, this will aggravate the worry about overpunishment.

Moreover, normative thresholds are arbitrary when the relevant underlying factors are scalar. Thresholds attach enormous normative significance to small differences straddling the threshold and ignore large differences above and below

\begin{figure}
\centering
\includegraphics[width=\textwidth]{proportional_justice_meets_bivalence.png}
\caption{Proportional Justice Meets Bivalence}
\end{figure}
Partial Responsibility and Excuse

51

the threshold. For instance, X and Y are responsible and, hence, blameworthy to similar degrees, whereas Z is blameworthy to a much higher degree. Their comparative just deserts are represented on the diagonal. However, the bivalent system with a responsibility/excuse threshold treats them very differently. X is fully excused, and Y is fully responsible, though their underlying levels of normative competence are very similar. Moreover, Z is treated as just as responsible and, hence, blameworthy as Y, even though Z is significantly more culpable than Y. These are significant failures of just deserts.

3.5 NONIDEAL THEORY

A perfect moral accountant (e.g., God) would employ a fully scalar conception of just deserts, assigning blame and punishment on a case-by-case basis and making them proportionate to culpable wrongdoing. Her determinations would conform to the diagonal. However, our judiciary and juries are staffed by mortals who are imperfect moral accountants, with the result that attempts to implement just deserts sometimes lead to overpunishment or underpunishment.

One concern is that jury studies suggest that juries tend to focus on the magnitude of the wrongdoing and are insufficiently sensitive to factors that reduce culpability, thus leading to significant overpunishment.

There is a problematic gap between scalar moral worth and bivalent divine verdicts – penalties and rewards – if God assigns all souls to Heaven or Hell, which are noncomparatively good or bad. See Ted Sider, “Hell and Vagueness,” Faith and Philosophy 19, no. 1 (2002): 58–68. This problem is reduced, though perhaps not eliminated, if Dante is right that there are levels (circles) in Heaven and Hell corresponding to a person’s degree of moral worth.

See Catherine A. Crosby, Preston A. Britner, Kathleen M. Jodl, and Sharon G. Portwood, “The Juvenile Death Penalty and the Eighth Amendment: An Empirical Investigation of Societal Consensus and Proportionality,” Law and Human Behavior 19, no. 3 (1995), 245–61. The questionnaire contained descriptions of cases with defendants on trial for murder whose ages ranged from ten to nineteen years. The details of the cases included a description of the crime, probable culpability of all juveniles, level of remorse, and age of the defendant. The number of respondents willing to impose the death penalty for the defendants were as follows: 96.3 percent of male respondents and 95.7 percent of female respondents were willing to impose the death penalty on the nineteen-year-old defendant; 92 percent of male respondents and 87 percent of female respondents were willing to impose the death penalty on the sixteen-year-old defendant; 87.5 percent of male respondents and 52.9 percent of female respondents were willing to impose the death penalty on the fifteen-year-old defendant; and 71 percent of male respondents and 52.4 percent of female respondents were willing to impose the death penalty on the ten-year-old defendant. Though the willingness among male respondents to impose the death penalty was not completely insensitive to immaturity, and the willingness among female respondents was more sensitive, the level of insensitivity in both men and women was striking. A similar finding about the comparative insensitivity of views about the severity of sentencing to degree of maturity and normative competence is made in Simona Ghetti and Allison D. Redlich, “Reactions to Youth Crime: Perceptions of Accountability and Competency,” Behavioral Sciences and the Law 19, no. 1 (2001): 33–52.
One remedy for this blindspot for culpability would be to require explicit culpability determinations, involving determinations of degrees of responsibility. In principle, this could occur at the guilt or sentencing phase of a trial. But, as we saw, there are practical and conceptual obstacles to doing this at the sentencing phase. These determinations could be made at sentencing if they were made mandatory, rather than discretionary. Even so, to give effect to the grading of culpability, mandatory minima would need to be eliminated or greatly reduced. Even if these practical problems could be overcome, there would still be the conceptual obstacle that excuses deny responsibility or culpability and so should be assessed at the guilt phase of a trial, as other affirmative defenses are. Because partial responsibility and excuse concern this same dimension of desert, there is a strong argument for including assessments of partial responsibility at the guilt phase of a trial. If we require a mandatory grading of culpability at the guilt phase of a trial, we are effectively replacing a bifurcated trial with a tripartite trial in which determinations of wrongdoing and culpability/responsibility are separated and mandatory (Figure 3.6).

Under this proposal, once wrongdoing was proved, there would be a mandatory culpability determination, where the defense could introduce evidence of reduced competence and not just complete incompetence. There would be grades of culpability, and the defense would have the burden of establishing an excuse, whether full or partial. But each case would be required to reach a separate culpability determination. After this, there would be a separate sentencing phase where further considerations of mitigation and aggravation, including nondesert factors, would be decided.53

53 I would like to think that this proposal for a trifurcated trial is similar in spirit to Robinson’s elegant proposals to make the process and verdicts of the criminal law better reflect the underlying normative structure of criminal liability. For instance, Robinson argues that the simple binary verdict of guilty or not guilty obscures the different possible reasons for a not-guilty verdict. It would be better if courts were required to deliver one of five verdicts at the guilt phase of the trial: (1) no violation, (2) justified violation, (3) excused violation, (4) nonpunishable violation, or (5) guilt. See Paul H. Robinson, Structure and Function in Criminal Law (New York: Oxford University Press, 1997): 204–7.
However, mandatory culpability assessments are only a remedy for overlooking the role of culpability in desert if these assessments can be made with some degree of reliability. But we might doubt that this is true. An important residual concern about implementing proportionate justice is that it’s very difficult to track small differences in culpability. So even if just deserts in ideal theory would be analog, perhaps just deserts in nonideal theory should be discontinuous.

There are really two issues here. First, it’s hard for imperfect moral accountants to recognize small differences in culpability. This is the problem of epistemic granularity. Second, even when we stipulate small differences in culpability, our normative responses don’t always track those differences. Suppose A and B both succumb to temptation and do wrong, but that A’s temptation is slightly greater than B’s. God might blame B (a little) more than A, but most of us wouldn’t. This is the problem of normative granularity. I’m inclined to view both epistemic and normative granularity as departures from the ideal of proportionate justice.

These are real difficulties in implementing analog justice for nonideal circumstances. But they don’t support adoption of the current bivalent system. Any optimal rule, principle, or norm can be misapplied. We don’t show that a norm is suboptimal just because some of its applications are individually suboptimal. Instead, we have to show that there is another norm whose adoption would produce fewer suboptimal outcomes overall or whose suboptimal outcomes would be less unjust. But then, difficulty with reliably producing just deserts by an analog method is not good reason to prefer a bivalent method, unless bivalence produces fewer cases of unjust deserts or ones that involve less injustice. But since the bivalent system ignores all but the most extreme forms of incompetence, it is likely to generate greater injustice – in particular, more cases of more pronounced overpunishment. If the deviations from proportionate justice are small, an analog system might still promote just deserts best, overall.

Nonetheless, it is possible that attempts to implement analog justice, even within a trifurcated criminal trial, would seriously deviate from proportionate justice, because of significant epistemic and normative granularity. If so, an alternative would be to move to some kind of discontinuous assessment of culpability that was more coarse-grained than proportional justice but more fine-grained than the bivalent system.

### 3.6 TRIVALENCE

One such alternative would be a trivalent culpability assessment that allowed for verdicts of fully responsible, partially responsible, and nonresponsible. Here, American criminal law might take a page from some other criminal justice systems that are trivalent about excuse. Criminal laws in England and Wales, Scotland,
Ireland, and Australia recognize a defense of diminished responsibility to homicide, reducing what would otherwise be the sentence for murder to one of manslaughter. For instance, in England, section 2 of the Homicide Act of 1957 provided this partial excuse for homicides committed by those with diminished capacity:

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing.

Section 52 of the Coroners and Justice Act 2009 in England and Wales modified this provision, reducing an offense of murder to manslaughter in cases in which the defendant killed another as the result of “diminished responsibility” arising from a medical condition that impaired the defendant’s ability “to understand the nature of his conduct, to form a rational judgement, or to exercise self-control.”

We might generalize this recognition of partial responsibility and excuse from homicides to all crimes. For instance, the German Criminal Code affords a full excuse for any offense to anyone who lacks normative competence and a partial excuse in cases of diminished responsibility in which normative competence is substantially, but incompletely, impaired.

Section 20 Insanity. Any person who at the time of the commission of an offense is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.

Section 21 Diminished Responsibility. If the capacity of the offender to appreciate the unlawfulness of his actions or to act in accordance with any such appreciation is substantially diminished at the time of the commission of the offense due to one

---


25 The Scottish recognition of partial excuse to homicide dates at least from HM Advocate v. Dingwall (1867) 5 Irv 466 and was enacted into statute in the Criminal Justice and Licensing (Scotland) Act 2010, § 168. Though its conception of incompetence is not as clear as it might be, the Scottish conception is arguably similar to that in the Model Penal Code and the Coroners and Justice Act 2009, recognizing both cognitive and volitional incompetence.


27 German Criminal Code, § 20 StGB.
of the reasons indicated in section 20, the sentence may be mitigated pursuant to section 49(1).\textsuperscript{28}

This would be to introduce into American criminal law a generic partial excuse defense.\textsuperscript{29} If trivalence is motivated by concerns about our inability to make the more fine-grained determinations of responsibility required by analog justice, then we might want to constrain such assessments within a finding of partial responsibility. We might insist that the punishment appropriate for partial responsibility should be half of what would be appropriate for full responsibility. Figure 3.7 shows one way to operationalize this proposal.

\textsuperscript{28} Ibid., § 21.

Not surprisingly, if we compare the trivalent and bivalent systems correctly applied – the outcomes of conforming to their principles – the trivalent system is superior. It equalizes the ratio of overpunishment to underpunishment and reduces the magnitude of injustice done in individual cases (which reflects distance from punishment imposed to the diagonal).

Because trivalent culpability assessments make a tripartition of culpability intervals, we might conceptualize them as substantially responsible, partially responsible, and substantially nonresponsible. We could also represent these as percentage intervals of full responsibility – 0–32 percent responsible, 33–66 percent responsible, and 67–100 percent responsible. We could understand these relationships between qualitative and quantitative assessments of culpability in one of two ways depending on which we take to be explanatorily primary. We could treat the qualitative assessments as mutually exclusive and jointly exhaustive and then treat the percentage of responsibility as a way of operationalizing these qualitative differences. Alternatively, we could treat the percentage of censure and sanction as reflecting percentage of culpability and the qualitative assessment of culpability as reflecting a perception of this percentage. For our purposes, I think we can remain agnostic about whether the qualitative or quantitative assessment is explanatorily primary.

However, if we accept the Blackstone asymmetry that overpunishment is worse than underpunishment, we might want to modify the trivalent model so that we never overpunish relative to the amount of responsibility, in effect rounding punishment downward so that 67–100 percent responsibility would warrant 67 percent of the maximum punishment under proportionate justice; 33–66 percent responsibility would warrant 33 percent of the maximum punishment under proportionate justice; and 0–32 percent responsibility would warrant no punishment (Figure 3.8).

This modification of trivalence makes use of only 67 percent of the scale of proportionate justice. Though it increases the degree of underpunishment somewhat, it eliminates the sins of overpunishment, at least when trivalence is correctly applied.

3.7 TETRAVALENCE

But we might think that we are often capable of somewhat more fine-grained culpability discriminations than the trivalent system allows. Perhaps the Goldilocks standard of granularity that is still psychologically realistic would be a tetravalent system that divides culpability into quartiles. As with the trivalent assessment, we can remain agnostic about whether qualitative or quantitative assessment is explanatorily primary. If we accept the Blackstone asymmetry that overpunishment is worse than underpunishment, we might want to avoid the sins of overpunishment relative to the responsibility quartiles, in effect rounding punishments downward so that 75–100 percent responsibility would warrant 75% of the maximum punishment under...
proportionate justice; 50–74 percent responsibility would warrant 50% of the maximum punishment under proportionate justice; 25–49 percent responsibility would warrant 25 percent of the maximum punishment under proportionate justice; and 0–24 percent responsibility would warrant no punishment (Figure 3.9).

If we are going to employ discontinuous measures of responsibility and normative competence, tetravalence is arguably the limit of granularity that is psychologically realistic. By comparison with trivalence, tetravalence would utilize a larger percentage of the scale of proportionate justice – 75 percent. While it would still produce underpunishment, it would limit its severity. Also, though it would be less punitive than proportionate justice, it would eliminate overpunishment entirely, in recognition of Blackstone’s asymmetry.

---

A retributive concern with just deserts should take partial responsibility and excuse seriously. There are questions for both ideal and nonideal theory about how best to handle partial responsibility and excuse. We have briefly explored four options.

1. A bivalent system with a comparatively low threshold for responsibility/excuse operative in American criminal law.
2. A trivalent system operative in some European criminal justice systems, including a variation that rounds punishment downward in response to Blackstone’s asymmetry.
3. A tetravalent system, which may approximate the Goldilocks standard of granularity and is also responsive to Blackstone’s asymmetry.
4. A fully scalar analog system that aims at proportionate justice.

A bivalent criminal justice system significantly fails to deliver just deserts. This is clearly true of ideal theory, but it also very plausible for nonideal theory, because bivalence ignores all but the most extreme forms of impaired normative competence. This means that we should reject bivalence and embrace partial responsibility and excuse.
One question is where to do this. In principle, it could be done at sentencing, at the guilt phase of a trial, or at a separate culpability phase, which would occur after the determination of wrongdoing but before sentencing. If culpability grading were to occur during sentencing, mandatory minima and enhancements would need to be eliminated or severely restricted. Moreover, culpability grading would have to be mandatory, rather than discretionary. Even so, there would still be something conceptually problematic about separating determination of full and partial excuse into separate phases of a trial, insofar as they both bear on the same dimension of the retributivist desert basis for blame and punishment, namely, responsibility. It makes better sense, I think, to include a determination of partial excuse at the same point at which full excuses are assessed. This could be part of the guilt phase of a trial, after the prosecution establishes wrongdoing, which is where affirmative defenses are now assessed. However, it should be a mandatory assessment. Alternatively, one might introduce a separate culpability phase in trials, after a wrongdoing phase. Whereas the prosecution would be required to establish wrongdoing, the defense would be required to establish degree of culpability. Under either proposal, wrongdoing for which the agent bears some responsibility would then pass to the sentencing phase of the trial, which would be restricted to nondesert factors.

Another question is how to implement partial responsibility and excuse. We examined three possibilities. Analog or proportionate justice is comparatively easy to understand in principle but potentially fragile in practice. Nonetheless, aiming at proportionate justice may minimize unjust deserts. That depends on the acceptance, rather than conformity, value of proportionate justice in relation to other systems. That’s a difficult question that is partly empirical insofar as it depends on the nature and extent of the epistemic granularity problem.

If the difficulties of implementing proportionate justice are severe enough, we might prefer a discontinuous system that is more fine-grained than bivalence. Trivalent and tetravalent systems that respond to Blackstone’s asymmetry are alternatives worth exploring. My sympathies lean toward a tetravalent system, partly because of its promise to deliver a Goldilocks standard, balancing fuller use of the scale of proportionate justice and psychological realism. But the choice is a difficult, partly empirical one that requires fuller exploration and assessment.\(^31\)

---

31 This is an exposition of the main ideas in what will be the last chapter of a book manuscript I am working on, (tentatively) titled *Fair Opportunity, Responsibility, and Excuse*. Earlier versions of this material were presented as a Faculty Research Lecture at the University of California, San Diego, at the University of St. Andrews, the Forum for Legal and Political Philosophy at Cambridge University, and a Yale Law School conference honoring Larry Alexander. I am grateful to Larry Alexander, Mitch Berman, Reuven Brandt, Tom Dougherty, Richard Holton, Heidi Hurd, Doug Husak, Adam Kolber, Michael Moore, Stephen Morse, Dana Nelkin, Theron Pummer, Fred Schauer, Chip Sebens, Paulina Sliwa, and Peter Westen for comments on earlier versions. Special thanks to Ben Sheredos and John Dougherty for invaluable help with the graphs.