

7-10-2023

Revisiting the Defence of Diminished Responsibility

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Citation Information

Botterell, Andrew. "Revisiting the Defence of Diminished Responsibility." *Osgoode Hall Law Journal* 60.2 (2023) : 337-372.

DOI: <https://doi.org/10.60082/2817-5069.3893>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol60/iss2/3>

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Revisiting the Defence of Diminished Responsibility

Abstract

My goal in this article is to revisit the defence of diminished responsibility. There are three things that, taken together, suggest to me that a defence of diminished responsibility ought to be made available to certain individuals accused of certain criminal offences. The first is that Canadian criminal law already recognizes a number of defences that reflect ideas about diminished responsibility. The second is that despite the availability of these specific defences to criminal liability, no general defence of diminished responsibility is formally recognized in Canadian criminal law. And the third is that given the Supreme Court of Canada's ongoing interest in the connection between criminal liability, fundamental justice, and the principle of normative involuntariness, we should take seriously the idea that a defence of diminished responsibility ought to be recognized and made available to certain offenders who suffer from substantial volitional impairments. My paradigmatic example of a volitional impairment is Fetal Alcohol Spectrum Disorder (FASD).

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Revisiting the Defence of Diminished Responsibility

ANDREW BOTTERELL*

My goal in this article is to revisit the defence of diminished responsibility. There are three things that, taken together, suggest to me that a defence of diminished responsibility ought to be made available to certain individuals accused of certain criminal offences. The first is that Canadian criminal law already recognizes a number of defences that reflect ideas about diminished responsibility. The second is that despite the availability of these specific defences to criminal liability, no general defence of diminished responsibility is formally recognized in Canadian criminal law. And the third is that given the Supreme Court of Canada's ongoing interest in the connection between criminal liability, fundamental justice, and the principle of normative involuntariness, we should take seriously the idea that a defence of diminished responsibility ought to be recognized and made available to certain offenders who suffer from substantial volitional impairments. My paradigmatic example of a volitional impairment is Fetal Alcohol Spectrum Disorder (FASD).

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* Associate Professor, Faculty of Law, Western University. I would like to thank Benjamin Berger and Ryan Liss for providing me with comments on previous versions of this article, and Alan Brudner, Marie Manikis, Gabe Mendlow, and Christopher Sherrin for discussion. Thanks as well to audiences at Western Law's Faculty Workshop and the online Criminal Theory Conference for extremely helpful feedback.

MY GOAL IN THIS ARTICLE is to revisit the defence of diminished responsibility.¹ Forty years ago, Mark Gannage published in this journal an article discussing the place of diminished responsibility in Canadian criminal law.² He concluded his article with the following observation:

The development of the doctrine [of diminished responsibility] in the case law was clearly a response to such factors as the growing prominence and recognition of psychiatric evidence and deep-seated changes in the approach to the concept and proof of *mens rea*, particularly in regard to the defence of drunkenness. Such factors were part of a shifting view of the whole concept of responsibility. Having realized that responsibility is a matter of degree, the judiciary has adopted a more humane and just approach through the incorporation into Canadian criminal law of diminished responsibility. It now remains an open challenge to Parliament to keep in step with the courts and introduce the doctrine into the *Code*. Only then will the law governing this area be more certain, uniform and fair.³

Whether, as Gannage says, there has been a reorientation in Canadian criminal law towards a “more humane and just approach” to criminal responsibility is, I think, open to debate. But what is clear is that Gannage’s challenge to Parliament has to this point gone unheeded. So it seems to me that a reconsideration of the defence of diminished responsibility in Canadian criminal law is both appropriate and overdue.

There are three things in particular that I want to emphasize—three things that, taken together, suggest to me that a defence of diminished responsibility ought to be made available to certain individuals accused of certain criminal offences. (Which individuals? Which offences? Those are good and important questions, and I have more to say about them below.) The first thing that I want to emphasize is that Canadian criminal law already recognizes a number

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1. In thinking about this topic, I have benefitted, in particular, from the following discussions. See generally Robert C Topp, “A Concept of Diminished Responsibility for Canadian Criminal Law” (1975) 33 UT Fac L Rev 205; Peter Aranella, “The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage” (1977) 77 Columbia L Rev 827; KJM Smith & William Wilson, “Impaired Voluntariness and Criminal Responsibility: Reworking Hart’s Theory of Excuses—the English Judicial Response” (1993) 13 Oxford J Leg Stud 69; Douglas Husak, “Partial Defenses” (1998) 11 Can J Law & Juris 167, reprinted in D Husak, *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press, 2010) 311; Stephen J Morse, “Diminished Rationality, Diminished Responsibility” (2003) 1 Ohio St J Crim L 289; Jeremy Horder, *Excusing Crime* (Oxford University Press, 2004) [Horder, *Excusing Crime*]; Alan Brudner, *Punishment and Freedom* (Oxford University Press, 2009) [Brudner, *Punishment and Freedom*].
 2. See “The Defence of Diminished Responsibility in Canadian Criminal Law” (1981) 19 Osgoode Hall LJ 301.
 3. *Ibid* at 320.

of defences that reflect ideas about diminished responsibility.⁴ Although these defences differ in a number of important ways, they include provocation, infanticide, not criminally responsible by reason of mental disorder (NCRMD), necessity, duress, and (in some cases) intoxication. So it is not as if the idea of diminished responsibility is alien to Canadian criminal law.⁵ My second point is that despite the availability of these specific defences, no general defence of diminished responsibility is formally recognized in Canadian criminal law. That is not necessarily a criticism. There is no conceptual or practical requirement that if the law recognizes certain specific defences that reflect some deeper normative principle, then that principle should itself be reflected in a more general defence. But—and this is my third point—given the Supreme Court of Canada’s renewed interest in the connection between criminal liability, fundamental justice, and the principle of normative involuntariness, it seems to me that we should take seriously the idea that a defence of diminished responsibility ought to be recognized and made available to certain offenders who suffer from what I call substantial volitional impairments.

In what follows, I use Fetal Alcohol Spectrum Disorder (FASD) as my paradigmatic example of a volitional impairment. I do this for several reasons. First, because there is a clear connection between FASD and criminality. It has been estimated that 60 per cent of FASD subjects over the age of twelve find themselves caught up in the criminal justice system, and that 10–28 per cent of all adult individuals in the Canadian prison population suffer from FASD.⁶ Second, because as I will argue, FASD can interfere with the executive functioning of individuals, thereby substantially compromising their ability to engage in the

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4. In some suitably broad sense, of course, all excuses trade on the idea of diminished responsibility. This is because somebody claiming an excuse is arguing that in some sense or another—due either to conditions affecting their capacity or ability to act, or to conditions affecting the circumstances in which they acted—they are not (fully) responsible for what they have done. More on this below.
 5. For substantially the same point, see Gannage, *supra* note 3.
 6. See e.g. Diane K Fast & Julianne Conry, “Fetal Alcohol Spectrum Disorders and the Criminal Justice System” (2009) 15 *Developmental Disabilities Research Rev* 250; Ann Streissguth et al, “Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects” (2004) 25 *J Developmental & Behavioral Pediatrics* 228. See also Larry N Chartrand & Ella M Forbes-Chilibek, “The Sentencing of Offenders with Fetal Alcohol Syndrome” (2003) 11 *Health LJ* 35; Jerrod Brown et al, “Fetal Alcohol Spectrum Disorders and the Criminal Justice System: A Systematic Literature Review” (2014) 3 *JL Enforcement* 1; Katherine Flannigan et al, “Fetal Alcohol Spectrum Disorders in the Criminal Justice System: A Review” (2018) 57 *Intl JL & Psychiatry* 42; Kaitlyn McLachlan et al, “Prevalence and Characteristics of Adults With Fetal Alcohol Spectrum Disorder in Corrections: A Canadian Case Ascertainment Study” (2019) 19 *BMC Public Health* 1.

sort of voluntary goal-directed behaviour that criminal liability presupposes.⁷ In short, FASD provides us with a particularly interesting and challenging test case when thinking about the nature and scope of a general defence of diminished responsibility. Of course, much more needs to be said about the relationship between voluntariness, FASD, and criminal responsibility, and I do that below.

I begin by drawing some distinctions and introducing some concepts that I hope will enable us to better understand what is at issue in this discussion. I then present my argument. That argument has three main parts. In the first part (Parts I-II), I articulate and defend the idea that diminished responsibility should be understood as a partial excuse resting on desert-based mitigating circumstances. In the second part (Part III), I consider the sorts of mitigating circumstances that might be sufficient to give rise to a partial defence and suggest that substantially impaired voluntariness is, plausibly, one such mitigating circumstance. And in the third part (Part IV), I argue that where certain mental disorders, such as FASD, have the effect of substantially impairing an accused's voluntariness, those suffering from such mental disorders ought to be entitled to a defence of diminished responsibility.

It should be clear from this description that my argument has both conceptual and empirical components. In part, it hinges on an account of what the defence of diminished responsibility is and, in part, it depends on various claims about normative involuntariness, criminal responsibility, and volitional impairment. This means that there are several ways in which I could go wrong. I might be correct about the nature of the defence of diminished responsibility but wrong about the implications of FASD, for example, about the availability of such a defence. Alternatively, I might be correct that individuals suffering from FASD deserve to be treated better or differently from the way in which they are currently treated by the criminal justice system, but wrong in thinking that the way to make this happen is through the recognition of a defence of diminished responsibility based on compromised voluntariness. (Worst case scenario: I get both the conceptual and the empirical aspects wrong.) I think a

7. For some very helpful discussions of FASD and its implications for criminal law, see Kent Roach & Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder and the Criminal Law from Investigation to Sentencing" (2009) 42 UBC L Rev 1; Benjamin Berger, "Mental Disorder and the Instability of Blame in Criminal Law" in François Tanguay-Renaud & James Stribopoulos, *Rethinking Criminal Law Theory* (Hart, 2012) 117; Mela Mansfield & Luther Glen, "Fetal Alcohol Spectrum Disorder: Can Diminished Responsibility Diminish Criminal Behaviour?" (2013) 36 Int JL & Psychiatry 46; Natalie N Brown & Stephen Greenspan, "Diminished Culpability in Fetal Alcohol Spectrum Disorders (FASD)" (2021) 40 Behav Sci & L 1.

plausible case can be made that a defence of diminished responsibility ought to be recognized in Canadian criminal law, and that individuals suffering from FASD ought, in certain circumstances, to be able to help themselves to it. But even if I am mistaken, it seems to me that the defence of diminished responsibility is worth considering in its own right. This is because it requires us to grapple with foundational issues about responsibility, blame, and punishment and, perhaps most importantly, forces us to confront some awkward truths about the ways in which mental disorder does and does not enter into our thinking about criminal desert.

I. DIMINISHED RESPONSIBILITY AND LIABILITY-MITIGATING CIRCUMSTANCES

The defence of diminished responsibility is not new. Perhaps the clearest and most familiar formulation of the defence comes from section 2 of the UK *Homicide Act 1957*.⁸ As it was originally worded there:

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...as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.⁹

Section 52 of the *Coroners and Justice Act 2009* altered the wording of section 2 of the UK *Homicide Act 1957* as follows:

- (1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
- (a) arose from a recognised medical condition,
 - (b) substantially impaired D’s ability to do one or more of the things mentioned in subsection (1A), and
 - (c) provides an explanation for D’s acts and omissions in doing or being a party to the killing.

8. (UK), 5 & 6 Eliz II, c 11, as re-enacted by *Coroners and Justice Act 2009* (UK), s 52 [*Homicide Act 1957*].

9. *Ibid*, s 2 (as originally enacted). For some discussion of the UK approach to diminished responsibility, see Ronnie D Mackay, “The Abnormality of Mind Factor in Diminished Responsibility” (1999) *Crim L Rev* 117; Ronnie D Mackay, “Diminished Responsibility and Mentally Disordered Killers” in Andrew Ashworth & Barry Mitchell, eds, *Rethinking English Homicide Law* (Oxford University Press, 2000) 55.

(1A) Those things are—

- (a) to understand the nature of D's conduct;
- (b) to form a rational judgment;
- (c) to exercise self-control

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.¹⁰

A similar sort of provision appears in the *Model Penal Code*.¹¹ There we are told that an individual may be convicted of manslaughter rather than murder provided that the homicide

is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.¹²

Two things about these defences are worth noting. First, the defences are restricted to cases of homicide, changing or reducing what would otherwise be a conviction for murder to a conviction for manslaughter. Second, both defences emphasize that the mental or emotional disturbance at the foundation of the defences must be substantial or extreme, and that it must play a role in causing, influencing, or explaining the accused's criminal behaviour.

Canada, of course, does not recognize a general defence of diminished responsibility—although as noted above, it does recognize a number of specific

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- 10. (UK), s 52, amending *Homicide Act 1957*, *supra* note 9. For helpful discussion of the nature and effect of these changes, see Ronnie D Mackay, "The Coroners and Justice Act 2009 – Partial Defences to Murder (2) The New Diminished Responsibility Plea" (2010) *Crim L Rev* 290; Louise Kennefick, "Introducing a New Diminished Responsibility Defence for England and Wales" (2011) 74 *Mod L Rev* 750.
 - 11. American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C.), (American Law Institute, 1985).
 - 12. *Ibid.*, § 210.3(1).

defences that reflect considerations touching on diminished responsibility.¹³ So let me begin by explaining what I mean when I talk about diminished responsibility. As I am going to understand it, the defence of diminished responsibility is a *partial*, as opposed to a *complete*, defence to criminal liability. What is the difference between partial and complete defences? In brief, complete defences preclude liability altogether, whereas partial defences do not. To take one example from Canadian criminal law, the defence of non-mental disorder automatism is (somewhat controversially) a complete defence to criminal liability. Somebody—such as the accused in *R v Parks*¹⁴—whose plea of non-mental disorder automatism is accepted, is not found guilty of a lesser included offence or convicted of a different offence than the offence charged. Such an individual is instead acquitted on the grounds that their impaired state of consciousness meant that there was no criminal conduct that was properly theirs, and so no *actus reus*. Advanced intoxication, on the other hand, is a partial defence to criminal liability.¹⁵ Consider an accused charged with murder contrary to section 229(a) (i) of the *Criminal Code* who successfully pleads that they were so intoxicated that they lacked the intent to kill. Such an accused would be acquitted of the offence of murder but likely convicted of the included general intent offence of manslaughter. In other words, while advanced intoxication does not remove criminal responsibility altogether, it may change the offence that an accused is said to have committed.

Partial defences are based on some underlying mitigating circumstance that “alleviates, abates, or diminishes the severity of a punishment imposed

13. It is also worth noting that the sentencing principles embodied in the *Criminal Code* seem to reflect underlying principles having to do with diminished responsibility and desert. See RSC 1985, c C-46, s 718.2(e) [*Criminal Code*]. For discussion of these principles, see e.g. *R v Gladue*, [1999] 1 SCR 688 [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*]. As Justice LeBel put it in *Ipeelee*:

Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely—if ever—attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability (*ibid* at para 73 [emphasis in original]).

14. [1992] 2 SCR 871. See also *R v Stone*, [1999] 2 SCR 290 [*Stone*].

15. The defence of intoxication, in both its advanced and extreme forms, is complex. For some relevant cases, see *R v Daviault*, [1994] 3 SCR 63 [*Daviault*]; *R v Daley*, 2007 SCC 53; *R v Tatton*, 2015 SCC 33; *R v Brown*, 2022 SCC 18.

by law.”¹⁶ While there are many different sorts of defences in criminal law (some years ago, Paul Robinson identified fifty-four distinct bars to successful criminal prosecution)¹⁷ and many different ways of categorizing them, the most central and familiar distinction remains that between justification and excuse. Consequently, it makes sense to begin with those two concepts and with the underlying normative picture that they reflect. In particular, it seems to me to make sense to think about partial defences against the backdrop of the concept of desert. While this is not an article about the difference between justifications and excuses, it pays to recall J.L. Austin’s famous way of drawing the distinction. In “A Plea for Excuses,” Austin said, “In the one defence [justification], briefly, we accept responsibility but deny that it was bad: in the other [excuse], we admit that it was bad but don’t accept full, or even any, responsibility.”¹⁸ As it might be put, justifications reduce or negate the wrongfulness of acts, and excuses negate or reduce the blameworthiness of agents. In both cases, however, the claim is that it would be unfair in the circumstances to punish the accused. It might be unfair because the accused does not deserve to be punished *at all*, either because they did not commit a wrongful act or because they were not to blame in doing what they did. This would be a complete defence. Alternatively, it might be unfair to punish the accused *fully* on the grounds that, although some measure of punishment is deserved, given what they did or how they did it, the exact measure of punishment ought to be less than it would otherwise be. This would be a partial defence. As Austin said in “A Plea for Excuses,” “[I]t has always to be remembered that few excuses get us out of it completely: the average excuse, in a poor situation, gets us only out of the fire into the frying pan—but still, of course, any frying pan in a fire.”¹⁹

16. Husak, *supra* note 2 at 312. See also Horder, *Excusing Crime*, *supra* note 2, ch 4.

17. See “Criminal Law Defenses: A Systematic Analysis” (1982) 82 Colum L Rev 199 at 203.

18. (Presidential Address delivered at the Meeting of the Aristotelian Society, Bedford Square, 29 October 1956), (Blackwell, 1957) 1 at 2.

19. *Ibid* at 3 [emphasis omitted].

I do not think that we need a detailed account of wrongfulness and blame to make sense of justifications and excuses.²⁰ It is also not clear that we need a complete theory of desert to be able to make sense of the idea that somebody who claims a partial defence is asserting that they are less deserving of punishment, while somebody who pleads a complete defence is claiming that they are not deserving of punishment at all. We have, I take it, an intuitive conception of the sorts of circumstances that might mitigate or negate, in whole or in part, wrongfulness or responsibility. But it is worth noting that even given such a rough and ready understanding of desert, we can immediately see that some circumstances that “alleviate, abate, or diminish the severity of a punishment imposed by law” cannot give rise to partial defences.²¹ For example, offenders often receive lesser punishments as a result of agreeing to cooperate with law enforcement. Perhaps they agree to testify against a co-accused or perhaps they provide information that will lead to the conviction of other offenders or to the recovery of evidence. But although these circumstances may serve to lessen the offender’s punishment, nobody seriously suggests that these sorts of mitigating circumstances operate as partial excuses or justifications.²² And that is because these circumstances are not linked in the right way to the idea of desert. For instance, it would be very odd to say to an accused, “Ah, well, now that you have agreed to testify against your co-accused, you are less deserving of punishment than they are.”

Or consider the defence of entrapment.²³ Somebody who pleads entrapment is not arguing that what they did was not wrongful or that they were not fully responsible for what they did. Rather, they are claiming that given its role in encouraging and facilitating the commission of the offence, the state lacks the authority to punish. This is why the remedy in cases of entrapment is a stay of

20. The literature on justifications and excuses is extensive. For a very incomplete list, see generally *ibid*; Kent Greenawalt, “The Perplexing Borders of Justification and Excuse” (1984) 84 Colum L Rev 1897; Sanford Kadish, “Excusing Crime” (1987) 75 Cal L Rev 257; Bruce Chapman, “A Theory of Criminal Law Excuses” (1998) 1 Can JL & Jur 75; George Fletcher, *Rethinking Criminal Law*, 3rd ed (Oxford University Press, 2000); Peter Westen, “An Attitudinal Theory of Excuse” (2006) 25 L & Phil 289; John Gardner, “Justifications and Reasons” in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) 91 [Gardner, *Offences and Defences*]; John Gardner, “The Gist of Excuses” in *ibid*, 121.

21. Husak, *supra* note 2 at 312.

22. For discussion, see Husak, *supra* note 2 at 313.

23. See e.g. *R v Mack*, [1988] 2 SCR 903. For helpful discussion, see Gerald Dworkin, “The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime” (1985) 4 L & Phil 17; Dennis Klimchuk, “State Estoppel” (2020) 39 L & Phil 297.

proceedings rather than an acquittal: Although proof of entrapment provides reasons why the offender's punishment ought to be mitigated, the mitigating circumstances on which the defence of entrapment rests are not based on individual desert and so cannot yield a partial excuse or justification.²⁴

To be sure, it might be suggested that the very idea of a partial defence is wrong-headed. Granted, it might be argued that not all mitigating circumstances reflect underlying principles of desert. But—so the argument goes—even where a mitigating circumstance reflects some desert-based principle, that circumstance cannot mitigate only in part. H.L.A. Hart, for example, suggests that we should think about excuses in criminal law by analogy with invalidating conditions in the law of contract.²⁵ But if this analogy is taken seriously, it seems to follow that excuses cannot admit of degrees. Why? Well, a contract either binds or it does not, so if excuses in the criminal law mirror invalidating conditions in the law of contracts, then excuses presumably either exculpate completely or not at all. But this seems to me to be a mistake. For one thing, ordinary language—as Austin noted—suggests otherwise.²⁶ It is commonplace to hear people say that somebody is “partly to blame” for something or that, with respect to some mitigating circumstance, “it doesn't excuse you completely.” For another thing, in civil suits, apportionment of responsibility between plaintiffs and defendants, or between multiple defendants, is commonplace. Thus, a court might find a plaintiff to be 30 per cent at fault and a defendant 70 per cent at fault in a negligence suit. But more to the point, there is no tension between acknowledging that an accused is entitled to a complete defence to criminal liability and acknowledging that the accused bears partial responsibility for their conduct. In other words, it is perfectly compatible with accepted principles of criminal liability that even some complete defences do not eliminate responsibility altogether. Self-defence,

24. So too with extreme youthfulness, for example. That an accused is very young—that is, under the age of twelve—certainly does not justify the accused's conduct, nor is it obviously an excuse. See *Criminal Code*, *supra* note 14, s 13. Rather, extreme youth exempts such individuals from the reach of the state's authority to bring criminal charges at all. For an argument about why that might be, see Gideon Yaffe, *The Age of Culpability: Children and the Nature of Criminal Responsibility* (Oxford University Press, 2018). In a very interesting paper, Victor Tadros has suggested that similar considerations might also apply to the state's authority or entitlement to punish certain impoverished offenders. See “Poverty and Criminal Responsibility” (2009) 43 *J Value Inquiry* 391. Finally, for a discussion about the relationship between punishment, moral blameworthiness, and “constrained circumstances,” see also *Gladue*, *supra* note 14; *Ipeelee*, *supra* note 14.

25. See “Legal Responsibility and Excuses” in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (Oxford University Press, 2008) 28 at 29.

26. Austin, *supra* note 19.

for example, requires that an accused have acted reasonably in using potentially lethal force to defend themselves. But it is not part of this idea that “the quantum of wrongfulness in all such killings is equivalent to that in, say, scratching one’s head. All that need be asserted is that the quantum of wrongfulness in such an act is insufficient to merit punishment.”²⁷ In other words, the existence of complete defences is compatible with the claim that when a defence exculpates, an accused may still bear some measure of responsibility or blame for their conduct.

In short, then, I propose to understand the defence of diminished responsibility as a partial excuse, amounting to the claim that an accused deserves less blame and punishment due to the existence of some underlying desert-based mitigating circumstance.²⁸ But from the fact that diminished responsibility is a partial excuse to criminal liability, a number of additional things follow.²⁹ Of particular importance is the idea that the defence of diminished responsibility, like all partial defences, is both *code relative* and *offence relative*. Partial defences are *code relative* because whether such defences are available (or needed) depends on how coarse- or fine-grained a particular criminal code is. A criminal code that includes a separate offence for every possible way of doing wrong is not a code where partial mitigation makes much sense. For example, suppose that a criminal code includes a single undifferentiated offence of robbery. If an accused commits a robbery while unarmed, that fact is a likely candidate for a mitigating circumstance; it seems, that is, to be the kind of thing that could be pointed to in order to reduce the accused’s punishment. But suppose that the criminal code is amended to incorporate two distinct offences of robbery and armed robbery. Then, the accused’s being unarmed no longer counts as a mitigating circumstance

27. Husak, *supra* note 2 at 316.

28. A distinction is sometimes drawn between exculpatory conditions and exonerating excuses (in Alan Brudner’s terminology), or between negative and affirmative defences. See Brudner, *Punishment and Freedom*, *supra* note 2 at 81-82. An exculpatory condition amounts to a denial of some elements of the offence. Thus, the defence of mistake of fact operates to deny an essential *mens rea* element (knowledge or intention) required for an offence. See *Beaver v The Queen*, [1957] SCR 531; *Pappajohn v The Queen*, [1980] 2 SCR 120. A genuinely exonerating excuse, on the other hand, while acknowledging that the accused committed the essential elements of the offence, nonetheless insists that it would be unjust to punish the accused fully, or at all. In what follows, I take it as given that the defences of necessity and duress operate as exonerating excuses rather than as exculpatory conditions, notwithstanding the fact that the gist of those two defences is that the accused behaved in morally involuntary manner. While this might be taken to imply that some essential element—voluntariness or the capacity to make a genuine choice—of criminal liability was absent, this is not the way in which these defences are typically understood.

29. See generally Husak, *supra* note 2 at 319-21; Horder, *Excusing Crime*, *supra* note 2.

or a partial defence. Instead, being unarmed functions as a complete defence to a charge of armed robbery while serving as the basis for a charge of (simple) robbery. In other words, “[i]n principle, the mitigating significance of any partial [defence] can always be changed by an alteration in the criminal code other than in the offense with which the defendant is charged.”³⁰

Another way in which partial defences are relative is that they are also *offence relative*. This is because whether a partial defence is available depends on the offence with which the accused is charged.³¹ The same underlying circumstance might be a partial defence if the accused is charged with one offence, but not if the accused is charged with another. By way of example, consider the defence of provocation set out in section 232 of the *Criminal Code*. The defence of provocation reduces culpable homicide that would otherwise be murder to manslaughter, provided that “the person who committed it did so in the heat of passion caused by sudden provocation.”³² Much has been written about the defence of provocation.³³ Some have suggested that if culpably causing the death of another human being in the heat of passion caused by sudden provocation is sufficient to reduce murder to manslaughter, then that should also be a defence to other offences, such as aggravated assault. On the other hand, since provocation seems to be very often pleaded by men whose victims are women, others have suggested that the defence is anachronistic, reflects outdated views about

30. Husak, *supra* note 2 at 320.

31. This is also true of some complete defences. Duress is a good example. See *Criminal Code*, *supra* note 14, s 17. While the statutory defence of duress operates as an excuse, it is not available where the accused is charged as a principal offender with high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson, or the abduction and detention of young persons. So again, whether the defence of duress is available to an accused charged as a principal offender depends on the offence with which that accused is charged. Alternatively, whether an accused is entitled to the defence of duress depends on whether the accused is charged as a principal or as a party. The Supreme Court of Canada has noted that, “this is an unsatisfactory state of the law.” *R v Ryan*, 2013 SCC 3 at para 84 [*Ryan*].

32. *Criminal Code*, *supra* note 14, s 232(1).

33. The most sophisticated and comprehensive treatment of provocation that I am aware of remains Jeremy Horder’s *Provocation and Responsibility*. (Oxford University Press, 1992) [Horder, *Provocation*]. This work is helpfully discussed by Dennis Klimchuk. See “Outrage, Self-Control, and Culpability” (1994) 44 UTLJ 441. For further discussion of the defence of provocation, see John Gardner, “Provocation and Pluralism” in Gardner, *Offences and Defences*, *supra* note 21, 155.

gender and chivalry, and ought to be abolished.³⁴ (Why, for example, should it be relevant at all to criminal desert that somebody intentionally killed another person in the heat of passion, having been temporarily deprived of self-control due to a provocative act or insult?) Still, what remains clear is that provocation is a statutory partial defence to murder. An accused who pleads provocation is not denying that they committed culpable homicide. Rather, they are claiming that the culpable homicide that they committed was not murder—notwithstanding that it was accompanied by the intent to kill or the knowledge that death was likely to result—but ought to be classified as something else. This is just to say that the defence of provocation is *offence relative*; had the accused been charged with manslaughter, then the defence of provocation would be unavailable, even if the accused unlawfully killed another human being in the heat of passion, having been temporarily deprived of self-control due to a provocative act or insult.

Finally, let me introduce one more distinction, a distinction that has been hovering near the surface throughout this discussion. That is the distinction between what I call “liability-mitigating circumstances” and “punishment-mitigating circumstances.” As I understand the term, a mitigating circumstance is punishment mitigating if it is considered at the sentencing stage of the criminal process. Most mitigating circumstances are of this variety. They do not affect the offence that the accused is found to have committed, but rather lessen the degree or severity of the punishment that the accused is subject to. Liability-mitigating circumstances, on the other hand, operate at the guilt or liability stage of the criminal process. To be sure, every liability-mitigating circumstance has the effect of lessening punishment. But it does so either by absolving the accused of criminal liability altogether, in the case of a complete defence, or by changing the offence that the accused is found guilty of, in the case of a partial defence. Provocation is a good example of a partial defence that is based on liability-mitigating circumstances: It reduces murder to manslaughter when the person who committed the killing did so in the heat of passion caused by sudden provocation. Having introduced this distinction between liability-mitigating and punishment-mitigating circumstances, however, I hereafter talk simply about partial defences or partial excuses, it being understood that such defences, by virtue of being defences, manifest

34. See Horder, *Provocation*, *supra* note 34.

liability-mitigating circumstances at the stage of criminal proceedings at which guilt is determined.³⁵

Return again to provocation. Provocation operates to reduce murder to manslaughter. But this is only possible because murder and manslaughter stand in a particular normative relationship. Very roughly, murder is a form of culpable or unlawful homicide that includes the subjective intent to kill.³⁶ This means that all murders are built upon the foundation of manslaughter. Something similar is true of infanticide. Infanticide is both a substantive criminal offence and a partial defence to a charge of murder.³⁷ Thus, a female person charged with the murder of her newly born child will have her charge reduced from murder to infanticide if, at the time she causes the death of her newly born child, she “is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is

35. Another familiar way of understanding varieties of diminished responsibility, often found in American discussions of the defence, is to introduce a distinction between a *mens rea* paradigm and a partial-responsibility or formal mitigation paradigm. By way of explanation, an accused raising the defence of diminished responsibility (or capacity) within the *mens rea* paradigm claims that their alleged mental abnormality interfered with or precluded the formation of the *mens rea* element required by the crime with which they are charged. Advanced intoxication is a good example of the *mens rea* paradigm in action: An accused charged with murder who raises the defence of advanced intoxication claims that due to their advanced degree of intoxication they did not, or could not, form the intent to kill. On the other hand, the partial-responsibility or formal mitigating paradigm “is a genuine excuse. The defendant is claiming that, whatever may be the case about the other elements of criminal liability, including *mens rea*, mental abnormality diminishes his or her responsibility for criminal conduct.” Stephen Morse, “Diminished Capacity” in Stephen Shute, John Gardner & Jeremy Horder, eds, *Action and Value in Criminal Law* (Clarendon Press, 1993) 239 at 247. Liability-mitigating circumstances, at least as I am understanding them, should therefore be understood as falling under the partial-responsibility paradigm.

36. I say “very roughly” because murder can also be committed in the absence of an intent to kill. See so-called unlawful object murder, which requires only subjective foresight of the likelihood of death. See *Criminal Code*, *supra* note 14, s 229(c). For discussion, see Kent Roach, “The Problematic Revival of Section 229(c) of the Criminal Code” (2010) 47 *Alta L Rev* 675.

37. See *R v Borowiec*, 2016 SCC 11 at para 15. See also *R v LB*, 2011 ONCA 153.

disturbed.³⁸ But again, this is only true because murder and infanticide stand in the right relationship to one another. (Why could provocation or infanticide not reduce culpable homicide that would otherwise be murder to arson, for example? Because the crimes are not linked in the right way.) In short, while murder, manslaughter, and infanticide are all forms of culpable homicide, manslaughter and infanticide are less serious offences than murder, a fact that is reflected in the sentencing provisions for the three offences and in the stigma associated with them.³⁹ This is why it is possible for murder to be reduced to manslaughter (in the case of provocation) or to infanticide (via the operation of section 233 of the *Criminal Code*).⁴⁰

It should be clear from the foregoing that implementing a defence of diminished responsibility in the manner in which I am suggesting would require some not-insignificant changes to the structure of the Canadian *Criminal Code*. Although the *Criminal Code* already incorporates a distinction between indictable and summary conviction offences—and so already includes a concept very similar to first- and second-degree versions of a given offence—that distinction does not reflect a distinction between different *kinds* of offences. That is, unlike homicide, where we have three distinct forms of culpable killing (murder, manslaughter, and infanticide), it is not as if there are two distinct forms of simple assault: the indictable kind and the summary conviction kind. Although the Crown can elect to proceed by way of indictment or by way of summary conviction, an accused is simply charged with assault.⁴¹ Still, it seems to me to be significant that the *Criminal Code* already recognizes different degrees (or degrees of severity) of offences. This is relevant because it suggests that the *Criminal Code* already has

38. *Criminal Code*, *supra* note 14, s 233. For some discussion of the history of and rationale for the offence of infanticide, see Constance Backhouse, “Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada” (1984) UTLJ 447; Michele Oberman, “Mothers Who Kill: Coming to Terms With Modern American Infanticide” (1996) 3 Am Crim L Rev 1, reprinted in (2004) 8 DePaul J Health Care L 3; Emma Cunliffe, “Infanticide: Legislative History and Current Challenges” (2009) 55 Crim LQ 94; Sanjeev Anand, “Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code’s Child Homicide Offence” (2010) 47 Alta L Rev 705; Isabel Grant, “Desperate Measures: Rationalizing the Crime of Infanticide” (2010) 14 Can Crim L Rev 253.

39. Murder carries with it a mandatory sentence of life in prison, with differing restrictions on parole eligibility depending on whether the murder is classified as first- or second-degree. Manslaughter carries with it a maximum sentence of life in prison and a minimum sentence of four years in prison if a firearm is used in the commission of the offence. And infanticide is a hybrid offence, carrying with it a maximum penalty of five years in prison if prosecuted by way of indictment. See *Criminal Code*, *supra* note 14, ss 235-37, 745.

40. *Ibid*, ss 232, 233.

41. *Ibid*, ss 265-66.

the resources in place to incorporate the sorts of degrees of offences that would be needed to implement a fulsome and meaningful partial defence of diminished responsibility.⁴²

II. BUT WHY DOES IT HAVE TO BE A DEFENCE?

Let us take stock of where we are. I have talked very generally about what makes something a partial defence and have made a specific proposal about diminished responsibility: It should be understood as a partial excuse to criminal liability. And I further explained that, to the extent that diminished responsibility depends on liability-mitigating circumstances, it should be viewed as a defence that arises at the liability phase of a criminal trial rather than at the sentencing phase. I also noted that in order to fully implement or operationalize this idea, some statutory changes to the *Criminal Code* would be required. In particular, if partial defences serve to reduce one offence to another, less serious offence, we need to be sure that we have the resources to recognize differing degrees of offences.

But this raises an obvious question, namely, why think that the defence of diminished responsibility ought to be understood at the liability stage of a criminal proceeding at all? Why think, in other words, that diminished responsibility should reduce one offence to another, less serious, offence rather than simply being a consideration to be taken into account at the sentencing stage? Let me try to answer this question by drawing our attention to a different question: Why should the criminal law include partial defences that reflect liability-mitigating circumstances at all? It clearly does: Consider provocation and infanticide, and perhaps advanced intoxication as well. But why not just deal with these issues at the sentencing stage? For instance, why not convict of murder a woman whose mind is disturbed within the meaning of section 233 and who intentionally takes the life of her newly born child, but leave open the possibility of a reduced sentence when it comes time to impose punishment on her by taking into account her disturbed mind? The not-very-interesting procedural answer is that murder carries with it a mandatory minimum sentence of life imprisonment, which means that once an accused is found guilty of murder, no reduction or mitigation in sentence can occur at the sentencing stage.⁴³ But this procedural answer hints at something deeper. Presumably, part of the explanation for why we recognize a defence of provocation, for example, has to do with the fact that a conviction for murder conveys an important message about the offender; that

42. For some discussion, see Horder, *Excusing Crime*, *supra* note 2 at 143–46.

43. *Criminal Code*, *supra* note 14, s 235.

message, and the stigma associated with it, is not something that can be later displaced by a reduced sentence. The so-called principle of “fair labelling” implies that it is sometimes important to get the name or label right; it makes a difference whether somebody is labelled a murderer or is instead found guilty of a lesser offence such as manslaughter or infanticide.⁴⁴ As it has been put by A.P. Simester and A.T.H. Smith, “a criminal conviction—at least for stigmatic offences—is regarded as a penalty in its own right...for it has the effect of labelling the defendant as a criminal.”⁴⁵

This same idea is also at work in criticisms of so-called “fault-undifferentiated crimes.” In “Proportionality, Stigma and Discretion,” Alan Brudner discusses what he calls the “proportionality principle” in relation to stigma: the idea that the stigma associated with a conviction for a crime must be deserved or justified by the accused’s degree of moral fault.⁴⁶ Brudner’s goal is to criticize a view—articulated judicially by, among others, Justice McLachlin in *R v Creighton*⁴⁷ and Justice Sopinka in *R v Daviault* (“*Daviault*”)⁴⁸—that the principle that the less blameworthy be punished less severely than the more blameworthy is consistent with the practice of leaving determinations of moral fault and blame to the penalty phase of criminal proceedings. In Brudner’s view, because the proportionality principle is a constitutional principle, determinations of moral blame cannot be left to the discretion of sentencing judges. Rather, “if persons have a right that the proportionality principle be satisfied then the requirement that punishment be proportioned to degrees of imputability is *lexically prior* to the consideration of factors going to other goals of sentencing.”⁴⁹ I take Brudner’s point to be the following: If we take seriously the idea that some offences carry with them more stigma than others and also accept—as seems plausible—that there is a connection between responsibility, fault, and stigma, then it is wrong to convict somebody of a high-stigma offence when they lack a commensurate level of fault. Now, there are many different ways to engage in criminal conduct: One can do so

44. For further discussion, see Horder, *Excusing Crime*, *supra* note 2 at 143–46. For a contrary view, see *R v Vaillancourt*, [1987] 2 SCR 636 at 663. As Justice McIntyre states, “no principle of fundamental justice is offended only because serious criminal conduct, involving the commission of a crime of violence resulting in the killing of a human being, is classified as murder and not in some other manner” (*ibid.*).

45. “Criminalization and the Role of Theory” in AP Simester & ATH Smith, eds, *Harm and Culpability* (Oxford University Press, 1996) 1 at 6 [emphasis omitted].

46. (1996) 38 Crim LQ 302 at 304 [Brudner, “Proportionality”].

47. [1993] 3 SCR 3.

48. *Supra* note 16.

49. Brudner, “Proportionality,” *supra* note 47 at 316 [emphasis in original].

intentionally, knowingly, recklessly, or by departing markedly and substantially from the standard of care expected of the reasonably prudent person; as a general rule, it is worse to intentionally cause harm than to cause harm recklessly or negligently. Consequently, an offence that does not differentiate between these different levels or degrees of fault (a fault-undifferentiated crime, in Brudner's terminology) is constitutionally problematic since it allows accused possessing very different levels of fault to be convicted of the very same offence.

Something similar follows, I think, from David Brink's observation that while the determinants of responsibility are scalar, criminal defences are typically bivalent, and also from Adam Kolber's insights about the "bumpiness" of various aspects of criminal law.⁵⁰ The thought behind the arguments of both Brink and Kolber is that there is something unfair about the fact that, while the elements of criminal liability depend on properties that are often measured in degrees, final determinations of criminal liability are yes or no, all or nothing. By way of illustration, consider what we might call a case of "overzealous" or "almost" self-defence. Suppose, that is, that an accused, reasonably believing that force is being used against them, engages in defensive conduct where the conduct in question is done for the purpose of defending themselves. But suppose, in addition, that it is determined that the conduct of the accused fell just short of being reasonable in the circumstances—perhaps they exercised too much force or perhaps the force that they exercised was of the wrong sort. Such an individual is *entirely* deprived of the benefit of the defence of self-defence. Moreover, because murder carries with it a mandatory sentence of imprisonment for life, the accused cannot benefit from mitigation at the sentencing stage either, even though they met some, but not quite all, of the elements of the defence of self-defence. But why should an individual who meets almost all of the elements of self-defence, but who responds in an overly zealous manner, be denied a defence entirely? Might it not be more appropriate to introduce an analogue of self-defence that excuses, perhaps only partially, without justifying?

In any event, the principle that there can be no criminal fault without voluntary conduct is a principle of fundamental justice:

It is a principle of fundamental justice that only voluntary conduct—behaviour that is the product of a free will and controlled body, unhindered by external constraints—should attract the penalty and stigma of criminal liability. Depriving

50. See David O Brink, "Partial Responsibility and Excuse" in Heidi M Hurd, ed, *Moral Puzzles and Legal Perplexities* (Cambridge University Press, 2018) 39; Adam Kolber, "Smooth and Bumpy Laws" (2014) 102 Cal L Rev 655. For a similar argument in the moral realm, see Larry Alexander, "Scalar Properties, Binary Judgments" (2008) 25 J Applied Phil 85.

a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice.⁵¹

This suggests that something like the proportionality principle in relation to stigma should apply not only to *mens rea*, but also when voluntariness, a core component of the *actus reus* and arguably an even more basic determinant of criminal liability, is at issue. That is, if the proportionality principle in relation to stigma tells us that the less blameworthy should not be included within the same criminal category as the more blameworthy when considering the effect of different kinds or degrees of *mens rea*, then the same should be true when considering principles governing voluntariness. It ought to be improper to convict accused who possess very different degrees of choice or control, or who manifest very different degrees of practical agency, of the same criminal offence. And, in my view, the best way to ensure this is, in some cases, to recognize a partial excuse of diminished responsibility at the liability stage of a criminal proceeding.

III. THE UNIFYING HYPOTHESIS

Let us suppose that I am on the right track in thinking that diminished responsibility should be understood as a partial excuse. This gives us a handle on the *form* or *structure* that the defence of diminished responsibility might take. But it does not tell us much about its content. In particular, it is silent on the following question: What kinds of liability-mitigating circumstances should give rise to a defence of diminished responsibility? I have already pointed out that not every mitigating circumstance gives rise to a partial excuse: Recall our discussion of an accused who agrees to testify against a co-accused or to offer information that will enable the conviction of other offenders. While such conduct may very well result in lesser punishment, it does not amount to a partial defence of their conduct. But then how are we to distinguish those mitigating circumstances that can form the basis of a partial defence, such as diminished responsibility, from those that cannot?

Douglas Husak has made an interesting and helpful proposal. His idea is that a mitigating circumstance should be recognized as being capable of forming the basis of a partial defence if, and only if, it has an analogue in some complete justification or excuse.⁵² Following Husak, I call this the “Unifying Hypothesis.”

51. *R v Ruzic*, 2001 SCC 24 at para 47 [*Ruzic*]. See also *R v Perka*, [1984] 2 SCR 232; *Daviault*, *supra* note 14; *Ryan*, *supra* note 32.

52. See Husak, *supra* note 2 at 321.

Husak unpacks the Unifying Hypothesis into two separate claims: the “Necessity Hypothesis,” according to which the existence of a complete analogue is *required* if a mitigating circumstance is to yield a partial defence; and the “Sufficiency Hypothesis,” according to which the existence of a complete analogue is enough to conclude that a mitigating circumstance constitutes a partial defence.⁵³ In this Part, I focus on the Sufficiency Hypothesis.

The idea behind the Sufficiency Hypothesis is that a circumstance counts as a mitigating circumstance and gives rise to a partial defence if it would constitute a full or complete defence had it been present to a greater degree. In other words, if we can find the candidate mitigating condition expressed in a complete defence, then it is in principle, the sort of mitigating condition apt for expression in a partial defence. An example might be useful here. Take age. It is clear that the age of an accused can be relevant to questions of desert. As a matter of fact, we believe that many youthful or immature individuals between the ages of twelve and seventeen are less deserving of punishment than adults convicted of the same offence due to their age. This is why we have the *Youth Criminal Justice Act*.⁵⁴ The Sufficiency Hypothesis has an explanation for why this is so. Were this circumstance, namely immaturity, present to a greater degree—that is, were the accused seven years old instead of seventeen or seventy-seven—there would be no criminal liability at all, since individuals under the age of twelve are exempt from criminal liability altogether.⁵⁵ Consequently, because youthfulness or immaturity has an analogue in a complete defence, it follows that age is the sort of mitigating circumstance that can, in principle, give rise to a partial defence.

What I now argue is that if we accept Husak’s Sufficiency Hypothesis, then substantially impaired moral voluntariness should also count as a desert-based mitigating circumstance that is sufficient to give rise to the defence of diminished responsibility. My argument is simple. There can be no criminal liability in the absence of normatively voluntary conduct: Moral involuntariness constitutes a complete defence to criminal liability. Consequently, if the Unifying Hypothesis is true, then impaired moral voluntariness of a sufficiently serious degree ought, in principle, to be a candidate for a mitigating circumstance giving rise to a partial excuse of diminished responsibility.

Although it involves obvious mental elements, the orthodox view has always been that voluntariness is an element of the *actus reus*. In *R v Théroux*, for example, Justice McLachlin said, “The term *mens rea*, properly understood,

53. *Ibid* at 323.

54. SC 2002, c 1.

55. *Criminal Code*, *supra* note 14, s 13.

does not encompass all of the mental elements of a crime. The *actus reus* has its own mental element; the act must be the voluntary act of the accused for the *actus reus* to exist.”⁵⁶ And this general principle concerning voluntariness has been elevated by the Supreme Court of Canada to a principle of fundamental justice. Again, as Justice LeBel said in *R v Ruzic* (“*Ruzic*”), “It is a principle of fundamental justice that only voluntary conduct—behaviour that is the product of a free will and controlled body, unhindered by external constraints—should attract the penalty and stigma of criminal liability.”⁵⁷

This principle—that an absence of voluntariness amounts to an absence of criminal liability—is reflected in a number of different legal doctrines. In its empirical or factual manifestation, it is most clearly reflected in the defences of non-mental disorder automatism and extreme intoxication. In its normative manifestation, the principle is at work in, among other places, the defences of necessity and duress. To be sure, automatism, extreme intoxication, necessity, and duress differ from each other in a number of different ways. But all the same, each ultimately rests on the idea that it is unjust to punish an accused who is not fully responsible for what they have done. This is a desert-based idea. The claim is not that it would be impractical or pointless to punish an accused who acted in circumstances of duress or that the state lacks standing or authority to do so. Rather, the claim is that it is fundamentally unfair to punish an accused for conduct that, in some sense, did not flow from their voluntary conduct.

It is difficult to say much that is uncontroversial about the concept of voluntariness since the concept itself is contested. But voluntariness has often been unpacked via two primary routes: via the concept of choice or control and via the concept of agency. Both, it seems to me, reveal important things about the voluntariness requirement—in both its factual and normative guises—in criminal law. Let me briefly discuss each concept in turn.

According to the choice or control theory, whether an act is voluntary depends on the ability of an agent to make a genuine choice or to exercise control over their choices. This idea has been endorsed by many different thinkers. According to Oliver Wendell Holmes, for example, “The reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise.”⁵⁸ Michael Corrado has remarked that the key to the voluntariness requirement is

56. [1993] 2 SCR 5 at 17.

57. *Supra* note 52 at para 47.

58. *The Common Law*, revised ed (Dover Publications, 1991) at 54.

“that the actor must have been able to avoid choosing to break the law. She must have been able to control her choice.”⁵⁹ And Husak has argued as follows:

What is important to our theory of criminal responsibility...is not action itself, but rather the control that actions typically presuppose. In other words, our reason for wanting to include an act requirement in criminal law is because we care about control. It is easy to see why this concern would lead (or mislead) us into believing that an act should be needed for liability. Paradigmatically, our acts are under our control, while our non-acts are not under our control.⁶⁰

The idea underlying the choice or control theory is that it is unjust to convict a person for something over which they lacked control.

What I am calling the “agency theory of voluntariness” has, I think, obvious affinities with the choice or control model, although it also differs from it in some important respects. According to the agency theory, the key idea when thinking about voluntariness is practical rationality or agency. For our purposes we can think of practical agency as the ability to respond appropriately to reasons about how one ought to act. The Supreme Court of Canada has come close to endorsing this view in saying that “[t]he treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law.”⁶¹ And Vincent Chiao has summarized this view as follows: “[P]unishment in a specific instance is unjust unless the crime charged was caused or constituted by the agent’s conduct (broadly understood) qua practically rational agent.”⁶²

What is a “practically rational agent”? While there is much to say about this concept, for present purposes I suggest that we think about it as an agent who is capable of responding to reasons about what they should do in a normatively appropriate way, using their “deliberative and executive capacities.”⁶³ On this view, individuals whose executive capacities are significantly impaired—such as sleepwalkers or those suffering from an epileptic seizure—should be excused not

59. “Is there an Act Requirement in the Criminal Law?” (1994) 142 U Pa L Rev 1529 at 1557.

60. Douglas Husak, “Rethinking the Act Requirement” (2007) 28 Cardozo L Rev 2437 at 2454 [citations omitted]. See generally Douglas Husak, “Does Criminal Liability Require an Act?” in Husak, *supra* note 2, 17. As this quote suggests, however, Husak does not believe that the *actus reus* doctrine of criminal law does in fact require an act. What it requires instead is control.

61. *Ruzic*, *supra* note 52 at para 45.

62. “Action and Agency in the Criminal Law” (2009) 15 Leg Theory 1 at 2. For a different attempt to develop and defend a version of the agency view, see Andrew Botterell, “Understanding the Voluntary Act Principle” in Tanguay-Renaud & Stribopoulos, eds, *supra* note 8, 97.

63. Chiao, *supra* note 63 at 16.

because they lack control over their choices (although that might very well be true), but rather because at the time when they engage in criminal conduct, that conduct is not their own.

I do not want to devote too much time to unpacking all of the nuances of the control and agency models of voluntariness; that would take me too far afield.⁶⁴ Rather, what I want to emphasize is that each model depends on identifying some property—control or practically rational agency—in the absence of which it would be inappropriate to punish an agent for something they have done. If agents cannot exercise meaningful control over their choices, then those choices are not really theirs; if agents are unable to respond appropriately to practical reasons, then they lack agency, and their conduct cannot really be said to be theirs either. Now the Sufficiency Hypothesis, recall, says that a liability-mitigating circumstance is a candidate for a partial defence provided that this circumstance would be reflected in a full or complete defence, were it present to a greater degree. Moreover, we have seen that involuntariness—either factual or normative—results in a complete defence (think here of necessity and duress). In the case of factual or empirical involuntariness this is because there is no *actus reus*, and so no conduct to attach criminal liability to. In the case of moral or normative involuntariness, this is because the accused's conduct cannot properly be attributed to their agency. But this means that where involuntariness is present to a lesser but still substantial degree, it ought to result in a partial defence. This is simply the Unifying Hypothesis applied to the principle of voluntariness.

And indeed, this is precisely the sort of picture reflected in the United Kingdom's approach to diminished responsibility. Recall the general structure of that defence: Briefly, a person ("D") who kills or is a party to the killing of another is not to be convicted of murder if (1) D was suffering from an abnormality of mental functioning; (2) that arose from a recognised medical condition that substantially impaired D's ability to understand the nature of D's conduct, to form a rational judgement, or to exercise self-control; and (3) that

64. For an influential proposal that links responsibility with the ability to respond appropriately to reasons, see John Martin Fischer & Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 1998). For discussion on this, see Walter Glannon, "Responsibility and Control: Fischer's and Ravizza's Theory of Moral Responsibility" (1999) 18 L & Phil 187. More recently, see Carolina Sartorio, *Causation and Free Will* (Oxford University Press, 2016); Carolina Sartorio, "More of a Cause?" (2020) 37 J Applied Philosophy 346; Alex Kaiserman, "Partial Liability" (2017) 23 Leg Theory 1 [Kaiserman, "Partial Liability"]; Alex Kaiserman, "Reasons-Sensitivity and Degrees of Free Will" (2021) 103 Philosophical & Phenomenological Research 687 [Kaiserman, "Reasons-Sensitivity"].

caused or was a significant contributory factor in causing D to carry out that conduct.⁶⁵ Note in particular the emphasis on the requirements of *substantial* impairment of *rational* judgement or *self-control*. It is natural to understand this as reflecting considerations tied to voluntariness: If an accused's ability to understand what they were doing, to engage in rational or deliberative thought, or to exercise control of themselves or their choices was substantially impaired by an abnormality of mental functioning, then a partial defence of diminished responsibility is appropriate.

How impaired must voluntariness be in order for it to result in a partial defence? This is a difficult question. But one way to approach this question is to think about the relationship between voluntariness and reasons for action. So consider a view that says, with respect to an individual O and an action A, that whether A was voluntarily done by O depends in part on O's reasons for or against the doing of A.⁶⁶ On this view, voluntariness can come in degrees. And the extent to which an agent's action was voluntary will depend on the extent to which the agent was sensitive or responsive, in acting, to the reasons for and against that action; the less an individual's reasons contribute to the doing of an action, the less free or voluntary the action is.

To take an admittedly simplistic and hypothetical example, suppose Jill suffers from cynophobia (fear of dogs), and consider a pair of cases.

1. Pre-Empted Cynophobia: Jill is invited to Jack's birthday party. However, it is snowing outside, a tennis match is on TV, and Jack is not a very good host. And so, on the basis of these reasons, Jill decides to stay home. Had these reasons not been present, however, Jane's cynophobia would have caused her to stay home anyway, since Jack has several large dogs, but Jill's cynophobia in fact played no role in bringing her action about.
2. Effective Cynophobia: Exactly as in Pre-Empted Cynophobia, except that this time Jill's cynophobia pre-empts her reasons for not attending Jack's party, rather than the other way around. Had Jill not been cynophobic, she would have stayed home, given the reasons that she had to do so (the snow, the tennis, Jack's abilities as a host), but these reasons in fact played no role in bringing about her action, which was entirely caused by her fear of Jack's dogs.⁶⁷

65. *Homicide Act 1957*, *supra* note 9, s 2(1).

66. See Kaiserman, "Partial Liability," *supra* note 65; Kaiserman, "Reasons-Sensitivity," *supra* note 65.

67. The structure of these cases is taken from Kaiserman. See "Reasons-Sensitivity," *supra* note 65 at 695.

In Pre-Empted Cynophobia, Jill's action is voluntary, since her fear of dogs contributed nothing to her decision to stay home. On the other hand, in Effective Cynophobia, Jill's staying home was not fully voluntary, since the reason why she did not go to Jack's party was that she was cynophobic and that was not a reason over which she had any control or authorship.

The idea is that reasons can make different contributions to the production of behaviour: Some reasons make more of a contribution, some less, and some reasons can be screened off, in whole or in part, by phobias, addictions, or mental disorders. Whether that happens in a given case is an empirical question. But this general picture opens up the possibility that somebody suffering from a liability-mitigating mental abnormality might, on occasion and as a result of their mental condition, fail to exhibit appropriate sensitivity to reasons or so might fail to exercise full self-control. And, provided that their failure to fully exhibit reasons-sensitivity or self-control is sufficiently serious, then the liability-mitigating circumstances that contribute to that failure may serve to diminish their responsibility and make it unfair to punish them fully for the offence that they are charged with.

No doubt it will be objected that this is unhelpfully abstract. For what does full or partial sensitivity or responsiveness to reasons look like as a practical matter? How is a trier of fact to determine whether an individual charged with a criminal offence was fully or only partially responsive to reasons and—if only partially responsive—whether the degree of responsiveness was sufficient to diminish their criminal responsibility? In a nutshell: Aren't the ideas of responsiveness to reasons and degrees of responsibility unworkable and wrong-headed?

Unsurprisingly, I think they are not, for several reasons. First, a version of this same objection can be pressed against a number of other defences and yet we do not think (or, at least, I do not think that we think) that those defences are for that reason wrong-headed. For example, how is a trier of fact to determine whether an accused pleading provocation *really* acted suddenly before there was time for their passion to cool? Or whether an accused pleading necessity *really* faced a situation of imminent peril? Or whether an accused charged with murder was so intoxicated that they were incapable of forming, or alternatively, did not in fact form the intent to kill? These are challenging questions. But since they cannot show that the defences of provocation, necessity, or intoxication are hopeless, it seems to me that similar considerations cannot show that a defence of diminished responsibility based on the idea of volitional impairment is hopeless either.

Moreover, at the sentencing stage of a criminal proceeding the sentencing judge must make determinations about an offender's degree of responsibility, and that inquiry will involve assessing the weight that should be placed on potentially mitigating circumstances, some of which may involve volitional impairments. This is commonplace. But if those sorts of determinations can be made at the sentencing stage, there is no reason why they cannot be made in the context of a formal defence of diminished responsibility. So again, it is not clear that these sorts of practical objections show that a defence of diminished responsibility based on the idea of volitional impairment is wrong-headed.

But still, suppose it is asked: Exactly how substantial does a volitional impairment have to be in order to give rise to a partial defence of diminished responsibility? In addressing this perfectly reasonable question it makes sense to go back to the idea underlying desert-mitigating volitional impairment, namely, normative involuntariness. My thought is that a volitional impairment will be sufficiently serious to give rise to a defence of diminished responsibility if it would be unfair to expect an accused to have done more than they did to resist the reasons that caused them to act. For example, suppose Jill commits a crime due in part to a compulsive disorder or an urge that is very hard to resist. If we think it would be unfair to have expected Jill to have resisted the hard-to-resist in the circumstances in which she found herself, then her conduct would only be partially sensitive to reasons, and she would only be partially responsible for what she has done. So again, the idea is to tie volitional impairments to the idea of moral involuntariness and ask, what is it reasonable to expect from this accused in the circumstances?

What evidence might support the conclusion that an accused's voluntariness was substantially impaired in such a manner? Such evidence might take various forms. It might include evidence about prior similar acts committed by the accused; evidence from individuals who witnessed the crime or who were in close contact with the accused before or after the act; evidence from the victim; a psychiatric assessment; evidence from expert witnesses, including medical professionals; or evidence provided by the accused themselves. There is no magic in any of this. An accused wishing to raise the defence of diminished responsibility would have to point to evidence that calls the issue of voluntariness

into question.⁶⁸ The trier of fact would then need to determine whether that evidence supports the conclusion that the accused's voluntariness was impaired and whether the degree of impairment was sufficient to give rise to a defence of diminished responsibility.

IV. IMPAIRED VOLUNTARINESS AND FASD

This completes the first two parts of my argument. I have articulated and defended the idea that diminished responsibility should be understood as a partial excuse; described a particular view of the sorts of mitigating circumstances that are, in principle, sufficient to give rise to a partial defence; and suggested that impaired voluntariness of a sufficiently serious sort ought to be recognized as a candidate for such a mitigating circumstance. I now argue that some individuals suffering from FASD ought to be entitled to a defence of diminished responsibility on the grounds that FASD serves to substantially impair their voluntariness.

Before doing that, however, let me pause to address an important question, namely, why focus on compromised (moral) voluntariness when a different, and perhaps more plausible, route to diminished responsibility for those suffering from FASD is available? For example, while it might be agreed that FASD should entitle an accused to a defence of diminished responsibility, it might be argued that the reason for this should not be based on compromised voluntariness. Instead, it should be based on the principle that where an accused's mental abilities are substantially impaired as a result of FASD, but the impairment falls short of the requirements for the defence of NCRMD set out in section 16 of the *Criminal Code*,⁶⁹ a partial excuse of diminished responsibility ought to be made available. Similar to our example of overzealous or almost self-defence, should not there perhaps be a partial defence of "almost NCRMD"?

68. Admittedly, questions about the appropriate standard of proof for claims involving assertions of involuntariness are complicated. See *Stone*, *supra* note 15 at para 219. In *Stone*, Justice Bastarache suggested, somewhat controversially, that in the context of claims of automatism an accused must establish involuntariness on a balance of probabilities. Justice Bastarache based his reasoning on the evidential burden appropriate to cases involving extreme intoxication or mental disorder. Consequently, it seems reasonable to adopt a similar burden and standard of proof in cases involving impaired voluntariness. Thus, an accused seeking to raise a defence of diminished responsibility based on impaired voluntariness would be required to establish, on a balance of probabilities, that their voluntariness was substantially compromised or impaired.

69. *Supra* note 14.

At a certain level, I have no objection to the idea of a partial defence of almost NCRMD, provided that it draws the appropriate distinctions and draws them in the right places. What I am more interested in is the principle on which the idea of a partial defence of almost NCRMD rests. The reason that I have focused on degrees of impaired volition is because, in my view, a better foundation for the defence of diminished responsibility is the moral involuntariness principle articulated by the Supreme Court of Canada in cases like *Daviault*⁷⁰ and *Ruzic*.⁷¹ And this is because the moral involuntariness principle reflects certain core organizing concepts of criminal law. As Dennis Klimchuk has argued, the reason why we do not punish those who act involuntarily is “because their actions resist imputation to them. Their agency, so to speak, is not implicated in their doings....Normatively involuntary actions...similarly resist imputation to those who perform them.”⁷² This general idea about imputability is certainly friendly to the practical agency account of the voluntariness requirement; if true, it also promises to explain not only excuses like duress and necessity, but also why we do not punish those who commit criminal acts while suffering from a mental disorder that renders them incapable of knowing what they are doing or of knowing that what they are doing is wrong. There is a sense in which such individuals have done what they should not have done, but all the same it is not clear that they are the authors of their actions. In short, what is attractive about the moral involuntariness principle is that it offers a unifying account of a range of different phenomena. It suggests, that is, that at the bottom of many apparently disparate defences is a normative core—one that is concerned with the extent to which individuals’ actions can be attributed to their practically rational agency.⁷³

70. *Supra* note 16

71. *Supra* note 52.

72. Dennis Klimchuk, “Moral Innocence, Normative Involuntariness, and Fundamental Justice” (1998) 18 CR (5th) 96 at 102. For criticism of the principle of moral involuntariness, see Brudner, *Punishment and Freedom*, *supra* note 2 at 241-45.

73. Of course, it might be objected that it is just as problematic to try to subsume different defences under the conceptual umbrella of normative involuntariness. For discussion, see Brudner, *Punishment and Freedom*, *supra* note 2 at 241ff. For example, if necessity, duress, self-defence, and NCRMD all reflect the principle of normative involuntariness, then how is it that necessity and duress operate as excuses, that self-defence is understood as a justification, and that NCRMD exempts an accused from criminal liability altogether? Although these issues are very complicated, I think part of the answer is that it is not only the principle of normative involuntariness that is doing the exculpatory work in self-defence and NCRMD. An accused is justified in acting in self-defence in part because the state is not in a position to intervene on their behalf, and so a right to self-defence devolves to the accused. And it is because an accused pleading NCRMD is suffering from a mental disorder that

Let me try to briefly forestall one potential objection. In suggesting that defences as different as provocation, infanticide, duress, and necessity might share a normative core I do not mean to suggest that there are no differences between them. For example, provocation involves an accused killing another person in a fit of sudden uncontrollable rage, while duress and necessity involve individuals whose wills have been overborne by threats against them or a third person in the case of duress, or by extreme circumstances in the case of necessity. Conceptually, then, provocation looks very different from duress and necessity. Moreover, as an historical matter, what counted as provocation arguably reflected outmoded understandings of heterosexual male honour. Thus the man who discovered his wife having sex with another man, the man who experienced an unwanted “homosexual advance,” or the man who found himself in a barroom brawl was frequently successful in pleading this partial defence to murder.⁷⁴ But given its checkered history, how can it be said that the defence of provocation reflects core ideas about voluntariness and imputability?⁷⁵

This is a fair question. But all the same, it seems to me that we can reject the conception of honour on which the defence of provocation historically rested, while retaining the idea that an individual who kills in a fit of provoked rage should be convicted of the lesser offence of manslaughter because that individual has not done something that can be fully attributed to their agency. I do not claim that this account is uncontroversial. But I do not think that it can be dismissed by pointing to the complicated history of provocation, infanticide, or intoxication.

What makes FASD and other mental disorders that fall short of what used to be called insanity particularly challenging, from the perspective of the criminal law, is that they exist in a kind of interstitial space between mental disorder giving rise to a finding of NCRMD and mental disorder that manifests itself in what might be called, very generally (and not very helpfully), poor judgement or flawed decision-making.⁷⁶ For the most part, if FASD is considered at all in the criminal

interferes with their capacity to understand what they are doing or to know that what they are doing is wrong, the exemption is appropriate in this case.

74. See *e.g.* *DPP v Camplin*, [1978] AC 705 (HL (Eng)); *R v Hill*, [1986] 1 SCR 313.
75. Similar observations could also be made about infanticide, which has its own fascinating and complicated history. For some discussion of that history, see Backhouse, *supra* note 39; Oberman, *supra* note 39; Cunliffe, *supra* note 35; Anand, *supra* note 39; Grant, *supra* note 39.
76. For a helpful overview of the many issues that arise when criminal law and mental disorder come into conflict, see KWM Fulford, “Value, Action, Mental Illness, and the Law” in Shute, Gardner & Horder, eds, *supra* note 36, 279.

justice system, it is considered at the sentencing stage of criminal proceedings.⁷⁷ And while some authors have considered how FASD might be relevant to the availability and application of criminal defences, nobody has, to my knowledge, suggested that the best way to do that is by recognizing a defence of diminished responsibility. Kent Roach and Andrea Bailey, for example, while suggesting that FASD might be relevant to certain criminal defences, stop short of arguing that FASD might constitute a mitigating circumstance sufficient to reduce one offence to another.⁷⁸ Instead, they suggest that there may be reasons to reconsider the nature of the hypothetical reasonable person when an accused suffering from FASD raises defences such as provocation, necessity, or duress.⁷⁹

What is FASD? FASD (also sometimes referred to as ARND, for alcohol-related neurodevelopmental disorders) is, as the name suggests, a spectrum of conditions or disorders associated with prenatal exposure to alcohol.⁸⁰ As Benjamin Berger notes, FASD is a developmental disorder with which individuals are born; it is not the result of any choices made by those who suffer from it.⁸¹ FASD carries with it a range of effects, including but not limited to superficial abilities in and understanding of language; adverse effects on both short- and long-term memory; and interference with adaptive behaviour and reasoning. Individuals suffering from FASD also encounter difficulty understanding and conforming their behaviour to standards of personal and social responsibility. They manifest difficulty in learning from past experience and often find themselves unable to appreciate the consequences that their conduct has on others or to understand the seriousness of their actions.⁸² Individuals suffering from FASD are also easily suggestible and prone to confabulation.⁸³

As several authors have noted, however, it would be a mistake to suppose that FASD is simply a medical condition connected with prenatal exposure to alcohol and unrelated to other socio-economic factors. As it has been put, FASD is “not simply about alcohol abuse. It is a complex issue rooted in the

77. Although it is certainly true that FASD bears on many other aspects of the criminal process, including fitness to stand trial. For some discussion, see Warren Brookbanks, Valerie McGinn & Joanna Ting Wai Chu, “Unfitness to Stand Trial and Fetal Alcohol Spectrum Disorder: Understanding and Responding to FASD Within the Criminal Justice System in New Zealand” (2022) 40 *Behav Sci & L* 159.

78. *Supra* note 8.

79. *Ibid* at 44, 66.

80. *Ibid* at 1.

81. *Supra* note 8 at 127.

82. *Ibid* at 127.

83. Roach & Bailey, *supra* note 8 at 27.

underlying social and economic conditions that influence all aspects of maternal and child health.”⁸⁴ Other commentators support this view: “Other factors increase the risk of developing [FASD] such as prenatal health, nutrition, poverty, tobacco use, socioeconomic factors and, in the case of Aboriginal offenders, the intergenerational effects of colonialization.”⁸⁵ In short, while it is triggered by prenatal exposure to alcohol, FASD is also exacerbated by broader socio-economic factors.⁸⁶

If you will remember, I suggest in Part III, above, that the two best ways to understand the voluntariness requirement in criminal law are via the choice or control theory and the agency theory. I am going to further suggest that on either way of understanding the criminal law’s voluntariness requirement, FASD can result in substantial impairments of an individual’s ability to engage in meaningful, normatively voluntary conduct, and that where such substantial impairments are demonstrable it should, for that very reason, give rise to a defence of diminished responsibility.

I am going to begin with a quote from Berger’s chapter, “Mental Disorder and the Instability of Blame in Criminal Law.” In that chapter, Berger says the following:

The inability to learn from past actions and the diminished capacity for exercise of will found in the impulsivity strongly associated with FASD raise serious concerns about the extent to which those suffering from FASD are fairly considered autonomous authors of their actions. Note that, in this respect, volition does, indeed, seem relevant to the conceptual foundations of mental disorders. Studies have noted

84. Paul Pallan, *Fetal Alcohol Syndrome: A Call for Action in B.C.* (Children’s Commission, 2001) at 9.

85. Chartrand & Forbes-Chilibeck, *supra* note 7 at 39.

86. This suggests the possibility of yet another route from FASD to diminished responsibility. To the extent that FASD is due in part to social and economic circumstances that the state is in a particularly good position to ameliorate (or that the state played a role in creating and maintaining), it might be possible to argue that the state’s authority or entitlement to punish an accused suffering from FASD—and especially Indigenous accused suffering from FASD—is significantly compromised. In other words, perhaps one could argue that some accused who suffer from FASD should be entitled to a defence of diminished responsibility on the grounds that the state lacks standing to punish them. For discussion, see Tadros, *supra* note 25. See also Berger, *supra* note 8 at 134 [citations omitted]. Berger makes a similar point that

[i]f one understands blame as relational or reciprocal in nature, society’s authority to call an accused to answer for a wrong committed might well be eroded when it becomes clear that, through systemic injustice, society has visited serious disadvantage and social wrongs on this person. By creating or sustaining unjust conditions that lead to crime, the state is complicit in and shares responsibility for the crime, make it unjust to blame the accused without also acknowledging and taking steps to remedy its own blameworthiness (*ibid.*).

that the linguistic and memory disruptions caused by FASD make the individual particularly susceptible to influence, suggestion and control, again raising red flags about agency. In short, despite the law's unreceptive posture towards such claims, from either a reason-based or agency-based perspective, the effects of FASD ought to severely complicate the attribution of criminal responsibility and, sadly, ought to do so for a substantial number of those addressed by the criminal justice system.⁸⁷

To use slightly different terminology, we might say that many individuals suffering from FASD are “agentially compromised.” This means that they are unable to exhibit the sort of control or the sort of responsiveness to practical reasons that we are entitled to expect from fully autonomous, and hence fully responsible, agents. Consider in this respect the choice or control theory. According to it, the *sine qua non* for criminal responsibility is control: control over conduct or control over choices. But the problem is that it is not clear that certain individuals suffering from FASD are capable of exercising the sort of control that would make them fully responsible for what they do. Note the emphasis on *full* responsibility. My claim is not that such individuals should be immune from criminal liability. Rather, it is that, to the extent that FASD substantially impairs the ability of such individuals to control their conduct or to exercise meaningful control over the choices that they make, it would be unfair to hold them fully responsible for their conduct and so unfair to punish them fully for that conduct or for its consequences. This is, it seems, part of the reason why very young children are completely exempt from criminal liability and why we are prepared to adopt a sliding-scale approach to the criminal liability of adolescents: Ordinarily, we think that a fourteen-year-old is less culpable or less deserving of punishment than a seventeen-year-old.

Things are, I think, even clearer when we approach the issue from the perspective of the agency theory. As Berger notes, “the diminished capacity for exercise of will found in the impulsivity strongly associated with FASD raise[s] serious concerns about the extent to which those suffering from FASD are fairly considered autonomous authors of their actions.”⁸⁸ I agree. If what the voluntariness requirement is trying to track is the extent to which individuals are able to behave in ways that manifest practically rational agency, then there is good reason to think that the practically rational agency of individuals suffering from FASD is compromised, often to a substantial degree. To be a practically rational agent one must be in a position to respond to reasons and to conform one's behaviour to reasonable standards set by oneself and by others. But through

87. *Supra* note 8 at 128.

88. *Ibid.*

no fault of their own, this is one of the things that individuals suffering from FASD have trouble doing.

In sum, whether we approach voluntariness via the concept of control or via the concept of practically rational agency, it seems clear that some individuals with FASD struggle to satisfy core conditions on volition, control, and agency that we correctly think are constitutive of genuinely autonomous agents. Moreover, it is clear that individuals whose practically rational agency is absent or who are unable to exercise meaningful control over their choices or conduct are sometimes entitled to a complete defence; this, I take, is the basis of the defences of necessity and duress. But the combination of this fact with the Unifying Hypothesis yields the following conclusion: that individuals suffering from FASD, whose practically rational agency is substantially compromised or who are unable to fully exercise meaningful control over their conduct, ought to be entitled to a partial defence of diminished responsibility. They do not deserve to be fully punished because, due to the effects of FASD, they are not fully responsible for what they have done.

V. OBJECTIONS AND REPLIES

A number of objections can be made to both the conceptual and empirical components of my proposal. But let me focus on three that strike me as particularly important.

The first problem I raise is for the conceptual part of my claim. The gist of my proposal is that if an individual is sufficiently agentially compromised then they are, in principle, entitled to a defence of diminished responsibility. But, the objection goes, the fact that somebody struggles to exercise control over their choices or has trouble responding in an appropriate manner to reasons does not show that they should not be held responsible for their choices or their conduct. The voluntariness requirement sets a low bar: So long as an accused enjoys a basic capacity for free choice and manifests that capacity in a given situation, then it is fair to hold them to account for the actions they perform and the behaviour that they engage in.⁸⁹

The objector says, in effect, that voluntariness is a binary property and operates like a standard light switch: Either you have it or you do not. And (goes the objection) so long as you exhibit some minimal degree of voluntariness (either empirical or normative), reasons-responsiveness, or self-control, you are a suitable candidate for criminal liability. On the view I am arguing for, on the

89. See e.g. Brudner, *Punishment and Freedom*, *supra* note 2 at 81-85.

other hand, voluntariness is a scalar property and operates like a dimmer switch: It can come in degrees. Some people can have more of it than others, and one and the same person can have more or less of it at different times or with respect to different actions. But perhaps more importantly, where an individual suffers from a substantially diminished degree of voluntariness, and where that diminishment is due to an underlying abnormality of the mind, then on the view that I am defending, it is unfair to hold that individual fully responsible for actions flowing from their (substantially) diminished agency.

It must be acknowledged that the view I am defending conflicts with standard interpretations of the voluntariness requirement. So my claim is obviously revisionary to some degree. But the claim is not that *any* degree of diminished voluntariness entitles an accused to a defence of partial responsibility. Somebody who makes a poor choice due to weakness of the will is not entitled to a defence of diminished responsibility for that reason alone. Rather, the volitional impairment must be substantial and must flow from a disordered or abnormal mind. So my response is, in effect, twofold: to accept the force of the objection but to point out that the picture I am sketching is not designed to reflect actual legal doctrine, but rather to revise it; and to point out that the degree of volitional impairment must meet a high bar and must flow from or be caused by the right sort of source.

The second possible objection is that FASD is a standing and relatively stable mental disorder or abnormality. In this respect it does not look like the sort of condition that could constitute a desert-based liability-mitigating circumstance. For example, if our paradigmatic examples of partial excuses are provocation and infanticide, then the sort of deficits that are standardly associated with FASD do not seem to fit very well with them. This is because in the case of both provocation and infanticide, the disorder that the accused claims to have suffered from at the time at which the offence was committed is a temporary one. In the case of provocation, it is sudden anger occasioned by the victim's unlawful or insulting conduct; in the case of infanticide, it is a disordered mind consequent on the effects of lactation or of giving birth. So does this not show that FASD fits poorly with the very idea of a partial excuse?

Two things can be said in response. First, we already have a model—the UK model—of diminished responsibility that incorporates the idea that a partial defence might be available where an accused's ability to exercise self-control is substantially impaired due to an underlying mental disorder.⁹⁰ So there is some precedent for the account of diminished responsibility that I am arguing for

90. See *Homicide Act 1957*, *supra* note 9.

here. But second, and perhaps more importantly, this objection overlooks the fact that there is no requirement that the defence of diminished responsibility rest on the same normative foundations or manifest the same liability-mitigating circumstances as provocation and infanticide, even if the normative consequences of those defences are the same in some cases. The question is whether we can identify an underlying liability-mitigating circumstance that has the effect of partially excusing the accused's conduct. Mitigating circumstances differ along various lines—duress is different from provocation, necessity is different from intoxication—and there is no conceptual or practical requirement that they partially excuse in the same manner.

The third important objection pertains to punishment and sentencing. In particular, should the sentencing options be different for an accused who pleads diminished responsibility on the basis of FASD? I think the answer is that, where an accused is successful in pleading diminished responsibility based on an underlying mental abnormality (such as FASD), the variety of sentencing options ought to reflect the fact and severity of that abnormality or disorder. Ideally, then, the sentencing options should include both custodial and non-custodial options, including perhaps mandatory psychiatric treatment where appropriate. My proposal would therefore include the recommendation that, where an accused demonstrates substantial volitional impairments due to an underlying mental abnormality such as FASD, the range of sentencing options should include the possibility of fixed-term hospital orders, with or without restrictions, non-custodial penalties or treatment orders, and absolute or conditional discharges.⁹¹

VI. CONCLUSION

My animating idea throughout this discussion has been that a humane criminal law ought to be able to make room for the idea that some mental disorders might give rise to desert-based mitigating circumstances. I have further argued that, to do this in a way that respects basic principles of criminal liability, what is required is the recognition of something like a partial defence of diminished responsibility. Such a defence would not operate to fully exculpate an accused. Rather, it would recognize that, in some circumstances, an accused whose mental

91. See Horder, *Excusing Crime*, *supra* note 2 at 152. See also Ian Freckelton, "Sentencing Offenders with Foetal Alcohol Spectrum Disorder (FASD): The Challenge of Effective Management," Case Comment on *Churnside v The State of Western Australia* [2016] WASCA 146, (2016) 23 Psychiatry Psychology & L 815.

abnormality substantially impairs their practical agency should be found guilty of an offence different from the one with which they are charged. I have spent some time discussing FASD because it seems to me to be an important form of mental disorder that is not adequately captured by the defence of NCRMD. But that does not mean that the agential impairments of those suffering from FASD should not bear on their criminal liability or desert. Again, my argument is not that having FASD is, without more, exculpating. Rather, the burden of my argument has been to motivate a distinction between complete and partial defences and to argue that, in some of its manifestations, FASD has all the hallmarks of a desert-based mitigating circumstance that ought to give rise to a partial excuse of diminished responsibility.

There are, to be sure, significant conceptual and practical challenges to recognizing a defence of diminished responsibility along the lines that I have suggested, and I have tried to address some of those objections above. Moreover, while my argument rests on some assumptions that have become fixed points in Canadian criminal law—here I have in mind the principle of moral or normative involuntariness—other assumptions about the relationship between mental disorder, volition, and criminal fault are more controversial. Furthermore, fully implementing and operationalizing a defence of diminished responsibility would require introducing different degrees of offences and would also require more complicated sentencing options for those whose ability to engage in meaningful voluntary conduct is substantially affected by the presence of mental disorder. But it seems to me that a humane criminal law ought to be open to the possibility of such changes if determinations of criminal liability are to properly reflect varying degrees of liability and desert. In conclusion, “[t]o acknowledge the humanity of short-comers is to recognize that they may be, in some circumstances, just as deserving as the mentally well-equipped...of some punishment, but also of mitigation and leniency, *pure and simple*.”⁹²

92. Horder, *Excusing Crime*, *supra* note 2 at 143 [emphasis in original].