

# Towards a More Contextualised Approach To Blame Attribution: The Case of the Diminished Responsibility Offender

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## Introduction

With the proliferation of nonstandard crimes which do not appear to have a clear wrongdoer nor a clear wrong, and which do not denote a traditional, capacity based approach to criminal responsibility, there exists a need within criminal law theory to take stock. Many commentators (though not all) yearn for a reaffirmation of the true, moral purpose of the criminal law and a delimitation of its boundaries.<sup>1</sup> However, with more formal recognition of an environment outside the criminal law which is ever expanding and mutating, such an ambition is unlikely to materialise. Even scholars such as Victor Tadros, who argues that the ‘central idea of holding an individual responsible’ is, in fact constant or ‘historically stable’,<sup>2</sup> acknowledges that this does not entail that the idea of *criminal* responsibility is historically stable.<sup>3</sup> It is argued that a more attainable aim is for clearer insight into the workings and interconnectivity of such aspects, with a view to informing future directions. To this end, this paper argues, (albeit somewhat ambitiously), for a more particularised view of blame and takes the example of the ‘Diminished Responsibility Offender’<sup>4</sup> to promote contextualisation

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<sup>1</sup> For example, see W Wilson, ‘What’s Wrong with Murder?’ (2007) 1(2) *Journal of Criminal Law & Philosophy* 157, 175; D Husak, ‘The Criminal Law as Last Resort’ (2004) 24(2) *Oxford Journal of Legal Studies* 207.

<sup>2</sup> V Tadros, *Criminal Responsibility* (Oxford University Press, 2005) 5.

<sup>3</sup> Ibid 6. Though Tadros differentiates between the basic conditions of criminal responsibility and the central doctrines of the criminal law (intention etc), he acknowledges that the latter too may fluctuate: ‘it may be true that there is an increasing focus on those mental states’.

<sup>4</sup> The term ‘Diminished Responsibility Offender’ identifies those homicide offenders with a mental disorder who come within the remit of the diminished responsibility defence. The term is employed to reflect a central objective of this paper which is to

both in the structure and substance of the law, based on current trends in criminal law theory, in addition to the behavioural sciences. Examining the issue of criminal responsibility through the lens of a particular type of offender facilitates a deeper, and arguably more tangible, understanding of the nature of the concept. This paper has selected the doctrine of diminished responsibility as a pertinent prototype, given its unique and dichotomous position within the criminal law; it vacillates between presenting itself as a manifestation of the heart of individual responsibility, and existing somewhat on the periphery of the criminal law, as a so called partial defence. Furthermore, it reveals the capacity based approach to criminal responsibility as a legitimating factor of its existence, while concurrently exposing the innate problems pertaining to the same.

Across jurisdictions, the doctrine of diminished responsibility focuses primarily on the individual's state of mind as the means of assessing whether or not the accused should be held to blame in respect of the crime committed.<sup>5</sup> Let us take the Irish jurisdiction as an example.<sup>6</sup> Section 6 of the *Criminal Law (Insanity) Act 2006* provides that:

- (1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person—
- (a) did the act alleged,
  - (b) was at the time suffering from a mental disorder, and
  - (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,
- the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.

The psychologically orientated wording of the section places the existence of a 'mental disorder'<sup>7</sup> (at the time of the wrongful act) at the core of whether the accused

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localise the critical analysis to the circumstances of a particular offender, with a view to breaking the hold of unifying theory.

<sup>5</sup> The partial defence in England and Wales employs the term 'abnormality of mental functioning' following the implementation of the *Coroners and Justice Act 2009* s 52. Conversely, the Scottish jurisdiction has chosen to retain the term 'abnormality of mind' in the *Criminal Justice and Licensing (Scotland) Act 2010* s 51B(1). For further discussion, see L Kennefick, 'Introducing a New Diminished Responsibility Defence for England and Wales' (2011) 74(5) *Modern Law Review* 750.

<sup>6</sup> See further, L Kennefick, 'Diminished Responsibility in Ireland: Historical Reflections on the Doctrine and Present-Day Analysis of the Law' (2011) 62(3) *Northern Ireland Legal Quarterly* 269.

<sup>7</sup> Under the *Criminal Law (Insanity) Act 2006* s 1, "'mental disorder" includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication'.

should not be held responsible or fully responsible for the act. The singularity with which the law in this area focuses on the mindset of the defendant is testament to its enduring commitment to the Kantian model of the individual as an autonomous, responsible, moral agent.

Thus, the law of diminished responsibility is a prime representation of the fact that, in modern law, regardless of which theory of criminal justice is applied there exists an innate assumption that the act performed by the accused resulted in wrongdoing, and that the individual who committed the act is responsible for it, and consequently, for the wrongdoing.<sup>8</sup> Inherent in this hypothesis is a presumption that blame for wrongdoing (and thus, criminal responsibility) can be morally attributed to that individual on the basis of the choice he has made,<sup>9</sup> or in Duff's words, 'as with morality, so with law'.<sup>10</sup> Thus, the law's notion of blame stems from its view of the individual as responsible for his own actions, and that it is the psychology of a person that can reveal whether or not he is in control of those actions.<sup>11</sup>

The first section of this paper illustrates why a 'grand theory' of criminal law is no longer a realistic objective, and argues for a more particularised approach to criminal responsibility — one which emerges from the perspective of the offender. The dominant, capacity based approach to criminal responsibility is appraised in the context of the Diminished Responsibility Offender in the second section, which goes on to explore alternative models ensuing from a more contextualised trend in criminal law theory. The final section ventures a version of what the contextualised approach might look like in practice, via a reformulation of s 6(1) of the *Criminal Law (Insanity) Act 2006*.

The subject matter of this paper is extensive in scope and many great minds, too numerous to mention, have explored the themes highlighted to a significant degree. Thus, the aim of the paper is not to provide a complete thesis on blame attribution, but to lay the groundwork for future research by reviewing part of the more recent literature in the field which seeks to address some, but by no means all, of the issues relating to blame attribution in the particular context of the Diminished Responsibility Offender. It is acknowledged that sections of this paper may raise more questions than it can answer, however, it is hoped that the discussion will act as a catalyst for further reflection and discourse on this complex field of study.

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<sup>8</sup> See further, I Dennis, 'The Critical Condition of Criminal Law' (1997) 50 *Current Legal Problems* 213.

<sup>9</sup> For an interesting discussion, see W Wilson, *Central Issues in Criminal Theory* (Hart Publishing, 2002) 336.

<sup>10</sup> R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Blackwell, 1990) 102.

<sup>11</sup> A Norrie, *Law and the Beautiful Soul* (Glasshouse Press, 2005) 111.

## I. A grand theory of criminal responsibility — ‘one size fits all’?

Grand theory could be viewed as a reaction against the contradictory paradigms and the ever shifting boundaries of the criminal law. A grand theory wants to make moral sense of what is perceived to be the core of the criminal law, by endowing it with a unitary, normative foundation and a clear, principled structure. A key feature of a grand theory is its reliance on a framework of practical reason, free from any exigencies of history, geography or society.

Notwithstanding the seminal writing of grand theorists such as Michael Moore, John Gardner, and John Braithwaite and Philip Pettit, the question persists as to whether the quest for a ‘grand theory’ of criminal law remains a viable and authentic pursuit.<sup>12</sup> Antony Duff, for one, maintains that any attempt to employ a grand theory should be resisted, for: ‘[t]hose who offer large-scale all-embracing theories of liability should realise that they cannot possibly be describing law as it really is, in its “contingent historical complexity”’.<sup>13</sup> Similarly, Andrew Ashworth and Andrew Von Hirsch, when speaking of Pettit and Braithwaite’s theory, attest to an increasing scepticism of sweeping grand theory, and maintain that any one theory which claims to address all difficulties within the criminal law, ‘is apt to yield answers that are meagre at best and, at worst, plain wrong.’<sup>14</sup>

Further evidence of the problematic nature of grand theory can be garnered from Ngaire Naffine’s critique of the work of Gardner.<sup>15</sup> She maintains that Gardner is

<sup>12</sup> In his paper on recent theoretical developments, Duff critiques three major grand theorists of the past 30 years, namely, Moore (*Placing Blame: A Theory of the Criminal Law* (Oxford University Press, USA, 2010)), Braithwaite and Pettit (*Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon Press, 1992)) and Norrie (*Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2001)), the latter ascription based on the ambitious nature of the text and its use of general terms. However, that Norrie’s theory has the objective of being a ‘grand’ one is contestable, as its aim is to challenge the a-historical and a-geographical ‘universal rationalising principles’ of the criminal law, and therefore, ultimately, the paradigm of grand theory — his historical framework behaving as a context rather than a unifying principle, as such. See R A Duff, ‘Theorizing Criminal Law: A 25th Anniversary Essay’ (2005) 25(3) *Oxford Journal of Legal Studies* 353.

<sup>13</sup> R A Duff, ‘Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?’ (2002) 6 *Buffalo Criminal Law Review* 147, 154.

<sup>14</sup> A Von Hirsch and A Ashworth, ‘Not Not Just Deserts: A Response to Braithwaite and Pettit’ (1992) 12(1) *Oxford Journal of Legal Studies* 83, 98.

<sup>15</sup> N Naffine, ‘Moral Uncertainties of Rape and Murder: Problems at the Core of Criminal Law Theory’ in B McSherry, A Norrie and S Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 213, 217. See also, J Gardner, ‘The Gist of Excuses’ (1998) 1(2)

preoccupied by core crime and a need to identify the true moral agent, to the detriment of 'real-world' people,<sup>16</sup> who appear to muddy Gardner's idea of the pure criminal law. She memorably describes such individuals as 'an anonymous sea of bitter faces'<sup>17</sup> which are quickly dispensed with when they sit, in conflict, with his attempt at capturing the true nature of moral agency. The significant point is that, for Gardner: '[m]oral certainty is achieved by a concerted focus on moral purity, not moral complexity or moral reality.'<sup>18</sup>

As a result, Naffine's critique of Gardner's theory brings into question the reliability, clarity and authenticity of the core of the criminal law, and with it, the foundation of the concept and practice of criminal responsibility. She suggests that even the core crimes of murder and rape, which are supposedly unquestioningly blameworthy, together with the concept of criminal responsibility they beget, do not provide 'a sure footing' for theories of blame: '[e]ven the "core" wrongs require us to think about how and why and whom we actually choose to and manage to criminalise.'<sup>19</sup>

Naffine's recipe for a grand theory is useful in terms of assessing whether the dominant, capacity based model is a suitable vehicle of blame ascription for the Diminished Responsibility Offender. She identifies three characteristics of the normative, traditional approach to grand theory: 'true agents', 'core criminality' and 'true criminal law'.<sup>20</sup>

Naffine points to the individual at the centre of both the Kantian and Aristotelian philosophy as the two prevailing models of the legal actor as 'true agent' within grand theory. The respective concepts may have different emphasis, but are on common ground in terms of their adherence to rationalism as a central precept, and their construction of a metaphysical individual free from the constraints of time and place. For Kant, in particular, such aspects as 'affects' and 'passions' hinder an individual's self-mastery which he views as a prerequisite for moral action.<sup>21</sup>

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*Buffalo Criminal Law Review* 575; J Gardner and S Shute, 'The Wrongness of Rape' in J Horder (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 2000); J Gardner, 'The Mark of Responsibility' (2003) 23 *Oxford Journal of Legal Studies* 157; J Gardner and T Macklem, 'No Provocation without Responsibility: A Reply to Mackay and Mitchell' [2004] *Criminal Law Review* 213.

<sup>16</sup> Naffine, above n 15, 224.

<sup>17</sup> *Ibid* 225.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid* 229.

<sup>20</sup> *Ibid* 214.

<sup>21</sup> I Kant, *Metaphysics of Morals* (1797). For discussion, see P Frierson, 'Kant on Mental Disorder. Part 1: An Overview' (2009) 20(3) *History of Psychiatry* 267, 277–80.

How, then, does this categorisation apply to the Diminished Responsibility Offender? To answer this question it is first necessary to consider whether or not a *true agent* can have a mental disorder. Traditionally, an ‘all or nothing’ approach has been employed to tackle this dilemma: a defendant either has the rational faculty to be considered an agent before the law or he does not. Thus, defendants with a mental disorder can avail of a denial of responsibility, or an exemption (usually via the insanity defence), where ‘profound’ (Gardner) or ‘serious’ (Horder) mental disorder affects the individual’s guiding reasons to such an extent that they cannot be made sense of (Gardner) or judged objectively in the context of an applicable moral standard (Horder).<sup>22</sup> Thus, such individuals are, in effect, non-agents for the purposes of grand theory.

The position is more complicated when we consider the Diminished Responsibility Offender, however. Though such a defendant could be considered an agent in the sense that he is the subject of conviction and punishment, it is questionable whether he is a *true agent* for the purposes of grand theory, in that he does not always reach the requisite rational bench mark.<sup>23</sup> As Gardner points out in his discussion of self-respect and denials of responsibility, the partial defence of diminished responsibility rests on ‘the *unreasonableness* of the defendant’s reaction, ie, their unamenability to intelligible rational explanation.’<sup>24</sup> Indeed, for both Gardner and Macklem it would appear that there is no space in a grand theory for mental illness as an excuse (as distinct from a denial of responsibility). They differentiate pleas like insanity and diminished responsibility from other excuses on the basis that, ‘[t]hey are reserved for those who are not quite among us, who cannot quite provide an intelligible account of themselves, and whose susceptibility to the full range of human judgment is therefore in doubt’.<sup>25</sup> Thus, it is arguable that grand theory does not form a suitable framework of blame in the context of this category of offender, given that he is frequently the subject of punishment.<sup>26</sup>

Secondly, a grand theory must demonstrate its commitment to the analysis of serious crime where it really matters — at the core. Core criminality points to those

<sup>22</sup> Gardner, ‘The Gist of Excuses’, above n 15, 589; J Horder, *Excusing Crime* (Oxford University Press, 2004) 9–10.

<sup>23</sup> There are numerous examples of cases where the behaviour of the Diminished Responsibility Offender does not make sense, and can only be explained via the presence of mental disorder. For an Irish example, see *DPP v Patrick O’Dwyer* (Unreported, Central Criminal Court, Carney J, 18 June 2007).

<sup>24</sup> Gardner, ‘The Gist of Excuses’, above n 15, 591.

<sup>25</sup> J Gardner and T Macklem, ‘Compassion without Respect? Nine Fallacies in *R v Smith*’ [2001] *Criminal Law Review* 623, 627. For criticism of Gardner and Macklem’s approach, see R Mackay and B Mitchell, ‘Provoking Diminished Responsibility: Two Pleas Merging into One?’ [2003] *Criminal Law Review* 745. For rejoinder, see J Gardner and T Macklem, above n 15.

<sup>26</sup> For example, Tadros tackles this issue by arguing for another category of agent, ie, ‘the responsible agent whose action did not reflect on him *qua* agent’: Tadros, above n 2, 129.

crimes which society and the law regard as ‘deep moral wrongs’ and which ‘attract great moral censure’.<sup>27</sup> Such crimes are fault heavy — deliberate, harmful and inherently wrong, and are listed by Husak as ‘rape, murder and theft’.<sup>28</sup> However, for the Diminished Responsibility Offender, it may be argued that such analysis does not take place at the core, but at the periphery. For, although such an offender has committed a serious crime, the moral evaluation of his act is dealt with not at the core, but in the realm of the defences.<sup>29</sup>

Finally, a grand theory must ensure that the true agent is called to account for his core criminal wrongdoing within a framework of ‘true criminal law’. The latter has three functions: it calls to account the individual, encapsulates the wrong and provides the appropriate forum wherein the individual can ‘demonstrate his moral agency’. Where the individual fails to do so in respect of the crime for which he is called to account, he is ‘an appropriate subject for the moral blame which is entailed in the assignment of criminal responsibility’.<sup>30</sup>

Failure to account is endemic in the realm of the partial defence of diminished responsibility, which occupies a fluid landscape amid the conceptual and psychological powerhouses of free will and determinism. For these are tragic cases often without a discernible explanation — brothers killing sisters, mothers killing daughters.<sup>31</sup> The partial defence is at the crux of the ‘evil or ill’ divide, as captured by Jeremy Horder in his categorisation of diminished responsibility as a legal claim under the conceptual umbrella of ‘diminished capacity’, a state which is in part both morally passive and morally active<sup>32</sup> — somewhere ‘in between’.

Such unsure footing on the landscape of moral agency is captured in a different light by Mark Coeckelbergh, who seeks to address the tension that exists between the ‘tragic’ nature of not only behaviour stemming from mental disorder, but all human action, and the ‘untragic’ legal and moral frameworks which permeate true criminal

<sup>27</sup> Naffine, above n 15, 215.

<sup>28</sup> D Husak, ‘Criminal Law Theory’ in M Golding and W Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005) 118.

<sup>29</sup> The relationship between offences and defences is far from straightforward, however, and some would argue that defences are an essential facet of the moral story. Fletcher, for example, points to certain offences, or ‘basic prohibitions on which there is consensus’ as pointing to ‘paradigmatic instances of wrongdoing’ which must be supplemented in exceptional cases by the defences (justification or excuse) in order to ‘make out a complete case of responsible wrongdoing’: G P Fletcher, *Rethinking Criminal Law* (Little Brown, 1978) 562. For further discussion, see P H Robinson, ‘Criminal Law Defences: A Systematic Analysis’ (1982) 82(2) *Columbia Law Review* 199; J Gardner, *Offences and Defences* (Oxford University Press, 2007).

<sup>30</sup> Naffine, above n 15, 216.

<sup>31</sup> For example, see *DPP v Patrick O’Dwyer* (Unreported, Central Criminal Court, Carney J, 18 June 2007); *DPP v Anne Burke* (Unreported, Central Criminal Court, McCarthy J, 23 March 2010).

<sup>32</sup> Horder, above n 22, ch 1.1.

law.<sup>33</sup> Coeckelbergh highlights the conceptual difficulties surrounding ‘hard’ cases, that is, ‘acts of violence which are essentially incomprehensible to society’, and where, as a result, society is unsure whether to regard the perpetrator as a criminal or a patient.<sup>34</sup> The essence of such cases is that there is some element whereby the defendant’s action is not entirely his own: ‘something that “happens” as much as it is “done”’.<sup>35</sup> The Diminished Responsibility Offender may be adrift in a tragic sea, surrounded by competing issues of free will and determinism, activity and passivity, and we must acknowledge, as Coeckelbergh wishes to, that perhaps the nature of this offender should not or, as is more likely, cannot, be altered in this regard. That is not to say, however, that the ‘true criminal law’ should overlook the need to provide a more suitable framework of criminal responsibility for such a subject.<sup>36</sup>

Though the above discussion suggests that a ‘one size fits all’ theory of criminal responsibility may not be a viable pursuit, it does not follow that theoretical analysis should be disregarded. Criminal law theory facilitates a conversation of the criminal law, and it is only through such exchanges that we can appreciate the penetrable nature of the boundaries of law, its related concepts of responsibility, and its ever shifting nature and scope. The point is that it cannot exist validly unless it engages with real criminal laws, their implementation, their operation and most significantly, their subjects. Indeed, Naffine advises that to capture the nature of serious crime we need to pay heed to the ‘relevantly-affected parties’ and the way in which they understand such crimes.<sup>37</sup> Duff, too, recognises that theorising is only intelligible when it takes place within some human practice.<sup>38</sup>

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<sup>33</sup> M Coeckelbergh, ‘Criminals or Patients? Towards a Tragic Conception of Moral and Legal Philosophy’ (2010) 4(2) *Journal of Criminal Law & Philosophy* 233. In developing his thesis, Coeckelbergh draws upon Kierkegaard’s notion of tragic action, Nussbaum’s conception of ‘poetic justice’, as well as relational theories of responsibility from Norrie and Duff, as discussed in further detail below.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid 234.

<sup>36</sup> Note Yannoulidis, however, who would argue that such a framework exists in the context of the insanity defence: the tension that exists between the competing interests of clinical evidence, responsibility (‘individual justice’) and community interest (‘societal protection’) in the ‘disease of the mind’ enquiry, though complex, can be, and is, reconciled by distinguishing between the purposes served by such elements: S Yannoulidis, *Mental State Defences in Criminal Law* (Ashgate, 2012) ch 3. Arguably, this point could apply to ‘mental disorder’ under the *Criminal Law Insanity Act 2006*, as the definition under s 1 incorporates the term ‘disease of the mind’. However, see discussion below under Part III, sub-section 2, which suggests a focus by the jury on medical evidence when interpreting the term, in addition to a move towards the further medicalization of the diminished responsibility defence in terms of the operation of the law. See also, Kennefick, above n 5, 762–3.

<sup>37</sup> Naffine, above n 15, 232.

<sup>38</sup> Duff, above n 12, 364.



Thus, while the aim of a universal, grand theory of criminal responsibility is idealistic and therefore fundamentally flawed, a theoretical framework, on the other hand, is necessary in order to facilitate and guide an authentic and worthwhile discussion. Such a discussion must engage with grand theories where relevant but recognise that distinctive factions of the criminal law, and consequently criminal responsibility, will have their own guiding principles which will, of course, coexist and interrelate with others. As a result, in the analysis to come, the purpose will be to ascertain the most appropriate guiding principles to apply to the Diminished Responsibility Offender, to the exclusion of a 'one size fits all' approach. To achieve this, a brief examination of the Kantian model of criminal responsibility which currently underlies the diminished responsibility doctrine is undertaken, before considering how alternative, more contextualised approaches may apply.

## II. Towards a contextualised approach to criminal responsibility

### A. THE KANTIAN DISCONNECT

Norrie refers to a 'Kantian orthodox subjectivism' as the foundation of the modern criminal justice system.<sup>39</sup> Similarly, Gardner acknowledges the 'profound influence on our contemporary intellectual culture' exerted by Kant's philosophy.<sup>40</sup> The essence of Kant's theory lies in his construction of an abstract and universal individual who is capable of morally relating to the rest of humanity on the basis of his ability to reason. The individual's relationship with humankind thus justifies the use of blame and punishment as a response to wrongdoing.<sup>41</sup>

Kant's notion of the abstract individual is at once confined and pervading. The individual is confined by the fact that he inhabits a rational world that exists apart from the physical person; a legal identity disconnected from his creatural body. For Kant: '[w]hen ... I enact a penal law against myself as a criminal it is the pure juridical legislative reason ... in me that submits myself to the penal law as a person capable of committing a crime'.<sup>42</sup> This disjointed construction of the legal subject is pervasive because it is bestowed upon, as opposed to inherent in, all individuals who come before the law.

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<sup>39</sup> A Norrie, "'Simulacra of Morality'?: Beyond the Ideal/Actual Antinomies of Criminal Justice' in R A Duff (ed), *Philosophy and the Criminal Law: Principles and Critique* (Cambridge University Press, 1998) 101.

<sup>40</sup> J Gardner, 'On the General Part of the Criminal Law' in R A Duff (ed), *Philosophy and the Criminal Law: Principles and Critique* (Cambridge University Press, 1998) 219.

<sup>41</sup> I Kant, *The Metaphysical Elements of Justice* (Macmillan, 1965) 100.

<sup>42</sup> Ibid 105.

In terms of how the Kantian model considers the offender with a mental disorder, the traditional and the sustaining view is that such an offender should be excused from criminal responsibility, and therefore punishment, where he has committed a criminal offence owing to his condition. However, there is little agreement on where in a theory of criminal responsibility mental disorder defences ought to be placed. Some scholars are of the view that such defences ought to be categorised as excuses, others that they ought to be categorised as exemptions, and still others that they ought to exonerate the defendant only if they impact upon another area of criminal responsibility.<sup>43</sup> However, the position for the Diminished Responsibility Offender is more complex, given the fact that even if partially excused on the basis of his condition, he may still be the subject of blame and punishment.

This section focuses on the notion of disconnection (inspired by Norrie's 'false separation' which will be discussed in further detail below) as a means of arguing that the current concept of criminal responsibility which underlies the partial defence of diminished responsibility is not a suitable framework upon which to attribute blame. Disconnection within the Kantian framework resonates on two levels — the external and the internal.

## B. ADDRESSING EXTERNAL DISCONNECTION

The benefit for Kant's individual, of course, is that he is free: his detachment from all contextual and circumstantial elements of a social, economic and personal nature thus ensures that his agency and responsibility 'transcend the particularities of real life'.<sup>44</sup> Furthermore, a focused, capacity based interpretation of criminal responsibility makes for a rather clean academic discussion of legal theories and terminologies, and appears to depoliticise both the courtroom and the lecture hall largely by excluding issues pertaining to social justice. As a result, the fact that such an approach is essentially (and some would argue, necessarily) a metaphysical construction of responsibility is frequently discounted.

The consequences of such universal liberation, however, can be morally opaque; to attempt to cancel out the significance of social justice and circumstance has a profound effect on an individual's position within the law.<sup>45</sup> As Kant himself realised, his construction of the subject struggles when it encounters problem cases; take for example, a mother who kills her child born outside marriage, or a soldier who kills in a duel. Both have committed a criminal act, yet, Kant is troubled by the fact that their tie to society and what it perceives as 'honour' — its values, in addition to their 'social identities as particular persons',<sup>46</sup> has prompted their respective actions. Thus, the

<sup>43</sup> For example, Tadros, above n 2, 322.

<sup>44</sup> A Norrie, 'From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer' (2002) 65(4) *Modern Law Review* 538, 545.

<sup>45</sup> Though one could argue that such issues as social justice are taken into account by the court in exercising discretion at sentencing, or by the jury when making a normative assessment. But is this sufficient?

<sup>46</sup> Norrie, above n 44, 546.

subjective standards of a society which is ‘barbaric and underdeveloped’<sup>47</sup> are at odds with what Kant would term, ‘appropriate’ standards.<sup>48</sup> Duff categorises this notion as a ‘dubious metaphysical distinction’ between the rational will and other aspects of the self.<sup>49</sup>

The scholarship of those who seek to tackle the external disconnect is now drawn upon for its intrinsic values of interconnectivity, relationalism, and dialecticism.

### 1. A LIBERAL COMMUNITARIAN APPROACH

Scholars such as Ashworth and Duff propose an Aristotelian alternative to criminal responsibility, which regards the accused not only as an autonomous individual, but as a member of a community of norms and values. Duff, in particular, seeks to address the external disconnect by supplementing morally the narrower Kantian approach.<sup>50</sup> His hypothesis advances the notion of ‘a polity of citizens whose common life is structured by such core liberal values as autonomy, freedom, privacy and pluralism, informed by a conception of each other as fellow citizens in the shared civic enterprise’.<sup>51</sup> For Duff, as communitarians we identify with and support our fellow members when they are wronged, and as liberals we respond only to those wrongs which affect negatively our defining values, leaving individuals to respond to other wrongs informally or through private law.<sup>52</sup>

Duff’s issue with the Kantian model is its inability to relate blameworthiness to community, and substantive moral values to culpability. That is not to say, however, that Duff disposes with the notion of the individual within the criminal justice system as an autonomous being. On the contrary, Duff accepts the significance of the individual, and merely supplements his standing by giving credence to his relationship with the community.<sup>53</sup> To succeed with his communitarian model, Duff proposes a communicative approach to punishment. Thus, punitive treatment of the individual would be provided either to a limited degree, and as a means of deterring crime; or, more ambitiously, as part of a communicative process the object of which would be to encourage the offender to repent for his criminal conduct, reform his character, and

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<sup>47</sup> Kant, above n 41, 107.

<sup>48</sup> Ibid.

<sup>49</sup> R A Duff, ‘Choice, Character and Criminal Liability’ (1993) 12(4) *Law & Philosophy* 345, 346.

<sup>50</sup> See, R A Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Blackwell, 1990); R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, 2007).

<sup>51</sup> Duff, *Answering for Crime*, above n 50, 11.

<sup>52</sup> Ibid 14.

<sup>53</sup> For critique of this approach, see A Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press, 2000) 139.

ultimately reconcile himself with the victim of his crime and his community, (both of whom, according to Duff's thesis, he would have wronged).<sup>54</sup>

Duff argues that the basic concept within the criminal justice system is that of responsibility, which he understands as the legal demand to provide a rational explanation for criminal conduct.<sup>55</sup> As a result, the criminal trial is not merely an instrument of judgement; it is a process of communication: the act of committing a criminal wrong must be explained by the offender to the community, and his denial of fault, (through the pleading of a justification or excuse), is the form such an explanation must take. If his form of explanation fails, he will be punished for his crime.<sup>56</sup> However, Duff's thesis may be undermined by the fact that the platform of communication is not necessarily equal. Though an interpersonal exchange may take place between the individual and the public (via the criminal law), one side is likely to dominate, and as Jenkins points out, 'which is a question likely to be decided by power differentials'.<sup>57</sup>

Duff's view of the individual, and consequently his approach to the offender with a mental disorder, is not as different from the Kantian approach as one would expect. For Duff, the responsibility of an individual depends upon his capacity in terms of reason responsiveness, that is, he is considered a responsible agent if he is capable of recognising and responding appropriately to the relevant reasons that bear on his circumstances.<sup>58</sup> Thus, Duff's hypothesis boils down to a question of rationality, both in a theoretical and practical sense — 'we are responsible agents insofar as we are rational agents', provided that the agent (in terms of his emotions, desires, beliefs and other cognitive dispositions) is responsible to reasons.<sup>59</sup>

While it is questionable whether Duff succeeds in blueprinting a system whereby the external disconnect of the individual from his or her community and moral context is addressed fully, his communicative methodology acknowledges the interrelatedness of the individual and social justice that Kantian individualism represses. However, for Norrie, such a move is to the detriment of the 'the guilty subject' who becomes lost in a dialogue with the community about the allocation of fault in a structurally unequal society.<sup>60</sup>

## 2. A DIALECTIC BLAMING RELATION

<sup>54</sup> R A Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 *Crime & Justice* 1.

<sup>55</sup> Ibid 33.

<sup>56</sup> A Haque, 'Review of R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*' (2008) 18(5) *Law & Policy Book Review* 423.

<sup>57</sup> R Jenkins, *Social Identity* (Routledge, 2<sup>nd</sup> ed, 2005) 101 (emphasis in original).

<sup>58</sup> Duff, *Answering for Crime*, above n 50, 39.

<sup>59</sup> Ibid.

<sup>60</sup> Norrie, above n 53, 139.

While Norrie sympathises with Duff's (and Ashworth's) dissatisfaction with Kantian theory, he finds that such writers fail to appreciate, and thus reinforce, the fact that the autonomous individual does matter. For Norrie, a compromise between the Kantian and Aristotelian approaches must be reached for justice to prevail. Accordingly, once the correlation between subject and object, individual and community, is seen as dialectical, the criminal law will no longer try to force its doctrine into either Kantian orthodox subjectivism or Aristotelian heterodox objectivism. Instead, it will take a more pragmatic approach by recognizing the ambiguity and difficulty of legal argument and counterargument for what it is.<sup>61</sup>

Norrie's difficulty with the Kantian approach is that the central notion of individual blame upon which it rests is inadequate.<sup>62</sup> He gives credence to the argument of the philosopher, Alasdair MacIntyre, who claims that the development of the notion of the modern self has resulted in the fostering of a representation of morality which lacks any substantive meaning.<sup>63</sup> Thus the modern tendency to idealise and conceptualise the individual comes at the cost of maintaining a valuable grasp of morality. For viewing the individual in isolation from his community allows us to make no moral sense of the good and the bad, the right and the wrong.<sup>64</sup> Norrie, for the most part, concurs with MacIntyre's approach, and places it alongside the concerns of A C Ewing,<sup>65</sup> in relation to retributivism with a view to formulating a critique of the liberal theory of punishment, the basis of which is to acknowledge the individual as an important figure in moral thinking but only if understood in a non-individualistic, relational way.<sup>66</sup>

To formulate his relational theory, Norrie fuses Bhaskar's social philosophy together with the social psychology of Rom Harré. Harré's theory asserts that the social takes precedence over the individual, but at the same time recognises the autonomy of the individual being. Bhaskar, on the other hand, maintains that due to their biological constitution, human beings possess certain inherent powers which in turn are subsumed into the structure of their social relations.<sup>67</sup> Thus, while Norrie accepts that the basic assumptions of their respective theories are far from identical; their alternative notions of dialectical relationality (Bhaskar) and psychological symbiosis (Harré) make essentially the same point: 'that individual being is intrinsically connected to what is usually regarded as lying beyond it.'<sup>68</sup> To inform his argument, Norrie identifies three 'anti-Kantian' themes, firstly; the problem of false

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<sup>61</sup> Ibid 233.

<sup>62</sup> Ibid 3.

<sup>63</sup> See further, A MacIntyre, *After Virtue* (Duckworth, 1985).

<sup>64</sup> Ibid 4. See also, Norrie, above n 39, 101 and following.

<sup>65</sup> A C Ewing, *The Morality of Punishment* (Kegan Paul, Trench, Trubner & Company, 1929).

<sup>66</sup> Norrie, above n 53, 5.

<sup>67</sup> Ibid 200. See also, A Norrie, *Dialectic and Difference: Dialectical Critical Realism and the Grounds of Justice* (Routledge, 2010).

<sup>68</sup> Ibid.

but necessary separation in Kantian thought, secondly; the inadequacies of an analytical model of criminal justice thinking, and thirdly; the need to retrieve and defend what remains of moral value within Kantian individualism.<sup>69</sup>

Bringing all three anti-Kantian themes together and applying them to the central notions of blame and punishment within the criminal justice system, Norrie argues that attribution of blame, from a dialectic angle, has to assume a much more ambivalent and communicative form, where 'the door is opened to discussion of the meaning and significance of different forms of justice.' What is required, according to Norrie's hypothesis, is a mode of moral accountability which spans the social space between an individual and his community.<sup>70</sup>

So what does this mean for the offender with a mental disorder? While Norrie does not directly address the position of such an offender within the criminal law in *Punishment, Responsibility and Justice*, an understanding of his likely position in this context can be extracted from his views on the relational subject. In this regard, Norrie's focus is on Harré's conception of how the individual subject is constituted out of social relations.<sup>71</sup> According to Harré, the 'conversations' of the social world provide the basis of a conception of the individual person, from which emerges a notion of the individual self as a unified basis for consciousness, agency and responsibility.<sup>72</sup> Thus, it can be argued that this image of the self also applies to the offender with a mental disorder, in that he too is essentially a product of the normative conversations which shape him.

This approach is confirmed in Norrie's analysis of the insanity defence in *Crime, Reason and History*.<sup>73</sup> In this context, Norrie argues that the focus on responsibility in the insanity defence does not pay heed to the circumstances in which 'madness' occurs within society. The notion of false separation comes into play here also, through the way in which the defence serves to isolate the accused and consequently his mental condition. The law locates mental disorder defences only within the psyche of the individual, thus hiding the profound social significance of 'madness'.<sup>74</sup> (Such a view, of course, correlates with Foucault's interpretation of the psychiatric approach to 'madness' as 'a convenient but ultimately misguided way of evaluating the social meaning of madness'.)<sup>75</sup> The application of this ideology for the

<sup>69</sup> Ibid ix.

<sup>70</sup> Ibid 14–15.

<sup>71</sup> Ibid 205.

<sup>72</sup> R Harré, *Personal Being: A Theory for Individual Psychology* (Blackwell, 1983); R Harré, *The Singular Self: An Introduction to the Psychology of Personhood* (Sage, 1998).

<sup>73</sup> Norrie, above n 12.

<sup>74</sup> Ibid 189.

<sup>75</sup> M Foucault, *Madness and Civilisation: A History of Insanity in the Age of Reason* (Routledge Classics, 2004) ix. For further analysis, see J Habermas, 'The Critique of Reason as an Unmasking of the Human Sciences: Michel Foucault' in J Habermas

Diminished Responsibility Offender in the Irish jurisdiction is clear, given its formal reliance on the mental state of the individual as the means of assessing whether the partial defence is applicable.

While Norrie's relational theory of blame certainly reflects the reality of the position of the individual (with and without a mental disorder) within his community, what is lacking is a concrete practical example of how a relational, dialectical theory would work in a court room or within a body of legislation. It is hoped that the final section of this paper will capture the spirit of Norrie's dialectic hypothesis through a redrafting of the partial defence of diminished responsibility under s 6.

### 3. A SOCIO-HISTORICAL APPROACH

Although she has shown support for a Duff-like theory of communitarianism,<sup>76</sup> the object of Nicola Lacey's more recent scholarship is to expand the premise that a moral theory is the most appropriate means of explaining blame attribution. She achieves this by distinguishing three diverse criminal law conceptions of attribution, namely, capacity, character and outcome principles, and relating such principles to their historical development.<sup>77</sup> Lacey's theory is based on George Fletcher's account of three historical patterns of liability,<sup>78</sup> which she builds on by developing a more complex differentiation, while simultaneously highlighting the historical conditions for the emergence of differing theories of responsibility.

Lacey argues that the philosophical underpinnings of criminal responsibility are but one of the many elements which impact the construction and interpretation of legal doctrine and practices of responsibility attribution. Her understanding of the notion of 'practices of responsibility', therefore, is that it encompasses the social, institutional and doctrinal dynamics shaping attributions of blame and responsibility, as opposed to the emotional and social responses that people have to wrongful conduct.<sup>79</sup> (However,

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(ed), *The Philosophical Discourse of Modernity: Twelve Lectures* (First MIT Press, 1990) 238.

<sup>76</sup> For example, see N Lacey, *State Punishment: Political Principles and Community Values* (Routledge, 1988).

<sup>77</sup> N Lacey, 'Space, Time and Function: Intersecting Principles of Responsibility across the Terrain of Criminal Justice' (2007) 1(3) *Journal of Criminal Law & Philosophy* 233; N Lacey, 'In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory' (2001) 64(3) *Modern Law Review* 350; N Lacey 'Responsibility and Modernity in Criminal Law' (2001) 9(3) *Journal of Political Philosophy* 249; N Lacey, 'Character, Capacity and Outcome: Towards a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law' in M Dubber and L Farmer (eds), *Modern Histories of Crime and Punishment* (Stanford University Press, 2007).

<sup>78</sup> See G P Fletcher, *Rethinking Criminal Law* (Little Brown, 1978).

<sup>79</sup> N Lacey, 'Response to Norrie and Tadros' (2007) 1(3) *Criminal Law & Philosophy* 267, 268.

as such human responses are intrinsic to the construction of the social and institutional dynamic in particular; this point warrants further investigation).

In the current legal climate capacity theory is perceived as the principal form of responsibility attribution that deals with mental disorder. While this is indeed evidenced by the emphasis within formal definition on the state of mind of the defendant, the reality does not necessarily correlate. For example, the offender's character is frequently taken account of at the sentencing stage in mitigation, and defences such as provocation (in an Irish context) have a strong subjective leaning. Furthermore, recent behavioural studies attest to the innate biasing effect that moral considerations have on folk ascriptions of blame attribution, as discussed below. This suggests that the two concepts of capacity and character are not mutually exclusive, and nowhere is this more evident than in the case of the Diminished Responsibility Offender. The two theories converge in this context; for, such an offender, although having been diagnosed with a mental disorder in most cases is nonetheless punishable before the law. Yet his reduced sentence and the title of his defence suggest that he is deemed to have some degree of diminished capacity. Theoretically, it is an uncomfortable, 'in between' position to occupy.

How can two such competing theories coexist? On a metaphysical level, the two are united by a common sense of moral condemnation of the offender, in that character theory argues that we should reserve moral condemnation for 'bad people', and capacity theory holds that it is morally wrong to punish someone who could not help it. Thus, they are brought together by a common aim, that is, to pacify the 'tragic' nature of human action, and their union is represented by the presence of formal psychiatric diagnostics as a staple within the criminal law.

The means by which the law has arrived at such a position gives us an insight into the ebb and flow of the relationship between these two paradigms of responsibility attribution. It is not so much the case as is often portrayed, that capacity replaced character theory in the eighteenth century, but rather that, as Lacey demonstrates, the two have, since the emergence of the capacity based conception, occupied the same space, the dominance of each fluctuating over time depending on the legitimating and coordinating factors at hand.<sup>80</sup> Within the context of the criminal law, it was a political need for legitimation, and a practical need to coordinate 'the sorts of knowledge which can be brought into a court room.'<sup>81</sup>

According to Lacey, it is only once we appreciate the societal conditions which underlie the shifting tides of responsibility attribution, that we will be in a position to resist the resurgence of a character status approach which promulgates 'punishment as forms of social power'.<sup>82</sup> Certainly her warning is pertinent to a framework of blame

<sup>80</sup> N Lacey, 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) 4 *Criminal Law & Philosophy* 109.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid 131.



strongly leaning towards a contextual understanding of criminal responsibility, in that discrimination and bias must be avoided. However, the reality is that capacity and character approaches coexist, just as the various objectives of punishment do, for example, just deserts, prevention, restorative justice and even social control. Perhaps the means of achieving the fairest outcome, rather than ‘resisting resurgences’, is to take the more positive step of constructing a specific framework to apply to a particular offender, such as is attempted in the final section of this paper.

### C. ADDRESSING INTERNAL DISCONNECTION

Internal disconnection — mind from action, mental disorder from individual — is also pervasive within the Kantian approach. This practice is based upon the rationalisation of the individual within the law, which is an assumption that must be questioned, particularly in light of recent scholarship in the behavioural sciences. Prior to discussing such studies, however, this paper will consider briefly the work of Fletcher as a potential medium of reconciliation in terms of the internal disconnect in the context of criminal law theory.

In his more recent writings, Fletcher reveals a tenuous support for the notion of a more holistic approach to objective and subjective elements of criminality, the *actus reus* and the *mens rea*.<sup>83</sup> Indeed, Lacey employs her socio-historical approach to show how his notion of manifest criminality already dominated the coordination of the criminal law prior to the rise of the Kantian approach, and to some extent correlates with a corresponding conceptualisation of ‘manifest madness’ as put forward recently by Arlie Loughnan.<sup>84</sup>

In *The Grammar of Criminal Law*, Fletcher outlines the three basic systems of structural analysis of criminal offences, ie, bipartite, tripartite and quadripartite modes, before acknowledging the appeal of the holistic model.<sup>85</sup> The tripartite approach to criminal liability has its origins in German civil law and consists of three stages: the definition of the offence, wrongdoing and culpability. Each of these three inculpatory stages corresponds with an exculpatory element that can negate criminal liability. The bipartite approach has Western common law origins and distinguishes between the *actus reus* (external side of criminal conduct) and *mens rea* (internal side of criminal

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<sup>83</sup> Fletcher, above n 78, 450; G P Fletcher, *The Grammar of Criminal Law: American, Comparative, and International, Volume One: Foundations* (Oxford University Press, 2007).

<sup>84</sup> A Loughnan, ‘Manifest Madness: Towards a New Understanding of the Insanity Defence’ (2007) 70 *Modern Law Review* 379; A Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press, 2012).

<sup>85</sup> Fletcher, *The Grammar of Criminal Law*, above n 83, 43–58. See also, L L Weinreb, ‘Manifest Criminality, Criminal Intent, and the “Metamorphosis of Larceny”’ (1980) 90(2) *Yale Law Journal* 294; R L Christopher, ‘Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions’ (2007) 28(6) *Cardozo Law Review* 2675.

conduct). In every offence there must be a union between these two elements. Fletcher describes it as the 'simplest, but also the least accurate' of the structures.<sup>86</sup> The quadripartite approach is Communist in origin and it classifies elements of criminal offences into the following categories: (1) subject of the offence (2) subjective side of liability (3) object of the offence (4) objective side of liability, with the subjective and objective elements being equivalent to *mens rea* and *actus reus*.<sup>87</sup>

Fletcher's discussion of internal structures of criminal offences then addresses the holistic scheme which challenges the more individualistic models outlined above, and moves towards a more dialectic and contextualised approach. The gist of the holistic model is that to distinguish between objective and subjective elements of criminality (between *actus reus* and *mens rea*) is oversimplified. Such a criticism is similar to that of Norrie's 'false separation', in that the holistic argument gives credence to an interrelatedness between 'mental states' and their manifestation in action, which opposes the view that the former are psychological events that have a life of their own, independent of their physical expression.

In applying this approach to the law, the basic mistake, according to the holistic model, is to search for the essence of mental states like voluntary or intentional conduct. However, the demands of doctrine within the criminal law will not so easily accept this philosophical argument, as in order to retain its systematic approach to liability, it needs to hold on to a semblance of such essences.<sup>88</sup> Thus, the holistic position challenges not only the accepted distinction between the objective and subjective dimensions of criminal responsibility but also the tripartite assumption of a separation between wrongdoing and culpability.<sup>89</sup>

But is the application of the law as assumed by the holistic position that straightforward? Horder, in his analysis of intention as the *mens rea* of murder, suggests not. He contends that far from seeing the notion of intention as a 'conceptual apparatus', the law uses it as a moral guide, which helps to inform the jury when reaching a normative or morally evaluative decision regarding whether to label the defendant as murderer.<sup>90</sup> Horder's argument is based on the fact that in recent judgments there is less of an emphasis on a formal definition of intention, with judges more inclined to encourage juries to use their 'good sense' in deciding whether a defendant intended to kill.<sup>91</sup>

Horder's assessment rings true in the sense that, as the behavioural studies discussed below suggest, the jury may make a moral assessment of the accused which

<sup>86</sup> Fletcher, *The Grammar of Criminal Law*, above n 83, 43.

<sup>87</sup> Ibid 47.

<sup>88</sup> Ibid 56.

<sup>89</sup> Ibid.

<sup>90</sup> J Horder, 'Intention in the Criminal Law — A Rejoinder' (1995) 58 *Modern Law Review* 678, 687–88.

<sup>91</sup> Ibid.

influences the outcome of the verdict, whether consciously or unconsciously. That is not to say, however, that the substantive law allows for such an assessment as a matter of form, nor does it follow that a judge asking a jury to use ‘good sense’ invites it to make a moral judgement as to whether the defendant should be labelled a murderer, as opposed to simply establishing the intended outcome of the defendant’s actions. For, even Horder acknowledges that in establishing the presence of intention, the law requires the jury to act as fact-finder in the context of what Horder terms a ‘weak evaluation of conduct’, as opposed to ‘strong (moral) evaluation’.<sup>92</sup> This is further supported by various recommendations for a more formal definition of intention within the law,<sup>93</sup> more general judicial guidance on the role of the jury,<sup>94</sup> as well as academic opinion.<sup>95</sup> Thus, it is important to distinguish between what Horder asserts the law does in a formal, substantive sense, and how participants in the legal process may behave in order to ‘get around’ the restrictions of legal decision-making, whether or not they are aware of their behaviour.

Indeed, on a more empirical level, research on the relationship between moral judgements and folk ascriptions of responsibility in the context of jury bias suggests that there exists within the individual a basic sort of partiality that occurs when people are asked to make judgements concerning someone’s mental state, particularly in the context of serious crime.<sup>96</sup> There exists growing evidence for the premise that individuals are more likely to judge that an action which is considered morally negative was brought about intentionally, than they are to judge that an action which is considered non-moral was brought about intentionally, albeit that the two actions are

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<sup>92</sup> Ibid 686. Horder suspects, however, that judges never intended to forego completely such a strong moral evaluative element from the law in this area: at 687.

<sup>93</sup> For example, Law Commission (UK), *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com No 218, 1993) [7.1]; Law Reform Commission (Ireland), *Report on Homicide: Murder and Involuntary Manslaughter* (Law Com 87, 2008) [3.78].

<sup>94</sup> For example, the Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (March 2010) advises that where the nature of the evidence elicits feelings of anger or sympathy in the jury, the jury should ‘put emotion aside and embrace a fair, careful and reasoned approach to the evidence’: at 15.

<sup>95</sup> For example, in discussing Horder’s assessment of the fact-finder’s morally evaluative role in the context of his proposed partial excuses as second degree offences, Huigens opines: ‘As a legal entity within a legal system charged with making legal decisions with legal consequences, a jury never decides moral questions. It can, of necessity, only decide legal questions.’: K Huigens, ‘Liberalism, Normative Expectations, and the Mechanics of Fault’ (2006) 69(3) *Modern Law Review* 462, 471.

<sup>96</sup> T Nadelhoffer, ‘Bad Acts, Blameworthy Agents, and Intentional Actions: Some Problems for Juror Impartiality’ (2006) 9(2) *Philosophical Explorations* 203; M Alicke, ‘Culpable Control and the Psychology of Blame’ (2000) 126 *Psychological Bulletin* 556; B Malle and S Nelson, ‘Judging *Mens Rea*: The Tension between Folk Concepts and Legal Concepts of Intentionality’ (2003) 21 *Behavioural Sciences and the Law* 563.

structurally similar.<sup>97</sup> Thus, certain major psychological concepts, such as intentionality, are ‘bound up in a fundamental way with evaluative questions — questions about good and bad, right and wrong, praise and blame’.<sup>98</sup>

Such a premise raises important questions concerning the concept of responsibility ascription and the philosophy of action. A notion at the centre of this is ‘automaticity’, that is, ‘the mind’s ability to solve many problems, including high level social ones, unconsciously and automatically’.<sup>99</sup> Thus it would appear that there is strong evidence to suggest that far from action being a considered and rational choice, it is, in fact, a non-rational, affective process. In terms of moral judgements, then, Greene and Haidt have argued that it is ‘more a matter of emotion and affective intuition than deliberative reasoning’.<sup>100</sup> Furthermore, Alicke’s ‘Culpable Control Model’ of blame attribution has shown that ‘cognitive shortcomings and motivational biases are endemic to blame’.<sup>101</sup> Thus, the basis on which a Diminished Responsibility Offender (and indeed any offender) makes decisions is not necessarily rational, yet he is judged within a rational framework. Furthermore, the way people make moral judgements is not based on rationality, but on intuition, therefore the jury does not make a rational judgement either.<sup>102</sup>

The potential impact of such studies on criminal responsibility within a legal framework could be considerable. The studies suggest that the more immoral the act, the less impartial the judgement of the jury.<sup>103</sup> For according to the Culpable Control Model:

the immoral nature of the act can *spontaneously* trigger jurors to go into the default mode of blame attribution – a mode that causes them to be affected by negative and relatively unconscious reactions that prejudice both their assessment of the crime and their assessment of the structural linkages relative to establishing the defendant’s guilt.<sup>104</sup>

The Diminished Responsibility Offender has committed what is often considered the most immoral act of all — homicide. Therefore, it is arguable that his

<sup>97</sup> Nadelhoffer, above n 96, 204. See, J Knobe, ‘Intentional Action and Side Effects in Ordinary Language’ (2003) 63 *Analysis* 190; J Knobe, ‘Intentional Action in Folk Psychology: An Experimental Investigation’ (2003) 16(2) *Philosophical Psychology* 309; T Nadelhoffer, ‘Blame, Badness, and Intentional Action: A Reply to Knobe and Mendlow’ (2004) 24 *Journal of Theoretical and Philosophical Psychology* 343.

<sup>98</sup> Knobe, above n 97, 309–10. See also discussion of Horder above.

<sup>99</sup> J A Bargh and T L Chartrand, ‘The Unbearable Automaticity of Being’ (1999) 54 *American Psychology* 462. See also, J Greene and J Haidt, ‘How (and Where) Does Moral Judgment Work?’ (2002) 6 *Trends in Cognitive Science* 517.

<sup>100</sup> *Ibid.*

<sup>101</sup> Alicke, above n 96, 557.

<sup>102</sup> See further, Nadelhoffer, above n 96, 210.

<sup>103</sup> *Ibid.* 211.

<sup>104</sup> *Ibid.* (emphasis in original). See also, Alicke, above n 96, 558.

mental disorder, in its capacity as a causal (and therefore potentially excusing) factor, is overlooked to a greater extent than in respect of acts perceived less immoral: 'spontaneous presumption of blame can cause the juror to *selectively look for evidence that supports blame attribution* while at the same time causing her to *overlook factors that might otherwise mitigate or exculpate blame or guilt*.'<sup>105</sup>

Indeed, the idea has been recognised by legal academics also, for example, Gardner and Jung highlight the view held by many psychiatrists which is that people do not necessarily refine or define their plans and aims in a way that would match the degree of specificity required by the criminal law, particularly in terms of deciphering a precise 'mental state'.<sup>106</sup> Gardner and Jung make the point that this somewhat ambiguous process of thought does not matter so much when it comes to moral issues, due to the fact that moral codes are often adaptable and simultaneously underpin several related descriptions under which an immoral act may be intended without the scale or quality of the immorality being significantly affected.<sup>107</sup> The law, however, is built upon the premise that the specific description under which an act was intended is definitive. Consequently, for Gardner and Jung, this may itself be regarded as a moral limitation on the extent to which the criminal law should be symbiotic with morality. Their somewhat ambitious conclusion, then, is that the law may have to modify its definition of intention in order to avoid pervasive and crippling individuation problems.<sup>108</sup>

All this intimates that individuals who find themselves before the court are held up against unrealistic standards, given that there is evidence to suggest that the way participants in the legal process make decisions and judgements does not necessarily adhere to the rational, Kantian framework upon which the law and legal system are based. The rational, fact-finding mandate of the jury is undermined by evidence of an innate and unconscious partiality which has the potential to steer (if not override) a logical assessment of the facts, whilst evidence of automaticity in the context of action challenges the perception that the behaviour of any offender, let alone one with a mental disorder, is a manifestation of a deliberative reasoning process. As a result, the traditional conception of the individual within the criminal justice system is subverted to a degree and the Diminished Responsibility Offender is particularly affected, given his unique position 'in between' responsibility and non-responsibility. Thus, a holistic, relational view of the Diminished Responsibility Offender which seeks to reconcile the internal and external disconnects integral to the Kantian model, results in a morally sound approach, and a realistic one, which extends beyond the universalised notion of the abstract individual.

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<sup>105</sup> Nadelhoffer, above n 96, 211 (emphasis in original). See also, L S Wrightsman, *Psychology and the Legal System* (Brooks/Cole, 1991).

<sup>106</sup> J Gardner and H Jung, 'Review: Making Sense of Mens Rea: Antony Duff's Account' (1991) 11(4) *Oxford Journal of Legal Studies* 559.

<sup>107</sup> Ibid 580.

<sup>108</sup> Ibid.

### III. Towards a contextualised definition of diminished responsibility under section 6(1) of the *Criminal Law (Insanity) Act 2006*

Though this paper consists largely of a review of the relevant literature, the purpose of this section is to consider briefly the application of theory to practice in order to open further research avenues. It does not aim to provide a complete 'solution', but explores tentatively the possibility of a reformulation of the definition of diminished responsibility within its current legislative framework, with a view to considering what a more particularised approach to responsibility attribution might look like. It by no means addresses all the issues pertaining to the diminished responsibility defence.<sup>109</sup>

In keeping with the discussion so far, two particular factors are addressed in order for the proposed definition to accord with a contextualised approach: the external disconnect of the individual from his moral and social context, and the internal disconnect of the psychological state from the individual. It is acknowledged that the arena of blame attribution encapsulates a number of complex avenues, such as control, choice, capacity and causation etc, that are not all addressed in this paper;<sup>110</sup> however, the scope of the discussion focuses on the external and internal disconnect as the two overarching aspects of blame attribution. A core issue with the Kantian approach is the external disconnect that exists between the legal subject and his moral and creatural context. The theories which criticise this approach and serve to inform a more contextualised guiding principle have in common the desire to expand the outer limits of blame attribution.<sup>111</sup> Furthermore, the internal disconnect encapsulated by the bipartite system is the key target of the holistic reaction to more traditional forms of criminal law structures, and is a theme which pervades the more empirical studies discussed above.<sup>112</sup> Thus, exploring the themes of internal and external disconnect first not only forms the basis of a contextualised approach to blame attribution in the context of the Diminished Responsibility Offender, but also sets the groundwork for further discussion of additional factors to blame attribution, a discussion which, though undoubtedly necessary, is beyond the scope of this paper.

To that end, it is recommended that s 6(1) be replaced by the following definition:

- (a) A person otherwise convicted of murder is instead to be convicted of 'section 6 manslaughter' if that person was, at the time that the act was committed, under the influence of extreme

<sup>109</sup> For consideration of these issues in an Irish context, see Kennefick, above n 6.

<sup>110</sup> For an interesting discussion of blame attribution more generally, see J Horder 'Criminal Culpability: the Possibility of a General Theory' (1993) 12 *Law and Philosophy* 193.

<sup>111</sup> See the discussion of Duff's liberal communitarianism, Norrie's dialectic blaming relation, and Lacey's socio-historical approach at Part II.B.1, B.2 and B.3 above.

<sup>112</sup> See discussion at Part II.B.3 above.

and extraordinary circumstances for which there is reasonable explanation.

(b) The reasonableness of such explanation shall be determined from the viewpoint of a person with the accused's personal circumstances.

(c) The extreme and extraordinary circumstances in part (a) must have a material bearing on the person's conduct such that they amount to a significant contributing factor to the crime for which the person is liable.

## A. 'SECTION 6 MANSLAUGHTER'

A title which avoids the use of the term 'diminished responsibility', or any other derivation, has two functions: firstly, it usurps the incorporation of derogatory terminology within the law, and secondly, it ensures that mental disorder is not presented as a status in respect of those who may be eligible to avail of the defence, as opposed to a factor to be taken into consideration.<sup>113</sup> A similar approach has been taken recently by the Scottish legislature, though in respect of the insanity defence. The term 'insanity' has been replaced by s 51B of the *Criminal Procedure (Scotland) Act 1995*,<sup>114</sup> which is entitled: 'criminal responsibility of persons with mental disorder'. The 'catchy' label has been dispensed with in favour of a title which, though acknowledged as cumbersome, dispenses with unnecessary and damaging stigma.<sup>115</sup>

Though the Scottish title employs the term 'mental disorder' in the definition in order to 'reflect or cohere with current medical concepts',<sup>116</sup> it is submitted that in order for 'section 6 manslaughter' to accord fully with a contextualised framework, such a term must be avoided. This paper has discussed how such a framework promotes the reconciliation of mind and action by means of a more holistic approach to the treatment of the Diminished Responsibility Offender. Thus, the use of 'mental disorder', in the sense of being a separate entity to the corporal individual offender, jars with the reconciliation of internal divides. This notion is discussed further below.

## B. 'UNDER THE INFLUENCE OF EXTREME AND EXTRAORDINARY CIRCUMSTANCES'

This term tackles internal disconnection by replacing the notion of 'mental disorder' as the starting point for reducing murder to manslaughter. In doing so, it addresses

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<sup>113</sup> See further, A Kenny, 'Can Responsibility be Diminished?' in R G Frey and C W Morris (eds), *Liability and Responsibility: Essays in Law and Morals* (Cambridge University Press, 1991).

<sup>114</sup> As inserted by *Criminal Justice and Licensing (Scotland) Act 2010*.

<sup>115</sup> *Criminal Justice and Licensing (Scotland) Act 2010* s 51B(1) incorporates the recommendations of the Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, (Law Com 195, 2004).

<sup>116</sup> *Ibid* [2.19].

unrealistic constructs and standards which are applied to the circumstances of the Diminished Responsibility Offender, and which do not reflect the reality of how humans (with or without a mental disorder) make decisions.

It is acknowledged that the abandonment of the use of medical or psychological language within the definition may be criticised as not reflecting current practice in terms of the centrality of psychiatric testimony within the courtroom. However, there is nothing in the proposed definition that would prevent expert evidence of this kind being adduced in order to show the circumstances in question. Furthermore, this approach acknowledges to a certain degree a point made by the Law Commission and also by Walker. Both have alluded to conduct, which does not amount to mental disorder within a given definition, being afforded the same treatment where it is accepted that legal classifications of conduct should reflect moral distinctions.<sup>117</sup>

The position may also be justified by the fact that the current definition of ‘mental disorder’ under s 6 of the 2006 Act is a legal term, and so there is scope for judicial expansion of the phrase beyond strictly medical diagnostics.<sup>118</sup> The point is that, at present, the jury tends to rely disproportionately upon the evidence of the medical expert in determining the ‘mental disorder’ requirement.<sup>119</sup> More than this, there is evidence to suggest that it even depends on the expert’s assessment in deciding whether or not the condition in fact reduces the responsibility of the accused for the crime committed.<sup>120</sup> Therefore, if the true intention of the law is, as some would argue, to allow the jury to take into account the social circumstances of the accused when assessing mental disorder,<sup>121</sup> then this needs to be clarified, and not just left to a ‘benign conspiracy’.<sup>122</sup>

The approach suggested herein is the antithesis of recent developments in England and Wales which introduced the term ‘recognised medical condition’ as the benchmark for an individual seeking to rely on a diminished responsibility defence.<sup>123</sup> Indeed, the Law Commission acknowledged that the old wording of the definition under s 2(1) of the *Homicide Act 1952* had long since developed beyond the identification of the narrow range of causes of an ‘abnormality of mind’.<sup>124</sup> Accordingly, if the judiciary are employing a wide interpretation of the term in question in order to reflect the justice of a particular case, for example that of the

<sup>117</sup> N Walker, *Crime and Insanity in England: The Historical Perspective, Volume I* (Edinburgh University Press, 1968) 252; Law Commission (UK), *Report on Partial Defences to Murder* (Law Com No 290, 2004) [5.18].

<sup>118</sup> See Kennefick, above n 6, 285–86.

<sup>119</sup> See Kennefick, above n 5, 762–63.

<sup>120</sup> Ibid.

<sup>121</sup> See, eg, Yannoulidis, above n 36.

<sup>122</sup> Law Commission, above n 117, [2.34].

<sup>123</sup> *Coroners and Justice Act 2009* s 52.

<sup>124</sup> Law Commission (UK), *Report on Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) [5.111].



mercy killer, why then, would the legislature suppose that the best approach would be to narrow that proviso to such a significant degree? The proposed terminology, in an Irish context, is constructed on the basis that the more appropriate drafting response to the nebulous nature of the diminished responsibility defence is to ensure that the definition is fit for its purpose; if that purpose is to allow for a more flexible approach in such cases, then so be it.

Thus, the use of ‘circumstance’ as opposed to ‘mental state’ or ‘state of mind’ widens the lens of the law to look at the individual within his context: the false separation of mind and action, mental disorder and individual, is removed. The use of the term encompasses Norrie’s dialectic blaming relation by expanding the narrow, individualistic commitment to the state of mind of the individual, and making provision for a more realistic, dialectic and relational means of considering the defendant. Yet, the fact that such circumstances must be ‘extreme and extraordinary’ acts as a buffer against frivolous defences. The circumstances are required to be ‘extreme’ in the sense that they must be acute and ‘extraordinary’ in the sense that they must be in excess of the norm, such factors to be interpreted on a case by case basis.

The term also acknowledges the fact that often, the defence of diminished responsibility exists between morally active and morally passive motivating reasons, as identified by Horder.<sup>125</sup> Moreover, incorporating ‘circumstance’ into the proposed definition facilitates the recognition of situations wherein both crime and madness occur within society. The phraseology is a potential gateway for an open expression of compassion by allowing room for social significance to be recognised more overtly within legal definition. Bearing in mind Coeckelbergh’s notion of the tragic nature of all human action, it is submitted that the proposed terminology goes some way towards facilitating the fact that in many cases of this nature, something ‘happens’ as much as it is ‘done’.<sup>126</sup>

The terminology also draws upon Lord Lloyd’s proposal to amend the Coroners and Justice Bill. Lord Lloyd moved an amendment to the Bill whereby, in a trial for murder, the trial judge would have the ability to direct the jury that if they were satisfied that the accused is guilty of the offence of murder, but also find that there were ‘extenuating circumstances’ they could add a rider to their verdict to that effect. The trial judge could then pass the sentence he considered appropriate, effectively usurping the mandatory life sentence.<sup>127</sup> The popularity of the proposal in the House of Lords suggests that the approach recommended herein may be possible.<sup>128</sup> The

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<sup>125</sup> Horder, above n 22.

<sup>126</sup> Coeckelbergh, above n 33, 234.

<sup>127</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 30 June 2009, vol 712, col 150.

<sup>128</sup> Though the amendment was supported by Baroness Butler-Sloss, Lord Mayhew, Baroness Warnock and Lord Joffe, among others, it was defeated in the final vote. United Kingdom, *Parliamentary Debates*, House of Lords, 26 October 2009, vol 713, col 1027.

proposal harks back to a more historic approach to the defence of diminished responsibility as recommended by the Royal Commission on Capital Punishment in 1953, where the Commission recommended that juries should have the ability to decide between life and death sentences, taking into account extenuating circumstances including the offender's mental state.<sup>129</sup> It is also reminiscent of the Scottish *locus classicus*, *HM Advocate v Dingwall*,<sup>130</sup> where Lord Deas referred to culpable homicide as including 'murder with extenuating circumstances'.<sup>131</sup>

Though such a move may be criticised on the basis of facilitating more flexibility in terms of who may be eligible to bring the defence, it is essential in order to fulfil the aims of a more particularised, contextual framework of blame. (Furthermore, it may be necessary to consider the incorporation of the plea of provocation in this context, given the close correlation between the two partial defences, though such analysis falls beyond the scope of this paper.)<sup>132</sup>

### C. 'FOR WHICH THERE IS REASONABLE EXPLANATION ... ACCUSED'S PERSONAL CIRCUMSTANCES'

The significance of communication as an element of a contextualised approach to blame is highlighted above in relation to the work of Duff. In his liberal communitarian approach, Duff stresses the importance of the 'communicative process' in order for the individual to reconcile himself with his community, and thus his social context. The requirement for an explanation as a component of the proposed definition reflects this process of communication, which encourages a more relational mode within the remit of the criminal law. The term draws upon two elements: the US Model Penal Code, and the definition of provocation in Ireland.

The 'extreme mental or emotional disturbance' (EMED) manslaughter provision of the Model Penal Code provides as follows:

[A] homicide which would otherwise be murder [is manslaughter if it] 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

<sup>129</sup> United Kingdom, *Report of the Royal Commission on Capital Punishment 1949-1953*, Cmd 8932 (1953).

<sup>130</sup> (1867) 5 Irv 466.

<sup>131</sup> Ibid 479-80.

<sup>132</sup> For discussion on the merger of the partial defences of diminished responsibility and provocation, see R D Mackay and B Mitchell, 'Provoking Diminished Responsibility: Two Pleas Merging into One?' [2003] *Criminal Law Review* 745; *R v Smith (Morgan James)* [2001] 1 AC 146; J Chalmers, 'Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism' [2004] *Criminal Law Review* 198; J Gardner and T Macklem, 'No Provocation without Responsibility: A Reply to Mackay and Mitchell' [2004] *Criminal Law Review* 213.

the actor's situation under the circumstances as he believes them to be.<sup>133</sup> (Emphasis added)

The section is deemed not to be a defence, but instead to be a form of mitigation which reduces murder to manslaughter, and has been known to form the basis of a provocation plea, in addition to a diminished capacity defence in certain States.<sup>134</sup> For example, this phraseology has been incorporated into New York legislation and was interpreted in the case of *Patterson v New York*,<sup>135</sup> where it was found to incorporate a broad, subjective approach to criminal liability for defendants who fall within its remit.<sup>136</sup>

The notion of a *reasonable* explanation is borrowed from the EMED definition in the sense that it ensures that the explanation offered by the accused allows for situational factors to be taken into account in conjunction with the presence of any mental disorder:<sup>137</sup> the subjective/objective approach adopted in the Hawaiian case of *State v Dumlao*<sup>138</sup> provides a useful interpretation for present purposes. The court explained that under the EMED 'reasonable explanation' test it considers: 'the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however inaccurate that perception may have been'.<sup>139</sup> The court then tempers this subjective approach with an objective assessment of whether the accused's explanation was in fact reasonable, with a view to deciding whether he is entitled to a reduction of the charge from one of murder to manslaughter.<sup>140</sup>

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<sup>133</sup> MPC §210.3(1)(b). There has been some criticism of the 'EMED' defence in terms of its scope. For example, see V Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1997) 106 *Yale Law Journal* 1331; J Dressler, 'Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject' (2002) 86 *Minnesota Law Review* 959.

<sup>134</sup> American Law Institute, *Model Penal Code and Commentaries* (Comment to [210.3]), 71. For a recent analysis of EMED, see P H Robinson, 'Abnormal Mental State Mitigations of Murder: The US Perspective' in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, 2011).

<sup>135</sup> 432 US 197 (1997).

<sup>136</sup> See further, R G Singer and J Q La Fond, *Criminal Law: Examples and Explanations* (Aspen Law & Business, 1997) 344–45.

<sup>137</sup> For discussion, see Horder, above n 22, 158.

<sup>138</sup> *State v Dumlao*, 715 P 2d, 822 (Haw, 1986). For in depth discussion, see R J Tjioe, 'Criminal Law — *State v Dumlao*: Hawaii's Extreme Mental or Emotional Disturbance Defense' (1987) 9 *University of Hawaii Law Review* 723; J Dressler, 'Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code' (1988) 19 *Rutgers Law Journal* 671, 704–07.

<sup>139</sup> *State v Dumlao*, above n 138, 830.

<sup>140</sup> *Ibid* 832. See further, Tjioe, above n 138.

The proposed definition differs slightly from the above, as the term ‘reasonable’ is envisaged as incorporating a subjective test, with the effect that it would be what the individual would consider a reasonable explanation from his perspective. Such an approach would certainly be open to criticism, in that it allows for such factors as the mental condition, attitude, beliefs and emotions of the accused to be taken into account, with the result that factors potentially not relevant to the accused’s behaviour could be given weight,<sup>141</sup> hence the inclusion of part (c) in the definition (discussed below).

Mackay and Mitchell have used the EMED provision as a starting point for their argument that the defences of diminished responsibility and provocation overlap at a certain point,<sup>142</sup> as was considered in the English decision of *R v Smith (Morgan James)*.<sup>143</sup> They make the pertinent point that:

there is a sliding scale or continuum of our mental health, with normality and abnormality at opposite ends. Depending on what has been happening in our lives, we move backwards and forwards along this continuum, with our thoughts, judgement and behaviour reflecting varying degrees of normality and abnormality.<sup>144</sup>

Mackay et al tackle any criticism of this approach, (ie, ‘that it effectively removes any normative element from the law’)<sup>145</sup> by noting that the criminal law ‘ought not to expect people to behave in a manner beyond their abilities’.<sup>146</sup> Such a view is in keeping with the criticism of grand theory above, in that it acknowledges

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<sup>141</sup> For example, see Horder, above n 22, 158–60. For an illuminating discussion of reasonableness, see M Baron, ‘The Standard of the Reasonable Person’ in R A Duff et al, *The Structure of the Criminal Law* (Oxford University Press, 2011) 11.

<sup>142</sup> Mackay and Mitchell, above n 132, 758, propose the following merged definition:

A defendant who would otherwise be guilty of murder is not guilty of murder if, the jury considers that at the time of the commission of the offence, he was:

- (a) under the influence of extreme emotional disturbance and/or
- (b) suffering from unsoundness of mind

either or both of which affected his criminal behaviour to such a material degree that the offence ought to be reduced to one of manslaughter.

See also, RD Mackay, B Mitchell and WJ Brookbanks, ‘Pleading for Provoked Killers: In Defence of Morgan Smith’ (2008) 124 *Law Quarterly Review* 675.

<sup>143</sup> [2001] 1 AC 146.

<sup>144</sup> Mackay, Mitchell and Brookbanks, above n 132, 688.

<sup>145</sup> *Ibid* 705.

<sup>146</sup> *Ibid*.

that responsibility attribution ought to take into account the reality of those who come before the law, like the Diminished Responsibility Offender.<sup>147</sup>

Though the Mackay and Mitchell definition sets out to incorporate provocation also, (a partial defence which has now been replaced by the ‘loss of control’ test under the *Coroners and Justice Act 2009*),<sup>148</sup> in addition to the fact that it employs such terms as ‘unsoundness of mind’, it is a helpful source in terms of its subjectivity. It is submitted that such an approach would work within an Irish context due to the subjective nature of the law of provocation in that jurisdiction.

The partial defence of provocation in Ireland facilitates consideration by the jury of the character, temperament and circumstances of the accused.<sup>149</sup> The proposed definition of ‘section 6 manslaughter’ draws upon this construct by allowing the court/jury to take into consideration the accused’s personal circumstances, thus satisfying the particularisation of the moral context of the individual.

#### D. ‘MATERIAL BEARING ON THE PERSON’S CONDUCT ... SIGNIFICANT CONTRIBUTING FACTOR TO THE CRIME’

The final section of the proposed definition is something of a safety valve. It draws from the existing Irish defence (‘such that’) and clarifies the requirement for a causal link between the effect of the circumstances on the individual and the criminal act itself, as is the position in England and Wales under s 52 of the *Coroners and Justice Act 2009*.<sup>150</sup> In doing so, it tempers to some degree the subjective nature of the

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<sup>147</sup> Note, however, Simester et al who would argue (in the context of negligence) that the ‘reasonable man’ ought to be endowed with certain limitations of the defendant: ‘[t]he reasonable man test should be subjective to the extent that the defendant’s shortcomings do not disclose fault.’ Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 4<sup>th</sup> ed, 2010) 155. In particular, they cite blindness, hearing and age as physical peculiarities that should be taken into account. Though reluctant to extend the scope of subjectivity beyond the physical, they do mention the more elusive concept of intelligence, or lack thereof, as the only non-physical characteristic for which an abnormal defendant should not be blamed; see general discussion, 154–57.

<sup>148</sup> *Coroners and Justice Act 2009* s 54.

<sup>149</sup> See *DPP v MacEoin* [1978] IR 27; *DPP v Kelly* [2000] 2 IR 1. See also Law Reform Commission of Ireland, *Report on Defences in Criminal Law* (Law Com No 95, 2009).

<sup>150</sup> *Coroners and Justice Act 2009* s 52(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.’ The sub-section is based on the Law Commission’s recommendation that the ‘abnormality of mind’ factor should provide an ‘explanation’ for the defendant’s conduct, Law Commission, above n 124, [5.124]. For further discussion, see Kennefick, above n 5, 761.

definition by ensuring that a connection exists between the circumstance in question and the killing.<sup>151</sup>

### **III. Conclusion**

An interrogation of the law relating to diminished responsibility in Ireland reveals that at its heart is an offender who is divided both internally and externally, from his moral circumstance and his mental disorder. A product of formalisation; the current law under s 6(1) stands as a remedy to mask the fundamental inadequacies of the traditional, Kantian approach to criminal responsibility. The objective of the more contextualised framework of blame argued for in this paper, is to redress the disconnections inherent in the criminal law as it relates to the Diminished Responsibility Offender, in particular.

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<sup>151</sup> Such an approach is also recommended by Mackay and Mitchell in the context of their hybrid definition: above n 132.