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Situating guilt: social injustice as a partial excuse

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Abstract

The pursuit of social justice in penal matters has regained momentum in Anglo-American criminal law debates. Among the various areas of discussion, a contentious issue is whether the social hardships that contribute to much criminal offending should be considered in the adjudication of criminal responsibility. Against this backdrop, this paper defends the position that chronic – ie long-lasting and ongoing – situations of social adversity can, in principle, warrant consideration in determinations of guilt. It therefore advances a proposal for a situational partial excuse (SPE) applicable to cases where criminal conduct is precipitated by conditions of chronic social adversity that unfairly diminish a person's opportunity to do otherwise. Importantly, the proposed excuse also accounts for the compounding role of both state and societal neglect in diminishing an individual's opportunities and resources to avoid wrongdoing. To this end, the paper integrates normative analysis with modern empirical insights into the relationship between adverse social contexts and crime, including through mechanisms of traumatic stress. It then elaborates the theoretical and doctrinal foundations of the SPE, articulates its statutory and evidentiary requirements, and discusses its coherence with core sentencing considerations.

Keywords: criminal law; social justice; responsibility; partial excuse; punishment

Introduction

The blurred line between social injustice[1] and criminal justice has regained traction in Anglo-American criminal law scholarship. The consistent recognition of the uneven application of criminal justice mechanisms to people from disadvantaged backgrounds reflects an acknowledgement of the institutional and social failures to respond effectively to the challenges confronting the most vulnerable members of society. In societies marked by inequalities, people from underserved and marginalised groups disproportionately find themselves involved in the criminal legal system. One reason is that the lack of economic resources and social opportunities is endemic to the genesis of harmful behaviours, including criminal conduct. Another reason is that many justice-impacted individuals suffer various forms of structural marginalisation prior to offending, such as institutional neglect, status-based discrimination, and a lack of means for accessing justice.[2] Importantly, these systemic forms of

[1]While many definitions exist, social justice refers to the fair and equal access to wealth, opportunities, and social benefits. Accordingly, social injustice encompasses systemic and structural inequalities rooted in institutions, laws, policies, and informal social practices that persistently disadvantage certain social groups, impacting their well-being. See M Powers and R Faden *Structural Injustice: Power, Advantage, and Human Rights* (Oxford: Oxford University Press, 2019).

[2]See for example C Haney *Criminality in Context: The Psychological Foundations of Criminal Justice Reform* (Washington DC: American Psychological Association, 2020).

inequality, both social and economic, expose disfavoured individuals to a higher risk of personal harms, such as domestic abuse and exposure to community violence.

When criminal offending results from structural, or systemic, inequality, achieving justice becomes challenging. This challenge is aggravated when the state itself is responsible for either creating or failing to alleviate the social harms that engender criminogenic conditions.[3] As Lacey has indicated, the unequal distribution of opportunities and resources 'shapes potential offenders' substantive opportunity to conform their behaviour to the norms of criminal law, and places special barriers on their efforts to do so'.[4] For Lacey and other commentators,[5] when the state holds such a responsibility, it lacks the moral authority to punish victims of injustice.

Under these circumstances, criminal law remains abstracted in its normative and dogmatic dimension. By operating with 'its own, internal conception of justice',[6] criminal law persists with its commitment to adjudicating any defendants as equal subjects who have freely chosen to break the law having adequately engaged their rational mental capacities[7] and despite a fair opportunity to adjust their behaviour to the law and do otherwise.[8] As long as blame is directed to punishing harmful conduct and protecting society from it, criminal law is just not designed to serve redistributive or social welfare functions beyond condemnation and protection.

For many years, scholarly criticism has emphasised several issues with the criminal law's insufficient regard for social injustice within the adjudication and punishment of criminal responsibility. This scholarly critique finds compelling support in the body of modern behavioural research – also labelled *social contextualism*[9] – indicating that overexposure to social harms like discrimination, institutional violence, or socioeconomic deprivation can significantly impact psychological well-being and behaviour, both in the short and long term, including through mechanisms of toxic or traumatic stress. A key insight is that in circumstances of persistent social adversity, individuals usually keep their rational mental capacities substantially intact; however, their interpretation and response to social cues are meaningfully shaped by, and are responsive to, the pathological contexts in which they operate. Thus, a person chronically exposed to adverse social conditions remains a rational subject whose choices are limited by and adapted to 'otherwise pathological and destructive present environments'.[10]

The breadth of available evidence on the relationship between social harms and problematic behaviour offers an important lens for reconsidering the boundaries of criminal responsibility[11] in the

[3]See M Manikis 'Recognising state blame in sentencing: a communicative and relational framework' (2022) 81 Cambridge Law Journal 294; see also L Zaibert et al (eds) *Responding to the Culpable State: Is Sentencing Mitigation Appropriate?* (Oxford: Hart Publishing, 2024).

[4]See N Lacey 'Criminal justice and social (in)justice' (LSE Working Paper No 84 2022) at https://eprints.lse.ac.uk/116949/1/Lacey_criminal_justice.pdf.

[5]See for example RA Duff *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001); RA Duff 'Blame, moral standing, and the legitimacy of the criminal trial' (2010) 23 Ratio 123; J Murphy 'Marxism and retribution' (1973) 2 Philosophy & Public Affairs 217; E Kelly *The Limits of Blame: Rethinking Punishment and Responsibility* (Cambridge, MA: Harvard University Press, 2018); A Poama 'Social injustice, disadvantaged offenders, and the state's authority to punish' (2021) 29 Journal of Political Philosophy 73; G Watson 'A moral predicament in the criminal law' (2015) 58 Inquiry 168; V Tadros 'Poverty and criminal responsibility' (2009) 43 Journal of Value Inquiry 391; JW Howard 'Moral subversion and structural entrapment' (2016) 24(1) Journal of Political Philosophy 24; T Shelby 'Justice, deviance, and the dark ghetto' (2007) 35 Philosophy and Public Affairs 126.

[6]See Lacey, above n 4.

[7]Ibid.

[8]HLA Hart *Punishment and Responsibility*: *Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968).

[9]For example, above n 2; C Haney 'Making law modern: toward a socio-contextual model of criminal justice' (2002) 8 Psychology, Public Policy & Law 3.

[10]See above n 2, p 10.

[11]This paper utilises 'criminal responsibility' in a narrow sense as a necessary condition for criminal liability and as synonymous for 'broad' culpability. See D Brink 'The nature and significance of criminal culpability' (2019) 13 Criminal Law and Philosophy 347. See also J Dressler *Understanding Criminal Law* (New York: LexisNexis, 4th edn, 2006) pp 126–128 (discussing 'broad' culpability); RA Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Oxford University Press, 2007) p 15 (distinguishing between responsibility and liability).

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context of chronic social adversity. This lens debunks individualistic and pathologising narratives of social disadvantage, partly shifting the focus from the individual to the adverse social contexts in which they are embedded. Drawing on this insight, this paper proposes a framework for recognising chronic – ie long-lasting and ongoing – social adversity[12] in determinations of guilt through the introduction a situational partial excuse (SPE). The proposed excuse focuses on chronic exposure to social hardships that – whether individually or in combination – operated as a choice-limiting factor contributing to the commission of the offence,[13] particularly in contexts where state or social aid is lacking or insufficient. The SPE builds on the rationales of situation-based doctrines such as duress – however with key departures – and adapts them to account for the persistent social adversities that characterise the defendant's living background. Notably, this partial excuse blends the logic of duress with elements of diminished responsibility doctrines, notably the Model Penal Code's Extreme Emotional Disturbance (EED),[14] to address the choice-limiting effects of chronic social adversity. The resulting judgment shifts focus away from the defendant's mind and towards the ways in which adverse social contexts influence decision-making. Thus, the SPE falls outside the traditional mental capacity mitigations, grounding reduced responsibility in the unfairly diminished opportunity to avoid wrongdoing imposed by chronic social adversity.

This paper is theoretical in both nature and scope. It focuses on addressing social injustice within existing canons of responsibility and excuse,[15] drawing on social contextualism as an empirical foundation for advancing the case for a partial excuse. The proposal aligns with, and complements, theoretical accounts that rely on the choice/capacity/fair opportunity model of criminal responsibility[16] to justify the acknowledgement of social injustice as a basis for sentencing mitigation.[17] Contributing to this body of literature, this paper explores whether, in principle, social injustice can be relevant to determinations of guilt – rather than solely to sentencing – and develops a framework for a partial excuse that enables its potential consideration at trial. The proposed partial excuse explicitly identifies chronic social adversity as a necessary, though not sufficient, condition for establishing a judgement of reduced responsibility.[18] It is not sufficient because, as a partial excuse to criminal guilt, additional criteria must be met – most notably, a demonstrated influence of such adversity on the defendant's conduct.[19] This

[12]This paper employs the concept of social adversity (or hardship) to refer to both systemic injustices – such as poverty, discrimination, institutional neglect – and personal injustices – such as interpersonal abuse and community violence – that stem from or are worsened by systemic inequalities. Due to their interconnected nature, these injustices and their impacts are addressed under a unified framework.

[13]See Section 4 below. Cf P Chau 'Temptations, social deprivation, and punishment' (2010) 30 Oxford Journal of Legal Studies 775 (engaging with the so called 'temptation argument' and holding that while *acting on* stronger temptations [motivating strength] in offending should be a mitigating sentencing factor, *facing* stronger temptations to offend should not).

[14]American Law Institute, Model Penal Code 1985, § 210.3(1)(b).

[15]See ibid. See also D Brink and D Nelkin 'Fairness and the architecture of responsibility' in D Shoemaker (ed) *Oxford Studies in Agency and Responsibility* vol 1 (Oxford: Oxford University Press, 2013) p 284.

[16]Hart, above n 8.

[17]For example, see BA Hudson 'Mitigation for socially deprived offenders' in A von Hirsch and A Ashworth (eds) *Principled Sentencing: Readings on Theory & Policy* (Oxford: Hart Publishing, 2nd edn, 1998) p 205; A von Hirsh and A Ashworth *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) pp 62–74; Chau, above n 13; R Lippke 'Social deprivation as tempting fate' (2011) 5 Criminal Law and Philosophy 277; R Lippke 'Chronic temptation, reasonable firmness, and the criminal law' (2014) 34 Oxford Journal of Legal Studies 75; M Bagaric 'Rich offender, poor offender: why it (sometimes) matters in sentencing' (2014) 33 Law & Inequality 1; D Brink 'Structural injustice and fair opportunity' in D Brink *Fair Opportunity and Responsibility* (Oxford: Oxford University Press, 2021) pp 210–228; K Sifferd 'How does structural injustice impact criminal responsibility?' (2023) 1 Criminal Law and Philosophy 1; B Ewing 'Criminal responsibility and fair moral opportunity' (2023) 17 Criminal Law and Philosophy 291. For a critical review of most recent scholarship see B Ewing 'Recent work on punishment and criminogenic disadvantage' (2018) 37 Law and Philosophy 29. See, more broadly, Section 2 below.

[18]See Ewing, ibid, at 38–41 (critiquing scholarly proposals – notably, Morse's and Lippke's – that recognise social deprivation as an eligible condition for a partial excuse for 'be[ing] of general kinds that a background of criminogenic social disadvantage is neither necessary nor sufficient to create').

[19]Cf *R v Ipeelee* [2012] SCC 13, para 83 (holding that sentencing considerations under s 718.2(e) of the Canadian Criminal Code (LRC) do not require a direct causal link between an Indigenous defendants' disadvantaged backgrounds and offence

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assessment must be informed by the insight that chronic social adversity shapes human choices 'not so much via acute pressures as by diffuse, longstanding ones',[20] constraining agency within harmful 'environments in which [individuals] find themselves'.[21] Crucially, the assessment also recognises the compounding role of both state and societal neglect in diminishing the opportunities and resources available to individuals to avoid wrongdoing and to act otherwise.

1. Social hardships do (not) matter

The relationship between social hardship and criminal offending is an old topic. Cesare Beccaria captured the relationship as early as 1764, when he described theft as the 'crime of poverty and desperation, the crime of that unhappy section of men to whom the perhaps "terrible" and "unnecessary" right to property has allowed nothing but a bare existence'.[22] More than a century later, though in a different register, even Cesare Lombroso eventually included situational components in the taxonomy of the 'occasional criminal' in the last volumes of *Criminal Man*.[23] In addition to these two pioneers in the history of law and criminology, contemporary commentators have commonly acknowledged the criminogenic effects of social disadvantage and argued for its relevance within the criminal process.

A broad consensus holds that social disadvantage can justify mitigation at sentencing.[24] This consensus has been reflected – albeit in a limited and discretionary way – in sentencing practice across various jurisdictions.[25] By contrast, greater controversies surround the specific relevance of social disadvantage to determinations of criminal guilt. To be sure, social disadvantage per se hardly exonerates people from criminal responsibility. In principle, statutory laws do not incorporate any explicit disadvantage-based excuse or justification. At most, defences such as necessity, self-defence, and loss of control/provocation can accommodate situations of hardship – such as abuse and homelessness – as circumstantial evidence.[26] Thus, exculpation still depends on the defendant meeting the specific legal requirements of the defence, rather than on their social circumstances as such.[27]

To address this gap, several scholars have over the years proposed defences – such as *'rotten social background'*, '*poverty*', or '*hardship*' defences[28] – that recognise identified social disadvantages, whether

because these circumstances 'do not operate as an excuse or justification for the criminal conduct' but 'provide the necessary context to enable a judge to determine an appropriate sentence'). For an analysis see B Ewing and L Kerr 'Reconstructing *Gladue*' (2024) 74 University of Toronto Law Journal 156 at 184–188.

[20]Ewing and Kerr, ibid, at 190.

[21]Ibid.

[22]C Beccaria [R Davies (transl)] *On Crimes and Punishments and Other Writings* R Bellamy (ed) (Cambridge: Cambridge University Press, 2012) p 53.

[23]C Lombroso [M Gibson and N Hahn Rafter (transl)] *Criminal Man* (Durham, NC: Duke University Press, 2006) ch 41.

[24]See above n 17.

[25]See the recent amendments to the UK Sentencing Council Guidelines, effective from 1 April 2024, including the addition of defendants' 'deprived backgrounds' as a mitigating factor, at https://www.sentencingcouncil.org.uk/wp-content/uploads/2024-03-20-Log-of-changes-for-publication.pdf. See also the Supreme Court of Canada's decisions in *R v Gladue* [1999] 1 SCR 688, paras 24–65 (interpreting s 718.2(e) LRC as instructing judges to treat imprisonment as a last resort for all perpetrators, giving particular attention to the circumstances of Indigenous people) and in *R v Ipeelee*, above n 19, para 73 (recognising that in sentencing Indigenous people, there are unique systemic and background circumstances that 'may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness'). Cf United States Federal Sentencing Commission's Guidelines Manual, § 5H1.10 and § 5H1.12 (2023), at https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2023/GLMFull.pdf (explicitly excluding that the individual's socio-economic status, race, gender, as well as the lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing, should be relevant grounds for a sentencing departure).

[26]For example *Commonwealth v Magadini*, 2015 WL 11070269 (Mass 2016).

[27]For example, SJ Morse 'Severe environmental deprivation (AKA RSB): a tragedy, not a defense' (2011) 2 Alabama Civil Rights & Civil Liberties Law Review 147; P Robinson and L Holcomb 'Individualizing criminal law's justice judgments: shortcomings in the doctrines of culpability, mitigation, and excuse' (2022) 67 Villanova Law Review 273.

[28]For example D Bazelon 'The morality of criminal law' (1976) 49 California Law Review 385; R Delgado '"Rotten social background": should the criminal law recognize a defense of severe environmental deprivation?' (1985) 3 Law & Inequality 9;

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historical or present, as autonomous grounds for exculpation. These proposals, however, have met with strong resistance from mainstream scholarship.[29] A central objection to recognising social hardhips as exculpatory lies in criminal law's foundational conception of individuals as rational and autonomous agents. Within this framework, human action is presumed to be governed by reason, and individuals are understood to possess the capacity to resist external pressures. This assumption further sustains the principle that guilt is inherently *personal* – attributed to the individual's conscious and voluntary decision to violate the law.[30]

Moreover, although socio-contextual factors may influence behaviour, the fact that many individuals facing severe disadvantage refrain from engaging in criminal conduct is often cited to argue that such factors merely increase the risk of offending, rather than deterministically causing it.[31] To presume otherwise would undermine the agency and dignity of disadvantaged people, advancing a deficit-based view that pathologises inequality and perpetuates stigma.[32] On this view, exculpating criminal conduct on the basis of social hardship risks denying the moral agency of those affected[33] and, in doing so, contradicts the egalitarian principles of criminal law.[34]

Furthermore, as previously noted, social adversity may be addressed in sentencing.[35] This practice is supported by several factors that intersect streamlined procedures and judicial politics. Among these are the challenges of implementing mitigation defences at trial, the gradual decline of jury trials coupled with incentives for guilty pleas, and the risk of burdening jurors with issues that blur the lines between politics and law. In the broader context of the legal and political culture surrounding trials (or the lack thereof), these issues can pose substantial obstacles for those advocating the consideration of social hardships at trial. Indeed, the prevailing opinion is that judges should be mandated to apply just discounts to disadvantaged defendants at sentencing, even if they possess considerable discretion in determining the mitigating relevance of the social adversity and the extent of the sentencing discount.

2. Rational choices in pathological contexts

An accredited theory in social psychology posits that human judgement generally suffers from cognitive attribution bias, better known as 'fundamental attribution error'.[36] This bias reflects the tendency for people to over-emphasise dispositional, or personality-based, explanations for behaviours observed in others while underemphasising situational explanations. In other words, people tend to judge a person's actions by nearly exclusively considering the person's individual traits rather than the social and environmental influences on such actions. Therefore, people normally identify the 'causes' of wrongful acts *inside* the person who committed them, overlooking the effects of the circumstances in which the acts developed and manifested.

ME Gilman 'The poverty defense' (2013) 47 University of Richmond Law Review 495; BA Hudson 'Punishment, poverty and responsibility: the case for a hardship defence' (1999) 8 Social Legal Studies 583. For other proposals, see A Kaye 'The secret politics of compatibilist criminal law' (2007) 55 Kansas Law Review 365 at 422.

[29]For example, M Moore 'The relevance of philosophy to law and psychiatry' (1984) 6 International Journal of Law & Psychiatry 177 at 179; S Kadish 'Excusing crime' (1987) 75 California Law Review 257 at 284–285; M Moore 'Causation and the excuses' (1985) 73 California Law Review 1091; P Robinson 'Are we responsible for who we are? The challenge for criminal law theory of coercive indoctrination and "rotten social background"' (2011) 2 Alabama Civil Rights & Civil Liberties Law Review 53; Morse, above n 27.

[30]RA Duff 'Choice, character, and criminal liability' (1993) 12 Law and Philosophy 345 at 347.

[31]For example Morse, above n 27.

[32]For example Kadish, above n 29, at 284–285.

[33]R Lippke 'Retribution and incarceration' (2003) 17 Public Affairs Quarterly 29 at 43.

[34]See Morse, above n 27.

[35]See above n 25.

[36]For example L Ross and RE Nisbett *The Person and the Situation: Perspectives of Social Psychology* (New York: American Psychological Association, 1991) pp 90–118; Z Kunda *Social Cognition: Making Sense of People* (Cambridge, MA: MIT Press, 1999) pp 417–418; DT Gilbert and PS Malone 'The correspondence bias' (1995) 117 Psychological Bulletin 21.

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As a human practice,[37] criminal law similarly suffers from this cognitive attribution bias insofar as it almost entirely allocates criminal responsibility to the individual aspects of human behaviour, minimising the role of situational forces.[38] This normative drawback becomes even more evident when placed under the lenses of *social contextualism*.[39] This perspective encompasses the broad research from social psychology and neuroscience to analyse the inescapable influences of socio-contextual factors on human behaviour, including both the historical and present contexts of individuals. This research emphasises the power of ongoing situations, contexts, and circumstances, all of which can 'elicit, precipitate, or provoke, and activate a wide range of behaviour – behaviour that is hardly the product of unencumbered "free choices"'.[40] There is now little empirical disagreement that human behaviour must be understood in context, as socio-contextual factors 'have repeatedly been shown to have a far more important and powerful influence' than individual predispositions.[41]

Robust research has documented the harmful behavioural effects of chronic exposure to social adversity, such as socioeconomic deprivation, persistent inequality, institutional neglect, repeated abuse, community violence, or a combination of these. This research has primarily recognised chronic social adversity as a potential source of (injustice) trauma,[42] which can[43] impact cognitive and emotional processes governing judgement, impulse control, empathetic responding, regulation of emotions, responsivity to social cues, and perception of threat,[44] thereby initiating or exacerbating problematic behavioural patterns. Overexposure to these adversities is now linked to a heightened risk of maladaptive tendencies, social withdrawal, self-harming behaviours, and aggression or violence towards others – among other implications.[45]

[37]See A Ristroph 'Criminal law for humans' in D Dyzenhaus and T Poole (eds) *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012) pp 97–117; A Ristroph 'The wages of criminal law exceptionalism' (2023) 17(1) Criminal Law and Philosophy 5.

[38]Limited exceptions include, for example, the defence of duress, which acknowledges the possibility of non-responsibility due to the effect of extreme situational pressures; and the defence of loss of control, which relies on the presupposition that a certain type/degree of external provocation may mitigate murder to manslaughter. But see D Dripps 'Fundamental retribution error: criminal justice and the social psychology of blame' (2003) 56 Vanderbilt Law Review 1385 at 1424–1430 (emphasising the greater legal receptivity to excuses that involve third-party wrongdoing, such as duress or provocation, than to those based on impersonal hardship such as poverty, trauma, and addiction). See also R Lippke 'Diminished opportunities, diminished capacities: social deprivation and punishment' (2003) 29 Social Theory and Practice 459 at 463 (noting that 'the criminal law is largely indifferent to the pressures, hardships, or temptations that individuals face, perhaps through no fault of their own'); M Kelman 'Interpretive construction in the substantive criminal law' (1981) Stanford Law Review 591 at 644 (holding that duress 'represents a severe threat to ordinary criminal law discourse' of individual culpability and noticing its limited application 'in terms of both time and the pressures that may influence the perpetrator. For the most part, only discrete incidents can form the basis of a duress plea, and these incidents must occur close in time to the arguably criminal incident').

[39]See Haney, above n 9.

[40]See above n 2, p 50.

[41]Ibid, p 6.

[42]See for example ibid; M Gelkopf 'Social injustice and the cycle of traumatic childhood experiences and multiple problems in adulthood' (2018) 1 JAMA e184488; A Hui et al 'Institutional injustice: implications for system transformation emerging from the mental health recovery narratives of people experiencing marginalization' (2021) 16 PLoS One e0250367; J Cenát 'Complex racial trauma: evidence, theory, assessment, and treatment' (2023) 18 Perspectives on Psychological Science 675.

[43]Not everybody relentlessly exposed to severe social adversity undergoes the same effects to the same extent. Variability depends on several factors, including one's age, resilience, coping strategies, the duration of the adversity, and the presence of social and institutional 'buffers'. See above n 2, pp 52–60.

[44]For example JD Bremmer 'Traumatic stress: effects on the brain' (2006) 8 Dialogues in Clinical Neuroscience 449.

[45]For example C Smith and T Thornberry 'The relationship between childhood maltreatment and adolescent involvement in delinquency' (1995) 33 Criminology 451; C Widom 'Does violence beget violence? A critical examination of the literature' (1989) 106 Psychological Bulletin 3; A Wall and R Barth 'Aggressive and delinquent behavior of maltreated adolescents: risk factors and gender differences' (2005) 8 Stress, Trauma, & Crisis 1.

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When overwhelming social adversity is a source of trauma, it can trigger levels of stress that exceed one's ability to cope.[46] This type of stress is often referred to as *toxic stress*.[47] When toxic stress is chronic and unbuffered, it places an individual 'under special demands that may lead not only to significant distress but also to an exhaustion of resources that – in a vicious circle – causes greater subsequent vulnerability'[48] to harmful conduct. Unlike traumatic life events, the challenge here lies in the 'ongoing requirement of coping with difficult *unchanging* realities'.[49] Moreover, chronic stress can develop insidiously, manifesting over time. Research suggests that strains arising from social adversity, such as living in underserved communities or suffering from abuse and discrimination, can be deeply traumatising and may 'influence individuals from birth to death'.[50] Neurobiologically, continued toxic or traumatic stress entails the repeated or prolonged activation of the biological stress-response system. This heightened biological response affects brain pathways[51] that govern psychological functions such as self-regulation, perception of and responsivity to social cues, impulse control, empathetic responding, and emotion regulation.[52] Alterations to these functions have been associated with a heightened risk of harmful behavioural patterns, including criminal conduct.

The criminogenic effects of chronic social adversity are widely recognised in the literature. For instance, in his compelling work on the contextualisation of crime,[53] Craig Haney meticulously compiled convergent evidence from 'decades of mounting research and coherent underlying theory'[54] to describe how criminal offending all too often originates in various forms of chronic adversity. Such adversity can include institutional abuses and neglect, structural racism, and socioeconomic deprivation, including their interconnections with personal traumas, such as experience of abuses and exposure to community violence. A key aspect of Haney's account is that, in addition to historical, or background adversities, such as being victim of child abuse, ongoing situations tied to a person's living environment, setting, and experiences profoundly shape behavioural patterns. While acute situational forces trigger immediate behavioural reactions, ongoing or repeated exposure to social harms can affect behaviour in a more gradual, cumulative way. Chronic exposure to toxic environments and situations, which Haney terms 'situational stressors',[55] can have lasting effects on the individual, leading to offending both in the short and the long term.[56] For Haney, even a person's continued presence in criminogenic contexts can lead to persistent law-breaking, often as a means of *coping or survival.*[57] Thus, law-breaking behaviour becomes a response mechanism to adverse structural conditions, especially when institutional support is lacking or ineffective. In this sense, criminal behaviour may serve as a way to navigate pathological socio-environmental demands. At the same time, harmful contexts constitute situational opportunities and demands for law-breaking conduct, as well as barriers to crime desistance.[58]

Altogether, contemporary empirical research invites a view of much wrongful behaviour by socially harmed people through the lenses of their own adversity. As emphasised, chronic exposure to severely unhealthy social contexts can provide powerful situational opportunities for precipitating adverse behavioural outcomes, including criminal conduct. A critical insight for this paper is that, in many

[46]See above n 44.
[47]For example H Franke 'Toxic stress: effects, prevention, treatment' (2014) 1 Children 390; S Lupien et al 'Effects of stress throughout the lifespan on the brain, behavior and cognition' (2009) 10 Nature Reviews Neuroscience 434.
[48]H Keren 'Consenting under stress' (2013) 64 Hastings Law Journal 679 at 701.
[49]Ibid.
[50]Ibid, at 702.
[51]See above n 44.
[52]See for example Lupien et al, above n 47.
[53]See above n 2.
[54]Ibid, p 37.
[55]Ibid, p 178.
[56]Ibid, p 257.
[57]Ibid, p 177.
[58]See for example J Laub and R Sampson 'Understanding desistance from crime' (2001) 28 Crime and Justice 1.

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cases, socially harmed individuals who engage in criminal conduct neither suffer from any substantial 'defect' in rationality and control nor become helpless victims of the adverse circumstances in which they act. Instead, these people use their practical reasoning skills to make choices that adapt to their ongoing pathological situations. Thus, their choices are rational but 'limited' by the objective situational influences originating in the harmful social contexts they persistently confront.

3. Situating guilt

The science of social contextualism paints a nuanced picture of the interactions between social factors and criminal conduct. Importantly, this scientific account does not suggest that offending behaviour in situations of social hardship is not the product of a person's choices, reasons, and capacities. Rather, it suggests that people's choices, reasons, and capacities for engaging in criminal behaviour in such situations should be understood in the context of those hardships. In other words, people who commit crimes under the influence of, and amid, chronic social hardships should be seen as rational agents, with their choice to offend often 'shaped through interactions with features of their environment, [and] contingent on responses emanating from that context'.[59] While individuals living in chronic social adversity do have options beyond crime, they are often trapped in contexts with few viable legal avenues to meet their needs and protect their interests.[60] Persistent, unbuffered hardships create genuinely difficult choices, fostering patterns of distress and trauma that can lead to dysfunctional behaviour, even when the mental capacity to comply with the law remains intact.[61] This recognition does not involve adopting a narrative that de-responsibilises or pathologises social disadvantage; instead, it maintains the individual's status as a rational agent within harmful contexts that condition and limit their choice to avoid wrongdoing.

Consider, for example, a financially abused woman living in a marginalised community who commits fraud to cope with an abusive environment. Domestic abuse, especially in marginalised contexts, creates a situation that often precipitates criminality as a means of survival and resistance to further victimisation, especially when help-seeking resources are unavailable, inaccessible, or unhelpful.[62] Most people living in abusive relationships do not experience substantial impairment of mental capacity. Their perception of limited options is not delusional, as they can appreciate the significance of their conduct and retain self-control.[63] The real issue in such cases is that the harmfulness of their environment unfairly limits the range of available options.[64] They are rational persons, living in harmful circumstances, who resort to crime to respond to persistent victimisation as many others in similar circumstances would, however wrong.

Collectively, these considerations lend support to various theoretical arguments in favour of recognising the mitigating relevance of social injustice. Among these, several scholars have proposed 'temptations' or 'incentives' arguments,[65] explaining why ongoing disadvantage may warrant defendants

[59]J Fagan 'Contexts of choice by adolescents in criminal events' in T Grisso and RG Schwartz (eds) *Youth on Trial: A Developmental Perspective on Juvenile Justice* (Chicago: University of Chicago Press, 2000) p 369 at p 371. As Haney explains, this claim is equally applicable to the adult population. See above n 2.

[60]See also Shelby above n 5, at 142–143 (acknowledging that some born into ghetto poverty escape through support, determination, or luck, but this does not negate the claim for redress of those who remain behind).

[61]See also RG Wright 'The progressive logic of criminal responsibility and the circumstances of the most deprived' (1994) 43 Catholic University Law Review 459 at 476.

[62]See for example A Moe 'Blurring the boundaries: women's criminality in the context of abuse' (2004) 32(3/4) Women's Studies Quarterly 116.

[63]AS Burke 'Rational actors, self-defense, and duress: making sense, not syndromes, out of the battered woman' (2002) 81 North Carolina Law Review 211.

[64]See above n 62, at 135.

[65]Von Hirsch and Ashworth (2005), above n 17; Chau, above n 13; Lippke (2014), above n 17; C Lewis 'Inequality, incentives, criminality and blame' (2016) 22 Legal Theory 153 (discussing 'criminogenic incentives' as cultural models of criminality, where disadvantaged individuals are driven by criminogenic values rather than lack of alternatives. Even if empirically weak,

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with intact rational capacities a lesser punishment. For example, Richard Lippke[66] has argued that the persistent struggles faced by people inhabiting severe social deprivation create a 'perverse incentive structure' that chronically tempts even individuals with strong self-control to yield in criminal behaviour. According to Lippke, people living in poverty must constantly overexert their self-control to resist situational pressures to offend, leading to eventual depletion. In his view, social deprivation may give rise to 'chronic temptation' – which may lead even agents of 'reasonable firmness' to do wrong.[67] While Lippke distinguishes 'chronic temptation' from duress, he holds that this condition should at least be treated as a partial excuse – 'typically in the form of sentencing mitigation'[68] – as it places individuals in conditions where their ability to comply with the law is constrained by persistent adverse circumstances.[69]

Although the science of social contextualism does not speak in terms of 'temptations', it nonetheless affirms that chronic social adversity can operate as a genuine choice-limiting factor insofar as it shapes individuals' perceptions and coping mechanisms, thereby making it more difficult to avoid succumbing to crime. Social contextualism further emphasises that conditions of chronic social adversity do not typically constrain agency through acute or immediate pressures; rather, they exert their influence gradually, shaping decision-making and behavioural trajectories over time. Their impact, in other words, is diffuse and longitudinal. Moreover, such adversity does not affect all individuals uniformly, although criminal outcomes are especially likely to arise in contexts where institutional and social support are absent or inadequate.[70]

This observation aligns with scholarly accounts that locate the mitigating force of diminished fair opportunity in the cumulative impact of social adversity on an individual's dispositions and motivations to refrain from wrongdoing. Ewing,[71] for instance, argues that a diminished fair opportunity associated with social disadvantage arises because such disadvantage operates as an obstacle both to avoiding wrongdoing and to acting in accordance with the moral reason to comply with the law. In his view, while such obstacles may not negate or outweigh the moral reasons against wrongdoing in the manner required to avoid condemnation – as in cases of duress – they nonetheless warrant a reduction in punishment insofar as they impair a person's ability to avoid becoming guilty and, consequently, to avoid punishment. In partial contrast to Hart's fair opportunity account,[72] Ewing contends that this condition is not confined to the presence of legal protections against liability to punishment. More fundamentally, it concerns the distribution of 'background *social* protections'[73] that shield individuals from circumstances likely to precipitate criminal conduct. The element of *unfairness*, he clarifies, does not lie merely in the severity of the adversities themselves, but 'in the fact that [these adversities] arise from independently wrongful or unjust treatment of [the person], or that they are operating on a person who has lacked a fair share of opportunity to act in accordance with moral reason across her life'.[74] On this account, fair moral opportunity is defined not simply by the absence of immediate pressure, but by the absence of *relational disempowerment* – a condition in

such models support the view that the disadvantaged – though mentally competent – often face stronger incentives to offend, weakening our moral standing to blame them).

[66]See Lippke (2011), above n 17.

[67]Lippke (2014), above n 17.

[68]Ibid, at 95.

[69]But see Ewing (2018), above n 17, at 41 (observing that Lippke's notion of chronic temptation is not limited to social disadvantage, but concerns persistent pressure to offend, which could also affect advantaged individuals).

[70]Cf Howard, above n 4 (introducing 'structural entrapment' as a condition where the state, through unjust laws or policies, foreseeably fosters environments that subvert moral agency and increase the likelihood of offending).

[71]Ewing (2023), above n 17.

[72]Above n 8. See also ibid, at 51 (acknowledging the responsibility problem of deeply disadvantaged individuals but leaving the issue untheorised).

[73]Ewing (2023), above n 17, at 310–311.

[74]Ibid, at 313.

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which a person's power over her moral fate is constrained by the wrongful or unjust conduct of others.[75]

Along similar lines – and drawing on Howard's notion of 'moral fortification'[76] – Ewing and Kerr[77] adopt a broad conception of fair opportunity to avoid crime that takes into account 'both (a) obligations and opportunities that [the person] may have had to fortify herself against those constraints and pressures, and (b) difficulties and costs that may have stood in the way of so fortifying herself'.[78] On this view, fair opportunity ultimately hinges on whether the state and society have provided the individual with a fair share of opportunities and resources conducive to fortifying themselves against pressures that make it difficult or costly to avoid crime.[79] Framed in this way, assessments of fairness must take into account the realistic chances and resources available to the individual to avoid falling into circumstances that ultimately contributed to her wrongdoing.

This framing aligns with the view that the lack of fair opportunity acquires mitigating relevance only when the offence is conditional upon persistently suffered injustice. Tommie Shelby's distinction between *civic reciprocity* and *natural duties*[80] is instructive in this regard. Shelby argues that individuals subjected to deep and enduring social injustice may, in some cases, be justified or excused for committing offences – such as drug distribution, theft, prostitution, welfare fraud, tax evasion, or shoplifting – that presuppose the existence of fair play in society. Because these offences often arise from deprivations of civic reciprocity – the mutual obligations that fairness in society would demand – the moral obligation to refrain from such conduct may be significantly weakened. Under sustained conditions of injustice, these acts may be viewed as less unreasonable or even morally legitimate. However, Shelby emphasises that the deprivation of civic reciprocity does not absolve individuals of their natural duties, including the duty not to be cruel, to avoid causing gratuitous harm, and to respect the moral status of others. These duties bind all moral agents, irrespective of how justly they have been treated by the state or society. Accordingly, acts such as taking another person's life, committing sexual assault, or robbing someone at gunpoint cannot be excused or justified by reference to social disadvantage, 'not because they are forbidden by law but because they cannot be fully justified from a moral point of view'.[81] David Brink advances a similar position. He argues that mitigation on the basis of social injustice should be contingent on a 'suitable nexus between the injustice and the crime committed'.[82] For Brink, crimes such as 'non-violent drug trafficking, prostitution, and fraud, in the right circumstances, might be … rational responses to the significantly reduced … opportunit[ies] that the marginalised face'.[83] In cases involving these and other offences like burglary, shoplifting, and street crime in general – including certain street crime classified as violent[84] – committed in response

[75]Ibid.

[76]JW Howard 'Punishment as moral fortification' (2017) 36(1) Law and Philosophy 45.

[77]Above n 19.

[78]Ibid, at 178.

[79]Ibid.

[80]Above n 5, at 151–156.

[81]Cf Ewing and Kerr, above n 19, at 190 (clarifying that the *Gladue* principles apply across all crimes, albeit 'the case for thinking that an offender was deprived of a fair opportunity to avoid his criminal culpability is likely to be clearer and stronger in the case of economic offences … than in … murder or sexual violence').

[82]Brink above n 17, at 225. It is worth noting that, under Brink's synchronous conception of the fair opportunity to do otherwise, social disadvantage bears on criminal responsibility – potentially supporting a partial excuse – only insofar as it impairs an individual's situational control, that is, their capacity to resist *immediate* situational pressures. But see Sifferd above n 16 (raising the concern that Brink fails to explain why a lack of situational control makes a person less culpable – or what about it renders them less deserving of blame and punishment).

[83]Brink above n 17, p 228.

[84]For an analysis of the inconsistently broad understandings of violence in criminal law see A Ristroph 'Criminal law in the shadow of violence' (2011) 62 Alabama Law Review 571; BA Hudson *Justice Through Punishment* (London: Macmillan, 1987) p 126; BA Hudson *Justice in the Risk Society* (London: Sage, 2003) p 61 (distinguishing between 'class-correlated' crimes such as street theft, robbery, burglary, and drug offences, and 'less class-correlated crimes' like domestic abuse and sexual violence, as well as the differences between 'serious crimes' [for their harmfulness to society] and 'crimes that are taken seriously by the

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to severe social adversity, the weight of such adversity may play a more meaningful role in balancing considerations of harm.[85] By contrast, mitigation is rarely applicable to offences such as aggravated assault, sexual violence, or domestic abuse, where the connection to social injustice is either tenuous or morally indirect.

Collectively, these accounts typically situate the mitigating force of social injustice within the context of sentencing. However, a key theoretical question remains whether such mitigation – and the foundations that support it – can be considered, in principle,[86] at the stage of guilt determination, thereby potentially allowing for a partial excuse at trial. To be sure, Anglo-American law does not recognise partial excuses at trial; with few exceptions,[87] responsibility is treated as 'a bivalent concept so that people are either fully guilty or not, and the responsibility threshold is rather low'.[88] Instead, diminished responsibility is most commonly applied through discretionary sentencing mitigation.

In his work on capacity-based generic partial responsibility,[89] Stephen Morse critiques this bivalent conception of responsibility. In his view, criminal responsibility should not be treated as an all-or-nothing construct, since certain conditions – such as diminished mental capacity – may substantially affect responsibility without fully negating it.[90] Moreover, existing excuse doctrines, such as duress and insanity, are exceedingly narrow in scope. By contrast, Morse argues that determinations of guilt should be more capacious, taking fuller account of the various constraints that can meaningfully limit individuals' capacity to choose lawfully. These constraints bear directly on crucial components of culpability and, accordingly, warrant consideration at the stage of liability.[91]

From this perspective, the mitigating relevance of conditions that diminish culpability should extend beyond sentencing considerations to guilt determinations, thereby recognising partial responsibility that reduces blame and, consequently, punishment.[92] Framed this way, partial responsibility constitutes an explicitly normative judgement of reduced blameworthiness to be made by a fact-finder before the verdict rather than by a sentencer post-conviction.[93] This judgement reflects the principle that responsibility exists on a continuum[94] and that holding an individual fully accountable when their ability to avoid wrongdoing was substantially constrained would be unjust. From a communicative standpoint,[95] recognising partial responsibility at trial conveys the moral message that those whose choices were

criminal justice and law enforcement systems' [because of the groups to which the perpetrators belong] – all of which contribute to 'class bound definitions of harm').

[85]See ibid and Bagaric, above n 17, at 41.

[86]See above n 35 and accompanying text.

[87]For example, the common law's 'heat of passion doctrine' and the Model Penal Code's 'extreme mental and emotional disturbance', both of which apply only to homicide crimes and serve to reduce murder to manslaughter.

[88]SJ Morse 'Criminal responsibility reconsidered' (2023) Criminal Law and Philosophy 1 at 14. See also SJ Morse 'Diminished rationality, diminished responsibility' (2003) 1 Ohio State Journal of Criminal Law 289 ('To understand the unjustifiable limitations of current doctrine, consider … heat of passion upon legally adequate provocation, and extreme mental or emotional disturbance for which there is reasonable explanation … Why should these doctrines be limited to homicide?').

[89]See ibid. See also SJ Morse 'Excusing and the new excuse defenses: a legal and conceptual review' (1998) 23 Crime and Justice 329 at 397. Although Morse's initial formulation of the Generic Partial Responsibility (GPR) excuse appeared to include cases involving either diminished mental capacity or sufficiently hard choices, his subsequent work on GPR focused exclusively on cases involving diminished mental capacity – particularly mild to moderate forms of mental illness that would not qualify for an insanity defense. He left unexplored the possibility of applying the GPR to situational hard choices. Morse has also consistently opposed ad hoc 'rotten social background' or 'social deprivation excuse' (SED) defences. In his later works, however, he has acknowledged that his proposed generic partial excuse could encompass cases of social deprivation – provided they substantially impair an individual's rational capacities. See Morse, above n 27, at 171.

[90]See ibid. See also Brink and Nelkin, above n 15.

[91]See Morse, above n 89, at 331 ('[T]he … excuses the law … recognizes … are actually premised on two … underlying excusing conditions, primarily the general incapacity to grasp and be guided by good reason and also situations of hard choice').

[92]See Morse (2023), above n 88, at 14.

[93]See Morse, above 88 and 89, and in particular Morse (2003), above n 88, at 298–299.

[94]See Morse (2023), above n 88, at 14.

[95]See JP Steffen 'A Kantian and communicative approach to criminal adjudication' (2021) 71 Syracuse Law Review 1337.

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unfairly limited by their circumstances – whether endogenous or exogenous – should receive a more lenient punishment.

Similarly endorsing a scalar view of excuses, Erin Kelly[96] argues that excuses function as moral responses to the limits of an agent's moral capacity and to the fairness of holding someone fully blameworthy under difficult circumstances. For Kelly, excuses question the fairness of ordinary moral expectations when it is unreasonable to expect a person to act morally, even if they remain broadly rational. Ultimately, it is unjust to hold individuals to standards higher than most could reasonably meet, especially when they face significant internal or external obstacles to moral action. This conception of excuse extends beyond the traditional and rigid defences currently recognised in the law, allowing for the recognition of excuses in cases where an individual deserves diminished moral blame due to their personal or social circumstances.

The integration of Kelly's with Morse's perspectives provides a robust foundation for the argument that ongoing exposure to chronic social adversity can – and arguably should – justify a partial excuse at trial. The disruptive impact of these adversities hinges on a fundamental precondition of responsibility – the fair opportunity to choose otherwise – raising the broader normative question of whether it is reasonable to expect agents to act lawfully under conditions of sustained injustice. This question presents a normative issue of blameworthiness that should be addressed as a matter of criminal guilt, rather than solely as a matter of punishment. Recalling the communicative perspective, acknowledging the mitigating force of social injustices in guilt determinations would more powerfully convey the message that '[t]he marginalized in a society do not benefit from the rule of law in the way that other members of their society do'.[97] Consequently, a finding of partial responsibility by reasons of endured injustice reflects a normative judgement that fully blaming individuals for crimes committed under severe and ongoing adversity would be unjust.

This conclusion finds support in the principle of personal guilt, including an understanding of the predicate 'personal' as denoting 'mental belongingness'.[98] Accredited scholarship holds that a criminal act can be said to 'belong' to the mind of the individual when they act under 'ideal decision-making conditions'.[99] As discussed earlier, such 'ideality' exists not only when the individual exercises sound practical reasoning and is free from extreme coercion, but also when they are free from persistent hardships that unfairly limit their choices to comply with the law. Although such pressures are neither acute nor immediate, their cumulative psychological toll can be severe enough to present a sufficiently hard choice and a significantly reduced opportunity to avoid crime. The individual's guilt should, at minimum, be reduced.

In light of the foregoing, the remainder of this paper develops a framework for a situational partial excuse (SPE) that explicitly recognises chronic social adversity as a ground for reduced responsibility. The following sections elaborate the doctrinal foundations of the proposed framework, alongside its statutory and evidentiary requirements.

4. A proposal for a situational partial excuse

(a) Doctrinal foundations

An SPE qualifies as a reduced responsibility doctrine, applicable when an individual commits an offence in response to chronic social adversity that significantly limits their opportunity to comply with the law. Notably, this partial excuse applies to cases where: (1) the individual has been chronically exposed to social hardship; (2) state or social aid has been absent or inadequate; and (3) these conditions operate as a

[96]EI Kelly 'What is an excuse?' in D Justin Coates and NA Tognazzini (eds) *Blame: Its Nature and Norms* (Oxford: Oxford University Press, 2013) p 244.

[97]Brink, above n 17, p 271.

[98]See F Coppola *The Emotional Brain and the Guilty Mind: Novel Paradigms of Culpability and Punishment* (Oxford: Hart Publishing, 2021) pp 162–166.

[99]For example K Ferzan 'Holistic culpability' (2007) 28 Cardozo Law Review 101.

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choice-limiting force contributing to the commission of the offence. This excuse does not negate the individual's rationality or autonomy but recognises reduced responsibility in contexts where unfair social adversity restricts lawful options. Accordingly, the conduct remains legally wrong, yet culpability is reduced because the offence occurred under persistent circumstances that rendered lawful behaviour substantially more difficult to maintain.

The rationale underlying SPE is qualitatively analogous – though differing in form and degree – to that of duress. Traditionally, duress excuses an individual when their choice to offend is compelled by an imminent threat of harm and overwhelming pressure to commit the crime.[100] The coercive source may be a human threat or, in the case of duress of circumstances,[101] from external conditions or natural events.

The excusatory force of duress derives from intense pressure that virtually nullifies the person's freedom of choice. In this sense, duress does not undermine the person's status as a rational agent but rather challenges their reasons for wrongdoing, insofar as the external pressure deprives them of a fair opportunity to avoid it. As Ewing and Kerr observe, the person is 'likely to be confronted both with *weaker reasons* to avoid wrongdoing and with *special obstacles* that make wrongdoing more difficult or costly to avoid'.[102] Positioned as a non-culpable victim of a wrongfully imposed difficult choice, the person cannot be fairly expected to resist the coercive pressure and act otherwise.[103]

Duress further recognises that legal compliance cannot fairly be expected when extreme pressures would compel an ordinary person of 'reasonable firmness' to offend. The common law's test to assess this requirement combines the actor's reasonable and genuine belief in the existence of a threat[104] with the requirement that their will was overborne and that a reasonable person of 'average fortitude and courage'[105] would similarly feel compelled to act unlawfully.[106] Less stringent formulations, such as that of the Model Penal Code,[107] adopt a more individualised test, focusing on what a person of reasonable firmness in the 'actor's situation' would have done. This approach preserves a standard that 'normal members of the community will be *able* to comply with'[108] while evaluating the offence in light of the individual's conditions.

In principle, the SPE embraces the core principles of duress – situational pressure and reasonableness – but departs from it in key respects. Regarding *situational pressure*, the SPE applies when criminal conduct results from cumulative pressures stemming from chronic social hardship, which progressively impair the individual's ability to choose lawful conduct. Like duress, the defendant acts unlawfully under situational constraints. However, these constraints do not arise from immediate unlawful pressures, but

[100]American Law Institute, Model Penal Code 1985, § 2.09.

[101]Duress of circumstances is often confused with necessity, which is generally held to be a justification. See *R v Conway* [1989] QB 290. But see *R v Martin* [1989] 88 Cr App R 343; *R v Abdul Hussain* [1999] Crim LR 570 (both affirming that duress of circumstances is governed by the same rules as duress by threat). On the ambiguities surrounding the excusing nature of duress of circumstances, especially in relation to the necessity justification, see eg C Wells and O Quick *Lacey, Wells and Quick Reconstructing Criminal Law: Texts and Materials* (Cambridge: Cambridge University Press, 2010) p 442. Cf N Padfield 'Duress, necessity and the Law Commission' (1992) Criminal Law Review 778 at 786–789.

[102]Above n 19, at 173.

[103]See for example J Dressler 'Exegesis of the law of duress: justifying the excuse and searching for its proper limits' (1988–89) 62 California Law Review 1331 at 1366. See also American Law Institute Model Penal Code, Tentative Draft no 10, 1960, § 2.09, Comments, 7 (observing that the defence of duress is recognised in circumstances where the 'law is ineffective in the deepest sense, indeed … it is hypocritical if it imposes on the actor … a standard that … judges are not prepared to affirm that they should and could comply with').

[104]See *R v Safi* [2003] EWCA Crim 1809; *State v Toscano* 74 NJ 421, 378 A2d 755 (1977).

[105]*R v Bowen* [1996] 2 Cr App R 157.

[106]D Varona Gomez 'Duress and the antcolony's ethic: reflections on the foundations of the defense and its limits' (2008) 11 New Criminal Law Review 615 at 626.

[107]The definition of 'situation' is normally left to the courts as a matter of common knowledge. See *State v Helmedach*, 8 A 3d 514 (Conn App 2010); S Kadish et al *Criminal Law and Its Processes* (New York: Wolters Kluwer, 9th edn, 2012) pp 928–929.

[108]HM Hart Jr 'The aims of the criminal law' (1958) 23 Law & Contemporary Problems 401 at 414.

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from long-standing and ongoing social adversity that compromises a person's opportunities and resources to have a fair standing in society.[109]

Similar to duress, the SPE defendant acts in response to endured stress developed through exposure to harm. A person acting under duress is typically excused because they react to intense, albeit transient or episodic, stress triggered by the fear of imminent harm if they do not engage in unlawful conduct. The excusing force of such stress is determined not only by its intensity, but also by additional circumstantial factors – most notably, the absence of a viable opportunity to seek protection from authorities due to the immediacy of the threat. A comparable logic applies to individuals who, as victims of sustained injustice, resort to unlawful behaviour as a means of coping or survival. First, the psychological impact of chronic stress is not qualitatively different from the acute stress induced by sudden situational threats. Secondly, as in duress cases, the stress produced by chronic adversity is especially compounded by systemic absence or inadequacy of institutional and social support, alongside a pervasive sense of distrust when such support has been sought but proved ineffective. If stress caused by immediate pressures – coupled with barriers to state intervention – can ground an excuse, there is no compelling normative reason why stress resulting from chronic social hardship – particularly when due to or exacerbated by structural and systemic barriers to protection – should not at least warrant mitigation.[110]

Additionally, the SPE diverges from duress in how the relationship between the underlying pressure relates to the offence. Under duress, the defendant typically faces a stark choice between two evils: committing a crime or suffering serious harm.[111] In partial contrast, the SPE encompasses situations in which unlawful conduct is undertaken to mitigate or cope with the effects of an ongoing social harm. Consider, once again, the financially abused woman who commits a property offence,[112] or an 18-year-old gang member who lives in an abusive household, endures extreme poverty in a violence-ridden neighbourhood marked by community distrust and minimal state protection, who sells drugs while carrying a firearm on the street as a survival strategy to cope with profoundly adverse conditions.[113]

Regarding *reasonableness*, the SPE embraces the Model Penal Code's individualised approach, which asks whether the circumstances of chronic social adversity would have led a person of reasonable firmness, *in the actor's situation*, to act as they did. By taking the perspective of a person experiencing persistent social hardship, the SPE standard recognises the cumulative impact of such adversity on the individual's realistic opportunity to comply with the law. Consistent with Ewing's and Kerr's account,[114] this opportunity is reduced in two principal ways: (1) when chronic social adversity weakens the reasons to avoid wrongdoing – for example, when the adversity arises from injustice attributable to state or societal neglect; and (2) when such adversity makes it significantly more difficult or costly to avoid wrongdoing – for instance, when abstaining from crime exposes the person to continued or aggravated hardship, or when no reasonably available alternatives exist for coping with their circumstances. It bears repeating that prolonged exposure to social adversity can precipitate trauma mechanisms which, while not necessarily reaching the threshold of a mental pathology, nevertheless shape an individual's perceptions of social cues and influence their behavioural responses. Accordingly, any assessment of weakened reasons or increased costs associated with complying with the law must take this fundamental factor into account.

Acknowledging the impact of chronic social adversity on an individual's well-being at the normative level does not entail shifting the adjudicative focus from the situation to the person; rather, it reinforces the well-established connection between social harm and individual harm, highlighting the profound

[109]See Ewing (2023), above n 17; Ewing and Kerr, above n 19. Cf Brink, above n 17, p 226 (proposing to expand the notion of duress to include hard choices produced as a result of 'collective action and inaction in the form of tax, education, healthcare, and criminal justice policies').

[110]See also Morse, above n 89, at 399 (acknowledging that hard choices exist along a continuum).

[111]See JF Stephen *A Digest of the Criminal Law* (London: Macmillan & Co, 4th edn, 1887) p 9.

[112]See section 3 above.

[113]Cf E Anderson *The Code of the Street: Decency, Violence, and the Moral Life of the Inner City* (New York: WW Norton & Co, 1999) ch 2.

[114]Above n 19, at 173–179.

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influence that social injustices can exert on an individual's psychological and behavioural wellness. These observations resonate, albeit to a limited extent, with the spirit of existing diminished responsibility doctrines, most notably the Extreme Emotional Disturbance (EED) mitigation outlined in the Model Penal Code.[115] A broader version of the common law's heat-of-passion or provocation doctrine, EED reduces murder to voluntary manslaughter when a killing is committed 'under the influence of an extreme emotional disturbance for which there is a reasonable explanation and excuse'.[116] Unlike heat of passion or provocation, EED is not confined to killings driven by a sudden emotional impulse.[117] Instead, this mitigation extends to cases in which traumas developed 'for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore'.[118] The Model Penal Code further requires that the emotional disturbance have 'a reasonable explanation or excuse', with the reasonableness inquiry directed toward two key aspects: (1) the circumstances that contributed to the individual's emotional disturbance; and (2) the defendant's perception of those circumstances at the time of the offence.[119] This inquiry is followed by an evaluation of whether the defendant's response to the situation was reasonable.[120] However, neither the Code nor the courts have provided a definitive framework for interpreting 'reasonableness' in this context, leaving its meaning largely dependent on jury interpretation on a case-by-case basis through a range of contextual indicators.[121]

Although the SPE does not rely on a normative narrative of pathology as EED does, it similarly requires that the reasonableness of the individual's conduct be assessed in light of the psychological effects of living under conditions of chronic social adversity – even where those effects fall short of a diagnosable mental disturbance. Put differently, evaluating the defendant's psychological state at the time of the offence primarily serves to establish the cumulative impact of chronic social adversity on their well-being. This, in turn, substantiates the claim that the defendant's actions were conditioned by persistent adversity, which influenced decision-making processes through mechanisms of distress.

The integration of adapted duress principles with elements of EED language helps guard against overly simplistic causal narratives linking social adversity to crime. Recognising adverse social conditions as partially excusing does not imply that such conditions deterministically cause criminal behaviour, nor that mere exposure to hardship alone suffices to mitigate responsibility. Rather, the relevance of such conditions must be established through the satisfaction of both statutory and evidentiary requirements. These requirements are set out in the following section.

(b) Baseline statutory and evidentiary requirements

A hypothetical statutory provision for SPE would require a workable formulation that centres on chronic social adversity and its limiting effects on the person's choice at the time of the offence. Consistent with the doctrinal foundations outlined above, the statutory formulation of this partial excuse incorporates both an objective and a subjective component. The objective component refers to the existence of a situation of chronic social adversity that is ongoing at the time of the crime. Situations that meet this requirement involve persistent hardships – both systemic and personal[122] – that undermine an

[115] American Law Institute, Model Penal Code 1985, § 210.3(1)(b).

[116] Ibid.

[117] For example, *Patterson v New York*, 432 US 197, 206 (1977); *People v Casassa*, 404 NE 2d 1310 (NY 1980); *State v Elliott*, 411 A2d 3, 7, 8 (1979).

[118] *Patterson*, ibid.

[119] *Casassa*, above n 117.

[120] Ibid.

[121] American Law Institute Model Penal Code and Commentaries 1985, Comment to § 210.3, p 62. Cf Ewing and Kerr, above n 19, at 178 (discussing sentencing determinations for Indigenous defendants and recognising that 'a good measure of imprecision is inevitable and ought not to prevent sentencing judges from nevertheless seeking individualized justice at best as it can').

[122] See above n 12.

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individual's fair standing in society, whether by disrupting salient relationships or by imposing severe financial strain. The first category encompasses social and relational adversities, including:

(1) *Relational and community instability* – sustained exposure to familial abuse, domestic or community violence;
(2) *Discrimination* – systemic disadvantage based on race, gender, class, disability, immigration status, or sexuality;
(3) *Marginalisation* – persistent exclusion from mainstream social life and access to resources, rights, and opportunities, as well as support networks.

Meanwhile, material adversities include:

(1) *Poverty* – prolonged hardship marked by inadequate access to basic needs and sustenance;
(2) *Unemployment and job insecurity* – extended periods without stable employment due to structural or systemic barriers;
(3) *Educational disadvantage* – restricted access to quality education due to systemic barriers;
(4) *Health inequality* – systemic barriers to medical or mental health care, resulting in untreated conditions.

The 'chronicity' requirement pertains to both the severity of these hardships and the frequency of the defendant's exposure to them. To qualify, such conditions must be persistent and recurring, affecting fundamental aspects of the person's life over an extended period.[123] To satisfy this requirement, the defendant would first have to produce evidence establishing the situation of chronic social hardship at the time of the offence, which serves as the factual basis for their claim. For instance, chronic social hardships may manifest as prolonged unemployment combined with structural discrimination, where barriers to economic and social opportunities remain unbuffered and recurrent over time.

The subjective prong evaluates whether chronic social adversity limited a person's choice to conform their behaviour to the law. This requirement encompasses two factors: (1) the criminogenic impact of the adversity; and (2) the absence of concrete institutional and social support to mitigate it. Regarding factor (1), the defendant must demonstrate that their situation of chronic social hardship operated as a choice-limiting factor contributing to their engagement in unlawful conduct. This evidence primarily concerns both the severity of the hardship, and the impact on precipitating the offence. Specifically, the defendant must provide evidence of the frequency of exposure to particular hardships and the extent to which these hardships affected their living conditions. This assessment also takes into account the person's psychological condition resulting from enduring adversity. Such evaluation should carefully examine the effects of adversity on the defendant's behaviour, enabling fact-finders to view defendants' actions in the context of their own victimisation. Ideally, this exploration should also aim to educate fact-finders on the broader impact of chronic situational stressors on human behaviour – particularly how sustained adversity can activate trauma mechanisms that shape decision-making and behavioural responses.

Factor (2) concerns the reasons for the defendant's failure to escape hardship. The inquiry focuses on whether meaningful aid was concretely available and whether the person could reasonably have expected to receive it. Proof of this requirement should include evidence of the lack – or inadequacy – of institutional and/or social support upon which the defendant could realistically rely to escape the conditions of hardship that contributed to the offence. The burden of proving this element could rest with the defendant – although less ideal – or alternatively shift to the prosecution. If the burden remains with the defendant, they will need to present evidence demonstrating the absence or insufficiency of public resources or effective

[123]It is important to clarify that past adversities, such as childhood abuse or historical trauma, do not satisfy the 'chronicity' requirement – that is, the ongoing presence and persistence of social adversity at the time of the offence. Nonetheless, such factors remain relevant at the sentencing stage, providing critical context for understanding the individual's life circumstances and informing proportionate and appropriate sentencing decisions.

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public services capable of providing assistance. The defendant may also demonstrate that, even where such support formally existed, structural barriers or repeated failures in accessing aid rendered it unreasonable to expect meaningful assistance. If the burden shifts to the prosecution, the state will need to prove the existence of concrete institutional or social aid that the defendant could have reasonably accessed. The defendant could then counter this evidence by demonstrating that any purported support was inadequate or inaccessible, for instance due to past experiences or systemic limitations. Regardless of where the burden lies, this requirement presupposes acknowledgement that living in conditions of social hardship often results from a complex interplay of structural, personal, and circumstantial factors. Such acknowledgement is crucial to avoid oversimplified presumptions regarding the defendant's fault for failing to escape the conditions that may have contributed to their criminal conduct.

Consequently, the defence is likely to fail where: (1) the hardship is insufficiently related to the offence; (2) the criminogenic impact is not established; and (3) the defendant could reasonably have accessed state or social aid. To illustrate, consider an unemployed husband who expresses a masculinity crisis by physically abusing his wife. While he may cite unemployment as a hardship, this alone is not sufficient. Unless unemployment is persistent and compounded by systemic barriers like discrimination, this situation does not meet the threshold for chronic adversity. Even if it did, the hardship in this case did not operate as a choice-limiting factor that plausibly precipitated the defendant's conduct. His actions – domestic violence – are not undertaken for survival, coping with deprivation, or navigating institutional failure. Rather, the harm inflicted stems from independent motivational or attitudinal factors, such as aggression or entrenched beliefs about gender roles.[124] By contrast, an 18-year-old gang youth who lives in an abusive household, endures extreme poverty in a violence-ridden neighbourhood marked by community distrust and minimal state protection, and is caught while selling drugs and carrying a firearm, more clearly fits the criteria for the SPE. He faces chronic social adversity, with little to no access to effective state protection. His criminal conduct is plausibly a survival strategy shaped by constrained opportunities and resources: drug selling offers financial means, gang affiliation provides protection, and carrying a firearm becomes a rational response to constant threat. These constraints are likely compounded by trauma and the absence of accessible support systems – child welfare services, social assistance, or policing – either unavailable, ineffective, or distrusted. Unlike the husband's conduct, the youth's offence reflects choices constrained by structural pressures, shaped by diminished reasons to act lawfully and heightened costs of compliance.

Ultimately, the central question under the SPE is whether the defendant's conduct was conditioned by hardship they endured through no fault of their own. The standard asks whether it was reasonable and fair to expect someone in those circumstances to have acted differently. Accordingly, the fact-finder must assess the defendant's diminished reasons for avoiding wrongdoing in light of their specific social and structural contexts. This assessment requires identifying the objective conditions of chronic social adversity shaping the defendant's experience and determining whether, from their perspective, compliance with the law was meaningfully constrained. This process entails both a factual inquiry into the hardship and a normative judgement regarding what could reasonably be expected of the individual. Key considerations include the severity of the hardship, the extent to which it limited lawful choice, and whether the defendant had any realistic means of escape. By adopting this contextualised approach, courts can evaluate conduct not as isolated deviance but as shaped by systemic adversity, thereby facilitating a more just determination of responsibility.

5. Sentencing considerations

The adoption of an SPE aligns with both retributive and utilitarian sentencing objectives. Regarding retribution, sentencing under the SPE would fulfil censuring and communicative functions,[125] as it rests on a judgement of the perpetrator as an agent capable of moral deliberation and response.

[124]Cf Hudson, above n 84.
[125]See Duff, above n 5.

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Simultaneously, such sentencing conveys the additional message that when unchecked social harms constrain an individual's choice to comply with the law, the state acknowledges the role of these harms in shaping the defendant's conduct. This acknowledgement reflects both the negative impact of social adversity and its contribution to the commission of the offence.

Following a finding of reduced responsibility under the SPE, the communicative function of criminal sentences would be realised through automatic penalty reductions,[126] reflecting the defendant's reduced degree of culpability. Such automatic reductions would also serve the practical purpose of mitigating the risk of inconsistencies in sentencing outcomes when assessing the mitigating relevance of adverse socio-contextual factors. As noted earlier, sentencing often involves substantial judicial discretion, with sentencing authorities being often reluctant to give weight to disadvantaged backgrounds as mitigating circumstances. By contrast, integrating these considerations at the stage of guilt determination ensures that sentences more accurately reflect the defendant's actual level of blameworthiness. This approach thereby helps to reduce the risk of unjust outcomes and disparities among similarly situated defendants.[127]

Recognition of the perpetrator's reduced responsibility through the SPE, coupled with a corresponding sentencing reduction, could be further complemented by state interventions aimed at acknowledging, addressing, or mitigating the criminogenic social harms the defendant non-culpably endured prior to offending. This approach aligns with Marie Manikis's proposal for a relational and complementary sentencing framework,[128] which permits a separate assessment of state responsibility for the 'systemic criminogenic contributions'[129] in addition to the individual's reduced culpability.[130] Consistent with this framework, where evidence establishes the state's role in contributing to or perpetuating the defendant's social adversity leading to the offence, sentences following SPE findings should incorporate measures that actively 'engage the state through actions that seek to minimize or partially redress the harms'[131] it either created or sustained, thereby unfairly constraining the defendant's ability to comply with the law.

The SPE is also consistent with the penological goal of social rehabilitation.[132] Anchored in the concept of social reintegration, social rehabilitation requires that system-impacted people be provided with the means and opportunities to either return to or remain in society with an improved chance to live as positive members of the community, fully exercising the rights and responsibilities this entails. In this way, social rehabilitation recognises the social dimension of crime and seeks to address 'not only individual behaviour but also social and structural advantages relevant to [them], which include social bonds, employment, education, and other benefits'.[133] The SPE aligns seamlessly with the principles of social rehabilitation, as it explicitly acknowledges the structural factors underlying criminal behaviour. Consequently, it provides a foundation for sentencing outcomes that evaluate individuals not only in terms of their choices to commit a crime but also in relation to the social structures that shaped those choices. This recognition may further incentivise courts to calibrate sentencing decisions in light of the social context of both the crime and the perpetrator. This approach may eventually encourage responses that constructively create meaningful opportunities for positive change, and actively support crime desistance.[134]

[126]See Morse (2003), above n 88, at 303 (proposing a fixed reduction in sentence in inverse proportion to the seriousness of the crime committed).

[127]Cf above 88 and 89.

[128]Manikis, above n 3.

[129]Ibid, at 308.

[130]Ibid (framing state-created harms as 'state's systemic criminogenic contribution by the creation and maintenance of societal inequalities', and 'state's systemic and criminogenic contribution through criminalization policies and practices that target or affect marginalized groups').

[131]Ibid, at 320.

[132]See F Coppola and A Martufi (eds) *Social Rehabilitation and Criminal Justice* (Abingdon: Routledge, 2024).

[133]A Ashworth et al (eds) *Principles of Sentencing: Readings on Theory and Policy* (Oxford: Bloomsbury, 3rd edn, 2009) p 4.

[134]This implication aligns with the spirit of the *Gladue* principles in Canada, which require courts to consider alternatives to incarceration, including restorative justice measures, in order to more appropriately address the systemic disadvantages experienced by Indigenous peoples. See Ewing and Kerr, above n 19.

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Conclusion

The provision for an SPE outlined in this paper offers an additional avenue for foregrounding social injustices within substantive criminal law. As the foregoing arguments indicate, recognising criminogenic situations of severe social hardship as partially excusing functions is an institutional acknowledgement of the unchecked social harms that too often contribute to criminal offending.[135] More importantly, this hypothetical partial excuse invites the adoption of a normative narrative of crime that is grounded in an empirically defensible conception of humanness, one that shifts 'the frame of reference … from one of "autonomous individualism" to one of "social individuality"'.[136] Naturally, no matter how compelling the theoretical arguments presented here may be, they remain insufficient to determine the 'right place' for social injustice within criminal law and its procedures, or to resolve the broader question of whether criminal law itself is a legitimate tool for addressing social injustice. These matters do not depend solely on whether the social dimensions of human conduct can be meaningfully integrated into normative discussions of criminal responsibility and punishment. More fundamentally, they hinge upon the ideological interpretation of criminal law's functions in relation to the broader pursuit of justice.[137]

[135]Cf above n 3.

[136]M Fondacaro 'Toward an ecological jurisprudence rooted in concepts of justice and empirical research' (2000–2001) 69 UMCK Law Review 179 at 193.

[137]See also N Lacey 'Socializing the subject of criminal law? Criminal responsibility and the purpose of criminalization' (2015) 99 Marquette Law Review 541 at 556.

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