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THE MISGUIDED CONCEPT OF PARTIAL JUSTIFICATION*

Shachar Eldar
Ono Academic College, Israel
Elkana Laist
Tel-Aviv Public Defender's Office, Israel

Despite the fundamentally binary character of justification (an act is either right or not, permissible or impermissible), an upsurge in recent Anglo-American scholarship offers some highly sophisticated and widely diverging conceptions of "partial justification" in criminal law. In the present article we identify eight distinct conceptions of partial justification. We find, however, that each of them is predicated on a different conceptual fallacy. Any sound concept of partial justification in criminal law ought to meet the dual challenge of utility and consistency: it should usefully convey a message that advances the conduct-guiding function of criminal law and retain some consistency with the key attributes of complete justification, particularly its allowing function and the implications of its typically universal nature. We maintain that none of the conceptions offered to date meets this challenge. The different meanings attached to partial justification do not further the guiding function of criminal law beyond what is achieved by the scalar concept of wrongfulness; indeed, they undermine the guiding utility of criminal law by obscuring the distinction between the permissible and the impermissible, thereby also diminishing the expressivity of the criminal conviction. Furthermore, extending partial universality to the proposed notions of partial justification implausibly marks retaliating victims and intervening third parties, who react to allegedly partially justified conduct, as partly blameworthy, whereas present legal doctrine rightly affords them a full defense.

INTRODUCTION

The interest of theorists of criminal law in the notion of "partial justification" appears to have been rekindled, as in recent years sophisticated and widely diverging attempts have been made to conceptualize this term.[1] Despite

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[1] In what follows, we discuss the more elaborate and original attempts to conceptualize partial justification, but these are by no means the only examples of the use of the term. More often than not, the existence of a notion of partial justification is simply stated or assumed rather than defended or clarified. *See*, most strikingly, Jim Staihar, *A New Systematic Explanation of the Types and Mitigating Effects of Exculpatory Defenses*, 12 NEW CRIM. L. REV. 205 (2009), at 222

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what appears to be the fundamentally binary character of justification (an act is either right or not, permissible or impermissible),[2] commentators have suggested classifying certain partial defenses as justifying, thereby giving rise to the notion of partial justification in the contexts of victims' consent, incomplete defenses, and most predominantly, provocation. Provocation is a defense that only partially prevents a conviction. A defendant using this defense is not acquitted but is convicted of manslaughter instead of murder, or of murder in the second degree instead of murder in the first degree, depending on the jurisdiction. This characteristic of the provocation defense shifts the debate from the rationales of justification (and its counterpart excuse) to their partial derivatives: partial justification and partial excuse. To date no one has attempted to tie together the diverging conceptions and offer a comprehensive appraisal of the viability of partial justifications.

In this article we critically describe the various attempts made to rationalize partial justification. In doing so, we revisit some of the classical writings on partial justification from the 1970s and 1980s, as well as address what appears to be a second wave of scholarship on this subject, starting roughly at the beginning of the present century. It is our assessment that the discourse surrounding partial justifications is grounded in a series of misconceptions implicit in the several conceptions of the term that we identify and discuss. These are, in order of discussion:

(a) part of the conduct is justified = partial justification;
(b) reduced wrongfulness = partial justification;
(c) the conduct deserves some justification = partial justification;
(d) justified emotions partially justify the conduct based on those emotions;
(e) complete justifications do not negate wrongfulness, therefore justification is a scalar concept and partial justifications exist;
(f) partial defenses that have an analogue in a complete justification are partial justifications;
(g) unreasonable belief in the existence of a justification = partial justification;
(h) objective requirements in partial defenses brand these defenses partial justifications.

Unifying these diverse conceptual endeavors is a common motivation to advance partial justification as a nuanced measure that denotes subtle normative judgment in particular cases of criminality. This is a noble impulse, consistent with just desert and the entailed requirement of fair labeling, that is, the idea of maintaining a close fit between agents' guilt and the categories by which their fault is expressed. But, as we see below, the term partial justification does not successfully do the work expected of it and is really used as a surrogate for a host of other notions and normative pronouncements.

(assuming the availability of partial justification without explaining or illustrating this point, in what is otherwise a lengthy and highly illustrated taxonomy of criminal law defenses).

[2] That is not to say that wrongdoing is not graded. We discuss the confusion between the practice of offence grading and the notion of partial justification below, under conception 2.

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Any proposed notion of partial justification in criminal law should face the dual challenge of utility and consistency. First, a useful concept of partial justification would convey a message that furthers the aims of criminal law, most important of which are its conduct-guiding function and its role in determining who deserves condemnation and punishment. Second, a sound concept of the same term in criminal law should retain some consistency with the key attributes of the underlying term of justification, particularly its conduct-allowing function—meaning that justification makes conduct that falls within the ambit of specific offences allowed nevertheless—and the implications of its typically universal nature. We maintain that none of the conceptualizations proposed to date for partial justification meets this mark.[3]

The different meanings attached to partial justification do not further the guiding and retributive functions of criminal law beyond what is already achieved by the scalar concept of wrongfulness and the common practice of offence grading. Indeed, they undermine the guiding utility of criminal law by obscuring the distinction between the permissible and the impermissible, thereby also reducing the expressive capability of the criminal conviction. That commentators have conceived such varied meanings for partial justification serves as an indication that the term cannot be expected to express a unified normative judgment on the agent's behavior. Furthermore, none of the conceptualizations offered for partial justification retain any part of the universal attribute typically associated with complete justification. Universality means that justifications are generally expected to be recognized by the victim of the justified conduct and by third parties. Extending universality to the proposed notions of partial justification leads to the implausible consequence of marking retaliating victims and intervening third parties who react to allegedly partially justified conduct as partly blameworthy, whereas present legal doctrine rightly affords them a full defense. The conclusion will be that the legal and jurisprudential (as opposed to the lingual or philosophical) notion of justification should maintain its binary essence.

A discussion of the terminological confusion that plagues the discourse on partial justification in criminal law must begin with a brief reference to the distinction between the concepts of justification and excuse.

[3] Alternatively, the proponents of partial justification could have devised or defended alternative concepts of full justification to accord with their various proposed notions of partial justification. Thus a sound concept of partial justification in criminal law may be devised either (partially) to coincide with the characteristics of full justification as commonly understood, or against the backdrop of a novel or unique conceptualization of full justification. Neither course is taken by the commentators on partial justification, who either explicitly endorse the common interpretation and implications of justification (neglecting to test their applicability to partial justification) or fail to discuss them altogether in their account of partial justification.

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JUSTIFICATIONS, EXCUSES, AND THE BINARY NATURE OF JUSTIFICATION

An agent is justified in committing a criminal offence if there is sufficient reason for him to do so, rendering his conduct right or at least permissible under the circumstances. To use two oft-cited illustrations, stealing a ladder may be justified if it was intended to be used in rescuing people trapped in a flaming building, and assault may be justified when it is needed to ward off a more harmful attack. Excuses, by contrast, form a more fluid category. The law may excuse the agent on varying grounds, including lack of capacity,[4] lack of free choice or lack of fair opportunity to conform to the requirements of the law,[5] out-of-character behavior,[6] and other such conditions.[7] In discussing the idea of partial *justification*, we need not commit ourselves to any single conception of excuse. With the aims of generalization and simplicity in mind, we adopt a definition by which an agent is excused if his conduct is wrong, all things considered, but there are reasons why blame is not apt or less blame is apt than would normally be the case. For example, in situations involving coercion one may be excused for killing another in order to alleviate a threat made to one's own life, and similarly one may be excused for somewhat exceeding proportional retaliation[8] in the exercising of self-defense.[9] Commentators often conclude that justifications center around the deed while excuses focus on the doer.[10] Perhaps most usefully, justifications are regarded as rules of conduct, providing citizens with *ex ante* guidance for rightful behavior, whereas excuses are decision rules (or rules of adjudication), directing the court on how to treat the agent fairly *ex post*.[11]

[4] Although lack of capacity is more aptly classified as an exemption rather than excuse.

[5] Most notably in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968), at 152.

[6] *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978), at 799–802 ("The only way to work out a theory of excuses is to insist that the excuse represents a limited, temporal, distortion of the actor's character.").

[7] On the variety of excusing conditions, *see* J.L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y 1 (1956), at 2. Much has been written on the subject of conceptualizing excuses. For a survey, *see* Marcia Baron, *Excuses, Excuses*, 1 CRIM. L. & PHIL. 21 (2007).

[8] The benchmark of proportionality is used here for the purpose of simplicity. But society may deem, for whatever moral reasons, that some deviation from proportionality in self-defense is permissible or even right. In this case, the demarcation between justification and excuse shifts to the line between allowed and disallowed disproportionality.

[9] The distinction, as we draw it, is a common one and can be found, e.g., in Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975), at 274–275; FLETCHER, *supra* note 6, at 759–875; and JOHN CYRIL SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW (1989), at 8–12. This manner of drawing the distinction is also predominant in the articles discussed below.

[10] *See* FLETCHER, *supra* note 6, at 759; Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 CRIM. L. & CRIMINOLOGY 421 (1982), at 437; Douglas N. Husak, *Justifications and the Criminal Liability of Accessories*, 80 CRIM. L. & CRIMINOLOGY 491 (1989), at 496–497. For an alternative way of stating the same idea, *see* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES (1984), at 101 ("Acts are justified; actions are excused.").

[11] For the application of this well-known distinction in the context of justifications and excuses, *see* FLETCHER, *supra* note 6, at 810–813; Husak, *supra* note 10, at 508; PAUL H. ROBINSON,

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The distinction between justification and excuse may have great practical significance when allocating legal responsibilities and rights to other participants in the act in question. Justifications typically grant a universal privilege:[12] neither the victim nor third parties are allowed to interfere with justified conduct, and whoever aids the justified agent is justified as well.[13] Conversely, excuses are predicated on particular personal attributes or specific states of mind that arise from the circumstances; therefore they are personal and not universal. An excused person should not be aided, and anyone assaulted by him may be justified in defending himself.[14]

Are justifications and excuses concepts of an either-or type, or do they lend themselves to fragmentation and scaling? Assigning excuses to the realm of blameworthiness, we should have no difficulty in conceding intermediary levels between full excuse and complete blame.[15] One can easily envision states of affairs in which the reasons for excusing the agent's wrongful conduct are not unmitigated or are outweighed by other considerations. Justifications, by contrast, seem to be indivisible and by nature binary: conduct is either justified and permissible or it is not.[16] Justifications are generally grounded in either maximizing consequentialism or deontological

STRUCTURE AND FUNCTION IN CRIMINAL LAW (1997), at 226–229; John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575 (1998), at 597; Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1 (2003), at 32–37.

[12] George Fletcher shows that the universal implication is grounded in various criminal codes. *See* FLETCHER, *supra* note 6, at 760–761. For support of the universal implication, *see also* Albin Eser, *Justification and Excuse*, 24 AM. J. COMP. L. 621 (1976), at 622; ROBINSON, STRUCTURE, *supra* note 11, at 105–106; Clair O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621 (1996), at 644. Although universality is a typical attribute of justification, it is not a necessary attribute of every justified act. Particularly, it does not apply where justification is afforded not because of a favorable balance of evils but to uphold an important interest, such as fulfilling a personal duty conferred on the agent but not privileging third parties to come to his aid. *See* Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984), at 1918–1925; Husak, *supra* note 10, at 517–518; Berman, *supra* note 11, at 62–64. As shown below, although universality is a typical feature of complete justification, it does not apply at all to what has been termed partial justification.

[13] For a compelling analysis according to which an objective understanding of justification may lead to a paradox, leaving both parties to a conflict justified and unjustified at the same time, *see* Russell Christopher, *Mistake of Fact in the Theory of Justification: Do Two Rights Make Two Wrongs?*, 85 CRIM. L. & CRIMINOLOGY 295 (1994). If the standard for examining the availability of justification is subjective, then intervention by third parties is decided according to the third parties' states of mind, i.e., based on their belief as to the justification of the conduct subject to their interference. If they interfere with conduct they believe to be unjustified, they may be justified in so doing. *See* R.A. Duff, *Rethinking Justifications*, 39 TULSA L. REV. 829 (2004), at 830.

[14] In contrast, Gur Arye maintains that the universal attribute of justification should extend to excuse; Gur Arye's concept of justification is consistent with the common view of that term, as reflected in the text. *See* Miriam Gur Arye, *Should a Criminal Code Distinguish between Justification and Excuse?*, 5 CAN. J.L. & JURIS. 215 (1992).

[15] However, accepting Gur Arye's contention that the attributes of justification should extend to excuses renders some of our arguments against partial justification applicable to partial excuse.

[16] *See*, most famously, SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE (1994), at 13–14.

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absolutism, or in their derivatives and variants. A consequential calculus would advise us whether the act is good or bad, all things considered.[17] Thus there is no meaning to partial justification under consequentialism, apart from saying that within the calculus, some good consequences of the act were weighed against the bad ones before the balance was found to be unfavorable,[18] which can be said of most bad deeds and is in the nature of the calculus.

The notion of partial justification hardly fits into deontological theory either. Under the strict form of this theory, even the notion of complete justification is inapplicable: if an act is prohibited by some deontological standard, no circumstance may justify it.[19] Nonabsolutist deontology may accept the existence of justification where the act in question is "a good thing, or the right or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion."[20] Kent Greenawalt explains this position by demonstrating that "the law permits much behaviour that is regarded as morally less preferable than its possible alternatives."[21]

This account of justification incorporates notions of good and right with the alternative notion of permissibility.[22] It should, however, be obvious that just as action can be either right or not, it can also be either permissible or impermissible. In fact, permissibility may be the more strictly binary concept of the two, because while action may arguably be neutral—neither good nor bad—permissibility is not subject to neutrality. There is no intermediate category between permissible and impermissible, because the rules of prohibition must classify all borderline cases one way or the other.[23]

Some commentators stress the idea that an evil remains an evil even when it is justified by other circumstances. John Gardner endorses this account of

[17] Thus, under utilitarianism, "utility is the ultimate source of moral obligations, utility may be invoked to decide between them when their demands are incompatible." John Stuart Mill, *Utilitarianism*, in UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT 1 (A. Lindsay ed., 1910), at 24. The same would hold for rule utilitarianism, under which an act is either in accord with the rule or it is not.

[18] Traditional utilitarianism may set the standard quite high, being concerned with best, not merely favorable options.

[19] THOMAS NAGEL, MORTAL QUESTIONS (1979), at 67. Absolute deontology may, however, leave space for excusing or pardoning the agent who could not live up to the deontological standard. This possibility is discussed in Vinit Haksar, *Necessary Evil: Justification, Excuse or Pardon?*, 5 CRIM. L. & PHIL. 333 (2011), at 337–341.

[20] Austin, *supra* note 7, at 2.

[21] Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89 (1986), at 105.

[22] Or, in other words, this account replaces the notion of the act being right with the alternative notion of the agent having a right to do it. *See* Joshua Dressler, *Why Keep the Provocation Defense? Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002), at 971 ("Either a person has a right to act in a certain way or he does not").

[23] Thus Greenawalt's account of partial justification, as discussed below under conceptions 1 and 2, cannot be defended on the ground of his conceptualization of the justified as permissible rather than good or right.

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justification. In his words, a justification of wrongdoing is a "cancelling permission" that "does not cancel the reason not to commit the wrong—it only defeats that reason—but does not cancel the reason's mandatariness."[24] This account, too, does not challenge the binary character of justification. The difference between viewing a justified action as good and right and viewing it as partly evil simply depends on the point of view, that is, on looking at different segments of the action. Taking a wider angle, the entire act may be seen as good overall; looking more closely at the (lesser) evil committed, it may still be viewed as a bad act that, given other circumstances, should be avoided. What Gardner seems to suggest is that we should not neglect the latter of these viewpoints. Arguably, one should note that although the act is justified from the perspective of the perpetrator and of society as a whole, still there has been an infringement of the rights of the victim of the lesser evil.[25] But this, again, may rest on the question of what factors we incorporate into our account, because under a wider account it may alternatively be argued that the victim has no right against justifiable infringements, which are part of the everyday dangers associated with social life.[26]

Notwithstanding the strength of the foregoing analysis, one may still wish to find some terminological use for partial justification. In this case, it will not do to charge one with incoherence or unintelligibility. Indeed, language may be stretched to fit the term, and as is attested by the abundance of endeavors to conceptualize it, it apparently holds much intuitive appeal. Law may also find a place for partial justification. After all, a strong theoretical foundation has never been the benchmark of legal doctrine, nor does it have to be. Yet in order to qualify as a sound legal concept, a notion of partial justification must offer more than merely a linguistic possibility; it must further the aims of criminal law and maintain some consistency with the attributes of complete justification as commonly understood in this context. Thus the test of any conceptualization of partial justification in criminal law is not altogether its coherence but rather its usefulness and its consistency with the characteristics of complete justification. In our view, none of the conceptions that have been offered to date for partial justification meets the mark. More specifically, we find that each of these conceptions is predicated on one of eight conceptual errors implicit in the different meanings attached to the idea of partial justification. We identify and discuss these fallacies in the next eight sections of the article.

[24] John Gardner, Offences and Defences (2007), at 255.
[25] Herbert Morris, On Guilt and Innocence (1976), at 55.
[26] Larry Alexander, *Self-Defense, Justification and Excuse*, 22 Phil. & Pub. Aff. 53 (1993), at 60–64.

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CONCEPTION 1: PART OF THE CONDUCT WAS JUSTIFIED EQUALS PARTIAL JUSTIFICATION

The term partial justification originated laconically in J.L. Austin's seminal work on excuses,[27] where it was incidental and benefited from neither illustration nor explanation. Soon after, commentators started referring to Austin's mention of the term without providing a comprehensive definition for it.[28] The first to recognize the awkwardness of the term partial justification and to attempt to establish a conceptual framework for its use was Kent Greenawalt.[29] Greenawalt offers two scenarios that serve to demonstrate the viability of partial justification. In the first scenario (the second scenario is discussed in the next section), an agent retaliates with reasonable and proportionate force to an assault, but after subduing the assailant, continues to pound him. Greenawalt claims that because the first phase of the conduct is completely justified, the conduct in its entirety, including the second and forbidden phase, can be described as partially justified. In Greenawalt's words:

> Suppose, for example, that Ben starts to slap Ann. She responds initially with appropriate force but continues to hit Ben after disabling him. Ann was justified in using moderate force, but her continued hitting was unwarranted. Taken as a whole, her action could be viewed as partially justified.[30]

Note, however, that by combining an earlier, justified conduct with a later, unjustified one into one action, Greenawalt simply plays with the level of individuation of the conduct in order to reach his conclusion that the action is partially justified.[31] Following this line of logic, one might say that the conduct of a killer who happened to give charity to a street beggar just moments before he shot and killed him (or, somewhat more remotely, before killing a person other than the beggar) is partially justified as a whole. Absent a test for demarcating conduct, it is not difficult to see how this trail of thought leads to a complete analysis of all of the defendant's virtues and vices—as in virtue- or character-based theories of accountability.

Greenawalt may respond by stressing that he does not mean for his analysis to be stretched this far. The two phases of conduct he describes—reasonable and proportionate resistance at first, followed by an unwarranted assault—should be examined together because they are closely related and constitute a single set of events, as opposed to the beggar incident or to a full-fledged virtue analysis. But even so, such an analysis does not produce a useful concept of partial justification. When discussing justification, we should

[27] Austin, *supra* note 7.
[28] *See also* the discussion *supra* note 1.
[29] Greenawalt, *Distinguishing*, *supra* note 21, at 92–93.
[30] *Id.* at 92.
[31] For a critical discussion of criminal law's employment of different levels of individuation in order to justify different outcomes, *see* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

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generally strive for a narrow individuation of conduct, separating the different phases of the agent's conduct as much as we can, because of the guidance implicit in categorizing an action as justified (remember justifications' role as rules of conduct).[32] Lumping together several stages of conduct and declaring them to be partially justified as a whole usually does not provide the agent with meaningful guidance as to which parts or aspects of his conduct were desirable and which were not. Generally speaking, a narrowly construed conduct analysis conveys a more useful message, focusing on each phase separately and differentiating exactly which phase of the conduct is allowed and which is not.[33]

Moreover, even if we follow Greenawalt and categorize several phases of conduct as one, it does not mean that the action as a whole is partially justified. In fact, Greenawalt performs an invalid leap from "part of the conduct is justified" to "the conduct as a whole is partially justified." For even if we choose to take a holistic view of the two-phase retaliation, as Greenawalt suggests, we must conclude that on the whole, using excessive force in warding off an attack is wrongful and disallowed, and therefore unjustified, although perhaps at times excused.[34]

A similarly invalid leap from "part of the conduct is justified" to "the conduct enjoys partial justification" is made by Kenneth Simons in his treatment of victims' consent.[35] Simons contemplates a partial justification for an agent who rapes a victim who has agreed to intimate sexual contact short of intercourse: "Arguably the defendant who engages in nonconsensual intercourse should be considered partly justified in his conduct and should receive a lesser punishment."[36] Surely the law would send a more useful message if it partitioned the defendant's conduct in order to communicate that his actions up to the intercourse were justified,[37] whereas the intercourse, which is the offence with which he is charged,[38] is not, and if mitigation of punishment is warranted, this would not be attributed to

[32] *Supra*, text to note 11.

[33] We qualify this statement because in a minority of cases it is useful to join several discrete acts into one account, as when an earlier act produces an obligation to evade a later omission, or when a series of acts constitute a single offence of sexual harassment. Note that such compound offences amalgamate multiple *wrongful* phases and no redeeming acts (and even if they did contain redeeming acts, other objections to terming them partial justifications, as appear in the text, would apply).

[34] A different conceptualization of partial justification holds that it is the initial attack on the agent by the victim-to-be, and not the justified first phase of the agent's retaliation, that renders the agent's conduct partly justified. This line of reasoning is discussed in the following three sections.

[35] Kenneth W. Simons, *The Relevance of Victim Conduct in Tort and Criminal Law*, 8 BUFF. CRIM. L. REV. 541 (2005).

[36] *Id.* at 547.

[37] Or, more accurately, fully allowed because at this stage no offence has been committed and therefore no justification needs be invoked.

[38] The analysis holds even if the law affords only one general offence of nonconsensual sexual contact, which does not differentiate between the act consented to in Simons's illustration and intercourse. There, too, the offence is aimed at the nonconsensual intercourse, and consent to some level of intimacy may constitute a mitigating factor.

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partial justification.[39] If, nevertheless, we are to view the conduct as a whole, it must be characterized as sexual contact that exceeded what the victim consented to and therefore it is wrongful and disallowed or, in other words, unjustified. Under a wide individuation of the conduct in scenarios of the two-phase type, all that remains to be said is that the conduct as a whole was indeed wrongful, although perhaps it was not as wrongful as it could have been under different circumstances, or conceivably there was some justification for it. We examine these types of rationale under conception 2 and conception 3.

The two-phase conception of partial justification is also inconsistent with the base concept of complete justification, as it does not retain the key features that distinguish justification, which are its conduct-allowing function and its universal nature. Viewing both phases as one whole, the agent's allowed act is subsumed under an overall disallowed conduct and loses its distinctiveness. Furthermore, the conceptual difficulty inherent in the leap from accepting that part of the conduct is justified to concluding that it enjoys partial justification extends to scenarios involving victim retaliation and third-party intervention. We see above that justifications are typically universal, meaning that their availability or lack thereof is derivative to victims and third parties.[40] How does this implication hold up in the hypotheticals offered by Greenawalt and Simons? If subdued Ben or the rape victim try to ward off the attack directed at them in the second phase of the event, which is alleged to be partly justified, should the law correspondingly hold them and anyone coming to their aid as partially culpable for the retaliation?

Although it may conceivably be argued that Ben is partly to blame[41] for the attack directed at him by Ann (although it would be more useful to say that he is fully blameworthy for the first phase of the attack and not blameworthy at all for the second part), the victim in Simons's example is certainly not to be blamed for being raped and should be viewed as fully justified in retaliating as long as she satisfies the requirement of proportionality. In both illustrations, surely, any third party who intervenes to help the retaliating victim is not partly culpable for so doing merely because the victim initially attacked the person now attacking him (in Ben's case), or has consented to certain sexual contact (in the case of the rape victim). If the third party intervenes in the second phase of these scenarios, any proportional harm caused is fully justified, notwithstanding the fact that part of the victim's conduct was justified. Thus a third party should be fully justified in intervening in aid of subdued Ben or the rape victim, and, correspondingly, the agents in both cases, that is, Ann and the rapist, should not be thought of as partly justified for their conduct in any meaningful

[39] *See id.* at 547–548, offering such rationales for mitigation as partial excuse and a less culpable mental state.
[40] *Supra*, text to note 12.
[41] As shown below, blame, unlike justification, is a scalar notion.

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way.[42] There is no good reason to make the leap from "part of the conduct is justified" to "the conduct as a whole is partly justified," because the conduct as a whole is both punishable and nonuniversal.

CONCEPTION 2: REDUCED WRONGFULNESS EQUALS PARTIAL JUSTIFICATION

The term partial justification has alternatively been used to signify an act that was performed in a manner that rendered it "*less inappropriate* than it would alternatively be" or "not as wrong as it might otherwise have been."[43] Greenawalt contemplates a scenario in which Ann hits Ben because Ben mistreated Ann's close friend. If Ann's reason for action was reprimanding Ben for his misbehavior toward her friend, the assault in this scenario is indeed unjustified, but to a lesser degree than it would have been had the assault been performed out of selfish motives.[44] Greenawalt classifies this form of mitigation as partial justification because the reason for which we view Ann as less blameworthy, that is, the reason for the reduced level of wrongfulness of her action, is "the same sort of reason that might fully justify her act; it differs only in that it is less powerful."[45] Greenawalt is aware that in light of the binary character of justification his rationalization of partial justification creates a conceptual challenge, noting that "the term justification has an either-or quality that makes people hesitant to speak of a partial justification when no aspect of the action is fully justified."[46] He nevertheless uses this rationalization of the term, noting its theoretical use, for example, in explaining the doctrine of provocation.[47]

It seems that Greenawalt downplays the conceptual unsoundness of referring to conduct that is wrongful, although not as wrongful as it conceivably might have been, as being partially justified. It may be argued that except perhaps for the most heinous acts, every act is not as wrongful as it could have been. For example, the reckless causing of harm is not as wrongful as the intentional causing of the same harm. Thus, according to Greenawalt's conception of partial justification, manslaughter can be conceived as

[42] Alternatively, one may choose to discard the universality of justification, but this would mean taking away an important reason for adopting the nomenclature of justification (and therefore partial justification) to begin with. *See also supra* note 3.

[43] Greenawalt, *supra* note 21, at 92 [emphasis in the original].

[44] Greenawalt's illustration is akin to the theory of partial justification according to which action based on justified motives may be partially justified. We discuss the merits of this theory below, under conception 4. Here we focus on Greenawalt's general claim that action that is not as wrongful as it might otherwise have been is partially justified.

[45] Greenawalt, *Distinguishing*, *supra* note 21, at 92. This rationale preempts Douglas Husak's more robustly articulated "unifying hypothesis," according to which partial defenses that have an analogue in a full justification are partial justifications (discussed below under conception 6).

[46] Greenawalt, *Distinguishing*, *supra* note 21, at 92.

[47] We return later to the question of rationalizing provocation, particularly in the discussion of conception 8.

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"partially justified murder" rather than a less severe conduct than murder on the scale of wrongfulness. Under this account, murder, too, is partially justified homicide provided that it was not carried out with the most objectionable of motives (whatever those may be) or that it did not constitute the most horrific manifestation of that offence.[48] Generally speaking, for all acts, save the most horrendous ones, there exist those that are more wrongful. This does not mean that all acts but few should be labeled relationally as partially justified, and if it does, this voids the term partial justification of any helpful meaning.

Criminal conduct may be graded, and wrongfulness is scalar, but categorizing an offence as partially justified merely because its physical manifestation was not the worst possible or because the mental element could have been more severe is tantamount to equating the current practice of offence grading with an alternative practice of viewing each criminal act as a more or less justified version of the most severe form of committing it.[49] Categorizing forbidden action as partially justified obscures the distinction between allowed and disallowed conduct and runs the risk of communicating the wrong message, for example, that the act of reckless killing is justified at some level because it was not intentional. The false leap here is from "not as bad as Φ" to "partially justified in relation to Φ."[50]

[48] Note, however, that some instances of homicide are categorized as manslaughter and not murder owing to the diminished capacity of the accused. In these cases it may be said that the category of murder is ill-fitting because of a partial excuse of the doer and not because of a justification of the deed. But even in these cases, the conduct is not as wrongful as it could have been, as the accused, in addition to being partly incapacitated, could have acted more wrongfully than he did, e.g., out of worse motives. Thus we may say that according to Greenawalt, all acts of manslaughter would be considered partially justified murders.

[49] Greenawalt may respond that when he talked about partial justification, he did not mean to grade the mental element but rather the reasons and motives for action, which are not part of the definition of the offence and are generally used as a basis for some defenses. If his claim is indeed limited in this way, it falls under conception 4, discussed below.

[50] Considering how faulty this account of partial justification is, it is surprising to find it frequently adopted by commentators and repeatedly restated in the literature. Some notable examples are Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007), at 222 (claiming that when the victim's consent does not serve as a full defense, it may be a partial justification in the following sense: "Partial justification does not make a wrongful act right; it merely renders the act less wrongful compared to what it would have been in the absence of the mitigating circumstance."); Stephen J. Morse, *The Irreducibly Normative Nature of Provocation/Passion*, 43 U. MICH. J.L. REFORM 193 (2009), at 202 ("If provocation/passion is a partial justification, then it is a claim that a killing in these circumstances is less wrong and more acceptable than if there were no or inadequate provocation deserving of a return."); *and see*, most recently, Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1029 (2011), at 1083–1084, claiming:

> The conceptual difficulty is overstated. To be sure, the term "justification"—when unmodified—has an either-or quality. This does not entail, however, that modifying the term amounts to contradicting it. The unmodified terms "full" and "empty" have an either-or quality about them: to say a vessel is "full" is to declare it completely full; to say a vessel is "empty" is to declare it completely empty. The logic of fullness and emptiness, it seems, is quite literally all-or-nothing. Yet people are not at all hesitant to refer to a

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Again,[51] the conceptual difficulty extends to scenarios involving retaliation by victims or intervention by third parties. Imagine that Ben proportionally defends himself against Ann's attack. Is he partly culpable for this act because, given Ann's motives in attacking him, her conduct was not as bad as it could have been? True, in this hypothetical situation it is assumed that Ann's reason for acting against Ben had to do with Ben's mistreatment of Ann's friend, and therefore Ben is not entirely without fault. But this is not a necessary part of Greenawalt's theory. Ann's conduct would have likewise been "not as wrong as it might have been" had she harbored good motives for action that had nothing to do with Ben, as for example, if Ben had recently inherited great wealth and Ann attacked him as an act of social protest. In this case, Ben is entirely without fault. But even if we take the illustration at face value, Ben is entirely without fault *for defending himself*. He is culpable for mistreating Ann's friend, but that does not make him culpable for defending himself against Ann's attack. This point is perhaps best illuminated if we imagine that Ben has already been punished for his mistreatment of Ann's friend.

Current law rightly allows Ben to defend himself against Ann. Just as clearly, the law is right not to regard any third party that intervenes to help Ben as partly blameworthy because Ben had at some point mistreated Ann's friend or indeed because Ann's conduct in attacking Ben was not as bad as it could have been.[52] Concurrently, if Ben is fully justified in retaliating against Ann and any third party is fully justified in helping him, Ann's act is not to be thought of as being partly justified. It may be concluded that the notion of equating partial justification with lesser degrees of wrongfulness retains neither the utility nor the implications of full justification.

CONCEPTION 3: THE CONDUCT ENJOYS SOME JUSTIFICATION EQUALS PARTIAL JUSTIFICATION

At times, a prohibited act blends both bad and good traits and therefore has some justification. May we concede the appropriateness of partial

glass as either half full or half empty. Nor do we have any difficulty understanding what is meant by these phrases when they are uttered.

Our response is that a more suitable analogy than fullness or emptiness is provided by the field of thermodynamics. A liquid can be characterized as hotter or colder, but *boiling* means crossing a certain threshold. So does conduct; it can be more or less wrongful, but for it to be justified it must cross the threshold that would make it right or permissible. Within the framework of criminal law, referring to "partial justification" is a misguided use of terminology, similar to the colloquialism that the water in the kettle has "partially boiled."

[51] As we see in the discussion of conception 1, above.

[52] What counts as proportional retaliation or intervention may shift downward in some instances, but this is consistent with the conduct responded to being less wrongful, not partially justified.

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justification for this category of cases? Susan Rozelle bases the provocation defense on partial justification following this type of rationale:[53]

> The mitigation from murder to manslaughter makes perfect sense in cases where the law permits some amount of force to be used (e.g., self-defense, defense of others, and resisting unlawful arrest). It would be unjust to punish one who killed for the full value of the force used (the murder) where some of the force used was permissible. Therefore, we offset the punishment for the full value of the force used by the amount the law permitted to be used.[54]

At first glance this account looks like a version of conception 1, leaping from the proposition that "part of the conduct was justified" to "the conduct enjoys partial justification." But Rozelle's envisioned conduct is not phased into distinct stages, as in that conception. Rozelle's account should not be confused with conception 2 either, although it is closely related to it. Rozelle does not center on the bad or negative aspects that are missing from the agent's conduct, rendering it less wrongful than it could have been otherwise, but rather stresses the good or positive aspects that are present in the agent's conduct. The conduct has something to commend it and therefore it is not all bad, and consequently (this is the leap), it is partially justified. But finding some positive aspects in what is generally a bad deed is not a unique characteristic of provoked killings. Indeed, evil rarely comes in pure form, and in this sense almost all bad acts have something to commend them. As shown above, balancing the evil caused with the evil spared (or good done) in the agent's conduct is in the nature of the justification calculus.[55]

Assessing the availability of a justification generally means that some good aspects or consequences of the conduct under scrutiny are weighted against the bad. A favorable balance means that the conduct is justified, that is, it is right or at least permissible. If, however, the balance is found to be unfavorable, the conduct is not justified and should not be performed. Partial justification plays no part in this account. The idea that some justification renders conduct partially justified, much like the idea that reduced wrongfulness leads to partial justification, results in substituting the practice of offence grading according to varying levels of wrongfulness with an array of partial justifications. It is therefore subject to the criticism applicable to the conceptualization of partial justification under conception 2, as it undermines the guiding force inherent in the binary nature of justification without gaining anything that the concept of wrongfulness does not already provide, and without retaining any of the utility or the implications of complete justification.

[53] Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197 (2005).
[54] *Id.* at 233.
[55] *Supra*, text to note 18.

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Another depiction of partial justification that builds on the commendable aspects of the prohibited conduct is offered by Stephen Garvey.[56] Referred to as a theory of "disproportionate response," this account states that a provoked agent is partly justified for killing the provocateur because the act of provocation merits a punitive response.[57] Accordingly, "the adequately provoked actor is therefore guilty of a wrong, but only because the punishment he inflicted usurped state authority and was disproportionate to the provocateur's crime."[58] This version of the invalid step (ranging from the statement that the conduct has some merit to accepting the conceptual viability of partial justification) is subject to the same line of criticism as the one directed at Rozelle's version of this conception. Moreover, note the perverse use of counterfactual analysis explicit in this theory as Garvey understands it: "the provocation facing the actor must be adequate inasmuch as the law's own norms, or the norms of some other system incorporated into the law or to which the law defers, would permit the use of non-lethal violence in response."[59] This means that the agent is partially justified because the state authority (and not necessarily the actor himself) would have been justified had it used lesser force than the agent did.[60] Put in this way, it is clear that this line of reasoning does not lead to a useful concept of partial justification.[61]

CONCEPTION 4: JUSTIFIED EMOTIONS PARTIALLY JUSTIFY THE CONDUCT BASED ON THOSE EMOTIONS

Garvey proposes a further theory of partial justification that he names "worthy motives" and explains in the context of the provocation defense:

> An actor who kills upon adequate provocation is one who has been seriously wronged in one way or another according to some set of norms. The adequately provoked actor's anger is therefore justified or warranted. According to the worthy-motive theory, the law nonetheless continues to insist that he not express his anger with lethal violence. However, if he does kill, he does so on the basis of a motive more worthy, all else being equal, than the motive of one who kills in the absence of adequate provocation. The law therefore

[56] Stephen P. Garvey, *Passion's Puzzle*, 90 IOWA L. REV. 1677 (2005).
[57] *Id.* at 1696.
[58] *Id.* at 1696.
[59] *Id.* at 1696–1697.
[60] Garvey, too, is critical of the "disproportionate response" theory, but his line of criticism is directed at the inability of the theory to explain the requirements of passion and reasonable loss of self-control explicit in the prevalent doctrine of provocation (*id.* at 1698). We may add that this theory also shifts the limits of the requirement of adequate provocation because of its insistence that adequate provocation is one that justifies the use of force by the state.
[61] We assess this type of counterfactual analysis in greater depth when discussing conception 6 below.

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considers the adequately provoked killer less culpable than his unprovoked or inadequately provoked counterpart.[62]

This account may be viewed as a specific case of conception 3, in which the conduct is commended by the agent's motive. In this case, the theory is subject to the type of criticism applicable to Garvey's "disproportionate response" theory of partial justification.[63] Alternatively, the theory may be coined in the terms relating to conception 2, with the worthy motive making the conduct less wrongful in the sense that the agent is less culpable for this conduct than he would have been otherwise. If so, what justifies the leap from the judgment that the agent is "less culpable" because of his motive to the conclusion that he is partially justified?[64] Can worthy motives support a useful concept of partial justification? As under conception 2, it is doubtful that anything is to be gained by the worthy-motive theory beyond what the concept of wrongfulness already affords. The provoked agent lacks the evil motive of the hateful or otherwise badly motivated killer, but this does not partially justify him; he is simply culpable of the lesser offence of manslaughter, or subjected to a lesser sentence, or both.[65]

But is there something more to the worthy-motives theory? Recently, Christopher Bennett offered a sophisticated portrayal of partial justification based on emotions.[66] For Bennett, too, emotions can play a partly justifying, not merely excusing, role. He states that "the reasons that count in favor of our emotion count also in favour of action done from that emotion,"[67] and therefore that action is partly justified. Bennett illustrates his position using hypothetical situations in which the harmful act was brought about by fear (lashing out at someone mistakenly perceived by the agent as an attacker) or by excitement (hugging a nearby stranger upon receipt of good news

[62] Garvey, *supra* note 56, at 1694. Implicit in this discourse is the distinction between conduct rules and rules of adjudication. As shown above (text to note 11), justifications are generally categorized as the former, excuses as the latter. For Garvey, the law "continues to insist that he not express his anger with lethal violence" (rule of conduct), but would treat him as "less culpable" if he does (rule of adjudication). This places provocation in the realm of the rules of adjudication, and therefore it would be more suitable to classify provocation as an excuse rather than a justification.

[63] *Supra*, text to note 56.

[64] Garvey, too, finds this leap puzzling. He airs his concerns in footnote 57 of his article, noting that "the logic of permission is all-or-nothing." This, however, does not prevent him from making extensive use of the term "partial justification" throughout his article. *See* Garvey, *supra* note 56, at 1693.

[65] Similarly, euthanasia is killing based on a good motive, but it is to be deemed permissible or impermissible; if it is the latter, it can and should be a lesser wrong than murder performed out of base motives. This is not to be confused with partial justification.

[66] Christopher Bennett, *Excuses, Justifications and the Normativity of Expressive Behaviour*, 32 OXFORD J. LEGAL STUD. 563 (2012).

[67] *Id.* at 566.

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over the phone).[68] In both instances Bennett counts the motive guiding the actor as favorable and therefore as partly justifying the act.[69]

Bennett distinguishes nonrational emotions, such as phobias, from rational emotions, such as fear (when there is something to be frightened of) or anger (when there is something to be angry about). The former excuse, whereas the latter (partly) justify.[70] But many of the bad things we do have rational reasons, perhaps more often than not. A robber may have a craving for wealth, which under Bennett's taxonomy can only be characterized as a rational emotion. Bennett alludes only to "considerations that would surely count, at least partially, in favour of an action,"[71] but entrepreneurship may count as such, and the entrepreneurial thief is not wholly or partly justified or even excused to any extent.

In other instances, possibly including Bennett's illustrative examples, the rational emotion can serve as a form of partial excuse but not as a justification. We do not always have the capacity to do the right thing in the eyes of the law, because of irrational as well as rational reasons. This is what is at the heart of the concept of excuse. Contending that a good motive or a rational emotion partly justifies wrongful conduct is to say in effect that if the conduct was less severe, or if the reasons for it were more pertinent, or both, the action would have been justified. But as it stands, that action is not justified, even if it could have been worse. Perhaps it is not as wrongful as other potential types of action, such as an unwarranted attack, because it was triggered by a good motive or a rational emotion. We understand the agent's reason for action and are ready to give him some leeway on its account. But this is the nature of partial excuse, not of partial justification.

Although it may be tempting to follow the apparent symmetry invoked when claiming that a justified emotion translates into a partially justified action based on that emotion, it is not even clear that emotions are at all "justified" and not simply "fitting," or relevant, or a common reaction to the situation. Based on such an account, all symmetry is lost. And just as important, when we describe emotions as fitting or common, we immediately find that such emotions have nothing magically justifying about them.

[68] Similarly to Bennett's, Pilsbury's preferred account of provocation is that "the defendant's motivating passion—his or her fear or anger toward the victim—was justified." Samuel H. Pilsbury, *Misunderstanding Provocation*, 43 U. MICH. J.L. REFORM 143 (2009), at 146 (*and see generally* 146–148). Unlike Bennett, Pilsbury would probably not hold too strongly to the partial justification terminology, given his opening statement in the article: "I disagree that determining whether provocation is a partial excuse or a partial justification is important for criminal law" (*id.* at 143).

[69] As the latter hypothetical suggests, Bennett frames his understanding of justificatory defenses in broad terms, referring to normatively mitigating reasons that would affect the nature of the offence: "justification is a normative consideration . . . that lessens, or perhaps cancels, the wrongness of the agent's action." *See* Bennett, *supra* note 66, at 565. This understanding risks losing or at least obscuring an important concept in criminal law: that of justification, strictly speaking.

[70] *Id.* at 569.

[71] *Id.* at 565.

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They are simply understandable human responses that may (partly) excuse the conduct they engender. If under certain circumstances it is important for the law to convey that the agent's wrongful conduct derived from a particularly understandable type of emotion, the law can fully excuse the agent. Arguably, this would achieve a greater expressive effect than "partially justifying" the conduct.

Furthermore, it is difficult to see how any reason for having an emotion can justify an action. Actions are twice removed from the reasons or stimuli that produce them (reason-emotion-action), and whereas the connection between the reason and the emotion is a strong one (although, as explained above, it is more a matter of a relevant or fitting emotion than a justified one), the link between the emotion and the action does not have to be so. There is a multitude of possible reactions to every situation and the emotions it may stir. Some are justified, others are not, and of the latter, some may be excusable. For example, when one is being provoked, anger is an understandable reactive emotion (justified in Bennett's terms), but one may act on that emotion in several ways. One may struggle with one's anger and ignore the provocateur, perhaps graciously offering him or her the other cheek; one may retaliate in anger with some provocative behavior of one's own; or one may lash out in an attack of varying degree. The last reaction is not justified by the emotion, reasonable as that emotion may be.[72] This should be taken as part of the reason why criminal law sanctions action and not emotions as such. Perhaps the link between the emotion and the ensuing action is not as obvious or automatic or uncontrollable as that between situations and emotions (although at least some of these can be mastered and self-regulated as well).

Revisiting Bennett's hypothetical, embracing a nearby stranger following the excitement caused by receiving a piece of good news is only one possible course of action. It may not be the worst kind (one may conceivably fire a handgun in excitement), but not acceptable nevertheless. And if the person being embraced is repulsed or simply unmoved by the agent's excited elation, and feels wholly, not only partly, harmed by the invasion, we must honor that feeling. This means that the agent has only an excuse vis-à-vis society, whereas a justification would apply generally (universally) and is expected to be recognized by the victim.[73] To retain a part of the universal attribute of justification consistently when viewing the excited embrace as partially justified, the victim who reacts to the embrace by pushing off the assailant must be marked partially culpable for so doing—to correspond to the assailant's partial justification. If the notion of the victim being partially wrongful and therefore blameworthy in this illustration is normatively unsound, as we think it is, it follows that the assailant should not be deemed

[72] If it is nevertheless a common reaction (generally or for people of the agent's makeup), it may serve to excuse the provoked.

[73] *See supra*, text to note 12.

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partially justified. It would be more practical to demand of the victim to proportionate her response by taking into account the harmfulness of the assailant's action, not his reasonable-under-the-circumstances emotions.

This type of emotion is exactly the mark of excuse and not justification, and it is this kind of practical implication that should be decisive in criminal law. Therefore the illustration shows the weakness of the idea that justified emotions partly justify actions based on these emotions within the context of criminal law.

CONCEPTION 5: COMPLETE JUSTIFICATIONS DO NOT NEGATE WRONGFULNESS, THEREFORE JUSTIFICATION IS A SCALAR NOTION, AND PARTIAL JUSTIFICATIONS EXIST

In his thought-provoking article on partial defenses, Douglas Husak contends that the key to understanding partial defenses is in finding their analogues in full defenses.[74] We scrutinize this theory in the next section of the article, under conception 6. Here we focus on one step in Husak's argumentation, in which he sets out to establish the existence of partial justifications. Husak observes that full justifications do not completely purge the act of all harmfulness but simply diminish wrongfulness and blame to a sufficient degree to preclude liability.[75] From this statement Husak concludes that justifications are relative by nature, and therefore partial justifications exist. Husak defends this concept of partial justification by contrasting two illustrative cases:

> In case one, Smith breaks Jones' leg in order to prevent Jones from stealing his car. In case two, Black allows White to steal his car, declining to prevent the theft by breaking White's leg. I think it is plausible to say *both* that Smith's conduct is more wrongful than Black's, and that Smith has a complete justification for his act of injuring Jones.[76]

It is doubtful whether the victim's intent to steal a car fully justifies the act of breaking his leg, but we assume for the sake of argument that it does. We can easily envisage less arguable cases in which the agent's response is proportional to the victim's threat. The more fundamental difficulty in Husak's conclusion that Smith's conduct is at the same time both wrongful and justified is that the analysis suffers from an inconsistent individuation of the act being analyzed: it is broad when discussing wrongfulness (*breaking someone's leg* is wrongful) and narrow when discussing justification (*breaking someone's leg in response to his threat* is justified). Consistent individuation of the act yields different results. Under a narrow individuation, we view the act as a proper response to the victim's threat, and therefore it is both not

[74] Douglas N. Husak, *Partial Defenses*, 11 CAN. J.L. & JURISPRUDENCE 167 (1998).
[75] *Id.* at 172. And *see* the discussion of Gardner, *supra*, text to note 24.
[76] Husak, *Partial*, *supra* note 74, at 172.

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wrongful and justified. Under a wide individuation, we focus on the agent's aggressive act independent of its reasons or background and therefore view it as wrongful and, by excluding the justificatory explanation of the act, also as unjustified.

Perhaps Husak deliberately shifts the level of individuation in order to illustrate his point, that is, that an act may be justified despite the fact that some other act may be even more justified, which proves that justification is a scalar notion. We agree that Husak is successful in proving the existence of a scale, but it is not a scale of justification but rather of wrongfulness or of its converse, righteousness. Our criticism here proceeds from our analysis of conception 2 (reduced wrongfulness equals partial justification). Just as for virtually every wrongful act, excluding the most heinous ones, there exist acts that are potentially even more wrongful, so for virtually every deserving act, excluding the most righteous, there may exist even worthier ones. This in itself does not prove that justification is scalar. If, all things considered, the act is justified overall, the fact that the agent could have chosen some even more favorable line of action does not make his act less justified. For beyond justification there lie not higher degrees of justification but rather mercy and clemency or perhaps compassion and charity. A better conceptualization of Husak's illustrative cases would thus hold that Smith is justified, whereas Black is both justified and merciful.[77]

In sum, the fact that a justified act is not the best possible course of action does not necessarily challenge the binary nature of justification; just as actions may be more or less harmful or wrongful, so they may be more or less merciful or charitable—but they may still be either justified or unjustified.

CONCEPTION 6: PARTIAL DEFENSES THAT HAVE AN ANALOGUE IN A COMPLETE JUSTIFICATION ARE PARTIAL JUSTIFICATIONS

Following his argument that justification is a scalar concept,[78] Husak introduces his description of partial justification as a component of what he terms a "unifying hypothesis" of mitigating factors. Under this hypothesis, a circumstance qualifies as either partial justification or partial excuse because it has a corresponding analogue in a complete justification or a complete excuse.[79] Partial justifications justify partially because they have counterparts

[77] Or perhaps Black is only merciful, as he did not do any wrong that warrants justification.
[78] As discussed in the last section above.
[79] Husak, *Partial*, *supra* note 74, at 177–186. Husak notes that partial excuses and partial justifications do not exhaust the category of mitigating factors. Some mitigating factors have to do with the offence, some with the offender, and yet others with the efficiency of the process of criminal law (e.g., cooperating with the police or pleading guilty at trial) (*id.* at 168–169). For Husak, a factor does not count as a partial justification if it is an element of the offence, and in its absence a different offence, if any, would apply. In this respect, Husak views provocation not

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in complete justifications, which justify completely. Partial excuses, in turn, excuse partially because they have counterparts in complete excuses.

This sophisticated argument for partial justification relies explicitly on counterfactual analysis, that is, on asking what would have been the case had the circumstances faced by the agent had been more serious or had the agent's response been less harmful (or a combination of both). In Husak's words, "a given circumstance provides a partial justification or excuse whenever it would suffice to preclude liability altogether were it present to a greater degree."[80] This means that had the circumstances been otherwise, a full justification would have been available, which is undoubtedly true. But Husak continues to infer from this fact that as things stand, a partial justification may be afforded to the agent. In no other area of culpability are counterfactuals used in this manner or play such a decisive role. Criminal law resorts to counterfactual analysis in determining the causal connection between the agent's conduct and the ensuing result, but even here it is relevant to the factual, not the normative aspect of causation. No good reason is offered for regarding counterfactual analysis as governing the normative question of justification. Husak is not blind to this idiosyncratic element in his theory, but as far as he is concerned, the problem lies not in the use of counterfactual analysis per se but in the use of what he regards to be the wrong basis for comparison.

"A partial justification reduces the wrongfulness of an act,"[81] writes Husak, invoking conception 2 (less wrongful equals partially justified). Husak is, however, doubtful and asks, "relative to what baseline is the wrongful act or the blame of the agent reduced?"[82] He answers:

> Counterfactuals are needed to answer this question. . . . In other words, a partial justification renders the act less wrongful than it would have been in the absence of that partial justification. . . . This condition, although necessary, is not sufficient to establish that the circumstance of the defendant has significance in mitigation. . . . If a reduction in sentence were warranted whenever these counterfactuals were true, a defendant who performs an act that is less wrongful than he could have performed, or who is less blameworthy than he could have been, would always have a partial justification or excuse. . . . In order to qualify for a partial defense, either the blame of the defendant or the wrongfulness of his act must also be less than that of the *paradigm* or *standard* offender or offense.[83]

Husak rejects counterfactuals that allude to the way things might have been but is happy to rely on those that refer to a standard or paradigmatic

as a partial defense but as a full defense to the charge of murder. To Husak, partial justifications are only mitigating factors in sentencing (*id.* at 175–176). Husak defends his view of partial justifications in Douglas Husak, "*Broad" Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449 (2012), at 461–462.

[80] Husak, *Partial*, *supra* note 74, at 177.
[81] *Id.* at 170.
[82] *Id.* at 170.
[83] *Id.* at 170–171.

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offence. But this is still to claim that an act is partially justified because it could have been worse, only this time in comparison not with what the offender might have done but with what others involved in similar conduct usually do. This variation of the counterfactual examination still falls under the "less wrongful equals partially justified" fallacy.

Furthermore, it is open to debate which the preferred baseline is for applying the counterfactual analysis: that which the agent could have done, or the paradigmatic commission of the offence. The latter seems to make more sense, as Husak rightly points out. But imagine a case in which the agent, because of certain external constraints, did not have the opportunity to act as badly as in the paradigmatic commission of the same offence. If that agent performs the act in a manner that was as wrongful as opportunity allowed him to perform it, should his action be judged relative to the paradigm or to what he could have done? Compared to which baseline is he partly justified? Husak does not discuss this possibility, but we believe that it points to the conclusion that the problem is inherent in counterfactual analysis, whatever baseline is used. The reliance on counterfactual analysis in turn points out that the aspect of the unifying hypothesis here discussed is a sophisticated variant of conception 2.

An apparent shortfall of the unifying hypothesis is the difficulty in defending criteria to decide when a given circumstance finds its analogue in a complete justification.[84] But the unifying hypothesis faces more fundamental difficulty because it is predicated on the assumption that incomplete justifications logically generate partial justifications. This does not have to be the case, however, and often incomplete justifications produce excuses. The explicit position of the German Criminal Code, for example, differentiates necessity as justification from necessity as excuse, the former applicable to the use of proportionate means to avert danger, the latter to necessary means that exceed proportionate response.[85] Thus disproportionate reaction to necessity is neither desirable nor allowed and is therefore incomplete as a justification but may nevertheless be fully or partially excused. Put in general terms, the full defense may be a justification, but its partial derivatives may stem from excuses. This is a bug in the unifying hypothesis, and Husak ignores it when he writes that:

> A defendant is justified in using deadly force in self-protection whenever the wrongfulness of using deadly force is outweighed by the good of self-protection. This balancing theory of complete justifications should be readily applicable to partial justifications. If a complete justification arises whenever the wrongfulness of an offense is outweighed, a partial justification arises whenever the wrongfulness of an offense is reduced, but is not outweighed altogether.[86]

[84] Husak identifies this shortfall in Husak, *"Broad," supra* note 79, at 462.
[85] STRAFGESETZBUCH [StGB] §§34–35.
[86] Husak, *Partial, supra* note 74, at 184–185.

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The shift from justification to (partial) excuse is not mystical or mysterious but rather prosaic and common. It is the shift from the right and the permissible to the understood and the conceded. A proportionate use of a defense is justified. Slight deviations from proportionate defense may be understandable and therefore generate an excuse.[87] Any greater deviation from proportionality is derived from that excuse. Therefore, partial justifications are not the necessary or even the proper outcome of incomplete justifications.

CONCEPTION 7: UNREASONABLE BELIEF IN THE EXISTENCE OF A JUSTIFICATION EQUALS PARTIAL JUSTIFICATION

For Re'em Segev, "justification—and accordingly wrongfulness—is a matter of degree and therefore an action that is justified in the strict sense is merely the peak of a continuum."[88] It should be clear by now that this account, akin to conception 2 (reduced wrongfulness equals partial justification), mistakenly equates the concepts of justification and wrongfulness. In discussing conception 2, we show that the leap from viewing wrongness as a scalar concept to holding that a graded notion of justification is a useful and consistent concept within the context of criminal law is invalid. Wrongfulness is scalar, while justification serves as a threshold beyond which the act is good or allowed. Until that point, the act may be forbidden with differing degrees of wrongfulness, but not of justification.[89] But Segev continues to offer an account of partial justification according to which one was partially justified[90] if one formed an honest though unreasonable belief concerning the availability of justifying circumstances, that is, if one believed that one acted with justification but did not collect enough information or did not put enough effort into learning otherwise. Thus one may be fully justified if one made all the reasonable inquiries and reached a rational conclusion that one's harmful act was proportional with the threat it was designed

[87] The precise benchmark of justification is of no particular consequence to the analysis. *See supra* note 8.

[88] Re'em Segev, *Sub-Optimal Justification and Justificatory Defenses*, 4 CRIM. L. & PHIL. 57 (2010), at 58. *See* similarly, *id.* at 69:

> The correlation between actions and moral considerations is a matter of degree. Actions reflect these considerations in better or worse ways. Accordingly, justification—and wrongness—are matters of degree. . . . In this respect, strict justification is not so special. It thus seems unreasonable to attach significant weight to this specific point on the continuum.

[89] Again, this is similar to the difference between heating and boiling: boiling is a point, and heating is a gradual or scalar process; "partially boiled" is not a useful term in thermodynamics and it is not consistent with theory. *See supra*, note 50.

[90] Occasionally Segev uses the more careful term "almost—but not strictly—justified." We find this to be a telling sign that he is not wholeheartedly convinced of the scalar notion of justification, as opposed to wrongfulness. *See*, for example, Segev, *supra* note 88, at 58.

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to counter, but only partially justified if one reached the same conclusion following a flawed or partial inquiry into the facts of the situation.[91]

Is this truly an account of partial justification? It seems to us that it serves not to explain the degree of justification but rather to elucidate the separate question of determining the threshold of justification. Segev reminds us that the purely objective and the purely subjective standards for determining the validity of a justification are not exhaustive, and that justifications may also be determined "rationally," that is, based not on objective reality or strictly on the agent's subjective understanding of it but on the circumstances the agent could have reasonably known. This introduces a standard of negligence or perhaps of willful blindness for assessing the validity of justification, and Segev gives a sophisticated account of this standard in his article, but his argument does not support the conclusion that justification is a matter of degree, only that different standards may apply in determining justification.

A lenient examination of the method used by the agent to collect the information on which she bases her evaluation of the situation she faces constitutes a move toward the subjective standard for determining justification. Alternatively, we can choose an objective standard and still concede the agent's unreasonable belief and fully or partly excuse an agent who acted under such a belief.[92] Segev's account takes an intermediate, third course, according to which the threshold of justification lies in making a rational assessment of the validity of the justificatory circumstances. In sum, the objective, rational, and subjective standards of justification do not form a continuum of justification. Rather, the difference between them is categorical: they form distinct standards by which to assess the threshold of justification. Under the rational standard, an actor who acts out of unreasonable belief in the availability of justification is not justified, although her act may be less wrongful than it would have been had she acted out of base motives.

Alternatively, Segev's unreasonable-belief account of partial justification may be interpreted not as forming an intermediate standard for assessing justification but as a strictly subjective standard, as it is focused on the agent's state of mind. Under this interpretation, action based on an honest but unreasonable belief in the availability of a justification is fully justified, but the agent is separately sanctioned for omitting to follow the full course of the rational decision-making process in the given situation. This interpretation of Segev's view is especially plausible if we consider that Segev seems not to be interested in the factual existence of the justifying circumstances, which suggests that according to his theory, an agent who was not mistaken in his choice to act would nevertheless not be fully justified if he did not follow

[91] Similarly, *see* Morse, *supra* note 50, at 204 ("If the defendant's honest belief is unreasonable, he is partially justified.").

[92] The idea that unreasonable belief about the availability of a justification may serve an excuse grounds the position of the German Criminal Code; *see* STRAFGESETZBUCH [StGB] §35.

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the rational process to its end, and therefore he would be sanctioned purely for failing to follow that process.[93] Under this mode of interpretation too, justification is not shown to be a scalar concept.

CONCEPTION 8: OBJECTIVE REQUIREMENTS IN PARTIAL DEFENSES BRAND THEM PARTIAL JUSTIFICATIONS

Under the common law, as well as in many present-day jurisdictions, a successful claim of provocation must rest on two cumulative elements: the homicide is committed in the heat of passion; the heat of passion was the result of adequate provocation. This dual requirement, and especially the objective condition of adequate provocation, leads some commentators to view provocation either as affording a partial justification[94] or, more commonly, as amalgamating partial justification and partial excuse. These commentators contend that whereas heat of passion is a subjective condition and may serve to partially excuse the agent who has experienced it, the requirement for an adequate provocation dictates an objective examination of the agent's conduct through the prism of the reasonable person, suggestive of a partial justification of this conduct.[95]

But none of the commentators adequately explains precisely how the victim's adequately provocative conduct justifies the agent's lethal response. In "A Plea for Excuses," Austin asks what we mean when we plead provocation: Do we mean that "he having done me such injury, I was entitled to retaliate (justification)"? But under the law, the provoked is not entitled to retaliate and would be subject to criminal liability and grave punishment if he did. This "plea for justification" illustrates the damage that the use of the term partial justification does to the conduct-guiding function of the criminal law.[96] Andrew Ashworth maintains that "an individual is *to some*

[93] Segev, *supra* note 88, at 64.

[94] Perhaps the best-known defense of provocation as a partial justification is Finbarr McAuley, *Anticipating the Past: The Defence of Provocation in Irish Law*, 50 MOD. L. REV. 133 (1987). Dressler claims that McAuley reaches his conclusion that provocation is based on partial justification and not partial excuse because of his flawed and restricted conception of excuse as applying only to cases in which the actor is denied any other option of conduct, such as insanity or automatism; *see* Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467 (1988), at 470–471.

[95] Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Fault in Criminal Law*, 8 BUFF. CRIM. L. REV. 385 (2005); Simons, *supra* note 35; Pilsbury, *supra* note 68; Berman & Farrell, *supra* note 50. The originator of this position is Andrew Ashworth, who articulates the oft-cited opinion that "the doctrine of provocation as a qualified defence rests just as much on notions of justification as upon the excusing element of loss of self control." A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292 (1976), at 307. It seems that Ashworth's followers take his position too literally. Unlike his followers, Ashworth is quick to clarify that his use of partial justification "does not necessarily imply a connection with the legal concept of justifying force (i.e., in self defence): its closest relationship is with the moral notion that the punishment of wrongdoers is justifiable" (*id.* at 307).

[96] Furthermore, the connection between the victim's wrongdoing and the reduced sentence offered to his killer need not be based on the notion of justification; indeed, the fact that the victim is partially at fault may provide reasons other than partial justification to mitigate

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extent morally justified in making a punitive return against someone who intentionally causes him serious offence."[97] He notes that "ordinary language reflects this approach, with characteristic phrases such as 'he brought it on himself,' 'she asked for it' and 'it served him right.'"[98] Thus Ashworth anchors the objective test on the victim's culpability.

Similarly to other elucidations of partial justification that we encounter in the previous sections, this retaliatory or punitive version of provocation (partly justifying the act as punishment for the victim's harmful and often unlawful conduct) is also based on an odd counterfactual analysis. In this case, even if the retaliation is proportionate and appropriate, which, by the very definition of the provocation doctrine, it is not (proportionate and appropriate retaliation falls under self-defense, not provocation), its partial justification rests on the logic that were the agent a punishing authority implementing a sentence that was legitimately meted to the victim, she would have been justified in so doing. But one cannot accept the justifiability, even if partial, of such vigilante justice.

Another explanation offered for the victim's adequately provocative conduct justifying the agent's lethal response is that by acting provocatively, the provocateur has reduced his right not to be harmed, meaning that he has partially forfeited his right to life.[99] This is a questionable theory as far as respect for the value of human life is concerned, and its dubious character is amplified in partial defenses. Is the life of the victim partly forfeited because he derogated the agent or had adulterous relations with his spouse (both of which may serve as basis for a successful claim of provocation)?[100]

The particular shortfall of conception 8 is the leap from viewing justification as an objective defense to concluding that any objective element of a defense is necessarily justifying. The objective standard in provocation, the requirement that the provocation be adequate, need not be understood as meeting the demands of a justification; it may alternatively serve to curtail the partial excuse afforded by the provocation doctrine, making it unavailable to agents who are prone to lose their self-control. The objective aspect of provocation thus sets a standard of self-restraint: only diminished control by those who have enough regard for the law to brace themselves is generally accepted, and not the rage of those who do not possess enough

punishment. For example, the victim's fault in provoking the agent may be understood as contributive to a comparative fault calculus, meaning that the agent's sentence is mitigated in order to balance the incentives provided to both the provocateur and the killer. Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CALIF. L. REV. 1181 (1994), at 1216.

[97] Ashworth, *supra* note 95, at 307.

[98] *Id.* at 307.

[99] *See, e.g.*, Bergelson, *Victims*, *supra* note 95, at 475.

[100] Dressler, *Rethinking*, *supra* note 10, at 457; Simons, *supra* note 35, at 557. Even if we concede that the provocateur did partially forfeit his right to life, this would mean only that the agent had some justification for his action, which does not render him partially justified (*see* conception 3), or that killing a provocateur is less wrongful than killing a nonprovocateur, which is different from being partially justified (*see* conception 2).

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respect for other people's rights of self-expression and act murderously in face of behavior or speech that is not to their liking. This analysis places the objective standard alongside the subjective one within the realm of excuse.

This particular view of provocation is endorsed by numerous commentators.[101] Joshua Dressler maintains that "under excuse theory we do not (fully) blame a person who (partially) loses his self-control if, *but only if*, he is not to blame for his anger and for his homicidal actions which result from it." Dressler exemplifies this by showing that voluntary intoxication is not an excuse even if it affects the agent's power of self-control.[102] Referring to excusing conditions in general, Jeremy Horder advocates integrating objective factors into the analysis of excuses, stating that "objective standards, in one form or another, are best understood as part of the necessary conditions, rather than as part of the sufficient conditions, for excuse."[103] Even Ashworth, the originator of the idea of provocation as partial justification, finally agrees that:

> the primary rationale of the objective standard is that it declares the widely felt distinction between someone who is truly provoked to kill (so that it may be said that the provocation caused the loss of self-control and partially justified it), and someone upon whose personality a relatively trivial provocation reacts in a disproportionate way.[104]

Thus an objective element of a partial defense serves as a normative qualifier of that defense understood as a partial excuse;[105] it does not transform the defense into a partial justification.[106]

Can this logic also go the other way? One may argue that just as we can integrate the objective requirement of provocation into an account of that defense as a partial excuse, it is also possible to integrate the subjective requirement (heat of passion) into the analysis of justifying factors, thus viewing provocation as a partial justification, notwithstanding its subjective

[101] This means that Berman and Farrell are wrong to ascribe the dominance of the view of provocation as excuse simply to the overemphasis in legal literature on the subjective, heat-of-passion prong of the doctrine. *See* Berman & Farrell, *supra* note 50, at 1047–1049. Incidentally, elsewhere in their article, Berman and Farrell admit that their theory of accumulating partial justification and partial excuse as the combined rationale of provocation doctrine falls short of explaining the requirement for a causal relationship between the provocative act and the heat of passion. But they say that this requirement can be explained as good practical sense or good policy (*id.* at 1104–1105). As noted above, the same can be said of the requirement for adequate provocation.

[102] Dressler, *Provocation*, *supra* note 94, at 474–475. Dressler articulates this view some years earlier, in Dressler, *Rethinking*, *supra* note 10, at 464–465; followed by Harel, *supra* note 96, at 1214; Garvey, *supra* note 56, at 1700; and Morse, *supra* note 50, at 194–195.

[103] Jeremy Horder, Excusing Crime (2004), at 28–29.

[104] Ashworth, *supra* note 95, at 311.

[105] Another alternative, less discussed in the literature, is evidentiary, viewing the objective factor as a proxy for a mental emotion or state.

[106] It should be remembered that provocation could have been simply a mitigating factor in sentencing and not a partial defense were it not for the generally applied mandatory (or minimum) sentence for a murder conviction (or murder in the first degree) or for the special gravity of the label "murderer."

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aspect. This may be achieved by maintaining that a justified emotion, such as heat of passion, partially justifies the act of killing. Note, however, that this argument falls under the fallacy of conception 4, predicating the notion of partial justification on the "justified" emotion that has triggered the action.

We see above that there is no convincing explanation for how acts such as uttering insults or perpetrating adultery can partly justify killing; it is more convincingly argued that the adequacy requirement in provocation may be subsumed into an analysis of excuse, as a qualification for the availability of excuse. Thus the partial defense of provocation is better understood not as a partial justification but as a partial excuse. But to complete the analysis, we must note further that as it stands, provocation may not afford a partial defense of any kind at all, but rather a complete defense applicable to the offence of murder. After all, a successful plea of provocation completely exculpates the agent from liability for that offence.[107] Moreover, provocation may not constitute a defense at all, partial or otherwise. In its common-law origins, provocation was not treated as a defense but as a rebuttal of the presumption of malice aforethought, which was the required mens rea for murder. If the presumption was lifted, the level of mens rea proven could amount only to that of manslaughter. Understood in this way, provocation simply demarcates these two levels of homicide on a scale of wrongfulness.[108]

CONCLUSION

The term partial justification, although frequently used, is revealed here to be both misleading and not useful. Partial justification, as it has been conceptualized to date, serves no purpose in criminal law beyond that which is achieved by the common practice of grading wrongfulness, and does so at an added cost. One aspect of this cost is the terminological perplexity that ensues from substituting an array of partial justifications for the grading function of criminal law. For example, proponents of partial justification would have us consider manslaughter as "partially justified murder" rather than a crime of a lower grade on the homicide scale, conveying the erroneous message that this offence is in some way partially condoned, whereas in truth it is not condoned at all and may result in grave punishment.

[107] *See* Richard Taylor, *The Nature of "Partial Defences" and the Coherence of (Second Degree) Murder*, [2007] CRIM. L. REV. 345, at 346–347. This analytical possibility is contingent upon the legal system demarcating the two offences, murder and manslaughter, and it therefore has no far-reaching theoretical implications.

[108] Ashworth, *supra* note 95, at 292. Taylor advocates including or articulating, within the definition of murder, the elements of that offence that defenses such as provocation may be regarded as negating. Taylor, *supra* note 107, at 346. Provocation doctrine would thus not be exculpatory but inculpatory and understood as a method of categorizing levels of culpability into either murder or manslaughter. For this opinion, *see also* Husak, *Partial*, *supra* note 74, at 175–176; Garvey, *supra* note 56, at 1683–1684.

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It is therefore not surprising that supporting argumentation for partial justification is marked by odd forms of counterfactual analysis and logical shortcuts. Obscuring the distinction between the permissible and the impermissible, the various meanings attached to partial justification compromise the conduct-guiding function of criminal law. When the commission of an act is somewhat justified because it consists of different phases or aspects, some good and others bad, the law would be in a better position to direct human behavior toward compliance if it expressed exactly which phases or aspects are allowed and which are not.

As far as the expressive role of criminal law is concerned, the fact that commentators who generally agree on the meaning of complete justification find such varied meanings to partial justification[109] suggests that the term cannot be expected to express a singular and clear normative judgment on the agent's behavior. Furthermore, the proposed notions of partial justification are inconsistent with the key attributes of complete justification, which are the conduct-allowing role of justification and the universal nature of justificatory defenses, that is, the idea that both victims and third parties would be at fault for interfering with justified conduct. None of the conceptions offered for partial justification retains any meaningful part of the allowing character of justification, as all of them are concerned with punishable conduct. And extending universality to partial justification would mean, counterintuitively, that any proportionate retaliation or intervention against an agent deemed partially justified (because she was provoked, or was given the victim's consent to some portion of her conduct, or had acted out of some fitting emotion) would be considered flawed in some way in order to concur with the agent's partial justification. We therefore conclude that none of the conceptions offered in the literature for the term partial justification surmounts the aforementioned difficulties. The legal notion of justification should preserve its binary essence.

[109] Some stage of the conduct is justified; the conduct is not as wrongful as it could have been; the conduct enjoys some justification; the conduct is based on a justified emotion; some characteristic of the conduct finds its analogue in a complete justification; the conduct is spawned from an unreasonable belief in the existence of a complete justification; the conduct enjoys a partial defense consisting of objective elements.

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