

PART TWO – DEFENCES IN THE STRUCTURE
OF THE CRIMINAL LAW

Reasons and Perspective in the Criminal Law

In this chapter, I further explore the distinction made between the criminal law's conduct rules and its decision rules, and examine arguments relating to the choice of perspective to be adopted in framing and applying these rules. I argue that the special relationship between criminal law and morality requires that criminal law conduct rules be framed by reference to objective facts. In analysing the perspective that should be adopted when applying decision rules, I distinguish between two threads of the rational process, viz., the process of observing facts and reaching reasoned factual conclusions and assessments on their basis ('functional reasoning'¹), and the process of inculcating and displaying commitment to normative rules of conduct ('norm-reasoning'). I argue that different blaming judgments flow from flaws in a person's functional reasoning, and flaws in her norm-reasoning, and further, that the quality of the defendant's norm-reasoning ought to be assessed by reference to the defendant's subjective perspective. This view of the structure of blaming judgments will have a direct bearing on the arguments I make about how we should conceive of the difference between a justification and a rationale-based defence.

2.1 Reasons and objectivity in conduct rules

Raz's analysis in the seminal *Practical Reason and Norms* is based on the fundamental claim that '[r]easons are referred to in explaining, in evaluating, and in guiding people's behaviour.'² The relationship of reasons to guiding and evaluating behaviour can reveal a lot about how the criminal law functions, because these are amongst the essential functions of the criminal law.

One area of particular interest is whether there is any difference between the logical bases

¹ The cognitive and intellectual processes that I pick out with the term 'functional reasoning' are a subset of the processes generally referred to as 'epistemic reasoning'. However, this subset excludes moral epistemology. Additionally, although norms themselves can be facts, they are not the kind of facts I have in mind when talking about the process of observing facts. Therefore, I adopt non-standard terminology here. Nevertheless, when discussing existing literature on the subject, and in the interests of clarity, I will occasionally need to refer to 'epistemic mistakes' and 'epistemic reasoning'. These references should be understood in context.

² J Raz, *Practical Reason and Norms* (Oxford, Oxford University Press, 1975/1999) 15-16.

for conduct rules and decision rules. Raz argues that '...reasons are used to guide behaviour, and people are to be guided by what is the case, not what they believe to be the case'.³ He further argues that:

Only reasons understood as facts are normatively significant; only they determine what ought to be done. To decide what we should do, we must find what the world is like, and not what our thoughts are like. The other notion of reasons is relevant exclusively for explanatory purposes and not at all for guiding purposes.⁴

If one broadly accepts these assertions, then certainly norms to guide behaviour (i.e. conduct rules) should be based on reasons that are facts, rather than beliefs. In making the implicit assertion that (at least) conduct rules ought to refer to facts and not beliefs, Raz acknowledges and addresses the obvious counter by arguing that:

To be sure, in order to be guided by what is the case a person must come to believe that it is the case. Nevertheless it is the fact and not his belief in it which should guide him and which is a reason. If p is the case, then the fact that I do not believe that p does not establish that p is not a reason for me to perform some action. The fact that I am not aware of any reason does not show that there is none. If reasons are to serve for guiding and evaluating behaviour then not all reasons are beliefs. It may seem that reasons which are neither the beliefs nor the desires of the agent cannot be used in explaining his behaviour, but this is a mistake. The explanation depends on his belief that the reasons obtain, but again this does not establish that his belief is the reason. All it shows is that this type of explanation of a person's behaviour turns on his belief that certain reasons apply rather than on the fact that they do apply. We can understand his behaviour even if we think he was wrong in believing that there were good reasons for him to do what he did.⁵

Raz's argument on this point makes a subtle appeal to our evaluation of the outcome of the behaviour, and invites us to make a similar evaluation of the behaviour that caused it. The resulting evaluation is one that refers to a standard of 'ought', based on a 'god's eye' awareness of all the contextual circumstances. The adoption of such a reference point assumes that conduct norms in the criminal law are meant to guide agents to achieve ideal and absolute goals (even if, on occasion, they cannot possibly be aware of the circumstances that make the guidance applicable), rather than to set attainable goals. This presupposition is not self-evidently correct.

³ *ibid* at 17. See also PH Robinson, 'Competing Theories of Justification: Deeds versus Reasons' in AP Simester and ATH Smith (eds), *Harm and Culpability* (Oxford, Clarendon Press, 1996) 64-65.

⁴ Raz, *Practical Reason and Norms* 18. See also Robinson, 'Competing Theories' 64-65.

⁵ Raz, *Practical Reason and Norms* 17.

Stewart, on the other hand, argues that since conduct rules must be capable of guiding conduct, they cannot demand knowledge of facts that one could not reasonably have been expected to know.⁶ Hence he views the role of criminal law conduct norms as providing attainable, rather than abstract guidance, and consequently insists that the conduct norm refer to accessible, rather than absolute truths. Again, Stewart makes a linking assumption that is not self-evidently correct. Stewart's implicit assertion is that framing conduct rules by reference to objectively true facts rather than subjective perceptions of the facts necessarily prejudices their ability to offer useful guidance. However, if one does not bind oneself to the view that in every case, being in violation of a conduct rule automatically attracts blame (or even prima facie blame) for disobedience of its guidance, conduct rules can offer useful normative guidance even when framed by reference to objective facts. While the legal provisions that typify criminal law conduct rules also have symmetrical decision rule aspects directing the decision-maker to evaluate reported behaviour by reference to the conduct rule, these are rarely the only decision rules operating in the evaluation of the behaviour. In fact, only in the exceptional set of strict liability state-of-affairs crimes does the mere circumstance of being in violation of a conduct rule ipso facto translate into a blaming evaluation of the violator. Blameworthiness usually requires more. If one admits the possibility that these other decision rules that operate in the criminal law may require reference to perceived rather than objective facts, then it is possible to imagine conduct norms that refer to the 'objective facts', and nevertheless offer useful normative guidance to the addressees of the rule, without necessarily generating unfair blaming judgments. I will make the argument that in fact key decision rules dealing with making personal blaming judgments do require reference to perceived, rather than objective facts, in **section 2.2.4**.

However, the question remains: should we prefer to frame conduct rules by reference to objective facts, or to facts as perceived? We can start by considering when it is legitimate for the state to offer guidance in the form of criminal law conduct rules. Humans naturally and constitutively possess purposive agency⁷ – the ability to choose one's willed actions, even in

⁶ H Stewart, 'The Role of Reasonableness in Self-Defence' (2003) 16 *Canadian Journal of Law and Jurisprudence* 317, 333-36.

⁷ ME Bratman, 'Planning Agency, Autonomous Agency' in *Structures of Agency: Essays* (New York, Oxford University Press, 2007) 197-98, treats purposive agency as one of the core features of human agency. Additionally, he also treats reflectiveness, planfulness, and a conception of our agency as temporally extended, as core features of human agency. However, for the purposes of the present study it is sufficient to focus on purposive agency. This is

defiance of one's biological needs and instincts. In the absence of legitimate guidance about *how to exercise* this purposive agency, each person enjoys the archetypical Hohfeldian liberty⁸ to do as she pleases, and how she chooses to act is entirely her own business.⁹ But although her capacity to exercise her purposive agency as she pleases is normatively unrestrained, there is no legitimacy implied by the absence of such normative restraint. A person who exercises this Hohfeldian liberty acts neither legitimately nor illegitimately – the absence of constraint is merely a starting point that may be altered by legitimate normative guidance.

In liberal states, we avoid giving people guidance in respect of conduct that is purely their own business.¹⁰ Accordingly, I will treat only conduct that is not purely a private individual's business as being potentially subject to legitimate guidance. If a person's behaviour can be shown not to be the business of anyone else, it will be outside the domain of any legitimate guidance. Of course it remains to be seen how broadly we define the scope of one's own business and the business of others, but in principle, the assertion is that legitimate liberal guidance is only possible in respect of conduct which is also the business of some natural or legal 'bearer' of business other than the actor. Where this is not the case, any guidance offered is illiberal, busybody guidance.

So, when are a person's actions not purely her own business? Since we are looking for an

because, as Bratman notes elsewhere, we can sometimes do things that are merely purposive, and that do not involve the other three capacities identified. ME Bratman, 'Reflection, Planning, and Temporally Extended Agency' in *Structures of Agency: Essays* (New York, Oxford University Press, 2007) 21-22. Since our experience of criminal justice systems is that criminal liability can attach even to such 'merely' purposive actions, and this study concentrates on the criminal law, it is appropriate to focus on 'mere' purposive agency. See also A Gewirth, *Reason and Morality* (London, University of Chicago Press, 1978) 26-42 who bases his principle of generic consistency on the fundamental assumption that all morally salient actions are voluntary and purposive. It is a human's innate capacity for voluntary and purposive action that I refer to as purposive agency.

⁸ WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven, Yale University Press, 1919) 35-49, particularly at 42-43.

⁹ J Locke, *Two Treatises of Government and A Letter Concerning Toleration* (New Haven, Yale University Press, 1690/2003) 109-10 makes a similar, but not identical, proposition when he argues that prior to the state's laws, man is free to do as he pleases, subject only to the law of nature. The proposition made here is even more foundational – I argue that in the absence even of what Locke calls the law of nature, a human would be free to act as she pleases, simply because she is capable of doing so, and there is nothing to tell her not to do so.

¹⁰ This was the broad view argued for by JS Mill, *On Liberty* (New Haven, Yale University Press, 1859/2003) 80-81, 121, 139-44. Although Mill's views have been shown to need some qualification over the years, it remains a broadly acceptable synopsis of the limits of the guidance that may be offered by a genuinely liberal state.

explanation that logically precedes legal norms, for the present we may ignore purely 'legal' persons – they do not exist in a pre-norm world. Now even in a world logically prior to legal norms, each person is possessed of certain elements that constitute her as a human. I will argue in **sections 3.1** and **3.2.1** that each person is constitutively entitled to possess and defend these elements, and is not subject to guidance to the contrary.¹¹ Even if the enumeration of the constituent elements that I propose seems unappealing, so long as one agrees that each human has *some* constituent elements and that even pre-legally, she may possess and defend these elements without being subject to legitimate guidance to the contrary, the argument may proceed. At the core of what is pre-legally a person's business, are these constituent elements. Now although prior to any legitimate guidance to the contrary a person's chosen actions are entirely her own business, when this person's actions affect the constituent elements of another, even without a system of legitimate guidance it is clear that these actions are legitimately the business of the affected party as well.¹² The latter can legitimately complain about the former's actions, and therefore can legitimately offer non-busybody guidance to the former in respect of these actions. The affected person's standing arises pre-legally and is a deviation from the default absence of such standing. Her pre-legal standing to legitimately offer guidance to restrict the conduct of others stems from and is limited to, the effect that such conduct would actually have on her constituent elements. The only normative restrictions that can be supported by such a narrow pre-legal standing is guidance against *actually affecting* (as opposed to guidance requiring a person to try not to affect, or even guidance against trying to affect) the constituent elements of others.¹³ Anything more than that would be illiberal, busybody guidance.¹⁴

¹¹ T Hobbes, *Leviathan* (London, Yale University Press, 1651/2010) 79-80 identifies a fundamental 'right' of nature that inheres in each person, to preserve her own nature, and argues at pp 81-82 that this right is inalienable.

¹² Contrast this with a situation in which two persons exercising their unrestrained capacity to act find themselves interfering with each other without affecting their respective constituent elements, because their actions are mutually contradictory or incompatible – say, both are trying to pick up and take away the same stone. On these facts, neither would be interfering with the actions of the other legitimately (or illegitimately), since their respective actions are themselves neither legitimate nor illegitimate – they are merely an exercise of their Hohfeldian liberties – their unrestrained capacity to act. Although conflict also arises in such cases, since the actions of both parties are entirely their own respective businesses, no non-busybody guidance can be offered to either.

¹³ In this connection, see also HM Hurd, 'What in the World is Wrong?' (1994) 5 *Journal of Contemporary Legal Issues* 157 who also argues at length that for deontological moral theory, the most convincing and internally coherent way to identify a wrong is by reference to actually doing morally prohibited actions, rather than trying to do them, or intending to do them, or deliberating about doing them, or being motivated to do them.

¹⁴ The same proposition can, and I will argue in **section 3.3** should, be extended by analogy to apply to a world in which the law has vested upon its subjects additional rights. These rights expand the set of matters that are the 'business' of each subject. Therefore, more cases will arise in which it is legitimate for a person to comment upon

The set of circumstances in which *the criminal law* can legitimately offer guidance, will necessarily be some subset of all the cases in which at least *someone* can offer legitimate guidance.¹⁵ It follows that a liberal criminal law's standing to offer normative conduct guidance is at least as narrowly drawn as the standing enjoyed by the person affected. In our pre-legal world therefore, it is therefore also, at minimum, limited to the actual effects that a person's behaviour has on the constituent elements of others. Accordingly, reference to the intended, (incorrectly) believed, or possible effects of some behaviour in framing a norm relating to it, is inappropriate. In other words, an ideal liberal criminal law's guiding norms must necessarily be framed by reference to objective outcomes, rather than subjective perceptions or anticipations of outcomes. Since we have already noted that the mere circumstance of being in default of a conduct rule need not necessarily lead to a blaming judgment, this idea is palatable.

We have so far considered only conduct rules that imperatively restrict a person's original unfettered capacity to act as she chooses, and since we start from a position of absolute unfettered capacity, the majority of conduct rules that we encounter will be of that nature. However, it is also possible to have conduct rules that permit, or at least recognise an immunity from contrary guidance in respect of, certain conduct.¹⁶ Such conduct rules would effectively expand the scope of their addressees' liberty, since they would operate as overriding carve-outs from imperative conduct restricting rules. The philosophical constraints on the scope of imperative conduct restricting rules stem from the fact that they modify the default position of absolute unrestricted capacity to act as

the conduct of others.

¹⁵ For the present purposes it is not necessary to adopt a concluded view on the characteristic features of that subset but Duff and Marshall's explanation that only those wrongs that are 'public wrongs' ought to fall within the (potential) domain of the criminal law, points us in the direction of a plausible answer. By 'public wrongs' Duff and Marshall mean wrongs that are properly the concern of 'the public', i.e. all members of the polity, by virtue simply of their shared membership of the political community. See RA Duff and SE Marshall, 'Public and Private Wrongs' in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh, Edinburgh University Press, 2010) 71-72; SE Marshall and RA Duff, 'Reply' in PH Robinson, SP Garvey and KK Ferzan (eds), *Criminal Law Conversations*. (Oxford, Oxford University Press, 2009) 250; SE Marshall and RA Duff, 'Criminalization and Sharing Wrongs' (1998) 11(1) *Canadian Journal of Law and Jurisprudence* 7, 13-14.

¹⁶ A similar distinction is also made in J Hruschka, 'Justifications and Excuses: A Systematic Approach' (2005) 2 *Ohio State Journal of Criminal Law* 407, 408. Rules of this sort will be discussed in greater detail in **sections 4.1** and **5.1**.

one chooses. But as 'permissive conduct rules' are not exceptions to this absolute unrestricted capacity to act as one chooses, they are not subject to the same philosophical constraints that rein in imperative conduct-restricting rules. They therefore need not necessarily be framed by reference to objective facts. For reasons that will become clear in **sections 2.2.4** and **5.1**, it is my view that in practice, it makes no difference whether such rules are framed by reference to objective facts, or by reference to perceptions of facts.

On the primary argument made above, there can be no liberal moral criminal law conduct norm proscribing conduct that will not actually affect (in the sense of harm or perhaps offend) any person other than the actor. What's more, even after such a norm is set in place, if the actor's disrespect for the conduct rule does not actually affect any other person (i.e. when the disrespect of the conduct norm does not translate into a violation of it), the norm does not give the liberal criminal legal system any claim to a moral voice in censuring for such behaviour. This hints at an explanation for why many modern criminal legal systems tend to differentially punish two people who attempt the same offence when only one of them succeeds, despite their equal personal culpability. The attempter simply does not affect other people in the same way, and to the same extent as the person who completes the offence. Hence the moral voice available to the criminal law in censuring an attempter is the relatively weak voice generated by the harm actually caused by the attempt (arguably, the expressive effect of the attempt and the example set by it), instead of the strong moral voice that harm constitutive of the completed offence would have generated.¹⁷ An alternative way of looking at the same proposition is that in a retributive criminal legal system, the outer limit of the law's moral jurisdiction to censure for an offence 'φ' is directly correlated to a generalisation as to how much other people are affected by the offence.¹⁸ While a mere attempt to φ

¹⁷ J Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 *Hastings Law Journal* 91, 99-100.

¹⁸ For instance, AP Simester and A von Hirsch, *Crimes, Harms, and Wrongs* (Oxford, Hart Publishing, 2011) 3 argue that by criminalising an activity, the state declares that it is morally wrongful, instructs citizens not to do it, and warns that upon default they are liable to be convicted and punished within specified limits. According to the authors, these limits signal the seriousness with which the act is regarded. See also A von Hirsch and A Ashworth, *Proportionate Sentencing* (Oxford, Oxford University Press, 2005) 131-32, 135-37; and Dressler, 'Reassessing the Theoretical Underpinnings' 104. GP Fletcher, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949, 961 too argues that '[I]n each type of retributive theory, the primary issue is wrongdoing. The gravity of the wrong determines the maximum severity of the punishment.' While I cannot argue for it here, I proceed on the basis that in victimising offences, the seriousness with which an act is regarded i.e., the gravity of the wrong – is directly related to how much it affects others.

may also be an objectively bad thing, it is bad only in a comparatively limited sense, and therefore, a failed attempt is less serious than the completed offence, and ought to be censured less strongly than a completed offence. Hence, the punishment prescribed for an attempt to ϕ tends, in many jurisdictions, to be lower than the punishment prescribed for actually ϕ ing.

In summary, in the context of the criminal law system, I generally agree with Raz's conclusion that conduct rules, at least to the extent that they restrict liberty, should be framed on the basis of facts as reasons for action. Once ϕ is identified as conduct to be avoided on pain of criminal sanction, the criminal law should say 'You should not ϕ ', rather than 'You should not do what you believe to be ϕ ', or 'You should not try to ϕ ', or 'You should try not to ϕ ', when framing the conduct norm.

2.2 Reasons and subjectivity in decision rules

Raz notes that reasons are used to evaluate a person's behaviour.¹⁹ On that basis, we may explore the possibility that a rational agent can be adjudged blameworthy if her actions, in her circumstances, reflect poorly on the quality of her reasoning.²⁰ That suggestion is consistent with the accepted dogma that one prerequisite of any blaming evaluation of an agent's actions is that she must have been capable of exercising rational facilities while performing them.²¹ Duff too recognises the link between the quality of reasoning and blame, when he argues that a putatively justified agent acts in a 'warranted', and therefore not blameworthy, manner:

An agent whose beliefs and actions are both epistemically and normatively reasonable is at least warranted in what she does... Whether warranted or justified, she can answer for her actions with a clear conscience, even when they involved the commission of a crime: her practical reasoning was impeccable, and she acted reasonably in accordance with its conclusions; she acted either as she had sufficient reason to act, or at least as she had good reason to believe that she had sufficient reason to

¹⁹ Raz, *Practical Reason and Norms* 15-16.

²⁰ V Tadros, *Criminal Responsibility* (Oxford, Oxford University Press, 2005) 65-66 supports a similar proposition but argues from partly intuited notions of responsibility instead.

²¹ This fact actually suggests an even stronger connection between reasoning and blame – although we may well be able to attribute causal responsibility to a person who is incapable of reasoning, such a person is not blamed for causing harm. This indicates (albeit not conclusively) that it might be possible to argue that an agent can be considered blameworthy vis-a-vis a system of norms *only* if her actions, in her circumstances, reflect poorly on the quality of her reasoning. At this stage I will not attempt to defend this stronger claim, but I believe that the overall tenor of my argument does support it.

act.²² (*emphasis added*)

2.2.1 The threads of reasoning

It is useful to consider two threads of a person's reasoning separately. The first has to do with the person's exercised capacity to observe facts and reach reasoned factual conclusions and judgments on their basis. Let us call this functional reasoning. The second relates to the person's understanding and responsiveness to normative guidance. Let us call this norm-reasoning.²³

To understand the distinction that I am proposing here, consider the following examples. First, consider the case of the pub landlord:

T, a burly drunk, begins to act aggressively at a pub. D, the pub landlord asks T to leave, but this just makes T more aggressive. T starts to swing his arms around threateningly. At this, D pins T's arms to his side, and bundles T onto the landing outside the pub door. Because D uses a bit too much force in doing so, T loses his balance, and falls down a short flight of five steps into the street, and strikes his head. T sustains a head injury, from which he dies.²⁴

When questioned, D might explain why he used that amount of force by saying that he did not intend to use as much force as he had ended up using. Or, perhaps he made a mistake about how strong he was, or how heavy T was, or how drunk and off-balance T was, or how slippery the floor was, and so underestimated the effect that the force would have. D employs functional reasoning in order to make all of these assessments, and so if D uses any of these explanations, he admits to exhibiting *functional reasoning* that was arguably, in some sense, deficient. Alternatively, D might explain that he intended to use exactly as much force as he used, but that he either believed that he was entitled to use that much force, or didn't care whether or not he was entitled to use that much force. In reaching these conclusions, D employs norm-reasoning, and so if D offers these explanations, he admits to exhibiting *norm-reasoning* that was arguably, in some sense, deficient.

Consider also the case of the policeman in hot pursuit:

D, a policeman, is called to a house to investigate a report of a dangerous gunman terrorising someone

²² RA Duff, *Answering for Crime* (Oxford, Hart Publishing, 2007) 296. See also the more general views expressed at 267-71. Similarly, see AP Simester, 'A Disintegrated Theory of Culpability', in DJ Baker and J Horder (eds), *The Sanctity of Life and Criminal Law* (Cambridge, Cambridge University Press, 2013) 190.

²³ This distinction runs along similar lines to the one briefly described by Hruschka, 'Justifications and Excuses' 409. I do not make any claim that these threads are always mutually exclusive – as will become clear, although they are conceptually distinct, there may well be significant areas of overlap.

²⁴ These were the facts in the case of *R v Scarlett* [1993] 4 All ER 629.

there, and on arrival, he sees T running away with what appears to be a gun. He chases T and coming upon him as he rounds a corner, shoots T dead. At the time, T is unarmed, on his knees with his hands in the air, begging not to be shot.²⁵

When questioned, D might explain that at the time, he genuinely (albeit wrongly) believed that T was about to shoot at him. Or perhaps he might say that he had aimed to fire a warning shot above T's head, but had missed his target, and ended up killing T. In making judgments like whether T was about to shoot at him, or whether he was aiming correctly and safely above T's head, T exercises his functional reasoning. Any mistakes he makes in doing so, potentially reveal his functional reasoning in poor light. Alternatively, D might explain that he intended to shoot T dead despite knowing that T was not trying to shoot at him, because he either believed that he was entitled to shoot with deadly intent at suspects who had fled, or because he didn't care whether or not he was so entitled. In reaching these decisions, D employs norm-reasoning, and so any mistakes he makes potentially reveal his norm-reasoning in poor light.

A person who is poor at functional reasoning potentially invites blaming judgments that reflect that shortfall in exercising her exercised capacity to reason – she is careless, or perhaps objectively reckless.²⁶ Such a person exhibits deficient functional reasoning in failing to observe situational facts that she should have observed, or in reaching unwarranted conclusions on the basis of those facts, or in erroneously underestimating or overestimating the potential risks of a course of action, or the extent of the consequences it might generate. The common thread in all these errors of reasoning is that (in the absence of any normative guidance as to how good the person's functional reasoning should be) they do not reveal the person in a bad light in respect of her commitment to, and appreciation of, normative rules of conduct. They merely show that the person made an error of

²⁵ These were the facts in the case of *Beckford v R* [1988] AC 130.

²⁶ The exact meaning of recklessness is subject to some dispute. Some authorities suggest that a person is reckless when she is actually aware of the potential adverse consequences of her planned actions, and in the circumstances actually known to her, it is unreasonable to take the risk of causing these consequences, but she goes ahead anyway. This test is one of advertence. In this context, see *R v G* [2004] 1 AC 1034 which built upon the subjective approach to recklessness set out in *R v Cunningham* [1957] 2 QB 396. Other authorities suggest that a person who goes ahead with her planned actions without actually being aware of the unreasonable risk of adverse consequences, even though such risk would have been obvious to a reasonable person, is also reckless. See for instance, *R v Caldwell* [1982] AC 341, which laid down this standard of 'objective recklessness'. English law has since distanced itself from *Caldwell* style recklessness, but to the extent that this formulation is plausible, the blaming judgment stems from not being careful enough. Objective recklessness is therefore a blaming judgment stemming from poor functional reasoning.

judgment in her assessment of aspects of the physical world.

A person who is poor at norm-reasoning does not obey the normative guidance given to her, either because she inculcates contrary normative values, or because she chooses to ignore the norms.²⁷ She accordingly invites blame as someone who displays an inappropriate attitude towards the normative guidance given to her. Recall that the normative guidance contained in conduct rules is meant to guide behaviour – a conduct rule is not a mere stipulation of the consequences that are likely to ensue from being causally connected to specified undesirable outcomes or occurrences. So described, a person is norm-blameworthy if her *behaviour* demonstrates a failure to be guided by the norm, whether or not the harm that the norm was aimed at preventing actually occurs. Conversely, if a person's behaviour demonstrates acceptance of the guidance offered, she is not norm-blameworthy, whether or not the ideal consequences ensue. Within the context of substantive criminal law relating to core offences, it is generally accepted that the core norms at play are morally derived, and hence a person who acts because she does not believe, for instance, that killing is bad, or who reacts to a threat by choosing to respond to it in a manner that is excessive, invites the judgment of being morally bad, or evil.

If blameworthiness (as opposed to attribution of legal causation) depends on the quality of a person's reasoning, then we must ask, to what standard should the defendant's reasoning be compared? By dividing the defendant's reasoning into functional and normative reasoning, we can treat this as two separate questions vis-a-vis the two different types of reasoning. It is immediately clear that for the purposes of attributing blame, there is no point in comparing the defendant's functional reasoning to the perfect functional reasoning of someone with a 'god's eye' awareness of all circumstantial facts. Since no human can possibly attain a 'god's eye' awareness of everything, that is an unreal standard by reference to which to judge a human. Any person who makes an epistemic mistake falls short of the 'god's eye' standard of functional reasoning, but even outside

²⁷ There is of course the third possibility, *viz.* that she is unaware of the content of the norm. In most cases, ignorance of the norm is usually dealt with by a post-moral (and posited) meta-rule, which usually, but not inevitably, deems a person to be informed of all conduct guidance in the criminal law. Theorists like A Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid it' (2011) 74 MLR 1 and DN Husak, 'Mistake of Law and Culpability' (2010) 4 *Criminal Law and Philosophy* 135 criticise of the intransigence of such a meta-rule, but I cannot enter into that debate here. Where such a meta-rule exists, the explanation that one was ignorant about the applicable norm is unavailable to the agent, and where there is no such meta-rule, ignorance of the applicable norm may exempt from norm-blame.

legal contexts, when we call someone careless or objectively reckless, we are not just saying of her that she happened to make an epistemic mistake. We are asserting that she fell short even of the less demanding standards of functional reasoning that are expected of her by us in the context of her actions. The context within which the agent acts often determines how demanding the applicable standard of functional reasoning is – a trained professional is societally expected to meet higher standards of functional reasoning when acting within the scope of her training than a layperson.²⁸ Even outside the realms of special training, we may declare that the agent was careless when she failed to meet the standards that we would expect of an ordinary member of society acting in the agent's place. The law often refers to such standards, particularly in adjudicating civil liability, but it is important to remember that these benchmarks exist as societal facts that are logically independent of any institutionalised stipulation of standards²⁹ (including those institutionalised in a legal system). In other words, independently of the law, there exists normative but non-institutionalised guidance in societal norms, as to how good one's functional reasoning should be. The violation of purely societal norms about the quality of functional reasoning expected exposes a person to a form of societal disapprobation, and I will call this subset of societal disapprobation 'functional blame'.

We turn now to identifying the appropriate benchmark for assessing norm-reasoning. Should the quality of norm-reasoning be assessed by reference to the norms applicable to the facts as they objectively exist, or by reference to the norms applicable to the facts as perceived by the defendant? The first thing to note here is that since norm-reasoning and functional reasoning are conceptually distinct, in principle, the evaluation of the quality of a person's norm reasoning is distinct from, and should not be influenced by the quality of her functional reasoning. To unpack this proposition, consider the following permutations:

1. Because of her poor functional reasoning, D misidentifies the applicable normative guidance. However, she exercises her capacity to follow the (misidentified) norm guidance. She does not display poor norm-reasoning, even though on the whole, she does the wrong thing in the circumstances. Her error here is purely one of functional reasoning.
2. D correctly identifies the applicable normative guidance, but does not exercise her capacity to follow it. Again, on the whole she does the wrong thing in the circumstances, but this time she

²⁸ See in this context the discussion of role-specific expectations as to the quality of functional reasoning in J Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 575, 579-81. 584-85.

²⁹ By 'institutionalised stipulation of standards', I mean standards that might exist within the broad set of what Raz calls 'institutionalized systems'. See Raz, *Practical Reason and Norms* 123-31. Standards also exist in society per se, but society is not an institutionalised system.

displays poor norm-reasoning, and not poor functional reasoning.

3. D exhibits poor functional reasoning in misidentifying the applicable norm guidance, and is not guided even by those norms. Here too she does the wrong thing in the circumstances, but this time she displays both poor functional reasoning, and poor norm-reasoning.

There is one other relevant permutation, that I will only mention at this stage, but expand on a little later in **section 2.2.3**.

4. There is normative guidance directing D to meet a certain standard in terms of her functional reasoning – say the standard of a reasonable person, which also happens to be the expected societal standard. D's functional reasoning does not meet the societal standard. In this case, the same exercise of D's rational capacities attracts both functional blame and blame arising from poor norm-reasoning (which I will call 'norm-blame'). But even here, although D's desert of norm-blame and functional blame coincides, her functional reasoning and norm-reasoning remain distinct, and are benchmarked against different standards set by different systems. The benchmark for D's functional reasoning is the non-institutionalised system of societal expectations, whereas the benchmark for her norm-reasoning is the institutionalised normative guidance directing D to meet the standard of the reasonable person in her functional reasoning.

As a practical matter, a person can only apply her norm-reasoning capacities to the norms that apply to the facts as she perceives them.³⁰ Hence the quality of a person's norm-reasoning (i.e. her responsiveness to conduct norms) can only be assessed by reference to her beliefs (where the term includes her perception of the facts and her reasoned factual conclusions and assessments on that basis, but not her normative beliefs³¹). Therefore, even if the applicable conduct norm is framed by reference to objective facts, norm-blame should only be apportioned by evaluating the defendant's reasoning by reference to the normative guidance applicable to the facts as she perceived them.

³⁰ Raz, *Practical Reason and Norms* 17 also concedes that 'To be sure, in order to be guided by what is the case a person must come to believe that it is the case.' See also the observations made in **section 2.1** in respect of Raz's assertion that reasons (as facts and not beliefs) can and should be used to evaluate behaviour.

³¹ I exclude the defendant's normative beliefs from an evaluation of her norm-blame because we are not testing the mere internal consistency of her normative reasoning. See note 27 above as to why erroneous beliefs about the content of the normative system are usually irrelevant to the outcome of an assessment of norm-blame.

2.2.2 Norm blame and criminal culpability

Keeping the two threads of reasoning distinct gives us the conceptual tools to make an important proposition about culpability in the criminal law. Traditional theories of culpability or blameworthiness attempt to link a moral agent, D, and a proper blaming judgment for causing some prohibited consequence ' ϕ '.³² For instance, in Hart's modified choice theory of culpability:

What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for abstaining from what it forbids, and a fair opportunity to exercise these capacities.³³ (*emphasis added*)

Michael Moore, who rejects Hart's shift from pure choice to the capacity to exercise choice as the basis for culpability, also refers to the choice made in causing the evil which the norm seeks to prevent,³⁴ rather than in disobeying the norm. Similarly, Gur-Arye says, 'respecting offenders' dignity requires that they will not be held liable for offenses whose commission does not express their negative attitude (mental state) towards other persons' protected interests' (*emphasis added*).³⁵ Simester too argues that '[t]he burden for ascribing culpability [both for choice-based and character-based culpability theories] lies in justifying that evaluative link between act and defendant – that link which allows us to transmit judgments of the deed across to the person' (*emphasis added*).³⁶

This approach wrongly identifies the basic challenge of culpability *at the evaluative stage of the criminal law* because it fails to note the centrality of the criminal law's system of conduct rules to *ex post* culpability rulings.³⁷ Because of this, choice theorists find it difficult to link the prohibited consequence, ϕ , to the moral agent, D, in the absence of anything as unequivocal as advertent choice,³⁸ and character theorists, in suggesting that something like 'insufficient concern

³² Simester, 'A Disintegrated Theory' 180.

³³ HLA Hart, *Punishment and Responsibility* (Oxford, Oxford University Press, 1968) 152.

³⁴ MS Moore, 'Choice, Character, and Excuse' (1990) 7(2) *Social Philosophy and Policy* 29, 57. See also P Westen, 'An Attitudinal Theory of Excuse' (2006) 3 *Law and Philosophy* 289 who expressly pegs his theory of excuses to the actor's expressed attitude toward what the criminal statute declares to be the legitimate interests of persons.

³⁵ M Gur-Arye, 'Human Dignity of "Offenders": A Limitation on Substantive Criminal Law' (2012) 6 *Criminal Law and Philosophy* 189, 201.

³⁶ Simester, 'A Disintegrated Theory' 180.

³⁷ I expand in detail on this idea in M Dsouza, 'Criminal Culpability After the Act' (2015) 26 *King's Law Journal* 440. For the present purposes, the condensed summary of the argument presented in that paper will suffice.

³⁸ See for instance the choice-based theories proposed in Moore, 'Choice, Character, and Excuse'; CO Finkelstein, 'Responsibility for Unintended Consequences' (2005) 2 *Ohio State Journal of Criminal Law* 579; MS Moore and

for the interests of others' is a blameworthy *character trait*,³⁹ attract criticism for defining the 'in principle' domain of *criminal* culpability too broadly.⁴⁰ But in the criminal law's institutionalised normative system, *criminalisation theory* is directly concerned with ϕ , and *it* draws the link between ϕ and the criminal law's normative guidance to behave so as not to cause ϕ . This link often depends on ϕ being an undeserved violation of some victim's interest. Yet it remains true that a person may choose⁴¹ to accept the criminal law's normative guidance, and still ϕ ; and conversely, that she may reject the normative guidance, but still fail to ϕ . Once the prohibiting norm is in place, culpability theory need only provide an account of the link *between D and the applicable norm*. The challenge of culpability, in the sense of *ex post blameworthiness* then, is to explain why D's violation of the prohibiting norm results in a negative evaluation of D. I think that culpability theories that try to trace our negative evaluation of the outcome ϕ back to D at the *ex post* stage of blame evaluation, start at the wrong place.

At the *ex post* stage, if we start with the criminal law conduct norm, it is easy to trace our negative evaluation of the fact that D acted contrary to the norm back to our evaluation of D. Conduct norms are meant to guide conduct or behaviour, and so D shows due regard to them when she is guided by those norms in choosing her actions. She is not culpable (i.e. blameworthy) in these circumstances. Conversely, D acts culpably when she does not let the conduct rules guide her behavioural choices. Accordingly, D's in-principle⁴² criminal culpability depends on her attitude⁴³

HM Hurd, 'Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence' (2011) 5 *Criminal Law and Philosophy* 147. See also in this connection Simester, 'A Disintegrated Theory', 185, 191; AP Simester, 'Responsibility for Inadvertent Acts' (2005) 2 *Ohio State Journal of Criminal Law* 601, 603.

³⁹ See for instance Simester, 'A Disintegrated Theory' 192-94; RA Duff, 'Choice, Character, and Criminal Liability' (1993) 12 *Law and Philosophy* 345, 362; Tadros, *Criminal Responsibility* 82-85, 90.

⁴⁰ See Duff, 'Choice, Character, and Criminal Liability' 368; Simester, 'A Disintegrated Theory' 195. I emphasise the reference to *criminal* culpability in the main text because the said 'in principle' domain of culpability may well apply unobjectionably in respect of *non-criminal* culpability.

⁴¹ I refer to choice here since even character theorists agree that choice does supply a link between our judgment about a wrong ϕ , and our evaluation of D, albeit via a disclosure about D's character.

⁴² By in-principle culpability I mean only *whether* D deserves criminal blame. How much criminal blame she deserves is a separate question, not directly relevant to the present argument, and so I leave that to one side for now.

⁴³ My reference to an 'attitude' towards a conduct rule should be understood in contradistinction to Sendor's usage of the same term in his explanation of the desert of criminal liability. Sendor is concerned with the defendant's attitude (in particular, the attitudes of respect or disrespect) towards the right protected by a norm, rather than the norm itself. His reference to the defendant's attitude allows him to consider, in addition to *mens rea* factors, aspects of the defendant's mental state generally relevant at the supervening defence stage. My own usage of the term is both

towards the criminal law's conduct rules. It does not depend on her having caused (or not caused) a consequence that an applicable conduct rule sought to avoid.⁴⁴ This approach differs significantly from traditional approaches to understanding culpability, because expressing an inappropriate attitude towards a norm is not synonymous with causing the harm that the norm was designed to prevent. Although a choice to ignore or behave contrary to a norm usually coincides with bringing about the outcome that the norm is calculated to avoid (at least where the conduct rule is well formulated), it need not. Similarly, although the bringing about of an outcome that a norm is calculated to avoid usually involves a failure to be guided by the conduct rule in question, it need not be. D may display a deplorable attitude towards the norm guidance without bringing about the proscribed outcome, as in the case of a failed attempt to ϕ ; or she may cause the feared outcome without displaying a blameworthy attitude towards the concerned norm, as in the case of negligent or accidental ϕ ing. The argument made here recognises the distinctness of the enterprise of criminalisation and the enterprise of determining blameworthiness, and is sensitive to it. We criminalise the bringing about of ϕ by creating an appropriate criminal law conduct norm ' π ' because, for instance, ϕ is a harm. Having done that, it is redundant to once again refer to the occurrence (or otherwise) of ϕ when determining an agent's blameworthiness in respect of norm π . The agent's blameworthiness should depend instead on her attitude towards π .

By the yardstick suggested, a person may deserve criminal blame depending on her attitude

broader and narrower. It is broader in that it refers to an attitude towards the norm, rather than the interests protected by the norm; and it is narrower in that since I am unconcerned with any actual outcomes, respect or disrespect to the norm may be established without referring to considerations relevant to establishing supervening defences to liability for causing the outcome. See BB Sendor, 'Mistakes of Fact: A Study in the Structure of Criminal Conduct' (1990) 25 *Wake Forest Law Review* 707.

⁴⁴ A similar argument was also made by Karl Binding in German in *Die Normen und ihre Ubertretung*. For the present purposes, I rely on Eser's summary of Binding's thesis in A Eser, 'Justification and Excuse' (1976) 24 *American Journal of Comparative Law* 621, 625. For Binding, the norm breached by criminal acts was drawn from a set of norms separate from, and underlying, doctrinal law, and a person was guilty of acting wrongfully when she directed her will towards violating these underlying norms. Duff, 'Choice, Character, and Criminal Liability' 363-64 too considers in passing the possibility that an improper attitude towards the criminal law's norms may be the basis for culpability, although he identifies the having and acting upon that attitude as a character trait. Thus he would explain that an agent's criminal culpability arises from her possession of that character trait. Although this move is open to him, it seems somewhat unnatural to identify the 'having and acting upon of an improper attitude towards the criminal law's norms' as a character trait. It bears little resemblance to other (more recognisable) character traits that Duff also identifies – traits such as honesty, dishonesty, courage, cowardice, generosity, meanness, compassion and callousness.

towards the criminal law's norms even if the apprehended outcome does not materialise.⁴⁵ Intuitively we do think that two persons who do their utmost to commit murder are equally bad persons, even when due to blind luck, only one succeeds,⁴⁶ and the understanding of culpability proposed here explains why. Yet, as explained in **section 2.1**, the entitlement or standing to offer liberal guidance, and award criminal blame arises only when harm occurs. In other words, the outcome of the agent's actions creates the (blamer's) entitlement to blame, whereas the agent's attitude to the norm creates her own desert of blame.⁴⁷ Perhaps this is how all blame, criminal or otherwise, works. Perhaps the assertion that we blame D for ϕ ing is just convenient shorthand for the fuller explanation that we blame D because her actions resulted in ϕ happening, and she was blameworthy for not following some normative guidance designed to prevent ϕ from happening. However, I need not defend those propositions here. For the present purposes it is sufficient to say that the criminal law, as an enterprise of the state, assigns blame in the public domain of citizenry, and that in that special institutionalised context, when it assigns criminal blame, both blameworthiness and something for which to blame are necessary (but not independently sufficient) preconditions.

The importance of the shift in focus from blaming based on the outcome contemplated by a norm to blaming based on the agent's responsiveness to the norm, is best showcased by what it suggests about whether criminal blameworthiness can stem from inadvertence. Although a complete defence of my views on this issue would require a separate paper, I will briefly outline them here.

If norm-blameworthiness depends on the agent's attitude towards the norm, then criminal blame is that subset of norm-blame that arises in respect of the norms contained in the criminal law.

⁴⁵ In this context, see the general discussion of failed attempts and unmaterialized risks in MH Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford, Oxford University Press, 2011) 204-06. I do not adopt Kramer's view without reservation – in particular, I have reservations about his assertion that the degree of harm that actually occurs in some way positively correlates with the degree of evilness associated with the conduct. Nevertheless, I agree with the underlying assertion that moral blame may be deserved even when no harm actually materialises.

⁴⁶ In fact, L Alexander and KK Ferzan, 'Results Don't Matter' in PH Robinson, SP Garvey and KK Ferzan (eds), *Criminal Law Conversations* (Oxford, Oxford University Press, 2009) argue that equal criminal liability should ensue in such cases.

⁴⁷ This is a conclusion with which I think that Michael Moore would agree, given his views on the independent moral significance of wrongdoing. See MS Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford, Oxford University Press, 2010) 191-247.

A person's criminal blameworthiness then ought to be predicated on her displaying an inappropriate attitude towards the criminal law's normative guidance. It seems unlikely that one can display an attitude towards a norm without advertent⁴⁸ to it. The obvious rebuttal to this proposition is that 'If D can display an "attitude" of "I cannot be bothered to be careful not to be in violation of a right (i.e. by causing the prohibited outcome)", surely she can also display the attitude of "I cannot be bothered to be careful not to be in violation of a norm"'. That argument fails because an attitude towards 'being in violation of a norm', is not the same as an attitude towards the norm itself. To be in violation of a norm is to have caused the harm that the norm was designed to prevent. As previously explained, causing or avoiding harm is not coterminous with accepting or rejecting the corresponding norm's guidance.⁴⁹ Of course, one can be careless about finding out the normative guidance available. However as pointed out earlier,⁵⁰ as a general (and fairly uncontroversial) rule, that does not exculpate from norm-blame.

In order to truly deserve norm-blame then, a person should at least be subjectively reckless about, or wilfully blind to, the possibility of disobeying the normative guidance applicable. In other words, the minimal requirement for norm-blame is that the agent advertently chose not to exercise her capacity to avoid violating the norm. Inadvertent norm violations are not norm-blameworthy, and where the normative system concerned is that of the criminal law, inadvertent norm violations ought not to be criminally blameworthy.⁵¹ Ordinarily, a person who inadvertently brings about that *outcome* is at most functionally blameworthy and in principle, the criminal law should not punish for this kind of blameworthiness. This conclusion fits well with the fact that the mens rea stipulations in most core criminal law offence definitions require advertence, in the form of either

⁴⁸ For a sophisticated account of what it means to advert to something (in that case, a risk of harm, as opposed to my proposed alternative focus on the norm guidance), see Moore and Hurd, 'Punishing the Awkward' 152-6, who also, citing different arguments, conclude that liability in the criminal law ought to be predicated only on advertence, and that criminal liability based on inadvertence is normatively illegitimate.

⁴⁹ The same logic also tells us that the attitude of 'I cannot be bothered to be careful not to be in violation of a right' is not an attitude towards the right. This difference is the difference between negligently causing harm and advertently causing harm. Sendor errs in treating carelessness as an attitude towards the underlying right. See Sendor, 'Mistakes of Fact' 727. Carelessness is actually an attitude towards being in violation of a right, and that is why, vis-a-vis the underlying right, it is inadvertent. Blame for inadvertently causing ϕ derives from poor functional reasoning, and not (or at least not without stipulating additional norms) from poor norm-reasoning.

⁵⁰ See note 27 above.

⁵¹ Moore, 'Choice, Character, and Excuse' 58 also tentatively suggests the same conclusion.

intention, knowledge or subjective recklessness.⁵² Mens rea stipulations may be seen as one filter in a process geared to isolating norm-blameworthy persons (rationale-based defences being another).

But if criminal blameworthiness is explained in this way, then it must stem only from poor norm-reasoning. It cannot arise from poor functional reasoning, and so in principle, criminal liability should not flow from functional blameworthiness. This conforms to the general intuitive association of the label 'criminal' with wickedness or evil, rather than having poor observational skills, or being poor at interpreting the facts that one does observe.⁵³ Nevertheless, the criminal law regularly convicts people for bringing about ϕ negligently or in a manner that is 'objectively reckless'.⁵⁴ In doing so it appears to designate the convict criminally blameworthy because of her poor functional reasoning. Since negligence-based liability is fairly commonplace in the criminal law, and a finding of negligence is an indictment of the actor's functional reasoning, it would appear that poor functional reasoning (i.e. functional reasoning found to be deficient by reference to societal norms) can, and regularly does, found criminal liability. This would therefore suggest that the normative position that I adopt is implausibly revisionist. In fact it is not.

⁵² In relation to 'subjective recklessness', see note 26 above. Intention, knowledge and subjective recklessness are appropriate bases for making criminal convictions, because they reveal flaws in the defendant's norm-reasoning vis-a-vis the criminal law's norms.

⁵³ As Kramer, *The Ethics of Capital Punishment* 188, notes:

'Numerous wrongs are committed through negligence. Although some negligent wrongs are extremely harmful... none of them is properly classifiable as wicked. Carelessness is a vice, and it can lead to horrifically injurious consequences in some settings; but the gravity of the culpability of a careless action, even when calamitous results ensue therefrom, is not sufficient to render the action evil.'

⁵⁴ As Sendor, 'Mistakes of Fact' 714, and Tadros, *Criminal Responsibility* 81, note in other contexts, negligence is an adequate threshold for blame. Since the criminal law is, amongst other things, a tool for social regulation, the extension, for regulatory reasons, of the criminal law to making blaming judgments in respect of functional reasoning is tempting, and indeed some would say pervasive in modern legal systems. On this point, see also Lord Rodger's separate concurring judgment in *R v G* [2004] 1 AC 1034. For the reasons I have stated, I consider such a use of the criminal law to be philosophically inappropriate. Lord Bingham's comments in *R v G* [2004] 1 AC 1034, 1055 reflect the same idea. He says,

'...it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication...) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.'

Nevertheless, I do accept that there is some scope for legitimate criminal liability when the criminal law chooses to offer normative guidance as to how one should exercise one's functional reasoning.

2.2.3 Criminal liability apparently linked to functional reasoning

Most cases in which the criminal law appears to impose liability for poor functional reasoning may be explained in a manner that is compatible with the normative proposition I make. The key is to see these cases as instances in which, in addition to a primary conduct rule (which directs its addressees not to bring about a proscribed outcome ϕ), the criminal law also adopts an institutionalised benchmark for the quality of functional reasoning that it expects the said addressees to employ in being guided by the primary conduct rule. This benchmark is often (though not invariably) set by reference to the objective reasonable person, who is sometimes attributed a selection of the defendant's capacity-limiting characteristics. There is copious literature addressing the topic of exactly which characteristics of the defendant should be so selected, but I do not propose to comment on that issue at this stage. Instead, I propose that in adopting an institutionalised benchmark, the criminal law supplements its primary conduct norm with a secondary conduct norm. Since an agent can choose to be more, or less, careful while gathering facts about a given situation and when extrapolating conclusions on the basis of these facts, it is conceptually possible to have normative guidance as to this aspect of the agent's behaviour. What's more, it is easy to see that an agent who chooses not to follow such normative guidance displays a flaw in her norm-reasoning, and that this flaw can support norm-blame. Consider for instance, special regulations that require persons who offer adventure-sports activities to take special care to ensure the safety of their equipment. When the subject of this normative guidance chooses not to take such care as is required by the norm, she invites norm-blame.

So when the criminal law proscribes causing ϕ and institutionally requires that each person's functional reasoning in seeking not to cause ϕ must meet the benchmark set by the reasonable person, it is offering the following cumulative normative guidance to the addressee:

Primary Norm: Do not cause ϕ ; and

Secondary Norm: Take as much care as a reasonable person would, not to inadvertently cause ϕ .

These norms are violated only when D (advertently) does not choose her behaviour by reference to them.⁵⁵ D violates the Primary Norm when she advertently chooses not to exercise her capacity to avoid ϕ ing (whether or not she actually ϕ s). She only violates the Secondary Norm

⁵⁵ Or is treated as having done so in terms of a meta-rule of the type described in note 27 above.

when she advertently chooses not to exercise her capacity to comply with the Secondary Norm, i.e., to take as much care as a reasonable person would, not to inadvertently ϕ . Of course the same failing might also attract functional blame, but when criminal liability is imposed for the failing, it is best understood as liability based on norm-blame relating to the Secondary Norm, rather than liability based on functional blame. Hence in such cases too, the finding of blameworthiness in relation to the defendant can be traced to an advertent failure to be guided by a conduct norm.

This explanation of blaming decisions within the institutionalised system of the criminal law helps us to make sense of cases involving advertent wrongdoing as well as of most cases that have hitherto been seen as involving criminal liability for inadvertent wrongdoing. It does this without abandoning the certainty of the link offered by choice based approaches to culpability, between our judgments about what the agent did, and about the agent herself. So for example, where ϕ is 'causing the death of a person', the criminal law gets the standing to blame an agent when she causes another person to die. However, criminal blame *for murder* ensues if the causal agent was norm-blameworthy in advertently violating the criminal law norm against killing another,⁵⁶ whereas criminal blame *for gross negligence manslaughter* ensues if she was norm-blameworthy in advertently violating a secondary criminal law norm requiring each person to take care not to be grossly negligent in the performance of their duties, when such negligence might result in the death of a person. Similarly, consider the law of rape (and many other sexual offences) in England and Wales. Prior to the Sexual Offences Act 2003, in terms of the notorious case of *Morgan*, the mens rea requirement in relation to the complainant's lack of consent was the absence of an *honest belief* that the complainant was consenting.⁵⁷ Accordingly, a defendant who honestly believed that the complainant had consented did not commit rape. This formulation treated poor functional reasoning in identifying the complainant's consent as irrelevant to the sort of blame apportioned by the criminal law of rape. The normative guidance offered in relation to consent in the *Morgan* era was as follows:

Primary Norm: Do not have sexual intercourse with V without her consent.

If D genuinely believed that V was consenting, then however unreasonable that belief, D was not norm-blameworthy in relation to the Primary Norm, and so could not be convicted of raping V.

⁵⁶ I ignore for the moment doctrinal oddities that mean that in jurisdictions like England and Wales, a person can be convicted of murder even without intending to kill the deceased, if she intended to inflict serious injury upon the victim, and death resulted.

⁵⁷ *DPP v Morgan* [1976] AC 182.

This outcome was compatible with the proposition that at its core, a criminal conviction signifies at least that the convict did not have due regard for the criminal law's conduct rules.

The law on this point has been changed by the Sexual Offences Act 2003, and under s1(c) thereof, the mens rea now required in relation to consent for the rape offence, is an absence of *reasonable* belief in the complainant's consent. Additionally, s1(2) explains that '[w]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps [D] has taken to ascertain whether [V] consents'. With some slight simplification for explanation, the normative guidance now offered in relation to consent to sexual intercourse ought to be parsed as follows:

Primary Norm: Do not have sexual intercourse with V without her consent.

Secondary Norm: If you believe that V is consenting, take as much care as a reasonable person would to ensure that your belief is correct.

In terms of this guidance as well, where D genuinely believes that V was consenting, then no matter how unreasonable that belief is, D does not incur norm-blame in relation to the Primary Norm. However, if D refuses the guidance of the Secondary Norm, and does not take as much care as a reasonable person would have taken to ensure that his evaluation about V's consent is correct, then D *is* norm-blameworthy in respect of the Secondary Norm. If in these circumstances the proscribed consequence (i.e. non-consensual sexual intercourse) occurred, then D could suffer norm-blame (and a criminal conviction) relating to a criminal law conduct rule.

Unpacking the conduct norms for a criminal offence that appears to blame for poor functional reasoning in this way helps us avoid reaching some unfortunate conclusions. Consider for instance, the case of *R v B (MA)*.⁵⁸ In that case, the court held that under the Sexual Offences Act 2003, the reasonableness of D's honest but mistaken belief that V had consented to sexual intercourse must be judged by reference to the strictly objective standard of what a reasonable person would have believed, even if D's actual belief was caused by mental conditions not amounting to insanity in law (such as delusional psychotic illnesses or personality disorders) which affected his ability to understand whether V was consenting to sexual intercourse. In other words, if D suffers from a delusional psychotic illness that does not answer to the law's idiosyncratic conception of insanity, and because of this illness he has intercourse with V mistakenly believing that she is consenting to –

⁵⁸ *R v B (MA)* [2013] 1 Cr App R 36.

even welcoming – sexual intercourse, he should be labelled a rapist. This, even if he subjectively made every effort to ensure that V was actually consenting, because an objectively reasonable (i.e. not mentally ill) person would not have believed that V was consenting.⁵⁹ Keeping aside for a moment our sympathy for V's plight, there is surely something deeply disturbing about this labelling outcome. The court concluded that D should be labelled a rapist, even though D might never have dreamed of forcing himself upon another, and might in fact have tried his best to ascertain that his prospective sexual partner was consenting. It held that the label of 'rapist' was appropriate even where D's main problem was that mental illness has affected his ability to correctly analyse his situational perceptions. This label is highly stigmatic, and yet the court held that D should share it with other persons who are unambiguously contemptuous of the sexual autonomy of others.

This disturbing outcome can be avoided by recognising that even where the criminal law seems to blame for poor functional reasoning, it is actually issuing normative guidance requiring addressees to take special care in forming epistemic judgments, and blaming for a person's failure to choose her actions by reference to the guidance in this norm. On that account, D incurs blame relatable to the Secondary Norm only if he chooses not to exercise his capacity to achieve the standards of functional reasoning that a reasonable person would have attained.⁶⁰ Even assuming, as was the case in *R v B (MA)*, that incapacity based defences are unavailable, if D tried but was unable to achieve the prescribed standards of functional reasoning, D would not deserve norm-blame relatable to the Secondary Norm, because he accepted the guidance in the Secondary Norm. Such an outcome has intuitive appeal, and doctrine has tried to accommodate it to some extent by picking and choosing certain features of the defendant by reference to which the benchmark set by the law is moderated. Hence, the reasonable person is often attributed the defendant's age, gender, and physical handicaps. But this solution is inelegant and inadequate. Attempts to exhaustively enumerate the features of the defendant that ought to be attributed to the reasonable person have

⁵⁹ Strictly, this part of the ruling was obiter. However, it does flow from the belief that the criminal law may punish for poor functional reasoning.

⁶⁰ This is a slight modification of the standard account of choice-based culpability proposed by theorists like Moore, 'Choice, Character, and Excuse' 57, and Finkelstein, 'Responsibility for Unintended Consequences' and recounted by others like Simester, 'A Disintegrated Theory' 185. The standard account proposes that a moral agent, D, is (prima facie) culpable or blameworthy for causing the proscribed outcome, ϕ , only if she chooses not to exercise her capacity to avoid causing ϕ . In the argument made in this section, I have replaced the reference to the causing of the proscribed outcome ϕ , with a reference to the violation of the norm that proscribes ϕ ing.

consistently proved inadequate, and no convincing principled defence of any such list of features has been forthcoming. So when cases like *R v B (MA)* arise, courts that proceed on the basis that the criminal law blames for poor functional reasoning continue to have to reach conclusions that they themselves find disturbing⁶¹ in order to preserve doctrinal integrity. The alternative approach described herein sidesteps these problems. It offers a clear and principled basis for exonerating any person who has tried to meet the standards of functional reasoning prescribed by the law, even when she fails.

This idea may be scaled up further to take into account additional complexities in the law. For example, the criminal law may additionally adopt a Tertiary Norm relating to behaviour that might cause D to become unable, or less able, to achieve the standards prescribed in other norms. In fact, it often does just that. Consider for instance the defendant who fails to comply with a norm of the criminal law because she is intoxicated or in an uncontrolled automatic state. When this intoxication or state of automatism is self-induced (i.e. voluntary), the criminal law often treats the defendant as being criminally blameworthy, provided that the outcome (or conduct) proscribed by the Primary Norm occurs. The subtext of rules that inculcate voluntarily intoxicated persons⁶² (or if you prefer, prevent them from raising evidence of their voluntarily intoxicated state to negate mens rea⁶³), rules that prevent defendants from relying on mistakes attributable to their voluntarily intoxicated state,⁶⁴ and rules that inculcate persons who offend in a self-induced state of automatism,⁶⁵ is that there is tertiary normative guidance in the criminal law against choosing to do something that jeopardises the effective exercise of one's capacity to be guided by other applicable criminal law norms. Someone who does not exercise her capacity to avoid breaching this Tertiary Norm deserves norm-blame by reference to the Tertiary Norm. Of course, even such a norm would not inculcate a defendant of the sort contemplated in the dicta in *R v B (MA)*, and that, I think, is a good thing.

⁶¹ See for instance the manner in which the Court of Appeal in *R v B (MA)* [2013] 1 Cr App R 36 tried to moderate the effect of its statement of the law in paras 40-41.

⁶² See for instance, *DPP v Majewski* [1977] AC 443, 474; *R v Kingston* [1995] 2 AC 355, 369 and AP Simester, 'Intoxication is Never a Defence' [2009] 1 Crim LR 3. *cf R v Heard* [2007] 3 WLR 475, 484-5.

⁶³ AP Simester, JR Spencer, et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Oxford, Hart Publishing, 2016) 717-19.

⁶⁴ See for instance in England and Wales, s76(5) of the Criminal Justice and Immigration Act 2008.

⁶⁵ See for instance *R v Quick* [1973] QB 910; *R v Bailey* (1983) 77 Cr App R 76; and *R v Coley* [2013] EWCA Crim 223.

Embracing an acquittal in *R v B (MA)* does not commit us to denying that V suffered a wrong. Whether V suffered a wrong, and whether the person who was the author of that wrong deserves to be criminally blamed for authoring it are separate questions. Conceptually, the fact that the criminal law exonerates D from criminal blame does not prevent us from recognising that V nevertheless suffered a wrong. On that basis, civil law remedies may continue to be available to V for the wrong she suffered.⁶⁶ Neither is an acquittal necessarily worrying from the perspective of crime prevention. Even where criminal blame is ruled out for a person suffering from delusional psychotic illnesses or personality disorders of the sort considered in *R v B (MA)*, the state can empower the court to require the person to undergo treatment. This is the sort of power that is regularly exercised by courts in respect of defendants who are found not guilty of a charged offence by reason of insanity.

It appears to me that a large majority of seemingly negligence-based offences can be explained on this basis. As for the minority of offences that cannot, the arguments made herein offer a normative case for rejecting them. I therefore propose that philosophically, criminal blameworthiness ought to be understood as norm-blame arising from the failure to show due regard to the guiding norms of the institutionalised system of the criminal law. This, coupled with the actual causation of a proscribed outcome, should be understood as amounting to criminal blame. Further, one should only be taken to have not shown due regard to a norm if one has adverted to it, and then chosen not to exercise one's capacity to accept its guidance.

2.2.4 The choice of perspective in decision rules

A court's jurisdiction to evaluate behaviour that violates conduct norms is regulated by decision rules. These govern the general trial procedure, the substantive determination of liability in a particular case, and the consequential determination of the punishment for a liable person. At least the last two categories of these decision rules deal with the agent in a personal manner – they make personal norm-blaming judgments in respect of the particular case and that particular agent. As I have argued, the general nature of a norm-blaming judgment requires reference to perceived facts rather than objective facts. For this reason, I maintain that decision rules dealing with the substantive evaluation of personal norm-blame ought generally to be denominated in terms of reasons that are beliefs (i.e. perceptions of facts), rather than objective facts. Furthermore, there is no special normative reason to even formally peg such decision rules to objective factual bases. The

⁶⁶ I touch upon this possibility in **section 8.5.3**.

decision rules relating to these blaming judgments are addressed to judges (or, where applicable, the jury) who are required to assess the behaviour of an agent after it has happened. As we have already noted, they are concerned with the evaluation and censure of conduct after it has occurred, and not with providing prior guidance for behaviour. Therefore, while Raz is right in arguing that conduct rules should be framed by reference to objective facts, his reasons for insisting that norms should be based on facts and not beliefs do not apply when rules are referred to in the context of evaluating past conduct.⁶⁷ Raz himself proceeds on the contrary basis that reasons as facts should be used to evaluate behaviour.⁶⁸ However there are several types of evaluating judgments one can pass with respect to behaviour, and while the application of Raz's methods may well tell us whether behaviour was objectively beneficial, they would be inappropriate for telling us (as is the enterprise of decision rules in the criminal law) whether the person engaging in the behaviour acted in a criminally blameworthy manner. Alternatively, if one accepts that the special liberal moral context of the criminal law generates reasons to ground conduct norms in objective facts, it still does not follow that criminal law decision rules should also be grounded in objective fact. The criminal law already has a moral voice since it adopts moral conduct norms. When it evaluates conduct, it does so by reference to morally predicated standards and therefore it can speak with a moral voice, simply by virtue of that fact.

As explained in **section 2.2.3**, even when the criminal law appears to blame for poor functional reasoning, it should in fact be understood as making a norm-blaming judgment relatable

⁶⁷ As M Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 *Harvard Law Review* 625, 672-73 observes,

'...according to Dr. Raz, the various arguments for the rule of law all spring [from] the basic intuition that 'the law must be capable of being obeyed' and that hence 'it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it.' But this idea, with its seemingly unassailable logic, applies only to conduct rules: by definition, conduct rules are all one needs to know in order to obey the law. Decision rules, as such, cannot be obeyed (or disobeyed) by citizens...'

Similarly, Stewart, 'The Role of Reasonableness' 333-34, argues that:

'It is uncontroversial that some legal rules, such as the rules of the road, are meant to guide the conduct of citizens, while other legal rules, such as the rules governing the application of the insanity defence, do not. The instrumental demands of the rule of law that Raz identifies apply more urgently... to the first kind of rule, but not to the second: a rule that people are supposed to follow must be reasonably clear, promulgated in advance, publicly available, and so forth, while a rule that determines when an offender will be declared insane rather than responsible would never be relied upon and so need not always be promulgated in advance or clear to the public.'

⁶⁸ Raz, *Practical Reason and Norms* 15-16.

to a norm requiring the agent to meet an institutionalised qualitative benchmark for functional reasoning when being guided by another conduct rule. Hence even in these cases, the quality of the agent's norm-reasoning should be evaluated from a subjective perspective. If the agent did not realise that she was in a situation in which the 'meet the institutionalised benchmark for functional reasoning' norm applied to her, she would not have displayed poor reasoning vis-a-vis that norm.

As such, all decision rules that deal with the apportionment of norm-blame require the decision-maker not to take notice of circumstantial factors that the agent did not perceive. Concomitantly, all decision rules that deal with the apportionment of functional blame require the decision-maker to ascertain whether the agent perceived at least all circumstantial factors that that society normatively expected her to have perceived, and decide whether the assessments she made based on those factors were at least as good as those that that society normatively expected her to have made.⁶⁹ Thus if the decision rule is stated as 'The agent was not blameworthy in doing X if Y happened' (where Y is a specified circumstantial contingency), then while applying it the decision-maker must mediate the harshness of the rule at least to the extent that the agent should not be found to be norm-blameworthy in doing what she believed to be X, if she did it because she believed that Y had happened; and she should not be found to be functionally blameworthy if her beliefs that she was doing X, or that Y had happened, were appropriate on the basis of facts that she knew or was normatively expected within that society to have known. Indeed a failure to use these perspective-adjusted standpoints when applying any rule that deals with the attribution of personal blame would invariably result in an unfair assessment of the reasoning of a person. The law's expressive capacity should not be used to convey such an unfair personal blaming judgment, since that would amount to lying about the defendant.⁷⁰

⁶⁹ The standard may be higher or lower depending on the role performed by the agent (a doctor would have to exercise better medical judgment than a layperson) or the development of her mental capabilities (an infant is not required to be as reasonable as a mature person).

⁷⁰ See also BS Byrd, 'Till Death Do us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women' (1991) 1 *Duke Journal of Comparative & International Law* 169, 176, and BS Byrd, 'Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction' (1987) 33 *Wayne Law Review* 1289, 1301-02, who agrees that '[a] completely objective standard is appropriate only for defining norms of conduct and making factual determinations but is never appropriate for judging the actor's responsibility for objectively determined wrongs.' Along similar lines, see Robinson, 'Competing Theories' 64-65 and MN Berman, 'Justification and Excuse, Law and Morality' (2003) 53 *Duke Law Journal* 1, 55-56.

2.2.5 The reasonableness of beliefs, and 'imperfect self-defense'

I have argued that although norm-blame should only be assessed on the basis of the agent's norm-reasoning within the context of the facts as the agent perceived them, where there is normative guidance, explicit or implicit, requiring the agent to be especially meticulous in her functional reasoning, the agent may deserve norm-blame for failing to be adequately guided by *that* norm. When deciding on whether such norm-blame is appropriate, a comparison of the perceived facts with the facts that the agent would have perceived if she had exercised her functional reasoning with the requisite care would provide evidence of the failure to be appropriately guided. Can it be argued that there is always implicit normative guidance requiring persons who claim a rationale-based defence to have taken special care to meet objective standards of reasonableness in their functional reasoning?

Simester seems to imply that this is the case. He says that a person who sets out to act on the basis that she is entitled to a rationale-based defence, knowingly commits a prima facie offence, and so can be expected to conform to a higher standard of reasonableness in claiming the defence.⁷¹ The presence of such implicit normative guidance would also fit well with Uniacke's theory as to the perspective that must be adopted while making any moral assessment of a person. Uniacke argues that the moral assessment of a person must be agent-perspectival, by which she means that the person's deservingness of moral blame must be assessed by examining her conduct in the context of facts that she actually knew, and the information reasonably available to her.⁷² Something like the implicit normative guidance hypothesised by Simester seems to also be implicitly assumed in Uniacke's qualification requiring reference to information reasonably available to the agent. Greenawalt too argues for a perspectival approach mediated by a reasonableness standard. In his view, '[s]o long as one exercises the best possible judgment on the facts he can reasonably acquire, the existence of other facts knowable only in some practically unimportant sense is immaterial for purposes of moral evaluation.'⁷³ Stewart also adopts a similar position when arguing that,

We would have to say to [the 'putatively justified' actor], that he should have done something else; but

⁷¹ AP Simester, 'Mistakes in Defence' (1992) 12 OJLS 295, 308-9. Admittedly, 'can be expected to' is not the same as, 'is cautioned to'. In that sense, perhaps Simester is arguing that the requirement that an agent meet a higher standard of reasonableness is purely a decision rule, and not a conduct norm at all. I will consider this possibility a little later in this section.

⁷² S Uniacke, *Permissible Killing* (Cambridge, Cambridge University Press, 1994) 42. See also S Uniacke, 'Rights and Relativistic Justifications: Replies to Kasachkoff and Husak' (2000) 19 *Law and Philosophy* 645, 646.

⁷³ K Greenawalt, 'Distinguishing Justifications from Excuses' (1986) 49(3) *Law and Contemporary Problems* 89, 94.

we would not be able to tell him what that something else was; we would be blaming him for not knowing and not acting upon a fact he could not reasonably have been expected to know. Assigning blame in circumstances such as these is akin to imposing absolute liability, which is repugnant to any account of criminal law that takes issues of fault and responsibility seriously (as [John] Gardner's and Fletcher's certainly do). In short, a person who acts reasonably in response to the reasonable appearance of a deadly threat to himself or one under his protection has done nothing which attracts the kind of blame the criminal law requires. [The 'putatively justified' actor] is entitled to say, and we should say, that he did the right thing in the circumstances. A fact he could not reasonably have known – the suspect's gun was an imitation – does indeed mean that his conduct was, from some perspective, wrong; but this is not the kind of wrong that should affect our legal assessment of his conduct. From the point of view of the criminal law, he did nothing wrong, and we should therefore not say that his conduct was merely excused rather than justified.⁷⁴

However, none of these arguments are premised on the existence of words to suggest normative guidance to conform to objective standards of reasonableness in the offence definition, or the rationale-based defence stipulation. It therefore seems difficult to support the assertion that it is nevertheless implied. Moreover, if the pre-legal standing to legitimately comment upon the conduct of others stems from the actual effect of such conduct on another human's constituent elements, then for a pre-legal basis to proscribe the negligent or objectively reckless conduct of others, there must be a constituent element that creates a pre-legal entitlement not to be exposed to risk (or more specifically, risk above a certain threshold deemed 'reasonable'). This seems exceedingly unlikely, since risk is a human-authored, rational and relational concept, rather than something that exists in nature as part of what makes a human. Therefore I doubt that there can be any implicit pre-legal guidance requiring people to conduct themselves with care. The argument that such normative guidance can be read into institutionalised systems of criminal law seems to stem purely from dismay at completely exonerating a defendant who acted carelessly or even grossly negligently, rather than from any actual flaw of reasoning that it reveals in the defendant's attitude towards the system of normative guidance. If this is the basis of the argument, then it is a prudential, and not a moral argument, and if accommodated, it would be another dilution of the moral foundations of the criminal law. Conversely, rejecting the argument for implicit guidance universally applicable to all persons who claim a rationale-based defence need not necessarily result in the complete exoneration of the defendant. It would only mean that the blame that should be affixed is functional rather than moral blame. In such cases, it is conceivable (though not necessarily desirable) that criminal

⁷⁴ Stewart, 'The Role of Reasonableness' 333.

consequences may be imposed by stretching the criminal justice system. Furthermore, it is certainly possible (and more morally appropriate) to impose civil liability upon the agent for her blameworthiness vis-a-vis a separate set of institutionalised civil law norms that more closely track societal norms relating to the functional standard of functional reasoning.

Even if we abandon the idea that there is always implicit moral normative guidance requiring persons who claim a rationale-based defence to have taken special care to meet objective standards of reasonableness in their functional reasoning, we may still insist that as a pure decision rule, a person's access to a rationale-based defence should be made contingent on her meeting objective standards of reasonableness in their functional reasoning.⁷⁵ However, such a model would undermine the conduct rule's guidance by blaming persons who subjectively complied with the conduct rule. Although it is quite possible for a decision rule not to mirror a conduct rule, generally, such decision rules operate to the benefit of the defendant in not mirroring the conduct rule, rather than to her detriment. A 'higher standard of reasonableness' stipulation that is purely a decision rule would be illegitimate, because it would unfairly assign norm-blame to persons who complied with the norms that they believed were applicable. It would generate blaming decisions that took people by surprise. Furthermore, the moral judgments it would generate in respect of persons who are careless in claiming a rationale-based defence would be false. It would label such persons as having displayed deficient moral reasoning, whereas in fact they had demonstrated only poor observational or logical reasoning skills. It is not enough to respond that making such a judgment encourages people to be more careful when they know that they are committing a prima facie offence. The system's moral assessment of the particular defendant would still be wrong, and making the questionable claim that making such a wrong assessment has positive deterrent consequences does not change that fact.

For this reason, I think that it would be illegitimate to read into the criminal law either any general normative guidance requiring that a person claiming a rationale-based defence must have met objective standards of reasonableness, or a decision rule to that effect. A person who explains her actions as conforming to the norms applicable to the situation in which she mistakenly, but honestly believed herself to be, should be completely absolved of norm-blame, even if her mistake was unreasonable. Instead she should suffer a judgment that holds her functionally blameworthy. Such a person should not be labelled an evil person, but rather, a negligent, careless, or objectively

⁷⁵ As may have been Simester's intent in the text accompanying note 71 above.

reckless person.⁷⁶ To the extent that we wish to affix liability for such blameworthiness, non-criminal liability is most appropriate.⁷⁷ Nevertheless, if for prudential reasons, we prefer to attach criminal responsibility to persons who cause harm due to extreme carelessness, this should ideally be done by ex ante positing express norm guidance imposing upon such persons a duty to take care to avoid the harm concerned.⁷⁸ A failure to take due care would then attract norm-blame.

Something similar (though not quite identical) to this possibility is considered in passing by Duff, who suggests that:

... we should... recognise that one who acts on a carelessly formed, epistemically unreasonable and mistaken belief is neither warranted in nor excusable for acting as she does: the question is whether she should be convicted of the same offence as one who acts without a belief in facts that would justify his action; or of a lesser offence to mark the distinctive, and less serious, character of the wrong she commits.⁷⁹

The same intuition also finds expression in the approach of some jurisdictions in the United States to unreasonable mistakes in claiming a rationale-based defence, at least in the context of causing death.

One such jurisdiction is California, where the doctrine of imperfect self-defence is applied to such cases. This doctrine is explained in the following terms:

...when the trier of fact finds that a defendant killed another person because the defendant actually, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary

⁷⁶ See also Gardner, 'The Gist of Excuses' 575-76, who gives the example of the English law prerequisite that a person's actions be dishonest for the system to label her a thief, instead of meddlesome, or puerile, or presumptuous, or thoughtless.

⁷⁷ In this context, see the views expressed by L Alexander and KK Ferzan, 'Against Negligence Liability' in PH Robinson, SP Garvey and KK Ferzan (eds), *Criminal Law Conversations* (Oxford, Oxford University Press, 2009) 274 and Alexander and Ferzan, 'Results Don't Matter'. Although these views are far from undisputed, I share the authors' opinion that there is no convincing non-consequentialist, *moral* argument to criminally punish negligence.

⁷⁸ Something like this can be seen in the Model Penal Code, as per §3.04 to §3.08 of which, a good-faith belief in justificatory facts gives rise to a justification, subject to the rider in §3.09(2) that a recklessly or negligently formed belief cannot support a justificatory defence to an offence for which recklessness or negligence suffices to establish culpability.

⁷⁹ Duff, *Answering for Crime* 293-94.

manslaughter.⁸⁰

A more recent formulation of the effect of this doctrine may be found in the case of *People v Humphrey*, wherein it was explained that,

...for killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter.⁸¹

In simple terms, this doctrine has to do with the manner in which the law is posited in California. Murder is defined as the unlawful killing of a human being with malice aforethought, whereas manslaughter is the unlawful killing of a human being without malice. 'Malice' is understood in a manner that covers more conceptual ground than the concepts of 'intention' and 'knowledge' in a typical mens rea stipulation. It seems to require an intent to act unlawfully.⁸² Thus a person who kills another under the honest but unreasonable mistake that she was legitimately acting in self-defence undoubtedly intends, or at least knows that she is very likely, to cause the death of her victim. Nevertheless, she is not doing so out of malice, since she has no intent to act unlawfully. In the absence of malice, the level of guilt declines,⁸³ and the defendant must be convicted of manslaughter instead of murder.

The doctrine of imperfect self-defence treats an unreasonable mistake in claiming the right to kill in self-defence as the negation of a posited element of the offence, rather than as a matter relating to the appropriate background considerations in light of which to assess norm-reasoning. Thus the doctrine of imperfect self-defence works in a completely different way from the approach that I advocate for dealing with unreasonable mistakes while assessing norm-blame. Moreover, it is considerably more limited in scope, and only applies to reduce a murder conviction to a manslaughter conviction, because it is constrained by the words of the posited law. Even so, its very existence is significant, since it suggests a wider intuitive reluctance to brand a person who has

⁸⁰ *In re Christian S* (1994) 7 Cal 4th 768, 771.

⁸¹ *People v Humphrey* (1996) 13 Cal 4th 1073, 1082.

⁸² *In re Christian S* (1994) 7 Cal 4th 768, 775-80. The court concluded that despite an amendment to the statutory definition of 'malice' which stated that an awareness of the obligation to act within the law was not a sine qua non for establishing malice, the concept of malice nevertheless requires an intent to act unlawfully.

⁸³ *ibid* at 773.

merely been careless 'evil' or 'malicious'.

My arguments as to why conduct rules must refer to objective facts, and as to why there is no implicit general normative guidance requiring that a person claiming a rationale-based defence must have met objective standards of reasonableness, make reference to, and depend upon the existence of, certain pre-legal, moral normative standards of what conduct is wrong. To make good these arguments I need to demonstrate that the presumed connection between the criminal law and pre-legal standards of right and wrong is plausible, and that is my endeavour in the next chapter.