

* *This set of posts is written with a view to being accessible to a wide range of readership. I've therefore kept footnotes and references to a minimum. The ideas I discuss here are set out in much greater detail, with references, bibliography, index, and other bells and whistles in my 2017 monograph, 'Rationale-Based Defences in Criminal Law', which you can find in larger public and university libraries, in addition to being available to purchase online and in bookstores. If you have no way of accessing a copy but would like to check my sources on any of these ideas, please reach out to me at m.dsouza@ucl.ac.uk, and I'll try to help.*

On Justifications and Excuses

Part 2: A matter of perspective (in Conduct Rules)

In concluding my [previous post](#), I noted the various things that I needed to do in order to fill out my 'quality of reasoning' hypothesis about how rationale-based defences work. The first amongst these was explaining how conduct and decision rules (I explain these terms in [Part 1](#)) map onto doctrinal criminal law. This is my task in this post and the next. Specifically, I ask, "By reference to what perspective should conduct and decision rules be framed and applied?" Here's the nub of the problem: as humans, we have access only to things that our senses can perceive. Often, we get it right – what we perceive is the truth of the matter. But our senses are imperfect, and so inevitably, we sometimes get it wrong – think of any magic trick you've ever seen, or in the criminal law context, think back to the [Putative Justification](#) example in [Part 1](#). So, given this, should our rules be drafted and applied by reference to the facts as they really exist, or by reference to what D perceives as the facts? And can we have different answers in respect of conduct and decision rules? In this post, I focus on conduct rules.

Some arguments that don't quite work

Joseph Raz argues in *Practical Reason and Norms* that "people are to be guided by what is the case, not what they believe to be the case". He therefore thinks that norms to guide behaviour (i.e. conduct rules) should be based on objective facts, rather than subjective beliefs as to facts. Of course, Raz accepts that "to be guided by what is the case a person must come to believe that it is the case." Still, he insists that "it is the fact and not [the agent's] belief in it which should guide him... 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."

Notice that Raz appeals here to our evaluation of the outcome of the behaviour, and subtly invites us to make a similar evaluation of the behaviour that caused it. If *p* is the case but I believe *not-p* and act on that belief, then ordinarily, a sub-ideal outcome results. On Raz's view, my behaviour in bringing about this outcome is also sub-ideal – I ought to have acted as if *p* was the case. Now, the standard of 'ought' here is based on a 'god's eye' awareness of all the contextual circumstances. Adopting this perspective in the context of the criminal law would presuppose that the criminal law's conduct rules are meant to guide agents to achieve ideal goals (even if, on occasion, they cannot possibly be aware of the circumstances that make the guidance applicable), rather than attainable ones. This presupposition is not self-evidently correct.

Others, like Hamish Stewart, disagree. They think that the criminal law's conduct norms should provide attainable, rather than ideal guidance, and so insist that conduct rules refer to perceived, rather than objective truths. But this claim too is premised on an intuited presupposition that is not self-evidently correct. Why think that the criminal law's conduct norms should provide guidance that is always attainable? After all, ideal guidance, contained in conduct rules framed by reference to objective facts rather than the subjective perceptions thereof, *could* offer useful guidance about how, *in principle*, we should respond to various situations. The worry seems to be that this is useless guidance – since we don't have infallible access to the objective facts, we might end up being blamed for violating guidance that we could never have known was applicable. But that worry assumes that merely *being* in violation of a conduct rule always automatically attracts blame (or *prima facie* blame) for violating the rule. This assumption is clearly wrong. True, legal provisions that typify criminal law conduct rules (i.e. offence definitions) also have symmetrical decision rule aspects directing the decision-maker to evaluate reported behaviour by reference to the conduct rule. However, these are rarely the *only* decision rules governing the evaluation of the behaviour. Only in exceptional strict liability state-of-affairs offences does the mere *being* in violation of a conduct rule *ipso facto* translate into a blaming evaluation of the violator. Blame almost always requires more. And if these other decision rules in the criminal law refer to perceived rather than objective facts, then conduct rules that refer to the 'objective facts' could still offer useful normative guidance to their addressees, without necessarily generating unfair blaming judgements. In fact, I think that this is a good description of how the criminal justice system actually plays out... but more on that in later posts.

A way forward

So we have two potential answers to the conundrum of what perspective to adopt when framing criminal law conduct rules, but both lack a convincing supporting argument. To make progress, let's

get back to basics. When it is legitimate for the state to offer guidance in the form of criminal law conduct rules? Humans naturally and constitutively possess purposive agency – the ability to choose one's willed actions, even in 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 liberty (i.e. an absence of authoritative restriction) to do as she pleases, and how she chooses to act is entirely her own business. But although her capacity to exercise her purposive agency as she pleases is normatively unrestrained, this absence of normative restraint bestows no legitimacy upon the agent's exercise of purposive agency. A person who exercises a Hohfeldian liberty acts neither legitimately nor illegitimately – the absence of constraint is merely a starting point that may be altered by legitimate normative guidance.

Now, bear in mind that we are theorising about the criminal justice system of a liberal society. In such a society, “Mind your own business!” is a perfectly good response to a busybody who tells you how you should conduct yourself in purely personal matters. But if your conduct is (also) the ‘business’ of another, then they are not a busybody when they ‘get involved’. And they may legitimately get involved in a plethora of ways. The one we’re interested in here is, by authoritatively telling you what you should do. The other’s authority to legitimately tell you how you should conduct yourself stems from, and is limited by the extent to which, your conduct is also their business.

So, when is a person's conduct not purely her own business? Remember, our ultimate question is about how we should frame legal norms, so we are looking for an explanation that logically precedes legal norms. Let’s therefore ignore purely ‘legal’ persons – they do not exist in a pre-legal world. But 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 a later post ([Part 4](#)) that each person is constitutively entitled to possess and defend these elements, and is not subject to guidance to the contrary. Now we might disagree on exactly what belongs in a list of constituent human elements, but so long as you accept 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. Although prior to any legitimate contrary guidance, a person's chosen conduct is entirely her own business, when this person's conduct affects the constituent elements of another, even without a system of legitimate guidance it is clear that the conduct is legitimately the business of the affected party as well. So, the latter can legitimately complain about, and offer non-busybody guidance in respect of, the former's conduct.

The affected person's standing arises pre-legally and is an exception to the default absence of such standing. Therefore, her pre-legal standing to legitimately offer guidance about the agent's conduct 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. After all, it is only if the agent's conduct actually affects the entitlements of another that it becomes the other's business, and only then can she legitimately offer non-busybody guidance.

Now consider a world in which the law posits additional rights for its subjects. These rights would expand the set of matters that are the 'business' of each subject. By analogy therefore, more cases will arise in which it is legitimate for a person to comment upon the conduct of others. But again, only guidance against *actually affecting* the posited rights of others is permissible in a liberal state. (Of course, the state can posit a right to *feel* secure about some other entitlement 'X', and this new right may, in effect, support guidance against trying to affect X, or in favour of trying not to affect X. But my broader structural point stands.)

Since liberal conduct-limiting guidance can only legitimately proscribe *actually affecting* the entitlements of others, liberal (conduct) rules offering such guidance must be framed by reference to objective facts about whether the conduct will actually affect such entitlements. The set of circumstances in which *the criminal law* can legitimately offer guidance, will necessarily be a subset of all the cases in which at least *someone* can offer legitimate guidance. 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 other words, an ideal liberal criminal law's guiding norms must also necessarily be framed by reference to objective facts about outcomes, rather than subjective perceptions or anticipations of outcomes. Liberty limiting conduct rules should adopt an objective perspective. Since, as we have already noted, the mere circumstance of being in default of a conduct rule need not necessarily lead to a blaming judgement, 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, conduct rules can also permit conduct, or at least recognise an immunity from guidance proscribing it. One example is the familiar conduct rule that permits one to use force to defend one's life and limb against attack. Such conduct rules effectively expand the scope of their addressees' liberty, since they operate as overriding

carve-outs from imperative conduct restricting rules against subjecting others to force. My argument that liberty-limiting conduct rules should be framed by reference to objective facts relied on those conduct rules being exceptions to the default position of absolute unrestricted capacity to act as one chooses. Permissive, liberty-expanding conduct rules are not exceptions to this default unrestricted capacity, and so my argument does not apply to them. However, for reasons that will become clear in the next post (Part 3), in practice, I don't think it makes a difference whether such rules are framed by reference to objective facts, or by reference to perceptions of facts.

All in all, in the context of conduct rules in the criminal law – at least those that restrict liberty – I agree with Raz's conclusion that we should adopt the objective perspective.

In the next part, I will consider what perspective we should adopt when framing and applying decision rules.

** This post summarises the argument in Chapter 2.1 of my 2017 monograph, 'Rationale-Based Defences in Criminal Law'. For much more detail, please consult that part of the monograph. I recommend reading the Introduction to the monograph as well – this sets out the overall plan of action for the monograph, and explains how I hope to convince readers about my thesis despite it addressing a puzzle in criminal law theory to which there is no uniquely correct answer.*