** 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 4: A matter of perspective (in criminally blaming Decision Rules)

This post is the next in a series of posts in which I defend my theory of rationale-based defences in criminal law. As a reminder, on my account, the difference between successful pleas of paradigm justifications and paradigm rationale-based excuses is the quality of the defendant's reasoning. The objective outcomes of her actions make no difference at all.

Part 1 of this series of posts outlined my 'quality of reasoning' hypothesis about how rationale-based defences work, and identified various things that I needed to show to make it good. I started on the first of these in Part 2, where I argued that in a liberal criminal law system, conduct rules (ie, rules that guide people on how they should or may conduct themselves) that restrict liberty should be drafted by reference to the facts as they really exist. Thereafter, in Part 3, I began to consider the perspective to be adopted in respect of criminal law decision rules (ie, rules that do not guide the subjects' conduct, but instead guide the officials' evaluations of /judgements about the subjects' conduct). As a first step, I distinguished between norm-reasoning (how well one responds to normative guidance) and functional-reasoning (how well one perceives facts and makes reasoned conclusions and judgements based on them), and demonstrated that different blaming judgements flow from flaws in these types of reasoning. I argued that, in general, the criminal law should blame *only* for poor norm-reasoning, and that the general nature of a norm-blaming judgment requires reference to perceived, rather than objective, facts.

This post builds on that foundation to argue that the criminal law decision rules relevant to making personal blaming judgments should be applied by reference to the facts as perceived by the defendant. Like I did in Part 3, I assume here an awareness of the content of norms. This lets me bracket issues relating to mistakes about, or ignorance of, the norms. The problem of how to deal with ignorance of, or mistakes about, norms cuts across the issues I address in my book, and in this set of posts; any

solution to it will be compatible will the theory I defend here.

The choice of perspective in decision rules

In Part 3, I argued that the criminal law should ordinarily blame *only* for poor norm-reasoning, and that the general nature of a norm-blaming judgment requires reference to perceived, rather than objective, facts. Consider now the implications of this claim for the perspective to be adopted in criminal law 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. Accordingly, the propositions argued for in Part 3 have direct relevance for these decision rules. It follows that decision rules governing the substantive determination of criminal liability and the consequential determination of punishment should be applied by reference to perceived, rather than objective facts. My focus in this set of posts in on the substantive rules of criminal liability – the rules of punishment merit their own, detailed, treatment. So, for the present purposes, the key conclusion is that the decision rules that govern the determination of substantive criminal liability require decision-makers to disregard circumstantial factors that the agent did not perceive or properly understand.

This means that a decision-maker applying a decision rule, say, that 'D is not blameworthy in doing X if Y happened' (where Y is a specified circumstantial contingency), should not find D to be norm-blameworthy in doing what she believed to be X, if she did it because she believed that Y had happened. Indeed, a failure to use perspective-adjusted standpoints when applying any rule that deals with the attribution of personal norm-blame would invariably result in an unfair assessment of the agent's norm reasoning. Insofar as the criminal law's expressive capacity should not be used to convey an unfair personal blaming judgment – that would amount to lying about the defendant – the criminal law should use perspective-adjusted standpoints when apportioning personal norm-blame.

Notice that my claim does not extend to decision rules that concern the apportionment of functional blame. In fact, the evaluation of functional-reasoning positively requires the decision-maker to look beyond perceived facts. The decision-maker must 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. The applicable societal 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 (a child is not required to be as reasonable as a mature person). In sum (and without prejudice to the proposition that in general, apportioning functional blame should not be the criminal law's business), a person is not functionally blameworthy if her beliefs that she was doing X, or that Y had happened or was likely to happen, were appropriate based on the facts of which she was aware, or of which she was normatively expected within that society to have been aware.

The implications for rationale-based defences to criminal charges

The implications of these propositions for criminal law defences are clear once we put together the following propositions:

a. The criminal law should ordinarily blame only for poor norm-reasoning;
b. Some defences, specifically, rationale-based ones, work by showing that the defendant's norm-reasoning was of an appropriate standard;
c. The quality of a person's norm reasoning can only be assessed by reference to the facts as the person perceived them; and
d. The quality of the person's functional-reasoning does not affect the quality of her norm-reasoning.

In combination, these propositions suggest that the plausibility of the denial of norm-blame, implicit in any plea of a rationale-based defence, must be assessed by reference to the facts as perceived by the defendant. It should not matter whether the defendant was mistaken as to the facts, even if her mistake was so bad that she deserves functional-blame. A person who responds appropriately to the normative guidance applicable to the facts as she perceives them deserves no norm-blame, and so, has a good claim to a rationale-based defence. (In later posts, I will address the strength of this claim to a defence.) This holds true also if she is mistaken – even unreasonably mistaken – about the facts.

But before accepting that this proposition flows from my arguments about the various threads of reasoning, and what the criminal law should blame for, we should consider the possibility 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 suggest 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. Others, like

Uniacke, Greenawalt, and Stewart too adopt positions that appear to be premised on a similar claim. If they are right, then one could accept all my arguments and still conclude that rationale-based defences are not available to people who acted on the basis of unreasonable beliefs as to the situational facts. Even such people would, after all, have responded inappropriately to the normative guidance requiring them to meet a higher standard of reasonableness when claiming a rationale-based defence.

The problem is that none of the arguments for the 'implicit normative guidance to take special care' claim can point to anything in the wording of the paradigmatic forms of normative guidance aimed at preventing these offences that can support such an implication. Recall that in a liberal state, the criminal law's normative guidance paradigmatically guides *against actually affecting* others, rather than in favour of trying not to affect others. Accordingly, there is no automatic guidance requiring people to 'care enough' – itself a normative standard; how much is enough? – to double-check factual perceptions; that guidance requiring special care in reaching factual conclusions is precisely the conclusion that these arguments must support. At root, in fact, the arguments for the 'implicit normative guidance to take special care' claim seem 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 that is the argument, then it is not an argument about what flows from the foundational features of our criminal justice system. Instead, it is a prudential argument about what sort of criminal justice system would be good to have regardless of what flows from the foundational features of the criminal law. This may be a bullet that the proponents of the 'implicit normative guidance to take special care' claim are willing to bite, but there is another, more serious, problem with this argument – it rests on a flawed premise. It is not the case that rejecting the argument for implicit guidance universally applicable to all persons who claim a rationale-based defence necessarily entails the complete exoneration of the defendant. All it entails is that the appropriate type of blame is functional-blame rather than norm-blame. In such cases, it is certainly possible (and more morally appropriate) to impose civil liability upon the defendant 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.

But perhaps I was unfair to Simester (and others). Perhaps they did not mean to make the 'implicit normative guidance to take special care' claim at all; perhaps what they meant is 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. But quite apart from the

fact that they offer no theoretical basis for such a decision rule, having such a decision rule 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 a criminal (with the implication that she is an evil person), but rather, a negligent, careless, or objectively reckless person. To the extent that we wish to affix liability for such blameworthiness, non-criminal liability is most appropriate. 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. A failure to take due care would then attract norm-blame.

The attentive reader will have noticed that insofar as I presume a connection between the criminal law and some pre-legal standards of right and wrong, my arguments rely implicitly on the existence of certain pre-legal (perhaps we might call them 'moral'?) normative standards of what conduct is wrong. The next step towards making good my arguments, therefore, is to demonstrate that the presumed connection between the criminal law and pre-legal standards of right and wrong is

plausible. I will begin to defend that claim in the next part of this series of posts.

** This post summarises the argument in Chapter 2.2.4, and 2.2.5 of my 2017 monograph, 'Rationale-Based Defences in Criminal Law'. For much more detail, please consult these resources. As background, I recommend reading the Introduction to my 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.*