



# WHAT EXPLAINS THE CRIME/TORT DISTINCTION?

## Developing and Applying Razian Theory

This thesis is submitted in partial fulfilment of the requirements for the degree of *Doctor of Philosophy*, Ph.D. at the School of Law, Trinity College, The University of Dublin,

David Edward Campbell

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## SUMMARY

The thesis asks the question: What explains the crime/tort distinction? It adopts and develops Razian theory to provide an answer. The explanation proposed is that crime is fundamentally concerned with assessing the rightness of agency in light of *relevant* norms whereas tort is fundamentally concerned with assessing the conformity of agency with *applicable* norms.

Both crime and tort employ the language of normativity and morality. They outline what one ought or ought not to do, i.e. duties. They make normative and moral determinations that mark one out as *inter alia*; responsible, liable, culpable and blameworthy. They describe actions and their results as right, wrong, liability attracting, wrongful etc. Both bodies of law appear to be addressed to the same task of responding to wrongdoing but they employ different assessment practices and result in different responses. These differences are curious and warrant an explanation. This thesis uses practical reason theory as a way of providing such an explanation.

Joseph Raz has developed a theory of norms which provides an understanding of their operation in practical reason. This theory has a 'calculus' which can be applied to assessing agency; however, the theory has difficulty fully explaining our assessments of instances where an agent's reasoning conflicts with the requirements of an applicable norm. Raz notes where an agent follows the dictates of their own, sound, reasoning in the face of a conflicting norm they have on one assessment acted reasonably but on another assessment not acted in a manner well-grounded in reason. This distinction (between reasonableness and well-groundedness) is not developed by Raz or others but is proposed here to provide a basis for an explanation of the crime/tort distinction. It is argued that reasonableness and well-groundedness are distinct assessments and that crime is fundamentally concerned with assessing the former while tort is fundamentally concerned with assessing the latter.

When assessing action, an understanding of the two concepts of 1) what it is to do the wrong thing and 2) what it is to breach a duty, are central. It is argued these are dissociable assessments as one can obtain in the absence of the other. Building upon John Gardner and Benjamin Zipursky's work on breaches of duty, a schema for understanding duty breaches is proposed as a division between Conduct Duties and Result Duties. Conduct Duties make requirements on an agent's conduct whereas Result Duties make requirements on an agent to achieve or avoid certain results. This model when applied as a tool of analysis of crime and tort illuminates an understanding of the crime/tort distinction that sees crime and tort occupying corollary positions vis-à-vis the centrality of Conduct Duties and Result Duties, respectively: Tort being centrally concerned with Result Duty breaches while crime is centrally concerned with Conduct Duty breaches. It

is also argued that tort typically requires duty breaches *simpliciter* whereas crime requires more than mere breaches of duty but entails at its core, an assessment of wrongness.

Gardner built upon Razian theory to develop the concept of unjustified action or wrong action. He proposed that action is justified when done in pursuit of an applicable guiding reason, which in the case of a norm is action done in pursuit of the applicable norm. Under this view justification can be understood as a species of being well grounded in reason. However this is challenged and it is argued that justified action is actually action done in pursuit of a *relevant* norm as discerned within the epistemic bounds of the agent because it is a form of reasonableness rather than well groundedness.

One of the recognized differences between crime and tort is that criminal ascriptions centrally involve determinations about culpability or blameworthiness while tortious ascriptions centrally involve determinations about liability or responsibility. In order to better discern necessary conditions of ascriptions of criminal blameworthiness and tortious responsibility the thesis uses defences in criminal law and the law of tort as a route to such better understanding because when we understand why some may avail of particular defences it provides us with insight into why others may not, and when we understand how such defences may operate it enlightens us as to how they may not. In other words understanding who, why and how one or one's actions are not eligible for the ascriptions of blameworthiness and/or responsibility tells us something about who, why and how they *are* eligible. Engaging with the philosophy of criminal defences it is proposed that defences can be categorized as either exculpatory or non-exculpatory, and when so understood it elucidates the relevant ascriptive audience for criminal blameworthiness as those engaged in what Aristotle terms voluntary action, described herein as 'agency proper'. Examining tort law defences it is proposed that there are no defences as such, merely denials of a necessary element; this provides an indication of the relevant ascriptive audience as being those engaged in mere attributable agency or what Aristotle described as non-voluntary conduct.

The thesis continues its central case approach in considering the core targets of ascriptions of criminal blameworthiness or tortious responsibility and seeks to discern those targets from an engagement with theoretical analyses of non-defence constraints on the ascriptions of blameworthiness and responsibility. From this it is discerned that blameworthiness requires a necessary wrongness, while responsibility merely requires a mere duty breach.

The analyses of the earlier chapters are then brought together to demonstrate a through line can be discerned linking action that is not well-grounded in reason with duty non-conformance and therefrom, responsibility; and another linking unreasonableness to unjustifiedness/wrongness to blameworthiness. This understanding allows for an explanation of the crime/tort distinction as; crime is fundamentally an assessment of the

reasonableness of agency (i.e. rightness in light of relevant norms) whereas tort is fundamentally an assessment of the well-groundedness of agency (i.e. conformance with applicable norms).

The theory developed by this thesis is then tested through its application to cognate debates and against critiques of general theories, in order to assess whether or not the theory can provide a coherent set of answers to these ongoing debates. Firstly, it critiques the theories which unify the ascriptions of responsibility and blameworthiness such as those of Gardner and Zipursky, and argues instead that they are distinct assessment types. The theory developed here offers a conciliation to the two sides of the results matter/don't matter debate (i.e. whether or not the results of agency goes to the blameworthiness of the agent) because it separates the assessment of blameworthiness from responsibility and thus proposes that results do not go towards the blameworthiness of an agent they do go towards their responsibility. The thesis also provides an answer to the theoretical conundrum of the normative position of the mistaken aggressor, denying the incompatibility of competing justifications. Finally it is proposed the theory developed here can successfully explain recent developments in the law of gross negligence manslaughter in England and Wales.

**DEDICATION**

*IN MEMORIAM*

Theresa Mary Campbell (Née Holt)

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## INTRODUCTION

### *Introduction:*

This introductory chapter performs a number of orienting functions. Firstly, it introduces the somewhat curious division of labour between the criminal law and the law of tort. It does so by highlighting some of the overlapping and at times contradictory justifications often advanced for the two bodies of law. The very purpose of the thesis is to engage with this curious distinction in an attempt to understand and offer an explanation for it.

The chapter then outlines the methodology the thesis employs. This is a work of legal theory and uses methods appropriate to that field. It employs the methodology of Hartian positivist jurisprudence in being general (not tied to a specific jurisdiction) and descriptive (morally neutral and without justificatory aims), this position involves a commitment to a pluralist approach and in keeping with that pluralist ambition - including in methodological choices - the thesis also adopts the natural law method of the central case and the uncontroversial standard implicit therein of coherence. As a piece of legal theory/philosophy the standard tool of thought experiments are also used to 'stress test' the claims of other theorists in an attempt to advance or rehabilitate their positions.

A number of tests against which the thesis will measure itself are then introduced. This work sets itself the ambition of offering a general theory of ascription as it relates to explaining the crime/tort distinction. As such two critiques against universal theories (one tort, one crime) along with specific critiques against the possibility of a general theory of defences are outlined and their criticisms are used to develop the tests adopted.

The theory developed here will then be applied to some live debates and issues relating to ascriptive theory with a view to assessing whether or not it can offer a coherent set of answers to these debates. If the theory developed in this thesis can offer those coherent answers then it will be a further indication of its success as an explanation of the distinction.



The final orientation this chapter provides is a road map of the structure of the thesis and the progression of the central arguments made, giving brief descriptions of the contents of each chapter.

*Ambit of Thesis:*

This thesis is a work of legal theory within the discipline of philosophy of action and more particularly the field of practical reason theory. It can be classed as an exercise of applied jurisprudence. The ambitions of the work are therefore theoretical rather than practical. The focus is on the theory or philosophy of law rather than its practice and takes the view that theory has value in and of itself. Adopting a philosophical focus involves foregoing other worthy approaches to the study of this important topic. In this case the focus on theory means eschewing the otherwise legitimate doctrinal focus. However theory does not arise in a vacuum and so it is apt to incorporate references to and analyses of certain doctrinal aspects of law. In fact as a work of *applied* jurisprudence (as opposed to general jurisprudence) this is not only apt but necessary. As a piece of theory however the thesis is not limited in scope to the law alone and it is equally apt that the thesis draws upon other cognate areas of study e.g. normative theory. In engaging with doctrinal law this work is operating at a level of abstraction one step removed from the doctrine or law itself and so does not propose to tease out the intricacies of each area discussed. Because the work is theoretical in nature it does not propose to be linked to or apply solely to one particular jurisdiction. It is however based upon the Anglo-American, common law system, and will draw references from the English, American and Irish legal systems throughout.

*Seeds of Curiosity:*

The crime/tort distinction has already attracted academic attention and this may be because there is uncertainty whether there is a real distinction to

be drawn between the underlying natures of these two bodies of law.<sup>1</sup> They both appear to be directed towards the diminution of wrongdoing, and yet they make use of very different systems of deliberation and most strikingly different responses; tort ascribing liability and awarding damages, while crime ascribes culpability and orders punishment. Whether there really is a core distinction to be made - other than a mere spectrum or scalar distinction - between these bodies of law, and their respective assessments of wrongfulness they clearly operate in the legal system as separate entities. The ostensibly shared rationale, vis-a-vis wrongfulness, yet difference of assessment practices and response(s) makes the distinction between the two bodies of law a matter of deep intrigue.

The distinction drawn in law between being culpable and being liable is curious. Consider a tortious trespass against the person and a criminal assault. Why is it in trespass-against-the-person torts we consider the defendant's *liability* and in criminal proceeding of assault we consider their *culpability*? Is it just a contingency of the forum chosen? Is it a matter of degree such that really serious trespasses-against-the-person torts become crimes after a certain point? Are the two assessments complementary examinations of an agent, such that both are needed for a complete picture or are they mutually exclusive? Historically, Williams and Hepple remind us that actions for trespass of the person were once and at the same time a united criminal and civil action "The action of

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<sup>1</sup> For example see, Kenneth Simmons, 'The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives' (2008) *Widener Law Journal*, 719; David Friedman, 'Beyond The Crime/Tort Distinction' (1996) *Boston University Law Review* 103; Beth Stephens, 'Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime?' (1997) *Albany Law Review* 579; Ambrose Lee, 'Public Wrongs and the Criminal Law' (2015) *Criminal Law and Philosophy*, 155; Noah Kazis, 'Tort Concepts in Traffic Crimes' (2016) *Yale Law Journal* 1131, Alex Stein, 'The Domain of Torts' (2017), *Colombia Law Review* 535; Douglas Husak 'Gardner on the Philosophy of Criminal Law' (2009) *Oxford Journal of Legal Studies* 169; Benjamin Zipursky, 'Two Dimensions of Responsibility in Crime, Tort and Moral Luck' (2007) *Theoretical Inquiries in Law* 97; Patrick Elias, and Andrew Tettenborn. 'Crime, Tort and Compensation in Private and Public Law.' (1981) *The Cambridge Law Journal* 230.

trespass *vi et armis* ... commenced early in the thirteenth century, under King John, as a combined civil and criminal proceeding. It operated not only to give the plaintiff damages but to punish the defendant by a fine payable to the Crown.”<sup>2</sup>

The relationship between crime and tort is further briefly treated upon by Williams and Hepple when they claim that “It is broadly true to say that all crimes are torts if they amount to a physical interference with the plaintiff or his property, at least if they cause actual damage to him. But a crime is not generally a tort if, although potentially dangerous, it has not yet caused damage”<sup>3</sup> They proceed to give the examples of dangerous driving or attempted murder. In this they highlight an interesting distinction between crime and tort; why is the one generally only concerned with actual negative consequences and yet the other incorporates attempts and dangerous conduct with non-injurious results? Is crime’s incorporation of inchoate offences something of an anomaly or is tort’s unconcern with same the anomaly? This difference will be ventilated more fully later on in the thesis where it will be considered as the basis of a potential (although incomplete) explanator of the crime/tort distinction.

#### *Victim or Defendant?*

The law adopts core general principles to explain and guide its particular reasoning. In criminal law one such principle is the maxim *actus non facit nisi mens sit rea*; which can roughly be said to require the concurrence of a guilty mind with a guilty act. How does this core principle which is clearly a defendant focused measure fit with the often offered justification of criminal law as our chief harm prevention tool, which would be an entirely victim focused justification? On the other hand in tort a central principle is *restitutio in integrum*, which requires that a victim be put back in the position they would have been in had an injury not been sustained

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<sup>2</sup> Glanville Williams and B.A. Hepple, *Foundations of the Law of Torts*, (2nd ed, Butterworths 1984) 43.

<sup>3</sup> Glanville Williams and B.A. Hepple, *Foundations of the Law of Torts*, (2nd ed, Butterworths 1984) 2.

by them. This is victim focused but how comfortably does this sit with the explanation of tort as being directed at wrongdoers with the aim of preventing and diminishing wrongdoing; which is a defendant focused concern?

*Responses:*

The responses utilised in each body of law do not provide a clear cut explanatory distinction either. For example in this jurisdiction the Criminal Justice Act, 1993 provides in Section 6(1) that;

on conviction of any person of an offence, the court, *instead of or in addition to* dealing with him in any other way, may, unless it sees reason to the contrary, make (on application or otherwise) an order (in this Act referred to as a “compensation order”) requiring him to pay compensation in respect of any personal injury or loss resulting from that offence”.<sup>4</sup>

Compensation for personal injury is more standardly understood as a tortious response, but the above statutory provision recognises it as a non-custodial criminal sentence available to the courts. Interestingly the provision allows for such personal injury compensation “instead of” more standard criminal responses. Regarding a converse example in tort law, Ethan Kerstein notes that “Punitive (also known as “exemplary” or “vindictive”) damages have long been an extant common law remedy “for wanton, wilful, or outrageous conduct”<sup>5</sup> which are “extra-compensatory damages the aim of which is to punish the defendant for his wrongful conduct and to deter him and others from acting similarly in the future.”<sup>6</sup> Work more typical of criminal law.

This apparent overlapping is intriguing but also troubling because as Vincent Chiao notes, “[the US] constitution and the common law

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<sup>4</sup> Criminal Justice Act 1993, Section 6(1), (emphasis added).

<sup>5</sup> Ethan Kerstein, ‘Navigating Still-Murky Waters: The Search for Punitive Damages in an Injured Seaman’s Unseaworthiness Action’, (2019) 97 Texas Law Review 673, 680. Quoting *Atlantic Sounding Co. v Townsend*, 557 US (2009) 409.

<sup>6</sup> James Goudkamp and Eleni Katsampouka, ‘An Empirical Study of Punitive Damages’, (2018) 38 (1) OJLS 90.

distinguish the law of crimes from all other areas of law, reserving special procedural and substantive rights to those hauled into court on criminal charges. It is therefore important to know when a case is ‘criminal’ and when it is not.”<sup>7</sup> In a system which abides by the principle innocent until proven guilty, beyond all reasonable doubt and where punishment is preserved for those found guilty then it is unjust to punish those who the court finds against, on the balance of probability. If there are underlying substantive differences between torts and crimes it is important therefore to have a firm understanding of what they are in order to know what responses are appropriate.

In this jurisdiction the seminal case dealing with the criminal-civil divide is *Melling v O’Mathghamhna* in which the former Supreme Court set out the key indicia of a criminal offence. Lavery J for the majority held;

it seems to me clear that a proceeding, the course of which permits the detention of the person concerned, the bringing of him in custody to a Garda Station, the entry of a charge in all respects in the terms appropriate to the charge of a criminal offence, the searching of the person detained and the examination of papers and other things found upon him, the bringing of him before a District Justice in custody, the admission to bail to stand his trial and the detention in custody if bail be not granted or is not forthcoming, the imposition of a pecuniary penalty with the liability to imprisonment if the penalty is not paid has all the *indicia* of a criminal charge.<sup>8</sup>

The focus on the practicalities of procedure in this judgment stands in some contrast to the more philosophical consideration given by Kingsmill Moore J., where he considered

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<sup>7</sup> Vincent Chiao, ‘Punishment and Permissibility in the Criminal Law’, (2013) 32 Law and Philosophy 729.

<sup>8</sup> *Melling v O’Mathghamhna* [1963] 97 I.L.T.R 60, 64

(i) They are offences against the community at large and not against an individual. Blackstone defines a crime as “A violation of the public rights and duties due to the whole community, considered as a community”...

(ii) The sanction is punitive, and not merely a matter of fiscal reparation, for the penalty is £100 or three times the duty paid value of the goods; and failure to pay, even where the offender has not the means, involves imprisonment.

(iii) They require “*mens rea*” for the act must be done “knowingly” and “with intent to evade the prohibition or restriction”. *Frailing v. Charlton* [1920] 1 K.B. 147. If *O'Connor v. Brennan* [1939] I.R. 274 purports to decide that *mens rea* is not a necessary ingredient of an offence under section 186 I would not regard it as correctly decided. *Mens rea* is not an invariable ingredient of a criminal offence, and even in a civil action of debt for a penalty it may be necessary to show that there was *mens rea* where the act complained of is an offence “in the nature of a crime”... but where *mens rea* is made an element of an offence it is generally an indication of criminality.<sup>9</sup>

Kingsmill Moore J’s judgment has the advantage of greater theoretical coherence in that it doesn’t suffer from the circularity of holding that a procedure that is not criminal will not involve characteristics that are criminal.<sup>10</sup>

Academic commentary in this jurisdiction has also addressed itself to sketching the broad outlines of the criminal/civil divide offering analysis such as;

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<sup>9</sup> *Melling v O’Mathghamhna* [1963] 97 I.L.T.R 60, 72

<sup>10</sup> Liz Campbell, ‘The Recovery of “Criminal” Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm’ (2010) *Victoria University of Wellington Law Review* 15.

The law of torts is primarily concerned with private disputes between individuals whereas criminal law has a greater public dimension. Tort is principally concerned with the provision of compensation whereas criminal law is concerned with the regulation of conduct and the maintenance of social order.<sup>11</sup>

and

[Criminal law] at its core... identifies certain conduct as being particularly reprehensible and censures and condemns those who engage in this conduct... the criminal law does not however merely censure those who offend against social order. By setting rules for conduct it also acts as a guide to the individual.<sup>12</sup>

and

In looking at the moral quality of actions the criminal law generally takes a subjective approach ...[while in civil law]...as a rule, an objective approach is taken.<sup>13</sup>

Clarke J (as he was then) makes an effort at delineating the division of labour between criminal and civil responses in his *obiter* statements in *DPP v O'Shea*<sup>14</sup> where he opined at paragraph 2.5;

It is fair to say that, at least so far as serious criminal offences are concerned, the primary focus of the criminal law has traditionally been on the culpability or blameworthiness of the actions of those who are accused. Indeed, and this is a point to which I will shortly turn, blameworthiness, as opposed to consequences, has often played a much more significant role in the determination of criminal sanctions than is the case in determining civil remedies. This might well be described as one of the most significant

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<sup>11</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 6.

<sup>12</sup> TJ McIntyre, Sinead McMullan, Sean o Toghda, *Criminal Law*, (Round Hall 2012) 3.

<sup>13</sup> TJ McIntyre, Sinead McMullan, Sean o Toghda, *Criminal Law*, (Round Hall 2012) 4.

<sup>14</sup> *DPP v O'Shea* [2017] IESC 41.

fundamental distinctions between the criminal and civil law. If a person is guilty of a civil wrong, such as negligence or breach of contract, then, provided that the adverse consequences are foreseeable and not otherwise excluded by rules of law such as the concept of remoteness, the remedy will ordinarily be entirely dependent on the consequences. A defendant who is guilty of a very minor act of negligence or a technical breach of contract but where that minor wrongdoing gives rise to very serious and foreseeable consequences, may find that the award of damages, for example, far exceeds that which might be appropriate in a case where the wrongdoing was much more severe but the consequences, perhaps with no thanks to the wrongdoer, relatively minor.

Faced with these murky waters despair is of course an option but Chiao counsels against such an attitude;

Now, one conceivable response would be to reject the civil-criminal distinction as entirely illusory or pointless. But this might seem too breezily dismissive. After all, the distinction between civil and criminal law is deeply entrenched, of long historical pedigree, and is common to most, and perhaps all, Western legal systems. It would thus be surprising to learn that nothing can be said in favor of the distinction, or at least something more or less closely resembling it.<sup>15</sup>

*Pre-Legal Concepts:*

Liability is very different to culpability and they draw upon different pre legal concepts. Liability is a legal version of the attribution of responsibility whereas culpability is a legal version of blameworthiness. To say someone is responsible or blameworthy is to engage with

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<sup>15</sup> Vincent Chiao, 'Punishment and Permissibility in the Criminal Law', (2013) 32 Law and Philosophy 729, 748.



normative and moral concepts. The law's incorporation of morality is nothing new and indeed it has been noted that;

“the law might, and often does, incorporate a moral standard (without specifying its content), for example a (moral) standard of proportionality or reasonableness (which is common, for example, in criminal law and in public law). In such a case, the analysis in the moral sphere is directly applicable to the legal sphere.”<sup>16</sup>

The thesis will engage with issues of morality and in particular the concepts of responsibility and blameworthiness as a route to understanding the crime/tort distinction. Beyond the application of law in courts, moral theory and moral theorists also traverse similar ground with attempts to understand when an individual becomes responsible and/or blameworthy, albeit from a degree of abstraction. In order to do so theorists within this field often make use of thought experiments to bring out the core issues for analysis. This is a useful tool adopted throughout this thesis also.

One illuminating thought experiment which notes the distinction between a person breaching a duty and a person doing the wrong thing (two central concepts to determining responsibility and blameworthiness and upon which much rests in this thesis) is provided in the following scenarios: “D drove at 100kph through a village.” We have enough information, assuming no exception applicable to D arises, that D has in fact breached a duty owed to the community not to break speed limits. We have insufficient information, however, to determine whether or not D did the right or the wrong thing in so speeding. Likewise, if informed “A intentionally killed B” we might claim that A breached a duty not to kill B but we require further and better particulars before assessing A's conduct in so killing as right or wrong.

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<sup>16</sup> Re'em Segev, 'Justification Under Uncertainty', (2012) 31 Law and Philosophy 523, 548.

In the first scenario if the driver was joy riding - simply speeding for the fun of it, in complete disregard of the risk posed to others - we might then say his actions were wrong whereas if the situation of a gravely injured passenger pertained, such that time was of the essence in order to save the injured person's life we might assess his breach of the speed limit in his attempts to reach a hospital in time as having done the right thing.

In the second scenario, consideration of whether A was right or wrong in killing B is altered depending on, for example, whether A is a murderous misanthrope who happens to choose B as his victim or someone who is defending their family from murderous misanthrope B. In the above scenarios we can see that the question of whether one breached a duty is a distinct and dissociable inquiry from whether or not one was right or wrong (in so breaching). This is fascinating; if I do the right thing but in the process breach a duty owed - perhaps even a legal duty - then what is the appropriate response to such action? Conversely if I do the wrong thing but was in compliance with a relevant duty – perhaps a duty to obey the orders of a superior officer, how are my actions to be assessed?

### Terminology:

An initial note on the terminology of basic concepts is apt at this juncture. Joseph Raz identified as the most important branches of practical philosophy; value theory, normative theory and ascriptive theory.<sup>17</sup> Value theory being centrally concerned with good, bad, better and worse; normative theory with ought, rules, duties; and ascriptive theory with attributing blame and responsibility. Under the framework outlined by Raz above this thesis operates largely within the normative and ascriptive divisions noted, with a particular focus on ascriptive theory in attempting to understand and explain the crime/tort distinction.

The aim of the thesis is to understand and explain the crime/tort distinction and part of this involves understanding necessary conditions for

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<sup>17</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 11.

determinations of blameworthiness and responsibility in their pre legal sense as well as at law. Theorists use phrases such as culpability, liability, blame, responsibility and blameworthiness in a variety of sometimes complementary, sometimes conflicting ways. Compare for example George Sher's understanding of blame as being accounted for in negative reactive attitudes as it

consists of a set of dispositions (to become angry, express one's disapproval, and the like) which are explained by the combination of the belief that the agent has acted badly and a desire that he not have done so.<sup>18</sup>

And Brian Weatherson's view that we can dissociate negative reactive attitudes such that we may think less of someone without blaming them.

We could treat JoJo as responsible by, for example, being angry at him, or having contempt for him, even if we don't blame him, or think blame would be the right kind of attitude to hold.<sup>19</sup>

When the thesis uses the term 'blameworthy' it does so as the relevant agent has met the moral conditions of deserving blame. Culpability is understood as the ascription of blameworthiness at law.

Responsibility is a particularly ambivalent phrase and therefore important to define. Consider for example Hart's famous passage highlighting the multivocal or polysemic on the use of 'responsibility';

As captain of the ship, X was responsible for the safety of his passengers and crew. But on his last voyage he got drunk every night and was responsible for the loss of the ship with all aboard. It was rumoured that he was insane, but the doctors considered that he was responsible for his actions. Throughout the voyage he behaved quite irresponsibly, and various incidents in his career showed that he was not a responsible person. He always maintained that the exceptional winter storms were responsible for

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<sup>18</sup> George Sher, *In Praise of Blame*, (Oxford University Press 2005) Chp. 6.

<sup>19</sup> Brian Weatherson, *Normative Externalism* (Oxford University Press 2019) 106.

the loss of the ship, but in the legal proceedings brought against him he was found criminally responsible for his negligent conduct, and in separate civil proceedings he was held legally responsible for the loss of life and property. He is still alive and he is morally responsible for the deaths of many women and children.<sup>20</sup>

Here he distinguished between various uses of the term and in particular what he describes as; Role-Responsibility, Causal Responsibility, Liability-Responsibility and Capacity-Responsibility. It is used in this thesis however in the sense of attributability where one's conduct and the consequences of one's conduct may be understood as belonging to that agent. Whereas liability is the legal form of this form of responsibility which marks one out as vulnerable/susceptible to attribution at law. The distinction is important to note because further in the thesis it is shown that not all cases of criminal culpability can be classed as being consistent with the internal logic of blameworthiness and not all cases of tortious liability can be classed as being consistent with the internal logic of responsibility.

Further terms and concepts will be described and defined as they are introduced throughout the thesis.

### Methodology:

#### *Preliminary*

The thesis is a work of legal philosophy and so adopts the standards appropriate to that field including the perspective that;

Philosophy consists in analysis and argumentation. A philosophical argument succeeds if it is clear, logically sound and rationally convincing. Its practical impact is neither here nor there.<sup>21</sup>

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<sup>20</sup> HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (2<sup>nd</sup> edition Oxford University Press 2008) 211.

<sup>21</sup> Raino Malnes, 'Philosophical Argument and Political Practice; on the Methodology of Normative Theory' (1992) *Scandinavian Political Studies* 117.

*General and Descriptive:*

This thesis is a work of legal philosophy and as such it adopts the methodological approaches of that field. It is recognized that “Legal philosophy, certainly in the Anglophone world and increasingly outside it, has been dominated for more than a half-century by H.L.A. Hart’s 1961 book *The Concept of Law*”<sup>22</sup> and that this dominance fed into methodological debates which “typically scrutinize either one of two (related) methodological claims in Hart’s classic work.”<sup>23</sup> In that opus magnus, Hart described his methodology in the postscript as follows;

My aim in this book was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense ‘normative’) aspect.... My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.<sup>24</sup>

Indeed it is considered to be “the methodology of almost all legal philosophy these days”.<sup>25</sup> One critique of such an approach however is found in Frank Jackson’s work *From Metaphysics to Ethics: A Defence of Conceptual Analysis*.<sup>26</sup> Here he makes the claim that the approach adopted

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<sup>22</sup> Alex Langlinais and Brian Leiter, ‘The Methodology of Legal Philosophy’ in Cappelen, H. et al. (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016)

<sup>23</sup> Alex Langlinais and Brian Leiter, ‘The Methodology of Legal Philosophy’ in Cappelen, H. et al. (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016)

<sup>24</sup> HLA Hart, *The Concept of Law*, (3<sup>rd</sup> Edition, Oxford University Press 2012) Postscript

<sup>25</sup> Alex Langlinais and Brian Leiter, ‘The Methodology of Legal Philosophy’ in Cappelen, H. et al. (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016)

<sup>26</sup> Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford University Press 1998)

by Hart is an immodest conceptual analysis which is problematic in that it seeks to understand law by reference to our intuitions regarding the extensions of the concepts to possible cases. This critique however is neatly disposed of by Leiter and Langlinais when they accept that the approach is indeed an immodest conceptual analysis under Jackson's paradigm "but (and this is key) it has to be since the concept, as manifest in our language, constitutes the social construct of law!"<sup>27</sup> Raz adopts a similar line in his consideration that;

In large measure what we study when we study the nature of law is the nature of our own understanding. The identification of a certain social institution as law is not introduced by sociologists, political scientists, or some other academics as part of their study of society. It is part of the self-consciousness of our society to see certain institutions as legal. And that consciousness is part of what we study when we inquire about the nature of law.<sup>28</sup>

This thesis seeks to operate from the law rather than applying a pre-conceived ideological perspective onto the law in some effort of reconstruction. In this it follows in the tradition of Hart in that it seeks to be free of moral assessment and retain a strictly neutral descriptive approach. Of course no theory is value free and this is recognised by even those who would be opposed to the value laden approach of natural lawyers. Dickson recognises this where she accepts that theorists

make value judgments of a certain kind and that these value judgments are required simply in virtue of the nature of theoretical accounts; namely, that they attempt to construct cogent and structured explanations that can assist others in understanding as fully as possible the phenomena under consideration. In *Evaluation and Legal Theory*, I term these kinds of value

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<sup>27</sup> Alex Langlinais and Brian Leiter, 'The Methodology of Legal Philosophy' in Cappelen, H. et al. (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016)

<sup>28</sup> Joseph Raz, 'Can There be a Theory of Law?' In *Between Authority and Interpretation* (Oxford University Press 2009): 17-46.

judgments "purely metatheoretical" value judgments and include simplicity, clarity, elegance, comprehensiveness, and coherence among the virtues that any successful theory attempts to live up to.<sup>29</sup>

This thesis also adopts these purely metatheoretical value judgments and in particular coherence. This work does not set itself the aim of reconstruction of the bodies of law or indeed any practical aim, it is decidedly a piece of theory however as Hart indicated as successful description can form a 'preliminary' to critique and reconstruction. Any basis for reconstruction which may be offered by this thesis flows from the constraint of normative coherence, rather than fit with any particular ideology.

It is noteworthy that the Hartian and general legal philosophical methodology has been understood as hierarchicalist in that, any attempt to understand what the law is, must rely on a fairly elaborate understanding of law's functions in society, and of the ways in which the law is constituted to fulfill those functions... there are chains of dependency relations between different areas of philosophy, and "methodological" considerations are considerations that require retreat from area A up a stage in the hierarchy to area B on which area A depends.<sup>30</sup>

Giving rise to the following pictorial representation

Law  $\Rightarrow_{(\text{depends on})}$  Collective Action  $\Rightarrow_{(\text{depends on})}$  Rationality<sup>31</sup>

This is also the approach adopted here and reflects the Razian understanding. This understanding of the fundamental dependence on rationality adds credence to the adoption of Razian theory on practical rationality as the lens through which to conduct the analysis of this thesis.

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<sup>29</sup> Julie Dickson, 'Methodology in Jurisprudence: A Critical Survey' (2004) *Legal Theory* 117.

<sup>30</sup> Herman Cappelen, Tamar Szabó Gendler, John Hawthorne, and Josh Dever. 'What Is Philosophical Methodology?' in Cappelen, H. et al. (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) Chapter 34.

<sup>31</sup> Herman Cappelen, Tamar Szabó Gendler, John Hawthorne, and Josh Dever. 'What Is Philosophical Methodology?' in Cappelen, H. et al. (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) Chapter 34.

### *Central Case:*

The thesis also adopts a central case approach. Finnis worries that adopting a purely folk concept of law will lead to a diversity of particular conceptions and raises the question “How then, is there to be a general, descriptive theory of these varying particulars?”<sup>32</sup> This leads Finnis towards a central case methodology which is derived from Aristotle’s description of things in their focal sense. This has been recognised in the view expressed by Andrea Dolcetti that “Finnis’s central case method is inspired by the methodology followed by Aristotle to identify central and peripheral cases of friendship.”<sup>33</sup> An example often given for this focal sense is an eye. When a person’s eye is in their head, intact and operating properly such that it allows for sight it can be said to be an eye in the focal sense. Whereas when an eye is removed from a head we rightly continue to describe it as an eye but just not an eye in the focal sense; it is an eye in the non-focal sense. This approach is analogous to Finnis’s conception of unjust laws (via Aquinas) as describable as laws just not in the focal sense. The central case methodology is ably described by Leiter and Langlinais as;

A central case analysis of some phenomenon identifies some subset of possible or actual instances of that phenomenon as explanatorily privileged. The members of this subset are the paradigm or *central cases* of the phenomenon, and they are privileged in two respects. First, the central cases are privileged insofar as a theory of the phenomenon is primarily concerned with explaining the important features of these cases. Second, the central cases are explanatorily prior to those instances of the phenomenon that are not members of the set of central cases. These are the *peripheral cases* of the phenomenon, and they are

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<sup>32</sup> John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford 2011).

<sup>33</sup> Andrea Dolcetti, ‘The Central Case Method in “The Nature of Legislative Intent.”’ (2019) *American Journal of Jurisprudence* 41.



explanatorily posterior in that they can only be understood as defective, failed, or “watered- down”<sup>34</sup>

One advantage of the central case approach is that it

provides a solution to the problem of what to include in the theory and resolves the issue of how to make judgements of importance and significance. It allows the theorist to relate all aspects of the phenomenon to a central case without him or her having to incorporate into the theory all possible manifestations of the phenomenon. The field of inquiry "includes everything which is relevantly *related* to one *central type*", including defects or corruptions of the central type.<sup>35</sup>

One critique of the central case method is provide by Nick Barber who considers the method encounters difficulty in understanding harmful practice. However Hill identifies the difficulty with this critique in that;

The problem with Barber's understanding is that he would have the theorist attempt to evaluate a bad practice without any foundation (a central case) through which to understand why the practice is bad. Plain ethical evaluation of bad practices is possible, but will not result in a general social theory.<sup>36</sup>

This highlights the use of such an approach for this thesis in that a general theory of explaining the crime/tort distinction is sought.<sup>37</sup>

#### *Other Possibilities:*

While the general and descriptive approach the central case method commend themselves and will be adopted here. Other approaches could

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<sup>34</sup> Alex Langlinais and Brian Leiter, ‘The Methodology of Legal Philosophy’ in Cappelen, H. et al. (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016).

<sup>35</sup> Matthew Hill, ‘Methodology in Legal Theory: Finnis and His Critics.’ (2012) Te Mata Koi: Auckland University Law Review 167.

<sup>36</sup> Matthew Hill, ‘Methodology in Legal Theory: Finnis and His Critics.’ (2012) Te Mata Koi: Auckland University Law Review 167.

<sup>37</sup> An example of the use of the central case method can be found in the recent work of Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2012).

have been taken such as John Rawls's famous methodological approach known as Reflective Equilibrium. In moral philosophy it is recognized that "Many ethicists appear to think that knowing the basics of how the reflective equilibrium method works is all you need to know about how moral philosophy should be done."<sup>38</sup> The method has been described as;

We must begin from judgements about individual cases which must be held sincerely and which must also be stable in the kind of careful deliberation that is not distorted by strong emotions or self-interested bias. In the second stage, we attempt to formulate a set of general moral principles that could both fit and also justify the previous convictions. When we formulate these principles at this preliminary stage, it will be likely that there will not be a perfect match between our carefully considered judgements about the cases and the general principles. In the third stage, we then try to get rid of the previous conflicts in two ways. In some conflict cases, it makes sense for us to modify our judgements about the cases on the basis of the general principles because those principles support our intuitions so well elsewhere. In other cases, in contrast, it makes more sense to attempt to find new, more sophisticated principles so that we do not have to give up our convictions about the cases given how deeply held they are. Finally, in the fourth stage, we fine-tune our principles by taking into consideration the leading ethical theories on the topic and the best arguments made in their support.<sup>39</sup>

This approach has been critiqued for, amongst other things, merely providing guidance on how to seek coherence and secondly as providing no guidance on how to resolve conflicts between principles and convictions.<sup>40</sup> To the extent that coherence is desirable the thesis adopts

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<sup>38</sup> Jussi Suikkanen, *'Methodology and Moral Philosophy'* (Taylor & Francis 2019) Introduction.

<sup>39</sup> Jussi Suikkanen, *'Methodology and Moral Philosophy'* (Taylor & Francis 2019) Introduction.

<sup>40</sup> Jussi Suikkanen, *'Methodology and Moral Philosophy'* (Taylor & Francis 2019) Introduction.

that preference - but as a standard (rather than a methodology) by which to assess crime and tort. Coherence is uncontroversial as a *desideratum* and is especially fitting in the use of the central case method. Therefore the reflective equilibrium methodology is not taken in favour of the more established jurisprudential method of the central case.

Liam Murphy offers a “practical-political” view to general jurisprudence which indicates we should favour the theoretical answer to the question ‘what is the law?’ by considering the political consequences which would flow from the answer we choose and then opting for the best answer by reference to what we consider would be the best consequences.<sup>41</sup> This approach is unsuitable to the enterprise of this thesis because this work is an effort at understanding and explicating rather than reformation or following any particular socially or politically desirable consequences.

Another option for a methodological approach could have been the economic model a la Posner.<sup>42</sup> The economic model is heavily criticized by Coleman where he considers it to be both reductive and functional because it “seeks to explain tort law by showing that its central concepts can be reduced to the concept of economic efficiency.”<sup>43</sup> And in doing so it ascribes the function of economic efficiency. Coleman preferring and proposing an analysis based on the structure of tort law which has been described as “The argument's starting point is the idea that tort law has a structural and a substantive “core.”<sup>44</sup> This criticism is considered to have been well made and thus the economic model has not been adopted.

Finally, an approach to understanding the central concern of criminal law and the law of torts could have focused on statistical frequency, based on the assumption that the more of a particular type of, say, crime there is then the stronger the claim would be to that type being the central case. In

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<sup>41</sup> Liam Murphy, ‘The Political Question of *The Concept of Law*.’ in Jules Coleman (ed) *Hart’s Postscript: Essays on the Postscript to The Concept of Law* (Oxford University Press 2001) 371.

<sup>42</sup> Richard Posner, *Economic Analysis of Law*, ( 8<sup>th</sup> edn, Aspen Publishers 2011).

<sup>43</sup> Jules Coleman, *The Practice of Principle*, ( Oxford University Press 2001) 11.

<sup>44</sup> Jules Coleman, *The Practice of Principle*, ( Oxford University Press 2001) 15.

criminal law then it would involve an acceptance of regulatory crime and perhaps even strict liability crimes as being the archetypal crime. This however is unconvincing given the relevantly recent arrival of strict liability and the fact that such crimes are relatively unknown to the common law. In any event, as they are creatures of statute this need not overly concern us here because this thesis is concerned primarily with a common law rather than legislative approach of particular jurisdictions.<sup>45</sup>

*Pluralist:*

Suikkanen makes a strong claim when he considers;

It is unlikely that the best ways to approach the second- order metaphysical questions about the nature of moral properties are the same as the ways in which we should think about first-order questions such as what duties we, as individuals, have towards non-human animals. This suggests that, when it comes to the methods of ethics, we should be methodological pluralists rather than monists.<sup>46</sup>

In recognition of this desirability of pluralism the thesis seeks to adopt the methods of legal theory across the natural law/positivist divide, finding value in each of them. This is why both the general-descriptive of the positivists and central case of the natural lawyers are equally employed.

Julie Dickson has offered a fresh way of conceiving of legal methodology through an engagement with the Dworkinian “moral and political evaluation and justification of law”<sup>47</sup>. In this she is joined by Jules Coleman,<sup>48</sup> Andrei Marmor,<sup>49</sup> and Wil Waluchow,<sup>50</sup> She conceives of a

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<sup>45</sup> On a critique of overcriminalization see Doug Husak, *Overcriminalization: The Limits of Criminal Law*, (Oxford University Press 2008)

<sup>46</sup> Jussi Suikkanen ‘*Methodology and Moral Philosophy*’ (Taylor & Francis 2019) Introduction.

<sup>47</sup> Julie Dickson, ‘Methodology in Jurisprudence: A Critical Survey’ (2004) *Legal Theory* 117.

<sup>48</sup> Jules Coleman, *The Practice of Principle*, (Oxford University Press 2001) chps. 11 and 12.

<sup>49</sup> Andrei Marmor, *Positive Law And Objective Values*, (Oxford University Press 2001) 153-159.

<sup>50</sup> Wilfred Waluchow, *Inclusive Legal Positivism* (Oxford University Press 1994) 19-30.

division between those who engage in moral evaluation of the law and those who engage in evaluation but not moral evaluation of the law; Where she groups Finnis and Hart in the former camp as engaging in “indirectly evaluative legal theory.”<sup>51</sup> To the extent that this is correct then this thesis, in adopting a pluralist approach – including as it regards methodology - may also be classified as engaging in indirect evaluative legal theory; although this is not a central plank or prominent aspect of the methodology it is seemly to note the possibility of this classification.

Julie Dickson reminds us that;

in order to directly evaluate whether a social institution such as law is good or bad, and to make a judgement on what we ought to do with regard to it, we must first of all know quite a lot about the features of it which are relevant to such an evaluation. If we are to be capable of answering directly evaluative questions such as whether and under what conditions legal norms ought to be obeyed, then we need to know quite a bit about how those norms...operate.<sup>52</sup>

So, while this thesis is not seeking to make evaluative judgments *per se* on the crime/tort distinction, understanding how the norms of criminal law and tort law operate respectively will provide a basis or springboard from which evaluative judgments may be made. Dolcetti continues this thought claiming, “it is important to know what sort of thing something is trying to be before we settle on the standards by which it ought to be judged.”<sup>53</sup>

Internal coherence is almost self-evidently desirable but more importantly it provides an indisputable basis upon which to judge a claim or proposition. So, while tort law and criminal law can be judged by a myriad of standards the first logical claim to a standard of evaluation is provided by coherence. Dolcetti draws this out in “I maintain that there is

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<sup>51</sup> Julie Dickson, ‘Methodology in Jurisprudence: A Critical Survey’ (2004) *Legal Theory* 117.

<sup>52</sup> Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001).

<sup>53</sup> Andrea Dolcetti, ‘The Central Case Method in “The Nature of Legislative Intent.”’ (2019) *American Journal of Jurisprudence* 41.

something important about evaluating law by the standards it sets for itself in light of its very nature, and of the nature of its claims,”<sup>54</sup>

In attempting to uncover and understand the central underlying principles of tort and crime the thesis follows closely the methodology of Jules Coleman and what he terms the pragmatic conceptual analysis.<sup>55</sup> This approach can be described as; “the attempt to discover the principles that are embodied in a given area of the law, without concern for the moral appeal of those principles”<sup>56</sup> and which he adopts in his work on corrective justice where for example he argues;

The argument in this section of the book develops the claim that tort law is best understood in terms of a conception of corrective justice. The mistake would be to think that the argument for this claim rests on the moral attractiveness of corrective justice. It does not. The considerations that support the account are epistemic or theoretical, not moral or political.<sup>57</sup>

And that although the theoretical study of discrete areas of law differs from general jurisprudence,

In the former case, the aim is to uncover underlying explanatory principles, whereas in the latter case, the aim is to explain the possibility conditions and the normativity of law considered as a general social phenomenon. But there is nonetheless a unifying connection between the respective methodological approaches that Coleman advocates for these two types of inquiry. Although both are subject to norms governing theory formation, neither, on his view, involves substantive moral or political argument.<sup>58</sup>

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<sup>54</sup> Andrea Dolcetti, ‘The Central Case Method in “The Nature of Legislative Intent.”’ (2019) *American Journal of Jurisprudence* 41.

<sup>55</sup> Jules Coleman, *The Practice of Principle*, (Oxford University Press 2001)

<sup>56</sup> Stephen Perry, ‘Method and Principle in Legal Theory’ (2002) *The Yale Law Journal* 1757.

<sup>57</sup> Jules Coleman, *The Practice of Principle*, (Oxford University Press 2001) Lecture One.

<sup>58</sup> Stephen Perry, ‘Method and Principle in Legal Theory’ (2002) *The Yale Law Journal* 1757.

So, the central methodological choices made for this project find support in the above theorists' views. Consider for example, Dickson's priority given to understanding how the law operates before engaging in evaluation, Dolcetti's appeal to assess the law as regards the standards it sets itself (and its usefulness re a central case analysis), Coleman's pragmatic conceptual analysis divorced from moral appeal (and its connection to the descriptive endeavour here) and Perry's recognition of the focus of applied jurisprudence as being the uncovering of underlying explanatory principles – the very point of this thesis.

*Thought Experiments:*

This thesis is a work of legal theory/legal philosophy, as such it is positioned in the interdisciplinary ground occupied where legal scholarship and philosophical scholarship overlap. Indeed scholars within this field are as likely to be located in the school of philosophy as much as the school of law. The philosophical tool of the thought experiment is used as a way of shearing analyses of extraneous or irrelevant material to crystalize the issues at hand and to put these issues under strain in order to draw out a firmer understanding. This is a well-known approach and can be seen to useful effect in something like the trolley problem, used to test and explain the distinction between deontology and consequentialism.<sup>59</sup>

Philosophical thought experiments are recognized as a standard methodological approach to philosophical inquiry, most particularly in moral philosophy;

One standard method on which most ethicists rely at some point is testing whether different suggested moral principles fit our moral intuitions about various fanciful problem cases. These cases are intentionally unrealistic as their purpose is to enable us to focus on just a few isolated features of the situations. Focusing on these features in artificial thought experiments enables us to test whether

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<sup>59</sup> On the trolley problem see; Philippa foot, *Virtues and Vices*, (Oxford university Press 2002), 27ff.

our moral principles carve the joints of the moral reality at the right places in a way that would be difficult to do in messy real-life situations. One famous example of this type is the trolley case in which a trolley is about to hit five people but you have an option of redirecting it to kill only one person.<sup>60</sup>

The use of such experiments has been criticized by some in that it has been discovered that the order in which cases are presented affects the moral intuitions the participants are willing to accept.<sup>61</sup> Along with evidence that;

in trolley cases, the order in which cases are presented makes a difference to verdicts ... and so do the subject's mood ... variation in superficial content like racially charged names of characters ... or the way the case is framed.<sup>62</sup>

However a successful defence to such critiques is raised by Antti Kauppinen highlighting the distinction between laypeople posed with such experiments and philosophers who “are different from ordinary folk in relevant respects, more competent or better able to manifest their competence. Sometimes this is put in terms of *philosophical expertise*.”<sup>63</sup> It is taken as reasonable to assume a like expertise in legal scholars and legal philosophers.

The thesis will adopt thought experiments as a method in testing and critiquing the theories of philosophers (most appropriate for a work within Razian theory of course will be the theories of Raz and Gardner) and in offering advancements on or rehabilitations of same.

### *Applying the Methodology*

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<sup>60</sup> Jussi Suikkanen, *Methodology and Moral Philosophy* (Taylor & Francis 2019) Introduction.

<sup>61</sup> Eric Schwitzgebel, and Fiery Cushman, ‘Expertise in Moral Reasoning? Order Effects on Moral Judgment in Professional Philosophers and Non-Philosophers’ (2012) *Mind & Language*, 135.

<sup>62</sup> Antti Kauppinen, ‘Who’s Afraid of Trolleys?’ in Jussi Suikkanen (ed) *Methodology and Moral Philosophy* (Taylor & Francis 2019).

<sup>63</sup> Antti Kauppinen, ‘Who’s Afraid of Trolleys?’ in Jussi Suikkanen (ed) *Methodology and Moral Philosophy* (Taylor & Francis 2019).



The approach adopted by this thesis is to develop and apply Razian theory as a tool of analyzing and explaining the crime/tort distinction. It does so by *inter alia*; developing an understanding of what it is to do the wrong thing and what it is to breach a duty. ‘Razian theory’ in this context is understood to incorporate the work of Joseph Raz; in particular his work on practical reason and norms and the adoption and continuation of that work by John Gardner; in particular as it pertains to the two concepts above, wrongness and duty breaching.

The thesis adopts the lens of Razian theory and makes use of the developed concepts available within that school of thought as tools of analysis. Following exposition of Razian theory on the nature and operation of reasons (referred to in shorthand as ‘Razian reasons’ here) the thesis proceeds to consider the application of these tools in assessing human action, i.e. in the ascription of responsibility and the ascription of blameworthiness; these being the central ascriptions of tort and crime respectively. Within these considerations of responsibility and blameworthiness the thesis adopts the approach of engaging with the advanced and nuanced work of the scholars working within Razian theory; however, it does not do so in an uncritical fashion. Rather, the thesis seeks to develop those concepts through correction and rationalization where appropriate. Two examples of this critical approach within the thesis are; 1) It ultimately argues that the application of Razian reasons provides an incomplete tool of ascription and 2) Gardner’s work on the nature of justification requires recalibration away from its current objectivist manifestation.

Regarding the tools of description and the central case method; the thesis seeks to work from within the current legal practices involved with ascriptions of liability and culpability in tort and crime and from the central cases of the operation of such processes to discern an explanation for the distinction. This approach is vital to understanding core concepts within the thesis such as criminal blameworthiness and tortious responsibility because when we do it provides us with standards against

which to measure non-standard cases or as Gardner puts it “a paradigm or central case is simply the case that shows how the other cases - including those supposed counterexamples - ought to be. It is part of the very idea of a central case that there might be cases (even statistically preponderant cases) that do not exhibit all the features that make the central case a central case.”<sup>64</sup>

Finnis of course makes significant use of the central case in his work, *Natural Law and Natural Rights*.<sup>65</sup> He is also critical of those who focus on the limit cases instead of the central case as offering an incomplete picture of the law. Gardner notes however “the criticism can be turned on its head and aimed back at Finnis himself. There can be nothing resembling a theory of law—a complete explanation of law's nature—that includes only treatment of law's central case and shows no parallel interest in what Raz calls “the limits of law,” a topic raising no less intriguing philosophical questions.”<sup>66</sup>

These criticisms however do not deny the value of each approach – merely the necessity to not fall prey to either extreme. This work attempts to thread the golden mean by balancing its use of the central case approach with its companion of the limit cases through the analysis of defences, as described below.

Finally, engaging in the description and analysis of defences provides a significant route to understanding blameworthiness and responsibility at law. This is because when we better understand when, why and how an agent or their agency is not eligible for ascriptions of blameworthiness and/or responsibility it tells us a great deal about when, why or how they *are* eligible. Mindful of the different use of terminology David Brink adopts, he still identifies this complementarity of analysis when he considers;

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<sup>64</sup> John Gardner, ‘Nearly Natural Law’, (2007) 52 *American Journal of Jurisprudence* 1, 4.

<sup>65</sup> John Gardner, ‘Nearly Natural Law’, (2007) 52 *American Journal of Jurisprudence* 1.

<sup>66</sup> John Gardner, ‘Nearly Natural Law’, (2007) 52 *American Journal of Jurisprudence* 1, 14

Because the denial of responsibility is an excuse, responsibility and excuse are inversely related. Those responsible for their wrongdoing lack an excuse, and excused wrongdoing is wrongdoing for which the agent is not responsible. This means that responsibility and excuse should have corresponding structure, and either could be studied by studying the other. Excuse is a window onto responsibility, and vice versa. This allows us to model responsibility and, hence, broad culpability by attending to excuses.<sup>67</sup>

A great deal of work has been done on defences in criminal theory, including – and most pertinently for this thesis – John Gardner’s work on the structure of defences and his developed understanding of justifications and excuses.<sup>68</sup> By contrast there is a dearth of scholarship on the theory of tort defences; however some recent leading work by James Goudkamp has initiated a certain interest in this area. The work of these theorists will be analysed and developed upon by this thesis.

Following the development of an understanding of and explanation for the crime/tort distinction the thesis will test the viability of this explanation against tests distilled from critiques against general theories (as detailed next). As well as assessing the theory against the tests to be outlined the theory will also be applied to relevant debates and issues within cognate aspects of legal theory. If the ascriptive theory developed in this thesis can provide coherent answers and analyses to the issues then it will support the claim to being a successful theory.

*Tests:*

In offering an explanation of the crime/tort distinction the thesis adopts the Hartian approach to advance a general and descriptive theory of ascription. It is general in the sense that it is not tied to any particular common law jurisdiction and furthermore it will also offer “an

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<sup>67</sup> David Brink, ‘The Nature and Significance of Culpability’, (2019) 13 *Criminal Law and Philosophy* 347, 354.

<sup>68</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008).

explanatory and clarifying account of”<sup>69</sup> the ascriptions of criminal culpability and tortious responsibility. The theory advanced is descriptive “in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures”<sup>70</sup> of such ascriptions.

The appeal of successfully developing a general theory of ascription is great. Horder notes the attractiveness of discerning such a general theory vis-à-vis criminal culpability;

We would be equipped not only with a very simple explanation for the complex structure of criminal culpability, but also with a clear critical perspective from which to analyse new or potential bases for culpability as they are developed in the courts. That is the considerable allure of an exclusive unitary theory of culpability.<sup>71</sup>

This is a strong appeal indeed, but one that applies not only to criminal blameworthiness but also to tortious responsibility. The very possibility of such theories however is disputed - including by Horder. In order to test the explanations and theories provided by this thesis it will be useful to engage with these objections because criticisms against the possibility of providing universal or unified theories are useful as ‘stalking horses’ in this work. In this way they can provide standards and tests against which the thesis should be able to measure itself. I have therefore chosen two demanding critiques against unified theories - one for tortious liability and one for criminal culpability - from which to draw these tests; *The Failure of Universal Theories of Tort Law*<sup>72</sup> by James Goudkamp and John

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<sup>69</sup> HLA Hart, *The Concept of Law*, (3<sup>rd</sup> Edition, Oxford University Press 2012) Postscript

<sup>70</sup> HLA Hart, *The Concept of Law*, (3<sup>rd</sup> Edition, Oxford University Press 2012) Postscript

<sup>71</sup> Jeremy Horder, ‘Criminal Culpability: The Possibility of a General Theory’, (1993) 12 (2) *Law and Philosophy* 193, 195.

<sup>72</sup> James Goudkamp and John Murphy, ‘The Failure of Universal Theories of Tort Law’, (2015) 21 (2) *Legal Theory* 47.

Murphy and *Criminal Culpability: The Possibility of a General Theory*,<sup>73</sup>  
by Jeremy Horder.

*Tort:*

In Goudkamp and Murphy's piece they critique three dominant, universal theories across five aspects of tort law which they claim none of the theories adequately explain. The three theories chosen by the authors are Ernest Weinrib's corrective justice theory,<sup>74</sup> Robert Stevens's rights theory,<sup>75</sup> and Richard Posner's economic theory.<sup>76</sup> The overarching test they have used is "Does the *explanandum* fit the *explanans*?"<sup>77</sup> or do the theorists' explanations of the law fit the actual law. The five main problem areas chosen by Goudkamp and Murphy are 1) the breach element in negligence, 2) liability for pure economic loss, 3) punitive damages, 4) the defence of illegality and 5) *Rylands v Fletcher* strict liability.<sup>78</sup> While Goudkamp and Murphy go into great comparative detail to argue their point it suffices to briefly outline the main difficulties posed by the five areas identified;

Regarding the breach element in negligence the critique rests on the Hand formula adopted in US tort law. This formula measures the existence of a duty partly by the burden that would be placed on the defendant should there be such a duty in place thus offending the corrective and rights theories; the corollary however being the fact that the hand formula is not employed outside of the US thereby offends the economic theory.<sup>79</sup> In a way it is a misnomer to describe this as the "breach element" it is perhaps

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<sup>73</sup> Jeremy Horder, 'Criminal Culpability: The Possibility of a General Theory', (1993) 12 (2) Law and Philosophy 193.

<sup>74</sup> Ernest Weinrib, *Corrective Justice*, (Oxford University Press 2016).

<sup>75</sup> Richard Posner, *Economic Analysis of Law*, ( 8<sup>th</sup> edn, Aspen Publishers 2011).

<sup>76</sup> Robert Stevens, *Torts and Rights*, (Oxford University Press 2009).

<sup>77</sup> James Goudkamp and John Murphy, 'The Failure of Universal Theories of Tort Law', (2015) 21 (2) Legal Theory 47, 49.

<sup>78</sup> *Rylands v Fletcher* (1868) LR 3 HL 330

<sup>79</sup> It should be noted the Learned Hand formula is heavily criticized in feminist theory e.g. "The judicial discourse emphasizes rationality and cost/benefit analysis. The feminist literature, which derives much of its reasoning from Carol Gilligan's *In a Different Voice*, claims that implementing the reasonable person standard in such a way gives voice to only the male point of view and not the female." In Jacob Assaf, 'Feminist Approaches to Tort Law Revisited' (2001) *Theoretical Inquiries in Law* 221.

better described as the “duty element” in negligence. It could more broadly be described as a critique that some jurisdictions of the common law world identify the existence of duties in slightly differing ways.

The pure economic loss conundrum for tort law sees a diverse field of application across the common law world with each of the three theories not being adequately able to explain such divergence. Goudkamp and Murphy claim that any resort the theories may have to a claim that pure economic loss is a fringe and controversial aspect of tort law is unavailable to universal theories because to do so would be to adopt a prescriptive rather than explanatory approach to the law.

Punitive damages obviously present difficulties for the corrective and rights theories because such damages are awarded not by reference to compensation or rights violations. They are also problematic for economic theory in that if punitive damages are awarded to deter conduct then it is inefficient that only the victim may sue or that there is an availability of insurance to cover an award of such damages. As noted earlier punitive damages also pose some confusion for the crime/tort distinction.

The defence of illegality where the defendant relies upon the illegality of the plaintiff’s actions as a block to the tortious claim poses a number of difficulties for each of the three theories. Goudkamp and Murphy claim that for the corrective justice theory, a defence of which focuses on the plaintiff and their illegal actions means that it is insufficiently bilateral to fit within that theory. The rights theory is required to contort itself to the claim that rights are waived when engaged in illegal action. While the economic theory’s position that the denial of a remedy to the illegal plaintiff is efficient because it deters further illegality rings somewhat hollow when the impugned behaviour was not deterred by the criminal law in the first place.

*Rylands v Fletcher* fits more comfortably within economic theory than the others for obvious allocation of costs reasons. The corrective justice theory has difficulties in the unequal treatment of the parties; however the

most striking challenge is from the rights theory which claims that this type of action is unjust because it is the allocation of risk in the absence of a duty or right.

The objections raised by Goudkamp and Murphy may not be quite as strong as they believe them to be but in any event their work is helpful in highlighting salient contentious areas of tort law that any theory of general application should be adequately able to encounter and explain. The thesis will therefore return to these above challenges including the overarching test laid down by Goudkamp and Murphy of fit between the *explanans* and the *explandum*.

*Crime:*

In the criminal context the stalking horse which can be adopted is the article produced by Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*.<sup>80</sup> Horder considers three main contenders for a general theory; capacity theory, character theory and agency theory arguing that each of them has something to offer in understanding culpability but none of them meets the test he sets of unifying the pattern of culpability “to the exclusion of all others.”<sup>81</sup>

A repeating concern for Horder is how successfully the relevant theories accommodate culpable negligence. He does this however from the perspective of English law at the time where recklessness was understood in a more objective hue under *R. v Caldwell*,<sup>82</sup> which he makes explicit reference to in footnote 1. The objective position in *Caldwell* was moved away from however and the law in that jurisdiction has since returned to what is termed ‘subjective recklessness’ (and never deviated from the subjective perspective in Irish law). The culpability of negligence has returned therefore to a much more contestable position than he allows for

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<sup>80</sup> Jeremy Horder, ‘Criminal Culpability: The Possibility of a General Theory’, (1993) 12 (2) Law and Philosophy 193.

<sup>81</sup> Jeremy Horder, ‘Criminal Culpability: The Possibility of a General Theory’, (1993) 12 (2) Law and Philosophy 193, 194.

<sup>82</sup>*R. v. Caldwell* [1981] 1 All E.R. 961.

in the article, and this must be borne in mind when considering his objections.

Horder critiques the choice theory as epitomized by Michael Moore firstly as being unable to account for the supposed culpability of negligence and secondly as relying in part on capacity theory because the choices must be a product of the defendant's capacity; thereby falling foul of the test he sets of exclusion to all other theories. Horder therefore dismisses (along with defiance theory) choice theory as not a sufficient contender for inclusion in his selected general theories.

As an archetype of capacity theory Horder refers to Hart;<sup>83</sup> again focusing on negligence he notes "Hart claimed that what matters in making a culpability judgment is whether the defendant had the physical and moral capacity"<sup>84</sup> This theory adequately explains the general exemption for the insane and for young children as they have insufficient capacity, however Horder critiques the theory as being unable to provide a sufficient gradience to the moral quality of action. The capacity to avoid wrongdoing doesn't do justice to the differences brought to bear by the differing culpable mental states. He gives the example of the significant moral distinction between intentional murder and involuntary manslaughter.

Regarding the character theory, it has a greater explanatory power for excuses but falls foul of adequately dealing with uncharacteristic behaviour, and as such poorly deals with the *mens rea* requirement in crime. This critique is consistent with the nature of culpability assessments. Criminal culpability is assessed not on the enduring nature of someone's ephemeral character over the broad sweep of time but rather their particular conduct and its particular consequences at a particular time. It is temporally and corporeally limited.

The final theory Horder examines - the agency theory – he argues more adequately explains the moral valence of *mens rea* than the previous

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<sup>83</sup> HLA Hart, *Punishment and Responsibility*, (Oxford: Clarendon Press, 1968) 136.

<sup>84</sup> Jeremy Horder, 'Criminal Culpability: The Possibility of a General Theory', (1993) 12 (2) Law and Philosophy 193, 202.



theories. Horder uses a bulls-eye metaphor to explain this where the more successful an agent's action the closer to the *mens rea* bulls eye it will be with intention at the centre, with the next ring out occupied by recklessness, beyond that to knowledge and finally – under his understanding - to encompass negligence at the outer edges. Horder considers this theory also has the advantage of explaining the lesser significance of attempts; because they are instances of failed agency rather than successful agency. However he considers even this final promising theory fails the exclusivity test imposed by relying upon the capacity theory to explain the non-culpability of children and the insane.

*General Tests:*

Beyond these challenges to the development of general theory for tort and crime a number of tests have also been proposed relating to theories of more specific application; particularly in areas relating to culpability and liability - which may be useful to adopt. For example, there is much debate about the nature of the justification/excuse distinction and how to categorise defences in criminal theory. A useful test for any theory developed throughout the thesis to adopt is the one provided by Westen which he describes as 'perspicuousness', which he explains is how successful the theory is at "combining defenses that are normatively *alike* and excluding defenses that are normatively *unlike*."<sup>85</sup> Further, Westen considers;

The measure of a normative theory of law is its robustness. A robust normative theory of criminal excuses (1) provides a persuasive and independent normative account of a substantial range of contemporary defenses in criminal law, (2) treats likes alike and unalikes unlike by including as "excuses" all defenses that share the same normative principle of exculpation and by excluding all defenses that do not, and (3) provides normative

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<sup>85</sup> Peter Westen, 'An Attitudinal Theory of Excuse', (2006) 25 Law and Philosophy 289, 310.

guidance to jurisdictions regarding how to reform and supplement existing defenses.<sup>86</sup>

While Westen is concerned here only with criminal defences it is reasonable to expect his test of 'robustness' i.e. normative likeness to be transposable to a consideration of tort defences. The standards of perspicuousness and robustness shall therefore be employed then when seeking to propose a set of coherent answers to central debates in legal theory regarding defences (both in criminal law and tort law); a topic central to the methodology of this thesis.

*Application:*

This thesis is one of theory and so any claims to import, such that they are, are bounded by that field. The implications are theoretical rather than practical. Following the assessment against the tests outlined above the thesis will, in Chapter 6, demonstrate the theoretical impact of the theory through the novel positions or arguments it offers to cognate issues in ascriptive theory such as; the relationship between responsibility and blameworthiness and its allied concern of the Results Matter/Don't Matter debate. It will then consider the interesting concern of the normative position of the mistaken aggressor. Finally it will consider its application to Gross Negligence Manslaughter, arguing that the theory proposed here can successfully explain the recent developments in that area of law in England and Wales.

The purpose of applying the theory is to provide an ancillary standard against which the theory advanced can be measured. The thesis is offering a general ascriptive theory and so debates which concern whether or not an agent can be ascribed as blameworthy or responsible are useful and pertinent in testing the theory. This is because these debates and issues concentrate around the most contentious issues in the scholarly dialogue bringing to the fore points of departure in often irreconcilable

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<sup>86</sup> Peter Westen, 'An Attitudinal Theory of Excuse', (2006) 25 Law and Philosophy 289, 353.

perspectives. If the theory advanced here can offer coherent answers to these debates then this will provide a further indication of its success as a general theory. The debates and issues were chosen by reference to the central issues addressed in the thesis. In examining the crime/tort distinction an obvious overlap is provided by the question of the role results and conduct play respectively in such ascriptive practices and this finds allied expression in the results matter/don't matter debate.<sup>87</sup> Finally the interesting philosophical debate surrounding the normative position of mistaken aggressor (so central to an understanding of justifications – a chief concern of this work) will be addressed; a debate which garners competing answers in moral theory.<sup>88</sup> As well as dealing in the areas cognate to this work, these issues and debates have been chosen because of the intractability and irreconcilability of the positions theorists adopt in relation to them. Such divergence is taken as an indication of the difficulty these debates engender and if this thesis can offer coherent positions to them then it further supports its claim to being a successful theory.

Road Map:

Chapter 1 sets the scene and positions the thesis in terms of both the conceptual context and the intellectual historical context. It also contributes to the argument of the thesis through exposition of some key concepts which will be used; namely, the nature of the relationship between practical reason and morality and the division of modes of agency depending upon the rationality and use of reason of the agent at a given time.

The chapter begins with sketching an historical lineage stretching from the father of western philosophy, Aristotle through to the mediaeval thinking of Aquinas, on to the renaissance political philosopher Machiavelli. It progresses to the rationalist of the enlightenment era, Kant

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<sup>87</sup> Larry Alexander and Kimberley Ferzan, *Criminal Law Conversations*, (Oxford University Press 2011), Chp 7.

<sup>88</sup> Marcia Baron, 'Justifications and Excuses' (2005) *Ohio State Journal of Criminal Law* 387.

along with the sceptical Humean perspective and concludes with a brief treatment of some more modern developments and analyses. This lineage demonstrates a recurrent theme of practical reason and rationality at the core of determinations of what one ought to do and assessing and distinguishing right action from wrong action.

The chapter begins with Aristotle and considers his concept of *phronesis* or practical reasoning - along with its elemental components - as vital to *eudaimonia* or human flourishing. It then considers practical reason as it pertains to animals and children, leading to his division between action that is 1) Voluntary, 2) Involuntary and 3) Non-Voluntary. Intention as a paradigm of practical reason demonstrates voluntary action. Involuntary action is explained by the example of being moved by external forces, such as being blown by the wind. These are readily understood distinctions; however, he proceeds to add the third category of 'Non-Voluntary' action to describe an undeliberated type of action as can be seen in animals or young children. While non-voluntary action has a certain quotient of voluntariness, absent deliberation and choice it is, he argues, more akin to operating on instinct, and as such doesn't merit the full descriptor, voluntary.

This historical review is then progressed as the thesis considers the medieval engagement with practical reason through the works of St. Thomas Aquinas. It was understood by Aquinas that reason is a central aspect of personhood and valued as a tool to more fully share in the divine. Aquinas directly models his *recta ratio agibulum* on *phronesis*. A distinction between 'right knowledge' and 'right reasoning' is then introduced with Aquinas significantly categorising *prudentia* or practical reason as a form of the latter rather than the former.

The chapter proceeds to renaissance era thought, through a consideration of Machiavelli's work, most especially his lesser known but much more voluminous and sustained work on republican theory as found in,

*Discourses on Livy*.<sup>89</sup> Reason was seen as the route by which man's more virtuous second nature can be developed. Discipline is recognised as a necessary ingredient for such virtue, echoing Aristotle's view that man requires law and justice in order to flourish.

The historical review ends then with a brief consideration of Kant's use of reason in the creation of a formulaic logic of ethics, where questions of right and wrong once answered must be capable to producing a universalizable rule. This era also produced a sceptic of practical reason in Hume. This chapter engages with that sceptical critique. Finally the chapter moves with chronological inevitability on to an overview of some current work in the field of practical reason by more modern scholars.

The nature of the relationship between practical reason and morality as brought to the fore by the survey of scholars will be given more detailed consideration where it is determined that they stand in intimate relation to one another. A distinction between the central questions of practical reason and moral reason are drawn, where the former asks 'what will I do?' and the latter 'what is the right thing to do?' The question of morality (moral reasoning) is determined as necessarily involving a consideration of the interests of others, whereas the question of action (practical reason) is not.

The above analyses then feed into a consideration of the nature of agency and the differing modes of agency. Ultimately the Aristotelian divisions of action are adopted and slightly developed to propose involuntary action as non-agency, non-voluntary action as mere agency or attributable agency and the most advanced voluntary agency as full agency or agency proper which is both attributable and assessable against correct moral reasoning.

Chapter 2 begins with an explanation of the suitability of Raz and his theory of practical reason as the chosen paradigm of the thesis based on a

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<sup>89</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009)

number of scholastically fruitful aspects of his work including; his pluralist focus on the operation of practical reason and - most pertinent to this thesis - his development of second order exclusionary reasons as a way of conceiving of (legal) duties along with the body of ascriptively and normatively relevant scholarship his work has fed into.

Following this introduction the chapter then proceeds to engage in an exposition and analysis of Razian reasons which sees a division between first order and second order reasons where first order reasons are direct reasons for action whereas second order reasons are reasons for or against acting on reasons. This understanding makes available a ‘Razian calculus’ which determines what is to be done by reference to the undefeated outcome of conflicting reasons of differing positional or internal weight where reasons of a coordinate plane may be defeated on an intra plane basis by weightier reasons while reasons on differing planes may be defeated by positional rather than internal strength; e.g. where second order reasons prevail against first order reasons. These are dense and complex propositions therefore exposition and explanation is apt and engaged in in this chapter.

It is noted that Raz’s calculus however does not neatly align with assessments of whether the actor did the right or the wrong thing because of its incomplete character. Raz notes and grapples with this non-alignment at various junctures throughout *Practical Reason and Norms*;<sup>90</sup> however, it is proposed the solution lies in an undervalued and undeveloped distinction noted by Raz, which is the distinction on the one hand between acting reasonably and on the other hand acting in a manner well-grounded in reason. One gets the impression that the assessment of acting reasonably is offered as a second best version of one’s action being well grounded in reason. In this way a reasonableness determination could be seen as a lesser form of a well-groundedness determination (an error I

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<sup>90</sup> Cf Joseph Raz, *Practical Reasons and Norms*, (2nd edn Oxford University Press 1990) 40, 41, 84.

consider Gardner also makes) when in fact they are different and dissociable assessment types and should not be considered as lesser or greater forms of the one assessment. Understanding this distinction brings clarity and coherence to normative and ascriptive concepts pertinent to this thesis such as the distinction between breaching a duty and doing the wrong thing, as discussed in the following chapter.

Chapter 3 seeks to develop an understanding within Razian theory of two central concepts to the ascriptions of responsibility and blameworthiness; namely the concepts of, what it means to be wrong, and what it means to breach a duty. The chapter begins with interrogating pertinent theories on duty breaches. Building upon John Gardner and Benjamin Zipursky's contributions to this area a schema for better understanding duty breaches is proposed as a division between Conduct Duties and Result Duties. This division loosely tracks Gardner's distinction between duties to try and duties to succeed where the latter is understood as a duty to  $\phi$  and the former a duty to make an effort to  $\phi$ . However the Conduct/Result distinction has the advantage of a more objective hue, without necessary reference to subjective intentions and as such matches more closely the law's understanding of conduct duties such as the duty of care.

This Conduct/Result model when applied as a tool of analysis of crime and tort illuminates an understanding of the crime/tort distinction that sees crime and tort occupying corollary position vis-à-vis the centrality of Conduct Duties and Result Duties, respectively. Tort is centrally concerned with Result Duty breaches while Crime is centrally concerned with Conduct Duty breaches. In the effort to understand and explain the crime/tort distinction it is tempting to stop here and see this corollary concern as explaining the distinction however this would be an error because while tort typically requires duty breaches *simpliciter* crime requires more. The fact that one has breached a legal rule may be justified or excused in a criminal proceeding which demonstrates that centrally crime requires what is termed in Razian theory and herein as wrongness.

Regarding wrongness the thesis builds upon the Gardnerian concept of unjustifiedness to develop the view that unjustified action is wrong action. Gardner has developed a theory of justified action arising when the explanatory reason is in coherence with the guiding (undefeated) reason while unjustifiedness is made out when there is dissonance between these two reasons. This structure of justifiedness is adopted but the thesis does not accept wholesale the Gardnerian view. The difference argued here is that the guiding reason is to be determined within the epistemic bounds of the agent as opposed to that of the community. In this way justification is understood as subjectively bounded albeit objectively assessed; rather than objectively bounded and objectively assessed as proposed by Gardner. The relationship between wrongness and duty breaches is then considered with the thesis arguing that the fundamental focus of criminal blameworthiness assessments is the assessment of wrongness not that of mere duty breaches.

Chapter 4 argues that the relevant ascriptive audiences for responsibility and blameworthiness are distinct. Engaging with the philosophy of criminal defences it is proposed that such defences can be categorized as either exculpatory or non-exculpatory. Exculpatory defences encompassing the standard division of justificatory and excusatory defences, while non-exculpatory defences exclude classes of persons beyond the writ of ascriptive assessments, within which are further two sub divisions of public policy non-exculpatory defences -which includes double jeopardy and diplomatic immunity - and Non Public policy non-exculpatory defences such as that afforded to the young and the insane. When this is so understood it elucidates the relevant ascriptive audience for blameworthiness as those who engage in voluntary action and as such exercise attributable and assessable agency. Examining tort law defences, for which there is a dearth of scholarship (understandably given the following claim) compared to the theory of criminal law defences, the thesis proposes that there are no real defences in tort law, merely denials. All so called defences in tort law are categorizable as denials of an element of the tort. These advancements to the understanding of defences in



criminal law and the law of tort indicate that the ascriptions of criminal blameworthiness are defence-inclusive whereas ascriptions of tortious responsibility are not.

Adopting a central case approach, chapter 5 of the thesis then considers the targets of ascription and seeks to discern same from an analysis of and engagement with relevant theory regarding non-defence constraints on the ascriptions of blameworthiness and responsibility. The doctrines of remoteness and causation along with a consideration of the work of harm all indicate that tort law is a duty centric body of law. With regard to crime however, the wrongness constraint is interrogated and proposed to be applicable (only) to blameworthy crimes. While extra-blame logic may justify crimes beyond the constraint of wrongness, blameworthiness proper is so constrained; indicating central case crime to be wrongness-centric.

Chapter 6 then briefly summarizes the explanation of the crime/tort distinction as proposed by this thesis and assesses it against the tests outlined here. The chapter then proceeds to apply the theory to cognate issues and debates in legal theory. The first part of the chapter summarizes the explanation of the crime/tort distinction advanced as; at its core crime is an assessment of the reasonableness of agency (i.e. the rightness/justifiedness of agency in light of subjectively bounded *relevant* norms) whereas tort at its core is an assessment of the well-groundedness of agency (i.e. the conformity of agency with objectively determined *applicable* norms). The second part of the chapter tests this explanation against the tests outlined earlier, i.e. the challenges advanced in the introduction against general theories arguing that the explanation adequately meets the challenges made. The third part of the chapter applies the theory. It begins with the objection raised by Benjamin Zipursky and John Gardner that responsibility and blameworthiness are merely different dimensions of the one assessment and therefore the results of agency go towards blameworthiness of the agent as much as the quality of the agency; ultimately arguing against this unitary position. The

chapter then considers The chapter also offers an answer to the results matter/don't matter debate in criminal theory. This debate concerns the blameworthiness/responsibility of an agent where one side considers the results of one's conduct do not go to blameworthiness/responsibility while the other claims they do. The chapter also provides an answer to the theoretical conundrum of the mistaken aggressor. This quandary essentially queries is the mistaken aggressor entitled to defend themselves. This section will then conclude with a brief application of the theory to explain the development of the law of Gross Negligence Manslaughter in England and Wales. This has been chosen as a particularly felicitous practical lens because of the use of negligence across the crime/tort divide. It is proposed that the explanation advanced by the thesis provides a coherent response to this and the previous issues and debates along with meeting the challenges and standards identified.

Conclusion:

The purposes of this chapter were introduction and orientation. It outlined some of the intriguing aspects of the crime/tort distinction. It noted an ostensibly shared rationale of seeking the diminution of wrongfulness and yet very different assessment practices and responses. It explained the methodology adopted by the thesis and it developed tests and standards for the work to assess itself against.

The methodology adopted by this thesis can be briefly summarized as follows; It is *General and descriptive*. General in that it is not tied to any particular common law jurisdiction and descriptive in the sense that it seeks to work from within the bodies of law rather than determining a particular ideological perspective *ex ante* and applying it to the bodies of law as a normative standard. In this way it is intended to be ideologically neutral and as such aspires to be as *pluralist* as possible. This appeal to plurality marks Razian theory as particularly appropriate as the vehicle through which to engage in this research. Any normative claims of desirable restructuring will be founded then upon the uncontroversial desideratum of consistency and internal *coherence* rather than fittingness

with a predetermined perspective. The thesis will adopt *thought experiments* as a standard method to ‘stress test’ the offerings of others and as a route to building upon and rehabilitating Razian theory.

The tests which the thesis adopts and which will be used to measure the ascriptive theory advanced herein are as follows;

1. Can it meet the challenges levelled by Goudkamp and Murphy and explain the follow? 1) the breach element in negligence, 2) liability for pure economic loss, 3) punitive damages, 4) the defence of illegality and 5) *Rylands v Fletcher* strict liability.
2. Can it provide a general theory that does not fall foul of Horder’s critiques against the capacity theory, character theory and agency theory and meet the standard of being to the exclusion of all others?
3. Can it offer an understanding of defences that meets the standard of ‘Perspicuousness’? along with the internal standard of ‘Robustness’?

This chapter progressed the argument of the thesis by providing it with a starting point and offering a justification for engaging in research in this area. It was also necessary to set out the tests by which the arguments and propositions of the thesis will be measured against and the methodology to be used in progressing the arguments of the thesis. Finally the road map offered performed the function of orientation for the reader.

## **CHAPTER 1: PRACTICAL RATIONALITY, MORALITY, AGENCY**

### *Introduction:*

The purpose of this chapter is to contextualise the thesis within the wider field of scholarship and to outline two concepts allied to practical reason in ascriptions of tortious responsibility and criminal blameworthiness; morality and agency. This chapter will situate the work of the thesis by locating it as operating within a long tradition of practical reason theory. The chapter continues this tradition through an engagement with the relationship between practical reason, morality and agency.

The chapter begins by sketching the historical lineage of thought around these issues from ancient times in the work of Aristotle to the mediaeval philosophy of Aquinas, on to the Renaissance thinking of Machiavelli. It then moves on to enlightenment era contributions of Kant and the sceptic Hume, culminating in a brief outline of some more modern developments.

Following the historical outline the chapter then considers the nature of the relationship between practical reason and morality. Some theorists consider them to be the same thing. This position will be interrogated. Ultimately the chapter argues against this equivalence view, by distinguishing between practical reason which has deliberated action as its issue and ethical or moral reason which can and should inform and guide practical reason but need not necessarily do so.

The chapter then concludes with an examination of agency where it builds upon the Aristotelian divisions between voluntary, non-voluntary and involuntary action. While the Aristotelian categorisation of action is adopted it is described in terms of agency to propose involuntary action as non-agency, non-voluntary action as attributable agency and the most advanced voluntary agency as full agency or agency proper which is both attributable and assessable against correct moral reasoning. Attributable agency being found in children but also exercised by adults in “unthinking” action while attributable and assessable agency is the

preserve of the mature and fully developed human involved in deliberative action.

*Choice of Philosophers:*

A key requirement of a doctoral thesis is that it shows an appreciation of where/how it fits in the wider field of knowledge/scholarship. This of course includes the modern work which engages specifically with normative theory and the theory of criminal culpability and tortious liability (as it will later in the thesis), however theorizing practical reasoning has a long lineage in Western Philosophy and it is appropriate therefore to recognize that lineage. A number of distinct epochs are recognized by scholars in the history of philosophical thought. They are 1) The ancients, 2) Medieval thinkers, 3) The sometimes forgotten Renaissance era and 4) The modern scholars.<sup>91</sup> The thesis takes its lead from these scholars in choosing a prominent philosopher from each era to sketch that historical lineage and place the work of this thesis in its proper context. While these epochs have been chosen to fit the categories provided within the scholarship of the history of philosophical thought, from within those categories choices have been made of philosophers who have engaged in work that has been drawn upon later by those who engage with Razian theory (the central philosophical lens of this thesis).

The choice of the particular philosophers was based on their subsequent use by the central legal scholars which this thesis draws upon and the relevance of their work to the enterprise of the thesis. To flesh this out and draw the lines of relevance more clearly I propose now to outline the relevance and centrality in question. Aristotle almost needs no justification given his undisputed status as the father of western philosophy. However it is not just his standing that justifies his inclusion but also his work. If one engages with practical reason, practical reasoning and the evaluation of a person and their agency then Aristotle's work in that sphere provides rich theoretical waters. In particular the distinction he

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<sup>91</sup> George Klosko, *The Oxford Handbook of the History of Political Philosophy* (Oxford University Press, 2011).

draws between various forms of conduct along the lines of voluntary, involuntary and non-voluntary will provide the basis of one of the original contributions of this thesis, namely the recognition that tort is centrally interested in a different form of agency than crime. The thesis self declares as adopting a Razian lens and identifies itself as engaged in Razian theory in an effort to explain the crime/tort distinction. As will be explained later in this chapter Raz can be understood as developing from Aristotle and in particular is classifiable as a recognitionalist. Aristotelian theory is also heavily drawn upon by John Gardner the other chief theorist in the field within which this thesis situates itself.

The central case method is a primary methodological vehicle through which this thesis works. This approach has its best recognized use in modern jurisprudential scholarship in the work of John Finnis. Finnis draws this approach from and otherwise also draws heavily upon Aquinas. Aquinas's work derives directly from Aristotle and so that makes him a suitable inclusion in the list of philosophers considered here in order to draw the historical lineage. However his inclusion has the added applicability because of the strong influence his work has had on Finnis and so indirectly one of the core methodological approaches of this work. In terms of the apposite inclusion of Aquinas vis-à-vis theory an important link which can be drawn between him and the work of this thesis, (as will be seen) is the division he draws between '*Prudentia*' and '*Scientia*'. Which importantly distinguished between right reasoning (the former) and right knowledge (the latter). This is relevant because in allowing for the distinction, right reasoning can ultimately be incorrect. This – as will be seen - is a central distinction made in rehabilitating the Gardnerian model of justification, which is based on proposing justification as a form of *prudentia* rather than *Scientia*.

Of all the Renaissance era political and philosophical thinkers Machiavelli is perhaps the best known. It is not however for his work on political pragmatism (*The Prince*) that justifies his inclusion in the work of scholars

here but rather it is his work as *the* central figure in Republican theory.<sup>92</sup> Republicanism is seen at the heart of thinking in the criminal theorizing of Phillip Pettit,<sup>93</sup> and Anthony Duff.<sup>94</sup> The latter of course being a towering figure in the world of criminal theory. While this thesis is not a work on republicanism one of the chief insights from Machiavelli's republican work which also has direct implication for the work herein is the distinction he draws between first nature and second nature. The second nature requiring the application of practical reasoning and a full consideration of the interests of others. It is this second nature and its clear link to Aristotelian voluntary conduct [or as will be developed here 'full/proper' agency] that marks Machiavelli out as an appropriate inclusion in the drawing of an historical lineage.

Finally the more modern work of Kant and in particular the work on duties makes him an appropriate inclusion as the enlightenment era scholar included here. Kant's understanding of duties as categorical and mandatory reasons is the understanding adopted by and developed by Gardner.<sup>95</sup> It also has pertinence to the Razian notion of protected reasons.<sup>96</sup> An issue – as will be seen – as pivotal in assessing human agency across both crime and tort.

#### Aristotle:

From the earliest days of philosophy the nature of humankind and its apparent uniqueness has been a matter of curiosity and deliberation. The father of western philosophy, Aristotle devoted much effort to examining the conduct of man and politics in his work on practical sciences. He contended that the highest good of humankind is human flourishing or *eudaimonia* which can roughly be understood as a life lived in accordance with reason; expressed more poetically as “an activity of the soul

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<sup>92</sup> For discussion on his central relevance see Iseult Honohan, *Civic Republicanism*, (Routledge 2002)

<sup>93</sup> Philip Pettit, *Criminalization*, (Oxford University Press, 2014) Chp 5.

<sup>94</sup> RA Duff, *The Realm of Criminal Law*, (Oxford University Press, 2018) Chp 5

<sup>95</sup> John Gardner, 'Reasons and Abilities: Some Preliminaries' (2013) *The American Journal of Jurisprudence*, 63.

<sup>96</sup> Joseph Raz, *The Authority of Law* (Oxford University Press, 1979) 18.

expressing reason in a virtuous manner.”<sup>97</sup> This view places a heavy emphasis on reason as a necessary ingredient to *eudaimonia*. The particular form of reason required to bring about or secure the good life however is practical reason or what he terms *phronesis*; mere theoretical reason (albeit very valuable) is insufficient for this task.

The necessary aspects of *phronesis* are *bouleusis* or deliberation and *prohairesis*; deliberative choice.<sup>98</sup> So we can see that from the very start of western philosophy acting out one’s decisions or deliberative action is taken as the unique feature of mankind which separates us from the rest of animal kind. While animals of course act voluntarily the distinction is in the fact that they do not act deliberatively because of their incapacity to make reasoned decisions.<sup>99</sup> Reasoned choice and action on foot thereof (*phronesis*) is a human specific quality which allows us to achieve full(er) human flourishing.

It is within this view of the uniqueness of humankind and its highest good of human flourishing (*eudaimonia*) that leads Aristotle to consider the function of the political state. The *polis* “comes into being for the sake of living, but it remains in existence for the sake of living well.”<sup>100</sup> This provides us with a standard by which to judge a given polity; the better it is at promoting *eudaimonia* the better it is as a political entity. One of the chief tools and entities of any political state is of course the law and so likewise the law can be assessed against this same standard of whether or not it supports and promotes *eudaimonia*. Indeed in the famous and much used quote the law is recognised by Aristotle not only as assessable against the standard of promoting *eudaimonia* but necessary for same; “Man, when perfected, is the best of animals, but when separated from law and justice, he is the worst of all.”<sup>101</sup> The political community, under this view, is necessarily a rational community and indeed it is the very capacity for

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<sup>97</sup> Christopher shields, *Aristotle*, (Routledge 2007).

<sup>98</sup> Aristotle, *Ethics*, (JAK Thomson tr, Penguin 1976) III.2.1112a15-17.

<sup>99</sup> Mjid Mollayousefi and Leila Shirkhani ‘Aristotle and the Theory of Decision (Prohairesis)’ (2017) 11 (20) *Journal of Philosophical Investigations*, 249.

<sup>100</sup> Aristotle, *Politics*, (RF Stalley tr, Penguin 2009) 1252b29–30.

<sup>101</sup> Aristotle, *Politics*, (RF Stalley tr, Penguin 2009) Book I, 1253a.31.



reason that allows a *polis* to come into existence and it is its promotion that maintains it.

For Aristotle the law is necessary for general human flourishing - or the promotion of life led in accordance with reason. The relation law has to rationality is further developed in his also famous quote; “The law is reason free from passion.”<sup>102</sup> So we can see that rationality, law and human flourishing are from the very beginning of western philosophy understood as standing in intimate relation to one another.

Reasons can of course come in a variety of forms and sophistication. Aristotle noted in *De Motu Animalium* that animals possess a simple form of reasoning which can be described as “a simple link between apprehension by the mind of something good (or desirable) and the activation of appetite leading to action. This is plausible, and is in fact the description of general ‘animal’ movement: desire, perception, action.”<sup>103</sup> Whereas human action has potential beyond such an animalistic type basic reasoning. For Aristotle while animals have a quasi deterministic existence because of the heavy dominion of instinct and appetite he adds various steps between desire and action to explain full human action; namely deliberation and choice to produce a sequence such as “desire-deliberation-perception-choice-act”<sup>104</sup>

Having the capacity to reason involves the capacity to engage in deliberation; in other words to consider the reasons for or against a given action, to come to a choice and to execute that decision. This is a special type of human conduct, and is dissociable from other versions of conduct. Aristotle, in Book III of Ethics, draws the distinction between actions that are 1) Voluntary, 2) Involuntary and 3) Non-Voluntary.<sup>105</sup> He describes chosen or deliberative action (*Phronesis*) as the archetype of voluntary

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<sup>102</sup> Aristotle, *Politics*, (RF Stalley tr, Penguin 2009) Book III, 1287a.32.

<sup>103</sup> Daniel Westberg, *Right Practical Reason: Aristotle, Action and Prudence in Aquinas* (Clarendon Press, Oxford 1994) 15.

<sup>104</sup> Daniel Westberg, *Right Practical Reason: Aristotle, Action and Prudence in Aquinas* (Clarendon Press, Oxford 1994) 15.

<sup>105</sup> Aristotle, *Ethics*, (JAK Thomson tr, Penguin 1976) Book III.

action, while involuntary would be along the lines of action under compulsion which is described as archetypically arising “when it has an external origin of such a kind that the agent or patient contributes nothing to it; e.g. if a voyager were to be conveyed somewhere by the wind or by men who had him in their power.”<sup>106</sup> It is apt to note in passing that such externality is a notion well known to law under for non-insane automatism. Aristotle proceeds to define non-voluntary actions as exemplified by that type of action engaged in by children and animals, because while they “have a share in voluntary action” they don’t in the deliberative understanding he proposes of choice.<sup>107</sup>

These distinctions of types of conduct and this schema of understanding conduct are used throughout this thesis. While all forms of conduct have outward expression - and in that sense such expression does not necessarily provide a sufficient distinguisher - it is voluntary conduct that is the special preserve of a fully developed rational creature and it will be seen and contended in subsequent chapters that this version of conduct is of special interest to morality and determinations of blameworthiness.

In chronological sequence, the baton of philosophical inquiry into practical reason was passed from Aristotle in the ancient era to Aquinas in the medieval era who we turn to now.

#### Aquinas:

St. Thomas Aquinas was a central philosopher of the middle ages who continued the philosophical engagement on practical rationality. He may be described as the father of natural law theory; his work having been lately clarified and expounded upon by the natural law scholar, John Finnis. St. Thomas Aquinas divides law into four categories;<sup>108</sup>

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<sup>106</sup> Aristotle, *Ethics*, (JAK Thomson tr, Penguin 1976) Book III 1109b30-1110a16.

<sup>107</sup> Aristotle, *Ethics*, (JAK Thomson tr, Penguin 1976) Book III 1111b5-31.

<sup>108</sup> Thomas Aquinas, *Summa Theologiae*, I-II 90 Article 3, <<http://www.newadvent.org/summa/2090.htm>> accessed on 14th June 2019

- a) *Lex Aeterna*, which can be described as divine reason, “it is God’s plan for the universe” which everyone and everything is subject to.<sup>109</sup>
- b) *Lex Divina*, is divine law or the law of God as revealed to us in scripture.
- c) *Lex Naturalis*, are those principles of *Lex Divina* which are knowable by rational creatures.
- d) *Lex Humana*, or positive law provides particularities to the principles of natural law and in this way depends for its legitimacy on its coherence with natural law. This Lex can also be further subdivided into two categories; *jus gentium* and *jus civitas*, where the former is derived but distinct from natural law and can be seen in all human societies, such as rules against unjustifiable killing. The latter relates to the laws of a particular *civitas* or polity and may or may not be shared more broadly.<sup>110</sup>

Such is the connection between rationality and morality at least in the question of natural law Aquinas is described as “seeing law as a function of the intellect.”<sup>111</sup> Indeed Aquinas describes law as rational ordering to the common good made by either the whole people or a “personage who has care of the whole people”<sup>112</sup> The importance and use of practical reason for Aquinas in coming to an understanding of natural law is described by Finnis in his work as;

The principles of practical reasonableness are now understandable as having the force and depth of a kind of sharing in God’s creative purpose and providence. The good of practical reasonableness is now understandable as good not only intrinsically and for its own

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<sup>109</sup> Cf MDA Freeman, *Lloyd’s Introduction to Jurisprudence*, (8<sup>th</sup> edn Thomson Reuters 2008) 100.

<sup>110</sup> Cf MDA Freeman, *Lloyd’s Introduction to Jurisprudence*, (8<sup>th</sup> edn Thomson Reuters 2008).

<sup>111</sup> Cf Daniel Westberg, *Right Practical Reason: Aristotle, Action and Prudence in Aquinas* (Clarendon Press, Oxford 1994) 34.

<sup>112</sup> Thomas Aquinas, *Summa Theologiae*, I-II 90 Article 3, <<http://www.newadvent.org/summa/2090.htm>> accessed on 14th June 2019

sake but also as a constituent in the good of assimilation and adhesion to the omnipotent creator's practical wisdom and choice.<sup>113</sup>

It had been thought that natural law theory requires a coherence between human law and natural law in order for the former to be valid, however the modern understanding of the relationship between the two is more nuanced, including Finnis's argument that what Aquinas meant is not that a law lacking coherence with natural law was invalid but rather that it is a corruption of law and describable as law in a non-focal sense.<sup>114</sup> This theme of a law as non-focal, or not within the inherent logic of the law it purports to be (albeit still valid) will be adopted as a tool of description and analysis and returned to later in the thesis.

It has been noted that Aquinas, like many Medieval philosophers,

held that reasoning is what differentiates us from other animals. Humans are, by the Aristotelian definition, rational animals. We are distinct from other rational beings (namely, angels) because we are animals, but we are also distinct from other animals because we are the only animals who have the power to reason.<sup>115</sup>

Aquinas was of course a church scholar which meant that his intellectual work was suffused by a monotheistic theological paradigm; within which he developed his theories. But even in an ideological perspective so heavily dominated by faith, his work clearly values reason as a central aspect of humankind's personhood. Aquinas makes heavy use of Aristotle's work, including that concerning ethics; a rather innovative endeavour for a church scholar to rely so upon the works of a pagan philosopher. It can be said that Thomistic *prudentia* is "modelled directly on *Phronesis* and is described by Thomas as *recta ratio agibilium*"<sup>116</sup>

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<sup>113</sup> John Finnis, *Aquinas: Moral, Political and Legal Theory*, (Oxford University Press 1998) 308.

<sup>114</sup> MDA Freeman, *Lloyd's Introduction to Jurisprudence*, (8th edn Thomson Reuters 2008).

<sup>115</sup> Creighton Rosental, *Lessons from Aquinas*, (Mercer University Press 2011) 32.

<sup>116</sup> Daniel Westberg, *Right Practical Reason: Aristotle, Action and Prudence in Aquinas* (Clarendon Press, Oxford 1994) 26.

which can be translated as something akin to ‘right reason as regard to practice or action’.

An unusual sequencing in agency arises in *Summa* in that for Aquinas decision precedes deliberation. This is counter intuitive in that surely the sequence is that one deliberates on the relevant issue and then following such deliberation decides. This peculiarity is explained by the fact that he conceives of decision in a manner different to the ordinary understanding. For Aquinas deliberation is more a function to “specify the means to a desired end.”<sup>117</sup> With choice acting in the role more closely related to ‘decision’ in the common vernacular. This reversal of sequence however does not pose a particular difficulty for relating Aquinas with his progenitor Aristotle or intellectual decedents such as Finnis, once the different technical senses of deliberation and decisions are understood and accounted for.

Significantly Aquinas does not define *Prudentia* as a *Scientia* or “right ‘knowledge’ but right ‘reasoning’”<sup>118</sup> In this way right reasoning can be distinguished from moral knowledge. This is a repeating distinction of some import to the central argument of this thesis. This distinction follows an Aristotelian virtue ethicist line of thought which allows for a space between “knowledge of moral principles and actually having the habit of deciding and acting correctly.”<sup>119</sup>

Aquinas is described as understanding that “humans have a natural inclination to pursue what is apprehended by reason as good. It is in response to this view that Scotus emphasized the rational will as a self-determining power capable of transcending natural inclinations and tendencies.”<sup>120</sup> This dichotomy between natural inclinations and reason as

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<sup>117</sup> Daniel Westberg, *Right Practical Reason: Aristotle, Action and Prudence in Aquinas* (Clarendon Press, Oxford 1994) 168.

<sup>118</sup> Daniel Westberg, *Right Practical Reason: Aristotle, Action and Prudence in Aquinas* (Clarendon Press, Oxford 1994) 187.

<sup>119</sup> Daniel Westberg, *Right Practical Reason: Aristotle, Action and Prudence in Aquinas* (Clarendon Press, Oxford 1994) 188.

<sup>120</sup> George Duke, ‘Aquinas, Kant, and the Eclipse of Practical Reason’, (2016) 69 *The Review of Metaphysics* 709, 726 quoting Duns Scotus *Ordinatio* IV, d. 46.

a liberating or transcending capacity leads neatly into the next section, in our chronological consideration of the philosophical examination of rationality, to renaissance-era thought as found in the work of Machiavelli.

Machiavelli:

Machiavelli is best known for his work of political realism, *The Prince* but a far greater and more sustained effort was exerted by Machiavelli on the intellectual problems of republicanism. *The Prince* was merely produced as an attempt to return to the good graces of the Medici, whereas his enduring political interest was in the theory of republicanism. His chief republican work, *Discourses on Livy* is seen by republican thinkers of all hues as a canonical text within their intellectual lineage. It is through this republican theory that we now proceed to engage with renaissance era thinking around human action.

*First Nature*

The default position for human nature, according to Machiavelli, is not an altogether positive one. He goes so far as to claim “that men never do good except out of necessity.”<sup>121</sup> This points to a first nature of man which is *not* good and in fact requires effort to *be* good. He further advises lawmakers to “take for granted that all men are evil and that they will always act according to the wickedness of their nature whenever they have the opportunity.”<sup>122</sup> This view of mankind is one of a lazy and opportunistically wicked species. A view, which while regrettable, may nonetheless be realistic. In any event he advises that it is appropriate a lawgiver address themselves to this dark side of humanity as “where something works well by itself without the law, the law is unnecessary,

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<sup>121</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 28.

<sup>122</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 28.

but when that good custom is lacking, the law is immediately necessary.”<sup>123</sup>

Let us examine some of the flaws of what may be described as this first nature of mankind. In the first instance, man is short-sighted and is generally incapable of seeing beyond present circumstances and requirements:

Most men will never agree to a new law that concerns a new order  
In a city unless a certain necessity shows them it is required, and  
since this necessity cannot arise without risk, it is an easy thing for  
that republic to be ruined before it can be brought to perfection in  
its organization.<sup>124</sup>

Machiavelli relies on Tacitus to explain the vengeful nature of mankind “Men are more inclined to repay injury than kindness: the truth is that gratitude is irksome, while vengeance is accounted gain.”<sup>125</sup> The idea that taking revenge is a gain has a quasi-sadistic quality to it. This view however fits comfortably within the more robust description proffered by Machiavelli that “human nature is ambitious, suspicious, and incapable of setting limits to a man’s fortunes.”<sup>126</sup> This paradigm is somewhat redolent of a Hobbesian view of “The condition of man . . . is a condition of war of everyone against everyone”<sup>127</sup> in that the first nature individual seems to be in battle with others in some form of zero-sum game which one only wins if another loses.

Machiavelli bemoans the fact that men typically, and weakly, allow the vagaries of fortune to determine their character;

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<sup>123</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 28.

<sup>124</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 23.

<sup>125</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 84 citing Tacitus, *The Histories*, (iv.3).

<sup>126</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 84.

<sup>127</sup> Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) Chp 13.

They become vain and intoxicated with good fortune, attributing all the good they receive to an exceptional ability they have never known. As a result, they become insufferable and hateful to all those around them. This situation then brings about some sudden change in their luck, and upon looking such a change in the face, they immediately fall into the opposite fault and become vile and abject.<sup>128</sup>

And so in this way occupy the opposite position of that famous advice of Kipling namely, “meet with Triumph and Disaster and treat those two impostors just the same”, or more chronologically apt Scipio’s proclamation “when Romans are defeated, they do not become discouraged; nor, when they win, do they become insolent.”<sup>129</sup>

The above along with other passages in *Discourses* represents a somewhat dismal picture of man’s nature which is in turn, lazy, opportunistically wicked, short-sighted, superficial, vengeful, clouded by passions, preoccupied with self, requiring leadership/regulation, susceptible to the vagaries of fortune and overawed by results. This outline however is presented as a descriptive reality rather than a normative desirability. For within this Pandora’s Box of human nature there also lies hope. While the above identified Machiavelli’s view of the first nature of mankind, mercifully it appears there is also a second nature.

### *Second Nature*

Let us begin with the decision-making defect of judging things as they appear rather than as they are. This regrettable aspect of humanity is not an inescapable fate to which one and all are doomed. This first nature is not the extent of human capability because its instinctual and small form can give way to the enlarging possibility of a second, rational nature. The

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<sup>128</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 328.

<sup>129</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 329.



pithy phrase “the people, although ignorant, can grasp the truth”<sup>130</sup> nicely sums up this potential, without flattering the baser reality. While initially they deceive themselves as to general questions “they do not do so in the particulars”<sup>131</sup> and therefore Machiavelli opines “the quickest way to open the people’s eyes, given that a general matter may deceive them, is to make them get down to its particulars.”<sup>132</sup> This is a hopeful message as to the second nature of man. Truth is not beyond an individual’s grasp or ability, but they must make the effort to examine the particulars i.e. details of any given thing. This second nature is perhaps well described as requiring effortful mental activity such as the attention to detail or particulars.

More than this ability to transcend the form and understand the substance, man also has the capability for brilliance. Ability is latent within mankind; even for some to the point of exceptional ability. Machiavelli considers deeply the conundrum of how to draw this out. A key problem is the inherent laziness of man or as Machiavelli recognises that generally man won’t do anything difficult unless he has to. As indicated above this second nature is embraced by the concept of “effortful mental activity” and so will not generally be developed by choice. Machiavelli’s chief solution therefore is the removal of such choice. He cautions on the dangers of copious choice in various passages including: “where choices are abundant and unlimited freedom is the norm, everything immediately becomes confused and disorderly.”<sup>133</sup> And “men act either out of necessity or by choice ... ability is greater where choice has less authority.”<sup>134</sup> His

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<sup>130</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 30 quoting Cicero, *De Amicitia*, 25-6.

<sup>131</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 119.

<sup>132</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 122.

<sup>133</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 28.

<sup>134</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 20.

preference for necessity even goes so far as the claim “hunger and poverty make men industrious and laws make them good.”<sup>135</sup>

When such exceptional ability arises it has the potential to benefit more than just the bearer of such ability; in fact it can have enormously beneficial consequences to the point that “the goodness of a single man, along with his exceptional ability”<sup>136</sup> can keep a Republic free; the highest of praise in a work on republicanism.

### *Indeterminate Nature*

From the analysis above we can discern a distinct Machiavellian understanding of human nature as malleable, along with an essentially pessimistic view of man’s natural inclinations which is well summed up in the phrase ‘human nature is deficient but educable.’ Aristotle and Harrington occupy some of the more optimistic ground on this issue where they at least start with the premise that man’s character is initially indeterminate.<sup>137</sup> Harrington proposes the elicitation of virtue as a relatively simple affair because “good orders make evil men good, and bad orders make good men evil.”<sup>138</sup> This approach sees the individual as essentially passive and a pedagogical *Tabula Rasa* awaiting to be filled. It should be noted however, that even this more optimistic approach does not go so far as to believe man to be essentially good.

Despite the more optimistic albeit sympathetic vantage of Harrington, he nonetheless is in agreement with Machiavelli, De La Court and Hobbes in viewing all political behaviour as essentially self interested<sup>139</sup> and that the dominant political reality is the passions. De La Court considered “The

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<sup>135</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 28.

<sup>136</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 65.

<sup>137</sup> Aristotle, *Politics*, (RF Stalley tr, Penguin 2009) 1287b15.

<sup>138</sup> James Harrington, *The Commonwealth of Oceana and A System of Politics* (first published 1656 JGA Pocock ed Cambridge University Press 1992) 274.

<sup>139</sup> Jonathan Scott, ‘Classical Republicanism in Seventeenth-century England and the Netherlands’ in Martin Van Gelderen and Quentin Skinner (eds), *Republicanism A Shared European Heritage* (Cambridge University Press 2002) 74.

contrariety of interest between monarchies and republics; between private and public interest was not between government by reason and government by passion, but between the *self-interest* of a single person and that of a self-governing community.”<sup>140</sup>

Christopher Holman’s work, *‘Machiavelli’s Philosophical Anthropology’* considers the malleability claim; “He rejects positive models of human nature, that is, models that interpret the human essence as a fixed set of human tendencies whose objective contours can be determined and mapped in systematic fashion, thus producing an architectonic model of humanity.” And “Just as it would be a mistake to read Machiavelli’s account of socialization as mere mediation of an essential human disposition toward a positive mode of doing or being, so too it would be a mistake to interpret it as mere habituation that produces a second nature that is as static as our “first” nature.” Holman identifies that just because a second nature may be inculcated it also fails to enjoy the status of an essential quality of human nature and is like the first nature, malleable. “Machiavelli provides many examples where second nature reveals its perpetually open character through non-protracted socialization.”

Returning to the more typical ability of a given individual, it is certainly hopeful that the second nature may be drawn out – “good examples arise from good training, good training from good laws.”<sup>141</sup> – but just as the first nature is susceptible to change, neither is this second nature a fixed or immutable characteristic: “how easily men may be corrupted and how they may transform themselves and give themselves a completely different nature, no matter how good and well educated they may be.”<sup>142</sup> Indeed it seems that while a second nature is with great difficulty developed, no such effort is required to corrupt that same nature. This

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<sup>140</sup> Jonathan Scott, ‘Classical Republicanism in Seventeenth-century England and the Netherlands’ in Martin Van Gelderen and Quentin Skinner (eds), *Republicanism A Shared European Heritage* (Cambridge University Press 2002) 69.

<sup>141</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 28.

<sup>142</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 113.

disparity between the effort required to develop the second nature and the ease with which one may be or become corrupted indicates the appropriateness of the ordinal priority given and also the term 'default' to describe the first nature.

The second nature seems to require effort to develop and involves effortful application. In order to so develop Machiavelli identifies the necessary presence of discipline which he equates with necessity. Discipline may for example be imposed on a given individual or it may be of internal character in the form of self-discipline. Importantly the effortful application requires the use of reason and rationality, and while his work places a heavy focus on how a republic can make men good such goodness is clearly an application of practical reason appropriately motivated by the needs of the republic.

Kant:

A well-known and well regarded rationalist philosopher of the enlightenment era, Kant, linked in a very direct way rationality with ethics and agency. He produced works directly concerned with analysing reason, most notably in his famous *Critique of pure reason*<sup>143</sup> and *Critique of Practical Reason*<sup>144</sup> over which much ink has been spilt by subsequent scholars. His work has spawned schools of thought with sometimes contradictory interpretations of Kant's positions. This brief treatment does not seek to solve such competing conundrums but proposes merely to identify him and his work in the lineage of philosophers who through the ages have engaged with rationality.

Kant's *Critique of Practical Reason* and *Groundwork* develops practical reason as occupying a position of primacy in morality. Most pertinently for the work of this thesis, from his analysis he claims to have discerned a supreme principle of practical reason which has a particularly famous

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<sup>143</sup> Immanuel Kant, *Critique of Pure Reason*, (Norman Smith trs, Palgrave Macmillan 2007).

<sup>144</sup> Immanuel Kant, *Critique of Practical Reason*, (Thomas Abbott trs, Dover Publishers 2004).

formulation in; “Act only according to that maxim whereby one can at the same time will that it should become a universal law’...according to Kant’s legislative conception of practical reason, this is the supreme principle both of morality and rationality.”<sup>145</sup>

Cullity and Gaut further analyse Kant’s work in this regard as;

Roughly, it is the argument that only actions done from duty have true moral worth; that this moral worth is not derived from the purposes to be attained by the action; that acting from duty is action that is required by the supreme principle and is performed because of the agent’s realization that it is so required.<sup>146</sup>

It is noteworthy that Kant considered between theoretical reason and practical reason the former was supreme as he indicated;

But if pure reason of itself can be and really is practical, as the consciousness of the moral law proves it to be [cf. §2.2 on the “fact of reason”], it is still only one and the same reason which, whether from a theoretical or a practical perspective, judges according to a priori principles; it is then clear that, even if from the first [theoretical] perspective its capacity does not extend to establishing certain propositions [e.g., the existence of God] affirmatively, although they do not contradict it, as soon as these same propositions belong inseparably to the practical interest of pure reason it [theoretical reason] must accept them.<sup>147</sup>

Kant however also conceived of practical and theoretical reason as unified as he indicates in the introduction to *Groundwork*:

[A critique of pure practical reason] is not of such utmost necessity as [a critique of pure theoretical reason], because in moral matters

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<sup>145</sup> Garrett Cullity and Berys Gaut, *Ethics and Practical Reason*, (Oxford University Press 1997) 18.

<sup>146</sup> Garrett Cullity and Berys Gaut, *Ethics and Practical Reason*, (Oxford University Press 1997) 19.

<sup>147</sup> Immanuel Kant, *Critique of Practical Reason*, (Thomas Abbott trs, Dover Publishers 2004) 5:121.

human reason can easily be brought to a high degree of correctness and accomplishment, even in the most common understanding, whereas in its theoretical but pure use it is wholly dialectical [i.e., a source of illusion]... I require that the critique of pure practical reason, if it is to be carried through completely, be able at the same time to present the unity of practical with speculative reason in a common principle, since there can, in the end, be only one and the same reason, which must be distinguished merely in its application.<sup>148</sup>

These are well known arguments which do not need extensive rehearsal here. However, Kant was also engaged in disputing the work of sceptics to practical reason and in particular the work of David Hume which we turn to now.

Sceptics:

As has been seen, the importance of practical reason and its distinction from the passions resonates down the ages in western philosophical thought. Indeed it can be understood as liberation from the passions. This understanding of practical reason and its importance in our human agency is not of course without its sceptics, the most notable being David Hume, who famously determined that “reason is and ought only to be the slave of the passions and can never pretend to any other office than to serve and obey them.” He bases such a claim on the fact that “A passion is an original existence, or, if you will, modification of existence”<sup>149</sup> whereas reason is not. In this division of original and non-original he may be said to share a Machiavellian view of human (first) nature and further be considered a sceptic of practical reason. His position is that we really reason *from* our desires rather than *to* them, so the idea of practical reason which understands reasons as deployed to solve the problem of what ought

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<sup>148</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals*, (Jens Timmermann ed Cambridge University Press 2009). 4:391

<sup>149</sup> David Hume, *A Treatise of Human Nature* (first published 1740, Oxford: Clarendon Press 1978) 415.

one do or desire to occur next, he sees as being the converse of reality. It should be noted however that although the direction of the reasoning is reversed for Hume, he does not deny a role to reason and reasoning. Therefore to achieve our ends we must rationally determine the required action to do so and act thereon. In this way his position still encapsulates space for deliberative action as that conduct which is required to achieve our ends. However such deliberation and reasoning is closer in relation to the Aristotelian classification of non-voluntary conduct (as explaining animal conduct and the conduct of children). While the Humean understanding may have pertinence to this version of (non-voluntary) conduct and certainly it has pertinence to a discussion on unconscious biases and unconscious motivations etc it otherwise gives perhaps too much to the passions and maybe makes too bold a claim to deny the liberation reason gives us from our instincts and appetites.

A further challenge to - or sceptical perspective on - practical reason is found in the determinism viewpoint. This perspective sees humankind as purely a product of our past and the laws of nature, neither of which we have control over.<sup>150</sup> In this way it challenges the very notion of free will or agency because if events are determined by causes and forces outside of the control of the human agent then there is no room left for free will. However, as with all philosophical theories it is a broad church within which there can be found compatibilists which see no necessary incompatibility between determinism and free will or human agency as

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<sup>150</sup> Cf generally on causal determinism - Hofer, Carl, "Causal Determinism", *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.) Note the thesis takes the use of the Stanford Encyclopedia of Philosophy (SEP) as an accepted referencing by virtue of the fact the entries are written by leading scholars and cannot be edited by the public. It is also edited by world leading scholars; for example the editors in the philosophy of law section are Scott J. Shapiro (Yale University) Kimberly Ferzan (University of Virginia/School of Law) Martin Stone (Yeshiva University/Cardozo Law School) Kimberley Brownlee (University of Warwick) Leslie Green (University of Oxford) An example of the prominent use of such sources can be found in for example . [Cappelen, Herman, Tamar Szabó Gendler, John Hawthorne, and Josh Dever. "What Is Philosophical Methodology?" *The Oxford Handbook of Philosophical Methodology*. Oxford UP, 2016. The Oxford Handbook of Philosophical Methodology, Chapter 34.

regards ascriptions of responsibility.<sup>151</sup> And indeed “Hume went so far as to argue that determinism is a necessary condition for freedom—or at least, he argued that some causality principle along the lines of “same cause, same effect” is required.”<sup>152</sup> In a world without causality any sort of agency in the form of deliberate action would be impossible.

A critique of the Humean approach which highlights the lack of sufficient regard for the agent and their agency can be found in Matthew Silverstein’s plaintive remark that “The problem with the Humean view is that it leaves no work for the agent herself to do.”<sup>153</sup>

A final particularly strong critique of the Humean focus on instrumentality of reason for passion’s purpose is offered through the deployment of a retorsive argument such that;

Those attracted to the Humean approach should bear in mind, however, that instrumental rationality is itself the expression of an objective normative commitment. The instrumental principle says that we are rationally required to take the means that are necessary to achieve our ends; if the principle represents a binding norm of practical reason, then we are open to rational criticism to the extent we fail to exhibit this kind of instrumental consistency, regardless of whether we want to comply with the principle or not.<sup>154</sup>

This philosophical perspective finds more modern expression in the work of neuroscience in such scholarship as Chris Willmott where he examines and challenges the concept of free will based on our unchosen biological features, including genetic features.<sup>155</sup> His work draws from a significant body of scientific research to indicate a correlation between certain

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<sup>151</sup> Cf John Fischer, *The Metaphysics of Free Will*, (Oxford: Blackwell Publishers 1994).

<sup>152</sup> Hofer, Carl, "Causal Determinism", *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.)

<sup>153</sup> Matthew Silverstein, 'Ethics and Practical Reasoning', (2017) *Ethics* 127, 353–382 at 365.

<sup>154</sup> Wallace, R. Jay, "Practical Reason", *The Stanford Encyclopedia of Philosophy* (Spring 2020 Edition), Edward N. Zalta (ed.)

<sup>155</sup> Chris Willmott, *Biological Determinism, Free Will and Moral Responsibility* (Springer International Publishing, 2016)



biological and genetic markers with criminal behaviour. It is noted of course that correlation is not causation and indeed the author is cognisant that the science is still in too early a stage for full adoption in the criminal justice system however he makes the case for its inevitably greater inclusion. Again a full denial of free will may be too extreme; while there may be an argument for more subject or agent specific standards to be at play in ascriptive practices - at least as they relate to culpability/blameworthiness - it would be too great a step to deny free will merely because of propensity or greater internal difficulty for a given agent. Greater difficulty is just greater difficulty; further, assessments in the criminal law are a largely subjective enterprise already and if it gets to the point of true absence of will the law also recognises this possibility and caters for it in defences available. Such practices and defences may be better informed and gain greater sophistication as the science improves but to point to such proclivities of nature as denials of free will *tout court* is to perhaps place upon the science a burden too heavy for it to bear.

Solving the free will/determinism debate is far beyond the scope of this thesis and not one which can be resolved here. However the work adopts the mainstream position that either free will exists which allows for ascriptions of responsibility and blameworthiness but, even if it doesn't exist, blame and responsibility can still be real as per the compatibilists. The availability of the compatibilist position allows those wishing to embrace the possibility of ascribing responsibility and blame to remain agnostic on the existence of free will. Therefore the thesis proceeds on the basis of the existence of free will sufficient for ascriptive practices.

While this work accepts the existence of free will and links it to the rational capacity of humankind this is not to say that we are at all times and in all places fully rational but rather that we have the capacity for reason. This is obviously a great differential between humankind and animal kind. It is also accepted that being rational can be liberating. It can free us from the tyrannical slavery of instinct and appetite, and provide us instead with the liberty to be responsive to reason and to pursue higher

order, longer term goals. In order to pursue these longer term, higher order goals in our lives which can support human flourishing the capacity and application of reason is required. If Aristotle is correct, and it is a compelling position – that the purpose of law is to at least facilitate *eudaimonia* then it is concerned with promoting the higher order purposes and selves of the citizenry in concert with seeking to protect such purposes from undue interference. This is of particular importance when humans seek to live in proximity to one another; the law facilitating such an endeavour. In doing so it allows for a community of rational beings to arise or perhaps more pertinently a community of rationality.

### Modern Scholarship:

The previous section outlined the work of select scholars from history in their engagement with the concept of practical reason. This charting of the engagement through the ages spanned the ancient philosopher Aristotle, the medieval church scholar Aquinas, the renaissance political thinker Machiavelli and the enlightenment thinkers Kant and Hume. However the study of practical reason has been continued into the modern era and multiplied, with some very significant and enlightening contributions made to the field along with developing and analysing the works of those theorists from antiquity already mentioned. To catalogue the full breadth of the work in this field is beyond the scope of this thesis however it is relevant to give a brief treatment on some more recent work in practical reason.

Practical reason can be said to be a subset of the broader philosophical field of philosophy of action, which explores the ‘doings’ as opposed to the ‘happenings’ of human action. Velleman reminds us that this area is cognate with the Wittgensteinian question of “what is left over if I subtract the fact that my arm goes up from the fact that I raise my arm?”<sup>156</sup> which is set to distinguish “the difference between a mere occurrence involving

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<sup>156</sup> Wittgenstein, *Philosophical Investigations*, (GEM Anscombe trs, Oxford: Blackwell. 1972), §621

my body and an action of mine.”<sup>157</sup> Some have pointed out that even non passive activity may still be less than an action, Parfit notes that “Like my cat, I often simply do what I want to do. I am not using an ability that only persons have.”<sup>158</sup> Or Frankfurt’s similar view that “actions are instances of activity, though not the only ones even in human life. To drum one’s fingers on the table, altogether idly and inattentively, is surely not a case of passivity...[n]either is it an instance of action.”<sup>159</sup> Theorists such as Frankfurt and Velleman consider it is necessary therefore to distinguish between mere activity on the one and action on the other. This distinction of mere activity on the one hand and action on the other has an echo of for the line drawn between the Aristotelian Non-Voluntary action and Voluntary action, respectively.

One of the chief divisions within modern theories of practical reason is that between what can be termed realists and constructivists, where the former such as Parfit and Scanlon see normative facts as independent and objective and the latter rejects such independence and objectivity instead considering the normative to be constructed through the will of the agents. Another division is that provided between internalists and externalists where the former considers the motivations of the agent to ground any reasons for action. While the latter considers reasons for action can arise independent of the motivations of the individual agent and indeed such reasons can then motivate the agent upon their discernment.<sup>160</sup>

Cullity and Gaut consider that the context within which recent theorising on practical reason has proceeded is one of three ‘poles’ of thought involving the 1) Aristotelian, 2) Kantian and 3) Neo-Humean poles. They draw out the main points of contrast between these poles or schools through an examination on three main issues of A) “the relation of the

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<sup>157</sup> J. David Velleman, *The possibility of Practical Reason*, (Oxford University Press, 2000) at p 1

<sup>158</sup> Derek Parfit, *Reasons and Persons*, (Oxford University Press, 1986) at Introduction.

<sup>159</sup> Harry Frankfurt, *The Importance of What we Care About*, (Cambridge University Press, 2012) 58-68 at 58

<sup>160</sup> Bagnoli, Carla, "Constructivism in Metaethics", *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), Edward N. Zalta (ed.)

normative reasons an agent has to the motivational states he actually tends to have”<sup>161</sup> B) “the relation between what an agent has a normative reason to do and what it would be good for her to do-between practical reason and value.”<sup>162</sup> C) The relation of a subject’s reasons to everyone else’s reasons.<sup>163</sup> This analysis leads them to represent the interactions between the various poles in what they describe as “the following simple picture:”<sup>164</sup>

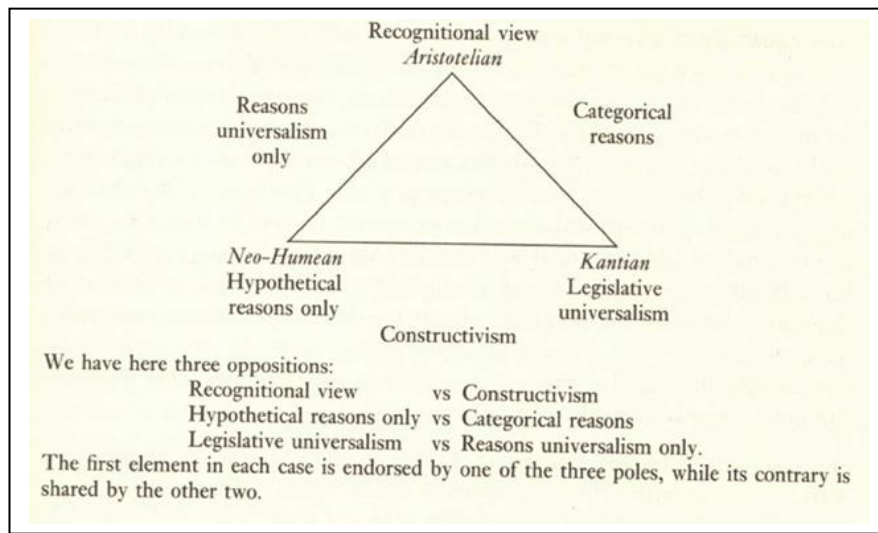


Figure 1: Three Pole Of Practical Reasoning<sup>165</sup>

While it is unnecessary to give detailed examination of each of the poles or the corresponding and contrary positions in what has already been a reasonably detailed and background theory heavy chapter, the above diagram gives a neat pictorial representation of current scholastic environment of practical reason theory.

**Practical Rationality And Morality:**

<sup>161</sup> Garrett Cullity and Berys Gaut, *Ethics and Practical Reason*, (Oxford University Press 1997) 3.

<sup>162</sup> Garrett Cullity and Berys Gaut, *Ethics and Practical Reason*, (Oxford University Press 1997) 4.

<sup>163</sup> Garrett Cullity and Berys Gaut, *Ethics and Practical Reason*, (Oxford University Press 1997) 5.

<sup>164</sup> Garrett Cullity and Berys Gaut, *Ethics and Practical Reason*, (Oxford University Press 1997) 5.

<sup>165</sup> Garrett Cullity and Berys Gaut, *Ethics and Practical Reason*, (Oxford University Press 1997) 5.

We are *inter alia* rational beings; rationality is neither a sufficient nor necessary condition for human personhood; as it is perfectly conceivable for there to be a human completely absent rational capacity and of course there are rational entities such as computers which are clearly non-human. As Gardner puts it;

We human beings are rational beings. We have a highly developed capacity to respond to reasons. This is an important aspect of our nature. It does not follow that there can be no case of a human being whose capacity to respond to reasons is limited or missing. It only follows that such a rationally deprived human being is not the central case or paradigm of a human being.<sup>166</sup>

This central aspect of being human involves the ability to respond to reasons, and when such response is a resultant action it can be described as an outward expression of our practical rationality. In other words, practical reason is the application of reason to the question of what one will do. George Duke describes it as “[i]n general terms, practical reason refers to the capacity for determining, through deliberation or reflection, how one should act.”<sup>167</sup> which he proceeds to develop in detail by adding;

Given a set of alternatives for action, practical reason is concerned with assessing what it would be best to do, and perhaps also with what one ought to do (in the moral sense). It is thus concerned not only, or primarily, with matters of fact and explanation, but with normative claims about the most desirable course of action.<sup>168</sup>

We can see in this outline an uncertain boundary between practical reason as understood as deciding what to do and moral and normative reasoning, as understood as what one ought to do.

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<sup>166</sup> John Gardner, ‘Nearly Natural Law’, (2007) 52 American Journal of Jurisprudence 1, 1.

<sup>167</sup> George Duke, ‘Aquinas, Kant, and the Eclipse of Practical Reason’, (2016) 69 The Review of Metaphysics 709, 709.

<sup>168</sup> George Duke, ‘Aquinas, Kant, and the Eclipse of Practical Reason’, (2016) 69 The Review of Metaphysics 709, 710.

### *Morality:*

Morality is often associated with weighty concepts such as abortion, murder, sexual acts etc. but it has been argued by Raz that “[w]hile there are arguably some timeless and placeless moral norms, to regard morality as wholly comprised of these is to limit morality to too narrow a range of subject matters.”<sup>169</sup> Perhaps a better view is to consider such issues as the most weighty of moral matters but that morality has a range which spans the trivial as well as the weighty. In any event let us consider such ‘timeless and placeless’ moral norms in a pre-Razian manner first. Such standard considerations of what can be classed as immoral have at their core a notion of harm to others. However it doesn’t take long to recognise that harm as mere injury to another person is morally ambivalent; it may be the right or the wrong thing to do. Further, mere unpleasantness doesn’t seem a very weighty moral concern; one can endure unpleasant or harmful situations through acts of nature. One proposal advanced to meet these concerns is;

a will-oriented conception of harm on which harm involves a distinctive sort of frustration or impediment of the will or of the ability to exert and effect one's will. An advantage of this hypothesis is that it may vindicate the intuition that pain amounts to a form of harm, without appealing solely or brutally to its unpleasantness.<sup>170</sup>

Where morally repugnant harms may be classed together in a way that;

they might be thought to share in common the feature that they place agents in a relation of conflict with or estrangement or alienation from significant aspects of themselves, their conscious experience, their lives, or their circumstances<sup>171</sup>

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<sup>169</sup> John Gardner, ‘Nearly Natural Law’, (2007) 52 *American Journal of Jurisprudence* 1, 4.

<sup>170</sup> Seana Valentine Shiffrin, ‘Harm and its moral significance’, (2012) 18 *LEG* 357, 383.

<sup>171</sup> Seana Valentine Shiffrin, ‘Harm and its moral significance’, (2012) 18 *LEG* 357, 387.

The great moral codes of organised religion tend to a harm-centric form such as ‘Thou Shalt Not Kill’ and yet as argued above injury alone doesn’t seem to do the full work of morality. Even a cursory consideration of this duty reveals its general rather than absolute nature. One can conceive of many instances when the general duty that one should not kill may be breached in a manner in which they are still doing the right thing. For example; if there was a madman with his hand over a button which will detonate a nuclear bomb, threatening to destroy everything and kill everyone in Dublin, and I had an opportunity to kill him before he was able to complete his catastrophic mission, then to kill him would be engaging in right action. In this scenario Madman’s interests are injured by being killed and therefore I will have engaged in harmful conduct but if it was the right thing to do, would it be immoral?

A prohibition on harm may be a proxy for protecting the interests of others. The other regarding nature of morality is discernible by a brief survey of philosophical literature. It is acknowledged that morality can involve the promotion of the interest of one person/group over another person/group. However such promotion must be justified and it is accepted that the justification must be made by reference to something other than the self-interest of the actor. Sikka describes this as the grammar of morality excluding self-interest,<sup>172</sup> while Nagel opines that;

it means that we can only recognise as moral, social rules of a certain sort, ones whose logic entails that if the interests of some are excluded from the domain of moral concern, reasons need to be given for this exclusion, and these reasons cannot take the form, ‘that works out better for me.’<sup>173</sup>

This understanding of morality as being centrally concerned with a consideration of others’ interests is a repeating motif in scholarly literature as will be encountered later in the thesis.

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<sup>172</sup> Sonia Sikka, ‘Moral Relativism And The Concept Of Culture’ (2012) *Theoria* 50.

<sup>173</sup> Thomas Nagel, ‘Ethics’, in Paul K Moser and Thomas L Carson (eds), *Moral relativism: A Reader*, (Oxford University Press, 241)

*Connection between rationality and morality:*

The connection between rationality and morality has been considered in Gardner's article, *Nearly Natural Law* where he proceeded on the basis that "[b]eing subject to morality is an inescapable part of being rational in much the same way that being subject to logic is an inescapable part of being rational."<sup>174</sup> He titled this view of humanity as the inescapable morality thesis (IM) which he gave expression to in rule form as; "(IM) Engagement with moral norms is an inescapable part of rational, and hence human, nature."<sup>175</sup>

Once one trespasses upon a discussion of morality it is often a short slide to discussions of value, and ultimate value(s). Aristotle certainly pins his colours to the mast in this regard in his monist conception of the good life, Aquinas of course considers a life lived in as full a coexistence with the divine as the ultimate goal and Machiavelli (in his republicanism work) considers *virtú* the primary goal. The advantage of practical reason in Razian theory is that it is pluralist and concerns itself more with the operation or workings of practical reason and our attendant assessments of same without committing itself to any necessary content of moral values. This has obvious resonance also with the general and descriptive ambitions of Hartian jurisprudential methodology, as adopted here. This pluralist quality is returned to by Gardner in his consideration that "(IM) has nothing to say about the content or scope of morality. It concerns only morality's hold over us as rational beings."<sup>176</sup> Of course it may be challenged that any school of practical reason must necessarily hold rationality as the ultimate good but this is to confuse the question of assessing reason by its own standards with the claim that a perfectly rational life is the ultimate value, á la Aristotle.

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<sup>174</sup> John Gardner, 'Nearly Natural Law', (2007) 52 *American Journal of Jurisprudence* 1, 2.

<sup>175</sup> John Gardner, 'Nearly Natural Law', (2007) 52 *American Journal of Jurisprudence* 1, 2.

<sup>176</sup> John Gardner, 'Nearly Natural Law', (2007) 52 *American Journal of Jurisprudence* 1,4.



*Are Practical Reason and Morality the same thing?*

Our understanding of morality must at its essence involve an appreciation of what is right and what is wrong. Lewis argues that “in all the world and in all of life there is nothing more important than to determine what is right ... [it is] the question of all questions”.<sup>177</sup> Barden and Murphy<sup>178</sup> cogently advance Lewis’ proposition and argue that each and every decision involves a deliberation of what the right thing to do is. Therefore “the moral domain is the domain of deliberation and choice”. They opine that it is not confined to those decisions that are thought of as important, but includes deliberation over mundane matters such as (the example they give) whether or not to cook the dinner. Such a broad view immediately strikes one as intuitively incorrect. The popular conception of morality is one of heavy hitting philosophical discourse employed to solve quandaries relating to such issues as suicide and sexuality. However, when one accepts the fundamental principle that morality is an attempt to understand the distinction between right and wrong or more pragmatically as an answer to the question; ‘what is the right thing to do?’ Then one may be committed to such a broad view. This is so because -the argument goes- whenever we *choose* we are engaged in a deliberation over which option is the right one; or what is the right thing to do. This deliberation can occur along a spectrum of importance from considerations of whether or not to commit suicide; whether or not to pay one’s taxes, whether or not to maintain a healthy lifestyle; whether or not to cook dinner. There is no dispute as to the fact that deliberation over suicide is more important than one over cooking, they are certainly of a different degree to one another; however, all involve the asking of that great moral question about what the right thing to do is. Therefore they are all candidates for inclusion within the ambit of morality.

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<sup>177</sup> Clarence Irving Lewis, *The Ground And Nature Of The Right* (Columbia University Press, 1955).

<sup>178</sup> Garret Barden and Tim Murphy, *Law and Justice In Community* (Oxford university Press, 2010).

A difficulty for practical reason lies in *akrasia*, where a person knowingly performs irrational action; this may have a strong variety such as a drug addict being unable to resist the need/temptation for their drug or it may present in a weaker form of what is sometimes describes as ‘clear eyed akrasia’ where for example I know I shouldn’t break my diet and eat the chocolate cake but decide to do it anyway because I’ve had a long day and want some comfort food. The difficulty akrasia presents to practical reason is that if practical reason is to be practical it should be practical in issue, i.e. result in action. However if one has determined the right thing to do and still acts in a contrary fashion how can they be said to have engaged in practical reasoning if the action they take does not flow from their reasoning? One way of mitigating the difficulty is by restricting the operation of practical reason to Korsgaard’s conditional that practical reason will generate intention insofar as the agent is rational.<sup>179</sup>

Matthew Silverstein provides another solution to the problem of akrasia for practical reason theory by separating out practical reason from ethical reason, where the former is concerned with what to do or how to act, resulting in the successful paradigm in intention, while the latter is a type of reasoning addressed to the question of what one ought to do, resulting in the successful paradigm in a normative judgement.<sup>180</sup> In this division he denies the position of what he calls the ‘identity thesis’ which acknowledges no division between practical reason and ethical reason.<sup>181</sup> Rather he argues that arriving at normative judgments as to what one ought to do still leaves the work of practical reason – the question of what one *will* do – undone. This is not to say that the two are unrelated of course and we can regret the occasions an agent fails to conform to their own normative reasoning. He summarises his view as follows;

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<sup>179</sup> Bagnoli, Carla, "Constructivism in Metaethics", *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), Edward N. Zalta (ed.)

<sup>180</sup> Matthew Silverstein, ‘Ethics and Practical Reasoning’, (2017) *Ethics* 127, 353–382 at 353.

<sup>181</sup> Matthew Silverstein, ‘Ethics and Practical Reasoning’, (2017) *Ethics* 127, 353–382 at 354.

Here is my hypothesis: normative reasoning is reasoning about practical reasoning—to think about reasons for action or about what ought to be done is to think about practical reasoning rather than to engage in it. More specifically, normative reasoning is reasoning about sound or successful practical reasoning. When, for example, I conclude that I ought to eat lunch at home tomorrow, my conclusion concerns the outcome of sound practical reasoning. In particular, it amounts to the judgment that were I to reason soundly about where to eat lunch tomorrow, I would arrive at the intention or decision to eat at home.... It follows that normative or ethical judgments are about practical reasoning rather than products of it, and that normative reasoning is a form of doxastic or theoretical reasoning. The conclusion of ethical deliberation—a judgment about what I ought to do—is just a belief about the outcome of sound practical reasoning.”<sup>182</sup>

Raz takes the view that it is incorrect to think of practical reason as necessarily (or even conceivably) having action as its outcome. The conclusion of reasoning must be belief not intention or action.

Reasoning is the handmaiden of normativity. In as much as features of the world make certain responses, emotional, cognitive or active, appropriate, where we have the capacity to respond to them through the use of rational powers, they belong to the normative domain. Reasoning is the reason-guided mental activity of finding out how we should orient ourselves towards the world. Practical reasoning consists of those reasoning activities that aim to determine how we or others should act in the world. The acting, including the intentions with which it is done, is not part of the

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<sup>182</sup> Matthew Silverstein, ‘Ethics and Practical Reasoning’, (2017) *Ethics* 127, 353–382 at 373.

reasoning, but is determined by it, at least when we react rationally.<sup>183</sup>

This formulation allows us to reject Silverstein's inclusion of an additional or further form of reasoning - ethical reasoning – and instead understand that there is a gap between reasoning and action. However this in no way diminishes the fact that when one acts on foot of, or in consequence of deliberation and choice, i.e. reasoning then they engage in a type of conduct that makes them especially susceptible to our assessment of their conduct.

When one reasons badly or acts contrary to their own reasoning we might say they have engaged in a form of irrationality but it would seem odd that irrationality and immorality would be identical. We certainly don't react to irrationality *simpliciter* in the way that we do to immorality, it is for example only immorality which we consider apt for the reactive attitude of blame. Adil Haque notes this in that the criminal law “typically takes persons to be choosing and reasoning beings: hence persons may be punished for conduct involving an act or omission they choose to perform (as opposed to an involuntary bodily movement) and which manifests defective reasoning on their part (as opposed to a reasonable mistake of fact).”<sup>184</sup> Rationality and morality are certainly intimately connected but it seems that the relationship may be one which sees that when one acts in a blameworthy manner they are necessarily acting irrationally but one may act irrationally without being blameworthy i.e. without such irrationality involving immorality. A development of this distinction is continued through the argument of this thesis.

The moral question “what is the right thing to do?” is very close to the question of practical reason; “what shall I do?” Further, it seems the ambit of morality to be cognate with deliberation which marks the fields of

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<sup>183</sup> Joseph Raz, ‘Normativity: The Place Of Reasoning’ (2015) *Philosophical Issues*, 144.

<sup>184</sup> Adil Haque, ‘International crime: In context and in contrast.’ In R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo, & V. Tadros (Eds.), *The Structures Of Criminal Law*. (Oxford University Press 2012).

morality and practical reason as intimately connected. This relationship presents as an matter of interest and curiosity. It is pertinent to determine the contours of that relationship; do they overlap, if so how much? Is one the subset of the other? etc. To begin with the most obvious distinction, a difference between the two lies in the other-regarding nature of morality. Morality asks what is the right thing to do but it does so in a way that invokes a consideration of how one's conduct might affect others' interests.

Morality exists within the realm of rationality. Unthinking forces of nature or beasts of the land are not acting immorally if they wreak havoc. Their impact on the world might be considered by us as dangerous or unwelcome or in need of being defended against or neutralised, but not immoral. One would not sensibly admonish the gathering storm on the horizon or moralise at a rising flood or growling beast. Such irrational occurrences are beyond the writ of morality because they are beyond the writ of rationality.

As considered above, when we exercise practical reason and ask ourselves "what is the right thing to do?" we enter into the realm of morality. Morality may therefore be said to be co-ordinate with practical reason, and thereby be understood as a subset of broader rationality. Being a subset of rationality, it shares the features of rationality. The nature of morality however, is clearly also other regarding. It can be understood as a special type of practical reason. It can be better understood as asking the question of practical reason, i.e. "what shall I do?" in the form, "what shall I do, given others interests?"

#### Agency:

*What is agency?*

In the review of modern scholarship on practical reason we have seen it involves attempting to explain human action or doings as opposed to happenings, encapsulated in the Wittgensteinian question of "what is left over if I subtract the fact that my arm goes up from the fact that I raise my

arm?”<sup>185</sup> and understanding “the difference between a mere occurrence involving my body and an action of mine.”<sup>186</sup> Here we have clear engagement with the notion of agency, which involves intentionality and attributability. The engagement of practical reason seems to convert what from outward observation may be a mere occurrence into an action which is belonging to and of the doer. This encapsulates the notion of agency adopted here.

Some may take a more expansive view of agency and prefer to classify all activity within the corporeal realm as agency.<sup>187</sup> Such a broad view would see a storm or fire as having agency because they bring about a change in the world. While it is true that natural actions and actors alter the world as agency may also alter the world; however, it seems clear that there is a material difference between merely having an effect upon the world and affecting through decided action. The former is part of the historical record of your movements in the world but the latter is not merely part of the record but can be understood as being owned by the agent.

The understanding of agency adopted here is founded upon the Aristotelian analysis *supra* of choice and practical rationality. It is from our ability to reason that we gain our capacity to choose. However, choice alone is an incorporeal entity and resides purely within the mind of the chooser. Choice requires action to give it life. It is this coherence of choice and action that deserves the title of full or proper ‘agency’. One is properly classed as an agent when one takes deliberate action on foot of rational choice. If we have choice alone, without the ability to give life or force to these choices, we may not be classed as agents and likewise if we act in the world without choice then again we are not agents but rather akin to acts of nature or creatures.<sup>188</sup> It is our ability to make choices and

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<sup>185</sup> Wittgenstein, *Philosophical Investigations*, (GEM Anscombe trs, Oxford: Blackwell. 1972), §621.

<sup>186</sup> J. David Velleman, *The possibility of Practical Reason*, (Oxford University Press, 2000) 1.

<sup>187</sup> John Hyman, *Action, Knowledge and Will*, (Oxford University Press, 2015).

<sup>188</sup> Robert Barnard and Tyler Simon in *Three Paradigms of Rational Agency* <[https://www.academia.edu/1449811/Three\\_Paradigms\\_of\\_Rational\\_Agency](https://www.academia.edu/1449811/Three_Paradigms_of_Rational_Agency)> last accessed on 18<sup>th</sup> August 2019.

consequently act upon them which transforms us into agents proper and it is because of our capacity to choose and our ability to control our presence in the world - and indeed control the world itself - that such decided conduct is rightly attributable to us as our agency.

An understanding of agency is important because it is pertinent to notions of ascriptions. David Brink indicates the necessity of certain qualities of rationality an agent must have in order for them to properly be considered an appropriate target of ascriptions of culpability or liability;

If someone is to be culpable or responsible for her wrongdoing, then she must be a responsible agent. Our paradigms of responsible agents are normal mature adults who are normatively competent ... This requires that agents not simply act on their strongest desires, but be capable of stepping back from their desires, evaluating them, and acting for good reasons. If so, normative competence involves reasons-responsiveness,<sup>189</sup>

Wallace refers to a similar capacity requirement in the memorable phrase of being able to ‘grasp and respond to’ reasons.<sup>190</sup> While Susan Dimmock understands the role of intention as standing in intimate relation to practical reason and thereby agency. She considers that “[t]o lack the capacity for practically rational agency one would have to be incapable of forming and acting on intentions.”<sup>191</sup> And again she notes that “Intentions play an important role in explaining the conduct of practically rational agents. Intentions ‘rationalize’ actions taken in execution of them.”<sup>192</sup>

The Aristotelian division discussed above can assist with understanding and developing the view adopted here of agency. It was noted in an earlier section that Aristotle divided action into the categories of; voluntary,

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<sup>189</sup> David Brink, ‘The Nature and Significance of Culpability’, (2019) 13 *Criminal Law and Philosophy* 347, 354

<sup>190</sup> RJ Wallace, ‘Three Conceptions of Rational Agency’, (1999) 2 *Ethical Theory and Moral Practice* 217.

<sup>191</sup> Susan Dimmock, ‘Intoxication and the Act/Control/Agency Requirement’, (2012) 6 *Crim Law and Philos*, 341, 353.

<sup>192</sup> Susan Dimmock, ‘Intoxication and the Act/Control/Agency Requirement’, (2012) 6 *Crim Law and Philos*, 341, 359

involuntary and non-voluntary. Building upon this Aristotelian categorization, human conduct and agency is classified here into three modes. The first mode, described by Aristotle as involuntary is akin to being blown by a wind, i.e. where a person ‘acts’ in the world in a manner that they do not control and in this way cannot be considered to belong to them or be attributable to them. It is described here as non-attributable action. The second mode concerns the action described by Aristotle as non-voluntary such as undeliberated action or action on foot of instinct. A young child may engage in this agency. Or a mature and fully rational human may also do so when engaged in unthinking or undeliberated action. While the action here is not deliberated upon in the full sense such action isn’t forced upon the agent and may reasonably be considered an emanation of the agent; as such it may be said to belong to the agent and is attributable to them. It is described here therefore as attributable agency. The third mode of agency concerns the paradigm voluntary agency which is deliberative action. To be able to engage in deliberative action/agency is to have, and to exercise, control of our presence in the world. Indeed it is the active endeavour to alter the world in a way that will align it with our desires. This is agency proper or full agency and is attributable to the agent. While it is an emanation of the agent it may also be described as a chosen creation of the agent and as such allows us to evaluate the agent. It is described here therefore as attributable and assessable agency.

*Legal recognition of denials of agency:*

In its ascriptions of criminal blameworthiness and tortious responsibility the law engages with agency and its limits. The law holds the view of conduct being owned by or attributable to agents but not necessarily to non-agents. At common law we can sometimes see a lack of concern with conduct that doesn’t meet the threshold of agency proper or of ‘attributable and assessable’ agency in its approach to the question of automatism.<sup>193</sup> This type of conduct while part of the history of the agent’s

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<sup>193</sup> Cf the line of case law such as, *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386; *Hill v. Baxter* [1958] 1 Q.B. 277; [1958] 2 W.L.R. 76; [1958] 1 All E.R. 193, D.C. *Reg. v. Hennessy* [1989] 1 W.L.R. 287; [1989] 2 All E.R. 9, C.A. etc.



bodily movement in the world is not deliberative action and is counted as insufficient for the attribution of criminal culpability. This extends to automatism being accepted as a defence even for strict liability crimes such as careless or dangerous driving. With dangerous driving, the offence in the UK and Ireland is stated as an objective test with no necessary reference to the *mens rea* of the accused at the time she was in charge of the vehicle. Such as found section 53(1) “A person shall not drive a vehicle in a public place at a speed or in a manner which, having regard to all the circumstances of the case (including the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected then to be therein) is dangerous to the public.” Here we see no subjective aspect to the tests required for the criminal conviction. The necessary element for the prosecution to prove is the *actus reus*, i.e. physical conduct. Lord Denning gives some insight into the nature of the action required in his judgment that;

The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily: and an involuntary act in this context—some people nowadays prefer to speak of it as ‘automatism’—means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking.<sup>194</sup>

The decided case law on this point is that in relevant circumstances a given defendant may rely on an automatism defence as a way of negating the *actus reus* of the crime rather than the *mens rea*. It is counted as a denial of the action being attributable to the defendant. This is a bold claim for the law to make. The blanket denial of voluntariness in such circumstances or any dissociative state is a stretch too far for the Aristotelian

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<sup>194</sup> Per Lord Denning *Bratty v Attorney-General for Northern Ireland* [1963] A.C. 386 at 409

understanding of involuntariness. Reflexes and spasms can certainly be considered involuntary but action conducted while in a dissociative state is more properly considered as non-voluntary because it is the conduct of the agent albeit conduct that is not deliberated upon; what is described here as attributable agency. Perhaps the better view is that the criminal law's real concern- for some reason - is focused on agency proper or attributable and assessable agency rather than mere attributable agency.

In other full or partial exemptions from the force of criminal law we can see instances of when the law self-selects rational conduct/agency as its focus. For example the exemption provided for the young. In criminal law people below a certain age are not yet considered to be capable of being criminally responsible for their conduct. This may be function of the undeveloped or not yet fully developed capacity for rationality; a similar basis justifies the exclusion of the insane from such criminal culpability considerations. The fact these exemptions apply to both strict liability and *mens rea* crimes alike is significant because it is not just the mental element but the conduct that is deemed not to be assessable.

Law is itself an attempt to provide guidance to and control of, human conduct; in so doing it holds itself out as providing answers to an agent's questioning "what ought I do?" In this way it offers solutions to the problem of practical reason. It thereby locates itself as an entity of reason, affecting (or at least aspiring to affect) the operation of rationality in the form of agency. Indeed it is often described as "reason free from passion" This descriptor perhaps flows from the pre-enacted generic nature of law. The fact that the law seeks to provide general rules of application rather than engage in the specific weighing up of relevant competing reasons in particular cases gives it a detached, rational character. Because of law's claim to supremacy as the chief normative force in any given society it functions by not only providing *an* answer to the problem of practical reason; when it applies it provides *the* answer. It is therefore not just

engaged in the realm of practical reason but rather holds itself out as being definitive within that realm.<sup>195</sup>

Stephen Morse highlights the centrality of agency to the law and in particular the criminal law. He notes that even in the face of addiction the “criminal law’s concept of the person is the antithesis of the medical model’s mechanistic concept...the law ultimately views the criminal wrongdoer as an agent and not simply as a passive victim who manifests pathological mechanisms”<sup>196</sup>

The extremeness of denying an act altogether, as with automatism is noted by other theorists and critiqued, such as Westen’s explanation that “it is misleading to classify automatism with instances in which persons are entirely lacking will, because automatism involves complex, agent-directed actions in which actors perceive the world, make means/ends judgments about it, and act to carry out their ends.”<sup>197</sup>

Continuing his review of the question of rational capacity and agency appropriate for criminal law, Westen considers the immaturity of children and their own rational agency denying the view that they are incapable of discerning right from wrong but rather;

The reason that children possess such defenses is not that they are entirely unaware of what they are doing or that it is wrong. On the contrary, children can typically recount what they have done in words that are not very different from the words of the criminal law; and children typically realize they are doing something wrong, particularly with respect to serious offenses. What children are too immature and inexperienced to understand, and, indeed, what the state assumes they are incapable of understanding, is the significance of those interests in the lives of people... Because

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<sup>195</sup> Although this is law’s claim it may not necessarily be made out, see discussion on legitimate authority in Joseph Raz, *The Authority of Law* (Oxford University Press 1979).

<sup>196</sup> Stephen J. Morse, ‘Hooked On Hype: Addiction And Responsibility’ (2000) 19 *Law and Philosophy* 3, 4.

<sup>197</sup> Peter Westen, ‘An Attitudinal Theory of Excuse’, (2006) 25 *Law and Philosophy* 289, 367.

children are incapable of appreciating those interests in the way adults do, their conduct is incapable of manifesting disparaging attitudes toward those interests.”<sup>198</sup>

In this description we have language which echoes the understanding of morality - as outlined above - as being necessarily other-regarding. In this way we might rewrite the description of the incapacity of children to be an insufficient moral appreciation. While they may be able to understand an action as wrong in the sense of being against the rules a full appreciation of the effect upon the interests of others is lacking. This lack of understanding is present even when engaged in voluntary action or agency proper.

As regards tort law Peter Cane highlights that “An act can attract tort liability only if it was ‘voluntary’.”<sup>199</sup> In doing so he indicates what might be described as the fundamental ‘defence’ in tort; if A’s acting was involuntary then A cannot be said to be responsible for same. Again the use of the term voluntary requires some clarification. Cane distinguishes between deliberateness and voluntariness, neatly summed up as; “All deliberate conduct is voluntary, but conduct can be voluntary without being the result of deliberation.”<sup>200</sup> A further distinction however is also developed as that between ‘deliberate’ and ‘intentional’ where he considers that “In tort law, ‘deliberate’ is a term applied to causes, while ‘intentional’ is a word applied to consequences.”<sup>201</sup> He goes further to suggest that recklessness also, like intentional, refers to consequences of conduct as opposed to the conduct itself.<sup>202</sup> This stands in some contradistinction to the general thought in crime where intention and recklessness are classified as types of *mens rea* and are thought to refer to the mental element of the conduct. In any event, returning to the question of voluntariness; undeliberated but voluntary conduct would be classed

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<sup>198</sup> Peter Westen, ‘An Attitudinal Theory of Excuse’, (2006) 25 Law and Philosophy 289, 364.

<sup>199</sup> Peter Cane, *The Anatomy of Tort Law*, (Hart Publishing 1997) 29.

<sup>200</sup> Peter Cane, *The Anatomy of Tort Law*, (Hart Publishing 1997) 32.

<sup>201</sup> Peter Cane, *The Anatomy of Tort Law*, (Hart Publishing 1997) 32.

<sup>202</sup> Peter Cane, *The Anatomy of Tort Law*, (Hart Publishing 1997) 33.

under the Aristotelian schema as non-voluntary conduct and as such attributable but not assessable agency, and so to that extent there is no disagreement between the argument of the thesis and Cane in describing such attributable agency as necessary for tortious liability.

Raz's rational functioning principle also supports an understanding of when our agency is apt for assessment. Raz notes that "conduct for which we are...responsible is conduct which is the result of the functioning, successful or failed, of our powers of rational agency."<sup>203</sup>

Conclusion:

This chapter situated and contextualized the work of the thesis within the wider field of scholarship. The chapter highlighted the long tradition in western philosophical thought engaging with cognate theory. It drew an intellectual lineage stretching from Aristotle, to Aquinas, to Machiavelli to Kant and into the modern period.

Crime and tort both assess human action and its results. In doing so they ask questions such as was Defendant's action the right/wrong thing to do? And was a given action attributable or not to Defendant? These draw on pre-legal concepts of morality and agency. Practical reason theory has an intimate connection with both morality and agency and as such the chapter sought to develop an outline understanding of those relationships.

Some key points raised in this chapter which the thesis later draws upon include;

- The distinction between Aristotelian Non-Voluntary, Involuntary and Voluntary conduct. It will be proposed that tort and crime are concerned with two distinct forms of agency; tort with non-voluntary conduct and crime with voluntary conduct.
- Morality and practical rationality are intimately connected. Determining what one will/should do ( in light of others' interests)

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<sup>203</sup> Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011) 267.

and then acting upon, or on foot of, that determination results in an emanation of rationality and morality of the agent which can be assessed by the community. This is counted as the archetype of Voluntary Conduct/Agency proper.

- Right reasoning (*prudentia*) is distinguishable from right knowledge (*Scientia*). This will become relevant when we consider an assessment of an agent's conduct when these two dissociate. In the legal context this will be seen when one's legal duties and one's faultless reasoning conflict, i.e. breaking the speed limit to get one's son to hospital.

## CHAPTER 2: RAZIAN THEORY

### *Introduction:*

The purposes of this chapter are 1) to offer justifications for using the theory of Joseph Raz as developed both by him and subsequent scholars as the main vehicle through which the analysis of this thesis is conducted 2) to offer an explication of pertinent aspects of this theory and 3) the chapter concludes with a critique of the ability of Razian theory to comprehensively assess human action, ultimately proposing an underdeveloped aspect of his work as a solution to the difficulties that otherwise arise.

The chapter begins by describing the intellectually fruitful character of Raz and the work of others in Razian theory. Some of the advantages of Raz include the non-monist character of his work, the significant pertinence of his work to legal theory regarding the nature of second order mandatory norms, and the development of his work by other scholars in relevant and cognate areas, such as John Gardner's work on criminal culpability and tortious liability.

Joseph Raz's work is complex and nuanced and as such explication is desirable. The chapter explains Raz's work on reasons and the conflict of reasons. The role of second order mandatory norms in practical reasoning is expounded upon and in particular - because of its relevance to law - the nature and operation of duties and rules is outlined.

Following this laying out of Raz's theory the chapter considers some of the stronger critiques leveled against same. Ultimately the chapter proposes none are sufficiently troublesome to warrant an abandonment of Razian theory as the paradigm through which the thesis operates. The explication intentionally precedes the critique here because the particular complexity and nuance of the contours of Raz's theory make it appropriate to lay the theory out in its own terms prior to considering its potential weaknesses.

What is described here as the ‘Razian calculus’ for assessing action is criticised as being incomplete. Raz recognises the difficulties but doesn’t fully develop a solution. This chapter argues a solution lies in developing the heretofore underdeveloped distinction he noted between action that is ‘well-grounded in reason’ and action that is ‘reasonable’. Finally the chapter concludes with a brief consideration of how the solution offered here might withstand feminist critiques of reasonableness.

### Why Raz?

Raz emerged as the most fruitful theorist within the field of practical reason for the work of this thesis because of *inter alia*; his pluralist perspective, his developed theory on the operation of second order mandatory norms and the further adoption and development of his work by subsequent scholars regarding theory relevant to ascriptive practices, such as Gardner’s work.

### *Continuing from Aristotle:*

Raz and his work can be associated with that of Aristotle and as continuing rather than making any great break with the practical reason theory which precedes him. The focus on *phronesis*, or *prudentia*, or practical reason found current expression in the field of jurisprudence within what might be termed Razian theory. Raz in his work focused in on and developed detailed analytical tools for considering important concepts for the operation of practical reason. His work on determining what to do given situations where there is conflict between reasons is built upon in this thesis. This aspect of his work has particular pertinence to understanding what happens when the reasons provided by legal duties conflict with other reasons for action.

Cullity and Gaut, referencing their analysis - as represented pictorially in the previous chapter - note a unique position occupied by this Aristotelian approach where they consider;

Aristotelianism as we construe it differs crucially from the other two poles. According to its recognitional view, what makes it



rational to choose an action is that it is good-it is an appropriate object of rational choice because it is good-whereas for Kantian or neo-Humean constructivists, the converse relation holds. The distinctively Aristotelian approach to the theory of practical reason, then, is to begin with an independent account of the conditions under which actions are good, and to derive from this an account of practical rationality.

By these lights at least we can then locate Raz within this Aristotelian camp, because he too is a recognitionalist. We can see echoes of this when Raz considers;

Aspects of the world are valuable. That constitutes reasons for action. Because we are rational animals, ones with the power of reason, we are able to conduct ourselves in the light of those reasons. Being rational is being capable of acting intentionally, that is, for reasons, as one takes them to be, and that means in light of one's appreciation of one's situation in the world.<sup>204</sup>

We can clearly see an understanding of rationality as a capability.<sup>205</sup> Being *inter alia* rational beings is not a suggestion that we are purely or solely rational, nor are all our actions deliberated for and decided on foot of a rational calculus. As considered above a person may act reflexively where

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<sup>204</sup> Joseph Raz, *Engaging Reason*, (Oxford University Press 2002) 1. Value is a recurring focus of Raz's work. For consideration of value more generally cf. Joseph Raz, *Ethics in the Public Domain* (Oxford University Press 1994) Especially Chp 1, 'The Ethics of Well-Being', or for the role of values in legal theory, Chp 10. 'Authority, Law, and Morality'; Joseph Raz *The Authority of Law* (Oxford University Press, 1979) chp 10, 'Law and Value in Adjudication'. And more recently, Joseph Raz, *Intention And Value*, (2017) *Philosophical Explorations*, 109. Here he draws a direct link between value and intention e.g. "For people, having intentions involves belief in the value of what they intend"

<sup>205</sup> Joseph Raz, 'The Guise of the Bad' (2016) *Journal of Ethics & Social Philosophy*, 1. where he considers "*Homo sapiens* is among the species whose members can possess rational powers of a kind that enables not only choice of action but also recognition of the value of things."; For consideration of the link between rationality, morality and authority (main themes in Raz's work) cf. *The Authority of Law*. Joseph Raz. Oxford University Press 1979 Chp 1, Legitimate Authority, and his view "If the very nature of authority is incompatible with the idea of morality and rationality, then those who believe in legitimate authority are not merely wrong or mistaken in one of their moral beliefs. They are committed to an irrational belief or are guilty of a fundamental misapprehension of the concept of morality or of that of authority."

the bodily movements are certainly those of the person but they are not capable of being classed as deliberative action. This is because it takes an application of reason in order to be able to act intentionally. This Razian position is reflected in the way the law operates. As proposed above, the law is cognisant of the possibility of action that is not agency proper and has occasion to recognise this undeliberated action as categorically distinct from an intentional act. Indeed it can go so far as to view such undeliberated action as non-attributable to a given person. In this way Raz and the law (when recognising such distinction) echo the Aristotelian categorisation separating on the one hand voluntary and involuntary action (which is described here as mere attributable agency) and on the other hand deliberated action or agency proper which is attributable and assessable for its quality.

*Non-Monist:*

The aim of this thesis is to understand and offer an explanation of the crime/tort distinction and as such can be described as engaged primarily in a descriptive enterprise. The thesis does not seek to impose a pre-determined ideal in order to offer a normative proposal of how the crime/tort distinction should be (if at all). While it is true that the understanding and explanation of the thesis may subsequently be used to inform desirable standards by which to measure crime and tort, this measuring is not the core purpose of the thesis. Given the descriptive focus of the work a pluralist perspective, such as that offered by Razian theory, is preferable. Razian theory – as developed by Raz and others – offers tools to understand the workings of law and morality without making claims about appropriate or inappropriate content. The thesis works from within crime and tort rather than from without and as such having means by which to examine the mechanics of how ascriptions of criminal blameworthiness and tortious responsibility arise are beneficial to the general endeavors herein.

*Second Order Reasons:*

The work of Raz in his development of an understanding of the operation of second order mandatory reasons is particularly informative to an understanding of the connection of law with practical reason. Raz has developed a nuanced and sophisticated insight into the operation of reasons and in particular their conflicts. This aspect of his work will be developed in greater detail in the following section but it suffices to indicate here that the analytical and technical lens provided by his work gives us a method by which to understand the role rules and in particular legal rules play in practical reasoning.

*Razian School:*

Raz and Razian theory also prove attractive for the work of this thesis because of the developments made by subsequent scholars. Reasons were brought to the fore in jurisprudence in the 1970s; most prominently by Joseph Raz, and his work remains a guiding light in that field. He has developed a robust, mature and sophisticated schema for understanding the nature and operation of reasons but his work has also been developed by others who build directly upon Razian reasons and therefore may be loosely grouped and classed together as the 'Razian school'.

Central issues to understanding necessary conditions for ascriptions of criminal blameworthiness and tortious responsibility are those of understanding wrongness and understanding duty breaches. Both of these concepts have been developed by Gardner in his adoption and development of Razian theory. This can significantly be seen in Gardner's work on the nature of justification and defences generally as well as his other work on the conditions for assessing others and their lives regarding potential culpability. Further his work on what types of duties apply to us is relevant to concepts of tortious responsibility. All of these will be examined and interrogated in the following sections and chapters. It suffices to indicate at this juncture that Gardner's field leading work has direct lineage with Raz and this goes to justifying Razian theory as an appropriate lens through which to conduct the analysis of this thesis.

### Razian Reasons:

Raz's significant claim regarding the nature of reasons is that there is a difference between what he calls first order and second order reasons of action. This is recognized as "one of Raz's most important philosophical insights"<sup>206</sup> and "the foundation upon which much of his work in legal and political as well as in practical philosophy is built"<sup>207</sup> and has been described as "perhaps the most significant work in jurisprudence since H.L.A. Hart's *The Concept of Law*."<sup>208</sup> Hence this thesis will focus primarily upon this aspect of his work as it forms the building blocks for his later important contributions to questions of authority, legitimacy, morality of freedom etc. It is undoubtedly the corner stone of Razian theory and as this work is an exercise in that school of thought it is pivotal to the work herein also. More importantly however this thesis is concerned with - and self identifies as - a work focused on practical reason, therefore it is this particular aspect of Raz's theory that is most important and germane to the aims of this work, rather than how he has built upon this work to address those other albeit interesting but not entirely germane aspects of political (as opposed to practical) philosophy. It is apposite however to briefly draw the connections that arise in order to demonstrate how this foundational work fits in the broader scheme of Razian theory and in this way provide context; which this chapter will also do.

### *Facts:*

Raz begins with facts, as they form the elemental guiding reasons. Facts are distinguished from beliefs because while beliefs can be reasons, in order to be properly guided by a guiding reason, he considers one must surely be guided by actual reality rather than belief of reality. This is a modest but fundamental proposition which is sound because the alternative would essentially be the creation of an individual reality, where

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<sup>206</sup> Stephen R Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 S Cal L Rev 913

<sup>207</sup> Stephen R Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 S Cal L Rev 913

<sup>208</sup> William Edmundson, Book Review, (1993) Law and Philosophy 329.

one's own considerations of what the right or wrong thing to do is, would be correct. It would be peculiar if each individual were able to create their own subjective facts. This of course does not mean that belief plays no part in our being guided by guiding reasons. In fact belief is an essential element of our responses to such reasons.

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.<sup>209</sup>

Here Raz indicates that the epistemic bounds of the subjective, individual viewpoint do not limit the existence of applicable guiding reasons. The consequence of this subject independent nature of guiding reasons must be that there may be reasons for which we should act that we are not and may never be aware of. In truth only perfect knowledge can fully identify the applicable guiding reasons (a source of legitimate criticism, raised later in the thesis) however the closest we may get is community knowledge which, cognisant of our own mortal bounds we may somewhat inaccurately - but tolerably so - describe as complete knowledge.

He proposes reasons understood as facts are normatively relevant as they provide reason for action: the fact that  $p$ , is a reason for  $x$  to  $\phi$ , expressible in formal logic as  $R(\phi)p,x$ .<sup>210</sup> This objectivity of guiding reasons is a crucial aspect of the character of those reasons. It seems therefore that an objective viewpoint is required to confirm their existence. An individual may of course correctly discern and applicable, objective, actual, guiding reason but in order to confirm the correctness of that discernment we must consider the objective viewpoint. To access the objective view point at law we can have recourse to legislation, judicial decision making over

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<sup>209</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 17.

<sup>210</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 20.

years or centuries, and a given jury. These all are sources of objectivity to provide us with such a viewpoint, however, it is of course true to say that these too are epistemically bounded. While our aspiration may be to access the objective viewpoint as noted - in reality at best we access the community viewpoint.

Raz distinguishes between guiding reasons and explanatory reasons where he states “reasons can be used for guiding and evaluating because they can be used in explanation.”<sup>211</sup> This distinction between guiding and explanatory reasons is significantly built upon in Gardner’s illuminating development of justification, where he proposes a coherence between the two is required for justified action; of which more in the next chapter.

Raz develops the argument that reasons which determine what one ought to do; i.e. normatively significant reasons can only be those of fact because “to decide what we should do we must find what the world is like, and not what our thoughts are like.”<sup>212</sup> Raz uses a forecast of rain as an example to explain some of the reasons for which we might act. The reason for which we might bring an umbrella with us is either the fact that it will rain or that one has a belief that it will rain. One can deconstruct the statement “the probability it will rain is a reason for taking an umbrella” as there being 1) a reason to believe it will rain and 2) that it will rain is a reason to take an umbrella, or “the probability that p is a reason for x to  $\phi$ , is analysed into ‘There is reason to believe that p and  $R(\phi)p,x$ ’”.<sup>213</sup> However, beliefs rather than facts are still central to explaining behaviour; they detail an agent’s own assessment of which relevant normative guiding reasons(s) applied to her, and her response in behaviour on foot of such assessments.<sup>214</sup>

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<sup>211</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 16.

<sup>212</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 18.

<sup>213</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 21.

<sup>214</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 19.

*Conflicts:*

Regarding conflicts of reasons Raz details a given reason may be outweighed by a stronger, conflicting reason. Raz tells us that when reasons conflict such conflict may be settled by strength, such that the stronger reason prevails;

The need to take an injured man to hospital at the time I promised to meet a friend at Carfax is a reason for not keeping the appointment which overrides the promise which is a reason for keeping it.<sup>215</sup>

Such overriding of a reason means one may act contrary to a weaker, conflicting reason (keeping one's promise) and still be acting in conformity with reason. So, we have an understanding that while reasons await conformity we may actively non-conform and still be considered as having acted in conformity with reason more broadly. Raz is primarily making the point that such non-conformance with reason is still well grounded in reason and thereby an agent's well-groundedness in reason is not a question of complying with every reason but one of compliance – when reasons conflict - with the strongest reason.

This well-grounded non-compliance may be contrasted with a cancelling condition such as being released from a promise, “The fact that my friend has released me from my promise is a reason for nothing at all and yet it cancels the reason to go to Carfax created by the promise.”<sup>216</sup> Raz also reminds us it is important not to import a strength affecting character to cancelling conditions because “since cancellation by a cancelling condition does not involve a conflict of reasons it does not reflect on the strength of reasons.”<sup>217</sup>

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<sup>215</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 27.

<sup>216</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 27.

<sup>217</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 27.

Cancelling conditions are important for law. The law obviously provides reasons for or against action however it can also provide exceptions to the rule for example; one must not make a nuisance except by licence or one must not injure another's rights unless they have waived said rights, such as a *volenti non fit injuria* in tort. *Qua* cancelling conditions, such conditions don't operate to affect strength or strength disputes, rather they seem to go to scope, restricting the ambit of such reasons to allow for a space of exemption.

First order reasons can be understood as direct reasons to  $\phi$  or not to  $\phi$ . An example of a first order reason is the umbrella scenario. The fact that it will rain is a first order reason to bring one's umbrella while second order reasons are reasons to act or refrain from acting on reasons. One of the examples provided by Raz to illustrate second order reasons is that of a soldier, Jeremy;

While serving in the army Jeremy is ordered by his commanding officer to appropriate and use a van belonging to a certain tradesman. Therefore he has reason to appropriate the van. His friend urges him to disobey the order pointing to weighty reasons for doing so. Jeremy does not deny that his friend may have a case. But, he claims, it does not matter whether he is right or not. Orders are orders and should be obeyed even if wrong, even if no harm will come from disobeying them. That is what it means to be a subordinate. It means that it is not for you to decide what is best. You may see that on the balance of reasons one course of action is right and yet be justified in not following it. The order is a reason for doing what you were ordered regardless of the balance of reasons.<sup>218</sup>

The scenario of a subordinate receiving an order from a superior presents a clear example of a second order, exclusionary reason, i.e. a reason to

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<sup>218</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 38.



refrain from acting on reasons i.e. one's own reasoning regarding the relevant pros and cons. The example is further enlightening because for Jeremy he regards the order as a first order reason to act, as well as being a second order reason not to act for competing reasons. This is because he sees it as a reason to appropriate and use the van as well as a reason not to act on other first order reasons that pertain to the appropriation or otherwise of the van.

As described earlier, reasons may conflict and when this happens such conflicts may rationally be resolved through strength. When first order reasons or second order reasons conflict on an intra plane basis then the weightier reason, being the stronger reason, should triumph from such conflict and thus may be considered an undefeated reason. When conflicts arise across planes or on an inter-plane basis however, a different calculus applies such that positional rather than internal strength resolves such conflict. The subordinate can deny his first order assessment of what the right thing to do is in a given situation and rely on the second order exclusionary reason provided by the superior's order, and in doing so may still be secure in the knowledge that he has in fact acted in a manner well-grounded in reason despite not following the dictates of his own reasoning on the pros and cons of the particular situation. This is because the second-order reason defeats a first order reason by virtue of positional strength.

This schema of understanding reasons can be applied to determinations of whether or not a given agent is acting in conformity or nonconformity with reason. Where there are two potential first order determinations to  $\phi$  or not to  $\phi$ ; two potential second order determinations to  $\phi$  or not to  $\phi$ ; and two potential actual actions of  $\phi$ -ing or not  $\phi$ -ing, eight possible scenarios arise which I propose may be represented in the following chart(s):

1 <sup>st</sup> order	2 <sup>nd</sup> order	Actual Act
φ	φ	φ
		-φ
φ	- φ	φ
		-φ
-φ	φ	φ
		-φ
-φ	-φ	φ
		-φ

Figure 2: Possible Actions<sup>219</sup>

In gauging an action as either in conformity or non-conformity with reason we can apply the ‘Razian calculus’ and make the following determinations:

1 <sup>st</sup> order	2 <sup>nd</sup> order	Actual Act	Conforming (C) or Non- Conforming (NC)?
φ	φ	φ	C
		-φ	NC
φ	- φ	φ	NC
		-φ	C
-φ	φ	φ	C
		-φ	NC
-φ	-φ	φ	NC
		-φ	C

Figure 3: Conformance Assessment

This analysis coheres with the set of principles Raz discerns as flowing from the nature and operation of reasons and their conflicts;

<sup>219</sup> Original diagram here and following created by candidate for thesis.

P1: It is always the case that one ought, all things considered, to do whatever one ought to do on the balance of reasons.

P2: One ought not to act on the balance of reasons if the reasons tipping the balance are excluded by the undefeated exclusionary reason.

P3: It is always the case that one ought, all things considered, to act for the undefeated reason.<sup>220</sup>

This schema presents and provides for a pleasing and straightforward logical tool for assessing actions of given agents. This understanding which incorporates the role of second order exclusionary reasons has direct relevance to assessing an agent's actions vis-à-vis law. This is so because law is undoubtedly classifiable as an archetype of second order exclusionary reasons. His work on rules provides us with a basis upon which to consider laws, a brief exposition of which we turn to now.

*Raz on Rules:*

Raz discusses rules and principles of the sort which are normally “stated by saying that a certain person ought to, should, must etc., perform a certain action.”<sup>221</sup> which he alternately describes as categorical rules -as opposed to technical rules. These are, for him a species of general mandatory norms which have companion, non-rule, particular varieties. However given his purpose to explore the role of norms in practical reasoning “which does not significantly depend on the generality of the norms” he is content to deal with the broader category of mandatory norms.

Following Von Wright, Raz distinguished four elements in every mandatory norm;

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<sup>220</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 40.

<sup>221</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 49.

- 1) The Deontic Operator
- 2) The Norm Subjects
- 3) The Norm Act
- 4) The Conditions of Application<sup>222</sup>

While Raz adopts the phraseology of “rules are reason for action” he does admit that this is not strictly true and rather; “Since rules are objects and only facts are reasons rules are not, strictly speaking, reasons. The fact that there is a rule that p is a reason and not the rule that p itself. For brevity I shall, however, refer to rules as reasons, just as I shall continue to refer to values and desires as reasons.”<sup>223</sup> It is apt to highlight this, although justified, slight discrepancy in language here prior to proceeding; this thesis follows this elision in also describing rules as reasons.

In his attempt to understand the type of reason that constitutes a rule he makes a number of initial distinctions;

Since any action and any person can be subjected to regulation by norms we cannot distinguish norms from other reasons by the character of the norm subjects or of the norm acts. Similarly, it would be futile to distinguish between norms and other reasons by their strength. We are all familiar with norms of widely differing strength. Some relate to fundamental features of human societies and human life and are to be regarded as very strong reasons. Others, like many rules of etiquette, are of little importance and carry little weight. One is thus forced to look to content-independent features of rules to distinguish rules from reasons which are not rules.<sup>224</sup>

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<sup>222</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 50.

<sup>223</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 51 footnote.

<sup>224</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 51.

The content-independent character which he advocates for as explaining and understanding the distinction between rules on the one hand and reasons which are not rules on the other is their exclusionary character. Mandatory norms he argues are either 1) An Exclusionary Reason or - more commonly 2) A First-Order Reason *and* an Exclusionary Reason. In other words mandatory norms are most commonly reasons to perform the norm act (1<sup>st</sup> order) and reasons not to act for conflicting reasons. It may of course be said then that it is impossible to have a non-exclusionary mandatory norm; the exclusionary character being a vital distinguishing feature of same.<sup>225</sup>

Accepting Mills's summarization of the reasons for having rules as time saving devices and error reducing devices Raz proceeds to distinguish rules from maxims.

A man regards such a maxim as a rule only if he believes that at least in some cases the maxim ought to be followed even if in doubt whether its solution is the best on the balance of reasons, even if, were he to consider the case on its merits, he might find that the maxim should not be followed in this case.<sup>226</sup>

A rule therefore, under this view, is a rule even if wrong. This is because while both the rule and the maxim indicate which action is appropriate it is only the rule and not the maxim that has the force of exclusionary reasons not to act for competing reasons. Therefore “[f]ollowing a rule entails its acceptance as an exclusionary reason for not acting on the balance of reasons even though they may tip the balance.” This presents as a somewhat peculiar way of looking at rules which Raz accepts “may sound paradoxical”.<sup>227</sup> How can one be said to be acting with “reason on his side” if he acts for a rule that is wrong in a given instance? The answer

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<sup>225</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 59.

<sup>226</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 60.

<sup>227</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 61.

Raz gives is that it is because the rule is justified *qua* rule (time saving, error reducing etc.) rather than justified in the particular circumstances. Therefore the agent is not acting in an arbitrary manner but rather “[w]henver one acts for a valid reason which is a reason for not acting for some other reason, one is acting in accordance with reason and not at all in an arbitrary or unjustifiable way.”<sup>228</sup>

Authority also provides an example of the creation and issuing of mandatory norms. One which has pertinence for an examination of law.

To understand what it is for a person to have authority one must understand what it is for another person to regard him as having authority. A person has authority either if he is regarded by others as having authority or if he should be so regarded. To regard a person as having authority is to regard at least some of his orders or other expressions of views as to what is to be done (e.g., his advice) as authoritative instructions, and therefore as exclusionary reasons.<sup>229</sup>

Like for rules discussed *supra* it may well be that the authoritative instruction is ‘incorrect’ in the particular circumstances before a given agent, i.e. the balance of reasons based on internal strength tips in favour against following the instruction; however, the justification one has for disregarding such countervailing reasons is based on the justification for authority rather than the justification for the particular instruction. Such justifications founded on perhaps expertise or social coordination.<sup>230</sup> The exclusionary character is not therefore derived from the weight of reasons for, or the desirability of, particular norm acts in particular situations but rather from the fact of it being issued by authority. There can be seen

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<sup>228</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 62.

<sup>229</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 62.

<sup>230</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 63.

therefore a similarity of effect between norms and authoritative instructions in that both must be followed irrespective of their rightness.

Analysis:

*Critiques of Raz:*

Raz is of course not without his critics and given his broad expanse of work ranging from questions of freedom, morality, authority, positivism etc. there have been ample fora within which to attract such critics. This thesis is concerned with the practical reasoning dimension of his work and as such the critics levelled at this aspect of his work are *ad rem* for discussion here.

Some critiques of Raz have been leveled based not on the flaw of his theory but on the fact that he failed to fully appreciate the full dimensions of it;

Raz himself has underestimated the complexities of multi-level assessments in practical reasoning because he circumscribes the possible categories of second-order reasons too narrowly. Raz's own definition and theoretical utilization of second-order reasons emphasize the possibility of *isolating* a level of practical reasoning from the considerations and values which ultimately justify the decisions being taken. The notion of a second-order reason is in fact far richer than Raz allows.<sup>231</sup>

Perry's almost laudatory critique here does however harbour a more full bodied criticism that Raz's account of exclusionary reasons is ambiguous. Perry focuses in on the availability of positive second order reasons, something which he considers is lacking in Raz's work. This is a fair comment but is explicable by virtue of Raz's concern with legal directives specifically which are negative in nature.

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<sup>231</sup> Stephen R Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 S Cal L Rev 913

Perry highlights a more troublesome concern for Raz's theory of practical reasoning which is that it often occurs under uncertainty. For Raz the agent either knows the fact that is normatively relevant or the agent believes that fact to obtain but in situations where there are chances of an occurrence, such as a chance that it will rain then the fact-belief paradigm fails because they are situations when "circumstances where we have reason in advance to think that we do not know what the objective balance of reasons requires"<sup>232</sup> This point is well made out by Perry and as will be seen later in the thesis finds support here as regards the question of how to act under uncertainty is critical to an understanding of how one may be justified in their actions.<sup>233</sup>

Andrew Jordan criticizes Raz's account in "that exclusionary reasons, as they figure in Raz's account of authority, including the authority of law, are at odds with an attractive account of moral motivation."<sup>234</sup> Where he claims "that an attractive account of moral motivation precludes the possibility that moral reasons can be excluded in the way that Raz's account requires."<sup>235</sup> This is a particularly strong critique because if second order reasons are not necessary to explain the common phenomenon of practical reasoning then at the very least the burden on Raz is all the heavier and potentially allows us to do away with second order reasons. If "[l]imiting ourselves to the tools of first order moral reasons—including such relations as outweighing, and disabling—allows us to preserve a more attractive account of the relationship between what there is strongest reason to do, what one is motivated to do, and that for which one is praiseworthy or blameworthy" that could be a difficult result for Razian theory.

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<sup>232</sup> Stephen R Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 S Cal L Rev 913, 924

<sup>233</sup> It should also be noted that Perry admits that the Razian theory is particularly compelling for criminal law, which of course is a central focus of this work.

<sup>234</sup> Andrew Jordan, 'Exclusionary Reasons, Virtuous Motivation, and Legal Authority' (2018) *Canadian Journal of Law & Jurisprudence*, 347.

<sup>235</sup> Andrew Jordan, 'Exclusionary Reasons, Virtuous Motivation, and Legal Authority' (2018) *Canadian Journal of Law & Jurisprudence*, 347.



The critique offered by Jordan is however limited. Firstly by the modesty of his claim. He is proposing only what he hopes to be a more attractive model rather than a devastating destruction of the Razian account. Further he is not denying the ontologically distinct nature of second order reasons. Reasons to  $\phi$  are obviously by their nature distinct entities than reasons to act or refrain for acting on reasons. Therefore the concept of second order reasons survives Jordan's critique, it is merely their usefulness he focuses in on. To this extent then the critique does not dissuade us from accepting second order reasons as distinct and thereby maybe having relevance to the assessment of the thesis. In terms of its attractiveness or otherwise it is necessary to consider its usefulness in ascriptive practices. Jordan considers and critiques the link between Razian reasons and the ascription of blame or praise;

if one accepts that moral praiseworthiness and blameworthiness should be understood in terms of responsiveness to objective moral reasons, and that responsiveness to moral reasons involves a set of motivational dispositions described above, then it will turn out that exclusionary reasons are at odds with a sound account of moral reasoning.<sup>236</sup>

To the extent that the Razian model and Razian calculus is insufficient in determining blameworthiness (and presumably praiseworthiness) then there is common cause between this thesis and the critiques of Jordan. Indeed Jordan highlights similar concerns as I raise later in this chapter;

Raz himself is aware of the apparent motivational paradox that arises if we accept his account of exclusionary reasons, though it is not clear that he grasps its full implications.<sup>237</sup>

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<sup>236</sup> Andrew Jordan, 'Exclusionary Reasons, Virtuous Motivation, and Legal Authority' (2018) *Canadian Journal of Law & Jurisprudence*, 347, 351.

<sup>237</sup> Andrew Jordan, 'Exclusionary Reasons, Virtuous Motivation, and Legal Authority' (2018) *Canadian Journal of Law & Jurisprudence*, 347, 352.

However the fact remains that in order to determine the question of duty breach then the calculus is useful and the notion of second order exclusionary reasons is central. The law requires duty breaches in its assessments – it cannot convict morally repugnant but legal actions. It cannot enforce reparation where no prior duty was recognized. The law simply cannot do away with the duty breach assessments and the concept of second order exclusionary reasons best explains that assessment. It may indeed be true that on a broader purely moral evaluation they are not as useful or attractive in understanding duty breaches but in ascriptions of legal blame or responsibility the law's claims to supremacy are taken to have been well made out and therefore the calculus is sound for such breach assessments.

Daniel Whiting adopts the fairly uncontroversial understanding of the relationship between the reasons that bear on one and what that person ought to do in his formulation; “O) A person ought to  $\phi$  if and only if the reasons she has to  $\phi$  are weightier than the reasons she has not to  $\phi$ .” But of course this will always fail as an understanding of legal assessments because his rule is an all things considered rule, in other words, on the basis of all the information this rule applies. But the law does not operate like this. Law has a partial view and makes claims as to supremacy and completeness. While these claims need not be made out on the broader view from the internal perspective however – which is of course the applicable viewpoint when one deals in legal ascriptions i.e. criminal culpability and tortious liability – the claims are taken to have been well made out and this is why the calculus is sound.<sup>238</sup>

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<sup>238</sup> This is not to deny the difficulties that lie in situations where the law's claims are in troubling discord with the broader all-inclusive view. In particular it has potential to denude the law of its legitimate authority. While this aspect of Raz's work is not the core focus here it is useful to contextualize this position vis-à-vis Raz's defence of what he calls the "service conception" of authority, which regards authorities as "*mediating* between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reason." for discussion on this see Joseph Raz, *Authority, Law and Morality*, (1985) The Monist 295,299.

Further, given the greater relevance of blame to criminal convictions it is the very availability of defences - which cancel the protection of the protected reason - that means the law does not make as heavy a use of second order reasons in such determinations. This should be of some succor to Jordan. He notes; “[b]ut, as should be apparent, one upshot of the virtue theoretic account is that, contra Raz, at least moral reasons do indeed require compliance.”<sup>239</sup> Which is of course correct and why the use of second order exclusionary reasons are issues for duty conformance assessments while compliance (as will be seen) is an issue for justificatory defences.

Jordan worries that “We can tell a story about how competing goods are arranged in different contexts, and what an appropriate response might be in the face of competing considerations when to feel regret, say. Not so with exclusionary reasons, as there is no content to them, *qua* exclusionary, that might ground such a story.” But this worry doesn’t seem particularly well founded. Take for example when one is unable to comply with a promise they previously made. It seems reasonable to accept that no matter how weighty or good one’s reasons for breaking their promise (note we remain uninformed and therefore neutral as to the content of the promise), a regret at having to do so is an apt response.

Jordan considers the concepts of outweighing (in terms of internal strength rather than positional strength) and disabling are sufficient. Outweighing has been described above. The example provided to explain disabling which is defined as “If some consideration, X, disables a reason, Y, then X figures as the explanation of why Y is not a reason, even if it would be one in some other context.” i.e. playing a game of poker, where the reasons against deception are disabled by the practice of playing poker. A disabled reason is distinct from an excluded reason because the excluded reason still maintains its normative force whereas a disabled one does not. This is the position adopted by Daniel Whiting which informs Jordan’s work

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<sup>239</sup> Andrew Jordan, ‘Exclusionary Reasons, Virtuous Motivation, and Legal Authority’ (2018) *Canadian Journal of Law & Jurisprudence*, 347, 353.

and when they refer to disabling reasons they can be said to be dealing in what Raz (and Gardner) describe as cancelling conditions.<sup>240</sup>

Disabling however is unsatisfactory as a complete understanding because it fails to allow for excluded reasons to maintain their normative force. This is particularly true where the law is wrong in a certain instance. Take for example the case of the father rushing to take their child to hospital. The fact that the law prohibited speeding could not in any attractive or sensible way be understood as disabling the reason the father has to save his child's life. It is the very fact that it maintains its normative force – even though in the law's partial view it is an excluded reason – that motivates and potentially justifies his actions.

The maintenance of normative force in the face of exclusion is particularly troublesome for justificatory defences. In allowing for justificatory defences (as will be seen) the law is adopting a quasi-cancelling condition because it is cancelling the protection afforded to the protected reason of the criminal prohibition but it is not cancelling the normative force – aside from and absent that protection. For example when a justificatory defence is allowed, let us imagine a justificatory defence is allowed to the charge of stealing bread in the case of otherwise starving. The justificatory defence cancels the protection afforded to the reason, i.e. denudes it of its second order character which then allows the competing first order reasons to be weighed. It does not however disable the reasons against stealing. Those reasons remain intact albeit now susceptible to being outweighed.

These concerns are echoed by Noam Gur also where he finds his critiques of the pre-emption thesis (which itself is based on second order reasons) because of the “thesis's [in]ability to accommodate situations of

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<sup>240</sup> Daniel Whiting, 'Against Second Order Reasons', (2017) *Nous* 398, 400.

justified disobedience.”<sup>241</sup> Gur considers two lines of argument available for proponents of the pre-emption thesis;

(i) by saying that the directives in question fail to qualify as authoritative... or (ii) by saying that the exclusionary force of authoritative directives has a limited scope.<sup>242</sup>

This thesis is also concerned with this strange feature of legal rules. However Gur’s flaw is to consider the concept of ‘justified disobedience’ as being something oxymoronic when in fact a solution lies in the argument advanced later in this thesis where we can dissociate the two assessments; obedience on the one hand and justifiedness on the other. It is in the nature of the view expressed herein that justification in the relevant and legal sense will always be called for *because of* disobedience and whether or not one was justified in their actions does not bear upon whether or not they were under a legal obligation or whether or not they conformed to that obligation. It is by the very nature of being called upon to offer a justification that one was in fact under such an obligation and one did not conform thereto.

A more vigorous broadside is fired by Daniel Whiting. This is a more direct attack and more full bodied because Whiting challenges the very existence of second order reasons.<sup>243</sup> Whiting offers significant challenges to the idea that one can “do something *for a reason for a reason*.”<sup>244</sup> In other words against the possibility of positive second order reasons. This is admitted as not something which occupies much of Raz’s thinking and as it is not something which the law engages in. The thesis may remain agnostic on the possibility that there are no second order positive reasons because as noted above the law is a body of negative or exclusionary second order reasons, and it is these that occupy the analysis here.

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<sup>241</sup> Noam Gur, *Legal Directives and Practical Reasons*, (Oxford University Press, 2018).

<sup>242</sup> Noam Gur, *Legal Directives and Practical Reasons*, (Oxford University Press, 2018).

<sup>243</sup> Daniel Whiting, ‘Against Second Order Reasons’, (2017) *Nous* 398.

<sup>244</sup> Daniel Whiting, ‘Against Second Order Reasons’, (2017) *Nous* 398, 404.

However there are also reasons to suggest Whiting's critique of the existence of positive second order reasons is not without its flaws.

Whiting makes his principled argument against second order reasons based on creditworthiness. He sets up the view that if one  $\phi$ 's for an undefeated reason they are creditworthy. This he considers is problematic for the notion of second order reasons because where the protagonist acts for an undefeated reason based on the unworthy motivation to get a reward such as

The case in which Kelly acts for a reason for the reason that she will get a reward shows that it cannot be true *both* that acting for a good reason suffices for creditworthiness *and* that it is possible to act for a reason for a reason. So, we must reject either the claim about credit or the supposition that in this case Kelly acts for a first-order reason for a second-order reason.<sup>245</sup>

The retort however lies in rejecting the claim against credit and in highlighting the distinction between acting in conformance with a reason and acting in compliance with a reason. In the example he cites we can analyze the actions of Kelley as being in conformance with the reason but not in compliance and as such it is a stretch to describe them as having acted *for* the good reason. This is a distinction of some import and forms the basis of the proposed view on justification later. Further, and more importantly even where one acts for a second order reason but this demonstrated a flaw in their character such as the scenario Whiting provides where;

Kelly is deciding whether to send her daughter to school A or school B. The career- related considerations favour B, but the weightier education-related considerations favour A. Kelly promised Dave that she would make her decision on educational grounds alone. So, Kelly decides to send her daughter to A for

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<sup>245</sup> Daniel Whiting, 'Against Second Order Reasons', (2017) *Nous* 398, 404.

educational reasons on the basis of her promise to Dave. As it happens, had Kelly not made her promise, she would have sent her daughter to B, not A. She is concerned about her daughter's education only because she is concerned with keeping her promise to Dave. That is, she responds to the education-related considerations only for the reason that she promised Dave to do so.<sup>246</sup>

The idea that conformance with second order reasons or in other words conformance with undefeated reasons is sufficient to be classed as creditworthy (and more pertinently the converse that non-conformance is sufficient to be classed as blameworthy) is entirely rejected by the enterprise of this work which seeks to demonstrate that duty conformance or indeed compliance (and their converse) are insufficient assessments to found determinations of praise or blame. This thesis takes the view - as will be explained later - that one must be both in non-conformance with a mandatory second order reasons and have acted in a manner which entails a dissonance between guiding and explanatory reasons. While it is not a claim being pursued here, most probably the converse is also true regarding praiseworthiness which likely requires conformance with a second order non-mandatory reason and have consonance between the relevant guiding and explanatory reasons. These terms will become clearer later in this chapter and as the thesis progresses however it suffices for now to indicate that conformance with second order reasons is only half the story – and the least interesting half by far – for questions of praise or blame.

Therefore while the critiques considered above are sophisticated none are deemed sufficiently troublesome to dissuade a use of Razian theory.

*The Law:*

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<sup>246</sup> Daniel Whiting, 'Against Second Order Reasons', (2017) *Nous* 398, 407.

When Raz marks out the exclusionary character as a distinguishing feature of mandatory norms he provides us with a tool for better understanding and analysing a particular mandatory norm in the form of legal duties. As laws are a species of mandatory norms they share the same exclusionary character as such norms and thus play the same role in our practical reasoning.<sup>247</sup> It is important therefore to consider the make-up and/or limitations of mandatory norms in general for such same makeup and/or limitations will apply to legal norms in particular. Law's exclusionary character or in other words its functioning as a mandatory norm has of course a doubly important feature because of law's claim to be both comprehensive and supreme. Legal systems claim to be comprehensive, in that they do not "acknowledge any limitation of the spheres of behaviour which they claim authority to regulate."<sup>248</sup> As an elaboration of their claim to comprehensiveness, legal systems also claim to be supreme in that they claim "authority to prohibit, permit or impose conditions on the institution and operation of all the normative organizations to which members of its subject community belong."<sup>249</sup> Therefore within this partial view of law the mandatory nature of its norms can have no equal. Its comprehensiveness and supremacy means that it cannot tolerate competing norms.<sup>250</sup>

*Fallibility:*

As seen *supra* Raz proposes an understanding of rules such that they have a follow-even-when-wrong aspect. This of course presents as something troubling, and indeed he admits it "may sound paradoxical". It is important to note that while this is an absolute property from the internal perspective of the rules or in the case of the law, the internal perspective of the law which flows from the claim of law to supremacy and completeness. These

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<sup>247</sup> Cf Joseph Raz, *The Authority of Law* (Oxford University Press 1979) p18, footnote "All mandatory rules are protected reasons."

<sup>248</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 150.

<sup>249</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 151.

<sup>250</sup> See also Joseph Raz, *The Authority of Law*, Chp6, 'The Institutional Nature of Law' for similar commentary.



claims however are not always well made out from an all things considered view. As Raz notes, “[t]he evil the disobedience is designed to rectify may be so great, may indeed itself involve violence against innocent persons (such as the imprisonment of dissidents in labour camps in the Soviet Union), that it may be right to use violence to bring it to an end.”<sup>251</sup> and Edmundson quite rightly notes “[e]very government, as we saw, claims unbounded power to decree what ever it decides. The condition of legitimacy only says that it cannot have that power unless its use of it leads its subjects to conform to reason.”<sup>252</sup>

Take for example the case of Jeremy above who was ordered to appropriate the van, Raz immediately qualifies this with an explanation that in the extraordinary scenario of Jeremy being orders to commit an atrocity it would be a different matter but in the ordinary course of things the order is a reason not to act on the balance of reasons. As Edmundson notes, “Jeremy admits that there is a more inclusive viewpoint from which it appears that his orders must yield to weightier reasons. But Jeremy also believes that there are reasons why this more inclusive viewpoint is one he has reason not to adopt here as his guide.”<sup>253</sup> And this is exactly the case with law which is also partial i.e. not all things considered.

So while the thesis admits - and it is perfectly clear from *Practical Reasons and Norms* and his later work on *The Authority of Law* that Razian theory accepts - the follow-even-when-wrong character is not absolute and in an evil regime there is no difficulty in accepting the evil laws should not be followed. However the thesis can be taken as assuming the common law and in particular its emanation in criminal law and tort law is not an evil system of law. What follows therefore proceeds with the assumption and on the basis that discussion of mandatory norms in the form of laws are discussion of law/norms issued by legitimate authority.

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<sup>251</sup> Joseph Raz, ‘The Guise of the Bad’ (2016) *Journal of Ethics & Social Philosophy*, 1.

<sup>252</sup> William Edmundson, Book Review, (1993) *Law and Philosophy* 329. And see Joseph Raz, *Ethics in the Public Domain* (Oxford University Press 1994) Chp 16 ‘Government by Consent’.

<sup>253</sup> William Edmundson, Book Review, (1993) *Law and Philosophy* 329.

This is appropriate because it is reasonably uncontroversial to claim that the rules of criminal law and tort law emanating from the common law fall within the ambit of ordinary and legitimate exercise of authority. This does not require perfection on the part of the common law but likewise we can recognise clear water lies between the common law and orders to commit atrocities. They are not equivalent. In any event the thesis can be taken as making claims only as they relate to legitimate laws.

Raz's answer to this paradox is to rely upon the nature of second order reasons and their positional strength from which exclusionary reasons obviously also benefit. However, such reliance only gets us so far. It explains the non-arbitrariness of a given agent following a wrong rule but it doesn't address the more fundamental concern that he would have agents following wrong rules as a preferable state of affairs to agents doing the right thing in the face of the rule requiring otherwise. It is not to say that such norms are infallible – that much is recognised in the acceptance that the internal strength of reasons may indicate non-compliance with the norm. It is in fact an acceptance of the fallibility of mandatory norms but nonetheless a requirement of conformity with same.

A further indication of the fallibility limitation of rules can be found in their generic character. As they are pre-enacted 'catch all' requirements they do not have the full facts of each and every instance at hand or necessarily contemplated in their formulation. Such rules/norms resting for their validity not on their infallibility or correctness of each and every scenario they apply to but rather on the justification of rules *qua* rules (i.e. error reducing – laboursaving etc) so their generic quality admits such fallibility.

As a consequence of the exclusionary nature of mandatory norms we saw that rule following involves "its acceptance as an exclusionary reason for not acting on the balance of reasons even though they may tip the

balance.”<sup>254</sup> In other words if a rule is a rule, and not merely a maxim or ‘rule of thumb’ it should be followed even when wrong. This curious property of mandatory norms is logically consistent within the Razian paradigm (as outlined in the diagrams earlier) which prioritises the positional strength of the exclusionary reasons, which of course form part of such norms. This, ‘must-be-followed-in-the-face-of-wrongness’ property of mandatory norms presents as a somewhat disturbing aspect of norms and potentially a flaw or unintended consequence; a fly in the ointment of Razian theory on practical reasoning. Mechanistic obedience of norms presents as, at the least, requiring significant justification.

Raz provides such justification by indicating that we may look at the bases upon which norms are often justified. However, when we examine these bases they fail to offer completely convincing justifications for this unusual, ‘follow-even-when-wrong’ property. Firstly let us consider the justification that they are error saving devices. This is particularly unsatisfactory because if the norm calls for an erroneous norm act then such justification offers little solace due to its retorsive quality. Regarding a norm’s labour saving character this also strikes as an insufficient justification because to say it was easier to do the wrong thing presents as patently unworthy.

A final claim of social coordination while stronger than the previous two, also presents as suspect, because even though sub optimal coordination may be preferable to no coordination at all, the purpose of such coordination is presumably to ensure we are coordinated in performing right action, not just any action. This in no way challenges the view that law (as the chief normative force) has a significant role in social coordination or that the aims of social coordination can form a legitimate basis for the use of law as a mechanism or tool for such an endeavour. That is not contested. But Raz’s claim here and the one which is not entirely well made out is the converse; it is not that social coordination

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<sup>254</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 61.

may legitimately use law but rather that law *derives its legitimacy from* social coordination. As noted given coordination may be towards evil pursuits at the very least this justificatory basis must be recast to include a qualification recognizing the prior value of right action.

The argument perhaps being made is that each of these may if sufficiently necessary or weighty across the whole community of norm subjects justify the existence of same, i.e. something along the lines of, particular injustices may be justifiable in pursuit of broader justice. Nonetheless when a norm subject performs a wrong act in compliance with a legal norm then the burden of justification rests with the law rather than with the right action. The question which must be answered is why is it okay to do the wrong thing in this instance? One way of explaining this is to adopt the partial viewpoint of the norm – or in the legal scenario of the partial viewpoint of law – within the world of the norm it is supreme and such supremacy is definitive. On a broader/global view the rational agent should act rationally i.e. do the right thing but within the partial perspective of the norm compliance is all. The main “complicating factor” admitted by Raz is the scope of the given norm, which for rules generally may be pertinent (i.e. school rules may not apply to a student outside school hours) but for a law which recognises no such limitation to its potential scope, this is not troublesome.<sup>255</sup>

#### *Subsidiarity:*

When Raz accepts that rules cannot be ultimate values he highlights a limitation of some importance. The exclusionary character of mandatory norms means they cannot be ultimate. This distance from the values which norms presumably serve gives them their quasi independent nature but it is suggested that such distance also indicates their secondary calibre i.e. lesser import. Such entities must be subsidiary to those which are fundamental or ultimate values. For example a rule which insists upon

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<sup>255</sup> It is interesting to note how Raz directly builds upon the justifications for norms (canvassed in this section) in his Normal Justification Thesis for authority, see Joseph Raz, *The Authority of Law*, (oxford University Press 1979)

hospital staff wearing gloves before touching a bleeding patient has a quasi-independence from its underlying value of protecting life (through limiting the spread of infectious diseases) but the rule is clearly secondary to the actual pursuit of the value – even if such pursuit requires non-conformance with the glove wearing rule on a certain occasion.

The overarching purpose of norms proposed by Raz, is to “simplify practical reasoning”.<sup>256</sup> This further highlights what the thesis is claiming to be the subsidiary position of norms in practical reasoning generally. Entities for the purpose of simplifying practical reasoning are of course legitimate and useful to have but they are in substitution for the ‘real deal’ of the rational agent engaging in complete rational analyses themselves. If this is as Raz claims “the whole purpose of having norms”<sup>257</sup> then their whole purpose is to occupy a substitutionary, subsidiary or secondary role.

They may also be understood as occupying what may be termed a defensive position. They are the legitimately acceptable substitutions for one’s own reasoning. Therefore when one performs wrong action – in compliance with a given norm – they may rest on the defence of having been rule compliant. From this view we can provocatively conceive of rules (or the law) as representing a complete list of defences, i.e. rule abiding is a full defence. This is converse to the standard position of stated exceptions to rule compliance being understood as defensive rather than perceiving rule compliance itself as the defensive position and thus presents a Janus faced conception of norms and their compliance, both of which it is argued are accurate, just for two distinct assessment types, as will become evident.

*Authority:*

When Raz considers “If the person to whom the order is addressed does not perform the act he was ordered to perform because he finds, correctly, that on the balance of reasons he should not perform it, he may still be

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<sup>256</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990)

<sup>257</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990)

disobeying the order and acting contrary to the intention of the prescriber.”<sup>258</sup> Because of law’s claim to supremacy and completeness in such a circumstance it may deem it appropriate (in its partial view) to impose the full response warranted by non-compliance. In fact a response to the breach of law is to be expected in a similar fashion as it would be from a superior to a subordinate for disobeying an order irrespective of the fact that such disobedience is engaged in reasonably. Such is the response of authority to having its authority challenged. So, while the agent may have rationality proper on their side they may still expect to face the power of the challenged authority to bear down upon them for their disobedience.

It must be remembered that authority’s response to disobedience or challenge is even a further step removed from fundamental values than the norm because the authority exists in order to facilitate/actualise the mandatory norms and the mandatory norms exist to facilitate/actualise the fundamental values. So in our discerned hierarchy we have; first and foremost acting in a value promoting manner, secondly acting in a manner that is in compliance with mandatory norms and then thirdly acting in a manner obedient to authority. Certainly obedience to authority may present as prudentially more pressing but such prudential concerns which may accompany threats of the use of authority’s power are only auxiliary reasons, rather than the complete and operative reasons provided by more fundamental normative entities, and should be considered as such.

By way of contextualization with Raz’s further and important work on Authority it is worthy of note that there is a cognate debate such as that which is referred to as the *paradox of authority*. This is the question to which Raz’s thesis of legitimate authority is intended to be the answer.<sup>259</sup> The ‘paradox’ presents its issues as follows:

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<sup>258</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 83.

<sup>259</sup> Joseph Raz, *The Conflict between Authority and Autonomy* in Joseph Raz, *Authority* (Blackwell, 1990).

- a) If an authority tells you to do the correct thing, then the authority *adds nothing*, because you should do the right thing regardless of what the authority tells you
- b) If an authority tells you to do the incorrect thing, then it still adds nothing, because you should do the right thing, not the wrong thing the authority tells you to do.

Therefore, per Wolff authority adds nothing, and following authority is an inherently irrational practice.<sup>260</sup>

Raz's conception of legitimate authority is built up from three interrelated theses: the dependence thesis, the pre-emption thesis, and the normal justification thesis. The *dependence thesis* is outlined by Raz as follows:

All authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.<sup>261</sup>

The reasons that Raz states already apply to the subjects are called 'dependent reasons'. The *pre-emption thesis* claims that a directive issued by the authority may not be added to 'all other relevant reasons' for action, but instead may 'exclude and take the place of some of them'.<sup>262</sup> Raz explains the normal justification thesis as follows:

[The] normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly'.<sup>263</sup>

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<sup>260</sup> Robert Paul Wolff, *In Defense of Anarchism* (Harper and Row 1970), 20.

<sup>261</sup> Joseph Raz, *The Authority of Law* (Oxford University Press 1979) 47.

<sup>262</sup> Joseph Raz, *Ethics in the Public Domain* (Oxford University Press 1994).

<sup>263</sup> Joseph Raz, *The Morality of Freedom*, (Clarendon Press, Oxford 1986) 53.

Legitimate authority therefore does add something contra Wolff in that it makes it more likely that the subject will comply with the reasons that bear upon them.

Well-Foundedness/Reasonableness:

Earlier we saw a neat assessment calculus provided by Raz where conformance or otherwise with undefeated reason as determined through internal or positional strength gave us a tool based in reason to assess a given agent's actions. However the calculus may not be as complete as one would like and difficulties arise in the assessment of one's actions when first and second order reasons conflict, as Raz himself recognises;

When the application of an exclusionary reason leads to the result that one should not act on the balance of reasons, that one should act for the weaker rather than the stronger reason which is excluded, we are faced with two incompatible assessments of what ought to be done. This leads normally to a peculiar feeling of unease, which will show itself when we wish to censure a person who acted on the balance of reasons for disregarding the exclusionary reason and when we have to justify someone's acting on an exclusionary reason against claims that the person concerned should have acted on the balance of reasons.<sup>264</sup>

And

If we do wrong when we act contrary to what we ought, all things considered, to do, then our judgement that someone did wrong because he acted on a reason which is overridden by another is more complete and unequivocal than our condemnation of a man who acted on reasons which, though not overridden, are excluded by second-order reasons such as the presence of authority or facts indicating that he should not trust his judgement on the merits ...

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<sup>264</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 41.



Conversely, though we approve of people acting as they ought, all things considered, to do, our approval is more complete and unreserved when the reasons for which they acted prevail on balance than when these are reasons which entail overruling, as it were, an autonomous practical assessment.<sup>265</sup>

So, under the Razian calculus, in determining whether the agent was right or wrong we move from the clear, unambiguous scenarios to the less clear and conflicted ones. It is safe to say that where the first order and second order reasons concur i.e. both indicate one should  $\phi$  or not  $\phi$  and where the action taken is also in concord with the agreeing reasons then we may conclude such action was unambiguously right. Conversely where both first and second order reasons concur and yet the agent acted in opposition to same then again we have an easy assessment of being able to conclude such action as wrong. These are the clear-cut cases.

It becomes less clear however in situations where the first and second order reasons disagree such that the dictates of one's own reasoning on the relevant pros and cons and the requirements of a second order reason propose conflicting action i.e. one to  $\phi$  and the other not to  $\phi$ . Should the agent comply with the second order reason despite their own, sound, reasoning? Raz tells us they may comply with the second order reason in consequence of which we can accept their actions to have been in conformity with reason albeit not demonstrating responsiveness to their own reasoning. Conversely should the agent follow their own reasoning of first order reasons in contravention of the second order exclusionary reason we may describe their actions as not in full conformity with reason but we may not go so far as to judge them as having acted fully contrary to reason given their following of first order reasons.

Adopting the three main principles of reasoning outlined *supra* we may then seek to assess conforming or non conforming agency as either right

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<sup>265</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 45.

agency or wrong agency. According to the calculus it should be a straightforward equation of conformance with right action and non-conformance with wrong action but instead of a series of clear cut determinations we have a mixture of clear cut and qualified assessments such that our preceding table may be evaluated as follows;

1 <sup>st</sup> order	2 <sup>nd</sup> order	Actual Act	Conforming (C) or Non-Conforming (NC)?	Right (R) or Wrong (W)?
$\varphi$	$\varphi$	$\varphi$	C	R
		$-\varphi$	NC	W
$\varphi$	$-\varphi$	$\varphi$	NC	$\sim W$
		$-\varphi$	C	$\sim R$
$-\varphi$	$\varphi$	$\varphi$	C	$\sim R$
		$-\varphi$	NC	$\sim W$
$-\varphi$	$-\varphi$	$\varphi$	NC	W
		$-\varphi$	C	R

Figure 4: Rightness Assessment

So Raz presents us with a conundrum at the core of ascriptive theory; how do we judge action as right or wrong, good or bad in the less clear scenarios of conflicting 1<sup>st</sup> and 2<sup>nd</sup> order reasons. When it comes to assessing the behaviour of an agent Raz, in a telling paragraph, considers;

A person's action can be judged as being well grounded in reason or not according to whether there actually are reasons for performing the action. It can also be assessed as reasonable or rational according to whether the person had reasons to believe that there were reasons for his action. It is the world which guides our action, but since it inevitably does so through our awareness

of it, our beliefs are important for the explanation and assessment of our behaviour.<sup>266</sup>

This recognition of the important place of belief for explaining *and* assessing behaviour distinguishes between assessing behaviour as 1) actually well-grounded in reason and 2) being rational or reasonable.<sup>267</sup> It is proposed that the dissociability of these two assessments, while nuanced, provides us with a solution to this conundrum and helps explain much of the current ascriptive divisions of law upon which the crime/tort distinction is founded.

Implicit in Raz's above paragraph is a recognition of an objective and subjective divide where determinations of a person's behaviour as being well grounded or not is a purely objective<sup>268</sup> matter where the community can stand back from the limits of the individual and discern purely from their viewpoint; firstly, which guiding reasons applied and secondly, did the behaviour of the individual conform to that/those guiding reasons. This two stage test will, without more (and certainly without necessary recourse to the subjective viewpoint) give a determination of a person's action as being well grounded in reason or not.

The dissociated assessment of whether an individual acted reasonably or not is a separate matter and conversely *does* have a necessary engagement with the subjective viewpoint. In order to make a determination as to the reasonableness of an individual's behaviour Raz tells us we must look to "whether the person had reasons to believe that there were reasons for his action."<sup>269</sup> In other words we must adopt the subjective viewpoint and work within its epistemic bounds. However, in determining whether or not one had reasons for their belief such determinations should be made

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<sup>266</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 22.

<sup>267</sup> As both 'rational' and 'reasonable' are offered by Raz the thesis adopts 'reasonable' because of its greater capacity to accommodate the technical understandings adopted and developed herein.

<sup>268</sup> The term objective is used here and elsewhere as understood as the epistemically bounded community viewpoint.

<sup>269</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 22.

by reference to objectively legitimate applicable reasons. The psychotic killer will have reasons to believe she should kill but presumably we would not count such reasons as among the legitimate, applicable (i.e. relevant) ones. So, while the assessment of reasonableness may be subjectively bounded it is a form of assessment which sees the community limiting its viewpoint to that of the individual and from within that viewpoint discerning the applicable reasons; thereafter if the individual conformed to those relevant reasons they may be deemed as having acted reasonably.

Raz offers the above distinction as almost a sop, but it is proposed that he has missed the full import of the dissociability of these assessment types. One gets the impression that the assessment of acting reasonably is offered as a second best position to one's action being well-grounded in reason. In this way a reasonableness assessment could be seen as a lesser form of the same assessment (an error I consider Gardner makes, as will become apparent later) when in fact they are different assessment types. The reason why Raz would consider this to be the case is undoubtedly founded upon the centrality he affords facts as opposed to beliefs in his theory (as discussed earlier). Well-groundedness entails conformance to objectively discerned facts whereas reasonableness can entertain the applicability of beliefs in its assessment.<sup>270</sup> This can clearly be seen where he precedes the introduction of his distinction with the following;

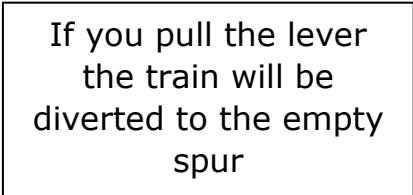
It seems to me that most of the difficulties in regarding reasons as relations between facts and persons turn on examination to be the same as the difficulties concerning probabilities or, at any rate, amenable to treatment in a similar way. The analysis sketched here

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<sup>270</sup> I suggest this is also the basis under which Gardner develops a hierarchy of defences which sees mistaken justifications classified as excuses. Cf the discussion on the normative position of the mistaken aggressor in Chp 6 for more on this: Gardner would take the view there that there justifications cannot conflict.

combines insistence on regarding only facts as reasons with ways of explaining behaviour in terms of one's beliefs in reasons.<sup>271</sup>

The idea that reasonableness should be considered as secondary in a hierarchy or as the next best thing to being well grounded in reason is however challenged by the remainder of this chapter. Let us consider the ubiquitous but useful thought experiment of the trolley problem. In this variant the agent is presented with the scenario of a trolley hurtling down the track and the track diverges with five people stuck on one spur and nobody on the other. Our agent has the means to divert the trolley through use of the lever. Above the lever reads a sign



If you pull the lever  
the train will be  
diverted to the empty  
spur

*Figure 5: Trolley Instruction (Lie)*

Now let us assume this instruction is a lie, and in fact the opposite is true. From our objective viewpoint - with all of this information - we can discern that for the agent's action to be in conformity with the objective applicable guiding reason they should not pull the lever. If they do not pull it, we can assess their action as having been well grounded in reason; however, a reasonableness assessment requires the community to work within the subjectively bounded viewpoint and from the knowledge available within those bounds determine the relevant guiding reason. Such an assessment must surely be that the agent should pull the lever. Therefore, given the agent's epistemically bounded (albeit objectively flawed) viewpoint, for them to act reasonably they must pull the lever, i.e. act entirely contrary to the conditions required in order to be well-

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<sup>271</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 22.

grounded in reason. This scenario highlights the distinct and dissociable natures of the two assessment types of 1) well-groundedness and 2) reasonableness.

If an agent, within the epistemic limits of their subjective viewpoint correctly discerns the applicable reasons (i.e. those the community similarly bounded would also so discern) then they must be said to be acting in as perfectly a reasonable manner as possible; whether or not they happen to have been well-grounded in reason. Therefore, it is not legitimate to assess the agent's pulling of the lever as rationally poor. It is not open to us to think less of them *qua* rational being and indeed we might be horrified by the agent acting in contrary fashion even though they would have objective conformity on their side.

It is worth recalling from the earlier analysis, it was highlighted that Aquinas does not define *Prudentia* as a *Scientia* or "right 'knowledge' but right 'reasoning'"<sup>272</sup> There is perhaps an echo here in the distinction between well-groundedness and reasonableness; where the former is a matter of right knowledge while the latter is one of right reasoning.

Another illustrative example on the operation of reasons by Raz is "the fact that my son has been injured is a reason for me to drive him to hospital at 45 mph."<sup>273</sup> While not an absolute reason (because should a pedestrian walk into the road it would be overridden) it is a conclusive reason because it overrides "the only conflicting reason present: the legally imposed 30mph speed limit." This is an interesting example because it is not a claim of a cancelling condition arising such that he is exempt from the speed limit it is a claim that the fact of or the reason to obey the speed limit is overridden. Also despite the existence of a second order mandatory norm in the form of a legal duty, and all that that entails the speeding father

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<sup>272</sup> Daniel Westberg, *Right Practical Reason: Aristotle, Action and Prudence in Aquinas* (Clarendon Press, Oxford 1994) 187.

<sup>273</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 28.

would be assessed as having acted reasonably, in the subjectively bounded although objectively assessed manner described above.

While Raz doesn't expand further on this scenario it seems clear that the driver's legal breach is complete and therefore is still vulnerable to an adverse legal response. While the driver would unequivocally have breached the law in so behaving I think we can comfortably class his action as having behaved reasonably. In other words despite such reasonable behaviour, we may consider him to have acted illegally. This illuminates something of the legal viewpoint for us; namely, its partiality. The legal view is only a partial view. The complete<sup>274</sup> view indicates the father has acted as correctly as anyone could or would be expected to act in a similar scenario. However the legal view need not have a complete perspective. Might we complain of injustice should the father be prosecuted and punished for his breach of the law? Perhaps, but as outlined above, such is the nature of the partial view of law. Its claim to supremacy and completeness brooks no argument from competing non legal norms. There can of course be exceptions allowed for; however, because of law's claim to both supremacy and comprehensiveness such exceptions or allowances must be explicitly provided for in order for the law to consider same as valid.

### *Hierarchy:*

Expanding upon the reasonableness/well groundedness distinction; for one to act reasonably involves a subjectively bounded but objectively assessed determination that one did the right thing, whereas to act in a well-grounded manner imports being norm compliant. Under the reasonableness assessment norm compliance represents a good defence to wrongness, as the rules are accepted, legitimate exceptions to acting reasonably. Conversely a norm conformance assessment is entirely

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<sup>274</sup> As much as any mortal view may be complete

objective and so conceivably may allow no exceptions, other than those it explicitly incorporates.

When a norm requires action alternate to that which is required by the balance of reasons *simpliciter*, Raz tells us the reasons for the rule “justify action despite those other reasons even though on the particular occasion concerned they do not override them.”<sup>275</sup> Here we have something of a mirror image of that which is proposed by Gardner, when he located justification firmly within the defensive. In that instance he was considering justification of defences for breaches of legal duties, his claim being; offering justification or having onus to do so admits wrongdoing because otherwise “what is one justifying?”<sup>276</sup> Here however Raz offers the basis for justifying one’s compliance with the norm in the face of conflicting requirements from a balance of reasons analysis. Gardner’s pithy - otherwise “what is one justifying?” can be likewise brought to bear here. Again both are comprehensible and consistent when one accepts the distinction of assessment types. Under Gardner’s analysis justification must be offered for acting in a manner not well grounded in reason (e.g. duty breach) while under what Raz is offering – although unenunciated and undeveloped – is an acceptance that justification must be offered for acting in a rule-compliant manner that is unreasonable (e.g. wrong).

Here we have two competing and distinct analyses or assessment types, with two complementary defensive positions potentially available for each in the distinction between reasonableness assessments versus well-groundedness assessments. While they are two alternate and perhaps competing assessment types it should not be considered that they are equally important. Given the fact that the whole purpose of such assessments is to assess the practical reasoning of a given agent and given the subsidiary and substitutionary position of norms compliance vis-a-vis such practical reasoning, we can see that a reasonableness assessment is

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<sup>275</sup> Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990) 75.

<sup>276</sup> John Gardner, ‘Justifications and Reasons’ Chp 5 *Offences and Defences* (Oxford University Press, 2008).



the more important of the two. This is because a reasonableness assessment involves the full and direct consideration of the rightness and or wrongness of a given agent, while a well-groundedness assessment merely gives us a proxy of same.

In the absence of the positional strength provided by the second order exclusionary aspect of norms, the question of whether one should engage in the norm act is a function of the relative first order strength of such reason – which is itself the outcome of “the requirements of various conflicting values”. Raz considers such analysis of first order weight is only pertinent in instances where conflicting non-excluded reasons apply. However, this is to take the positional weight of second order reasons too far. To do the wrong thing merely to remain compliant with the rule calls for justification.

We once again see Raz grappling with the imperfect or incomplete nature of a mere non-compliance assessment alone when he admits “If the addressee disobeys, the prescriber may admit that on one assessment he has done well, and yet he may maintain that though aware of this it was his intention that the addressee will obey the order and disregard conflicting reasons.”<sup>277</sup> This is of course because there are indeed two assessments at play.

Further the hierarchy of conformance with mandatory second order exclusionary norms as superior to compliance with the balance of reasons is flawed. Because such norms are for the purpose of easing practical reasoning they are substitutionary and subsidiary. They are tools for doing the right thing but by far the more important thing is to perform right action rather than slavishly comply with tools designed to promote the performance of right action. Therefore the hierarchy is actually

- 1) perform right action
- 2) comply with norms

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<sup>277</sup> Joseph Raz, *Practical Reasons and Norms*, (2nd edn Oxford University Press 1990) 84.

### *Feminist Critique:*

The criticism offered of Raz here and the solutions proffered make use of the concepts of reasonableness and objectivity. These are concepts that have been criticized themselves in feminist theory and as such it is apt to consider how compatible or otherwise the proposals around these concepts are with that school of jurisprudence.

### *Points of Agreement:*

In particular the ‘reasonable man’ standard (an obviously gendered and offensive formulation although now more commonly referred to as reasonable person) has been critiqued on a number of fronts. Firstly the fact that the reasonable person test is a construct of judges (a profession where women are significantly underrepresented and white, straight, middle class men are perhaps over represented) means the test derives from the particular prejudices and assumptions of that thin stratum of society. This position should find comfort in the concept of reasonableness the thesis is advancing because ‘reasonable’ here is subjectivized to the epistemic limits of the agent and assessed against how we as a community would have acted. This subjectivism may go some way to avoiding the need for a reasonable woman test as some propose and rather focus on the reasonable defendant;<sup>278</sup> irrespective of race, creed, gender sexuality etc. Under this view if reasonableness were to be a matter for criminal trial (and it will be argued that wrongness as a species of unreasonableness is the central concept for culpability assessments) then because it is a question of how the community would have acted in the agent’s shoes it would be a matter for the jury rather than the judge. Importantly it would be the standard that is created by the jury when such an issue is posed to them bypassing the potential of (male) judicial bias in the formulation of the standard.<sup>279</sup>

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<sup>278</sup> On the reasonable woman test cf Barbara Gutek, and Maureen O'Connor, ‘The Empirical Basis for the Reasonable Woman Standard’ (1995) *Journal of Social Issues* 151.

<sup>279</sup> An important issue considering the critique by Jacob Assaf “the jury still is instructed by the judge, who directs them as to what they may and may not consider in

This understanding of reasonableness also doesn't fall foul of the concern identified by Mayo Moran who states the reasonable person test "has also attracted substantial criticism from egalitarian critics and feminists insofar as it presupposes contested notions of 'normal' behaviour"<sup>280</sup> The reason why the conception of reasonableness proposed here may find favour with Moran is because 'normal' would here be a matter of fact (how would we have acted in their shoes) rather than law (applying a legal standard of reasonable person).

Hilaire Barnett notes that

[f]eminist legal method does not ignore, nor exclude, the necessity of predictability and certainty in law which is facilitated by the application of rules and principles. Nor, necessarily, does feminist legal method offer an exhaustive alternative to "traditional" legal methods. Rather, feminist legal method seeks to complement traditional legal method by incorporation of alternative views, experiences, perceptions and values"<sup>281</sup>

It is hoped that the more inclusive and subjectivized approach to reasonableness offered here may also facilitate a similar inclusion of alternate views, experiences etc. Another critique of the reasonable person test, in particular as it finds expression in American jurisprudence is provided by Jacob Assaf where he considers;

These levels address not only the characteristics that are examined, or not examined, and taken, or not taken, into account by the courts, but also the "pure" logical/rational implementation of the reasonable man standard, which is not necessarily required by the mere definition of reasonableness. The courts have exhibited a growing tendency to examine the question of reasonableness

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their decision and what factors and standards are relevant for their decision." In his work, 'Feminist Approaches to Tort Law Revisited' (2001) *Theoretical Inquiries in Law* 211, 221.

<sup>280</sup> Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press 2003)

<sup>281</sup> Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish 1998).

according to the Learned Hand formula, even though there are a variety of other methods to do so. For example, reasonableness can be examined in terms of the blameworthiness of certain behavior, of the flaw in that behavior (wrongfulness), etc. The standard feminist argument is that the courts very rarely choose to do so.”<sup>282</sup>

But again the feminist perspective should find common cause with the type of reasonableness proposed in this thesis and its use in blameworthiness determinations in particular. This is because the thesis is proposing a move away from rational calculus assessments alone and indeed relegates the importance of such assessments to secondary, as above.

Jacob Assaf continues;

There are feminist scholars who argue that the use of the reasonable person standard, which tries to create a high level of abstraction and objectivity and emotional detachment with regard to the case and its circumstances, is in fact also a male-oriented standard, which perpetuates the gender inequality in tort law<sup>283</sup>

Perhaps the view proposed here which is a combination of the male-oriented standard (under his model) of the calculus of norm conformance and the female-oriented standard of the subjectively bounded reality of the agent offers a conciliation to gendered understandings of assessment.

Carol Gilligan produced a significant study of moral psychology, *In a Different Voice*,<sup>284</sup> which Judith Baer describes as having among its conclusions that it “maintains that, while men’s moral development emphasizes “rights and noninterference,” women’s psychology is “distinctive in its greater orientation toward relationships and

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<sup>282</sup> Jacob Assaf ‘Feminist Approaches to Tort Law Revisited’ (2001) *Theoretical Inquiries in Law* 211, 221.

<sup>283</sup> Jacob Assaf ‘Feminist Approaches to Tort Law Revisited’ (2001) *Theoretical Inquiries in Law* 211, 221.

<sup>284</sup> Carol Gilligan, *In a Different Voice : Psychological Theory and Women's Development* (Harvard University Press, 1982) 151.

interdependence,” valuing “attachment” to others over “separation” from them.”<sup>285</sup> Again there is some scope of conciliation between the theory proposed by the thesis and this viewpoint in that although the focus on morality proposed is as an exercise of rationality - central to this exercise is the developed requirement of the incorporation of others’ interests into the question of what the right thing to do is. This could be said to incorporate something like ‘care’ into the question of reason responsiveness and find some common cause with the ‘ethic of care’ a la Linda McClain.<sup>286</sup>

### *Points of Departure?*

To the extent that this thesis seeks to understand the underlying principles and reasons for the crime/tort distinction rather than having any particular interest in the real world effect of these bodies of law or the distinction then it can be described as falling to be classed as conventional jurisprudence and as such susceptible to the charge identified by Judith Baer that “Conventional jurisprudence requires that adjudication “must be genuinely principled, resting ... on analysis and reasons quite transcending the immediate result that is achieved”... The “woman question,” on the other hand, exemplifies the result-oriented jurisprudence that conventional jurisprudence condemns.”<sup>287</sup> This means that the thesis will be to this extent at least occupying an irreconcilably distinct theoretical domain. This does not necessitate a conflict however in that while focusing on principles and reasons of course means it is not focusing in on outcomes and effects but there is no challenge to the desirability of the alternative approach inherent in this. They are distinct and irreconcilable endeavours but not necessarily competing. For example once the reasons and principles that underlie the distinction are brought to the fore and a greater understanding of same is arrived at then it is open to

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<sup>285</sup> Judith Baer, ‘Feminist Theory And The Law’ in Robert Goodin (ed) *The Oxford Handbook of Political Science* (Oxford University Press 2011).

<sup>286</sup> Linda McClain, ‘Care As A Public Value: Linking Responsibility, Resources, And Republicanism’ (2001) *Chicago-Kent Law Review*, 76.

<sup>287</sup> Judith Baer, ‘Feminist Theory And The Law’ in Robert Goodin (ed) *The Oxford Handbook of Political Science* (Oxford University Press 2011).

a feminist scholar to use these insights to challenge aspects of or the very existence of the distinction.

Further if this thesis adopted a feminist perspective or other critical viewpoints such as Marxism, or the critical legal studies movement then it would stray from its desired ideological neutrality as expressed in its methodology of being descriptive and pluralist.

*Conclusion:*

This chapter progressed the argument of the thesis by firstly offering justification for the choice of Joseph Raz and work within his theory as suitable for the analysis conducted by this thesis. Then the chapter explicated some of the nuanced and complex aspects of Raz's theory as it applies to practical reasoning in light of applicable law. The chapter considered the assessment of human action through use of what is described here as the 'Razian calculus'. The calculus was found to be incomplete. It was argued that the underdeveloped distinction between action that is well grounded in reason and action that is reasonable may provide a more complete analysis of human action; however, these assessments are distinct and dissociable. It was further argued that while distinct, a hierarchy of assessment types exists with reasonableness as superior to well-groundedness.

## CHAPTER 3: WRONGFULNESS AND WRONGNESS

### Introduction:

This chapter develops an understanding within Razian theory, as developed by John Gardner, of what it is to have done the wrong thing and what it is to have breached a duty. These are central concepts in criminal law and the law of torts because they are central concepts to the ascriptions of tortious responsibility and criminal blameworthiness. John Gardner is the chief scholar within Razian theory to have developed these important ascriptive concepts. He uses the terminology of acting ‘wrongfully’ to describe duty breaches and ‘wrongness’ to describe unjustified action; the chapter adopts these terms. This chapter makes use of central case torts and crimes as the focus of analysis in developing an understanding of core requirements for the ascriptions of criminal blameworthiness and tortious responsibility.

The chapter begins with wrongfulness. Building upon Gardner and Zipursky’s work on breaches of duty, a schema for understanding duty breaches is proposed as a division between Conduct Duties and Result Duties. Conduct Duties make requirements on an agent’s conduct whereas Result Duties make requirements on an agent to achieve or avoid certain results of their conduct. This model when applied as a tool of analysis of crime and tort illuminates an understanding of the crime/tort distinction that sees crime and tort occupying corollary positions vis-à-vis the centrality of Conduct Duties and Result Duties, respectively. Tort is centrally concerned with Result Duty breaches while Crime is centrally concerned with Conduct Duty breaches. This is a tempting basis for explaining the crime/tort distinction but it is proposed that this differing focus tracks rather than explains the foundation of the crime/tort distinction.

Regarding wrongness, Gardner built upon Razian theory to develop the concept of justified action. He proposed that the question of justification is not just a matter of what one did but why they did it such that the

explanatory reason must cohere with an extant applicable guiding reason; which in the case of a second order mandatory norm is action done in pursuit of the applicable norm. Under this view justification is understood as a species of being well grounded in reason and conversely being unjustified as a species of being not well-grounded in reason. This view is challenged as incorrect in its objectivist understanding; rather it is proposed that justified action is actually a type of acting reasonably, which following the argument of the previous chapter is subjectively bounded albeit objectively assessed.

The chapter concludes by offering Re'em Segev's developed concepts of 'goodness' and 'rightness' as a complementary route to understanding these divisions of well-groundedness versus reasonableness. The good thing to do being discernable with perfect knowledge is conformance with objective applicable guiding reason whereas the right thing to do under uncertainty is akin to the subjectively bounded albeit objectively assessed proposal offered here for reasonableness.

#### Linking Raz and Gardner:

Gardner, an ex-supervisee of Raz, carries the baton of Razian theory in his work in legal theory and particularly criminal law theorizing. He adopts the tools of Razian theory. Indeed this is so much so that I propose their work - as it relates to ascriptive theory at least- can be classed as a school. This link includes *inter alia* how Gardner adopts the conception of legal duties as protected reasons with the concomitant attribute of being second order exclusionary reasons (perhaps the chief development of Raz). This plays an important role in Gardner's understanding of acting wrongfully, which is - under his schema - the central requirement in both tortious and criminal responsibility and culpability respectively. Gardner also adopts the guiding/explanatory distinction favoured by Raz to develop his sophisticated arguments on the nature of justification (as will be explained later in this chapter). Most pertinently Gardner adopts wholesale what has earlier been described as the 'Razian calculus' vis-à-vis conflicts of reasons as his approach to recognise the applicable guiding reasons; an



approach which will be challenged and critiqued here. Moreover Gardner adopts the Razian practical reason paradigm in his development of a theory of defences with a consequential hierarchy based on the rationality of the defendant.<sup>288</sup>

Because of the intimate link and direct usage of Razian theory the same critiques as are levelled at Raz can be taken as leveled at Gardner, as it relates to his adoption of the practical reason framework. These have been examined in the previous chapter and will therefore not be revisited here. Note however the critique levelled by Leora Dahan-Katz concerning Gardner's emphasis on rationality where she considers that "the beating heart of justification lies in the realm of morality rather than in that of rationality."<sup>289</sup> And that the emphasis on reason to be "the overstated significance of rationality ... in the context of Gardner's analysis of the concept of justification"<sup>290</sup> To the extent that this thesis follows the Razian reasons approach adopted by Gardner and the concomitant emphasis on rationality then the proposal offered here could also be susceptible to such a critique however the identification of morality as a subset of rationality in the first chapter denudes Dahan-Katz of the force of some of her criticism and I suggest there may be more common ground between these positions, because of that, than her analysis allows.

#### Wrongfulness:

Gardner adopts the (admittedly somewhat cumbersome) terminology of 'wrongful' and 'wrong' to demonstrate the division between breaching a duty and doing the wrong thing, respectively, where wrongful action is action in breach of a duty while wrong action is unjustified action. Although the terminology is cumbersome, as a purpose of this thesis is to

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<sup>288</sup> See John Gardner, *Offences and Defences : Selected Essays in the Philosophy of Criminal Law*. (Oxford University Press, 2007) Chp 4.

<sup>289</sup> Leora Dahan-Katz, 'Justification, Rationality and Morality in John Gardner's Offences and Defences.' (2012) *Jerusalem Review of Legal Studies* 93.

<sup>290</sup> Leora Dahan-Katz, 'Justification, Rationality and Morality in John Gardner's Offences and Defences.' (2012) *Jerusalem Review of Legal Studies* 93.

build upon Razian theory – including correcting and advancing Gardner’s contribution – it is appropriate to continue usage of same.

A legal example to demonstrate the distinction between breaching a duty and doing the wrong thing is the *Vincent*<sup>291</sup> case. By way of summary, in order to protect his vessel from an oncoming storm the captain of the steamship *Reynolds* tied the ship up against a pier without the pier owner’s consent. The storm arrived - and because the ship was berthed - damage was done to the pier. This factual matrix demonstrates that the captain breached a duty owed to the pier owner not to damage their property but because of the circumstances the court determined that the captain in fact did the right thing or more accurately the Captain would have been wrong to do anything else, where per O’Brien J. ‘no master would have been justified in attempting to navigate his vessel, if he could avoid doing so’

Building upon Razian reasons, Gardner proposes justification to be built upon guiding and explanatory reasons.<sup>292</sup> Guiding reasons essentially being what one ought to do and explanatory reasons offered as an account of why one acted in a particular way. On this view justification (a combination of what one did and why one did it) resides in the coherence of guiding and explanatory reasons while dissonance between these two reasons gives rise to unjustified or wrong action. Furthermore, he defines fault as “a shortfall of virtue that consists in the performance of actions that are both unjustified and unexcused”<sup>293</sup> In adopting the above we may therefore analyse the actions of the captain of the *Reynolds* as having been wrongful but not wrong since he was justified in doing as he did. Moreover, no fault is attributable to the captain because having not performed unjustified or unexcused action the constituent elements of fault were not present. In other words, it may be said that just because the captain was faultless and was not wrong does not mean that he did not act wrongfully.

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<sup>291</sup> *Vincent v Lake Erie Transportation Co* [1910] 124 NW 221

<sup>292</sup> John Gardner, ‘Justifications and Reasons’ *Offences and Defences*, (Oxford University Press, 2007)

<sup>293</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 *The Review of Metaphysics* 95, 113.

### *Duty Breaches:*

Because the thesis seeks to understand and explain the crime/tort distinction this chapter will engage in an analysis of the nature and operation of duties at law with regard to central cases of the laws of torts and crime. Both criminal law and the law of tort require wrongful action (breaching duty) on the part of the defendant in order to impose a punishment in crime or a requirement to make reparations in tort. Both areas of law involve responding to breaches of duty; but which duties exactly are being breached?

Gardner has established a distinction between duties to succeed and duties to try.<sup>294</sup> A duty to succeed is a duty to actually  $\phi$  or not to  $\phi$  while a duty to try is to engage in conduct with the intention of  $\phi$ ing or not  $\phi$ ing. An example of a duty to succeed might be a duty to not harm another. A familiar form of a succeeding duty may be found in the Ten Commandments where an obligation such as ‘Thou Shalt Not Kill’ is stated. This duty can only be complied with by succeeding in not killing whereas a duty to try can be complied with by making an effort. The legal example for a duty to try which Gardner points to is the tortious ‘duty of care’. Under the rubric of duties to succeed/duties to try, he proposes that negligence is a hybrid trying/succeeding obligation; because the tort is only completed if the tortfeasor 1) failed to take adequate care and 2) did in fact injure, which he describes as “an obligation not to fail for want of trying”.<sup>295</sup>

Zipursky has independently established a similar distinction of duties which he calls duties of non-injury and duties of non-injuriousness.<sup>296</sup> To

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<sup>294</sup> This distinction is one which he has built upon and advanced through much of his later scholarship for example cf. John Gardner, ‘Say It with Flowers’ in *From Personal Life to Private Law* (Oxford University Press 2018) and in greater detail in John Gardner, ‘Obligations and Outcomes in the Law of Torts’ in *Torts and Other Wrongs* (Oxford University Press, 2019) and John Gardner, ‘That’s the Story of My Life’ in *From Personal Life to Private Law* (Oxford University Press 2018).

<sup>295</sup> John Gardner, ‘Obligations and Outcomes in the Law of Torts’ in Peter Cane and John Gardner (eds), *Relating to Responsibility*, (Hart Publishing 2001) 122

<sup>296</sup> Benjamin Zipursky, ‘Two Dimensions of Responsibility in Crime, Tort and Moral Luck’ (2008) 9 *Theoretical Inq. L.* 97

demonstrate the distinction between these duties it may be useful to consider road traffic incidents. Let us imagine three scenarios; 1) The most careful driver imaginable engaging in the most careful driving accidentally, unavoidably and through no fault of their own collides with a pedestrian, 2) The most careless and dangerous driver imaginable engages in dangerous driving but injures no one, 3) The same driver as in No.2 engages in the same driving but this time does in fact injure a pedestrian, to the same extent as the driver in No.1. Across these three scenarios we can describe the wrongfulness as the breaches of the two duties outlined by Zipursky as follows; the driver in No.1 has breached a duty of non-injury only. The driver in No.2 has breached a duty of non-injuriousness only and the driver in No.3 has breached both a duty of non-injury and a duty of non-injuriousness.

Zipursky and Gardner's schema are similar but not identical. In particular Gardner's duty to try imports a mental element which is not necessarily present in non-injurious conduct *simpliciter*. It is this mental aspect of the duty to try which has attracted criticism. Ori Herstein has argued that the conjunctive norm of Gardner's duty to try requiring that 'one must act with reasonable risk *and*, in so acting, intend to avert harm' may adequately explain a pre legal concept of taking care but does not characterize the legal duty of care which is determined by reference to the reasonableness (in the standard tortious usage here, not in the technical Razian manner developed earlier) of one's conduct irrespective of the presence or absence of an intention to conduct oneself reasonably.<sup>297</sup> Herstein provides the illuminating example of the grudge-bearing surgeon who uses his skills to amputate what he believes to be a healthy finger but unbeknownst to him the nurse had incorrectly marked the wrong finger for amputation and so he actually amputates the diseased (correct) digit. In this scenario the surgeon had the complete opposite of an intention to try to avert harm but his conduct was such that it met all objectively

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<sup>297</sup> Ori Herstein, 'Responsibility in Negligence: Why the Duty of Care is *not* a Duty "To Try"', (2010) *Can.J.L.&Juris* 403

determined reasonable standards of care thereby relieving him of any tortious liability. ‘To sum up ... failing to couple one’s conduct with intent or a view to avert harm is neither a necessary nor a sufficient condition for violating the duty of care in negligence.’<sup>298</sup>

We can more broadly classify the two rubrics of duties proposed by Zipursky and Gardner, and categorise the duty of non-injury and the duty to succeed as Result Duties while the duty of non-injuriousness and duty to try are Conduct Duties.<sup>299</sup> Although Zipursky’s duty of non-injury and Gardner’s duty to succeed cover similar ground and likewise with the duty of non-injuriousness and the duty to try, I adopt the broader classification of Result Duties and Conduct Duties because it does not prioritise a negative or positive form of the duties and operating at a slightly greater level of abstraction, gives clarity to the realm within which the duties operate.

*Conduct Duties and Result Duties:*

It is helpful at this juncture to consider the operation of Conduct Duty and Result Duty breaches along with wrongness through a reflection on central cases and issues in crime and tort. Let us consider tort law through the lenses of Conduct Duties and Result Duties and begin with a reflection on whether a Conduct Duty breach is typically sufficient to make out a tort. Is, for example, injuriousness alone or negligent conduct alone generally capable of grounding a tortious suit?<sup>300</sup> Relying upon and transposing the terminology more typically associated with criminal law we might phrase the query as to whether the orthodox canon admits such a thing as a victimless or inchoate tort?

It is uncontroversial to claim that a suit in tort does not normally arise in the absence of an injury. Tort centres on the maxim *Restitutio in Integrum* and thereby seeks to put the victim back in the position they would have

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<sup>298</sup> Ori Herstein, ‘Responsibility in Negligence: Why the Duty of Care is *not* a Duty “To Try”’, (2010) *Can.J.L.&Juris* 403, 413

<sup>299</sup> This is my own classification.

<sup>300</sup> The equivocation here with terms such as ‘typically’, ‘normally’ and ‘generally’ is consistent with the methodology of using central case positions.

been had the tort not occurred. Therefore to successfully make out a tort, typically one must demonstrate a breach of a Result Duty, because torts generally require an actualised harm. This is coherent with the imposition of reparative damages because in the absence of an injury done there would be nothing to repair.

While actionable *per se* torts do exist, in allowing such tortious claims, the courts are simply relieving the victim of having to prove damage to sustain a cause of action, i.e. they are assuming damage rather than establishing a conceptually troublesome entity of a victimless or inchoate tort.

The much criticised concept of punitive damages or damages awarded to nullify unjust enrichment has attracted such criticism, perhaps because of its dissonance with this core reparative function of the law of torts. In imposing such damages the courts are seeking to do something other than put the victim back in the position they would have been in had the tort not occurred. Rather, the courts appear to be responding to a breach of a Conduct duty as opposed to a breach of a Result duty and it may be this which makes such awards such outliers to orthodox tort theory.

The next consideration is whether a Result breach is sufficient to ground a claim in tort. From the above we can see that such a breach is a requirement but can it alone make out a tort? As an illustrative example let us examine the work Conduct Duty and Result Duty breaches do in the tort of negligence. Gardner describes negligence as a hybrid trying/succeeding obligation and to the extent that there is a Conduct Duty and a Result Duty aspect to negligence he is correct. However, accepting Herstein's criticism it seems that negligence superimposes upon the necessary Result Duty breach a second breach in the form of a Conduct Duty breach *simpliciter* (i.e. one without a mental element in the Conduct Duty of 'duty of care'). In requiring only an examination of what one did and not why they did it, negligence assessment makes use of only one limb of justification. It is thereby not engaged in an assessment of the wrongness of the Conduct Duty breach. The tort of negligence therefore

seems to be a combination of breaches of two duties *simpliciter*; Result Duties and Conduct Duties. In other words it is a purely ‘wrongfulness’ assessment.

Gardner proposes that negligence is not a variant of the duty to try (Conduct Duty) but that of the duty to succeed (Result Duty); i.e. it is a variation on strict liability, because the “moral essence of D’s tort is that she injured P”<sup>301</sup> while the negligence condition (i.e. Conduct Duty breach) is really a matter of establishing institutional fairness. Following this understanding of tort law, he proceeds to argue that removing the negligence condition, as in strict liability torts (*Rylands v Fletcher*)<sup>302</sup> doesn’t eat away at the moral foundations of the tort. This analysis is consistent with the centrality of actualised injury, i.e. a breach of a Result Duty as discussed above.

From the above we might make the claim that the standard position in tort law is that Conduct Duty breaches are typically insufficient to make out a tort e.g. “negligence in the air”<sup>303</sup> is not actionable, and that Result Duty breaches are necessary (and at times sufficient) for such a claim as no claim for reparation can be made in the absence of an injury. It is therefore reasonable to claim that tort is fundamentally concerned with Result Duty breaches rather than Conduct Duty breaches.

Adopting similar considerations for crime leads to a different conclusion. Let us begin with the query as to the sufficiency of a Conduct Duty breach to ground criminal liability. For tort we found Conduct Duty breaches to be standardly insufficient, at times unnecessary and for negligence at least adopted as a duty breach *simpliciter* and only secondary to a Result Duty breach. However, in crime the opposite is the case. Conduct Duty breaches alone fit comfortably and uncontroversially within the ambit of orthodox criminal law and theory. Considering briefly the three drivers scenarios

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<sup>301</sup> John Gardner, ‘Obligations and Outcomes in the Law of Torts’ in Peter Cane and John Gardner (eds), *Relating to Responsibility*, (Hart Publishing 2001)

<sup>302</sup> *Rylands v Fletcher* (1868) LR 3 HL 330

<sup>303</sup> Benjamin Zipursky, ‘Two Dimensions of Responsibility in Crime, Tort and Moral Luck’ (2008) 9 *Theoretical Inq. L.* 97

presented earlier: there was the careful driver who injured someone (No.1), the dangerous driver who injured no one (No.2) and the dangerous driver who *did* injure someone (No.3). The victimless driver scenario, No.2, while having caused no injury and therefore having breached no Result Duty may still attract criminal liability. As well as victimless crimes it is also worth noting that substantive crimes carry with them complementary inchoate versions of attempting/inciting/conspiring toward completion of same. It seems therefore that for criminal liability, Conduct Duty breaches alone can be sufficient.

What of the necessity of Result Duty breaches for crime? Result Duties do not appear to occupy the same necessary position for criminal law as they do in the law of torts. While in tort the standard position is that an actualised injury must be sustained there seems to be no similar requirement in criminal law. In the three sample breaches of the Result Duties/Conduct Duties outlined in the driver scenarios *supra*, both No.2 and No.3 are criminalised; dangerous driving is classed as a criminal offence, with or without causing injury. The fact that victimless and inchoate crimes fall uncontroversially within the ambit of orthodox criminal law indicates that there is not the same necessity for actualised injury as arises in the law of torts; therefore while the operation of the law of torts may be said to centre around Result Duty breaches, the same may not be said of criminal law. In this regard it seems that while the foundational duty breached in the law of torts is the Result kind, the foundational duty breached in criminal law appears to be the Conduct kind.

A sample completed *mala in se* crime such as an assault can further enlighten our analysis. The successful completion of such a crime involves breaching both a Conduct Duty and a Result Duty. The Conduct Duty breached is in Zipursky's terminology a non-injuriousness duty; in other words do not conduct yourself in a manner that will likely harm others, and the Result Duty breached is a duty not to harm others. So far, we have something that looks similar to the negligence discussed above,



the only difference seems a slightly more strenuous conduct duty is imposed. In the analysis of negligence we saw that it could be analysed as fundamentally resting on the Result Duty breach. However, this treatment doesn't map onto crime. First, the Conduct breach is doing something more than simply ensuring institutional fairness because this breach may be sufficient (depending on the intentions of the agent and/or the availability of defences) in and of itself to attract criminal responsibility, whereas for negligence, mere negligent conduct is not. Also, as for the Result Duty breach of injuring another it is not in itself sufficient to make out a crime in the absence of the necessary Conduct Duty breach.

David Brink offers a consistent analysis of the centrality of conduct to the makeup of criminal offences where he considers; "Every offense requires a conduct element. Only some offenses require result or attendant circumstance elements. For instance, driving while intoxicated is a conduct offense that does not require specific results, such as an accident or injury."<sup>304</sup>

The above analyses of duties may be summarised therefore as; a Conduct Duty breach can be a necessary and (for inchoate and victimless crimes, at least) sufficient condition for criminal liability, but a Result Duty breach can not; whereas for tort, a Result Duty breach can be a necessary and (for strict liability torts, at least) sufficient condition for tortious liability but a Conduct Duty breach can not. We may make the claim then that at the core of quintessential criminal assessment is Conduct Duty breaches and at the core of quintessential tortious assessment is Result Duty breaches. We may therefore say that crime and tort occupy corollary positions vis-a-vis the two types of duties.

The fact that tort focuses on Result Duty breaches and crime focuses on conduct Duty breaches presents us with an enticing possibility that this may explain the curious crime/tort distinction. Perhaps it is just a matter of crime being interested in one type of duty breach and tort being

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<sup>304</sup> David Brink, 'The Nature and Significance of Culpability', (2019) 13 Criminal Law and Philosophy 347, 359.

interested in another. While tempting, the breach of a Conduct duty alone doesn't seem to encapsulate the culpability generating nature of orthodox criminal behaviour, as developed in the wrongness section later in this chapter.

### Assessing Duty Breaches:

This section will examine the characteristics of duty breach assessments, highlighting salient qualities relating to the viewpoint and the state of knowledge of such assessments. Regarding the viewpoint; when assessing whether or not one has breached a duty, at law we do not typically consider the subjective desires or motivations of the agent. For example if we return to the grudge bearing surgeon encountered in the previous section we can see that the motivation of the surgeon to harm his patient was completely irrelevant to the question of whether or not he so harmed. While the surgeon may be said to have a subjectively odious view and intention we can only assess the actuality of the duty breach or otherwise by reference to the objective viewpoint. This is a position well known to private law in its objectivity and also somewhat in the *actus reus* element of crime which may be such objectively observable action. The relevant action in private law (or criminal *actus reus*) is not viewed from either the plaintiff/applicant perspective of the defendant's perspective but rather that of the community, which we refer to as the objective viewpoint.

Viewpoint is not the same as state of knowledge. As considered in the analysis of reasonableness in the Razian Theory chapter, an objective viewpoint may be brought to bear to a subjectively bounded state of knowledge. For duty breaches however, the state of knowledge considered is complete/perfect. It is not limited by, or referential to, what was known or unknown, or the Rumsfeldian known unknowns and unknown unknowns of any of the parties. It is an assessment conducted in the state of community knowledge. To return to another scenario highlighted earlier in the thesis, let us consider the trolley problem with the untrue sign/notice indicating to the agent that should she pull the lever the trolley will be diverted to an empty track thereby hurting no one, but in fact the

opposite was true. The question of what the agent should, all things considered, do is answered from the state of complete knowledge, which is that she should save the lives by not pulling the lever.

Returning to the Razian assessments of agency we saw that there was a troubling non alignment of his calculus;

1 <sup>st</sup> order	2 <sup>nd</sup> order	Actual Act	Conforming (C) or Non- Conforming (NC)?	Right (R) or Wrong (W)?
$\phi$	$\phi$	$\phi$	C	R
		$-\phi$	NC	W
$\phi$	$-\phi$	$\phi$	NC	$\sim W$
		$-\phi$	C	$\sim R$
$-\phi$	$\phi$	$\phi$	C	$\sim R$
		$-\phi$	NC	$\sim W$
$-\phi$	$-\phi$	$\phi$	NC	W
		$-\phi$	C	R

*Figure 6: Rightness Assessment*

We can see that the question of duty conformity or otherwise is in perfect alignment with that of well-groundedness in reason. This assessment has no gradience. The duty has either been conformed to or not. In the case of breaches it may have been breached with malice or in a completely unwitting manner. It matters not at all how or why or in pursuit of what aim or what motivations or desires were satisfied by such breaches, if any. It is therefore argued that duty breaches are a species of a well-groundedness assessment. It is a completely objective determination of the existence of a mandatory second order norm and whether or not an agent has conformed thereto.

Adopting the Razian description of reasons, legal duties are described as mandatory second order reasons and to be in breach of a legal duty is to act wrongfully. Because a duty breach is a species of agency that is not well-grounded in reason and as such is susceptible to an objective conformity determination - In the language of crime we might see this as the external observable aspect, i.e. the *actus reus* – it has no need to engage with defences, such as justification or excuse because the very notion of a defence admits the duty breach.

Criminal blameworthiness however certainly requires more. It centrally involves an examination of the availability of defences and it must consider the mental aspect (why they behaved as they did) before any such culpability can be arrived at. This is because a blameworthiness determination requires a consideration of the wrongness of the agency which was in non-conformance with the given duty, which we turn to now.

#### Wrongness:

As mentioned above, John Gardner working within Razian theory, has built upon Razian reasons, from which he has developed an understanding of significant concepts such as justification and wrongness, which is particularly pertinent to ascriptive theory. He has accomplished this by taking the distinction outlined by Raz between guiding and explanatory reasons and developing it into a full-bodied tool for understanding the criminal defences of justifications and excuses. Gardner adopts wholesale the framework of practical reasoning outlined in *Practical Reason and Norms*, such that he recognises the positional and internal weight differences that apply to reasons and the consequences of such differences in instances of conflict, as outlined in Chapter 2. For Gardner the legal norm which applies is understood as a protected reason and as such benefits from the concomitant attributes of such reasons, namely it is a second order exclusionary reason and will prevail by virtue of its positional strength in any conflict with first order reasons.<sup>305</sup> Under

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<sup>305</sup> E.g. “I endorse Joseph Raz’s view according to which the fact that one has an obligation to  $\phi$  is a protected reason to  $\phi$ , meaning a reason to  $\phi$  that is also a reason not

Gardner's model, justifications have a cancelling effect but do not cancel the reasons of the criminal prohibition, there merely cancel the protection that is afforded to that reason.<sup>306</sup> This cancelling of the protection then allows for the relevant reasons that apply to be assessed by their internal rather than their positional strength. However for Gardner the recognition of the guiding reasons that apply is done in complete fidelity to the Razian conception that such guiding reasons must be facts rather than beliefs and they must stand undefeated by other facts, as such he is committed to an objective recognition of guiding reasons; an understanding which is critiqued here. This section seeks to correct and develop Gardner's understanding of (un)justifiedness.

Like Raz, reading Gardner requires a certain amount of decoding because of the technical and dense nature of his writing.<sup>307</sup> It is apt therefore to engage in a brief exposition of his work through outlining the definitions of his terminology prior to engaging with and analysing his work which follows.

For Gardner an 'obligation' is understood as "no more and no less than a categorical mandatory reason"<sup>308</sup> and 'categorical' is held to apply to persons irrespective of prevailing personal goals,<sup>309</sup> while 'mandatory' denotes a reason that operates (at least on some occasions) to the partial or total exclusion of at least some countervailing reasons.<sup>310</sup> He conceives of a *malum in se* as a breach of obligation which exists apart from the law,<sup>311</sup> while a *malum prohibitum* is instead a new moral obligation

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to act for at least some reasons not to  $\phi$ ." In John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice.' (2011) *Law and Philosophy* 58, footnote.

<sup>306</sup> John Gardner, 'Justifications and Reasons' *Offences and Defences*, (Oxford University Press, 2007), 107.

<sup>307</sup> This description is not intended as pejorative, indeed density can be an admirable characteristic in philosophical writing.

<sup>308</sup> John Gardner, 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility*, (Hart Publishing 2001) 140.

<sup>309</sup> John Gardner, 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility*, (Hart Publishing 2001) 40.

<sup>310</sup> John Gardner, 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility*, (Hart Publishing 2001) 40.

<sup>311</sup> John Gardner, 'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility*, (Hart Publishing 2001) 121.

created by law.<sup>312</sup> ‘Consequences’ are understood as eventualities that follow an action and are causally connected to it,<sup>313</sup> and can be contrasted with ‘results’ which are instead causal constituents of an action; they do not follow the action but form part of it.<sup>314</sup> Apropos reasons and as briefly treated upon earlier, ‘guiding reasons’ are reasons that apply to one and bear on what one ought to do or believe, but may be overlooked or ignored, they are not reasons for which one so acts or believes.<sup>315</sup> Reasons for which one acts or believes are instead, ‘explanatory reasons’ which are logically related to guiding reasons as everyone who acts on it believes it to be a guiding reason but it may or may not be.<sup>316</sup>

Gardner’s work on justification and justifications are pertinent to this thesis and are built upon in this section but briefly, ‘partial justifications’ are held as prima facie reasons against one’s action or belief but are countered by some reasons in favour,<sup>317</sup> while complete justification arises when the reasons in favour are strong enough to prevail over the reasons against.<sup>318</sup> Excuses are understood by him as a form of incorrect justification because they are a justification of one’s belief that the action was justified; although it was not.<sup>319</sup>

Wrongdoing is understood as breaching a duty and associated with terms like committing wrongs, acting wrongfully etc.<sup>320</sup> while wrongness is made out by unjustifiedness.<sup>321</sup> Finally for this primer of his terminology, punishment is explained as a tool to rebalance reasons for the under

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<sup>312</sup> John Gardner, ‘Obligations and Outcomes in the Law of Torts’ in Peter Cane and John Gardner (eds), *Relating to Responsibility*, (Hart Publishing 2001) 121.

<sup>313</sup> John Gardner, ‘Obligations and Outcomes in the Law of Torts’ in Peter Cane and John Gardner (eds), *Relating to Responsibility*, (Hart Publishing 2001) 130.

<sup>314</sup> John Gardner, ‘Obligations and Outcomes in the Law of Torts’ in Peter Cane and John Gardner (eds), *Relating to Responsibility*, (Hart Publishing 2001) 130.

<sup>315</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008) 91.

<sup>316</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008) 91.

<sup>317</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008).

<sup>318</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008).

<sup>319</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008).

<sup>320</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 *The Review of Metaphysics* 95, 103.

<sup>321</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 *The Review of Metaphysics* 95, 103.

responsive; it adds the reasons against being punished to the already extant reasons against acting wrongly.<sup>322</sup>

*Justification:*

For Gardner we have seen that justification is something of a combined objective/subjective assessment where “No action or belief is justified unless it is true *both* that there was an applicable (guiding) reason for so acting or so believing *and* that this corresponded with the (explanatory) reason why the action was performed or the belief held.”<sup>323</sup> To recapitulate; he identifies wrong action as being unjustified action, and proposes justification to be built upon guiding and explanatory reasons. Guiding reasons essentially being what one ought to do and explanatory reasons offered as an account of why one acted in a particular way. The nature of justification is; 1) That there was an applicable guiding reason and 2) This corresponded with the explanatory reason.<sup>324</sup> The scope of unjustified action is broad and encompasses a gamut ranging from the trivial to the serious. Gardner reuses Raz’s example of knowing that the forecast is for rain and yet choosing to leave one’s umbrella at home as a scenario of unjustified and therefore wrong action.<sup>325</sup> On this view justification is not only a matter of what one did but also why they did it. It resides in the coherence of guiding and explanatory reasons while dissonance between these two reasons gives rise to unjustified or wrong action. Therefore, for him, there must exist an objectively determined guiding reason – such determination to be carried out entirely divorced from what the agent knew or didn’t know or was knowable or not to her, *and* the agent acted for that reason.

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<sup>322</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 *The Review of Metaphysics* 95.

<sup>323</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008), 94.

<sup>324</sup> John Gardner, ‘Justifications and Reasons’ *Offences and Defences*, (Oxford University Press, 2007).

<sup>325</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 *The Review of Metaphysics* 95.

Mark DSouza proposes the novel description of the commitment of certain theorists which he terms the ‘wrongness hypothesis’.<sup>326</sup> This is well described by Zachary Hoskins as the

Prominent view on which the key distinction between justifications and excuses is that justifications negate the wrongness of an offence, whereas excuses negate the agent’s blameworthiness for the offence but not the wrongness of the offence itself....[understood as]... As the Model Penal Code puts it, ‘To say that someone’s conduct is ‘justified’ ordinarily connotes that the conduct is thought to be right, or at least not undesirable’”<sup>327</sup>

Dsouza classifies Gardner along with Simester,<sup>328</sup> Husak<sup>329</sup> and Sendor<sup>330</sup> as falling to be understood as adherents of this hypothesis. When wrongness is understood in the objectivist hue of the actor having actually done something objectively and on an all things considered basis that is “at least not undesirable” then this categorisation is taken as correct, and provides a useful tool for contextualizing Gardner’s theory. The theory developed in this thesis will set itself as opposing that prominent view and so would be categorised by Dsouza with the minority and aligned with the positions of Marcia Baron<sup>331</sup> and Kent Greenawalt.<sup>332</sup> The thesis does so by proposing a subjectivized concept of reasonableness and thereby wrongness which does not have necessary recourse to such an all things considered view.

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<sup>326</sup> Mark Dsouza, *Rationale-Based Defences in Criminal Law* (Hart Publishing, 2017).

<sup>327</sup> Zachary Hoskins ‘Review of Mark Dsouza’s Rationale-Based Defences in Criminal Law’, (2020) *Criminal Law and Philosophy* 135.

<sup>328</sup> Andrew Simester, ‘On Justifications and Excuses’ in L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (Oxford, Oxford University Press, 2012) 99.

<sup>329</sup> Benjamin Sendor, ‘Mistakes of Fact: A Study in the Structure of Criminal Conduct’ (1990) 25 *Wake Forest Law Review* 707, 766.

<sup>330</sup> Doug Husak, ‘Justifications and the Criminal Liability of Accessories’ (1989) 80 *Journal of Criminal Law and Criminology* 491, 516–17.

<sup>331</sup> Marcia Baron, ‘Justifications and Excuses’ (2005) *Ohio State Journal of Criminal Law* 387,

<sup>332</sup> Kent Greenawalt, ‘Distinguishing Justifications from Excuses’ (1986) *Law and Contemporary Problems* 89.



It must be noted however that Dsouza's categorization is only successful insofar as it deals in the objectivity of justification. It does not mean that the defendant did not act wrongfully i.e. engage in wrongdoing (consider the captain of the *Vincent* earlier). Some have criticized Gardner for this. Consider Miriam Gur-Arye where she proposes "The examples of piercing, tattooing and consensual surgery reveal the problematic implications of Gardner's account that justifications do not negate wrongdoing."<sup>333</sup> This critique however is not successful in that it is permissions that are granted in such scenarios rather than defences being available. Permissions are not defences but rather are cancelling conditions. Cancelling conditions have the effect of limiting the scope of the relevant norm (in this case against assault/bodily interference) rather than offering a route to justifying a breach of the norm. The norm of, say assault, is not breached in the first place by the scenarios she highlights.

Having made clear that justification is not just a matter of what one did but also, why they did it. It is unfortunate Gardner didn't give this realization the full import it deserves, namely; it is an assessment of an agent's action upon their reasoning rather than an assessment of reasons and one's conformity thereto. To equate one with the other is problematic. Because it is an assessment of reasoning it is bounded by the subjective viewpoint such that only facts known (or knowable) to the agent are pertinent to assessing their reasoning. One's reasoning is bounded by one's own knowledge, not perfect knowledge or community knowledge. So, wrongness may be understood as unjustified agency or agency in pursuit of a defeated reason. Such wrongness may be made out in pursuit of a defeated first order reason or a defeated second order reason. In this way wrongness may, but need not necessarily be, made up of non compliance with a second order reason in the form of a legal duty.

Consider our grudge bearing surgeon. He has complied with his duty of care and brought about a beneficial result for his patient. However, he

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<sup>333</sup> Miriam Gur-Arye, 'On John Gardner's Justifications and Excuses' (2012) *Jerusalem Review of Legal Studies*, 82.

acted in pursuit of his vengeful desires, not in pursuit of the applicable obligations. In assessing the surgeon's agency then it could be said that there is a dissonance between the guiding and explanatory reasons; such dissonance constituting wrongness. So, it is not enough to just happen to be in conformity in order to be right, nor does it negate the agent's wrongness. Gardner is incorrect not to recognise the converse also holds such that where one happens to be in non-conformity but their actions were entirely justified, in other words where they came to as rational a conclusion as possible but were mistaken by virtue of some unknown knowledge they cannot be thought less of. My critique here finds common cause with a similar concern of Victor Tadros. He clearly identifies himself with a similar subjective viewpoint where he argues; "the defendant must act for the right reasons in breaching the criminal law, but that appearances can constitute reasons for action. Hence, even if things are not as they seem, the defendant may act for the right reasons, and this makes him justified rather than merely excused."<sup>334</sup>

The conformity assessment is 'objective' in the mortal and local sense in that it is bounded by the community viewpoint only and has no necessary reference to the subjective viewpoint. However, assessments of reasoning are necessarily bounded by the subjective viewpoint albeit assessed against the standard created by the community viewpoint. Therefore Gardner is wrong to suggest an agent who comes to as rationally sound a conclusion as possible should be thought of as engaging in unjustified action because of some knowledge unavailable to them (or perhaps anyone in the same situation) at the time. This is to confuse non-conformity with unjustifiedness. The former being a matter of well-groundedness or otherwise and thereby perfectly acceptable as an objective assessment the latter not so, because it is an assessment of reasoning, not reasons.

*Blemish:*

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<sup>334</sup> Victor Tadros, *Criminal Responsibility*, (Oxford University Press, 2005) 10.

The classically tragic figure is a recurring theme in Gardner's writing i.e. "the idea of a life unluckily blemished by wrongful actions that were performed without the slightest error" an example of which could be the captain of the *Vincent*<sup>335</sup> case discussed above. Remembering that the factual matrix demonstrates that the captain breached a duty owed to the pier owner not to damage the pier owner's property but because of the circumstances the court determined that the captain in fact did the right thing. So the captain came to a justified determination and acted upon it, but in so doing necessarily wronged the pier owner. Again to translate into Razian terms; the tragic figure will behave in a rationally perfect manner but in so doing not be well grounded in reason. Gardner considers the captain, although justified to be blemished by his wrongdoing. The reason why a rationally flawless wrongdoing is said to blemish our lives he claims flows from the nature of reasons and duties;

The question is why wrongdoing matters in the assessment of lives. Why is it the case that when wrongdoing is not avoided, it leaves an imperfection-what I have been calling a "blemish"-on the life of the wrongdoer? ... To get to the answer, one needs to begin by grasping a general truth about reasons. Reasons await full conformity. If one does not fully conform to a reason-if one does not do exactly what it is a reason to do-the reason does not evaporate. It does not evaporate even though one was justified in not conforming to it. It does not evaporate even though it is now too late fully to conform to it. Instead, it now counts as a reason for doing the next best thing, And failing that, the next best thing again, and so on.<sup>336</sup>

This concept of 'blemish' is somewhat troublesome. Under this description he seems to be equating the said blemish with what Raz describes as the force exerted by a reason indeed he goes on in the same writing to state "it still makes its force felt as a reason for me to regret that

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<sup>335</sup> *Vincent v Lake Erie Transportation Co* [1910] 124 NW 221.

<sup>336</sup> John Gardner, 'Wrongs and Faults' (2005) 59 *The Review of Metaphysics* 95, 103.

I did not do as I promised.”<sup>337</sup> Given reasons can apply to one entirely unbeknownst to the individual it seems reasonable to protest that under such a view our lives are hopelessly and overwhelmingly blemished; that we must all cut a tragic figure. Gardner foresees this objection and attempts to counter it with the distinction that while all reasons exert a force, non-mandatory and non-categorical reasons exert non-mandatory and non-categorical forces and therefore are “permanently vulnerable to ... abandonment.”<sup>338</sup> He thereby positions duties; understood as both categorical and mandatory (the non-conformance with which continues to exert a like force) as the central case of blemishing.

If blemishing is equated with exertion of force then it seems we must be primarily blemished from the outset and at best we can only work towards limiting/diminishing such blemish. This presents as an overly puritanical view. Gardner highlights the fact that a breached duty being unable to be fully conformed to thereafter such that even if the next best effort is made it leaves an enduring, permanent gap of force which cannot be expunged and thereby constitutes the blemish. He is still however claiming it is the reason exerting force which blemishes. This equates blemish with the force of reasons and therefore makes the concept of blemish redundant. Such equation also intuitively strikes a discordant note with how we standardly consider the concept of blemish as something extraordinary.

While the idea that reasons await conformity and any force exerted by reasons are of the type of reason i.e. mandatory reasons exert mandatory force is reasonable along with the claim that non-conformance still requires a next best effort and so we may go so far as to say the burden of the reason remains. However, to claim a life is blemished by such a burden is a stretch too far. Being burdened by reasons, or feeling their force is just an aspect of being rational. Rather, we may claim no more than a breach of a duty is a non-conformance with an applicable guiding reason and thereby may be considered as behaviour objectively not well grounded in

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<sup>337</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 *The Review of Metaphysics* 95, 104.

<sup>338</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 *The Review of Metaphysics* 95.

reason. The fact that the non-conformance is with a mandatory reason enables the community to *mandate* the next best conformity but all of this analysis can be undertaken without any necessary moral consideration. Gardner does not successfully make out a moralising force of ‘blemish’ (i.e. force of reasons) from mere non-conformance with a mandatory and categorical reason. This is not to say a breach may not be immoral, it is just to highlight it need not necessarily be so.

Gardner outlines what he considers those arguing from a control perspective would say i.e. those who claim an agent can only be morally blemished by wrongdoing under their control.

what is needed, the story goes, is some epistemic tweak built into the very fabric of practical rationality, such that those who act on what they rationally hold to be the balance of reasons should be regarded as acting on the balance of reasons (and as doing no wrong). Or something like that. Again you will not be surprised to learn that I regard this tweaking as a serious mistake. It is one thing to have a reason to defend oneself and quite another to have every reason to believe one has a reason to defend oneself that in reality one does not have (e.g. because one has strayed accidentally and without any warning onto the set of an action movie). The first opens the way to justifying one’s act of self-defence. The second opens the way to excusing it. Thus, sometimes, even though we are epistemically faultless, we cannot be aware of what we would need to be aware of in order to perform a justified action. In that case the most we can hope for is an excuse. That takes us down a peg, morally speaking, because although it testifies to our rational competence, it also points to a rational error, we acted for a non-existent reason, albeit one that we were justified in holding to exist.<sup>339</sup>

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<sup>339</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008) 87.

This argument has a number of difficulties. The first is the premise that wrongdoing – understood as nonconformity with reason – blemishes our lives. By use of the term ‘wrongdoing’ to describe such non conformance the rhetorical advantage is with Gardner on this point but when one considers wrongdoing is essentially non conformity with an applicable guiding reason we may denude the rhetorical advantage somewhat. Gardner’s premise is that non conformity blemishes; having shown blemish to be equatable with the ordinary force of reasons and thereby its redundancy the initial premise from which he proposes his argument is unproven.

The other difficulty arises - also flowing from the original flaw - in the critiquing phrase “those who act on what they rationally hold to be the balance of reasons should be regarded as acting on the balance of reasons (and as doing no wrong).”<sup>340</sup> The difficulty here is that moral blemishes are implied as the exclusive preserve of non-conformity with reasons. While recognising a similar distinction as Raz’s, namely behaving reasonably and behaving in a manner well-grounded in reason he does not allow for the possibility that blemishes may be attracted by unreasonableness as well or indeed instead of non-conforming behaviour.

The idea that epistemically faultless behaviour is insufficient protection against blemishes and indeed as capable of being considered second rate seems counter intuitive and from that perspective at least something like a control view has the advantage.

#### Assessing Wrongness:

Fundamental to Gardner’s understanding of the criminal law is that it is only;

secondarily a vehicle for condemnation, deterrence, and punishment. It is primarily a vehicle for the public identification of wrongdoing (by certain standards of evidence and procedure)

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<sup>340</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008) 87.

and for responsible agents, whose wrongs have been thus identified, to *answer for* their wrongs by offering justifications and excuses for having committed them. By calling this latter function ‘primary’ I do not mean to suggest that it is socially more important. I mean that the proper execution of the other functions depends upon it. Criminal law can be a proper vehicle for condemnation, deterrence and punishment only because it is a vehicle for responsible agents to answer for their wrongs.<sup>341</sup>

This claim sees wrongdoing (breaching of duties) as a necessary trigger for an examination of the justified or otherwise nature of the behaviour, which thereafter may attract condemnation/punishment. In other words he outlines the process of;

Step 1) Wrongdoing

Step 2) Examination of wrongness or otherwise

Step 3) Condemnation/punishment

Given this process, his claim that “Criminal law can be a proper vehicle for condemnation, deterrence and punishment only because it is a vehicle for responsible agents to answer for their wrongs.”<sup>342</sup> identifies the second step as a necessary stage before condemnation/punishment but it is worthy of note that it remains unclear whether - under this framework - it is the wrongdoing or the wrongness, or some combination, which attracts said condemnation.

We might translate Gardner’s analysis back into Razian terminology (upon whose work Gardner’s is so heavily indebted) as a claim that non-conformance with an applicable guiding reason i.e. behaviour not well grounded in reason triggers an analysis of the reasonableness of the

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<sup>341</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008) 80.

<sup>342</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008) 80.

behaviour i.e. whether the agent was behaving reasonably or not, which may then result in condemnation i.e.

Step 1) Well groundedness assessment

Step 2) Reasonableness assessment

Step 3) Condemnation

This ordering is consistent with the argument advanced in the chapter on Razian theory that the hierarchy of rational action is 1) perform right action and 2) conform with norms. While the above staging schema has the norm conformance assessment as the first stage this is not to suggest it is of greater importance. In fact the very position as Step 1 highlights the lesser importance it holds because it is the basic threshold to be met in order to proceed to step 2 prior to condemnation.

Gardner accepts the limits and/or fallibility of rules by admitting “consequently, of course, the price of following the rule is sometimes that one does not act as the underlying reasons apart from the rule would have one act.” He argues for compliance on the basis of probability i.e. following the rule one is more likely to be right than wrong. This is a concession consistent with the criticized aspect of Razian theory outlined earlier.

We have discerned two principal assessments of agency available in Razian theory; namely determinations of well-groundedness and reasonableness. Because applicable guiding reasons are not subjectively created and exist objectively outside of whether or not a given agent recognises such reasons (i.e. they are facts) conformity or otherwise with said reasons is a matter susceptible to purely objective assessments. In contrast to this position explanatory reasons are subjectively created; they are offered up by a subject to explain their agency i.e. why they acted as they did. These reasons are relevant and indeed important in assessing agency because while conformity with guiding reasons can be determined objectively and thereby without necessary reference to a subjective view



any assessment of whether or not an agent acted reasonably must necessarily include and be informed by the subjective view and the subjectively created explanatory reasons. We have determined assessments of agents' reasonableness or otherwise must adopt the epistemic limits of the subjective viewpoint but it is not thereby limited to the subject's belief of guiding reasons, rather discernment of such reasons remains firmly the preserve of the objective viewpoint albeit such viewpoint necessarily adopting the same epistemic bounds as the subject at the time of the agency such assessment is considering.

These two assessment types are dissociable. Such dissociability leads Raz to a conundrum as how to assess such agency in terms of being right or wrong. This distinction being of foundational import to ascriptive theory it is important to ensure a clear grasp of distinguishing right agency from wrong agency or good agency from bad agency. Here Gardnerian justification helps us. For an agent to be justified she must act for an applicable guiding reason. Justification, Gardner tells us requires more than conformity with a given reason; rather compliance is necessary. It is insufficient for an agent to unwittingly conform by chance, they must behave/act for the pertinent reason thereby complying with same. For Gardner however unjustified action is wrong action such that a fully objective determination of applicable guiding reasons without reference to the subjective viewpoint must occur and if the agent acted *for* such a reason we may assess their agency as right or justified. His error here is to conflate a well-grounded assessment with a rational assessment. Assessments of justification or otherwise are assessments of whether or not they acted reasonably not whether or not they were well grounded in reason although they may well be so well grounded in their reasonableness.

If to be unjustified is to be wrong it is a determination that the agent fell short of our expectations of her but how could we possibly expect an agent to do other than behave in as reasonable manner as possible? How can we

look down upon someone who came to as perfectly rational a conclusion as anyone would?

Is mere non-conformance sufficient for a determination of wrongness or is something more deliberate like contravention required? The first thing to note about the two is the obvious objective/subjective divide such that conformity can arise in an unwitting entirely non-deliberate manner and is therefore susceptible to a purely objective assessment. The agent need not have knowledge of the applicable reason with which she conforms; if she does have such knowledge and acts for that reason we may say she does more than conform with the reason, she complies with it. Conversely an agent need not have knowledge of an applicable guiding reason with which she is in non-conformity but if she does have such knowledge and acts against said reason we may say she does more than merely non-conform; she contravenes it.

In this light contravention takes on a deeply subjective hue. Is such determination of contravention an entirely subjective matter? Is it the case that only if an agent has themselves correctly identified the undefeated guiding reason and thereafter acts contrary to it that she has contravened it? No. Remembering guiding reasons as facts the agent must be aware of the fact but they need not have correctly determined its import as the applicable undefeated guiding reason before acting contrary to it to be assessed as acting in contravention. It is sufficient that she be aware of the fact which is the guiding reason. This is why we may say assessments of rationality are subjectively bounded not that they are wholly subjectively determined. We don't take the subjects reasoning as good or right simply because they had reason to do as they did or simply because they failed to grasp the full import of the guiding reason they contravened as that would be to put the cart before the horse. Rather it is an assessment *of* the agent's rationality precisely because it does not adopt the agent's reasoning on its face. In conducting such assessment we do not take on the agent's world view or ideological perspective, we simply take on the agent's actual

viewpoint; the facts that were available to her at the time she exercised the agency which is being assessed.

So while wrongness may be understood as agency in pursuit of a defeated reason or contravention of a relevant guiding reason the agent need not subjectively consider themselves to have been acting for a defeated reason or contravening an undefeated one. In other words they need not understand themselves as being wrong. The wrongness of their agency is an assessment of the reasonableness of their actions conducted against an objective measure. In this way it is a post hoc adjudicative position.

Following the above we may arrive at a definition of wrongness as follows; Wrongness is a special type of unreasonableness in the form of unjustified agency; such unreasonableness being made out by the agent acting for a reason which is determined by an objective analysis, bounded by the agent's subjective viewpoint, to have been defeated. Further we can see that while crime and tort may occupy corollary positions vis-à-vis Conduct Duties and Result Duties because of the necessary element of wrongness for crime such distinction seems to merely track rather than explain the crime/tort distinction.

#### *Goodness and Rightness:*

For this section the thesis will trespass dangerously into the field of pure philosophy to consider questions of goodness and rightness. However it is pertinent to do so as it has some relevance to the questions and arguments pursued throughout. Re'em Segev presents an analysis distinguishing between the good and the right, which seems to be addressing similar issues to the distinction developed in this thesis between Razian reasonableness and well-groundedness, albeit from a different perspective.<sup>343</sup> He does so by distinguishing between two viewpoints; that of perfect knowledge and that of uncertainty. Depending on the viewpoint and the state of one's knowledge the relevant normative concept will have

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<sup>343</sup> Re'em Segev, 'Justification Under Uncertainty', (2012) 31 Law and Philosophy 523.

what he terms as two aspects; determining what is right under conditions of perfect knowledge is the ‘ideal aspect’ while determining what is right under uncertainty, the ‘pragmatic aspect’;

The ideal aspect, which is concerned with the constitutive feature of the normative standard, and the pragmatic aspect, which determines the correct action under uncertainty (and thus provides guidance for an agent in the face of uncertainty and a criterion for the evaluation of the action of such an agent, before or after the performance of the action).<sup>344</sup>

He appears to be indicating that the ideal aspect can be useful in legal assessments for questions of conformity or otherwise;

it does not apply, it seems to me, in a public common (administrative or constitutional) law case. Consider, for example, a case in which the legality of the action of a public official is disputed. Assume further that the action of the public official is legal according to her (justified) belief (concerning a non-legal fact that is legally significant according to the applicable legal standard), but that it turns out that this belief was mistaken. It seems clear that there is no consideration against overturning the decision due to the (justified) belief of the agent – the public official – since the pertinent question is not whether or not to impose a (criminal) punishment on the official.<sup>345</sup>

He is somewhat undecided however about the application of this distinction to tort and proceeds on the shaky foundations of severity of consequences as the distinguisher for when the pragmatic and when the ideal aspect ought to be employed. He considers that because tort has less severe consequences the use of the ideal aspect is more tolerable; however it is proposed that the distinction is more substantial than that and is in fact

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<sup>344</sup> Re'em Segev, 'Justification Under Uncertainty', (2012) 31 Law and Philosophy 523, 526.

<sup>345</sup> Re'em Segev, 'Justification Under Uncertainty', (2012) 31 Law and Philosophy 523, 550.

a difference in kind – not just two aspects. The question of duty breach is – like the administrative official above– an objective assessment and as such conducted from the vantage of perfect knowledge. It is not merely a question of degree, tolerating something undesirable.

Another way of thinking about the wrongfulness/wrongness distinction is to consider the Re'em Segev's analysis of operating under uncertainty where he considers;

The objective conception is appropriate for the ideal aspect that answers the question of moral or legal validity or the (proper) content of morality and law, whereas the subjective conception is appropriate with respect to the pragmatic aspect which answers the question of whether an action is compatible with the pertinent normative standard in the face of uncertainty.<sup>346</sup>

Segev's discussion is nuanced and niche, focusing as he does on mistake vis-à-vis non normative facts; he assumes that the relevant agent acting under uncertainty correctly discerns the applicable normative standard and is guided by it. The contrasting scenarios he provides are

Type A) subjectively but not objectively justified action and

Type B) objectively but not subjectively justified action

These types are often referred to elsewhere in the literature as mistaken justification and unwitting justification respectively. If we consider the scenario of an agent encouraging a patient to drink from a cup. If Agent believes the cup to contain medicine although it in fact contains poison then we have a Type A situation. Conversely if Agent believes the cup to contain poison and in fact it contains medicine we have Type B.

His argument is that both the objective and subjective conceptions are correct in their understanding of their relevant aspect of justification but incorrect in their claim to exclusivity. He admits that the ideal aspect "is

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<sup>346</sup> Re'em Segev, 'Justification Under Uncertainty', (2012) 31 Law and Philosophy 523, 562.

a basic sense of a normative moral concept, a crucial part of the answer to the question what should a person do.”<sup>347</sup> Importantly however it is “part of” the answer not the exclusive answer. The agent he is concerned with has the aspiration to “act in a way that properly reflects the correct moral standard and the actual state of affairs.”<sup>348</sup> And so there is no claim that the subjective understanding is creative of morality, this being the role of the objective conception which is limited under his view to the ideal aspect whereas the subjective conception, limited to the pragmatic aspect does provide an evaluation purpose. The important understanding here being that “The different aspects of normative moral concepts, the ideal and the pragmatic, are not competing, since each has a different role.”<sup>349</sup> This argument against exclusivity has an inherent dissociability which coheres neatly with the theory pursued by this thesis. Perhaps some translation is available such that an agent being well grounded in reason may be described as having done the good thing whereas an agent acting reasonably may be described as having done the right thing.

Conclusion:

This chapter developed an understanding of the concepts of breaching a duty and wrongness within Razian theory. It was argued that duty breaches come in two varieties, Conduct Duties and Result Duties, and that these duties occupy corollary positions in crime and tort. While this offered a tempting explanation of the crime/tort distinction it was argued that this difference of priority didn’t get to the root of the distinction but merely tracked it.

Regarding wrongness, it was argued that it is a species of ‘unreasonableness’ rather than ‘not well-groundedness’ and as such is subjectively bounded albeit objectively assessed. It is this subjectivity that

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<sup>347</sup> Re’em Segev, ‘Justification Under Uncertainty’, (2012) 31 Law and Philosophy 523, 539.

<sup>348</sup> Re’em Segev, ‘Justification Under Uncertainty’, (2012) 31 Law and Philosophy 523, 540.

<sup>349</sup> Re’em Segev, ‘Justification Under Uncertainty’, (2012) 31 Law and Philosophy 523, 541.

gives it its moral evaluative force as it is a question of the quality of agency (i.e. rightness of agency in light of relevant norms) rather than its objective conformity (i.e. conformance of agency with applicable norms).

Finally, Re'em Segev's conceptions of 'goodness' and 'rightness' were offered as a complementary way of understanding the divisions advanced and developed within the thesis of reasonableness and well-groundedness.

## CHAPTER 4: ASCRIPTIVE AUDIENCES

### Introduction:

This chapter seeks to discern the relevant ascriptive audiences for tortious responsibility and criminal blameworthiness, in other words to determine who is susceptible to ascriptions of responsibility or blameworthiness at law. It does so because if these audiences are distinct it may tell us something about the crime/tort distinction itself.

The chapter uses defences as a route to ascertaining the relevant ascriptive audiences because when we know who is not counted as susceptible to ascriptions of responsibility or blameworthiness it gives us insight into those who *are* counted as susceptible. Engaging with the philosophy of the structure of criminal defences a categorization is proposed that such defences can be grouped as either exculpatory or non-exculpatory. Exculpatory defences are understood as encompassing the standard division of justificatory and excusatory defences, while non-exculpatory defences exclude classes of persons beyond the writ of ascriptive assessments. Within non-exculpatory defences there are a further two subdivisions of public policy non-exculpatory defences -which includes double jeopardy and diplomatic immunity - and Non Public policy non-exculpatory defences such as that afforded to the young and the insane. When this is so understood it is argued that the division elucidates the relevant ascriptive practice vis-à-vis blameworthiness is defence inclusive and the relevant ascriptive audience for blameworthiness as those who engage in voluntary action and as such exercise agency proper.

While there is significant scholarly work produced on the theory of the structure of criminal defences the same is not true for tortious defences, for which there is a dearth of literature.<sup>350</sup> This area of legal theory has

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<sup>350</sup>Cf Marcia Baron 'The Standard of the Reasonable Person in the Criminal Law' in R.A. Duff, L. Farmer, S. Marshall, M. Renzo, and V. Tadros (eds), *The Structures of the Criminal Law* (Oxford University Press, 2012). Mitchell Berman, 'Justification and



been brought to the fore by the recent work of James Goudkamp. Given his central role in developing this strand of academic inquiry this chapter briefly details some of his more significant claims, in particular his division between denials – which deny an element of the tort and defences which accept the commission of the tort but seek to block liability. Ultimately the chapter builds upon Goudkamp’s division to argue that there are no defences as such in tort merely denials. In other words those which have traditionally been considered ‘defences’ are in fact merely denials in that all so called defences in tort law are categorizable as denials of an element of the relevant tort. When this is so understood it is argued that the division elucidates the relevant ascriptive practice vis-à-vis responsibility is not defence inclusive and the relevant ascriptive audience for responsibility is those who engage in Non-Voluntary action and up, i.e. merely attributable agency.

### PART I - CRIME

#### *Blameworthiness of What/Whom?:*

In attempting to understand who or what may be deemed blameworthy it is appropriate to remain as agnostic as possible and narrow in step by step upon the relevant audiences at play. It is tentatively presumed that only human actors may appropriately be described as blameworthy, however there is precedent for a broader category including natural forces and animals. There is therefore something of a burden to be met in limiting the

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Excuse, Law and Morality’ (2003) Duke Law Journal 1. Kent Greenawalt, ‘The Perplexing Borders of Justification and Excuse’ (1984) Colorado Law Review 1897. Jeremy Horder, *Excusing Crime* (Oxford University Press 2004). Victoria Nourse, ‘After the Reasonable Man: Getting over the Subjectivity/Objectivity Question’ (2008) New Criminal Law Review 34. Paul Robinson, ‘Competing Theories of Justification: Deeds v Reasons’ in A. Simester and A. Smith (eds) *Harm and Culpability* (Oxford University Press 1996). Simester, A. ‘On Justifications and Excuses’ in L. Zedner and J. Roberts (eds) *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012). Kenneth Simons, ‘Exploring the Intricacies of the Lesser Evils Defense’ (2005) Law and Philosophy 645. Peter Westen, ‘An Attitudinal Theory of Excuse’ (2006) Law and Philosophy 289. Peter Westen, ‘Individualizing the Reasonable Person in Criminal Law’ (2008) Criminal Law and Philosophy 137.

focus to human actors. The burden however is not taken to be a very onerous one or one set at a high level but it is relevant to at least address it before moving on, which I propose to do now.

Herodotus records in his *Histories* that Xerxes, following in Darius's footsteps launched the second (also failed) Persian attempt to conquer the Greeks. The invasion took the natural route across the Hellespont, modernly known as the intercontinental straits at the Dardanelles. Having constructed two pontoon bridges to allow his army to cross, a storm arose destroying both constructions. The king of kings was furious and as Herodotus recounts;

“So when Xerxes heard of it he was full of wrath, and straightway gave orders that the Hellespont should receive three hundred lashes, and that a pair of fetters should be cast into it. Nay, I have even heard it said, that he bade the branders take their irons and therewith brand the Hellespont. It is certain that he commanded those who scourge the waters to utter, as they lashed them, these barbarian and wicked words: “Thou bitter water, thy lord lays on thee this punishment because thou hast wronged him without a cause, having suffered no evil at his hands. Verily King Xerxes will cross thee, whether thou wilt or no. Well dost thou deserve that no man should honour thee with sacrifice; for thou art of a truth a treacherous and unsavoury river,”: While the sea was thus punished by his orders, he likewise commanded that the overseers of the work should lose their heads.”<sup>351</sup>

It is therefore not unprecedented in the long history of civilization that punishment should be inflicted upon the natural world. It is interesting to note that the blame rests squarely with the raging waters while the overseers seem to have lost their heads as almost an aside, for something closer to incompetence. The reactive attitude and with it the punishment is directly focused on the straits. In a universe where features of nature are

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<sup>351</sup> Herodotus, *The Histories*, Book VII Chp. 35 tr. George Rawlinson, (Alfred A Knopf, New York 1997) 525.

imbued with divine personality there is some (audacious) sense to such punishment, and indeed Herodotus's assessment of the "wickedness" of such punishment presumably flows from the same acceptance of the existence of such personality. While such accounts can seem at first blush, as anachronistic and superstitious, they are not without their modern counterparts. Locally of course in Celtic spirituality nature is indeed imbued with divinity; albeit in the modern iteration a monotheistic divinity, and pertinently for this thesis there is a well settled legal notion of an 'Act of God'. Storms, damage by lightning strikes, floods etc. all fall to be classed as acts of God with very real legal significance especially in terms of insurance recovery. So, while there is a vestigial but real legal understanding of Acts of God, punishment or blame is understood to be incapable of being attracted by such things. While we may regret the oncoming storm or the rough seas, with the exception of historical eccentricities such as above no blame is attracted by the seas or the storms even in the face of great damage done by these and like Acts of God.

We can reasonably quickly dismiss the idea of natural acts falling within the purview of blaming institutions; however, animals pose a greater challenge because in the recorded legal history of Europe criminal trials of animals were practiced far longer than not practiced. Hampton Carson provides a neat summary and introduction to the animal trial.<sup>352</sup> Relying heavily upon Edward Payson Evans's authoritative work he notes records of animal trials stretching from the trial of moles in 824 in the Italian valley of Aosta right up to the trial of a fierce, murderer-abetting dog in Switzerland in 1906. There is therefore what appears to be a persistent and pervasive practice of trying animals for criminal misconduct. To choose one, in "1750 a female donkey was acquitted of charges of bestiality due to witnesses to the animal's virtue and good behaviour while her co-

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<sup>352</sup> Hampton Carson, 'The Trial of Animals and Insects. A Little Known Chapter of Mediæval Jurisprudence', (1917) 56;5 Proceedings of the American Philosophical Society, 410.

accused human was sentenced to death.”<sup>353</sup> More recently however Piers Beirne makes a compelling argument that while animal trials were a feature of continental jurisprudence there is little hard evidence to suggest they were an aspect of the common law.<sup>354</sup> In fact the practice at common law until its abolishment in 1846 was not to subject the animal to criminal trial but rather the application of the law of deodands, which Beirne details as follows;

From at least the early thirteenth century, when the rules of deodand (Latin *deo dandum*: "needing to be given to God") were first documented, the English eyre and assize courts developed the Anglo-Saxon doctrine of *noxae deditio*. One leading rationale of the deodand was stated by the great jurist Coke thus: “Deodands...when any moveable thing inanimate, or beast animate, doe move to, or cause the untimely death of any reasonable creature by mischance...[shall be] grounded upon the law of God”... In effect, in the case of an animal who had accidentally caused a human’s death, the animal’s owner had to give her assessed value in coin to the royal exchequer which then apparently passed the sum on to some charitable or pious purpose.<sup>355</sup>

While accepting that the notion of trying animals in a criminal forum is not unknown to law in Europe I shall rely upon the in-depth analysis of Beirne that they are not really a feature of the history of the common law and in any event are modernly understood to be entirely inappropriate. I shall therefore proceed on the *currently* uncontroversial basis that assessments of criminality and therefore legal blame are restricted to

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<sup>353</sup> Srivastava A, ‘Mean, dangerous, and uncontrollable beasts: Mediaeval Animal Trials’ (2007) 40(1) *Mosaic : A Journal for the Interdisciplinary Study of Literature*, 127-143.

<sup>354</sup> Piers Beirne, ‘A note on the facticity of animal trials in early modern Britain; or, the curious prosecution of farmer Carter’s dog for murder’, (2011) 55 *Crime Law Soc Change* 359.

<sup>355</sup> Piers Beirne, ‘A note on the facticity of animal trials in early modern Britain; or, the curious prosecution of farmer Carter’s dog for murder’, (2011) 55 *Crime Law Soc Change* 359, 360.

human actors. Having identified such species-specific restriction let us now proceed to consider whether or not all humans are susceptible to such blameworthiness/culpability. Criminal defences can provide us with an indication of who is not susceptible to culpability ascriptions, or in other words not within the ascriptive audience by relying on a defence not related to the act they committed but rather by virtue of their membership of a certain class excluded from culpability ascriptions; as the next section will develop.

Defences Exposition:

Peter Westen claims that his theory of excuses “derives criminal excuses from their converse, i.e., criminal culpability, and in doing so illuminates the nature of criminal culpability.”<sup>356</sup> He highlights here the value an examination of defences provides in getting at an understanding of substantive culpability, because if we understand the conditions of being deemed not culpable then it enlightens the conditions and limits of being deemed culpable. This section will attempt to discern the class of addressees, or audience if you will, of culpability ascriptions, as determined in the criminal law.

Defences are a central consideration of the ascription of blameworthiness because they go to the root of faulty conduct or blameworthy conduct. In criminal proceedings without a consideration of the applicability or otherwise of defences there would be an incomplete picture. The overall assessment of blameworthiness requires more than a mere proof of the elements of a particular offence. Even if the *actus reus* and importantly the *mens rea* can be proved by the prosecution then we have proof of the offence having been committed, but no more; and while the *mens rea* is certainly doing moral work in this calculation it is not the whole picture.

D’Souza adopts different interpretations of the terminology ‘culpability’ and ‘liability’ than used in this thesis however looking beyond such use

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<sup>356</sup> Peter Westen, ‘An Attitudinal Theory of Excuse’, (2006) 25 Law and Philosophy 289, 353.

we can still see the same concern for an examination of defences prior to a complete (what is termed in the thesis as ‘blameworthy’) assessment where he considers; “a criminally culpable person may nevertheless be excused from criminal liability, if, for instance, she is not morally culpable.”<sup>357</sup> Or in Duff’s view and terminology, he offers a model of distinguishing between offences and defences based on recognizing the difference between (what he terms) ‘responsibility’ and ‘liability’ in the criminal context. He argues that offences are those actions which the defendant is criminally responsible for while defences are those answers which the defendant can propose to block the move from criminal responsibility to criminal liability.<sup>358</sup>

The same concern noted above finds expression in the Razian school in Gardner’s critique of certain criminal law theorists’ confusion and muddled thinking around strict liability. He considers that objectors to strict liability have two distinct groupings; objectors to strict liability crimes on the basis of the absence of a *mens rea* element and objectors on the basis of the fault principle, which he describes as “a principle regulating the conditions for the imposition of criminal liability rather than the constituents of criminal wrongdoing.”<sup>359</sup> - with theorists often confusing the two.<sup>360</sup> It is argued that it is the fault principle objection which is better grounded because it acknowledges the central role of a consideration of defences before an overall assessment may be arrived at. This is a more complete picture of blameworthiness than a mere focus on *mens rea* could accommodate. In this way we can see that defences not only provide contrast to and highlight substantive culpability but consideration of same is a central, constituent part of arriving at such determinations. Having outlined the importance and usefulness of

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<sup>357</sup> Mark DSouza, ‘Criminal Culpability after the Act’, (2015) 26;3 King’s Law Journal, 440, 453.

<sup>358</sup> RA Duff *Answering For Crime: Responsibility And Liability In The Criminal Law*, (Oxford: Hart 2007).

<sup>359</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 *The Review of Metaphysics* 95, 118.

<sup>360</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 *The Review of Metaphysics* 95, 117.

defences let us now consider defences with a view to discerning who falls within the ambit of blameworthiness ascriptions at law.

The standard theoretical model of classifying defences is the justificatory/excusatory schema. Kent Greenawalt gives what he describes as the basic distinction of justifications and excuses, lying in the fact that justification is a matter of the action being warranted while excuse is a matter of the “nonresponsibility” of the defendant.<sup>361</sup> This is consistent with an act/actor distinction which sees the action as being justified and the actor excused. Such a view finds neat expression in Gary Watson’s formulation; “In general, an excuse shows that *one* was not to blame, whereas a justification shows that one was not to *blame*.”<sup>362</sup>

Greenawalt also describes the excusatory/justificatory distinction by reference to society’s perception of those who have the initial appearance of blameworthiness but with a defence as follows; those that are justified are free from blame and are not regarded as a weak or defective person, while those with an excuse may be fully or partially free from blame but are regarded as having demonstrated a “weakness or some defect.”<sup>363</sup> So while other theorists contestably discuss the hierarchy of culpability within the supposed non culpable states of being justified or excused, Greenawalt maintains a coherent line on the non-culpability of the justified and excused but sees a residual question of weakness offering the same hierarchy.

Greenawalt does however return to a moral quotient and measurement for the status of the *actions* that are deemed justified or excused. He considers that if the law’s purpose is only to allocate appropriate punishment the distinction between excuse and justification would have no relevance; but it does make such a distinction because the “criminal law should illuminate the moral status of various courses of action, and the

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<sup>361</sup> Kent Greenawalt, ‘Distinguishing Justifications From Excuses’, (1986) 49;3 Law and Contemporary Problems, 89, 91.

<sup>362</sup> Gary Watson, *Agency and Answerability*, (Oxford University Press, 2004) 224.

<sup>363</sup> Kent Greenawalt, ‘Distinguishing Justifications From Excuses’, (1986) 49;3 Law and Contemporary Problems, 89, 89.

community should be concerned with the reason a particular individual goes unpunished.”<sup>364</sup> He is thereby proposing defences not just offences to be part of the moral guidance provided by the law.

Gardner considers excuses and justifications to be expressions of our rationality “For having an excuse, like having a justification, is by its nature an affirmation of one’s rational competence. Both justifications and excuses are rational explanations for wrongdoing. They explain why the agent acted as she did by pointing to reasons that she had at the time of her action.”<sup>365</sup> For Gardner, excuses are unjustified actions that do not reflect badly on the defendant. The defendant, while lacking an adequate justification for his action, “has an adequate justification for the beliefs or emotions on the strength of which one does it”<sup>366</sup> in other words rather than justifying one’s action, one is justifying one’s “belief that one’s action was justified”<sup>367</sup> or that there was no such actual applicable guiding reason but their mistaken belief that there was, is justifiable. In this way Gardner claims excuses are a type of mistaken justification where the defendant thought that they were cohering to an applicable guiding reason but were in fact mistaken and when this mistake dawns on the defendant it engenders a particular type of remorse such that one “kick’s oneself”.

Drawing on the Kantian distinction between the phenomenal and the noumenal selves, where the former is conceived of through the conditions of experience while the latter is conceived of independent of same, for Gardner, the phenomenal self will prudently seek to escape the negative consequences of wrongdoing but the basic responsibility of the noumenal self will draw a hierarchy which *ceteris paribus* a rational agent will seek to abide by. Firstly, the rational agent will seek to do no wrongdoing – secondly, they will attempt to justify any such wrongdoing – thirdly, failing justification they will seek to excuse the wrongdoing and fourthly,

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<sup>364</sup> Kent Greenawalt, ‘Distinguishing Justifications From Excuses’, (1986) 49;3 Law and Contemporary Problems, 89, 90.

<sup>365</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008), 86.

<sup>366</sup> John Gardner, ‘Wrongs and Faults’ (2005) 59 The Review of Metaphysics 95,

<sup>367</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008).



at the nadir or base of the hierarchy of priority the agent will cast doubt on their own responsibility. By far a rational agent would prefer to justify wrongdoing and maintain their status as a member of rational society than to suggest otherwise by, for example, a claim of insanity.<sup>368</sup> Criminal defences, for Gardner, are therefore inextricably bound up with the rationality of the defendant.

*Categorization:*

Some difficulties arise with the justificatory/excusatory model; most significantly its insufficiency at categorizing all defences. For example defences based on immaturity, insanity or diplomatic immunity don't find easy purchase in either of the two categories. Robinson<sup>369</sup> has developed what Melissa Beth Valentine describes as a typology of defences across five categories, "failure of proof, offense modification, justification, excuse, and non-exculpatory public policy defense (NPPD)."<sup>370</sup> His use of the distinction between exculpatory defences and non-exculpatory defences is one which captures the procedural defence of double jeopardy and the public policy defence of diplomatic immunity, as defences which do not assess the culpability or blameworthiness or otherwise of the agent/defendant and in this way can be classed as non-exculpatory. This distinction has loosely been adopted by others, and this chapter will make use of the basic distinction as the starting point of the development of an alternate way of conceiving defences, which will be outlined in the following section.

In attempting to produce a more complete and coherent picture of defences Peter Westen offers a provocative distinction between justification and excuse.<sup>371</sup> In his proposal for a unified theory of excuses he groups

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<sup>368</sup> John Gardner, 'In Defence of Defences', *Offences and Defences*, (Oxford University Press, 2008).

<sup>369</sup> Paul Robinson, *Structure and Function in Criminal Law* (Oxford University Press, 1997).

<sup>370</sup> Melisa Beth Valentine, 'Defense Categories and the (Category-Defying) De Minimis Defense', (2017) 11 *Crim Law and Philos*, 545.

<sup>371</sup> Peter Westen, 'An Attitudinal Theory of Excuse', (2006) 25 *Law and Philosophy* 289.

defences which deny the *actus reus* (what he terms defences of *actus reus*) with justificatory defences and contrasts those defences against excusatory defences. This is because defences of *actus reus* are denials of wrongdoing, as are claims of justification whereas excusatory defences proceed from a very different basis; namely they are an acceptance of wrongdoing but seeking a determination of non-blameworthiness nonetheless. This is because justification is a denial of blameworthy conduct, whereas excuses are pleaded even when the defendant has engaged in “heinous conduct.” He sums this up in the persuasively straightforward manner redolent of Watson *supra*;

The difference between justification and excuse, properly understood, is as basic and simple as the difference between, “I did nothing wrong,” and, “Even if I did, it was not my fault.”<sup>372</sup>

A less principled foundation offered by Westen for the justificatory/excusatory distinction is the residual view where he considers all exculpatory defences left over when denial of *actus reus* and claims of justification are unavailable fall to be considered as excusatory defences. To combine in one normative group defences of *actus reus* and defences of justification is criticized by Fletcher who considers that this type of ‘unity thesis’ produces the result that we are morally obliged to feel the same indifference to killing someone as not killing someone.<sup>373</sup> This objection is countered by Westen with a view that;

Nothing in the unity thesis precludes either private individuals or the law from acknowledging and responding to the losses that choices of evils implicate. In contrast to non-killings and the killing of insects, justified killings involve enormous losses that

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<sup>372</sup> Peter Westen, ‘An Attitudinal Theory of Excuse’, (2006) 25 Law and Philosophy 289, 291.

<sup>373</sup> George Fletcher, ‘The Nature of Justifications’ in Shute, Gardner and Horder’s, *Action and Value in Criminal Law*, (Oxford University Press 1993), 183.

private individuals, the civil law, and the criminal law may rightly recognize.<sup>374</sup>

This is an intriguing retort as it implies an availability for the law to respond, perhaps with the award of damages (civil law) for the losses suffered by the justified acts of an individual who although is not blameworthy may still be considered liable or responsible for the losses suffered as a result of their actions.

Ultimately this viewpoint led Westen to reclassify defences such that;

Excuses thus include (1) instances in which conduct is not the product of a person's will; (2) instances of accident, mistake of fact, and mistake of law regarding either the elements of offenses or the elements of justification; (3) immaturity; (4) lack of cognition due to insanity or involuntary intoxication; (5) fugue states of automatism, such as hypnosis and sleepwalking; and (6) lack of volition due to insanity or involuntary intoxication.<sup>375</sup>

This seems somewhat of a hodgepodge grouping and while Westen claims this list is populated purely by exculpatory defences it seems unconvincing to suggest that immaturity<sup>376</sup> and insanity are exculpatory, as will be dealt with below. Further, his theory of linking *Actus Reus* 'defences' and justifications as both being denials of wrongdoing fails to recognize the distinction between wrongdoing and wrongness as discerned by Gardner and developed here.

Developing the exculpatory/non-exculpatory however can provide a schema which is both complete and meets the test set by Westen, -

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<sup>374</sup> Peter Westen, 'An Attitudinal Theory of Excuse', (2006) 25 Law and Philosophy 289, 302.

<sup>375</sup> Peter Westen, 'An Attitudinal Theory of Excuse', (2006) 25 Law and Philosophy 289, 360.

<sup>376</sup> This is more standardly known as infancy in this jurisdiction. I will continue to refer to such defences as immaturity. This is for the sake of consistency in terminology with theorists such as Westen but also as a preference for the descriptor for the purposes of the theory developed here. This is because it is the lack of maturity rather than the presence of infancy that founds such exclusions from criminal assessments, in the same way it is the lack of sanity rather than the presence of madness that founds the exclusion in insanity defences.

mentioned in the introduction - of perspicuousness, which he describes as how successful the theory is at “combining defenses that are normatively *alike* and excluding defenses that are normatively *unlike*.”<sup>377</sup> Understanding defences across an exculpatory/non-exculpatory division provides us with an avenue for understanding the addressees of blameworthiness ascriptions.

*Exculpatory/Non Exculpatory:*

How are we to classify defences such as immaturity or insanity? Recalling Gardner’s hierarchy of defences and in particular those viewed through the lens of the noumenal self we saw claims of irrationality were not considered as either justificatory or excusatory but rather as a separate species. This is an attitude found in other theorists also. Alexander and Ferzan also recognise an exemption for certain individuals from criminal law. “Irrational people are exempt from the criminal law. Rationality is the cornerstone of responsible agency. If an actor cannot comprehend or respond to norms then it cannot be said that laws or morality are properly addressed to the actor.”<sup>378</sup> They proceed to offer the examples of the young and the insane as typically holding exemptions from the criminal law.

Morse considers the criminal law to be an effort at guiding the reasoning of the agents it is addressed to and it;

assumes that the creatures to whom these reasons are addressed are generally capable of using these reasons as premises in practical reasoning that should in most cases lead to the conclusion that the agent should not violate the law.<sup>379</sup>

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<sup>377</sup> Peter Westen, ‘An Attitudinal Theory of Excuse’, (2006) 25 Law and Philosophy 289, 310.

<sup>378</sup> Larry Alexander and Kimberly Ferzan, *Crime and Culpability*, (Cambridge University Press 2009), 155.

<sup>379</sup> Stephen J. Morse, ‘Hooked On Hype: Addiction And Responsibility’ (2000) 19 Law and Philosophy 3, 21.

therefore when an agent has an impaired ability to (adopting R. Jay Wallace's phraseology)<sup>380</sup> "grasp and be guided by reason" this raises the prospect of the availability of a defence which should be considered. This, he considers, is because the legally relevant behavior is intentional action and as such they should "be considered nonresponsible only if they lack the general capacity for rationality in that context."<sup>381</sup> This view is also developed by Gary Watson where he considers in his analysis of Strawsonian moral theory that, "To be intelligible, demanding presumes understanding on the part of the object of the demand. The reactive attitudes are incipiently forms of communication, which make sense only on the assumption that the other can comprehend the message."<sup>382</sup>

To propose that that the immature and the insane are not addressees of the criminal law is too bold a claim. It may be true that they cannot be guided by the criminal law but they still fall within its ambit. The child and insane cannot commit crimes with impunity and should a bystander intervene to prevent the child committing a crime by physically restraining them that bystander would not be held even tortiously liable for assault.<sup>383</sup> A more sustainable claim is that they are beyond the ascription of criminal blameworthiness, a nuanced but important distinction.

What is it about rationality that sets the conduct of the rational person apart? One solution is that it is a matter of agency. Raz highlights that "One approach to the explanation of agency, with origins in the writings of Plato and Aristotle, takes acting for a reason to be the distinctive and central case of human agency"<sup>384</sup> and that,

The capacity for human action is - I join many in believing - the capacity to act knowing what one is doing and doing so because something in one's situation makes this action a reasonable, or a

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<sup>380</sup> RJ Wallace, 'Three Conceptions of Rational Agency', (1999) *Ethical Theory and Moral Practice* 2.

<sup>381</sup> Stephen J. Morse, 'Crazy Reasons', (1999) 10 *Journal of Contemporary Legal Issues*, 210.

<sup>382</sup> Gary Watson, *Agency and Answerability*, (Oxford University Press, 2004) 230.

<sup>383</sup> My thanks to David Prendergast for pushing me on this point.

<sup>384</sup> Joseph Raz, *Engaging Reason*, (Oxford University Press 2002) 22.

good, or the right thing to do. In other words, it is the capacity for intentional action, the capacity to act for reasons.<sup>385</sup>

Indeed as noted, Aristotle, in Book III of *Ethics*, draws the distinction between actions that are 1) Voluntary, 2) Involuntary and 3) Non-Voluntary.<sup>386</sup> The thesis earlier proposed the descriptor of mere ‘attributable agency’ for non-voluntary action because it is belonging to the agent albeit lacking the full engagement of rationality, while it was proposed deliberation exemplifies full agency or agency proper. The descriptor proposed for voluntary action is ‘assessable agency’ which of course incorporates or imputes attributability but because of deliberation engaged in allows us to assess the quality of same.

Mark Dsouza considers the status of the young and insane thus; “Exculpation in such ‘irresponsibility’ excuses have nothing to do with culpability—the inquiry never gets that far, because there is no point in investigating the culpability of someone who is not a responsible moral agent.”<sup>387</sup> This is echoed by Carl Elliott when he considers “it is equally important to realize that when we regard these sorts of persons as nonresponsible, it is not because their psychiatric illness is an excuse. Rather, it is because these people do not meet even the minimal conditions by which the notion of excusing conditions applies.”<sup>388</sup> A brief discussion on criminal theorizing of these defences are now apt.

### *Immaturity (Infancy)*

McCauley and McCutcheon note that the defence of *doli incapax* has a long lineage and was one of the first defences recognised in Common law.<sup>389</sup> They note the case law stretches back to the reign of Edward I, where it was determined that a child under 7 could not be convicted of

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<sup>385</sup> Joseph Raz in Ruth Chang (ed), *Incommensurability, Incomparability and Practical Reason*, (Harvard University Press 1998) 110.

<sup>386</sup> Aristotle, *Ethics*, (JAK Thomson tr, Penguin 1976) Book 3.

<sup>387</sup> Mark DSouza, ‘Criminal Culpability after the Act’, (2015) 26;3 *King’s Law Journal*, 440, 454.

<sup>388</sup> Carl Elliott, *The Rules Of Insanity*, (State University of New York Press 1996) 106.

<sup>389</sup> Finbarr McAuley and J. Paul. McCutcheon, *Criminal Liability : a Grammar* (Round Hall Sweet & Maxwell, 2000) 16

homicide.<sup>390</sup> This is a relatively uncontroversial exemption and has received little academic commentary as a result and of course given the common law position which had a conclusive presumption in this regard it meant the issue received little judicial analysis either. Blackstone expounded on the defence thus;

But by the law, as it now stands, and has stood since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that '*malitia supplet aetatem*'. Under seven years of age indeed an infant cannot be guilty of felony; for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of a felony. Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death.<sup>391</sup>

Various tests have been employed in cases concerning the rebuttable presumption of *doli incapax*, between the ages of 7 and 14 at common law. Historically the courts have determined that the child defendant must be proved to have known their actions were not only wrong but gravely wrong,<sup>392</sup> and that the child knew their action was not only wrong but immoral.<sup>393</sup> A harsher line was once held here where the deliberate nature of an act was enough to rebut the presumption.<sup>394</sup> We can see (in the English cases at least) a moral hue to the understanding of *doli incapax*. There is something about the children's ability to recognise right from

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<sup>390</sup> (1302) Y.B. 30 &31 Edw. I, p 511.

<sup>391</sup> William Blackstone, *Commentaries on the Laws of England*, Book IV, (First Published 1783 Garland, London, 1978) 23.

<sup>392</sup> *R v Gorrie* (1918) 83 JP 136 and a similar reasoning more recently in this jurisdiction *KM v DPP* [2013] IEHC 183

<sup>393</sup> *J.M.(a minor) v. Runeckles* (1984) 79 Cr AppR 255

<sup>394</sup> *Green v. Cavan County Council*

wrong, moral from immoral (or in the terminology of this work, to recognise the value of others interests perhaps) which is necessary.<sup>395</sup>

More modernly, Herring classifies the defences relating to children as one based on “the defendant’s mental condition.”<sup>396</sup> and offers “One way of understanding the law’s approach is to say that a child who commits a crime under the age of 10 needs the protection and support of social workers, rather than deserving the punishment and stigma of a criminal conviction.”<sup>397</sup>

Conor Hanly provides an in-depth analysis of the defence of infancy at common law (prior to legislative intervention)<sup>398</sup> which he indicates “reflected the prevailing view that children, due to their inability to comprehend the consequences of their actions, required some special protection from the full rigours of the law”<sup>399</sup> This is submitted to be a more likely view and certainly preferable to Herring’s focus on mental capacity. Hanly proceeds to further doubt that something along the lines of the mental condition approach is satisfactory where he impliedly critiques that position in his consideration that “This resulted in a number of rather arbitrary presumptions being made. Thus, a child was presumed to be incapable of forming the *mens rea* necessary”<sup>400</sup> And further in relation to the distinction between the harsher Irish approach which looked to deliberateness versus the wrong/immoral approach of England Hanly considers, “It is submitted, however, that the English approach is the more

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<sup>395</sup> Recently there is a more provocative politically based claim proposed in Gideon Yaffe, *The Age of Culpability: Children and the Nature of Criminal Responsibility* (Oxford University Press 2018) “The book argues that child criminals are owed lesser punishments than adults thanks not to their psychological, behavioral, or neural immaturity but, instead, because they are denied the vote.”<sup>395</sup>

<sup>396</sup> Jonathan Herring, *Criminal Law : Text, Cases, and Materials*. (8th edn. Oxford University Press, 2018) 616.

<sup>397</sup> Jonathan Herring, *Criminal Law : Text, Cases, and Materials*. (8th edn. Oxford University Press, 2018).

<sup>398</sup> Section 52 of the Children Act 2001 (as amended) in this jurisdiction. Given the focus of the thesis being on the common law and the broader principles as opposed to the intricacies Hanly’s analysis is still useful here.

<sup>399</sup> Conor Hanly, ‘The Defence of Infancy’ (1996) ICLJ 72.

<sup>400</sup> Conor Hanly, ‘The Defence of Infancy’ (1996) ICLJ 72.



logically consistent one. It is quite possible for a child to commit an action deliberately without knowing that it is seriously wrong”<sup>401</sup>

However Hanly equivocates on this point and “This means that the law assumes that the child cannot distinguish between right and wrong and is therefore incapable of forming the requisite *mens rea*.”<sup>402</sup> Acting with the requisite *mens rea* and knowing the difference between right and wrong are distinct. While they can have a connection, it is not apparent that the link is nearly as intimate or direct as the formulation above suggests. As noted earlier if the defence was one based on mental condition *per se* then we would expect the defence to be limited to crimes with *mens rea* elements, however the exemption extends to *actus reus* only crimes. This is particularly evident when one considers children and the insane can often make means ends deliberations and engage in fully intentional action. This poses a conundrum which this chapter will later propose is answered by an understanding that immaturity is not a ground for exemption by virtue of a mental impairment *per se* but rather is concerned with the type of agency they engage in.

### Insanity

It is thought that the insane cannot be blameworthy because they are not responsible for their conduct.<sup>403</sup> McAuley and McCutcheon consider insanity and begin with the proposition that “Criminal liability is based on the notion of individuals as responsible agents.”<sup>404</sup> Which leads them to consider “In this case the conduct is attributable to the defendant as agent, but he is absolved of capacity to appreciate the wrongfulness of his conduct.”<sup>405</sup> Note here the correlation with the theory advanced earlier in relation to distinguishing between attributable agency and agency proper,

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<sup>401</sup> Conor Hanly, ‘The Defence of Infancy’ (1996) ICLJ 72.

<sup>402</sup> Conor Hanly, ‘The Defence of Infancy’ (1996) ICLJ 72, 73.

<sup>403</sup> Ronnie MacKay ‘Insanity defence: Loake v Crown Prosecution Service Administrative Court’ (2018) Crim. L.R. 2018, 336.

<sup>404</sup> Finbarr McAuley and J. Paul. McCutcheon, *Criminal Liability : a Grammar* (Round Hall Sweet & Maxwell, 2000) 635

<sup>405</sup> Finbarr McAuley and J. Paul. McCutcheon, *Criminal Liability : a Grammar* (Round Hall Sweet & Maxwell, 2000) 635

based on the Aristotelian tripart division between voluntary, non-voluntary and involuntary conduct. As with the previous section there is something more at play than a mere mental impairment that would ensure the defendant couldn't form the requisite *mens rea* or act with the coincidence of *mens rea* and *actus reus*. They consider the basis for this exemption is the ability to appreciate wrongfulness; a quasi-moral standard akin to the infancy consideration *supra*. This is echoed in the Law Reform Commission's report on Defences where it considered the defence of insanity and that "The premise on which such defences is based is that, in a civilised society, only those who have the intellectual and moral capacity to understand the significance of their conduct should be judged by rules of criminal responsibility."<sup>406</sup>

An old fashioned description is offered by Hale where he opines the rationale for the exemption of the insane is that "for they have not the use of understanding, and act not as reasonable creatures, their actions are in effect in the condition of brutes"<sup>407</sup> Where brute is understood as animal or beast this fits with the categorization of agency advanced herein. So that although we do not equate animals with the insane or indeed animals with children - they clearly have different moral statuses – they can however be grouped in a normatively like manner as regards their exemption from culpability assessment; assessment of their agency simply never gets that far. This is echoed by Dsouza where he considers, "One category of defensive claims denies the defendant's status as a responsible moral agent at the time of the offence. This category includes claims of infancy, automatism, insanity and intoxication"<sup>408</sup>

In like manner to the question of the exemption afforded to children it can be argued that if the defence rested on irrationality *per se* then we would expect it to be limited to those crimes which have a *mens rea* element. However insanity it is thought (although somewhat unclear in England

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<sup>406</sup> Law Reform Commission, Defences in Criminal Law, (LRC 95-2009) 13.

<sup>407</sup> Matthew Hale, *The History of The Pleas of The Crown*, 1 Hale P.C. 31-32

<sup>408</sup> Mark Dsouza, *Rationale-Based Defences in Criminal Law* (Hart Publishing, 2017).

and Wales presently) offers an exempting defence to strict liability crimes. For discussion on this issue Herring notes;

In *DPP v Harper* it was held that insanity was not a defence to a strict liability offence. However, most commentators take the view that the decision is wrong. First, it made no reference to an earlier decision, *Hennessy*, which had stated that insanity was a defence to a strict liability offence. Second, the reasoning used in *DPP v Harper* is suspect. It was claimed that insanity is a denial of *mens rea*. However, if that was all insanity was there would be no need to have a special defence of insanity because any defendant who was legally insane would simply be able to claim he or she lacked the *mens rea* of the offence.<sup>409</sup>

There is perhaps succor for Herring the recent English case of *Loake v Crown Prosecution Service*<sup>410</sup> where the defendant was charged with harassment. Such harassment had only to be proved against a reasonable person standard, i.e. it had an objective test with no necessary assessment of the mental state of the accused. The question of whether or not a defence of insanity was available, given its objective nature, arose. It was held on appeal that the defence was indeed available. The fact that the insanity of the defendant goes to exculpating their conduct irrespective of mental state indicates there is something about their agency rather than just their rationality that makes them improper targets for blameworthiness determinations. There is some support for the idea in the following; “the purpose of the insanity defense is to exempt from the stigma of moral blame accompanying conviction those who, because their conduct is not voluntary, are not proper subjects of moral blame”<sup>411</sup> This

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<sup>409</sup> Jonathan Herring, *Criminal Law : Text, Cases, and Materials*. (8th edn. Oxford University Press, 2018).

<sup>410</sup> *Loake v Crown Prosecution Service* [2017] EWHC 2855

<sup>411</sup> James Brady, “Abolish the Insanity Defense?--No!” (1971) 8 Houston LR 629 at 640. See also, Mark Hathaway, ‘The moral significance of the insanity defence’ (2009) J. Crim. L. 2009, 310.

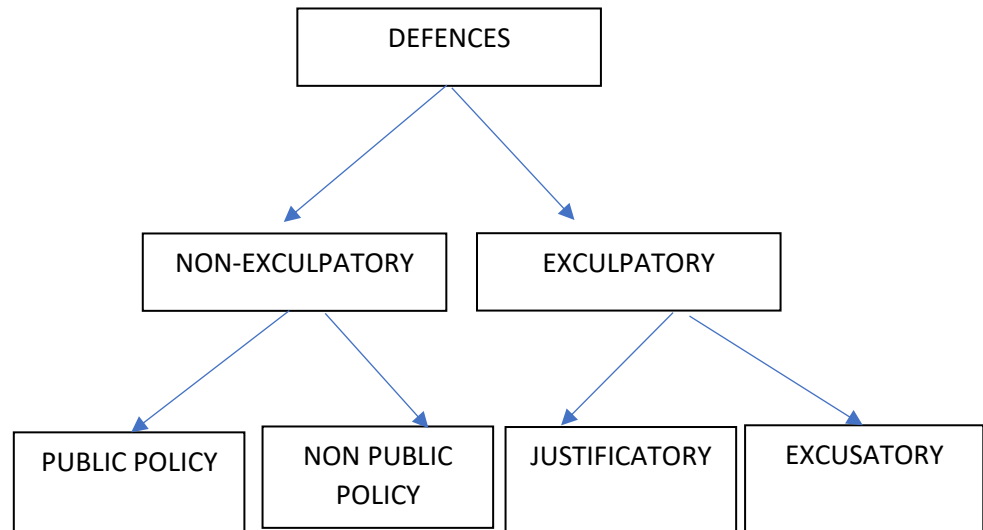
chapter will now proceed to analyze these exemptions on the basis of kinds of agency at play.

These analyses support the view that they are simply not within the target audience of culpability or blameworthiness ascriptions. Despite Dsouza's somewhat loose use of the term 'exculpation' these defences are better thought of as non-exculpatory defences because like diplomatic immunity and double jeopardy the assessment "never gets that far", i.e. never considers the blameworthiness of the agent/defendant.

The thesis will now propose a categorization of defences which will draw out the distinctions noted here more clearly. There are many ways in which defences can be grouped; consider the Law Reform Commission's view that "Defences in the criminal law can be categorised in a number of ways."<sup>412</sup> This thesis suggests a coherent and complete schema of defences is available if we consider the primary division to be between non-exculpatory defences and exculpatory defences; where non-exculpatory defences are those which relate to the fact that the defendant falls within a class of persons who are not susceptible to culpability ascriptions, while exculpatory defences accept the defendant's status as an addressee of such ascription but where they rely on one of the subdivisions of exculpatory defences; either excusatory or justificatory to avoid a blameworthiness determination. Non Exculpatory defences can hold defences which are both within the logic of blame, i.e. based on the insufficient rationality of the agent to be considered blameworthy as well as those that fall outside or outwith the logic of blame and are applied for countervailing public policy reasons such as diplomatic immunity. A diagrammatic representation may be helpful at explanation here;

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<sup>412</sup> Law Reform Commission, *Defences in Criminal Law*, (LRC 95-2009) 4.



*Figure 7: Defence Categorisation*

Within the above non-exculpatory defences it is proposed that non-blame considerations (or considerations outwith the logic of blame) apply for public policy defences such as diplomatic immunity and double jeopardy. These defences are there for purposes other than assessing blameworthiness. Countervailing logic is at play which is deemed sufficiently important to displace the logic of blame but finds its legitimacy on such countervailing logic. However the non-public policy defences within the non-exculpatory branch fits within the architecture of blameworthiness assessments. These are the defences that the defendant was a member of a class of persons beyond the writ of assessments of blameworthiness, so determined within that architecture.

When understood as such the division becomes illuminating for the purpose of distinguishing the audience of blameworthiness and assessments as being those within the exculpatory branch only i.e. the audience is those who are capable of offering justifications or excuses.

*Agents Proper:*

The analysis above indicates that the relevant practice for ascriptions of criminal blameworthiness is defence inclusive and the relevant audience for ascriptions of criminal blameworthiness are those who can rely upon their own reasoning as bars to such ascriptions. This section will now consider this analysis as highlighting agents proper, or in the Aristotelian division those who can engage in voluntary action as the relevant audience of central cases of ascriptions of criminal blameworthiness.

Susan Dimock attempts to discern the objects of criminalization from the list of; our actions, the control we exercise or our agency? She does so through a consideration of the law's approach to intoxication.<sup>413</sup> Dimock summarizes the first two approaches as;

Defenders of the act requirement suggest that only voluntary acts are, and may properly be, the objects of criminalization. Defenders of the control requirement, by contrast, argue that the objects of criminalization include any events or states of affairs over which the defendant exercised or could exercise the appropriate control.<sup>414</sup>

And proceeds in her article to articulate and defend the agency requirement as superior, arguing only that which expresses an individual's agency should be the focus of criminalization. She engages centrally with the proponents of the control requirement (most particularly Husak) and begins in agreement with him that the act requirement is incorrect and rather as Husak argues "the absence of control, and not the absence of action, establishes the outer boundary of deserved punishment and responsibility."<sup>415</sup>

The act requirement can be understood as one which holds that an individual be held responsible for their voluntary act alone. The essence

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<sup>413</sup> Susan Dimock, 'Intoxication and the Act/Control/Agency Requirement', (2012) 6 *Crim Law and Philos*, 341, 362.

<sup>414</sup> Susan Dimock, 'Intoxication and the Act/Control/Agency Requirement', (2012) 6 *Crim Law and Philos*, 341, 342.

<sup>415</sup> Douglas N. Husak, *The philosophy of the criminal law*, (Oxford University Press 2010) 34.

of the control principle is that an individual may be held criminally responsible for a state of affairs they control and not subject to criminal liability if they do not control such state of affairs or it would be unreasonable for them to have prevented them from arising. Dimock proposes the cases of intoxication run counter to both of these proposals, which are instances of when the law can and indeed often does hold individuals criminally liable even in the face of an absence of either the acts of the defendant being voluntary or the state of affairs being within their control. The courts have shown themselves very willing to impose liability for defendants who become voluntarily intoxicated and commit crimes under these circumstances, even where they would otherwise meet the requirements of automatism.

The courts may be concerned about letting those who get blind drunk and commit crimes off the hook based on the view that in getting voluntarily intoxicated they have entered a culpable state. However, as Dimock notes, that is a prudential matter rather than one of theoretical coherence and could be solved by the adoption of a provision similar to that which obtains in Germany under § 323a StGB, which makes “dangerous intoxication a crime, provided they became “mindlessly intoxicated” intentionally or recklessly.”<sup>416</sup> And in this way the drunk assaulter who is not a grand schemer can be unproblematically convicted of dangerous intoxication instead of the more theoretically troublesome conviction of someone without a suitably guilty mind (which would be illegitimate in Germany as a breach of the *schuldprinzip*)

Dimock offers a summary of her position in relation to the opposing act and control requirements;

My claim, then, is that Anglo-American [law] requires practically rational agency, that criminal liability is imposed for conduct that expresses our practical agency. Action and control have rightly been thought central to criminal liability because acting is a central

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<sup>416</sup> Susan Dimock, ‘Intoxication and the Act/Control/Agency Requirement’, (2012) 6 *Crim Law and Philos*, 341, 349.

way of exercising our practical agency in the world, and conduct typically expresses our agency only if we had control over its manifestation in the world.<sup>417</sup>

Even the case of the ‘grand schemer’ who becomes intoxicated for the purpose of committing crime is better dealt with under an agency assessment as it allows for the type of temporal extension that is not coherently available to the act and control perspectives. The agency view is superior to the act and control conditions because it allows for a situation where the agent “becomes impaired in order to commit the crime ... at T<sub>1</sub>, then one has the required culpability for the crime at T<sub>2</sub>, unless some factor relevant to practical deliberation intervenes, even if D at T<sub>2</sub> is unconscious or otherwise unaware of his own conduct.”<sup>418</sup> Which provides the prospect that agency is sufficiently broad to accommodate actions which are not the actor’s or not under his control once they all fall to be considered as parts of his overarching plan as an expression of his agency.

Alexander and Ferzan’s theory proposes culpability to arise in reckless actions and “unjustifiably privileging one’s reasons over other’s legally protected interests”<sup>419</sup> In acting so, they consider the actor to have manifested insufficient concern or regard for the interest of others. This concept of culpability is clearly building upon pre-legal morality, where immoral action is understood as the unjustifiable disregard of other’s interests. Alexander and Ferzan recognise this moral basis of culpability when they accept “our subjective approach to determining culpability describes the moral vice of insufficient concern.”<sup>420</sup> This foundation of culpability as resting on insufficient concern also finds expression in

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<sup>417</sup> Susan Dimock, ‘Intoxication and the Act/Control/Agency Requirement’, (2012) 6 *Crim Law and Philos*, 341, 353.

<sup>418</sup> Susan Dimock, ‘Intoxication and the Act/Control/Agency Requirement’, (2012) 6 *Crim Law and Philos*, 341, 357.

<sup>419</sup> Larry Alexander and Kimberly Ferzan, *Crime and Culpability*, (Cambridge University Press 2009), 90.

<sup>420</sup> Larry Alexander and Kimberly Ferzan, *Crime and Culpability*, (Cambridge University Press 2009), 90.



Greenawalt's claim that "The law aims to make individuals respect the interests of strangers."<sup>421</sup>

Westen founds his understanding of culpability on reproach which is a matter of reacting to what one (or society) believes to be a "reprehensible attitude toward the legitimate interests of himself or others."<sup>422</sup> His theory of defences flows from when it would be illegitimate to reproach a given individual; firstly, when they did not conduct such acts (denial of *actus reus* and justification) and secondly when they did not manifest reprehensible attitudes toward themselves or others (excuses). Further he considers the rationality of a defendant as a necessary condition for such reactive attitudes which he explains as "[i]t must be because something in the irrationality they exhibit precludes observers from experiencing the reactive emotion of indignation." In this way Westen's understanding of excuses has some consonance with the above notions of culpability as being attracted by something like insufficient concern for others' interests and the necessary condition of rationality.

The standard model of criminal responsibility which focuses on the rational self, as outlined above, has attracted some criticism as a denial of the phenomenal self.<sup>423</sup> The argument being that such an emphasis is a kind of Kantian abstraction that has a number of defects. Firstly it "presuppose[s] an individual subject in whom responsibility is fixed by mental characteristics relating to the cognitive control of actions"<sup>424</sup> which do not exist. Secondly it removes the individual "from his or her social context of substantive morality ... and commits an ethical injustice in relation to the alterity and lived reality of that individual."<sup>425</sup> The solution it is claimed lies in taking a cultural criminological starting point and

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<sup>421</sup>Kent Greenawalt, 'Distinguishing Justifications From Excuses', (1986) 49;3 Law and Contemporary Problems, 89, 100.

<sup>422</sup> Peter Westen, 'An Attitudinal Theory of Excuse', (2006) 25 Law and Philosophy 289, 292.

<sup>423</sup> Thomas Giddens, 'Criminal Responsibility and the Living Self', (2015) 9 Crim Law and Philos, 189, 189.

<sup>424</sup> Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford University Press 2000) 12.

<sup>425</sup> Thomas Giddens, 'Criminal Responsibility and the Living Self', (2015) 9 Crim Law and Philos, 189, 193.

incorporating the phenomenological self in determinations of criminal responsibility which Thomas Giddens suggests could be as simple as the “judge asking ‘what did this act mean to the defendant?’ or ‘what did it mean to the victim?’, and using the answers in the judicial assessment of responsibility.”<sup>426</sup>

Tadros has recently addressed a similar issue in a philosophical manner in his work, *Distributing Responsibility* where he provocatively argues distributive justice favors providing welfare-generating resources to wrongdoers, and away from do-gooders.<sup>427</sup> The structure of his argument goes;

- 1) Responsibility for wrongdoing is a burden,
- 2) The social structures of a society make a difference to who will be responsible for what and how responsible they will be.
- 3) It is therefore a burden that can be allocated and distributed.
- 4) Wrongdoers have an interest in not having the burden of responsibility for wrongdoing.
- 5) The inequality of distributing this burden can be counterbalanced by a reverse inequality of greater distribution of welfare-generating resources.

These are intriguing sociological and philosophical arguments however, the thesis shan't alter its focus away from rational personhood as the quintessence of responsibility because while criminology broadly and cultural criminology particularly can provide useful data on why people commit crimes, including societal contextual factors, the effort here is at a *theoretical* understanding of responsibility *conditions* when such crimes and torts are committed. The cultural criminological perspective in legal theory is rather fringe in its conflation of individual and society's responsibilities into a shared burden of blame for criminal acts, and more pertinently is outside the paradigm of the criminal law within which the

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<sup>426</sup> Thomas Giddens, 'Criminal Responsibility and the Living Self', (2015) 9 *Crim Law and Philos*, 189, 204.

<sup>427</sup> Victor Tadros, 'Distributing Responsibility' (2020) *Philosophy & Public Affairs* 223.

analysis of this thesis is conducted. In any event a sort of conciliation may be available here where questions on what the act meant can also be asked and answered in the current process of determining responsibility where what Raz and Gardner describe as “explanatory reasons” are called for and may be proffered.

*Culpability Summary:*

This first part of the chapter engaged with the scholarship on the structure of criminal and defences as a route to understanding the relevant ascriptive audiences for criminal blameworthiness. A schema for categorizing and analyzing criminal defences was proposed as available when they are grouped across an exculpatory and non-exculpatory divide. Exculpatory defences can then be understood as encompassing the standard division of justificatory and excusatory defences, while non-exculpatory defences exclude classes of persons beyond the writ of ascriptive assessments.

A particular consideration of insanity and immaturity as being non-exculpatory was engaged in. This importantly indicates there is something about their agency which excludes them from the ambit of blameworthiness assessments. If these defences were rested on irrationality *per se* then they would only coherently apply to *mens rea* crimes but the fact that these categories of agents are beyond assessment of even *actus reus* only crimes tells us it is their agency and not their rationality *per se* that excludes them. This indicated that the relevant audience for ascriptions of criminal *blameworthiness* is limited to those who can fall within the exculpatory side of the division or in other words those who engage in Aristotelian Voluntary Conduct; sometimes described here as agency proper.

We now move to consider the structure of defences in tort theory in an effort to discern if a different interest in agency applies there.

## PART II - TORT

### Responsibility Audience:

Let us move now from blameworthiness to responsibility. In this section and following on from similar considerations vis-à-vis blameworthiness we seek to discern the relevant members of the community who may be ascribed as responsible. For blameworthiness we conducted the analysis through the lens and tool of defences which indicated to us that the relevant subset of the community was that of rational agents who are capable of understanding and being guided by other regarding reasons and who have engaged in voluntary acts; which is termed here as agency proper or assessable agency. A similar approach shall be adopted here in the use of defences as a route to understanding who falls within the ambit of liability ascriptions. Unlike criminal law where no shortage of ink has been spilled in the analysis of defences there is in tort a comparative dearth of theoretical engagement with the concept. Very recent endeavours within the last 5 to 10 years have sought to fill this gap, led by James Goudkamp and his work, *Tort Law Defences*;<sup>428</sup> however the field is still within its infancy compared to the work done in criminal theory, and indeed discussion on tort law defences have thus far taken their lead from criminal theory and theoreticians.

### Goudkamp, Exposition:

Goudkamp in his book attempts to fill a theretofore, significant gap in the scholarly literature of tort law where defences have been given little or no theoretical engagement. A position which is, as noted, in stark contrast to that of criminal theory where voluminous work and ongoing debate abounds between theorists in understanding criminal defences. Given Goudkamp's leading position in the theory of tort law defences it is apt to engage with his work in some detail, as follows.

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<sup>428</sup> James Goudkamp, *Tort Law Defences*, (2<sup>nd</sup> edn Hart Publishing, 2016).

A fundamental distinction for Goudkamp's analysis of tort law defences is the separation out of defences from denials.<sup>429</sup> For Goudkamp, denials of elements of the substantive tort cannot be classed as defences. Examples of denials given include "pleas by a defendant in proceedings in negligence that he did not owe the claimant a duty of care, that he acted reasonably or that the claimant did not suffer any damage."<sup>430</sup> The distinction he offers for understanding the difference between denials and defences is that denials deal with the issues that constitute the claim and are already introduced by the claimant; which leaves the logical corollary that defences must be introduced by the defendant and not attack an element of the tort. This means then, under this paradigm, that the only available avenue for a defendant who seeks to rely on a defence is to accept the completion of the tort in that the elements must all be accepted before the offering of a defence is properly understood to be an issue.

Goudkamp makes a bold claim that tort defences can be classified into just two types; justificatory defences and public policy defences;<sup>431</sup> both however are only offered after the substantive tort is made out. The argument goes that to offer a justification is to claim that one acted "reasonably in committing a wrong"<sup>432</sup> while public policy defences have their own extra-tortious logic allowing countervailing reasons for barring the imposition of liability.

Goudkamp makes reference to foundational philosophical issues of importance to Razian school jurisprudence when he describes the relation between torts and defences as the tort providing the duty while the defence provides the privilege,<sup>433</sup> i.e. where the relevant duty may be disregarded.<sup>434</sup> This understanding is sometimes called the right to do

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<sup>429</sup> As seen earlier this is not a distinction unknown to criminal theory, cf Duff *Answering For Crime*, 22.

<sup>430</sup> James Goudkamp, *Tort Law Defences*, (2<sup>nd</sup> edn Hart Publishing, 2016) 2.

<sup>431</sup> James Goudkamp, *Tort Law Defences*, (2<sup>nd</sup> edn Hart Publishing, 2016), chapter 4.

<sup>432</sup> James Goudkamp, *Tort Law Defences*, (2<sup>nd</sup> edn Hart Publishing, 2016) 27.

<sup>433</sup> Cf Joseph Raz, *Practical Reasons and Norms*, (2<sup>nd</sup> edn Oxford University Press 1990).

<sup>434</sup> James Goudkamp, *Tort Law Defences*, (2<sup>nd</sup> edn Hart Publishing, 2016) 39.

wrong, or a right against the enforcement of one's duty.<sup>435</sup> The argument goes that the advantage of this approach for Goudkamp is that the duty remains extant and therefore violable while restricting the availability of its enforcement or pertinently the ascription of liability. The challenge however is if one has a right not to conform to a relevant duty can they be said to be under a duty at all. As seen in Raz's work a canceling condition denudes the otherwise mandatory second order norm of its obligatory force. The first order reason for performing the norm act may remain extant but the necessary characteristics in order for it to be considered a duty do not. This presents a significant difficulty for Goudkamp in his theory.

*Denials:*

Regarding denials – a concept of central importance to his theoretical framework - he categorizes denials into five groupings, denials of the;

1. Act element
2. Fault element
3. Causation element
4. Damage element
5. Other elements

The first denial is available in instances of involuntariness, as he claims tort law does not consider involuntary movements as acts. For this he relies upon Prosser and Keeton and their claim that “it is tautological to speak of ‘voluntary acts’ and self-contradictory to speak of ‘involuntary acts’, since every act is voluntary.”<sup>436</sup> This has most obvious relevance to claims of trespass where the voluntary impact upon another's person is required to make out same. McMahon and Binchy defines the voluntariness requirement as the “action must be under conscious

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<sup>435</sup> Cf Ori Herstein, ‘Defending The Right To Do Wrong’, (2012) 31 Law and Philosophy 343.

<sup>436</sup> W. Keeton, *Prosser and Keeton on Torts*, (5<sup>th</sup> edn, St Paul Minn, West Publiihing Co, 1984) 427.

control.”<sup>437</sup> This necessity of consciousness is something lesser than deliberated action and it seems more appropriate to be classed in the Aristotelian tripartite conception outlined above (between voluntary, involuntary and non-voluntary) as requiring mere non-voluntary conduct; i.e. mere attributable agency.

A particularly pertinent and interesting section for the purposes of this thesis is Goudkamp’s treatment of denials of fault - fault being of central concern to the questions of the ascription of blame and/or responsibility. Fault is a contested term and is available to authors to define in a myriad of forms. Goudkamp adopts a particular understanding of fault which does not fit that offered by Gardner earlier or adopted by the thesis; however, recognizing the breadth of latitude afforded authors in defining the term he has come upon a reasonable interpretation which also fits a standard everyday usage but one which is at conflict with the usage in criminal theory which incorporates mental capability, blame attraction etc.

Goudkamp regards involuntariness as a denial of negligence, (despite what he claims is the nonexistence of an act element for that particular tort)<sup>438</sup> This is because such a claim goes to denying not the act but what Goudkamp is describing as the ‘fault’ element of the tort.<sup>439</sup> This view, he proposes, is supported by reference to the cases of *Robinson v Glover*,<sup>440</sup> *Gootson v R*,<sup>441</sup> *Waugh v James K Allan Ltd*,<sup>442</sup> and *Scholz v Standish*<sup>443</sup> as authority that negligence is not attributed for involuntary acts where the defendant motorists respectively; spontaneously lost consciousness, suffered a seizure, suffered a heart attack or was stung by a swarm of bees. The claim being that “a defendant whose movements are involuntary does not act carelessly”<sup>444</sup> carelessness therefore is deducible as the relevant

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<sup>437</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 896.

<sup>438</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 49.

<sup>439</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 49.

<sup>440</sup> *Robinson v Glover* [1952] NZLR 669 (SC)

<sup>441</sup> *Gootson v R* [1947] 4 DLR 568 (Ex)

<sup>442</sup> *Waugh v James K Allan Ltd* [1964] SC (HL) 102

<sup>443</sup> *Scholz v Standish* [1961] SASR 123 (SC)

<sup>444</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 49.

‘fault’ for Goudkamp. This usage of the term fault to describe mere non-conformance with the relevant standard of care is a thin understanding of same as discussed earlier. In fact such ‘fault’ was shown to be mere nonconformance with a conduct duty such as the grudge bearing surgeon demonstrated.

*Defences:*

Goudkamp offers an understanding of justification defences as “defences that enable the defendant to escape liability because, in committing a tort, the defendant acted reasonably.”<sup>445</sup> He describes this as the ‘radical view’<sup>446</sup> and juxtaposes it with what he terms the ‘conventional’<sup>447</sup> view of considering justified acts as incapable of being wrongs. He picks out the views in particular of Peter Cane; “justifications deny wrongdoing”<sup>448</sup> and Arthur Ripstein who claims “[j]ustifications exculpate by showing that an apparently wrongful act was not wrongful”<sup>449</sup> along with Jules Coleman’s view, “when an actor *justifies* what she has done, she denies that the action is, all things considered, wrong.”<sup>450</sup> Goudkamp considers that the logical inference from this is that the conventionalists “are committed to the proposition that a justified defendant does not commit a tort...the absence of justification is actually an element of all torts ...[therefore] all pleas in justification are in fact denials”<sup>451</sup> The converse ‘radical’ view is summarised as understanding that a “defendant who has a justificatory defence has committed, but is not liable for, a tort.”<sup>452</sup> The descriptor ‘radical’ may be somewhat overdone and indeed such a view has obvious resonance with criminal defence theorists such as Duff, Gardner, Fletcher and DSouza whose views of defences are of blocking the move from culpability to liability, as discussed in the culpability

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<sup>445</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 76.

<sup>446</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 77.

<sup>447</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 76.

<sup>448</sup> Peter Cane, *Responsibility in Law and Morality* (Oxford, Hart Publishing 2002) 90.

<sup>449</sup> Arthur Ripstein, *Equality, Responsibility and the Law*, (Cambridge University Press, 1999) 138

<sup>450</sup> Jules Coleman, *Risks and Wrongs*, (Oxford, Oxford University Press, 1992) 217 (emphasis in original)

<sup>451</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 78.

<sup>452</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 78.



section above.<sup>453</sup> It also noteworthy that the critique offered by Goudkamp that if theorists such as Ripstein, Coleman and Cane are right then it would mean justifications would have to be classed as denials, isn't a 'knock down' critique as this may well just be the case or at least the other theorists may offer an equally sensible classification. In other words there is nothing apodictic about the incorrectness of the classification of justifications as denials.

The scenario of the 'innocent aggressor' is used to bolster the radical view's claim. The scenario offered involves an otherwise "upstanding citizen who has temporarily gone insane" because of being drugged by an enemy. In such a scenario the otherwise upstanding citizen -innocent aggressor - murderously attacks our protagonist, who uses self defence and in doing so seriously injures the aggressor. Goudkamp considers that the protagonist although justified still attracts some negative normative consequences, such as the moral obligation to apologize to the innocent aggressor and regretting the injury caused.<sup>454</sup> Goudkamp proposes that these negative normative consequences challenge the conventionalist perspective but fits well in the radical view.

The current view of tort defences in the Razian school as espoused by Gardner is to deny the sensibility of justification as a defence to torts. Gardner's position is; "That a norm-violation was justified is ... irrelevant to the law of torts. Torts are wrongs - breaches of obligation - and one owes damages for their commission even if one's wrong was justified"<sup>455</sup> The prevailing view regarding excuses likewise finds no space for excuses within tort law either as it "makes no room for excuses"<sup>456</sup> In countering this view Goudkamp attacks the too great a burden placed upon the *Vincent* case by Gardner, which is used by the latter as an illustration of

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<sup>453</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 78.

<sup>454</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 79

<sup>455</sup> John Gardner, 'What is Tort Law For? Part I, The Place of Corrective Justice', (2011) 30 *Law and Philosophy* 1, 42.

<sup>456</sup> John Gardner, 'Justification Under Authority', (2010) 23 *Canadian Journal of Law & Jurisprudence* 71, 92.

the role of justification in duty breaches and wrongness respectively. Goudkamp counters that,

Strictly speaking, all that the decision in *Vincent* establishes, relevantly, is that private necessity is not a defence to liability in trespass. It is extremely doubtful that it is authority for the far more general proposition that there are no justificatory defences whatsoever to liability in tort. That simply [is] not the *ratio decidendi* of the case. Gardner is mistaken in suggesting otherwise.<sup>457</sup>

Goudkamp's critique is not entirely on all fours as Gardner's analysis is one of a philosopher. He uses the case to consider Aristotelian tragedy of life's failing mismatching life's failures; of distinguishing the assessment of a person from an assessment of their life etc.<sup>458</sup> It is not a black letter argument of decided caselaw submitted as persuasive or binding authority in a court pleading, but rather a consideration of the foundational underpinnings of the theory of tortious responsibility and in this way the criticism misses its mark. Gardner's analysis is much more broadly based than the mere *ratio* of one case, as was gone into in some detail in earlier chapters.

Goudkamp explains the conventionalist view on defences is to consider justification as a denial of wrongdoing while conceiving of excuses as an acceptance of wrongdoing but offering a reason to block responsibility. Under this paradigm it is unsurprising therefore that there is no room left for excuses under the 'radical' view because the space occupied by the acceptance of wrongdoing - but the subsequent offering of a liability-barring reason - is already taken by the concept of justification, so when Goudkamp proceeds to claim that there are no such entities as excuses in tort law it is a claim that has been pre-established by the framework he has adopted.

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<sup>457</sup>James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2013) 82.

<sup>458</sup> Cf John Gardner, 'Wrongs and Faults' (2005) 59 *The Review of Metaphysics* 95.

Goudkamp surveys three theories of justification; the deeds theory, the dual theory and the reasons theory along with their respective answers to questions such as mistaken justification and unwitting justification in search for an adequate understanding of the term. In summary he considers Paul Robinson to espouse the deeds theory which holds that an action is justified if the reasons in favour outweigh the reasons against. This is an objective assessment divorced from the intentions or knowledge of the actor. The Dual theory is acknowledged as defended by George Fletcher, which requires the reasons in favour of the action to outweigh those against *and* for the actor to be aware of those reasons. While the reasons theory he describes as allowing justification where the actor reasonably believed the reasons in favour of their act to outweigh those against. To assist in the analysis he developed the succinct table copied here.<sup>459</sup>

Table 2: Outcomes of the Three Theories of Justification

	<i>Defendant knows that facts justify</i>	<i>Defendant knows that facts do not justify</i>	<i>Defendant reasonably but mistakenly believes that facts justify</i>	<i>Defendant unreasonably believes that facts justify</i>	<i>Defendant unaware that facts justify (unknowing justification)</i>
<i>Deeds theory</i>	Justified	Unjustified and unexcused	Excused	Unjustified and unexcused	Justified
<i>Reasons theory</i>	Justified	Unjustified and unexcused	Justified	Unjustified and unexcused	Unjustified and unexcused
<i>Dual theory</i>	Justified	Unjustified and unexcused	Excused	Unjustified and unexcused	Unjustified and unexcused

Figure 8: Outcomes of the Three Theories of Justification

It will be noted that the key distinguishing circumstances are those of the ‘mistaken’ justification and the unwitting justification. His critique of the theories provides that because the deeds theory allows for actions of an unwitting agent to be justified it strikes as “self-evidently wrong.”<sup>460</sup> He proceeds to challenge the objective nature of the deeds theory assessments in that,

<sup>459</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) 92

<sup>460</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) 92

[a] key defect in the deeds theory is that it does not recognize fully the importance of the role that reasons play in relation to the concept of justification. Because of the connection between reasons and the idea of justification, justifications reflect on one's success as a rational being.<sup>461</sup>

Goudkamp's criticism of the dual theory includes what he describes as the counter intuitive situation where "a person may find himself in a situation, through no fault of his own, where he is unjustified no matter how he acts."<sup>462</sup> This is because the dual theory requires an alignment of both objective and subjective. Therefore situations may arise - most notable the mistaken justification type scenario, as discussed earlier and will be dealt with later in the thesis - where no matter what the defendant does they will not be justified. Given that a rational actor will always be justified in their actions it strikes Goudkamp as unacceptable that there would be scenarios where it is impossible to be justified, despite perfect rationality on the part of the actor. The second difficulty is that need for God like knowledge to identify truly justified actions because "it is always possible that future facts will reveal that an act that appeared to be unjustified when it was performed was actually justified and vice versa."<sup>463</sup> This critique is redolent of the criticism offered by this thesis to the objectivist character of John Gardner's concept of justification. However, if the developed understanding of justification as developed here is accepted i.e. subjectively bounded albeit objectively assessed, Goudkamp's criticism in this regard is no longer pertinent.

In contrast to his critiques above he finds favour with the reasons theory and defends it on the basis amongst other things it allows for a situation where the actor may be justified but still appropriately face negative normative consequences and given that justifications are permissions it solves the supposed conundrum of the availability of resistance to

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<sup>461</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) 92/93.

<sup>462</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) 95.

<sup>463</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) 95.

mistaken aggressors.<sup>464</sup> (A conundrum engaged with further in the application chapter.) It is noteworthy however that the reasons theory Goudkamp favours also makes use of excuse in at least the ‘unexcused’ variety and as such stands in some conflict with his theory which apparently has no room for excuses.

*Immaturity/Insanity/Intoxication:*

When discerning the members of the community who are susceptible to ascriptions of blameworthiness, the defences of immaturity, insanity and intoxication were particularly illuminating. We shall therefore return to them now for similar considerations vis-à-vis discerning those susceptible to liability ascriptions.

McMahon and Binchy indicate that where “intent is an ingredient in a tort, the minor may escape liability where he or she was incapable of forming the requisite intent” but otherwise will be assessed as an adult would be assessed.<sup>465</sup> So for example in trespass where all that is required is what is termed in the thesis as non-voluntary action it suffices to establish such basic voluntariness for a child defendant to be found liable. In other words the standard of attributable agency can be coherently met by a child.

Unlike criminal law which at common law has traditionally indicated fixed ages under which children were conclusively incapable of being assessed as culpable, tort law has no such bright line division. In the case of negligence children tend not to have duties to others so there is scant authority regarding what might be termed affirmative negligence; but there is a robust corpus of jurisprudence regarding contributory negligence where defendants have claimed that the victim child showed an unreasonable want of care for their own safety. Once the basic capacity to have such concern is determined to be formed the courts will ascribe (part) responsibility. This can be as low as three years of age.<sup>466</sup>

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<sup>464</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) 96.

<sup>465</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 1467.

<sup>466</sup> *Macken v Devine* (1946) 80 ILTR 121 (CC)

Goudkamp considers that infancy can be a denial of the fault element of negligence. The argument is that the standard of care required by infants is only that of the reasonable child of the same age.<sup>467</sup> Hence a child who commits an act which would be negligent had an adult done likewise may “place weight on his immaturity ... [to] prevent the claimant from establishing a lack of reasonable care”<sup>468</sup> There is also an issue of impossibility for younger children, where Goudkamp considers that instances where the defendant is so young “that a reasonable child of the same age would lack the capacity to foresee risks, a finding of negligence could never be made.”<sup>469</sup> This analysis is consistent with the approach in this jurisdiction. Immaturity under these lights then is not a defence as it is vis-à-vis crime. It does not operate to exclude a certain class from ascriptions of blameworthiness but rather pertains to a particular element of the tort and denies its existence.

The general rule regarding insanity is that it is no defence to an action in tort. However Goudkamp promotes the view that insanity should be allowed as a defence. One of the strongest areas in which an insane defendant may be in a position to rely upon their insanity to bar the application of liability is that of a denial of a constituent element of a relevant intentional tort such as deceit. Even here however Goudkamp must equivocate somewhat where he indicates that “the fact that he was insane at the relevant time may reduce the probability that the court will conclude that he was seized of a fraudulent intent. Unless the existence of such an intention is established, the action in deceit will not be constituted.”<sup>470</sup> So while a court *may* accept insanity as going to a denial of the necessary element of intention there is again no such bright line exemption. While Goudkamp promotes the view that insanity should be a defence, he moves from the descriptive to the normative.

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<sup>467</sup> He relies here upon cases such as *McHale v Watson* (1966) 115 CLR 199 (HC) and *O v L* [2009] EWCA Civ 295

<sup>468</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) 50.

<sup>469</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) 50.

<sup>470</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) 51.

Intoxication poses an interesting distinction in tort law denials between voluntary intoxication and involuntary intoxication where the former is irrelevant and the defendant will be held to the same standard as the reasonable person whereas the latter will be held only to the standard of someone similarly intoxicated.<sup>471</sup> Goudkamp considers that the plea of involuntary intoxication may therefore lower the level of reasonableness required by the defendant below the standard of the reasonable person and thereby may be available to deny the ‘fault’ element of the tort. Denying the fault element can be translated as denying non-conformance with the applicable reasonableness standard.

These are very different approaches to that adopted in crime and it is proposed flow from the objectivity of tortious assessments. Once capacity for attributable agency has been established the question is that of conformance or for the imposition of liability, non-conformance, either in simple breaches of duty such as in trespass or other elements of the tort such as with the relevant reasonableness standard. The only accommodation which is allowed is for lack of capacity and even then standards will be readjusted to fit the circumstance where available and then applied in a like objective manner. Because objectivity is the approach adopted in tortious ascriptions it is questionable whether or not there are any such things as defences. Consider Goudkamp’s list of defences below;

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<sup>471</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) at 52 relying on the authority of *Davies v Butler* 95 Nev 763; 602 P 2d 605 (1979)

<i>Private justifications</i>	<i>Public policy defences that arise at the time of the tort</i>
Self-defence Defence of one's property Abatement Recapture of land Recapture of chattels Distress Qualified Privilege Innocent Dissemination Consent	Judicial process immunities Absolute privilege Diplomatic, consular and related immunities Foreign state immunity Act of State Trade union immunity Crown immunity Honest comment Illegality at common law Statutory illegality defences
<i>Public justifications</i>	<i>Public policy defences that arise after the tort</i>
Public necessity Defence of another person Defence of another's property Arrest Discipline Responsible journalism Medical treatment Justification Statutory authority	Limitation bars <i>Res judicata</i> Abuse of process Contract of settlement Release Offer to make amends Prior criminal prosecution Bankruptcy Reportage Death

Figure 9: Goudkamp's Taxonomy of Defences<sup>472</sup>

Returning to the analysis conducted regarding the defences available for blameworthiness we grouped them into two main categories; 'Non Exculpatory' and 'Exculpatory' and it was argued that non-exculpatory defences contained within their number public policy defences that exist and are applied for reasons outwith the logic of culpability, such as diplomatic immunity. The same basis for analysis may be applied to Goudkamp's schema where public policy defences can be considered as outwith the logic of responsibility and as such do not go to elucidating the core function of tort law. Each of the remaining 'defences' - which he classes as justifications - are within the logic of responsibility and as such can be used to infer and deduce aspects of the core nature of tort. When the 'defences' – both public policy and more particularly for our purpose non public policy - are examined each of them can be understood as denials, most particularly denials of a relevant element of the tort. They are claims such as “the duty did not apply to me because X”. In this way we might infer that the logic of responsibility - as understood in tort - may be said to only incorporate denials, and if denials are not defences this

<sup>472</sup> James Goudkamp, *Tort Law Defences*, (Hart Publishing, 2016) at 135.



suggests the internal logic of responsibility has no room for defences. As such we may make the claim there is no offence/defence distinction in tort which leads us back to the claim consistent with this analysis, from Gardner that there are no justifications in tort. A tort is either completed or not. An agent's reasons for committing a tort are entirely irrelevant. The only 'defence' available to a defendant is a claim that the tort has not in fact been completed by virtue of a denial of a constituent element of the tort.

Conclusion:

This chapter engaged with the scholarship on the structure of criminal and tortious defences as a route to understanding the relevant ascriptive audiences for criminal blameworthiness and tortious responsibility. A schema for categorizing and analyzing criminal defences was proposed as available when they are grouped across an exculpatory and non-exculpatory divide. Exculpatory defences can then be understood as encompassing the standard division of justificatory and excusatory defences, while non-exculpatory defences exclude classes of persons beyond the writ of ascriptive assessments. Tortious defences on the other hand were argued not to exist and rather the so called defences may be better understood as denials of an element of the tort.

In drawing the above together the criminal law can be understood as a set of norms addressed to the members of the rational community. Such norms are rules which individuals are expected to conform their deliberative actions to. In this way they act as tools in the practical reasoning of the individual community members. However more than just practical reason or rationality seems to be required in that children and the insane can engage in something like voluntary conduct and choose means to efficiently achieve their desired ends. While they may have a base rationality what they lack is the full or mature regard for others' interests and generally underdeveloped or non-developed rationality. In this sense they may have what is termed mere or attributable agency without having agency proper, because such agency requires deliberation and absent an

ability to adequately account for the interests of others or a mature rationality one may not be said to be capable of the required deliberation. If the assessment of blameworthiness or culpability were merely a matter of complying or conforming with the prohibitory criminal law it could be argued that mere attributable agents or Non-Voluntary actors alone may be the relevant audience however given the central role of defences as understood through the above analysis, culpability examinations are more than assessments of the elements of an offence and this gives us an indication that relevant audience of culpability assessments are moral agents or agents proper i.e. those who can engage in agency proper; Aristotelian Voluntary Actors.

From the analysis we can see that the approaches for crime and tort differ dramatically. While youth and insanity make the relevant agent unsuitable for ascriptions of culpability based on a lack of the relevant Agency proper, exemptions for incapacity take on a different hue for ascriptions of liability. For liability there is no general exemption for youth, insanity or involuntary intoxication. It seems that once the basic capacity for conscious action, or Aristotelian non-voluntary conduct is present then the person is within the membership of those susceptible to being ascribed as liable. It is proposed that this is best thought of as those that may be deemed mere agents or those with the capacity of attributable agency are within the ambit of tortious ascriptions.

Such an understanding of tortious responsibility, which is an objective question of conformance or otherwise and allows no room for defences - merely denials - indicates why it is theoretically consistent that children and the insane are within the ambit of the ascriptive audience for tortious responsibility. While Goudkamp argues for the exclusion of the insane from the ascriptive audience of tortious responsibility such an argument must rely on non-liability logic i.e. countervailing concerns outside the internal logic of tort, because their inclusion is perfectly consistent with the logic of responsibility.

## CHAPTER 5: ASCRIPTIVE TARGETS

### **Introduction:**

The last chapter sought to ascertain the relevant audiences for ascriptions of criminal blameworthiness and tortious responsibility. This analysis discerned those who engage in agency proper or assessable agency only as the relevant ascriptive audience of blameworthiness assessments whereas those with the capacity to engage in mere attributable agency were deemed the relevant ascriptive audience of responsibility ascriptions. We now move to consider the types of conduct and results that are the target of such ascriptive assessments. This is important because crime and tort both appear to be directed towards the diminution of wrongdoing but if they have different foci it will help us to understand the crime/tort distinction better.

Continuing the descriptive, general and central case approach this chapter will seek to discern the core targets of blameworthiness and responsibility. The previous chapter engaged with the theory on the structure of defences as a tool for analyzing the crime/tort distinction, this chapter however will engage with relevant theory regarding the structure of non-defence constraints on the ascriptions of criminal blameworthiness and tortious responsibility.

The chapter begins with a consideration of tortious responsibility or liability. It examines the doctrines of remoteness and causation along with a consideration of the work of harm in the assessments of tortious responsibility. It is argued that they indicate that tortious responsibility is a duty centric assessment. With regard to crime however, the wrongness constraint is interrogated and proposed to be applicable (only) to blameworthy crimes. While extra-blame logic may justify crimes beyond the constraint of wrongness, blameworthiness proper is so constrained; indicating central case criminal culpability assessments to be wrongness-centric.

## PART I - TORT

### Liability Target

Williams and Hepple highlight a fact so often borne out anecdotally by law students that “there is no branch of English law the name of which conveys so little meaning to the average layman as tort.”<sup>473</sup> This is no doubt partly because of the etymological origins of the word tort, which emanates from the Latin *torque* (to twist) on to medieval latin *tortum* (wrong or injustice) entering the English language post conquest, through Norman French but not percolating into common parlance. It is a phrase of continental provenance and moreover associated with the long established continental civilian body of law, delict. It has most assuredly a foreignness to it; however the concept of tort or at least civil action has long been in use in common law.

The eminent scholars propose that the fundamental distinction between criminal law and the law of tort is that the former seeks to control conduct and “is principally directed towards influencing behaviour. In contrast, the aim of the law of tort is principally to compensate the victim of wrongdoing.”<sup>474</sup> This claim is not one of absolute or universal application, they merely say these are the principal aims although there may be other, lesser or fringe objectives these primary goals are nonetheless relevant in any investigation of the purposes of such bodies of law.

A duty centric notion is proposed by Williams and Hepple in that they consider each tort to comprise of two distinct duties. The first is the primary duty that a particular result does or does not arise; or as they describe it “event shall or shall not happen”<sup>475</sup> which, should the primary duty not be conformed to, can give rise to a secondary duty in the form of

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<sup>473</sup> Glanville Williams and B.A. Hepple, *Foundations Of The Law Of Torts*, (2nd ed, Butterworths, 1984) 1.

<sup>474</sup> Glanville Williams and B.A. Hepple, *Foundations Of The Law Of Torts*, (2nd ed, Butterworths, 1984) 3.

<sup>475</sup> Glanville Williams and B.A. Hepple, *Foundations Of The Law Of Torts*, (2nd ed, Butterworths, 1984) 23.

what they describe as a “sanctioning duty on the defendant to pay damages for the wrong.”<sup>476</sup>

The terms ‘damage’ and ‘damages’ are legal terms of art where the former refers to what Williams and Hepple describe as “any injury or loss, physical or economic(financial)”<sup>477</sup> whereas the term ‘damages’ refers to “the compensation in money for loss suffered by a person owing to the tort, breach of contract, or breach of statutory duty of another person.”<sup>478</sup> Murdoch gives a comprehensive list of the classification of different types of damages awarded by the courts here;

Damages can be classified as (a) *nominal* – where there has been no loss, and the damages recognize that the plaintiff has had a legal right infringed; (b) *contemptuous*-where the amount awarded is derisory: *Dering v Uris* [1964] 2 QB 669; (c) *ordinary*-consisting of general and special damages; (d) *aggravated* -where additional compensation is awarded in recognition of the exceptional features which add to or exacerbate the plaintiff’s injury: *Kennedy v Hearne* [1988 HC & SC] ILRM 52 and 531; (e) *vindictive, punitive or exemplary* – where awarded to punish the defendant: *Garvey v Ireland* [1979] 113 ILTR 61; *McIntyre v Lewis & Dolan* [1991 SC] I IR 121; (f) *speculative* – calculated having regard to events which may happen in the future: *Hickey & Co Ltd v Roches Stores (Dublin) Ltd (No 2)* [1980] ILRM 107; (g) *liquidated* – where fixed or ascertained by the parties in the contract; (h) *unliquidated* – dependent on the circumstances of the case to be determined by the court.

It is obvious from the list above that compensation is not indeed the only aim of an award of damages nor likewise the only aim of tort.

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<sup>476</sup> Glanville Williams and B.A. Hepple, *Foundations Of The Law Of Torts*, (2nd ed, Butterworths, 1984) 23.

<sup>477</sup> Glanville Williams and B.A. Hepple, *Foundations Of The Law Of Torts*, (2nd ed, Butterworths, 1984) 54.

<sup>478</sup> Brian Hunt, *Murdochs Dictionary Of Irish Law*, ( Bloomsbury 2009) 309.

The practicing lawyer is trained to focus on the damages available to or from one's client. It is a victim centred viewpoint and could lead one to consider that the law of torts (as the eminent scholars *supra* have) is a question of victim compensation, but is this really the case? Such a view is certainly accepted in the general understanding of the function of tort as being to put victims back in the position they would have been had the pertinent injury not been sustained. This is most famously expressed in that central maxim of *restitutio in integrum*. Such a victim focused view however encounters a number of difficulties, most particularly when one considers the central issues of causation, remoteness and harm as follows below.

Causation:

Causation is of central importance in tort law, and an issue which Fleming claims has “plagued courts and scholars more than any other”.<sup>479</sup> The question of causation comes in two varieties; factual causation and legal causation. Factual causation otherwise known as *causa sine qua non* is – as the Latin indicates- a question of a “but for” analysis, where the courts will consider would the pertinent injury have been sustained by the victim *but for* the defendant's conduct. This analysis however is merely a preliminary assessment from which we may winnow all conduct down to that which is a candidate for the more pressing assessment of legal causation. The but for test is a rough tool which suffers serious deficiencies, not least its infinitely regressive nature. While it may be rough it only has a sifting function; it merely indicates which defendants *may* be liable not which defendants *are*. It acts as “a preliminary filter and to eliminate the irrelevant rather than to allocate legal responsibility.”<sup>480</sup> It therefore only provides the courts with a set of potential candidates. Given this limited use and non-determinative quality its roughness is not a difficulty for the larger work of ascription of liability, and in fact it performs a useful preliminary function.

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<sup>479</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 84.

<sup>480</sup> WVH Rogers, *Winfield & Jolowicz, Tort*, (18<sup>th</sup> edn Sweet & Maxwell 2010) 311

Once the question of factual causation has been disposed of the question of legal causation is then dealt with. We therefore move from what McMahon and Binchy describe as the question of “fact, in the scientific or physical sense of cause and effect ...[to a] ... question of law.”<sup>481</sup> The Latin phrase to indicate legal cause is *causa causans*, which translates as causing cause or referred to as real cause or sometime proximate cause. The description of legal cause as the “proximate cause” indicates that the quest for legal causation may be responding to the infinitely regressive quality of the *sine qua non* doctrine by picking out the nearest cause and thereby having the effect of limiting the backwards search to the more immediate causes. This however is not the case. Consider the following judgment;

There was evidence from which a jury might reasonably conclude that the accident had brought on a very rapid development of the aortic stenosis rendering an operation necessary at a much earlier period in the patient’s life than would have been the case if there had been no accident. If this is so the risk of death by a proper and necessary operation had to be incurred earlier in life. The risk turned out adversely. The man’s life was cut short at an earlier period than if there had been no accident and an operation, performed at a later date, had turned out equally fatally. The accident was truly the cause of this operation being performed at an earlier date than would otherwise have been necessary, and in consequence accelerated the death. It *was* the cause of his death occurring *at that time*. This is sufficient to satisfy the wording of the relevant section. Death at some time comes to all, but in the eyes of the law to accelerate that time is equivalent to causing death at that time so as to attach liability for the pecuniary loss to the dependents arising from such acceleration of death.<sup>482</sup>

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<sup>481</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 85.

<sup>482</sup> *Smith v Leavy* (17 November 1950) SC

If legal causation was purely a matter of determining the nearest cause of injury then the operation would be classed as the cause of death, not the so called 'accident'. The determination of legal cause does not then simply operate to augment the factual causation analysis by providing it with scientific limits. It is seeking causes in a different sense. McMahon and Binchy describe legal causation thus; "It is an approach which essentially looks at the problem from the plaintiff's point of view back to potential defendants, and it is an approach which favours the view that causation is primarily concerned with locating defendants."<sup>483</sup> This analysis indicates why the term "proximate cause" is problematic. If proximity were at the root of legal causation then it would simply be a modified factual causation; but this does not correctly describe its operation; rather it seems -fair enough- to be working within a proximate range but as McMahon and Binchy indicate it is "concerned with locating defendants" within that range.

Note that the purpose is to locate defendants, (a responsibility laden conception) not the proximate cause or the proximate human cause. Consider real or pure accidents. If I am the immediate and full cause of your injury because I stumbled into you accidentally, i.e. there was no broken man hole cover, no spilt milk, nothing we can pin on anyone, rather it was just a pure accident then my stumble albeit the full, proximate, human, cause is not a legally relevant cause.

Remoteness:

Determining the cutoff point of consequences for which a defendant may be held responsible/liable in tort is the work of the doctrine of remoteness. There are two authoritative approaches in this jurisdiction used in determining the attributable consequences. The approach of *Re Polemis*<sup>484</sup> is that of direct consequences where the court determined that "if the act would or might probably cause damage, the fact that the damage it in fact

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<sup>483</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 101.

<sup>484</sup> *Re Polemis & Furness, Withy & Co Ltd* [1921] 3 KB 560.



causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act”<sup>485</sup> Whereas in *The Wagon Mound (No.1)*<sup>486</sup> the court adopted a slightly different approach where it was held that

If, as admittedly it is, B’s liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened - the damage in suit? And, if that damage is unforeseeable so as to displace liability at large, how can the liability be restored so as to make compensation payable?<sup>487</sup>

Chains of causation may be broken and it can be useful to consider that which breaks chains of legal causation to help us understand better the substantive make up of those chains. The doctrine of *Novus Actus Interveniens* is just such a useful tool. Its operation is described in *McMahon and Binchy* as having the effect that “the defendant may do something for the consequences of which he could fairly be said to be responsible, but because of the supervening and subsequent act of another he may be relieved of this responsibility.”<sup>488</sup> One of the chief considerations of the courts in determining whether or not a *Novus Actus Interveniens* arises is the foreseeability or otherwise of that which is claimed to be an intervening act. As Maguire CJ, delivering the judgment of the court considered;

In my view the question as to whether an intervention of a third party should be regarded as breaking the chain of causation depends on whether, in the circumstances of the case, the defendants ought reasonably to have foreseen that such an intervention might take place.<sup>489</sup>

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<sup>485</sup> *Re Polemis & Furness, Withy & Co Ltd* [1921] 3 KB 560 at 577.

<sup>486</sup> *Wagon Mound (No. 1)* [1961] 1 All E.R. 404 (P.C.)

<sup>487</sup> *Wagon Mound (No. 1)* [1961] 1 All E.R. 404 (P.C.) at 425.

<sup>488</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 102.

<sup>489</sup> *Smyth v Industrial Gases (IFS) Ltd* (1950) 84 ILTR 1 (SC)

The result being that should not only the consequences of one's actions but also the interventions of others be foreseeable then the defendant may be held liable. This is an interesting dimension of legal causation because it can be distinguished from direct factual or cause and effect causation. It indicates that if Defendant1 acts and in so doing would not with their standalone action cause any injury to Victim, intentionally, recklessly or negligently, but such act foreseeably causes intervention of Defendant2 to act which does in fact injure Victim then Defendant1 is deemed the legal cause despite their own action being a step removed from the direct line of cause and effect.

Mc Mahon and Binchy caution that "All the cases cannot be reconciled on this matter but it is clear that two factors become important when the courts consider this matter."<sup>490</sup> The first is the foreseeability of the intervention as discussed above the second is, if the intervention is a human action, "the nature, the character and, in particular, the mental element of the intervening actor."<sup>491</sup> The courts will allow for a break in the chain of causation when the intervening action is "criminal or reckless in a subjective sense"<sup>492</sup> The classic case of course is that of *Breslin v Corcoran*,<sup>493</sup> where the chain of causation started from the driver who left their keys in the ignition of the car and ending with the defendant being struck by that same car. However the courts held that the dangerous driving of the car thief broke the chain of causation. The fact that the courts will allow criminal or subjectively reckless interventions to break the chain of causation even though foreseeable further indicates that the ascertainment of legal causation is indeed a question of a defendant search or in other words a search for wrongdoers where questions of cause and

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<sup>490</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 115.

<sup>491</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 115.

<sup>492</sup> Bryan McMahon and William Binchy, *Law of Torts*, (4<sup>th</sup> edn Bloomsbury 2013) 116.

<sup>493</sup> *Breslin v Corcoran* [2003] IR 203

effect and even foreseeability give way to an analysis and hierarchical ordering of, wrongdoing.

Dimmock describes *Novus Actus Interveniens* in terms of expression of agency where;

Agency is not spread across all causal lines, but it is spread along some. What marks the difference? Those events that have traditionally been thought to break causal chains (intervening human acts and unusual natural events or coincidences) are also the kinds of events that block agency from passing from one act to a subsequent act or event.”<sup>494</sup>

The question of remoteness is intriguing, because it begs the question, why would it be relevant whether or not the injury was foreseeable if the defendant caused the injury and the plaintiff suffered an injury. If the purpose of liability is *restitutio in integrum* and responding to the victim’s plight then remoteness seems an inconsistent doctrine especially when one considers that directly caused albeit unforeseeable injury may not provide a successful claim.

*Non Harm Considerations:*

Life is unfair. We are not equally situated in the field of luck and some of us will and do suffer in unjust proportion compared to others. As Machiavelli reminds us we are all subject to the vagaries of *fortúna* - fortune - and its effect upon humankind, with how it “varies, now by elevating them, now by oppressing them”<sup>495</sup> The courts too are familiar with the unfairness of life but see no reason for the law of tort to respond to what they term the vicissitudes of life.<sup>496</sup> In other words harm can be

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<sup>494</sup> Susan Dimock, ‘Intoxication and the Act/Control/Agency Requirement’, (2012) 6 *Crim Law and Philos*, 341, 357.

<sup>495</sup> Niccolò Machiavelli, *Discourses on Livy*, (Julia Conaway Bonadella and Peter E Bonadella trs, first published 1531, Oxford University Press 2009) 32.

<sup>496</sup> Cf *Baker v Willoghby* [1970] AC 467 and *Jopling v Associated Dairies Ltd* [1982] AC 794

occasioned without a legal defendant being available, upon whom liability may be imposed. It's just bad luck on the part of the injured. Again, if the primary focus of tort law was to respond to injury or harm then it is reasonable to expect the law to find the best available human cause and attribute liability in that way. The law does not respond to all and any harm and indeed conversely it can respond when no harm has been occasioned.

Converse to the law's non-responsiveness to harm it may ascribe liability in the absence of harm; the doctrine of *per se* torts is well established and damages are awardable without any proof from the plaintiff as to any injury suffered or harm endured. The archetypical *per se* tort is trespass, where the plaintiff need not suffer loss to succeed in their claim. Indeed McMahon and Binchy highlight that in the case of *Longenecker v Zimmerman* (1954) 175 Kan 719 where the defence proposed was that the Plaintiff had benefitted from the unconsented to topping of her infected trees. The court clearly determined that once trespass had been established damages were due irrespective of the trespass having beneficial or deleterious results.

Kit Barker considers the somewhat troubling issue of the courts awarding damages without loss on the part of the Plaintiff.<sup>497</sup> This is a settled aspect of tort law yet it is troubling because it poses difficulties for theories of tort which revolve around the victim centred maxim of *restitutio in integrum*. He begins by highlighting the well known judgment on this issue by Lord Shaw in *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamsom*,<sup>498</sup>

If A, being a livery man, keeps his horse standing idle in a stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you

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<sup>497</sup> Kit Barker, 'Damages Without Loss: Can Hohfeld Help?', (2014) 34 Oxford Journal of Legal Studies, 631.

<sup>498</sup> *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamsom* (1914) 31 RPC 104 (HL).

want restored? I restored the horse. There is no loss. The horse is none the worse; it is the better for the exercise'<sup>499</sup>

Baker's proposal is that in adopting the Hofeldian taxonomy the law can coherently place a value on legal powers – in the above case A's power to apply for ex ante injunctive relief to refrain B from using his horse - "as valuable legal assets, the loss of which can be compensated by a monetary sum"<sup>500</sup>

David Pearce and Roger Halson note a related issue with regard to vindictory damages.<sup>501</sup> They note the distinction between compensatory (loss based), restitutionary (gain based) and vindictory damages (rights based). They begin and end their analysis with a consideration of the controversial *Chester v Afshar*.<sup>502</sup> Lord Craighead gave a now famous quotation on the general purpose of tort law– after considerable engagement with academic commentary, not just case law;

The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content.<sup>503</sup>

The case was interesting because the normal rules of tortious ascription were not followed and yet the plaintiff succeeded in her case. Briefly, the defendant neurosurgeon failed to warn the plaintiff of a potential adverse complication even if the surgery was performed with due diligence and care. The surgery was undertaken with such diligence and care and therefore without a breach of the duty of care, and there was no evidence to suggest that the plaintiff would not have undergone the surgery;

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<sup>499</sup> *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamsom* (1914) 31 RPC 104 (HL) at 119.

<sup>500</sup> Kit Barker, 'Damages Without Loss: Can Hohfeld Help?', (2014) 34 *Oxford Journal of Legal Studies*, 658.

<sup>501</sup> David Pearce and Roger Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication', (2008) 28;1 *Oxford Journal of Legal Studies*, 73.

<sup>502</sup> *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134

<sup>503</sup> *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 at [87] (Lord Hope of Craighead).

however the adverse complication also arose. Controversially the court awarded damages. Pearce and Halson argue that while the surgeon was negligent in failing to warn about the potential consequences and therefore is a good candidate for some form of response from the court to the breach of her right to be fully informed, the better approach would have been to award vindictory damages aimed at compensating that rights violation rather than the overly onerous imposition of full liability for the non-negligently caused adverse consequences, as occurred in this case.

Francisco Giglio delves into this aspect of the law responding when no harm has been occasioned, in his work on restitution. He provides two interesting scenarios for consideration which are worthy of full transcription here as they highlight the conundrum and also form a central plank in his analysis;

In the first scenario, I have a beautiful villa. When I go on holiday, I leave the keys with my neighbour. But my neighbour is not very trustworthy. Soon after I leave, he organises parties for paying guests using my villa. After each party, he restores the villa to pristine condition and because he has his own supplies of water and electricity my utility bills are not increased by his use of my home. Upon my return, I find out about the parties but only because another neighbour tells me. In the second scenario, there is no villa, but I am still in a solid financial position. A friend of mine convinces me to invest in a company which produces a revolutionary microchip. He shows me publicity material relating to the company together with documents reporting its sound financial situation. All seem very convincing. I buy shares in the company, my friend acting as an intermediary in the transaction. Again, my friend is not trustworthy. He has not disclosed to me that he has a personal interest in the company and knows that it is close to bankruptcy. Following my investment, he manages to sell his own shares in the company for a good price. Yet, I realise in

time that the company is in trouble and sell my shares at the same price which I paid for them.<sup>504</sup>

Giglio indicates that there are three standard remedies available to the courts in responding to the claims presented to it based on; compensation, restitution and example. He describes compensation as nullifying or neutralizing the loss of the victim while restitution nullifies or neutralizes the gain of the defendant and exemplary awards as punishment.

He points to the fact that the courts find a claim of action in the first type of scenario following the line of reasoning as espoused by the judgment of Lindley LJ in *Whitwham*, '[t]hose cases are based upon the principle that, if one person has without leave of another been using that other's land for his own purposes, he ought to pay for such user.'<sup>505</sup>

Following the Weinribian view on tort law as founded on corrective justice – as discussed in the introduction to this thesis - Giglio considers that prohibition on enrichment has a place in such a normative analysis “providing it is understood that 'detriment' is not confined to a financial loss. A wrongful behaviour is detrimental to the claimant because it places him in the position of a sufferer from an injustice, which is independent of any compensable loss concretely sustained.”<sup>506</sup>

A fundamental distinction between responsibility and the response to ascriptions of responsibility must be understood. Much literature focuses on responses, i.e. damages and works backwards, this I think is one of the chief weaknesses of the economic approach to tort analysis. This division between responsibility and damages can be understood by comparison with criminal law and the division between culpability and punishment. Those who are deemed blameworthy become candidates for punishment and the level of punishment is generally understood to be constrained by the need for it to “fit the crime” but thoughts of punishment only occur

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<sup>504</sup> Francesco Giglio, ‘Restitution for Wrongs: A Structural Analysis’, (2007) 20 Can. J. L. & Jurisprudence 5.

<sup>505</sup> *Whitwham v. Uestminster Brymbo Coal and Coke* [1896] 2 Ch 538 (CA)

<sup>506</sup> Francesco Giglio, ‘Restitution for Wrongs: A Structural Analysis’, (2007) 20 Can. J. L. & Jurisprudence 5.

after a determination of blameworthiness and are secondary to such a determination; likewise thoughts of damages only arise after a responsibility determination and are likewise secondary. Consideration of loss can help in the quantification of compensatory damages and measurements of enrichment can determine the quantum of damages to be applied in a restitutionary response but they are secondary.

Giglio considers that “compensation and restitution accomplish equal yet opposite results; compensation aims to place the victim in the same position in which the victim was before the wrong was committed, whilst restitution aims to place the wrongdoer in the same position in which the wrongdoer was before he perpetrated the wrong .”<sup>507</sup> however a better view is available in the work of Robertson where he highlights that;

In *X (Minors) v Bedfordshire County Council*, Lord Browne-Wilkinson agreed with observations which had been made by Sir Thomas Bingham MR in the Court of Appeal in *M (A Minor) v Newham London Borough Council* ‘that the public policy consideration which has the first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter-considerations are required to override that policy’.

Arguing for an interpretation akin to;

When the courts ask, with reference to these factors, whether the defendant ‘ought’ to have had the relevant interest of the claimant in contemplation, it is clear that the question under consideration is a non-instrumental question of right and wrong. How the defendant ‘ought’ to have behaved is a question of interpersonal fairness, or what the claimant can reasonably expect of the defendant, not a question as to whether the community would be better off if the duty were recognized.<sup>508</sup>

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<sup>507</sup> Francesco Giglio, ‘Restitution for Wrongs: A Structural Analysis’, (2007) 20 Can. J. L. & Jurisprudence 5.

<sup>508</sup> Francesco Giglio, ‘Restitution for Wrongs: A Structural Analysis’, (2007) 20 Can. J. L. & Jurisprudence 5, 34.



This approach puts the defendant's duty breaching as the central concern of the courts rather than the reparation of damage endured by a victim. In this way, it seems more consistent with the foregoing analyses.

Agency:

We have seen across the issues of causation, remoteness and the non-applicability of harm that there are grave difficulties for an understanding of liability founded on the maxim *restitutio in integrum*, or a like consideration that the purpose of tort law is to compensate victims. If this maxim were really the basis of liability then causation would be the necessary and sufficient condition for such ascriptions. However we have seen that the causation of harm is neither a necessary nor a sufficient condition to make out liability in tort. Also, pure accidents may involve person A directly and immediately causing harm to person B but such immediacy adds nothing to the claim if the injury resulted from an accident. The chain of causation may also be broken by *Novus Actus interveniens* which standardly takes the form of the agency of another. Further any injury caused may be too remote. This notion of foreseeability coupled with the other limits of causation of any injury relocates the locus of liability assessments not on the injury of the plaintiff but on the conduct of the defendant.

When one considers that tort may respond in the absence of harm and even in the presence of the plaintiff being materially better off because of the result of the action of the defendant we must look elsewhere for an explanation of liability ascriptions. Posner's view of economic redistribution meets with great difficulty in the response the courts give to instances when the plaintiff has suffered no economic loss or indeed has benefited. Stevens' rights based theory is somewhat confounded by the defendant focused nature of questions of causation, remoteness etc. While Weinrib's corrective justice view holds more water in the face of these difficulties it finds it difficult to accommodate exemplary/punitive damages. A more coherent view of liability ascription however is available to us discernible from the above analyses and that is a defendant

focused assessment of their agency. Liability assessments are fundamentally a determination of the wrongfulness or otherwise of the defendant's conduct. It is an assessment of whether or not they have breached a duty. In accidental agency no duty has been breached, and therefore no liability ascribed. In agency whose causative effect is interrupted by the intervention of another agent the resulting consequences are no longer considered an expression of the agency of the original potential defendant. In injury which is sustained beyond the limits of foreseeability no duty has been breached by the defendant and therefore no liability ascribed and finally in the issue of punitive, exemplary damages etc. they are all linked by and understood as responses to the defendant's agency where they have breached duties other than harm centered duties. In this way a unifying theory of liability can be proposed which understands liability as an ascription for duty breaching agency. This duty focused theory fills in the gaps of the three dominant theories encountered in the Introduction chapter and can meet the challenges posed by Goudkamp and Murphy as argued in more detail in the next chapter. For now it suffices to demonstrate that a theory focused on duty breaching agency is a good candidate for such a theory of general application.

#### Liability Summary:

Is tort law victim focused? It appears not. It is clear that such an understanding of tort suffers some fatal difficulties arising from the very structure of tort law itself. Firstly, if responding to harm was the function of tort law then the central and determinative question would be that of factual causation. It would revolve around the question did A cause injury to B? This however is not the case. When harm is an issue factual causation, *causa sine qua non*, from the first is superseded by legal causation, *causa causans*. If causation of harm was the focus of tort law then pure accidents would be within its remit. The fact that A *accidentally* harmed B would be immaterial because the causation of harm would have been made out. In fact even direct and immediate infliction of harm is not

part of the ascription of liability when such direct and immediate injury is sustained accidentally.

A further difficulty for the claim that tort is focused on harmfulness lies in the operation of the legal doctrine of *novus actus interveniens*. The fact that the chain of causation can be deemed to be broken by some intervention - archetypically the agency of another - indicates the insufficiency of causing harm in determining liability.

If harmfulness was the focus why then would remoteness be a core doctrine of tort law? Why would only those who engaged in conduct which has foreseeably harmful consequences be vulnerable to a liability determination? And of course further why does the law provide for restitution even though no harm, i.e. no injury or diminution of wealth was suffered by the victim? The answer is that it is the agency of the defendant that is the focus of the legal ascriptions of liability not the injury sustained to the victim.

From the above we can see that it is wrong to make the claim that the ascription of liability is centred on *restitutio in integrum*, as Williams and Hepple have. It is perfectly defensible to indicate that this is the core (although not exclusive) function of the remedies available to tort law, but remedies are a response to and therefore logically posterior to ascription of liability. When we distinguish the remedies available from the primary substantive issue of responsibility/liability determinations it helps make clear that the law of tort is not in fact a body of law with the purpose of responding to harm or injury but rather to wrongfulness/breaches of duty. This is what makes the law's use of normative language so apt.

## PART II - CRIME

### Culpability Target:

Having determined the pertinent grouping susceptible to criminal ascriptions in the previous chapter (see the culpability summary subsection and the conclusion in chapter 4) we now move to consider what action on the part of a member of that grouping attracts an ascription of criminal culpability or blameworthiness. To blame an individual is a serious normative response which warrants clear understanding. Peter Westen does not speak of blame in his work on culpability instead preferring the term ‘reproach’ but while the form he uses differs the substance presents as a good understanding of blame, where he considers; “To reproach a person for conduct is to express the belief that he acted with a reprehensible attitude toward the legitimate interests of himself or others.”<sup>509</sup> He offers an understanding of reproaching an individual through a consideration of resentment, which he defines as an individual experiencing when she believes that her interests have not been respected. And resentment has a similar third party form in the emotion of indignation;

Like resentment, indignation is a reactive emotion that is triggered by A’s belief regarding B’s failure to accord a person, including B himself, the dignity that A believes the person deserves<sup>510</sup>

Reproach thereby being an expression of societal indignation at the regrettable conduct of the blameworthy. This is a very serious action on the part of the state and the determination of a given individual to be blameworthy is perhaps worse than the consequential punishment; as Westen puts it - “[it] may be the greatest harm a state can inflict on its citizens, *viz.*, the harm of publicly declaring that, in addition to committing

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<sup>509</sup> Peter Westen, ‘An Attitudinal Theory of Excuse’, (2006) 25 Law and Philosophy 289, 292.

<sup>510</sup> Peter Westen, ‘An Attitudinal Theory of Excuse’, (2006) 25 Law and Philosophy 289, 356.

a bad act, the defendant has revealed himself to have been a bad person deserving of society's low regard."<sup>511</sup>

Mark Dsouza shares a similar view on the importance of an agent's attitude in determining criminal blameworthiness;

Since criminal blameworthiness (though not necessarily moral blameworthiness), depends on the agent's attitude towards the norm, a person cannot be criminally culpable without displaying an inappropriate attitude towards the criminal law's normative guidance.<sup>512</sup>

It is interesting to note here that Dsouza limits his consideration to that of criminal culpability and blameworthiness and dissociates it from moral culpability and blameworthiness. Indeed in his work he also builds on other theorists to draw the distinction between criminal culpability and criminal liability as well as the distinction between criminal culpability and moral culpability, which can lead to scenarios such as "a criminally culpable person may nevertheless be excused from criminal liability, if, for instance, she is not morally culpable."<sup>513</sup>

Dsouza proposes the conditions for criminal blame are a combination of the conduct of the accused and the outcome of their conduct, summarized in the following two paragraphs;

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. Both blameworthiness, and something for which to blame, are necessary, but not

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<sup>511</sup> Peter Westen, 'An Attitudinal Theory of Excuse', (2006) 25 Law and Philosophy 289, 358/359.

<sup>512</sup> Mark DSouza, 'Criminal Culpability after the Act', (2015) 26;3 King's Law Journal, 440, 451.

<sup>513</sup> Mark DSouza, 'Criminal Culpability after the Act', (2015) 26;3 King's Law Journal, 440, 453.

independently sufficient, preconditions for the criminal law to assign blame.<sup>514</sup>

And

Although an agent's criminal blameworthiness depends on her attitude towards the criminal law's conduct norms, I argue that the criminal law ought only to blame blameworthy agents if there is something for which to blame them. For that reason, the proposed account of criminal culpability does not compel us to embrace a result-independent conception of the criminality of conduct.<sup>515</sup>

This proposes two tests must be met; 1) is society entitled to blame the actor because of a result brought about by the actor? and 2) is the actor deserving of blame? These are at first blush somewhat overlapping and perhaps confusing criteria for developing any theory of blameworthiness. It could be considered confusing and overlapping because the model proposed considers a "desert of blame" as being insufficient "to assign blame" but a more generous reading of Dsouza allows for a certain terminological overlap in his discussion between moral blame and criminal blame. It is interesting to note his requirement that the agent must be morally blameworthy in order to be eligible to be classed as criminally blameworthy.

Ripstein adopts an objective reasonableness standard to be employed when assessing criminal or tortious liability.<sup>516</sup> Essentially his theory is only when one acts unreasonably that one then becomes liable for the bad luck of any consequences flowing from such conduct. That is why in negligence it is only if the supposed tortfeasor acts unreasonably that he becomes liable for the injury suffered by the supposed victim; a situation that would not arise were the supposed tortfeasor to have acted reasonably.

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<sup>514</sup> Mark DSouza, 'Criminal Culpability after the Act', (2015) 26;3 King's Law Journal, 440, 455.

<sup>515</sup> Mark DSouza, 'Criminal Culpability after the Act', (2015) 26;3 King's Law Journal, 440, 456.

<sup>516</sup> Arthur Ripstein, *Equality, Responsibility and the Law*, (Cambridge University Press, 1999)

This sense of luck assignment is a function of Ripstein's political theory of equality and liberty, which seeks to respect the agency of all. In Ripstein's analysis of the case of *Vaughan v Menlove*<sup>517</sup> which involves a defendant of limited intelligence (such limitation being proposed as a defence to tortious damage) Ripstein agrees with the imposition of liability on the defendant because to do otherwise would be to have treated him "as a mere natural thing rather than as an agent."<sup>518</sup> This raises an interesting distinction that is borne out in the standard model of tort law where insanity is not a defence; whereas the converse holds true for criminal responsibility. Is this an error of one or the other or is there something to be gleaned about the difference between the two from this disparity?

We can see then in Ripstein's unreasonableness and in the role Dsouza considers moral blameworthiness may play in criminal culpability along with Westen's legitimate interests of others a recognition of a moral core to blame and blameworthiness which at least likely has a role in criminal culpability (if not perhaps criminal liability). These concepts are also all addressing the cognate issue developed earlier of 'wrongness' which adopted the Gardnerian understanding of same as requiring a dissonance between guiding and explanatory reasons but added to this the qualification of it being defined as a species of unreasonableness and therefore subjectively limited albeit objectively assessed.

*Wrongness Encapsulated in Duty Breaches?*

Is the sort of wrongness required for blame encapsulated in a breach of duty? It would appear not. Let us consider the case of a criminal prohibition where certain agency (e.g. assault) is proscribed. Firstly, the criminal law tracks our moral intuition in blaming or finding culpable those that attempt to commit such a crime, even though they may be said to have failed in their attempt in that the substantive crime was not

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<sup>517</sup> *Vaughan v Menlove* 132 E.R. 490 (C.P.) (1837).

<sup>518</sup> Arthur Ripstein, *Equality, Responsibility and the Law*, (Cambridge University Press, 1999) 85.

completed. This blame attracting quality of attempts indicates that even if the primary duty isn't breached – in this case assault – there is still a blame attracting quality to the agency that does not require the primary duty of the proscribed conduct to be breached. There is something in attempting that is sufficient to warrant blame.

Let us briefly consider what at law is necessary to identify what type of conduct counts as attempt and how it can be distinguished from other non-attempt conduct. A standard limitation identified is that the conduct must be more than merely preparatory.<sup>519</sup> Christopher Clarkson identifies that most of the case law tends to the view that there must have been a “‘confrontation’ with the victim ...or with the property.”<sup>520</sup> The advantage of confrontation is that it identifies a sound time at which the commission of the crime is undoubtedly more than merely preparatory; however there is the implication that if this marks an obvious form of attempt then somewhere between bad thoughts and confrontation lies the line between non-attempt and attempt.

The concept of more than merely preparatory can be interpreted quite broadly even to include up to the point of confrontation. The most striking example of this is the case of *R v Geddes*<sup>521</sup> which involved the defendant entering the toilets of a school he had no connection to, where he lay in wait with a knife, masking tape and a rope. Fortuitously no pupil entered the toilets and he left; as he had had no confrontation with any pupil his acts were deemed to be merely preparatory and therefore on appeal it was determined that he was not guilty of an attempt. Such a broad reading of ‘merely preparatory’ leaves no room for attempts before confrontation, which presumably there is. It might be said that in such attempts there is something sufficiently close to the full execution of agency that is in breach of the prohibitory duty to warrant blame, but what of scenarios where it is simply impossible to be in breach of such prohibitory duty?

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<sup>519</sup> *R v Gullefer* (1990) 91 Cr App R 356

<sup>520</sup> Christopher M.V. Clarkson ‘Attempt: The Conduct Requirement’ (2009) 29;1 Oxford Journal of Legal Studies, 25, 26.

<sup>521</sup> *R v Geddes* [1996] Crim LR 894, Court of Appeal



Attempting the impossible poses a fruitful theoretical quandary; how are we to deal with those who conduct themselves with the intention of committing a crime that it is not possible for them to complete? The standard example being something like the hopeful pickpocket who encounters an empty pocket. They appear to be engaged in at least morally dubious conduct but are they blameworthy and if so how is the law to deal with them? In this jurisdiction the obiter of Walsh J in *Sullivan*,<sup>522</sup> considered that “the ultimate impossibility of achieving or carrying out the crime attempted is not a defence to a charge of an attempt.”<sup>523</sup> This fits the reasoning of the House of Lords in *Shivpuri*,<sup>524</sup> where it was decided that the defendant who believed himself to be smuggling heroin but in fact merely had vegetable matter was found guilty of an attempt. Indeed in the judgment Lord Bridge of Harwich makes specific reference to the pickpocket confronted by an empty pocket where he considered “whether or not there is anything in the pocket capable of being stolen, if A intends to steal his act is a criminal attempt.”<sup>525</sup> Further, the Law reform commission in this jurisdiction has advised for a similar approach to the subjectivist understanding in *Shivpuri* be adopted here, where it recommended “ that factual impossibility not preclude liability for criminal attempt.”<sup>526</sup>

Bebhinn Donnelly-Lazarov offers a philosophical analysis of impossibility based on the ontology of attempting;

So, the statement ‘he attempted to import two blue bags of sugar’ does give some context not strictly belonging to the attempt as such but it also chimes with its ontology as an intentional action. It does nothing to contradict the following description of the action: ‘He travelled with two bags, one of heroin and one of sugar, but he did not know that one contained heroin.’ On the other hand,

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<sup>522</sup> *AG v Sullivan* [1964] 1 IR 169

<sup>523</sup> *AG v Sullivan* [1964] 1 IR 169 at 195

<sup>524</sup> *R v Shivpuri* [1987] AC 1

<sup>525</sup> *R v Shivpuri* [1987] AC 1 judgment of Lord Bridge of Harwich

<sup>526</sup> Law Reform Commission, Inchoate offences, (LRC 99 – 2010) 69.

the claim ‘he attempted to import heroin’ is just not one that we would have reason give; it does contradict the attempt’s relevant ontology.<sup>527</sup>

While there are rich theoretical waters in this area of law and deserve individual theses directed towards them it suffices for the development of the argument here to recognise that impossible crimes exist. To judge someone “on the facts as they believed them to be”<sup>528</sup> indicates that even where a result duty cannot be breached culpability is still attracted by the defendant. This supports the centrality of conduct duty to crime but more than that it supports the proposition that wrongness is subjectively bounded. If impossible attempts may be deemed blameworthy and culpable then this poses a real challenge to any claim of the centrality of duty breaches to ascriptions of blame.

The other great challenge to the ascription of blame being a duty centric endeavor is the availability of defences. Offering a defence admits of having breached a duty and yet has the effect of escaping a determination of criminal blameworthiness. It is pertinent to briefly consider some relevant aspects of defences. Returning to the analysis of the previous chapter we divided defences into the two broad groupings of non-exculpatory and exculpatory. Non-exculpatory defences provided us with an understanding of those who are beyond the ascription of blame, whereas exculpatory defences are only available to those susceptible to such ascriptions and as such form an important part of the operation of blame assessments. These exculpatory defences are traditionally broken down into justificatory and excusatory defences. The availability of defences indicates an insufficiency in the duty breach for determinations of blameworthiness.

Gardner considers excuses and justifications to be expressions of our rationality “For having an excuse, like having a justification, is by its

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<sup>527</sup> Bebhinn Donnelly-Lazarov, *A Philosophy of Criminal Attempts*. (Cambridge University Press, 2015) 102.

<sup>528</sup> Finbarr McAuley and J. Paul. McCutcheon, *Criminal Liability : a Grammar* (Round Hall Sweet & Maxwell, 2000) 438.

nature an affirmation of one's rational competence. Both justifications and excuses are rational explanations for wrongdoing. They explain why the agent acted as she did by pointing to reasons that she had at the time of her action."<sup>529</sup> Under this view the law is directed at the rational aspect of humanity; our rational personhood, and in particular our deliberative actions/morality/practical reasoning. The criminal law's offences play a significant role in assisting an individual's practical reasoning by indicating prohibitions against certain actions but the law plays an equally significant, like role in the exposition of exceptions to the general rule of prohibition and in the provision of defences.

The standard effort of Criminal theorists in the reasons theory school (and beyond) is to explain how justifications and excuses share a genealogy with one another; however, such efforts may be fruitless. It is claimed here that justifications and excuses arise from different foundational bases and concern the judgment of different persons. They in fact have no shared genealogy. Their relationship does not extend beyond the fact that they may both be categorized as defences.

Justified action, being right action, means that the justificatory defence arises from a claim that one did the right thing; an excuse on the other hand proceeds from the acceptance that what one did was wrong. These are diametrically opposed starting positions. There is no shared middle ground between the claim 'I did the right thing' and that of 'I did the wrong thing but...' Both of course seek a determination of not-culpable but the first, because one's actions are beyond the realm of culpability, the second, accepting one's actions to fall within the ambit of culpability but seeking to be excused on this particular occasion for a particular reason.

Different centres of judgment are also at play with regard to the two models of defences. The defendant claiming justification is asserting their own judgment. It is their own reasoning that is examined by the community. Such examination occurs through the lens of the defendant's

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<sup>529</sup> John Gardner, *Offences and Defences*, (Oxford University Press, 2008) 86.

subjective perspective and is bounded by the defendant's understanding. An excuse on the other hand is granted by the community and it is the community's reasoning of when, where, how etc. it will excuse wrong action that determines whether or not a particular defendant is to be excused. In short: the defendant justifies; the community excuses.

This distinction points to a central aspect of blameworthiness. In offering a justification and thereby in making the claim that one did not perform wrong action one is indicating that they are beyond the ambit of ascriptions of blameworthiness. This is not a claim on the part of the defendant that they did not breach a duty but is one of; yes, they may have breached a duty but the necessary condition of wrongness – for ascriptions of blameworthiness – is not present and as such they are not susceptible to such ascriptions. In this we see not only the insufficiency of a duty breach for a blameworthiness determination but also a necessity of unjustifiedness or wrongness.

#### *Mala Prohibita:*

A core function of crime is to deal with culpable behaviour; through its investigation of it, calling for an explanation of it and responding to it. This focus on culpability/blameworthiness finds straightforward expression when the criminal law deals with *mala-in-se* crimes as they come with their wrongness on their face. *Mala prohibita* crimes however offer a slightly murkier prospect. This would challenge the analysis *supra* in that for such crimes at least the duty breach may be sufficient to the blameworthiness determination. A standard description of these crimes is that their wrongness is created by their enactment. Is this true? Can the criminal law create wrongness by fiat, or are there restraints on its ability to create wrongness? Is it perhaps as Peter Whelan has identified in the case of cartel legislation a matter of giving expression to preexisting wrongs such as lying, stealing, cheating?<sup>530</sup> What of the case of social

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<sup>530</sup> Peter Whelan, 'Cartel Criminalization and the Challenge of 'Moral Wrongfulness'', (2013) 33;3 Oxford Journal of Legal Studies, 535.

coordination such as driving; where jurisdictions insist upon drivers driving on either the right hand side or the left hand side. There is nothing inherently immoral in driving on the right hand side of the road so rules against such action cannot be getting at an underlying moral truth, but perhaps they still rely on underlying morality for their normative force. Society having decided on a particular side of the road to drive on the individual who chooses to drive on the opposite side is endangering the lives of others and in this disrespect to others' interests and thereby would engage in wrong action by doing so.

*Wrongness Constraint:*

There is a du Bois-Pedain/Simester debate regarding the wrongfulness constraint (which given the thesis's adoption of Gardnerian terminology we might read as wrongness constraint) in criminalization which provides a useful outline of some central considerations therein. Simester proposes that wrongfulness turns on whether the reasons favouring an action are all things considered outweighed by the reasons against such action;<sup>531</sup>

an action is 'immoral' whenever it is morally wrongful; and that it is morally wrongful whenever, all things considered, one ought not to do it. In turn, one ought not to do an action whenever the reasons favouring its performance are, all things considered, defeated by the reasons against. For an action to be immoral, therefore, does not require that it is seriously or profoundly wrong, that it be evil or wicked; only that it should not be done. Most wrongful conduct is venial.<sup>532</sup>

This perspective is criticized by du Bois Pedain for the reason that this concept of wrongfulness imputes no distinction between rationality and morality.<sup>533</sup> She insists that displaying irrationality or what she labels

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<sup>531</sup> This seems to have close relation to what Gardner would describe as wrongness rather than wrongfulness; which he limits to duty breaches.

<sup>532</sup> AP Simester, 'Enforcing Morality'. In A. Marmor (Ed.), *The Routledge Companion To Philosophy Of Law* (New York: Routledge 2012) 481.

<sup>533</sup> Antje du Bois-Pedain, 'The Wrongfulness Constraint in Criminalisation', (2014) 8 *Crim Law and Philos* 149, 158

stupidity cannot be equated to acting immorally and that “to call my act morally wrong simply because it is stupid drains wrongfulness of its moral colour. I doubt that people would care very much about being accused of wrongdoing, if all that the verdict of wrongfulness meant was that they had done something stupid”<sup>534</sup> she instead proposes that immorality must involve a consideration of reasons that are other-regarding.

In Edwards and Simester’s critique of du Bois-Pedain they have unfortunately on this point adopted an unworthy straw man approach;

Be that as it may, du Bois-Pedain has a further objection to the thought that bare wrongfulness always amounts to moral wrongfulness: she laments that “to call my act morally wrong simply because it is stupid drains wrongfulness of its moral colour.” The source of du Bois-Pedain’s worry here is not entirely clear. Perhaps part of the worry is the assumption that to find immorality must always be to find something serious;<sup>535</sup>

Du Bois-Pedain’s “worry” is actually quite clear; she considers morality to have the character of other-regardingness and therefore moral reasons must be other-regarding. It is not a question of seriousness, it is a question of type; there is nothing to suggest that other-regarding reasons may not be trivial. A more successful critique proffered by them is founded on du Bois-Pedain’s reliance upon the political outlook of a given polity and on her particular reliance upon and limitation to liberal western democracies; this may indeed be a flaw for any overarching or universal theory of legitimate criminalisation.

Du Bois-Pedain highlights a difficulty for those who theorize about a wrongfulness constraint on criminalisation is found in *mala prohibita* crimes because “How can wrongfulness operate as an independent substantive constraint if one admits the possibility that the legislative

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<sup>534</sup> Antje du Bois-Pedain, ‘The Wrongfulness Constraint in Criminalisation’, (2014) 8 Crim Law and Philos 149, 158

<sup>535</sup> J. R. Edwards and A. P. Simester, ‘Wrongfulness and Prohibitions’, (2014) 8 Crim Law and Philos 171, 175.

intervention as such may turn pre-legally non-wrongful behaviour into a post-legal wrong?”<sup>536</sup>

Simester, accompanied by Edwards, responds to the criticisms leveled by du Bois-Pedain denying her view that criminalization can only legitimately occur for conduct that is wrongful for other regarding reasons. Instead they defend the proposition that bare wrongfulness (reasons in favour defeated by reasons against) provides a “necessary (albeit insufficient) condition of legitimate criminalization.”<sup>537</sup>

Wrongfulness is of course a contested term and therefore requires definition by those seeking to use it. Both du Bois-Pedain and Simester and Edwards are using the term to connote a certain incorrect response to reasons; the latter (pair) referring to the set of all reasons the former to a subset of that, limited only to those reasons which are other regarding. This contrasts with John Gardner’s definition of wrongfulness as conduct that is in breach of a duty; compared to rationally incorrect conduct, akin to the type used above which Gardner would describe as wrongness.

Edwards and Simester qualify their debate on two main fronts, which in highlighting the modesty of their claim, adds credence to it. They claim the bare wrongfulness constraint is merely a necessary and not a sufficient condition and further that it is *a* constraint rather than *the* constraint and so it does not offer anything like a complete picture; it is simply marking the outer bounds of legitimate criminalisation.

This debate raises important questions about the ambit of wrongness, wrongfulness and immorality. It is almost universally accepted amongst theorists that legitimate criminalisation has a wrongness constraint. In other words there is something in the very nature of crime that it is a response to wrong or bad conduct and conversely it would be perverse to criminalize right or good conduct. Cornford is the notable dissenter and

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<sup>536</sup> Antje du Bois-Pedain, ‘The Wrongfulness Constraint in Criminalisation’, (2014) 8 Crim Law and Philos 149, 165.

<sup>537</sup> J. R. Edwards and A. P. Simester, ‘Wrongfulness and Prohibitions’, (2014) 8 Crim Law and Philos 171, 171.

argues against the wrongness constraint – or at least as he takes it to be currently understood.<sup>538</sup> Cornford even-handedly outlines the strengths and plausibility of a view supportive of the wrongness constraint and he marshals the arguments of some of the leading theorists in the field to outline the opposing view, including Anthony Duff;

What is distinctive about criminal law is that it inflicts not just penalties, but punishments – impositions that convey a message of censure or condemnation; the convictions that precede punishment are not mere neutral findings of fact, that this defendant breached this legal rule, but normative judgments that this defendant committed a culpable wrong. The criminal law portrays crimes as wrongs; if it is to be truthful, it must therefore define conduct as criminal only if that conduct is, pre-criminally, wrongful.<sup>539</sup>

Simester and Von Hirsch;

Conduct is deemed through its criminalisation to be, and is subsequently punished as, wrongful behaviour that warrants blame. This official moral condemnation of activity and actor generates a truth-constraint. When labelling conduct as *wrongful*, and when labelling those it convicts as culpable wrongdoers, the state should get it right.<sup>540</sup>

And Tadros;

But condemnation and punishment are justified only if the person has done wrong. Therefore, it is wrong to criminalize conduct that is not wrong.<sup>541</sup>

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<sup>538</sup> Andrew Cornford, 'Rethinking The Wrongness Constraint On Criminalisation', (2017) 36 Law and Philosophy 615.

<sup>539</sup> R.A. Duff, 'Towards a Modest Legal Moralism', (2014) 8 Criminal Law and Philosophy 217 pp. 219.

<sup>540</sup> AP Simester and Andreas Von Hirsch, *Crimes, Harms, and Wrongs* (Hart Publishing, 2011) 19.

<sup>541</sup> Victor Tadros, 'Wrongness and Criminalization' in *The Routledge Companions to Philosophy of Law*, 165.



Although Cornford argues against the wrongness constraint he accepts a presumptive impermissibility of criminalising non wrongs, which is a defensible position. The sanctioning force of the criminal law can be used by society for weighty countervailing reasons of compliance but in the acceptance of ‘countervailing’ there is an understanding of extra-culpability or extra-blame logic at play overriding the logic of blame, which is the internally coherent legitimate purpose of crime and punishment as opposed to the otherwise use of crime as a tolerable albeit non-focal use. This may explain why strict liability is “at first blush ... anathema to the Continental criminal lawyer”<sup>542</sup> because of the civilian deductive approach with relevant constrictors such as the *schuldprinzip* in Germany which requires blameworthiness on the part of a defendant.<sup>543</sup> This principle has been placed on a constitutional footing and the German Constitutional Court has determined the requirement for a culpability principle derives from the constitutional protection of the rule of law<sup>544</sup> (*Rechtsstaatsprinzip*) and the guarantees in relation to human dignity;<sup>545</sup> in particular as recognition of the human being’s ability to reason.<sup>546</sup>

I favour Cornford’s analysis in that it allows for a more encompassing viewpoint. In this way it also fits the purposes of this thesis and the test laid out of the *explanandum* fitting the *explanans*. All crimes can be classified as either arising from the internal logic of blame or from countervailing extra-blame reasons, such as the pursuit of important social policy objectives.

*The two faces of criminal law:*

To use the criminal law for countervailing public policy reasons is to use it as a tool of punishment rather than as a tool of blame – two concepts

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<sup>542</sup> John R Spencer, ‘Antje Pedain, Approaches to Strict and Constructive Liability in Continental Criminal law’ in Andrew Simester (ed.), *Appraising Strict Liability*. (Oxford University Press, 2005)

<sup>543</sup> Markus Dubber, Tatjana Hörnle *Criminal Law: A Comparative Approach* (Oxford University Press 2014)

<sup>544</sup> Article 20 of the Basic Law of the Federal Republic of Germany

<sup>545</sup> Article 1 of the Basic Law of the Federal Republic of Germany

<sup>546</sup> Cf the Federal Constitutional Court Judgment of February 26, 1969 BvL 15, 23/68, BVerfGE 20,323.

which are so often confused with one another but which can be divorced from one another. A basic understanding of the distinction between criminal law and tort law lies in the different responses each attracts. The language of the criminal law clearly sets out its operation as one of punishing offences while tort seeks to determine liability. This punishing function is a core distinguisher of criminal law, however it is taken here to be understood as a tool of blame. Whether or not the infliction of harm on a wrongdoer is just or worthy of a criminal code is not given detailed consideration in this thesis; it may well be that it is not and other more enlightened ways of blaming individuals and responding to their wrongdoing is preferable but society employs punishment for this purpose currently and as such the terminology will be adopted and within this framework assumed that the standard method of blaming i.e. responding to blameworthy behaviour is through the infliction of punishment.

Tadros evocatively channels an emotion well known to doctoral candidates in the acknowledgement section of his most recent book, *Wrongs and Crimes* where he indicates: “I hate this book. I have failed to write it for a long time, and not for want of trying. One reason is that views about criminalization depend on views about punishment.”<sup>547</sup> While the first sentence has a pleasing and reassuring resonance to it for the PhD candidate, it is the last sentence that holds the more interesting theoretical substance. This dependence of criminalization upon punishment is taken as given in much of the debates in this area, based upon the logic of “if we cannot justify punishment, we cannot justify criminalization either—at least if by criminalizing conduct the state warrants punishment for it.”<sup>548</sup> However even in this presentation by a subscriber to this logic the error is plain, hence the need for his qualification of “at least if...” It is incorrect to consider it necessary to work backwards from justifying punishment to justifying criminalization. This is to put the cart before the horse. Firstly punishment is not in an automatic relation to crime. There is no reason to

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<sup>547</sup> Victor Tadros, *Wrongs and Crimes*, (Oxford University Press 2016) Page v.

<sup>548</sup> Victor Tadros, *Wrongs and Crimes*, (Oxford University Press 2016) 2.

think that punishment ‘was, is and ever shall be’ the response adopted by society to crimes. There was a time when it seemed unquestionable that children would be beaten as a very beneficial formative exercise; spare the rod, spoil the child! Thankfully such views no longer hold purchase in our developed and modern societies, and it may well be the case that such a trajectory is also before us in our responses to criminality. This thesis already has too many burdens without taking upon itself a review of punishment *tout court* but it suffices to indicate that there is no automatic theoretical link between blameworthy or criminal action and the desert of punishment. Secondly, the very purpose of punishment is to respond to criminal conduct it is not the purpose of crime to indicate punishable conduct. It is true that the criminally culpable deserve to be blamed but that such blame should take the form of punishment need not necessarily be the case.

Blameworthiness must come before legitimate blame-communicating-punishment and punishment is our current form of expressing blame but as discussed this need not necessarily be so. It is best to think therefore on non-wrong crimes as warranting punishment but not blame. This is why arguments of the normative force of law as being founded upon punishment have shaky foundations. It is fair to say punishment must be justified but that is a distinct endeavour from determining conduct deserving of blame.

Overinclusive crimes also pose a challenge to proponents of the wrongness constraint, where the underlying crime is actually morally wrong and therefore blameworthy. Here the underlying purpose of the over-inclusions is not of an extra-blame variety; its purpose is still to blame the blameworthy but it nonetheless employs an extra-blame logic of efficacy. The justification is not to blame the blameworthy but to *effectively* blame the blameworthy and it is in the space provided by ‘effectively’ where over-inclusiveness resides. The fact that the non-blameworthy will be punished is a sacrifice public policy is willing to make at the altar of efficacy. This provides a strong and convincing

justification for such over-inclusiveness; however, while its purpose is blame-centric its logic is still of an extra-blame variety.

Another good example of non-wrongful crime is provided by Susan Dimmock where she analyses the crime of filing off a serial number from a gun.<sup>549</sup> While the preponderance of reasons that come to mind for doing so are badly motivated, this need not necessarily be the case; one may have wholly innocuous reasons to file the serial number off; from aesthetic sensibilities onwards. However the law has, by virtue of the preponderance of illegitimate reasons for such an action, the need to track dangerous weapons, and the relatively minor infringement upon a citizen's liberty, well grounded non-blame reasons for adopting the punishing aspect of the criminal law.

Any theorist promoting a wrongness constraint seems to simultaneously attract a burden to explain the existence of *mala prohibita* crimes or to deny their legitimacy outright. This dichotomy may however be false. Consider the analysis provided by Dimmock who argues we may reconsider the characterisation of the distinction between *mala in se* and *mala prohibitum* not as one between conduct that is wrongful prior to criminalization versus conduct that is wrongful by criminalization but rather characterize the distinction as ones between “wrongs legitimate societies must criminalize and those they may but need not criminalize.”<sup>550</sup>

Dimmock is a hard-line wrongness constraint proponent albeit within the reasonably broad understanding of the *mala in se/mala prohibita* distinction. For her the crime of filing a serial number off a gun is unjust unless it is done with nefarious intent. For her only the logic of wrongness can justify criminalization and so no countervailing extra-wrongness logic may override such wrongness constraint.

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<sup>549</sup> Susan Dimmock, ‘The Malum prohibitum—Malum in se Distinction and the Wrongfulness Constraint on Criminalization’, (2016) 55 Dialogue, 9.

<sup>550</sup> Susan Dimmock, ‘The Malum prohibitum—Malum in se Distinction and the Wrongfulness Constraint on Criminalization’, (2016) 55 Dialogue, 9, 29.

This is perhaps too hard-line to be sustainable. A more moderate understanding is to separate out those crimes which adopt (and work within the logic of blame and thereby can be classed as efforts at determining criminal culpability) from those crimes which are of a non-blame variety and merely adopt the tools of the criminal law and thereby are efforts at imposing liability without culpability. These non-culpable crimes are of course entities of contingency. A polity may rightly decide that if punishment is an expression of blame it will be reserved for the blameworthy and instead pursue something more akin to public torts for regulatory breaches.

As noted above it is often said that the distinction between *mala in se* and *mala prohibita* is that the *mala in se* crimes are wrong prior to positive law whereas for *mala prohibita* crimes their wrongness is created by law. I raised the question earlier whether or not this could be the case and the answer provided here must be that it is not. If by the term ‘wrongness is created’ we are referring to the enactment of a prohibition i.e. acting in nonconformance with an applicable legal norm, then all prohibitions enacted would be *mala prohibita* and there would be nothing to distinguish between a criminal prohibition from a civil law prohibition; nearly all laws would be species of *mala prohibita*. It must be referring to something closer to moral wrongness, i.e. acting in non-compliance with a relevant guiding (undefeated) reason pertaining to the interests of others. If that is the case it must be clear that the creation of wrongness by fiat is not possible; therefore the standard model is wrong. To claim that *mala prohibita* involves the creation of wrongness allows for the deceit that all crimes deal in blame; they do not. It is better to think in terms of the distinction between crimes that reside inside the logic of blame and crimes that reside outwith that logic. To do this reminds us that the criminal law cannot create wrongness or blameworthiness. The purpose of this thesis is to derive an understanding of the crime/tort distinction from the law rather than to seek its reconstruction but in recognizing non-blame crimes it raises an obvious problem of internal coherence with the core purpose of

crime. If the criminal law is the chief blaming institution in the state and has as its core purpose a response to culpable behaviour then it strikes as theoretically problematic, and at least requiring justification, that there may be non-culpable culpability.

Conclusion:

From the above we can see that blameworthiness assessments have a necessary wrongness at their core, which is not well accounted for as purely a matter of duty breaches. While punishment is the standard tool of blame, the above work argued against any necessary connection between blame and punishment. When this oft supposed connection is broken we can then more clearly see that crime can be of a blame or non-blame variety. The former being best exemplified by the traditional *mala-in-se* crimes while the latter finds expression in, for example, strict liability crimes. There can be legitimate reason to use the legal tools of punishment but it is important to recognise that such uses are at least inconsistent with the internal logic of blame and require legitimation elsewhere, normally in broader public policy. Understanding this distinction between blame and non-blame crimes allows us to understand the wrongness constraint on criminalization as applicable only to blame based crimes. When the tools of the criminal law are used for extra-blame purposes no such constraint is applicable because such criminalization is operating outside of the logic of blame and culpability and is merely creating by dicta criminal liability absent necessary culpability.

Responsibility on the other hand is a far more straightforward prospect in that it applies to mere agents and it is simply an assessment of the conformity or otherwise of an agents' agency with the relevant duty. Such assessments are more straightforward because in order to establish conformity one need only take the conduct and results as observable from the community viewpoint and assess whether it conforms or otherwise to the relevant standard. It is a binary assessment of duty conformity or otherwise. The relevant agent's intentions etc. are immaterial because conformance may be witting or unwitting. This non engagement with the

mental state of the agent makes for a simpler assessment process. All we must do is consider was there a duty? and was it breached? This two stage test tells us whether the agent is responsible or not.

This chapter examined the targets of assessments of tortious responsibility and criminal blameworthiness through an examination of certain non-defence constraints on such ascriptions. It was argued that the analysis indicates the focus of tortious responsibility assessments is a duty centric one which assesses mere attributable agency for conformity to the applicable legal norm. The target of criminal blameworthiness on the other hand was determined to be an assessment of the wrongness or otherwise of the agency being assessed. This is novel because the standard hierarchy of criminal assessment is challenged. It is not the case that the commission of the offence is the primary concern but rather acts as a trigger for the primary concern of wrongness. And for tort it also clarifies a reverse hierarchy where subjective or mental state is at best secondary to duty breach and for torts such as negligence entirely absent – despite the standard understanding that there is fault on the part of the defendant at play.

The standard explanation is that wrongness can be created by *mala prohibita* and therefore acceptable to *blame* contraventions of such prohibitions through punishment but it was argued this is not the case. The blame/non blame categorization challenges this because wrongness cannot be created; we cannot blame but we can still punish. While this thesis does not set itself the target of offering a normative challenge to the current law, this analysis offers a potential ‘preliminary’ for further critique. That is, if there is something illegitimate to use the tool of blame where there is no blameworthiness or to punish the (at least potentially) blameless.

In discerning the target of tortious liability to be agency in breach of duty and criminal culpability to be wrongness this confirms the analysis of the previous chapter and provides corroboration for the proposition that these bodies of law are centrally directed towards differing types of agency; tort

to mere attributable agency and crime to agency proper. This is because duty nonconformance can be engaged in through nonvoluntary conduct while wrongness can only be engaged in by voluntary conduct.

The divergence between the two is clearly outlined by Cane where he elucidates that criminal law considers there to be a hierarchy of fault as it pertains to the mental element with intention at the top moving to recklessness then to knowledge and then (controversially) to gross negligence; it thereby applies a moral hierarchy. Tort however does not have such distinctions and Cane reminds us that

Although intention and recklessness are clearly distinguishable, in tort law they are treated as ethically equivalent. A requirement in tort law to prove (for instance) that D intended to injure P can be satisfied by proof that D was reckless as to whether D's conduct would injure P. This is probably because both intentional and reckless conduct necessarily involve deliberation.<sup>551</sup>

This makes sense if voluntary conduct is the necessary form of agency rather than a deliberated agency because as indicated any deliberation is necessarily voluntary and so any of the forms of deliberation suffice to make out the required condition of voluntariness.

The centrality of wrongness to blameworthiness assessments fits the analysis conducted earlier in the thesis and the three step process proposed by Gardner where wrongness is a necessary condition for blameworthiness assessments and central to the endeavor. All this indicating that the focus of such assessments is indeed 'wrongful wrongness' as opposed to 'wrong wrongfulness'.

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<sup>551</sup> Peter Cane, *The Anatomy of Tort Law*, (Hart Publishing 1997), 34.



## CHAPTER 6: SUMMARY, TEST AND APPLICATION

### Introduction:

As the title of this chapter suggests its purpose is to briefly summarize the explanation of the crime/tort distinction as proposed by this thesis, to test it and then to apply it. The first part of the chapter summarizes the explanation of the crime/tort distinction advanced herein. It is argued that the explanation of the distinction is:

At its core crime is an assessment of the reasonableness (i.e. rightness in light of *relevant* norms) of agency whereas tort at its core is an assessment of the well-groundedness (i.e. conformance with *applicable* norms) of agency.

The second part of the chapter assesses this explanation against the tests discerned in the Introduction. The third part of the chapter then applies the theory to some cognate issues and debates such as the objection raised by Benjamin Zipursky and John Gardner that responsibility and blameworthiness are merely different dimensions of the one assessment and therefore the results of agency go towards blameworthiness of the agent as much as the quality of the agency. It proceeds to apply itself to results matter/don't matter debate in criminal theory and the conundrum of the normative position of the mistaken aggressor. Finally the chapter considers gross negligence manslaughter law and proposes the theory developed here successfully explains the recent developments in that area of law in England and Wales.

### I Summary

#### Explaining The Crime/Tort Distinction:

Recalling the distinction between a well-groundedness assessment and a reasonableness assessment within the Razian framework it was argued that a well groundedness assessment is a matter of conformance or otherwise with an applicable undefeated reason. It is a rather straightforward examination of conformance or otherwise thereto that

constitutes the assessment process of well-groundedness. It is in this way a completely objective exercise.

Reasonableness on the other hand has a subjective character in that it is an assessment of the quality of agency or in other words the quality of one's deliberative action. When assessing deliberations it was argued that unknown facts, even those facts which are norms - including second order mandatory norms - cannot necessarily be held in the balance when assessing the quality of the deliberation. What matters is the agents subjective knowledge. It is true to say that the agent may have been objectively incorrect but if they came to as perfectly rational a conclusion as one would within the same epistemic bounds then we are not in a position to adjudge the quality of their deliberation as poor; we may not think less of them *qua* rational agent.

As regards the legal expression or recognition of well groundedness, the presence of legal norms as second order mandatory reasons provide - at least within the partial view of the law - undefeated reasons for action. Such mandatory second order reasons being undefeated provide us with the applicable norms, i.e. those norms which apply to the agent at a given time. Determinations of whether and which norms apply to a given agent at a given time are available irrespective of the agent's own understanding of same. They are objective determinations. In this way conformance with legal duties may be understood as a species of action that is well grounded in reason while non conformance may be deemed a species of action that is not well grounded in reason.

Reasonableness assessments on the other hand cannot be a simple matter of conformance or otherwise with an applicable norm in the way well-groundedness assessments are. Because it is an assessment of the quality of an agent's deliberations it necessarily is bounded by the epistemic limits of the agent. However as an assessment it of course is an objective consideration of what one would reasonably do given such limits, rather than an uncritical acceptance of the subjective desire. Within Razian theory this finds expression in Gardner's work on justified action and

unjustified action which may be described as rightness and wrongness. Gardner proposes that justified action - or what can be described as right action - arises where there is coherence between the explanatory reason and the guiding (undefeated) reason. This model is built upon by the thesis arguing that the guiding reason in question when assessing the quality of deliberation is limited to that which is known and knowable within the agent's subjectively bounded view. Therefore while we might describe the extant objectively discerned facts (including norms) as the applicable facts, when judging reasonableness we must look within the subjective bounds to discern the *relevant* facts available to the agent.

So in considering the well-groundedness and reasonableness distinction we might describe the difference between assessments of reasonableness and well groundedness as the former assessing the quality of agency in light of relevant norms whereas the latter assesses the conformity of agency with applicable norms.

The issue of duty breaches was encountered by the thesis and building upon Gardner and Zipursky's arguments on the nature of duties, a schema of Conduct Duties and Result Duties was proposed to broadly classify the types of duties at play in law. Adopting a central case approach it was observed that crime is centrally concerned with Conduct Duty breaches while tort is centrally concerned with Result Duty breaches. Whereas this presented as an enticing explanation of the crime/tort distinction it failed to adequately account for the necessary conditions of ascriptions of criminal blameworthiness, which has wrongness at its core. Because such wrongness can only be partly constituted by Conduct Duty breaches alone this division of differing types of duties breaches seemed to merely track rather than explain the crime/tort distinction.

Central case tortious responsibility on the other hand required no extra-duty consideration in that duty breaches *simpliciter* were discerned to be sufficient conditions for such an ascription. While Result Duties were shown to be the central concern for tort law, Conduct Duty breaches were found to be necessary for negligence torts in a purely objective manner.

The thesis analyzed the audience and targets of central cases of ascriptions of tortious responsibility arguing that central cases of such assessments encompass an audience of agents exercising attributable agency while being focused on assessing and responding to breaches of legal duties by defendants. Given that such duty breaches are instances of non-conformity with an applicable mandatory second order reason in the form of a legal norm it can be seen that such assessments are in fact well-groundedness assessments.

The analysis of criminal blameworthiness led to a discernment of the central case of the relevant ascriptive audience as that of agents exercising attributable and assessable agency while being focused on assessing and responding to wrongness. Given that such assessments have wrongness at their core it can be seen that they are in fact forms of reasonableness assessments.

Sometimes crime and tort stray beyond these traditional and core spheres, such as over inclusiveness in crime. Although it may be said that there is greater fidelity within tort to its core purpose of ascribing responsibility because such assessments of conformity or otherwise fit more neatly with the law's partial view and understanding of its completeness. But the thesis provides us with an explanation of these instances as being the uses of crime or tort for purposes beyond their core function for which such instances rest their justification on extraneous forms of logic, i.e. they are instances when crime is deployed outside the logic of blame and tort outside the logic of responsibility; and rather are used as tools for other purposes such as efficaciousness or countervailing public policy reasons.

It is valuable however to recognize this structure of blameworthy crimes and non-blameworthy crimes or responsibility attracting torts and non-responsibility attracting torts. Because when we see that the central case of crime is the assessment and ascription of blameworthiness or the central case of tort is the assessment and ascription of responsibility it is more than merely a peculiar notation of contingency but rather it is a statement about their core purposes of those two bodies of law and as such it marks

out the burden of justification resting with the cases which seek to operate beyond these core purposes.

In summary then it is argued that the crime/tort distinction can be explained by the fact that at its core, tort law is assessing the well-groundedness of agency while at its core crime is assessing the reasonableness of agency. This chapter will now proceed to consider the theory advanced against the tests it set itself in the Introduction before applying itself to the various theoretical quandaries and debates identified earlier.

## **II: Meeting the Tests**

### **Challenges to General Theory:**

Recalling the critiques against universal or general theories outlined in the *Introduction* certain tests were discerned from such critiques. The thesis sought to explain the crime/tort distinction through the adoption and development of Razian theory and in doing so developed a general theory of ascription. This section will now proceed to test this theory against those critiques.

The analysis conducted in the *Introduction* outlined the distinct tests and standards of;

- 1) Does the *explanandum* fit the *explanans*? Specifically can it meet the challenges levelled by Goudkamp and Murphy and explain the following? 1) the breach element in negligence, 2) liability for pure economic loss, 3) punitive damages, 4) the defence of illegality and 5) *Rylands v Fletcher* strict liability.
- 2) The ‘*to the exclusion of all others*’ test was proposed by Horder which might be described as requiring that any theory proposed be self-contained and not rely upon other theories in parts.
- 3) Regarding defences in particular, Westen’s test of ‘*robustness*’ with its internal requirement of ‘*perspicuousness*’, or the

ability to group normatively alike and normatively unlike, was discerned as a useful standard to apply.

It is proposed that the theory developed here can be an *explanandum* that fits the *explanans* and by use of the distinction between core and peripheral based on the development of Razian theory here it can also provide a basis for understanding why certain aspects of tort law are deemed controversial. If coherence with core purposes is desirable then these explanations can then form a 'preliminary' to normative critique and reconstruction. Moreover regarding the preferability of the theory here espoused as opposed to those considered by Goudkamp and Murphy: When one considers that tort may respond in the absence of harm and even in the presence of the plaintiff being materially better off because of the result of the action of the defendant we must look beyond response to harm for an explanation of liability ascriptions. Posner's view of economic redistribution meets with great difficulty in the response the courts give to instances when the plaintiff has suffered no economic loss or indeed has benefited. Stevens' rights based theory is somewhat confounded by the defendant focused nature of questions of causation, remoteness etc. While Weinrib's corrective justice view holds more water in the face of these difficulties it finds it difficult to accommodate exemplary/punitive damages. A more coherent view of liability ascription however is available to us discernible from the above analyses and that is a defendant focused assessment of their agency. Liability assessments are fundamentally a determination of the wrongfulness or otherwise of the defendant's conduct. It is an assessment of whether or not they have breached a duty. In accidental agency no duty has been breached, and therefore no liability ascribed. In agency whose causative effect is interrupted by the intervention of another agent the resulting consequences are no longer considered an expression of the agency of the original potential defendant. In injury which is sustained beyond the limits of foreseeability no duty has been breached by the defendant and therefore no liability ascribed and finally in the issue of punitive, exemplary damages etc. they are all linked by and understood as responses to the

defendant's agency where they have breached duties other than harm centered duties. In this way the unifying theory of liability proposed here which understands liability as an ascription for duty breaching agency is more attractive.

Goudkamp and Murphy's first difficulty with the breach element in negligence is that differing methods by which duties are recognized across the common law world are employed; the US adopting the Hand formula while this is avoided elsewhere. This difference however offers no offence to the theory proposed herein. The theory proposed here is that tort is centrally concerned with the well-groundedness of agency explicable through Razian theory as conformance with the applicable norm. The explanation offered by the thesis that tort is centrally a matter of assessing duty conformance as opposed to fault is not necessarily challenged by different methods of creating or recognizing such duties. For this thesis it suffices to note that all the jurisdictions require a duty to be breached, the only quibble is with how a duty may be recognised.

Regarding the diverse field of application of pure economic tort the theorists were concerned that *any resort the theories may have to a claim that pure economic loss is a fringe and controversial aspect of tort law is unavailable to universal theories because to do so would be to adopt a prescriptive rather than explanatory approach to the law*. This however is not a problem encountered by this thesis. The existence of outliers fits comfortably within the theory developed and the methodology adopted by the thesis. In adopting the central case method there inevitably are core and peripheral instances of the law. But more fundamental than that and a central value for both the descriptive and the central case approach is the metatheoretical value of coherence. This metatheoretical concern identifies the error in Goudkamp and Murphy's claim that any recognition of an outlier would move the theory from the explanatory to the prescriptive. The claims made here regard the central or core concerns of tort. This is a preliminary to prescription and normative restructuring not an instance of it.

The question of punitive damages trespasses more obviously away from the core function of tort into responses more traditionally reserved for criminal sanctions. This trespass has caused much debate regarding the legitimacy of such damages. These damages are awarded in response to the conduct of the defendant rather than by reference to any loss suffered by the plaintiff. Recalling the division espoused between conduct duties and Result duties may provide a basis for recognising the legitimacy of such awards however. While it is proposed that tort is centrally concerned with duty non-conformance and most typically non-conformance with result duties there is nothing in the explanation proffered here to suggest tort law may not be brought to bear on non-conformance with conduct duties. If punitive damages were solely responding to breaches of conduct duties with compensatory awards then this would cohere with the core concern of tort. Punitive damages however, have at least the appearance of going beyond the standard remit of tort law in *penalizing* rather than compensating. The theory developed here offers a route to understanding these awards. To the extent that they seek to blame and penalize they can be explained as adopting the logic of reasonableness as opposed to the logic of well-groundedness. We can therefore use the theory developed here to explain such instances as the displacing of the internal logic of responsibility by the extraneous logic of blame. The theory can explain then the award of punitive damages as examples of non-focal tort. No view need be taken as to the appropriateness of this here, it suffices to note that the theory developed can provide a coherent explanation of punitive damages and for those who would challenge such awards the fact that they may be adopting non-responsibility logic could provide them with a basis to support their claim.

The defence of illegality can fully explained by and fit within the theory proposed here. Recalling the analysis conducted earlier where it was argued that tort in fact has no defences proper but rather has denials. Under this view the 'defence' of illegality is in fact a recognition that the ordinary duty does not obtain when the purported plaintiff has engaged in relevant criminal activity. In other words the 'defence' is in fact a denial and



operates as a restriction of scope of the duty. This requires no contortion on the part of the theory advanced here.

The question of *Rylands v Fletcher*, strict liability tort is well accounted for under the theory developed here. With regard to the question of the legitimacy or otherwise of strictly liable tortious responsibility, when the concept of strictness is understood as an assessment of 'mere conformance' then it quite quickly highlights its suitability for tortious responsibility ascriptions and its unsuitability for criminal blameworthiness ascriptions. Contrary to blameworthiness determinations which have wrongness at their core and are founded on an assessment of the reasonableness of agency; in other words its quality in light of relevant norms, tortious responsibility is a duty centric analysis which has wrongfulness at its core. It is founded on an assessment of the well-groundedness of agency, or in other words its conformance with applicable norms. Such an assessment practice accommodates a strict liability approach in a theoretically coherent manner, because strict liability is also simply an assessment of well-groundedness.

It is proposed therefore that the theory developed can explain and accommodate each of the 5 issues raised by Goudkamp and Murphy.

Horder's Article, *Criminal Culpability: The Possibility of A general Theory*, argued none of the capacity, character or agency theories provided an answer meeting his standard of "to the exclusion of all others." The explanation proposed by the thesis has an obvious foundation in agency; be it the conformance of agency to an applicable norm or the rightness of agency in light of relevant norms. However, it can meet Horder's objection to the agency theory on this, 'exclusion to all others' basis. Horder considered the agency theory the best of the possible theories he canvassed but was particularly concerned that it failed the exclusivity test by relying on capacity to explain the non-culpability of children. It is proposed that the arguments prosecuted vis-à-vis types of agency based on the Aristotelian distinctions of action along with a consideration of the relevant ascriptive audiences provides just such a coherent explanation

and throws light on the fact that the assessments are indeed assessments of agency it is simply that different classes of agents are relevant for each assessment. In recognizing different forms of agency and how the two bodies of law concern themselves with different types of agency it indicates that children are still to be classed as agents and still be understood as having agency but it simply not a type of agency that the criminal law concerns itself with. In this way the agency aspect of the ascriptive theory developed provides a complete and exclusive paradigm.

Westen offered standards that should be met by any unified theory of defences where he proposed that it must be robust, by which he meant;

(1) provides a persuasive and independent normative account of a substantial range of contemporary defenses in criminal law, (2) treats likes alike and unalikes unlike by including as “excuses” all defenses that share the same normative principle of exculpation and by excluding all defenses that do not, and (3) provides normative guidance to jurisdictions regarding how to reform and supplement existing defenses.<sup>552</sup>

Regarding the first limb of his test of robustness it is proposed that not only does the schema of exculpatory and non-exculpatory defences proposed by this thesis account for a substantial range of defences, it in fact accounts for all defences. By allowing for the existence of defences based on logic outwith the logic of blame, or in other words based on countervailing reasons the schema incorporates all contemporary defences.

Apropos the second aspect which he also describes as perspicuousness, the linking of normatively alike defences is evident in the fact that those whose blameworthiness is assessable are linked together while those whose blameworthiness is not assessable are likewise linked together. So the schema accommodates diverse defences such as diplomatic immunity

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<sup>552</sup> Peter Westen, ‘An Attitudinal Theory of Excuse’, (2006) 25 Law and Philosophy 289, 353.

and insanity as encompassing those who by virtue of their membership of a particular class of persons are not subjected to a blameworthiness assessment – be that for public policy or non-public policy reasons i.e. blame encompassing reasons or public policy reasons. Finally the simplicity of the schema along with the recognition of the division between blame and non-blame logic allows for normative guidance to jurisdictions that indicates the ascription of blameworthiness as the central purpose of the crime and as such may guide law makers and reformers should they wish to confine the law to such core purposes.

### **III: Application**

In considering the application of the ascriptive theory developed here to live debates within legal theory we move away now from the assessment of the theory against the tests established in the Introduction, namely the fit between *explanandum* and *explanans*, perspicuousness, robustness, and meeting the specific challenges to universal or general theories identified. In moving to the engagement with theoretical debates we necessarily move from the considering the practice to considering theory. In this way we will as a matter of course be engaged in a different mode of assessing the theory. We move away from the tests outlined above and instead will be considering the ability of the theory to be applied to and provide coherent answers to these debates and coherent analysis to these issues.

#### **Dissociability of Blameworthiness and Responsibility:**

Returning to the central case analyses earlier we can see that when judging Conduct Duty breaches in criminal law, while it is the conduct that is being assessed it is ultimately with a view to determining whether or not a given defendant is culpable/blameworthy. It may therefore be said that it is ultimately directed towards what may be termed a ‘blameworthiness’ determination. With regard to harmful results, assessments of Result Duty breaches in the law of torts seek to attribute harmful results to a given actor who has been deemed to have caused those results. Tort is a duty breach analysis to determine legal responsibility. We may therefore say

that the law of torts is ultimately directed towards what may be termed a 'responsibility' determination.

This is a major distinction between these two bodies of law, which coheres with the earlier proposition that crime and tort occupy corollary positions vis-a-vis wrongness and between Conduct Duty and Result Duty breaches. The distinction outlined above regarding the centrality of 'blameworthiness' and 'responsibility' assessments to crime and tort respectively, helps explain the difference in the responses each attracts. Those who are deemed blameworthy are punished as an expression of that blame, and those deemed responsible, on the other hand are made to make reparations for the harm they caused.

Gardner and Zipursky hold common ground in relation to what they consider to be an appropriate assessment model relating to these two concepts of blameworthiness and responsibility but it is one which the thesis contests as theoretically troublesome. In proposing their shared assessment approach as troublesome reliance will be made on Zipursky's own work in highlighting two forms of assessment of wrongfulness. Zipursky has proposed two dimensions of what he terms 'responsibility': a fault-expressive form and an agency-linking form of assessment.<sup>553</sup> An agency linking assessment looks to the effect of one's conduct upon the world and attributes those effects to the agent in question while a fault-expressive assessment looks to one's conduct and seeks to use it as a tool for gauging the faultiness of the agent. So, Zipursky recognises two different forms of assessment but still maintains a unitary approach by claiming the forms are two 'dimensions' of a singular responsibility determination. It is this union which is contested.

We have seen that the victimless crime consists of wrongness in the absence of harm and yet the criminal is considered blameworthy and through punishment is so blamed and the strictly liable tortfeasor is required to make reparations irrespective of any negligence. What of the

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<sup>553</sup> Benjamin Zipursky, 'Two Dimensions of Responsibility in Crime, Tort and Moral Luck' (2008) 9 *Theoretical Inq. L.* 97

contrasting scenarios of a crime where the wrongness remains static and the harm varies? This is what Zipursky calls the completion asymmetry – where completed crimes are treated more seriously than inchoate/incomplete crimes (e.g. assault/attempted assault)?

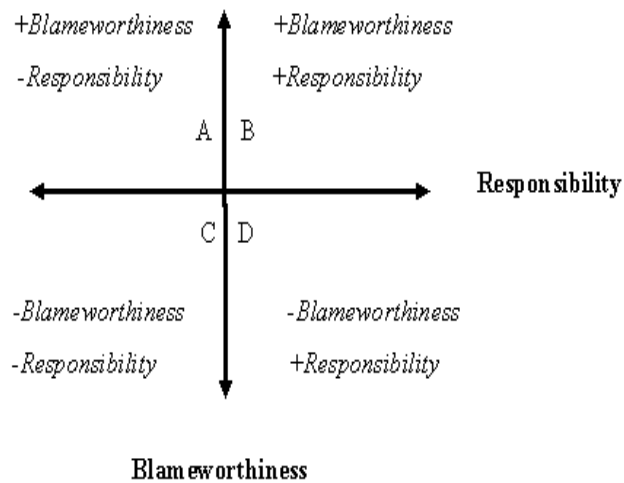
Both Zipursky and Gardner argue that the difference in treatment of completed crimes to inchoate ones only seems peculiar if one unjustifiably abstracts responsibility away from result embracing acts. Under their view the criminal who completes his crimes has the additional responsibility of the result to account for. The effect of his agency ('responsibility') is added to this quantum of blame and therefore having greater blame-responsibility he is treated to a greater severity of response; greater punishment. This method of calculation is worthy of examination, as a number of difficulties arise. Firstly though, it must be accepted that the courts do treat completed crimes more seriously than attempts – although the potential scale of punishment for attempts can often be the same as the completed substantive crime. Zipursky and Gardner therefore have the advantage of their theory being reflected by reality. Assuming punishment should fit and be proportional to blameworthiness, it is claimed however, that the theory of identical scope of potential punishment for completed as for inchoate crimes is correct and the practice which treats completion more gravely or as an aggravating factor is flawed.

The first difficulty the combination assessment model encounters is the divisibility of responsibility for harm. Given that harm caused is of a particular quantum it is reasonable that in a tort where there are concurrent wrongdoers the level of reparations due is shared proportionally between the wrongdoers/tortfeasors. The law has an interest in ensuring there is neither over nor under compensation and therefore it is true that by operation of a joint and several liability scheme one concurrent wrongdoer may be "on the hook" for the payment of full damages to a victim of tort, but the divisibility of responsibility for harm caused still pertains by operation of a right to contribution which a given tortfeasor may seek from the other concurrent wrongdoers. If a completed crime is an assessment of

a result embracing act then we must consider this divisibility in a criminal context such as in a scenario of say, common design, or accomplices. If harm is central to the overall quantum of blame-responsibility wouldn't it also maintain the characteristic of divisibility as in tort? So that where 6 people kill another, the result embracing act is distributed such that they are all found guilty of 1/6th murder and only face 1/6th of the punishment each? This, naturally, strikes as an unacceptable scenario, because criminal assessment is directed towards a blameworthiness determination and such determination is based, fundamentally not on a harm-caused assessment, but on a wrongness assessment. Those engaged in the common enterprise of murder are in equal measure wrong and it is the wrongness which attracts the community's blame. This equality of wrongness explains the equality of punishment.

The second difficulty with a unitary result embracing act assessment is the dissociability of blameworthiness and responsibility determinations. When Zipursky distinguishes fault-expressive responsibility from agency-linking responsibility he is essentially pointing to the same distinction as I am adopting here. However, rather than trying to force both (what I have termed) 'blameworthiness' and 'responsibility' under a single descriptor I have accepted their distinct natures. The two assessments, one of blameworthiness and one of responsibility, are distinct kinds of enquiries despite the centrality of wrongfulness to both. Their conceptual distinction can be considered through the following analysis;

The diagram which follows presents blameworthiness and responsibility as occupying two axes separated out along four Cartesian style quadrants. The + symbol indicates the presence of blameworthiness or responsibility and the – symbol indicates the absence of same.



*Figure 10: Disassociating Blameworthiness and Responsibility*

Quadrant A is evinced in the concept of victimless or inchoate crimes

Quadrant B when the intended criminal and injurious consequences map onto the actual consequences.

Quadrant C represents total innocence

Quadrant D when an unintended injurious consequence results from one's conduct, such as in negligence.

The third difficulty lies in the incommensurability of the two assessment types. Gardner proposes that punishment is imposed as an expression of blame and blameworthiness is determined by reference to fault; which he defines as action that is both unjustified and unexcused.<sup>554</sup> A certain inconsistency arises between his opposition to strict liability i.e. criminal liability being imposed in the absence of fault and his proposition of harm caused being a miscible ingredient of an overall blameworthiness

<sup>554</sup> John Gardner, 'Wrongs and Faults' (2005) 59 *The Review of Metaphysics* 95

assessment. If the harm caused is not, and cannot be, faulty in and of itself then how can something without a fault quotient be added to an overall fault-assessment? Fundamentally, it seems that Gardner and Zipursky commit the error of adding two different kinds together to produce one quantum of outcome. This is akin to adding the length and the weight of a table together.<sup>555</sup> It cannot produce a sensible result.

It is suggested that these eminent theorists have been led into error by an assumption that blame is fundamentally a response to duty breaches, i.e. wrongfulness whereas in fact it is actually a response to wrongness. Should a completed crime attract more responsibility, as suggested by the two theorists? Not quite - but it could loosely be said to attract more responsibilities.<sup>556</sup> The agent's wrongness level does not alter depending upon the results of his agency. The agent is therefore equally 'blameworthy' for the completed as for the inchoate crime; however, the results of the agency are undoubtedly different. He has much more to answer for under, what Zipursky might term, his "agency-linking responsibility".<sup>557</sup> The results of these two distinct enquiries varies considerably; the level of 'blameworthiness' for the wrongness is static between both inchoate and completed crimes but the extent of what is referred to here as 'responsibility' is obviously greater depending upon the results of one's agency. So, while there may be greater resultant extent to which the agent may be responsible, the degree of wrongness is unaffected by the completion of crime versus inchoate crimes.

Responsibility is a response to duty breaches and while one can be held responsible for their Conduct Duty breaches it is normally when one brings about a negative consequence in the world that we properly speak of one being responsible, which is why Result Duty breaches are so central to such ascriptions. Blame on the other hand is a response to wrongness

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<sup>555</sup> Analogy adopted from John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford 2011).

<sup>556</sup> Using responsibility here in its ordinary, more vague, usage; not mine.

<sup>557</sup> Benjamin Zipursky, 'Two Dimensions of Responsibility in Crime, Tort and Moral Luck' (2008) 9 *Theoretical Inq. L.* 97



and that is why it is triggered by - and indeed its *actus reus* (what one did) is completely constituted by - a mere Conduct Duty breach.

This fits a common claim among legal and moral theorists such as Bebhinn Donnelly-Lazarov's position summarized as "sufficiently advanced attempts are indistinguishable from complete crimes in matters of credit and blame."<sup>558</sup> Earlier it was claimed that the theory of identical scope of potential punishment for completed as for inchoate crimes is correct and the practice which treats completion more gravely or as an aggravating factor is flawed, and it is hoped this position is supported by the arguments *supra*. However this raises the question of whether or not the ascriptive theory proposed is meeting the test it set itself of the *explanandum* fitting the *explanans* but it does. This is firstly because this is a piece of theory and as the explanation of the dissociability of responsibility from blameworthiness fits the theory of equal punishment for completed and inchoate crimes the theoretical *explanandum* fits the theoretical *explanans*. It must be accepted however that this only applies with the assumption of the claim, namely that the punishment should fit or be proportional to blameworthiness. Punishment can of course have objectives other than responding to blameworthiness and indeed aggravating and mitigating factors employed in determining punishment can be divorced entirely from the question of blame. Consider the mitigating factors of; no prior convictions, good character, good prospects of rehabilitation, old age and family dependence on the offender.<sup>559</sup> None of these go to the blameworthiness of the defendant. They may or may not be suitable non-blame reasons to reduce punishment, the thesis makes no claim as to this, but they don't go to either of the necessary questions of duty breach or wrongness.

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<sup>558</sup> Bebhinn Donnelly-Lazarov, *A Philosophy of Criminal Attempts*. (Cambridge University Press, 2015) 66.

<sup>559</sup> List drawn from

[https://www.utas.edu.au/\\_data/assets/pdf\\_file/0005/1223834/Aggravating-and-Mitigating.pdf](https://www.utas.edu.au/_data/assets/pdf_file/0005/1223834/Aggravating-and-Mitigating.pdf) at p 3

Results Matter/Don't Matter:

The above dissociability of blameworthiness and responsibility provides the basis for an answer to the results matter/don't matter debate in criminal theory. The debate flows from concerns over moral luck in normative evaluations and essentially<sup>560</sup> - as the title of the debate suggests - revolves around the question of whether or not the results of one's actions go to the blameworthiness of the actor.<sup>561</sup>

One of the classic examples in law which encompasses this very problem is the one punch killing. If A punches B and B falls to the ground hitting his temple against the kerb and dies is A more blameworthy than A<sub>1</sub> who punches B<sub>1</sub> who also falls to the ground hitting his cheek against the kerb, sustaining bruising to his face? The argument against results having a part to play in determining blameworthiness is that the actions of agent A and A<sub>1</sub> are identical in motive and observable and actual conduct. His final act is the impact of his fist with the victim. The argument goes that we may pause the 'instant playback' at this point armed with all the knowledge we need to engage in a blameworthiness assessment. The fact of the positioning of the victim's fall is not something within the control of the defendant and why should such a slight variable beyond the agent's control make the difference in them being branded as an assaulter versus being branded as a manslaughterer.

The other side of the debate decries the artificiality of an abstraction of conduct beyond its ordinary result embracing character. The 'results do matter' side of the debate, like Gardner and Zipursky *supra* contend that the assessment of agency must include a consideration of the results of one's conduct as this too is part of a complete assessment. If we do not consider the results of the act then we are artificially drawing a line in time which is unsuitable because it leaves the assessment half-finished. They

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<sup>560</sup> On moral luck see Bernard Williams *Moral Luck : Philosophical Papers, 1973-1980* (Cambridge University Press 1981).

<sup>561</sup> For discussion on this debate see Larry Alexander, and Kimberly Kessler Ferzan. "Results Don't Matter." *Criminal Law Conversations* (Oxford University Press, 2011).

say the fact that the one punch caused the death of B must be a part of the assessment of A's agency and to not include it would be a flaw.

A pertinent example available, and one discussed in more detail earlier, is attempting the impossible which provides us with a complementary view into the results matter/don't matter debate. It has long posed a fruitful theoretical quandary; how are we to deal with those who conduct themselves with the intention of committing a crime that it is not possible for them to complete? This is somewhat the converse of the one punch manslaughter in that the results here turn out to be less than the hopeful criminal intends due to factors entirely out of her control. Should she benefit from this fortuitous impossibility despite the equivalence of malignity in her agency just because the crime would have been impossible. As seen earlier in the thesis the common law has determined such attempts are indeed susceptible to the full rigours of culpability assessments, with House of Lords determining in *Shivpuri*, "whether or not there is anything in the pocket capable of being stolen, if A intends to steal his act is a criminal attempt."<sup>562</sup> This position conforms to the analysis of the central concern of crime being wrongness, as argued in this thesis. The sufficiency of such wrongness as bases of blameworthiness ascriptions highlights results to be unnecessary to such assessments and as such favour the results don't matter side of the debate.

It is contended that the difficulty of the debate lies in the fact that there is a confusion of the assessments of responsibility and blameworthiness at play. When they are dissociated from one another, as above, then the singular assessment becomes plural assessments. From all of the above arguments it can be claimed then that the results of one's actions do not go to their blameworthiness as only the intended results rather than the actually transpired results go to the assessment of the quality of the agent's agency. However, this does not mean that the story ends there. The results are undoubtedly attributable to the agent in the sense that they may be said to be in breach of a Result duty because of being in objective non-

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<sup>562</sup> R v *Shivpuri* [1987] AC 1 judgment of Lord Bridge of Harwich

conformance to same. The results do not belong to someone else, they are the agent's to own and in this way may be said to be responsible for them. But their non-conformance goes to the well-groundedness of their agency not the reasonableness of it.

The two assessment types may be conducted parallel to one another. Because they are of differing kinds rather than differing degrees it allows for the separate assessments to concurrently but not unifiedly or integratedly be brought to bear. While a parallel assessment model may be said to favour the perspective of a moral luck critic because blameworthiness is determined without necessary reference to actual injury sustained, it does so without negating the responsibility an agent has for the results of their agency (foreseeable or intended) and in this way perhaps offers an answer which is a conciliation for the two sides of the results matter/don't matter debate.

Earlier we saw Westen opine that;

Nothing in the unity thesis precludes either private individuals or the law from acknowledging and responding to the losses that choices of evils implicate. In contrast to non-killings and the killing of insects, justified killings involve enormous losses that private individuals, the civil law, and the criminal law may rightly recognize.<sup>563</sup>

This perhaps allows the conciliation offered to find expression in legal practice where the results may be attributed in a responsibility attracting manner to the defendant – typically in the form of damages – while any blame attraction may be dealt with without necessary recourse to the results of such agency.

The purpose of this section has been to consider whether or not the theory can offer a coherent answer to this entrenched debate. This is a debate that operates at a level of theory rather than practice. It is proposed that the

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<sup>563</sup> Peter Westen, 'An Attitudinal Theory of Excuse', (2006) 25 Law and Philosophy 289, 302.

answer given to this debate is indeed a coherent one and is attractive for the conciliation it affords both sides.

*Normative position of mistaken aggressor:*

Another intriguing question which crosses law and morality are the twin prospects of 'wrong' justification; where on the one hand a defendant may engage in what is described as mistaken justification where they subjectively acted in a justified manner but fall foul of a like objective standard and the converse of unwitting justification where the agent acted in a subjectively unjustified manner but met all objective requirements of same.

As briefly noted earlier the question of unwitting and mistaken justification arises in the literature and offers an intriguing quandary about the normative position of the mistaken aggressor. In other words how may an agent react to a perceived but mistakenly perceived aggressor. A route in law to analysing this is the reasonable but mistaken defence of self defence. One view in particular is sufficiently provocative it warrants special engagement within this thesis. Ripstein offers a conception of the reasonableness of the actions of given actors in a mistaken self defence case. Under his view if the mistake is reasonable i.e. the mistaken aggressor is reasonably taken to be an actual aggressor then not only is the mistaken victim entitled to use force in their putative defence but the "the person who, by their intentional acts, leads others to reasonably believe that they are in danger is an aggressor, and so not entitled to invoke a right to self-defense any more than is any other aggressor"<sup>564</sup> This view offers a challenging view of the rights of the mistaken aggressor, which proposes he has altered his normative position in a way that may be entirely unwitting.

This viewpoint finds common cause with Greenawalt who offers a quasi maxim regarding the status of justified and excused action is that

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<sup>564</sup> Arthur Ripstein, *Equality, Responsibility and the Law*, (Cambridge University Press, 1999) 138, 196.

“Generally, justified acts may be aided and not prevented, and excused acts may be prevented but not aided.” This offers the same challenge as Ripstein in the mistaken self-defence case where if the defendant is justified, the mistaken aggressor may not prevent the attack upon themselves. However, if he isn’t actually the aggressor then shouldn’t he be able to defend himself against what to him would be a surprise attack?

The argument of course flows from the normative position of the putative victim, if he is justified in using force against a mistaken aggressor then there must necessarily be an alteration to the mistaken aggressor’s justifiedness in using force, otherwise we would have conflicting justifications. Indeed this is spelled out by Alexander in his view “The reason for drawing the distinction this way is to avoid the implication that justified actions might conflict with one another.”<sup>565</sup> However the conflict is in fact a false one. It is an understandable error flowing from a focus on the objective rather than the subjective. If justification is a matter of well groundedness then yes indeed there could only be one actor in the mistaken self defence case who could rely on a claim of justification. The problem however falls away once justification is understood as a species of reasonableness and as such is an assessment conducted within the bounds of subjective knowledge. Because it is subjectively bounded there is no fatal difficulty with conflicting justifications arising, two agents may act in conflicting justifications and neither be liable to a blameworthiness determination. On an objective analysis we are of course committed to one right answer and may say that he who is mistaken was not in conformance with the actual guiding reason and indeed some responsibility may flow from that assessment, however this does not alter the availability of justification to more than one agent.

Segev’s understanding of and argument for two aspects of justification; the ideal and the pragmatic provides a similar answer to the fraught question of what the normative status of the mistaken aggressor is in a

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<sup>565</sup> Larry Alexander, ‘Equality, Responsibility, and the Law’, (Book Review) (2002) 20;6 Law & Philosophy 617, 629

case of justified but mistaken self defence. The objection to a subjectivist constitution of justification being that it could lead to such impossible clashes. Segev counters however that;

“[t]his objection too, it seems to me, confuses the ideal and the pragmatic aspects of normative (moral) concepts. With respect to the former, resistance is indeed justified only to an unjustified action (for example, an unjustified attack), but as to the latter, which determines what an uncertain agent should do, the only plausible prescription is to decide whether to resist (use force) based on the (justified) belief of the agent concerning the pertinent variables, including those that pertain to the justification of the action of another.”<sup>566</sup>

And so the argument of this thesis, explaining the crime/tort distinction upon the different bases upon which each of the core ascriptive practices rest in the respective bodies of law - crime on reasonableness and tort on well-groundedness - provides us with a view on the normative position of the mistaken aggressor as a false problem flowing from the failure to recognize these distinct and dissociable assessments.

#### Negligence:

This section will begin with a consideration of the common law concept of negligence, which of course finds its paradigmatic expression in the law of torts. The structure of negligence in tort will be examined. It will be shown to have kept this structure when adopted into the criminal law for Gross Negligence Manslaughter. We will then consider whether or not negligence may be blameworthy. Reliance in this section will be made on some recent work from scholars of epistemology in relation to the concept of negligence. Ultimately it will be argued that there is nothing particularly special about the duty breach involved in negligence that makes it incapable of leading to a blameworthiness determination. Like

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<sup>566</sup> Re'em Segev, 'Justification Under Uncertainty', (2012) 31 Law and Philosophy 523, 557.

all blameworthiness determinations a duty must have been breached and the duty breached in negligence seems as apt to form that function as any other. Finally this section then proposes that the recent developments in this area of law in England and Wales can be successfully explained through the lens of the ascriptive theory developed in this thesis.

### Legal Negligence:

“The essence of negligence is a failure to act as a reasonable person would have.”<sup>567</sup> This pithy phrase neatly sums up what legal negligence is all about. Negligence has its paradigmatic expression in the law of torts and to successfully make out a claim of negligence in a civil case one must prove all four elements of 1)Duty, 2)Breach, 3)Damage and 4)Causation. In other words it must be proved that the defendant had a duty of care to the plaintiff, they breached that duty, damage was sustained by the plaintiff and there is an unbroken chain of legal causation between the duty breach and the damage sustained. The damage and causation elements are standard across central case torts as a tortious claim typically cannot be made out without having suffered damage (or harm); the standard tortious remedy being one of recompense, or to put the victim back in the position they would have been in had the tort not occurred.<sup>568</sup> It is within the first two elements of Duty and Breach that contain what’s special about negligence and how it is distinguished from other torts. The duty is described as a ‘duty of care’ which typically is set at the level of the reasonable person. It is the duty and breach that captures the essence described above of the ‘failure [BREACH] to act as a reasonable person would have [DUTY]’

Negligence also finds expression in the criminal law. Its best-known common law manifestation being gross negligence manslaughter of which the *locus classicus* is *R v Bateman*<sup>569</sup>. This is also the most serious iteration

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<sup>567</sup> Peter Charleton, Paul McDermott, and Marguerite Bolger. *Criminal Law*. (Butterworths 1999) 57 at [1.09]

<sup>568</sup> ‘Standard’ being important here there is no denying some torts don’t require damage or have recompense – *quia timet* injunctions etc.

<sup>569</sup> *R v Bateman* (1925) 19 Cr App R 8



of negligence at common law and given its gravity arguably feels most tightly the strictures of justice and fairness for that. In considering the case of *Bateman* it was held that the elements of the offence are that 1) the defendant owed a duty of care to the deceased (in this case his patient) 2) the defendant breached this duty, 3) the duty breach caused the death of the deceased and 4) the defendant's negligence was gross, showing such a disregard for the life and safety of others as to make it criminal. Here we can see that all four elements of tortious negligence are present in that the court requires, duty, breach, damage and causation. The tortious model and understanding of negligence appears to have been adopted wholesale, with the only difference between the tortious and criminal variety here being the addition of 'gross'.<sup>570</sup>

This addition of and focus on 'gross' does not however create a *sui generis* criminal negligence. 'Gross' is an adjective and like 'trivial' negligence or 'standard' negligence are all just descriptors relating to matters of degree rather than kind. The court determined the case on the standard model of duty, breach, damage and causation. The grossness of course was important to the court where it was determined that the defendant's actions fell so far below the standard of the duty of care as to be criminal. Grossness was clearly considered to be necessary in order to bring the negligence into the criminal fold and the court focuses heavily on this aspect of the negligence as its culpability generating feature. The ability or otherwise of grossness to generate culpability will be treated upon later in the section, it suffices for now to demonstrate that we are not in the realm of a new kind of negligence merely a particular degree of negligence.<sup>571</sup>

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<sup>570</sup> Further additions of obviousness made in *R v Adamako* and possibly restrictions of standard to the age and experience of the defendant *R v S* will be discussed later in the section.

<sup>571</sup> Cf *R v Evans (Gemma)* [2009] EWCA Crim 650 where court held 'duty of care' usually given its tortious meaning.

### Blameworthiness:

To mark an individual out as blameworthy is a serious normative determination. It has a force beyond merely saying “you did a bad thing.” It incorporates the more substantial evaluation; “you have been a bad person.” This is quite literally a damning critique of an agent and given its seriousness it demands a robust assessment to be met in order to legitimately come to such a judgment.

The law engages in the enterprise of marking out individuals as blameworthy through criminal convictions. As noted earlier, this is a very serious action on the part of the state, Simester describes it as follows; “The conviction is a public, condemnatory labelling of the defendant”<sup>572</sup> The determination of a given individual to be blameworthy is perhaps worse than the consequential punishment; as Westen puts it - “[it] may be the greatest harm a state can inflict on its citizens, viz., the harm of publicly declaring that, in addition to committing a bad act, the defendant has revealed himself to have been a bad person deserving of society’s low regard.”<sup>573</sup>

### Is Negligence Capable of Being Blameworthy:

The first preliminary version of this question to dispose of is can someone who meets the legal test of negligence be deserving or worthy of blame? Even the most ardent opponents to the culpability of negligence would have to answer this question in the affirmative. This is because those who act intentionally or recklessly may also meet the requirements of the negligence test. The more interesting and substantive challenge is whether negligence proper i.e. actual inadvertence/carelessness is capable of being blameworthy, which we turn to now.

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<sup>572</sup> Andrew Simester ‘Can Negligence Be Culpable?’ in Jeremy Horder (ed) *Oxford Essays in Jurisprudence: Fourth Series* (Oxford University Press, 2000).

<sup>573</sup> Peter Westen, ‘An Attitudinal Theory of Excuse’, (2006) 25 *Law and Philosophy* 289, 358/359.

Negligence is a disputed addition to the criminal law, which has attracted criticism.<sup>574</sup> This is in contrast to the widespread acceptance of recklessness as appropriate for determinations of culpability. Both negligence and recklessness are standardly categorised as species of *mens rea*. It tends to be argued that the exclusion of negligence as a legitimate member within canonical *mens rea* and the inclusion of recklessness as such a member is to be justified by the neat division of advertence. For the latter one must be conscious of the risk and take it anyway whereas for negligence there is no such requirement of advertence. Negligence requires only that the risk was foreseeable (by the reasonable person). This has an intuitive appeal; if an agent is unaware of the risk they are taking how can we legitimately blame them for taking that risk? Moreover, because negligence is an objective test and measured against the reasonable person it captures within its ambit those for whom it would be impossible to meet such a threshold raising the more problematic concern; if the agent is incapable of becoming aware of the risk how can we legitimately blame them? So, there seems *prima facie* good reason to adopt the advertence threshold as marking out and distinguishing conduct that is capable of attracting a blameworthiness determination from conduct which is not. However, the advertence merely tracks rather than constitutes this distinction. It is the objectivity rather than the lack of advertence that is problematic, where objectivity is a question of how someone else would have acted.

Larry Alexander and Kimberley Ferzan are among the more famous proponents of the claim that negligence cannot be culpable. They work with what they describe as the strongest counterexample to their position - the now (in)famous self-absorbed yuppie couple (Sam and Ruth) with a young baby. The couple are throwing a party for “socially prominent people who can help both of their careers and social standing.”<sup>575</sup> Having

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<sup>574</sup> E.g. Larry Alexander and Kimberley Ferzan, *Crime and Culpability*, (Cambridge University Press 2009), 155.

<sup>575</sup> Larry Alexander and Kimberley Ferzan, *Crime and Culpability*, (Cambridge University Press 2009) 77.

started a bath for their baby the first guests start to arrive but believing that the rate of water filling the bath tub poses no serious risk they head downstairs. However, in welcoming the guests “they become so absorbed with making the right impression that both forget about the child, with tragic consequences.”<sup>576</sup> Alexander and Ferzan’s argument being that once the thought of their child slipped out of their mind they had no power to retrieve it and so it was beyond their control; and we can’t blame people for things which are beyond their control.

Recently, this argument has been elegantly disposed of by Alexander Greenberg.<sup>577</sup> Where he argues that “Lack of awareness that one is taking a risk does not plausibly result, on its own, in the lack of control that Alexander and Ferzan allege it does.”<sup>578</sup> Greenberg does this by contrasting the case of Sam and Ruth with that of *Elliott v C*.<sup>579</sup> Different intuitive responses are garnered between the former case of the yuppie couple and the latter case of the intellectually challenged young girl. He proposes that while the former seems culpable the latter does not and that this can be explained by reference to the differing capacities to recognise risks. Sam and Ruth had a full capacity to do so while C did not. The claim that Sam and Ruth had no power to retrieve the thought of their child, he claims is false. “Sam and Ruth weren’t drugged, hypnotised, or brainwashed into forgetting about their child.”<sup>580</sup> He explains (with the help of Lucy Campbell) the fact that one fails to exercise a capacity does not entail that one did not have that capacity.<sup>581</sup>

Returning to the Razian theory outlined earlier in the section we can use the well-groundedness and reasonableness distinction to assess the yuppie

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<sup>576</sup> Larry Alexander and Kimberly Ferzan, *Crime and Culpability*, (Cambridge University Press 2009) 77.

<sup>577</sup> Alexander Greenberg, ‘Epistemic Responsibility and Criminal Negligence’ (2020) *Criminal Law and Philosophy* 91.

<sup>578</sup> Alexander Greenberg, ‘Epistemic Responsibility and Criminal Negligence’ (2020) *Criminal Law and Philosophy* 91.

<sup>579</sup> *Elliott v C* [1983] 1 WLR 939

<sup>580</sup> Alexander Greenberg, ‘Epistemic Responsibility and Criminal Negligence’ (2020) *Criminal Law and Philosophy* 91.

<sup>581</sup> Alexander Greenberg, ‘Epistemic Responsibility and Criminal Negligence’ (2020) *Criminal Law and Philosophy* 91 and footnote 18

couple and C. In both cases we have sufficient information to know that the agents involved did not act in accordance with the objectively discerned applicable guiding reasons. In other words we know that none of them acted in a manner well-grounded in reason. But did they act reasonably? In order to ascertain this we must look to why the agent acted as they did and within the subjectively ascribed epistemic bounds determine whether or not they acted for a relevant, undefeated, guiding reason.

Sam and Ruth, we can gather acted to impress their socially useful guests and that within their epistemic bounds the risk to the baby was knowable. Whereas with C we can see that she acted to keep warm and take it that within her epistemic bounds the risk was not knowable. The former we can say acted unreasonably, the latter reasonably. Breaches of duty however may be assessed objectively; this is why we can still understand C's actions as being not well grounded in reason even though they may be classed as reasonable.

If we test both parties against the negligence standard, in other words ask whether their conduct met the reasonable person test then we are bound to conclude both the yuppie couple and C failed to reach that standard. This is the essence of negligence; it is an objective conformance assessment. Objective in the sense that it involves a consideration of what the reasonable person, the (in)famous man on the Clapham omnibus, would have known or would have foreseen or would have done. Remembering that when it comes to blame we are making determinations not just about agency but about an agent, we are not just saying one did a bad thing but we are coming to the further and more devastating verdict that they have been a bad person. In order to do that we have an intuitive idea that the assessment involves not just doing a bad thing but doing it for bad reasons. A negligence test can successfully tell us something about agency but we can only make inferences therefrom with regard to the agent. It could plausibly give rise to presumptions of having acted for bad reasons, which we could require the defendant to rebut but this is stretching the

assessment to its absolute limits, and still leaves us with insufficient information regarding the agent to enable us to determine blameworthiness. It is, I suggest, purely a test of the well-groundedness in reason or otherwise of the agent. To return to our colloquial phraseology we can say both the couple and C did a bad thing but it is only when we engage in an assessment of whether or not they acted reasonably that we can make the further, crucial determination of whether or not they acted for bad reasons.

It should be noted however that the objective conformance assessment of a negligence test being carried out is structurally identical to the objective conformance assessment of any duty breach being carried out. When we consider the speeding drivers and the killers from earlier we can say that they all failed to comply with the applicable duties i.e. not to speed and not to kill. In this way then, it is difficult to ascertain why negligence could not be capable of being part of a blameworthiness assessment. It may well be true (and is argued by this section) that negligence cannot *per se* - in and of itself - attract a blameworthiness determination but it seems as legitimate a candidate for the duty breach, or 'doing a bad thing' part of the assessment as those duties specifying one should not kill or speed through a village.

We saw from *Bateman* earlier that the grossness of the negligence was seen to be culpability generating. Indeed this has some resonance with the MPC definition which focuses on a "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."<sup>582</sup> However while a duty breach or deviation is a necessary component of the blameworthiness determination it is insufficient. Whether the breach be trivial or substantial or gross it still merely addresses itself to the question of what one did and not why one did it, to understand the latter we need to work within subjective bounds.

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<sup>582</sup> Model Penal Code 2.02

Recent Developments:

A gradual movement towards the possibility of a subjective negligence is evident in the case law on gross negligence manslaughter. Following *Batemen*,<sup>583</sup> the courts decided in *Adamako*<sup>584</sup> that the risk must not only be foreseeable to the reasonable person but must be obvious. Then *R v S*<sup>585</sup> opined in an obiter passage that the standard should be restricted to the age and experience of the defendant and most recently and most importantly in *Rose* the state of knowledge of the defendant was taken as a limitation to determining foreseeability.<sup>586</sup> This case involved an optometrist who failed to carry out an examination on the child patient's optic nerve because they were uncooperative. Retinal images which had been taken demonstrated sufficient evidence of a life threatening condition, however the defendant claimed she had not seen those images and may have been shown images from a previous visit in error. This claim was accepted by the court. The patient died and the defendant was charged with gross negligence manslaughter. The court outlined the current requirements as;

- (a) the defendant owed an existing duty of care to the victim;
- (b) the defendant negligently breached that duty of care;
- (c) it was reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death;
- (d) the breach of that duty caused the death of the victim;
- (e) the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.<sup>587</sup>

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<sup>583</sup> *R v Bateman* (1925) 19 Cr App R 8

<sup>584</sup> *R v Adomako* [1995] 1 AC 171.

<sup>585</sup> *R v S* [2015] EWCA Crim 558.

<sup>586</sup> *R v Rose* [2017] EWCA Crim 1168, [2018] Q.B. 328,

<sup>587</sup> [2017] EWCA Crim 1168, [2018] Q.B. 328, 349.

The court proceeded then to consider the third limb of reasonable foreseeability. Standardly in tortious doctrine reasonable foreseeability is measured against what a reasonable person would have foreseen. However the court here determined that the “legal test of foreseeability in gross negligence manslaughter which requires proof of a “serious and obvious risk of death” *at the time of breach.*”<sup>588</sup> In other words the test has been limited to the epistemic scope of the subject, i.e. it became subjectively bounded. This is a significant development. In requiring a limitation to the subjective knowledge of the defendant we can see the law moving towards coherence with the central principles outlined in the ascriptive theory proposed by this thesis.

### Conclusion:

The chapter began with a summarization of various pertinent arguments made throughout the thesis to draw together the overarching argument that the explanation of the crime/tort distinction lies in that fact that at their core there are two distinct assessments taking place; crime is fundamentally an assessment of the reasonableness or otherwise of an agent’s agency while tort is fundamentally an assessment of the well-groundedness or otherwise of an agent’s agency.

The tests developed from the critiques of general theories in the introduction were addressed arguing that the explanation offered meets the concerns identified. This chapter then applied the theory to issues and debates within legal theory. It argued that assessments of responsibility and blameworthiness are dissociable. The chapter engaged with scholastic work promoting the view that results and consequences of one’s actions or agency go to blameworthiness. This was challenged as flawed and also an inconsistent position for the theorists to take given their other commitments. It was proposed that a better view is that the assessments are independent from one another. Regarding the results matter/don’t matter debate it was argued that once the dissociable and distinct natures

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<sup>588</sup> [2017] EWCA Crim 1168, [2018] Q.B. 32, 354 [emphasis added]



of the two assessment types (reasonableness and well-groundedness) are understood as such then the explanation advanced here offers an attractive conciliation to the two sides of the debate. The chapter considered the theoretical quandary of the mistaken aggressor. It has been argued that in order for a putative victim to be enabled to justifiably use force against a mistaken aggressor then the normative position of the mistaken aggressor must have been altered such that he would be unable to use force in his own self defence, despite not being an actual aggressor. This contention flowed from a view of the impossibility of conflicting justifications; however when justification is understood as a species of reasonableness such that it is subjectively bounded albeit objectively assessed the conflict is a false one and as such two competing and conflicting justified positions may arise without theoretical difficulty. Finally the chapter proposed that the theory developed in the thesis can successfully explain the recent developments in the law of gross negligence manslaughter in England and Wales.

## CONCLUSION

### *Question and Answer:*

The thesis asked the question, what explains the crime/tort distinction? In order to provide an answer it adopted and developed Razian theory to do so. Ultimately the answer arrived at was that tort is fundamentally concerned with assessing the well-groundedness (i.e. conformance with applicable norms) of agency while crime is fundamentally concerned with assessing the reasonableness (i.e. rightness in light of relevant norms) of agency.

The research arose from the curious division of labour at common law between tort law and criminal law. This curiosity arises from overlapping and at times competing and conflicting rationales offered for each body of law where vindicating victims and responding to perpetrators of wrongs are alternately proposed to be at the core of each. Differing responses were also found to be overlapping; with compensation for personal injury available as a criminal response and punitive damages in tort.

The thesis sought to better understand this division in the bodies of law and did so by working within the laws through a central case approach. It adopted the tools of Razian theory as a means of analyzing the distinction and the ascriptive practices adopted for assessing criminal blameworthiness and tortious responsibility. This approach proved fruitful in providing an explanation for the crime/tort distinction as being based upon a fundamental distinction between assessing action as unreasonable and assessing action as not well-grounded in reason. This approach culminated in an explanation that crime is centrally concerned with assessing the quality of agency in light of relevant norms (i.e. reasonableness) while tort is centrally concerned with assessing agency's conformance with applicable norms (i.e. well groundedness).

In summary it is proposed that the explanation offered of the crime/tort distinction provides a theoretically coherent way of understanding this

curious division in labour at common law. It also stands scrutiny against relevant challenges in being able to provide something of a unitary theory and also provide coherent answers to some of the more thorny theoretical conundrums in legal theory.

Reverse Outline:

Chapter 1 sought to establish the context within which the thesis is located. The chapter sketched an historical lineage stretching from Aristotle to Aquinas, on to Machiavelli, Kant, Hume and a modern perspective. The chapter began with Aristotle and considered his concept of *phronesis* or practical reasoning. It then introduced the division of action much relied on between action that is 1) Voluntary, 2) Involuntary and 3) Non-Voluntary, where Voluntary action is evinced in the paradigm deliberative action but Non-Voluntary had a share of voluntariness albeit not full deliberation. *Phronesis* found medieval expression in the work of Aquinas as *prudentia* and *recta ratio agibilium*. From Medieval thought the chapter proceeded to consider Renaissance era work from Machiavelli seeing reason as necessary for *virtú*. The universalizable formulaics of Kant and the skeptical position of Hume were then turned to followed by a consideration of the modern view on practical reason through Cullity and Gaut's work.

The chapter also contextualized the work through a consideration of the relationship between practical reason and morality along with that between practical reason and agency. It was argued that moral reasoning and practical reasoning were distinct and should not be considered as one. While Non-Voluntary action was considered as constituting attributable agency, Voluntary action was proposed as constituting assessable and attributable agency.

Following the contextualization work of Chapter 1, Chapter 2 explained the choice of Razian theory as a suitable vehicle by which to have conducted the analysis of this thesis. Following this explanation the chapter then explicated some of the pertinent aspects of Raz's theory

including the nature and operation of reasons of differing orders. The Razian calculus outlined in the chapter was interrogated and found to be incomplete in terms of assessing agency. A solution to this was proposed to lie in the underdeveloped distinction outlined by Raz between action that is well-grounded in reason and action that is reasonable.

Chapter 3 considered two concepts related and central to ascriptions of responsibility and blameworthiness. It sought to understand what it means to do the wrong thing and what it means to breach a duty. Regarding duty breaches, the chapter considered Gardner and Zipursky's schemas, ultimately building upon these to propose one of Conduct Duties and Result Duties. A central case analysis of tort and crime discerned Result Duty breaches as the central concern of tort and Conduct Duty breaches as the central concern of crime. This presented as an enticing explanation of the crime/tort distinction but it presented as an incomplete analysis of criminal blameworthiness which required more than mere duty breaches; namely it also required wrongness. The chapter built upon Gardnerian wrongness, adopting the structure proposed by Gardner of dissonance between guiding and explanatory reasons but developing an understanding of the discernment of the guiding reason as the *relevant* norm recognized within the epistemic limits of the subject rather than the *applicable* norm determined from objective knowledge.

Chapter 4 analyzed crime and tort according to their ascriptive audiences. It adopted defences as the primary tool of conducting such analysis. Criminal theory has a significant body of literature on defences and the chapter built upon this scholarly work to develop a schema categorizing defences across exculpatory and non-exculpatory divisions. The analysis indicated that non-public policy non exculpatory defences are shown to include the young and the insane. This facilitated an understanding of those who are excluded from ascriptions of blameworthiness by virtue of the internal logic of blame as those who are thought to engage in non-voluntary action, which indicates to us that the remaining relevant audience are those who engage in voluntary action or agency proper. An

analysis of tort law defences argued that such ‘defences’ were categorizable as mere denials, indicating no role for justification or excuse in central case tort. Rather the so called defences were understandable as denial of an element of the tort. In this way ascriptions of criminal blameworthiness can be said to be defence inclusive while ascriptions of tortious responsibility may not.

Chapter 5 engaged with non-defence theory relating to constraints on ascriptions of blameworthiness and responsibility. Considering remoteness and causation along with the work of harm all indicated that tort law is a duty centric body of law. With regard to crime however, it was argued that while extra-blame logic may justify crimes beyond the constraint of wrongness, blameworthiness proper is so constrained; indicating central case crime to be wrongness-centric.

Chapter 6 summarized the main arguments of the thesis culminating in the explanation of the crime/tort distinction as crime being fundamentally based on the assessment of the reasonableness of agency while tort is fundamentally based on the assessment of the well-groundedness of agency. The chapter proceeded to test this explanation against the challenges outlined in the introduction chapter and through an engagement with pertinent theoretical quandaries to assess the explanation’s ability to produce coherent answers to such conundrums. The chapter argued against the unitary position of Zipursky and Gardner’s understanding of the role of results in blame attraction. The chapter then produced coherent answers to the challenges outlined in the introduction chapter, the debate of results matter/don’t matter and the conundrum of the normative position of the mistaken aggressor. It finally applied the theory to explain recent developments in the law of gross negligence manslaughter in England and Wales.

*Original Contributions:*

The thesis has made a number of original contributions including;

- 1) Most significantly of course it provides a novel theoretical explanation of the crime/tort distinction. On the way to this explanation however it has also made a series of discrete original contributions including the following;
- 2) It has developed a heretofore underdeveloped aspect of Razian theory in drawing out the distinction between reasonableness and well groundedness.
- 3) It has rehabilitated John Gardner's already sophisticated conception of justification through the addition of a qualification that guiding reasons ought to be discerned within subjective bounds.
- 4) It has proposed distinct forms of legal agency at play across the tort/crime divide where tort is centrally concerned with (under the Aristotelian paradigm) Non-Voluntary conduct while crime is centrally concerned with Voluntary conduct.
- 5) It develops a novel argument for the hierarchy of reason responsiveness which relegates duty conformance as secondary to right action.
- 6) It has developed a schema of defence categorization which fits Razian theory and meets the tests of 'perspicuousness' and 'robustness'.
- 7) It tests the hypothesis that the conduct duty/result duty distinction can adequately explain the crime/tort distinction.<sup>589</sup>
- 8) It builds upon others to develop a refined model of duty categorization, namely between conduct duties and result duties.

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<sup>589</sup> Negative results in research are as valuable as positive because we now know the distinction cannot be adequately explained by this duty division.

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