THE MORAL FOUNDATIONS OF FAIR LABELLING

Khomotso Lekhine Moshikaro

LLB (Pretoria), BCL, MSc (Oxon)

Trinity College, Cambridge

March, 2023

This thesis is submitted for the degree of Doctor of Philosophy in Law.

Acknowledgements

This project was made possible by funding from Trinity College, Cambridge and the Oppenheimer Memorial Trust. Aside from my funders, I begin by thanking Mamokebe Rahab Moshikaro (my mother) who has made my education possible through great sacrifice and beneficence.

The project would also not have been completed without the advice and supervision of Findlay Stark and Antje du Bois-Pedain. I am especially grateful to Prof. Stark who continued supervising this project despite difficult circumstances, never failing to spot any spelling error, woolly phrasing or unclear argument in the thesis. Any further errors are my own. The rigour and depth imposed by both of my supervisors on this project has improved it beyond anything I could have achieved alone.

Over the years I have had enlightening and productive conversations with Rae Langton, Matthew Kramer, Andrew Cornford, Kelly Phelps, Helen Scott and Anton Fagan about various aspects of this thesis that have made a great difference to my thinking. I also thank all attendees at the multiple law and philosophy forums and discussion groups I attended in Cambridge.

Staying in Cambridge, I thank Michael Foran, Tony Zhou, So Yeon Kim, Rebecca Freund and Jelena Gligorijevic who walked this journey alongside me. Were it not for Michael's infectious love, and impressive command, of legal theory and philosophy; Tony's careful and cheerful defence of positions opposite to my own; So Yeon's inspiring self-discipline, kindness and generous instruction (alongside Tony) of how to make food about more than mere sustenance; Rebecca's relentless positive disposition and bedrock sense of fairness and decency; and Jelena's sound example and force of character, I could not have completed this thesis. I thank you all for your support.

Moving to Oxford, I thank Kameel Premhid, Richard McLaverty and Matthew Tordoff who took the first steps with me in my postgraduate journey and continued to encourage me

throughout the PhD process. I would also like to thank the London-set (Lally, Anton, Rajiv and Andrew) for their hospitality and company. I especially thank Tamara Leigh and the rest of the Leigh clan for their generosity and care in making the UK feel like a second home.

Ending in Cape Town (and South Africa more generally), I thank my friends and colleagues who supported me with their words of encouragement in the final stages of submission. In particular Ziyanda Stuurman, Colin Wardle, Nomonde Sithole, Nomfundo Ramalekana, Edwin Cameron, Nurina Ally, Mathabo Baase, Scott Roberts, Danwood Chirwa, Robin Cupido, Leo Boonzaier, Dan Mafora, Hannah Woolover, Jason Brickhill, Sanya Samtani, Ofentse Mohlasedi, Kaelelo Mashilo, Louis Botha and Cathy Powell. To Edwin in particular who insisted I take Jurisprudence on the BCL, all this is your fault.

I cannot help but also thank Deborah Slabbert (who introduced me to Tennyson, Achebe and Donne in high school, hosting delicious Sunday lunch-time debates about literature and philosophy with her wonderful family), Sue Heilgendorf (who first taught me to work seriously and carefully with sources in history class) and Lorraine van Velden (who has inspired a love of culture, food and travel in generations of students at Christian Brothers' College, Pretoria). A very special mention to Karin van Marle who first taught me that law may have something to do with justice. None of these impressive and formidable women ever had any doubts that a boy from Mamelodi could one day complete a Cambridge PhD thesis and for this I thank them.

Finally, not much more than the title page of this thesis could have been written without the love and support of my partner Ewald Botha who had to suffer through various conversations about blame, labelling and punishment as I worked through my arguments. His patience, support and humour has sustained and motivated me to do right by this topic even when it seemed too titanic a task to complete. I also thank him for ensuring that I do not become dull and only drone on about labels or changes in status in polite company. I dedicate this thesis to him.

Declaration

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as specified in the text.

It is not substantially the same as any work that has already been submitted before for any degree or other qualification. It does not exceed the prescribed word limit.

Abstract

Khomotso Moshikaro – The Moral Foundations of Fair Labelling

This thesis examines the principle of fair labelling in criminal law. It argues that fair labelling is a principle of justice concerned with the just allocation of blame in offence (i) naming (ii) differentiation, and (iii) persistence or duration. The first two chapters examine the concept of a criminal label and its relationship to punishment. I argue here that criminal labelling is not simply concerned with offence description and categorisation, but also the allocation of a status that alters the rights and duties of an offender. Categorising an offender as having committed a certain offence which is at odds with the blameworthiness they actually deserve is a site of certain kind of injustice - an ontic injustice. This ontic injustice creates a mismatch between the offender's entitlements (as per critical morality) and the legal categories and duties imposed on them when allocating blame in punishment. I argue that fair labelling is concerned with this specific kind of mismatch when the criminal law allocates blame in offence description and categorisation. I then argue that convictions (best understood as punitive criminal labels) are the paradigmatic case of criminal labelling and so the paradigm case for analysing fair labelling concerns. I then connect convictions to the communicative functions of the criminal law in punishment and explain why criminal conduct specifically concerns the public and community at large.

In the third chapter I defend and justify criminal labelling – especially the important part criminal labels play in punishment as a communal practice concerned with moral education. Here I stress the often-neglected role that civil society plays in criminal punishment. In the fourth chapter, I then analyse the role that fair labelling plays in the allocation of blame when concerned with issues of culpability. I argue that different mens rea requirements ought to be reflected in different offences as a point of departure, taking account of the importance of the interest entailed. This does not mean criminal offences cannot blur these lines, but that such blurring will require justification by appealing to the importance of the interest involved. I also analyse the rule of law implication of properly allocating blame and argue that fair labelling is compatible with, and mutually supported by, the rule of law.

The last two substantive chapters of the thesis are concerned with the persistence of an offence after offenders have served their sentence. I argue here that an offence can persist in a manner that incorrectly treats an offender as an irredeemable moral inferior and so miscategorises them as a second-class citizen. I then argue that the persistence of an offence may also fail to allow an offender to live down a conviction in a manner that creates a mismatch between their label understood as a status and their actual moral entitlements according to critical morality.

Table of Contents

Introduction **1**

I. Setting up the problem 1

II. Historical overview of fair labelling's evolution 2

III. The rationale of the thesis and contribution to knowledge 7

IV. Summary of thesis 10

Chapter 1: What is a Criminal Label? **20**

I. Introduction 20

II. The nature of criminal labels 21

a. Criminal labels as social categories with a status function 21

b. Social facts and altering rights and duties 24

c. Labels as legal and social kinds 26

III. Inappropriate criminal labels as ontic injustices 27

IV. Punitive social labels 33

V. Punitive criminal labels as the paradigm case for fair labelling 36

VI. Criminal labels other than convictions and their relation to fair labelling concerns 37

a. Discharges 39

b. Incapacity labels 46

c. Non-crime incidents 50

d. Anti-social behaviour orders 55

VII. Conclusion 58

Chapter 2: Labelling and Legal Punishment **60**

I. Introduction 60

II. Labelling and Punishment 62

a. Harm or suffering 62

b. Reprobative declaration and blame 63

c. Communication and public wrongs 64

d. Responsiveness and legal authority 70

e. The intentional harm component of punitive criminal labels 73

f. Intentional punishment, scope and the length of the label 75

III. Conclusion 77

Chapter 3: Justifying Punitive Labels, Communication and Fair Labelling **79**

I. Introduction 79

II. Censure 80

III. Complicating censure 83

a. What of deterrence? ... 83
b. Only a social status change without altering legal status ... 88
IV. Justifying public communication of offences ... 89
a. Addressing blame to third parties ... 89
b. Moral education ... 91
V. Justifying fair labelling ... 94
a. Blame allocation ... 94
b. Stigma and wrongful condemnation ... 97
c. Communication and fair labelling ... 99
VI. Conclusion ... 102
Chapter 4: Fair Labelling, Blame and Fault ... 104
I. Introduction ... 104
II. From mens rea to ill will ... 105
a. Purpose/Intention ... 107
b. Knowledge ... 110
c. Recklessness ... 116
d. Negligence ... 129
III. Conclusion ... 133
Chapter 5: Public Understanding and Rule of Law Challenges for Fair Labelling ... 136
I. Introduction ... 136
II. Blame and Public Understanding ... 137
a. An offence with several forms of mens rea ... 139
b. Heavily stigmatic offence names and public understanding ... 145
c. Public understanding and reasonable belief ... 150
d. The costs of changing public understanding ... 153
e. Proposed Amendments ... 155
III. Offence Inflation and the Rule of Law ... 156
a. A reminder of why fair labelling urges offence creation ... 158
b. The relationship between fair labelling and the rule of law ... 159
c. Legalism ... 163
IV. Overlapping charges and the potential for abuse of prosecutorial discretion ... 172
V. Conclusion ... 177
Chapter 6: Essentialising, Contempt and Dignity ... 180
I. Introduction ... 180
II. The argument from social contribution injustice ... 182
a. What is a social contribution injustice and when do we essentialise? ... 182
b. When is one's status as a social contributor denied? ... 184

III. Global assessments 188
IV. The argument from inferior status and contempt 197
a. Inferior status and moral worth 197
b. Contempt and redemption 201
c. Being impervious to redemption 205
V. Conclusion 209
Chapter 7: Persistence of a Label and Social Exclusion: Living Down Convictions 211
I. Introduction 211
II. The case for living down criminal convictions 212
a. The meaning of 'rehabilitation' 214
III. The persistence and exclusionary effect of a conviction through the sex offenders register 220
a. Overlap between prevention and penal logic 220
b. The challenge of the overlap for living down 223
IV. The persistence and exclusionary effect of the conviction through access to the criminal record and conviction 224
a. Structure of the access to criminal records scheme 224
b. Overlap between preventive and penal logic in access to criminal records 225
c. Inconsistency and ontic injustice 227
V. Conclusion 231
Conclusion 233
VI. Chapter 1 233
VII. Chapter 2 234
VIII. Chapter 3 234
IX. Chapter 4 235
X. Chapter 5 236
XI. Chapter 6 237
XII. Chapter 7 238
XIII. Overall Conclusion 238
Table of Legislation 240
XIV. Australia 240
XV. Canada 240
XVI. England Wales 240
XVII. Scotland 240
XVIII. South Africa 240
XIX. Criminal Codes 241
Table of Cases 242
I. Canada 242
II. England and Wales 242

III. Scotland 242
IV. South Africa 243
V. United States 243
VI. European Court of Human Rights and European Union 243
VII. International Tribunals 243
Bibliography 244

Introduction

I. Setting up the problem

This thesis presents a normative account of the principle of fair labelling in criminal law. The intuition that criminal labelling ought to be conducted in a manner that is 'fair' is not particularly controversial. However, 'fairness' may mean a variety of things. It may be simply fairness in the *naming* of various offences. By this I mean what we call a specific criminal offence ('murder' or 'manslaughter'). Fairness in criminal labelling may also mean fairness in the manner offences are *differentiated* from one another. By this I mean claims that 'murder' should be a separate criminal offence to 'manslaughter'. Fairness in criminal labelling may also mean the duration or *persistenæ* of a criminal label. By this I mean how long someone may be treated as, or called, someone convicted of murder or manslaughter.

In this thesis, I will argue that offence naming, differentiation and persistence are all governed by fair labelling. This does not mean that these three issues are not distinct, but merely that they are all related. The aim is to clarify, justify and develop the principle of fair labelling such that it can make sense of the various concerns involved. The main proposition of the thesis is that fair labelling is concerned with blame allocation in criminal labelling, where possessing a criminal label is understood as a status that alters the rights and duties of offenders. This basic idea has a range of implications for how we understand fair labelling, especially its scope and justification.

This introductory chapter will first discuss the historical development of the principle of fair labelling and how the understanding both of the aims and the justifications of the principle have evolved over time. Second, this chapter will explain the overall motivation of the thesis and the gap it fills in the present literature. Third and last, this introduction will map out the latter

chapters of this thesis and provide an overview of the assorted topics that will be addressed when unpacking fair labelling.

II. Historical overview of fair labelling's evolution

Forty years ago, Andrew Ashworth argued that criminal law should incorporate what he called a principle of 'representative' labelling.[1] Ashworth advocated that the label applied to an offence ought to fairly represent the offender's wrongdoing.[2] A year later, Glanville Williams refined this proposed principle and suggested it be called the principle of 'fair labelling'. In his words:

> 'I understand this to mean not merely that the name of the abstract offence but the particulars stated in the conviction should convey the degree of the offender's moral guilt, or at least should not be positively misleading as to that guilt, the chief reason being that on a later occasion the conviction may be on the back of the indictment before the judge or be read out in court and thus affect the future sentence.'[3]

The mischief fair labelling was intended to address according to Williams was, therefore, originally construed as disproportionate sentencing. However, constructing fair labelling as an issue of proportionate sentencing is not without its problems. Writing more than two decades later, James Chalmers and Fiona Leverick forced a reconsideration of this assumption.[4] Rightly, they pointed out that sentencing discretion cannot itself justify the principle of fair labelling.[5] It cannot, for example, explain the need to differentiate between different offences which carry the same range of available penalties.[6]

---

[1] Andrew Ashworth, 'The Elasticity of Mens rea', in Colin Tapper (ed.), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, London, 1981), pp. 53–56.
[2] Ibid 53-54.
[3] Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 Cambridge Law Journal 85.
[4] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217.
[5] ibid 225.
[6] ibid.

Chalmers and Leverick suggested that fair labelling ought to be justified on grounds of accurately communicating wrongdoing.[7] They argued that fair labelling means the communication of information that does not create a false or misleading impression of the nature or magnitude of the offender's wrongdoing, or encourage an inaccurate conclusion to be drawn about the offender's blameworthiness.[8] They also argued that a sound possible justification for fair labelling may be the communicative function of punishment, informed by the legitimate interest an offender has in their reputation.[9]

Part of why Chalmers and Leverick's intervention has been so influential is that they not only examined the fairness of a label but also the very concept of a label itself. Specifically, they argued that labelling is about describing and categorising an offender's criminal behaviour.[10] This particular exercise of describing and categorising offenders matters for a range of reasons, including the impact of a criminal record on one's employment and earning power.[11] However, they do not quite explain the nature of the link between describing or categorising offenders and the impact of the criminal record.[12] Nonetheless, they carefully map the territory covered by fair labelling by examining the possible rationale of fair labelling and settle on the most convincing argument for fair labelling: offence names communicate information about the offender to different bodies – the public, or agencies operating in the criminal justice system etc.[13] This is so that members of these bodies may form opinions or make decisions about the offender that

[7] ibid 227.
[8] ibid 228.
[9] ibid 237-238.
[10] ibid 221. For the influence this has had on international criminal law see Talita de Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18 International Criminal Law Review 788, 795.
[11] Chalmers and Leverick (n 4) 223.
[12] If one accepts a consequentialist justification for the reputational interest argument then this is not entirely surprising since the impact or consequences of the criminal record is sufficient reason to care about describing and categorising offences without further elaboration. If one does not accept a purely consequentialist justification then more must be said to explain the concern with categorisation and naming. Since this thesis does not adopt pure consequentialism as the justification for fair labelling, I will address this aspect in more detail in Chapter 1 of the thesis.
[13] Chalmers and Leverick (n 4) 238.

depend on the information received.[14] This means that depending on the circumstances, either the descriptive or the categorising aspect of labelling may be pivotal. Sometimes, it may be the name of the offence at issue or at other times it may be the difference in wrongdoing that may be at issue.[15] And so fair labelling concerns both offence naming and offence differentiation. However, although naming issues do sometimes arise, the most contentious or complex fair labelling issues relate to offence differentiation.[16]

The principle of fair labelling has subsequently had a wide-ranging influence. Much ink has been spilt discussing it in the realm of homicide law,[17] sexual offences,[18] property,[19] and non-fatal offences.[20] It has also influenced debates in international criminal law. Specifically, fair labelling has been important in creating and parsing out different modes of liability and defences particularly 'conceived and branded for' international crimes.[21] In the realm of complicity in international criminal law, this includes joint criminal enterprise, particularly in 'concentration camp' scenarios and co-perpetration through an organisation.[22] It has also applied to cases where offences are 'recharacterised' in international law. This is when the criminal law which operated at the time of

[14] ibid.
[15] ibid.
[16] Andrew Cornford, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 Oxford Journal of Legal Studies 985, 988-992.
[17] Jeremy Horder, *Homicide and the Politics of Law Reform* (Oxford University Press 2012) 95–96. See also the reply by Andrew Cornford, 'The Architecture of Homicide' (2014) 34 Oxford Journal of Legal Studies 819, 830–838. The influence of fair labelling particularly in homicide law is too extensive to summarise here, but for a brief sample see Matthew Gibson and Alan Reed, 'Reforming English Homicide Law' in Alan Reed and others (eds), *Homicide in Criminal Law: A Research Companion* (Routledge 2018) 37–61; CMV Clarkson, 'Context and Culpability in Involuntary Manslaughter: Principle or Instinct' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press 2000) 139–145; William Wilson, 'What's Wrong with Murder?' (2007) 1 Criminal Law and Philosophy 157, 159–163.
[18] Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 Oxford Journal of Legal Studies 82, 105–109. See also Scottish Law Commission, Report on Rape and Other Sexual Offences (Scot Law Com No 209, 2007) 40-44.
[19] Gary Betts, 'Robbery and the Principle of Fair Labelling' (2019) 83 The Journal of Criminal Law 205, 208–211. See also CMV Clarkson, 'Theft and Fair Labelling' (1993) 56 Modern Law Review 554, 554–558.
[20] Jeremy Horder, 'Rethinking Non-Fatal Offences against the Person' (1994) 14 Oxford Journal of Legal Studies 335, 335–340. See further John Gardner, 'Rationality and the Rule of Law in Offences Against the Person', *Offences and Defences* (Oxford University Press 2007) 39–43.
[21] Dias (n 10) 789.
[22] *Prosecutor v Tadić* (1999) ICTY, Appeals Chamber par 202–203, 220. *Prosecutor v Germain Katanga* (2014) ICC, Trial Chamber par 1381–1416; *Prosecutor v Ruto* et al., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, (2012) ICC, Pre-Trial Chamber ii, par301, 305–306, 313, 333.

impugned conduct is retroactively recharacterised as an 'analogous' law that was not operative at the time the offender is charged or convicted.[23] For instance, conduct that was sexual assault under the law when the crime occurred is later characterised as rape or a crime against humanity upon charging and/or convicting the accused.[24] Recent arguments have been launched positing that this is not only a violation of the principle of the rule of law in international law but also of fair labelling.[25] The influence of fair labelling is thus now pervasive in both international and domestic criminal law.

However, this pervasiveness has not necessarily resulted in consensus about the principle's meaning and ambit. More recently, Andrew Cornford has revisited the question of fair labelling's justification. First, building on Chalmers and Leverick's work, Cornford questions whether the communicative function of punishment *alone* may justify and explain fair labelling.[26] Second, Cornford argues that fair labelling is preferably understood as a principle of justice aimed at the proper allocation of blame in offence differentiation and naming.[27] Third, and last, Cornford argues that the limits of fair labelling ought to be seriously considered, particularly their relationship with, and connection to, the rule of law.[28]

Cornford understands 'blameworthiness' in this context to mean both wrongdoing (referring to the *conduct* for which an offender is blamed) and culpability (the degree to which they are at *fault* for that conduct).[29] Broadly, this complements how some philosophers have thought of blame. As Scanlon argues:

---

[23] Dias (n 10) 790.
[24] ibid.
[25] ibid 790–811.
[26] Cornford (n 16) 992-997. Cornford thinks the communicative function is important for thinking about fair labelling, but questions if it is sufficient to justify fair labelling. Chalmers and Leverick certainly think 'it can be said that the most convincing argument for fair labelling is that offence names communicate information about the offender to a number of different bodies' (see Chalmers and Leverick (n 4) 238). However, this does not mean they necessarily think this communicative function alone acts as a full and sufficient justification for fair labelling.
[27] ibid 13. This likely has its origins in Chalmers and Leverick's suggestion that fair labelling is related to the injunction (and principle of justice) to treat like cases alike, see Chalmers and Leverick (n 4) 221.
[28] ibid 19–22.
[29] ibid 5.

> 'In most cases, to decide that what a person has done is blameworthy is in part to decide that he has behaved wrongly—that he has acted in a way that is contrary to standards that we all have reason to regard as important and normally overriding. These can't be just any standards. Failing to meet the standards of athletic or artistic performance, or making mistakes in arithmetic, are not in themselves grounds for blame. Such standards do not have the right kind of importance, and their violation does not, in itself, have the right kind of significance to make blame appropriate. It is not easy to say exactly what kind of importance standards have to have in order to be moral standards … But I believe that, at least in a large and central class of cases, distinctively *moral* standards have to do with the kind of concern that we owe to each other. The importance of moral standards, at least in these cases, thus lies in the importance for us of our relations with other people.'[30]

Therefore, in the context of criminal law one is blamed for failing to meet or violating a standard that has something to do with the kind of concern owed to others in relationships with each other as legal subjects (and in legally recognised special relationships such as parental, caregiver etc in cases of criminal endangerment). In this sense, human relationships are the very foundations of blame.[31] Thus, the ill will or general attitudes of those we have relationships with (even if the relationship is one between citizens or legal subjects) informs our assessments of blame.[32] Fault speaks to the attitudes or ill will of the wrongdoer towards their victim. It follows that blaming usually includes the victim changing their behaviour and expectations towards the wrongdoer both as a response to the violation of a moral standard, and as a response to the ill will or disregard for the victim's interests shown by the wrongdoer.[33]

[30] Thomas Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press 2008) 123–124. See also R Jay Wallace, 'Hypocrisy, Moral Address, and the Equal Standing of Persons' (2010) 38 Philosophy & Public Affairs 307, 318–319.
[31] Scanlon (n 30) 128.
[32] ibid.
[33] ibid 129.

In criminal law, the victim's instincts for this kind of resentment are displaced by the state in such a way as to affirm the status of the victim as well as to ensure proportionate and measured responses to wrongdoing.[34] This does not, however, mean that blame itself is displaced from criminal law altogether. Blame is a response to not meeting moral standards that the law has recognised through criminalisation. Part of this recognition of blame by the criminal law is because, as Douglas Husak argues, substantive criminal law ought to track critical morality closely.[35] This does not mean that it cannot deviate from morality, but that these deviations must be justified.[36] Thus, the criminal law still blames offenders in its efforts to track morality, and because this exercise is institutionalised, blame must be apportioned and distributed amongst distinct categories of offenders. And so the current conversation has moved from questions about reputation and communication alone to deeper problems about the allocation of blame and how to frame the limits of fair labelling. This thesis picks up the threads of this conversation at this point.

III. The rationale of the thesis and contribution to knowledge

The basic thrust of this thesis is that, in its paradigmatic form, fair labelling is a principle of blame allocation in offence naming, differentiation and persistence. Particularly, the thesis aims to assess various aspects of fair labelling that concern this blame-allocating function of the principle and its relationship to other kinds of non-punitive criminal labels. The thesis takes the current discussion further by exploring not only the aspects in which labelling entails describing and categorising

[34] John Gardner, 'Crime: In Proportion and in Perspective' in John Gardner (ed), *Offences and Defences* (Oxford University Press 2007) 217–218.
[35] Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press 2010) 69. Husak argues that the reason for this aspiration of law to track critical morality is because procedural norms such as consistency, simplicity, and efficiency are insufficient for properly assessing the criminal law's own morally laden concepts such as wrongfulness or public wrongs. Thus, we can only look to morality to evaluate such concepts. For an alternative position with a caveat that criminal law must instead mirror a legal conception of moral blameworthiness that is distinct from critical morality in that it is 'cleaned up for deployment in legal systems' see Alexander Sarch, 'Should Criminal Law Mirror Moral Blameworthiness or Criminal Culpability? A Reply to Husak' (2022) 41 Law and Philosophy 305, 305–306.
[36] ibid 70.

criminal behaviour, but additionally its role in assigning a *status* that alters the rights and duties of offenders. The fairness of a criminal label is not simply a matter of offence naming and differentiation, but must include issues related to the persistence and duration of a label if this label continues to alter the rights and duties of offenders. The 'status change' aspect of criminal labelling has an effect on fair labelling's application in (i) the classic cases of allocating blame across various problems such as culpability requirements, the weight of different interests, and the subsequent limits of fair labelling (ii) the cases when one is incorrectly treated as an inferior and so disrespected in a manner that violates one's dignity (iii) cases where labels persist beyond hard treatment and have socially exclusionary effects on offenders.

This thesis traces these problems and argues that the injustice that fair labelling identifies of misallocating blame requires a serious re-examination of the many ways in which one can be mislabelled as a result of being thought to be more or less blameworthy than one actually is. The thesis stitches together discussions from the realm of social ontology with discussions in criminal theory to better explain how to think about fair labelling freshly and seriously whilst keeping sight of its distinctive blame-allocating concerns. As stated, the thesis argues that fair labelling is about more than describing or categorising criminal behaviour – it includes assigning a status to an offender and so alters their rights and duties. This is an aspect of criminal labelling that has not been deeply and explicitly examined as a fair labelling concern so far in criminal scholarship. For the purposes of fair labelling, the claim is that punitive labels are the central case of labelling in criminal law, but this does not mean labels cannot have other purposes such as education, prevention, and deterrence. The thesis also considers the classic cases when blame allocation is pertinent for determining culpability in mens rea requirements, discussing the validity of classic distinctions between concepts such as intention, foreseeability, recklessness and negligence.

A further important aspect of the thesis is that it rejects any perceived inherent tension between fair labelling and the communicative aspects of punishment, or the rule of law concerns

raised by scholars such as Cornford. Instead, a major theme of the thesis is that these tensions are often overstated or misunderstood. This does not mean they do not exist, but that fair labelling is not inherently hostile to them (in the case of the rule of law), or ambivalent towards them (in the case of communicating punishment). Instead, an approach that advocates understanding the proper relationship between these various principles and interests can help us understand fair labelling clearly. Much of criminal law scholarship would be improved by understanding these relationships and by examining more closely what it means for something to be a criminal label and so determine what kinds of labels fair labelling applies to. Criminal law scholarship would also be improved by not only focusing on how various principles conflict, but on how they interact to enhance or inform each other. Fair labelling, if understood as a principle calling for the just allocation of blame, is only enriched by its relationship to other principles such as the rule of law.

The thesis also connects the issues relating to the alteration of a person's status to ways in which labelling offenders may disrespect and treat them as moral inferiors. This is an especially under-explored area despite new work about the role of dignity, essentialising and contempt in criminal punishment.[37] This particular concern with not treating offenders as inferiors (thus violating their dignity and treating them with contempt) also allows one to assess the duration or persistence of a criminal label as a continuing practice of blame that risks treating an offender as irredeemable, and thus inferior, despite the possible right of offender's to live down convictions.

[37] I have in mind here the work of Kimberley Brownlee, Zachary Hoskins and Macalester Bell. I will later be drawing on particularly Kimberley Brownlee, 'Don't Call People "Rapists": On the Social Contribution Injustice of Punishment' (2016) 69 Current Legal Problems 327; Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford University Press 2019); and Macalester Bell, *Hard Feelings: The Moral Psychology of Contempt* (Oxford University Press 2013).

IV. Summary of thesis

Chapter 1 develops a conception of a criminal label as a legal label that authoritatively describes a person as having engaged in behaviour that meets the definitional criteria of a specified criminal offence, thereby performing a status-altering function in respect of the labelled individual. This change in status alters the rights and duties of offenders. A subset of these criminal labels are punitive labels. These are criminal labels where imposition of the label serves censuring and sanctioning functions. The chapter discusses different types of criminal labels as well as the phenomenon of social punitive labels (where a person is non-authoritatively, described as having engaged in behaviour that meets the definitional criteria of a specified criminal offence by other individuals in the social sphere). It argues that the central concern of fair labelling is the ontic injustice that results from the unwarranted imposition of an inappropriate punitive criminal label.

Taking this point into account makes the kind of wrong and injustice committed against someone who is mislabelled clearer. It is the wrong of categorising someone incorrectly as a certain sort of person falling into a particular category and so assigning them the wrong legal and social status. The incorrect alteration of someone's status in criminal labelling entails altering their rights and duties inappropriately. By 'inappropriately' I mean that the alteration of rights and duties is at odds with the person's actual entitlements in critical morality. This sort of misallocation of rights and duties is what philosophers call an 'ontic' injustice.[38] In turn, because the chapter argues that the punitive criminal label is the paradigmatic case of criminal labelling, the central case of fair labelling addresses the 'mislabelling' that occurs in the context of blame allocation in offence differentiation. This does not mean that issues of offence naming are irrelevant (especially when one considers the social impact of being criminally labelled). The point here is that offence differentiation precedes naming issues since one must first determine the nature and definitional

[38] Katharine Jenkins, 'Ontic Injustice' (2020) 6 Journal of the American Philosophical Association 188, 188. Such examples of ontic injustice are explored in further detail in Chapter 1.

criteria of an offence before deciding if the name of the offence is suitable. The offence name may later be deemed inappropriate or fall short of communicating the offence's criteria or nature, but this assumes that offence differentiation or categorisation in a criminal code has been settled already.

Of course, one can 'unfairly' distribute things other than blame through criminal labels (such as risk of the labelled person committing an offence or impairments to one's cognitive abilities). Nonetheless, features of fair labelling in the context of blaming can illuminate the relationship these non-punitive labels (and their non-blame allocations) have with punitive labels. For instance, unlike punitive labels, these non-punitive criminal labels do not have to refer to particular offences. This is because the punitive label is closely connected to a particular offence in a way other labels do not have to be. One is convicted of a specific offence, such as murder, theft or robbery. This means a conviction has greater communicative clarity about the specific offence committed than non-punitive labels. The conviction presupposes an offence being committed and must in turn reference this offence closely. Focusing on punitive labels allows one to explain the implications of fair labelling more clearly since fair labelling is also centrally concerned with offence differentiation and naming. For example, an anti-social behaviour order ('ASBO') may be a kind of criminal label, but it does not have to reference an offence closely in the same way that a conviction must.[39] One can infer that the person who is labelled as displaying 'anti-social behaviour' poses some kind of risk to public order, but one need not identify a specific offence they pose a risk to (if any at all). This does not, however, mean that ASBOs are not an alteration of one's status. They are. It also does not deny that these kinds of non-punitive labels cannot be mislabelled. ASBOs may be unfairly applied to an individual, resulting in an incorrect or inappropriate status change. However, unlike with a conviction for an offence, it is more

[39] As discussed in Chapter 1 below, I acknowledge ASBOs have been classified as 'civil' measures in England and Wales, but provide reasons in that chapter why for our purposes these are still criminal labels despite their new designation.

difficult in the case of an ASBO to explain how this mislabelling connects to offence differentiation and naming.

Demonstrating that the practice of criminal labelling concerns the alteration of one's status, rights and duties in order to serve a particular purpose (communicating blame, or preventing future offending) allows one to then consider key definitional features of the paradigm case – punitive criminal labels. Specifically, features such as communication of punishment, the uniquely 'public' nature of public wrongs and the intentional aspect of punishment can then be unpacked in order to better understand fair labelling as it applies to punitive labels. Chapter 2 discusses how the communication of blame involved in conviction must be understood against the backdrop of punishment. One cannot make sense of the importance of offence differentiation, naming and persistence without understanding the role that communication plays in punishment (understood as including the full alteration of the status of an offender from his finding of guilt, sentence and later alterations of his rights and duties). Both legal officials and ordinary members of the public infer distinctions in seriousness and wrongfulness depending on how offences are separated from one another in terms of their labelling. Where the distinctions are unjustified or inappropriate, they result in fair labelling concerns since they are then sites of ontic injustice.

This chapter also defends the importance of seeing criminal offences as public wrongs that concern the community. This is why an offence's commission and the status change that will apply to the offender may be communicated to the community and not just the offender themselves. The thought is that because the offender has committed a public wrong, punishment of the offender concerns the public. This does not mean anything and everything about the offender must be communicated, only that this is not just a matter between the offender and the state. The wider public also has an interest in the punishment of the offender.

Furthermore, because the state intentionally imposes burdens and duties on offenders when it punishes them, the scope and ambit of such intentional punishment must inform our

understanding of fair labelling. The state's intention helps delineate the ambit of the kinds of criminal labels aimed at punishment, such as convictions. The focus on status and its intentional assignment by the state helps one to understand not only the limits of what counts as a conviction, but also when the conviction can be considered to be spent. Fair labelling cannot be seriously understood without determining the limits of the kind of paradigm punitive labels to which the principle applies.

Exploring the importance of communication, public wrongs and intention in punitive labels allows one to consider whether the status change involved in punitive criminal labelling is justifiable. This discussion is taken up in Chapter 3, which argues that the practice of labelling offenders through conviction and subsequently fair labelling as an issue of blame allocation is justifiable. The chapter examines what is termed the educative function of labelling (made possible only by the communication of blame to the public). This function of labelling has been underappreciated or rejected by some scholars of fair labelling.[40] And yet it is vitally important: the educative function of labelling explains why punitive criminal labels are communicated to the community at large, rather than kept secret or published using anonymous labels or pseudonyms. It may be easy to understand why labels aimed at warning members of the public about dangerous offenders may justifiably be communicated to the public long after any period of 'hard treatment' is over,[41] but it is harder to explain why labels aimed at blaming and punishing offenders ought to be. I argue that the reasons for communicating such labels to the broader community become clear only when one appreciates the role of civil society in the educative purpose of punishment.

[40] Chalmers and Leverick reject the educative function as insufficient on its own for explaining or justifying fair labelling, but they do not categorically rule out that it has a role to play in explaining fair labelling, see Chalmers and Leverick (n 4) 229 and 237.

[41] 'Hard treatment' is the term Von Hirsch uses for sentences or the actual sanction such as imprisonment, see Andrew von Hirsch, 'Censure and Hard Treatment in Punishment's Justification: A Reconceptualisation of Desert-Oriented Penal Theory' in Antje du Bois-Pedain and Anthony Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (2019) 90.

Specifically, it must be understood that the point of communicative blame is to bring about greater alignment of moral understandings.

Although punishment cannot achieve full and deep mutual understanding of an offender's blameworthiness between the public and the offender themselves; it may still aspire to achieve a basic alignment of moral understandings between the public and offender.[42] Communicating the change in status of an offender, especially the alteration of duties imposed on them, allows the public to assess whether the state has justly or appropriately assigned such a status to an individual. In turn, it also allows the state to communicate the blameworthiness of an individual's conduct to the public and to the individual themselves. When this is done correctly, it allows for an alignment of understanding between the state, public and individual offender about the blameworthiness of the conduct committed and the change in status wrought by it. For example, the state is able to communicate that robbery is blameworthy and that those who commit the offence will have their status altered to reflect this blameworthiness compared with other offences. The public is able to judge whether the alteration of one's status is appropriate. The offender is also able to reflect on such matters. The alignment of these parties concerning the blameworthiness of the offence and the justice of the change in status is then a successful instance of communicative blame.

Having argued that punitive labels can be justified, Chapter 4 begins to explore the application of that justification to the differentiation of criminal offences and, accordingly, their labels. What must be effectively communicated, in a system of justified criminal labelling, is the extent of the offender's blame, as this informs the amount of change that will be wrought in her status. Two key issues must be confronted. The first is the extent to which mens rea states (purpose, knowledge, recklessness, negligence, etc.) must be communicated by offence labels. The

[42] Whilst fair labelling also aims to stand in solidarity with the victim (Tadros makes this point superbly in Victor Tadros, 'Fair Labelling and Social Solidarity' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012) 74), I am hesitant to assume that the victim and offender must in any way reach a moral understanding or alignment. I am happy at least to say that the public may stand in solidarity with the victim and the victim having any such alignment with the offender is contingent.

second, connected, issue is the relevance of public understandings of certain offence labels, and when these might communicate something inappropriate about the holder's blameworthiness.

In relation to the first issue, concerning mens rea, I contend that the presence of different mens rea states in relation to similar wrongs must, at least presumptively, be communicated using separate labels. Blame is a reactive attitude that hinges on the quality of ill will that one's mens rea state with regard to wrongdoing demonstrates. It will be argued that different mens rea requirements disclose a particular kind of ill will to a victim that warrants different treatment in punishment. The focus will be on the mens rea states employed most commonly in Anglo-American systems of criminal law, namely purpose, knowledge, recklessness and negligence.[43] Although countervailing considerations may point against doing so, the argument will be that, in principle, offence labels should communicate clearly the defendant's mens rea state, and not remain opaque on that front. The discussion of homicide offences in Chapter 4 will illustrate how this could work in practice.

In terms of the second issue, public understanding, I address this in Chapter 5. Here, I argue that public perceptions set the outer limits of permissible communication about blame. If one accepts that punitive labels are partially justified by educating the public and conscripting them into the practice of punishment, it follows that this communication of blame must remain within these broad limits. Cases where there is a mismatch between what the public assumes a label means must then be addressed as a potential source of unfair labelling. This does not mean that the law must track social morality as opposed to its critical dimension, but that for the law to be successful in its educative role, and likewise for society to properly hold the law accountable for its blame allocations, there must be a rough alignment of moral understandings between the criminal law and the public. The chapter will explore this idea through consideration of the labels 'murder' and

[43] Section 2.02 of the Model Penal Code of the United States.

'rape', and what public (mis)understandings of that term could mean for employment of that label, even when it is connected explicitly with mens rea concepts such as intention or recklessness.[44]

An obvious objection to the position defended in Chapter 4 is that it will be hyperinflationary in terms of the number of criminal offences created. Cornford argues that such likely offence proliferation gives rise to concerns grounded in the rule of law and the possible abuse of overlapping charges by prosecutors.[45] The rule of law concerns are that fair labelling usually requires new offences to be created and this threatens the clarity and intelligibility of criminal offences. This in turn, at least ostensibly, threatens the predictability of the criminal law by introducing too much complexity such that the law fails to govern official behaviour and to guide citizens.[46] The concern with overlapping charges is that, if more offences are created, this would risk the abuse of prosecutorial discretion and charge bargaining. Specifically, the argument is that the creation of less serious versions of an offence may result in prosecutors incorrectly charging someone because of charge bargaining, thus resulting in convictions that incorrectly allocate blame and violate principles of fair labelling. I also deal with this objection in Chapter 5. In addressing the tension between fair labelling and the rule of law, discussions from the area of complicity law will be used to demonstrate that a particular understanding that is not pessimistic about fair labelling, and does not assume it to be in tension with the rule of law, may fruitfully address concerns about mislabelling in a theoretically satisfactory manner. Further, taking fair labelling into account even when deciding whether to charge offenders in the exercise of prosecutorial discretion may itself ameliorate the problems that may occur as a result of fair labelling requiring the creation of new offences. The answer to concerns such as those raised by Cornford is not to give up on fair labelling, but to deepen one's commitment to the principle. If

[44] Findlay Stark, 'It's Only Words: On Meaning and Mens Rea' (2013) 72 Cambridge Law Journal 155, 156–160.
[45] Cornford (n 16) 1003-1010.
[46] Joseph Raz, 'The Law's Own Virtue' (2019) 39 Oxford Journal of Legal Studies 1, 3.

one does so, then it becomes evident that the rule of law is enhanced by fair labelling. Equally, fair labelling cannot do without the rule of law since it is a principle of *legal* justice.

However, as already suggested, fair labelling does not only concern issues of offence naming and differentiation. It also concerns the persistence of a label. In Chapter 6, I begin to explore the implications of this position. Recall that unfair labelling is a type of ontic injustice where one is categorised as a certain kind of thing such that one's rights and duties are mismatched with one's actual moral entitlements. The particular mismatch in question is that a person is inappropriately blamed due to an unjust allocation of such blame in the context of punishment. Of course, this could be an unjust allocation of blame because the criminal law fails to consider important distinctions in culpability or wrongfulness for purposes of blame allocation – the problem I addressed in the previous chapters. In Chapter 6, I focus on the kind of ontic injustice that results when labels persist inappropriately (meaning beyond a justified period taking account of their status as human beings or free and equal citizens). One reason to care about the persistence of a criminal label is that inappropriately labelling would also alter a person's status in a manner that conflicts or creates a mismatch with that person's dignity.[47] Furthermore, the aspects of both the process of conviction and the persistence of the label are related because one reason to endorse fair labelling as a principle is that a situation is envisaged where there will be publicity and communication of the label. It is thus difficult to discuss fair labelling without discussing whether convictions can be 'spent' and when an offender may no longer be labelled as such. The first possibility is my primary concern in this chapter.

There is a powerful counterargument to the justification for punitive criminal labelling: the essentialising objection.[48] This objection avers that criminal labels (including convictions) essentialise an offender; offenders are represented entirely by their criminal offence, rather than

[47] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2012) 50–51.
[48] Kimberley Brownlee, 'Don't Call People "Rapists": On the Social Contribution Injustice of Punishment' (2016) 69 Current Legal Problems 327, 343-344.

other features of their life. The essentialising quality of punitive criminal labels manages, proponents of this objection contend, to negate the ability of an offender to 'live down' their label. It is neither fair nor just, the argument goes, to have offenders rendered perpetually guilty of the offence they commit, to the extent that any other features of their life history are drowned out. To do so, the argument proceeds, is to treat them with contempt. At some point or another, there must be an opportunity afforded for their redemption; to change one's status. Chapter 6 agrees that failing to consider the capacity of an offender to redeem themselves is to treat them as an inferior in terms of their status as a free and equal citizen, and indeed as a human being. However, labelling them as an offender does not *per se* treat them as an inferior human being or citizen. Instead, the problem is treating someone as *irredeemable* and lacking the capacity to reform. To be treated and regarded as irredeemable by the state in a manner that is impervious to any evidence to the contrary is to be mislabelled unfairly. However, unlike rival views of this problem, in Chapter 6 I argue that the state need only avoid being impervious to acts of reform or redemption, not that it must assume the redemptive capacities of an offender, or treat them as reformed due to the mere passage of time.

In Chapter 7 I then examine the persistence of the criminal label as it relates to the social status of an offender. Specifically, I argue that the communication and publicity of a criminal label may extend the altered status of an offender. I examine in particular the disclosure of convictions and criminal records after an offender has served a period of hard treatment such as imprisonment. I do so by first examining the arguments in favour of why an offender ought to be allowed to 'spend' or 'live down' convictions. These arguments concern some kind of 'rehabilitative' logic (understood as a combination of non-recidivism and moral improvement) and pursue such living down by affording some measure of privacy that prohibits disclosure of an offender's criminal record. I then examine how measures such as sex offenders registries and access to criminal records granted to employers may extend the label (and its penal logic) despite being mostly concerned with reducing the risk of re-offending. This persistence of a label may inappropriately create a

mismatch with an offender's right to live down a label (and thus their moral entitlements which demand due respect for their capacity to reform).

Chapter 1: What is a Criminal Label?

I. Introduction

This chapter develops a conception of the central case of a criminal label as a legal label that authoritatively describes a person as having engaged in behaviour that meets the definitional criteria of a specified criminal offence, thereby performing a status-altering function in respect of the labelled individual. Specifically, the central case of these criminal labels is punitive labels: those where imposition of the criminal label serves censuring and sanctioning functions. Further, the chapter explores the phenomenon of social punitive labels, where a person is *non-authoritatively* described by other individuals in the social sphere, and different types of other criminal labels (the non-censuring penumbra cases). It identifies the central concern of fair labelling as the ontic injustice that results from the unwarranted imposition of a punitive criminal label, and the resultant unwarranted status change.

The first part of the chapter addresses the nature of criminal labels. It argues that the imposition of a criminal label consists of more than just an authoritative description and categorisation of an instance of law-breaking behaviour. It consists of assigning the labelled individual a status: the status of being an offender (which is for most purposes kept at this generic level, but is in some contexts an assignment of an offender status of a specific type such as a murder, rapist or thief).

The chapter then turns in Section *II* (a)-(c) to the concerns which arise from the status-altering dimension of criminal labels. One such concern is that the alteration of someone's rights and duties, both in law and ordinary social life, may be at odds with the person's actual entitlements in critical morality. That is, one can allocate these alterations in a way that creates a mismatch

between the law and morality. The kind of injustice which such dissonance creates is what philosophers call an 'ontic' injustice.[1]

The chapter lastly discusses other labels in Sections *IV-V* that mark the affected individual out as a criminal offender. In so doing, the chapter first considers non-criminal social (especially online) labels that are still punishments in ordinary social life, and then addresses criminal labels that are not convictions, specifically conditional as well as absolute discharges, insanity labels, 'non-crime hate incidents', and antisocial behavioural orders.

An important theme in this chapter is the proposition that different criminal labels can serve different ends. Some have primarily a risk-allocating and preventive function; others serve the ends of censure and sanction. In respect of the latter types of criminal label – for which the criminal conviction is the paradigm case – the specific kind of ontic injustice that the criminal label may give rise to is that it may categorise the offender such that this categorisation does not conform with the offender's blameworthiness. It may do so by *over*stating the offender's blameworthiness, or *under*stating it; both are unjust in the sense they are ontic injustices that misallocate blame. Avoiding unjust allocations of blame that result when punitive labels do not accurately reflect a person's blameworthiness in respect of their law-breaking behaviour is the main concern for the principle of fair labelling. It is this kind of ontic injustice that will be the focus of this thesis.

II. The nature of criminal labels

a. Criminal labels as social categories with a status function

In their influential article on fair labelling, James Chalmers and Fiona Leverick argue that labelling in the context of criminal law is not merely an instance of describing an offender's conduct, but

[1] Katharine Jenkins, 'Ontic Injustice' (2020) 6 Journal of the American Philosophical Association 188.

entails categorising that conduct.[2] Categorisation also implicitly requires that like cases (or categories) are treated alike.[3] They also link the need for categorisation to practical concerns arising from the administering a criminal justice system – it would simply be unworkable to have a system of criminal justice without categorisation.[4] They imagine a criminal legal system that dispenses with offence description or categorisation altogether, with only a single label remaining in the criminal code, such as 'D has engaged in conduct that violates a criminal prohibition', leaving all the work to be done at the level of sentencing, regardless of whether the conduct committed would be what we consider a murder, house-breaking or rape.[5] They reject this particular scheme of organising a criminal legal system as unworkable due to the large volume of information that would have to be kept and how difficult it would be to treat like cases alike.[6]

This is of course true.[7] It would indeed be highly impractical to organise a criminal legal system in this manner. However, it is important to appreciate that the reasons not to do so are not all merely pragmatic. After all, if there were compelling moral reasons to organise the criminal law in a manner that dispenses with categorisation or description, the practicality of such a scheme would have to be considered in light of the immorality that is being tolerated. Such toleration would then have to be justified.[8]

Primarily, labelling in the criminal law includes both describing and categorising conduct because of the *kind* of thing a criminal label is. It is the kind of thing that is part of a social reality comprised of human institutions.[9] This is to be contrasted with labelling and categorising the kinds of things that are 'brute facts' about the world such as the types of rocks, trees or flowers that

[2] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217, 220–221.
[3] ibid 221.
[4] ibid 220.
[5] ibid 223.
[6] ibid.
[7] I explore this point in Chapter 4 on the proposal for a single crime in a criminal code.
[8] Chalmers and Leverick provide inefficiency at doing justice and 'treating like cases alike' as reasons to justify not adopting such a scheme, see Chalmers and Leverick (n 2) 221.
[9] John Searle, *Making the Social World: The Structure of Human Civilization* (Oxford University Press 2010) 10. See also the lengthier discussion in John R Searle, *The Construction of Social Reality* (Illustrated edition, Free Press 1997) 32–43.

occur in nature.[10] A criminal label is what in social ontology John Searle has coined a 'constitutive status function'.[11] By this, he means that humans have the ability to impose functions on objects and people where these functions cannot be performed solely by virtue of their physical structures.[12] The performance of the function requires that there be a collectively recognized *status* that the person or object has.[13] It is only by virtue of this status that the person or object can perform the specific function.[14] A good example of this is money. Money has a particular function ascribed to it by human agents – to act as legal tender.[15] The physical aspects of money (paper or coins) cannot explain how it is able to perform this function.[16] Instead, money is able to function as tender only because human beings collectively recognise it as such.[17] The same may be true of things such as a 'president'. Without collective recognition of the institution of the office, and the accompanying recognition of the function of the office, the social entity called a 'president' would be nonsensical. The status thus has a function attached to it that can only be explained when considered against a backdrop of human institutions.

Criminal labels assign a certain status to the offenders they describe and categorise. This status is assigned to them for particular purposes and – as will be discussed further below – requires offenders to perform a certain role that fulfils their function. While it may sound a little odd to speak of a criminal offender as having a 'function' or specific 'role', I shall argue that it is not so odd as it may seem. Offenders are categorised for particular purposes and occupy a certain status in the criminal justice system and in society. More will be said about this below but, for now, we need only see that labels such as murderer, rapist, burglar, and thief are statuses which

[10] Searle, *Making the Social World* (n 9) 10.
[11] ibid 7.
[12] ibid.
[13] ibid.
[14] ibid.
[15] Searle, *The Construction of Social Reality* (n 9) 23. See also the excellent summary in Katharine Jenkins, 'Ontic Injustice' (PhD, Sheffield 2016) 17–25 <https://etheses.whiterose.ac.uk/13453/1/Jenkins%20Ontic%20Injustice%20Thesis.pdf> accessed 9 December 2022.
[16] Jenkins (n 15) 19.
[17] Searle, *The Construction of Social Reality* (n 9) 23–26.

appropriately-labelled offenders occupy. Considering criminal labels as 'social kinds' reveals that labelling in criminal law is more than mere description, but also more than just categorising, it also involves assigning a certain status to someone that alters their rights and duties.[18] It is now necessary to unpack the claims about the kind of thing a criminal label is and consider how this relates to fair labelling.

b. Social facts and altering rights and duties

The contention that criminal labels are social facts that presuppose the existence of human institutions appears straightforward. Just like a ten-pound note requires the human institution of money to exist, so a criminal label requires for its existence the human institution of law, particularly criminal law.[19] It is, however, easy to overlook certain important implications of this seemingly bland fact.

This becomes clear when attention is paid to *officials* within a criminal justice system. When thinking about the kinds of labels we attach to officials in the criminal justice system, the various kinds of people who occupy certain roles in the institution of criminal law, we tend to think of judges, prosecutors and police officers, all of whom have their part to play. And when we label these people, we would not think that we are merely describing and categorising different actors in the criminal justice system. We would not, in other words, think that this is purely an instance of cataloguing these various kinds of people who wear different uniforms. Instead, knowing that this is a human institution, we would surmise that there are functions they perform and statuses

[18] Searle, *Making the Social World* (n 9) 8–9.This odd-sounding phrasing (especially perhaps to the ears of legal scholars) of 'social kinds' is borrowed from the literature on social ontology, see also Jenkins (n 1) 188.
[19] Searle ibid 105–106.

they occupy to perform these functions. These statuses and functions they are supposed to perform then aid us in how we describe and categorise these officials.

Hence, it is not difficult to understand why we categorise *officials* in the criminal justice system so easily according to their status and functions. They are, after all, the agents in the system – the ones who do things to others. However, when we consider the persons variously described as suspects, defendants, and offenders, it is difficult to apply the same kind of logic because they are the people to whom things are done. They are investigated, questioned, charged, put on trial and, if convicted, sentenced. This leads us to forget that they, too, occupy statuses and perform functions in the criminal justice system. They can be required to do certain things because they are offenders (they may be required to do community service, pay fines etc). These things they do also have some kind of function in the system.

How are we to make sense of these statuses and functions that are occupied when we are describing and categorising offenders?

The first step to understanding criminal labels as statuses with a specific function is to think of the status as altering one's rights and duties. That is, when we assign the status of an offender we are not just doing something to the recipient, but requiring them to do something as well. This imposition of duties on them is a result of the 'role' they play in the larger system of criminal justice.[20] Although when speaking of a status, one is usually referring to an instance where the rights of the person who occupies the status are increased, as in the case of police officers or judges, this need not be the case. It is possible to occupy a status where only one's duties are increased. Such is the case of the offender.[21] This should not distract us from the fact that the

[20] I use the word 'role' here because it describes not only the 'status function' of an offender but also that they are part of a larger system in which the status was created to fit. Admittedly, to modern liberal ears, the word 'role' sounds better suited to a pre-modern aristocratic society so I will not repeat it. I only wished to make the later point about 'fit' not to imply inherent inferiority. For a similar point see Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 Ethics 202, 218.
[21] ibid 216.

offender is still an agent, whose duties are increasing to fulfil a certain function – being punished, preventing the risk of future offending, or both. The important point is that criminal labelling does not just simply describe and categorise citizens but alters the rights and duties of those to whom the label applies.

c. Labels as legal and social kinds

It is important to note that these alterations of an offender's rights and duties as a result of assigning them a criminal label traverse not only the legal realm but also the non-legal social realm. This point is not unique to criminal labels. Consider the example of the label 'wife' before 1991 in England and Wales, which is when marital rape was confirmed as a crime.[22] Before this occurred, what it meant to be a wife was, amongst other things, to be someone who did not have the right to deny sexual access to her body by one specific individual, her cohabiting husband.[23] It also meant that one was the kind of person who would be addressed by others as 'Mrs.', and other kinds of social esteem and social expectations were directed at married women. Therefore, that someone fell into the category of 'wife' made alterations to her rights and duties, both legally and socially, when applied as a status. Legal labels also operate in a wider social context that includes communal judgements that interact with legal categories. We live in a complicated social world where our practices of legal labelling interact with practices of social labelling. As will be discussed below, criminal labels are just as complicated in their relation to the broader community in which they operate. This complicates how we justify our classifications of social kinds.

[22] *R v R* [1991] UKHL 12; [1992] 1 AC 599.
[23] Jenkins (n 1) 190-191.

III. Inappropriate criminal labels as ontic injustices

It is helpful at this point to take stock of the argument presented so far concerning the nature of criminal labels. I have argued first that labelling in criminal law is more than mere description and categorising, and also involves assigning a certain status to someone – that of being an offender – which alters their rights and duties. Second, a person's rights and duties are altered according to a particular function that the status they have been assigned has been constituted for in a specific context – in our case, the context of criminal punishment. This does not mean punishment is the only function of criminal labels; as will be discussed below, criminal labels can also have a risk prevention rationale. In fact, it is often difficult to separate these two rationales when considering a criminal label's function.[24] Third, a person being incorrectly labelled means that their rights and duties are incorrectly altered. This – as I will explain further in this section – constitutes a kind of 'ontic' injustice against them – a wrong committed against them by the mere fact that they are assigned a status as a certain kind of social being where what it means to be that kind of social being is to be subject to constraints and negative enablements for interferences by others. This is what it means for an instance of labelling to be 'unfair' in the relevant sense.

If what it means to be labelled as a certain kind of thing comes with certain alterations to one's rights and duties, then it may be the case that the alteration itself is unjust. As Jenkins explains, the argument is that in some cases, the 'constraints and enablements that constitute social kind membership may be wrongful, in the sense that they are in contravention of the individual's moral entitlements.'[25] Returning to the example of a wife and marital rape, this kind of 'exemption' for rape was morally wrong since everyone is entitled to control sexual access to their body.[26]

[24] I will expand on this point in the next section, but for present purposes it is sufficient to accept that a criminal label need not only have a single function.
[25] Jenkins (n 1) 190.
[26] ibid 191.

There was thus a mismatch between the moral entitlements of the people who were wives and the legal and social constraints and entitlements that constituted the kind or category 'wife'.[27] This mismatch is what Jenkins calls ontic injustice.[28]

Importantly, ontic injustice is not a reference to the actual harms that people may be subjected to as a result of being categorised as a certain kind of thing.[29] It is not, in other words, the harm of actually being subjected to non-consensual sexual intercourse because you are a wife. It is also not the psychological harm or distress that may arise from being aware that one could be subjected to such horrors.[30] In the case of marital rape, the ontic injustice is 'the mere fact that someone is a wife, where being a wife consists, at least in part, of being someone who is not entitled to control fully sexual access to one's own body.'[31] Therefore, a wife who is not subjected to non-consensual sexual intercourse by her husband, and who suffers no psychological harm from fearing that possibility (and knowing it would not be considered rape by the law), still suffers ontic injustice.[32]

The basis for this wrong is what Stephen Darwall calls recognition respect, which requires recognizing certain properties of someone or something and being disposed to respond appropriately to these.[33] This kind of respect is an attitude that respects someone as a result of their moral status.[34] We recognize that the person has certain morally relevant properties that we ought to weigh in our deliberations and so conform our treatment or behaviour to align with the demands that flow from such a status.[35] The mismatch identified by ontic injustice is a kind of moral injury done to one due to the failure (at least by the law, but also by other social institutions)

[27] ibid.
[28] ibid 190-192.
[29] ibid.
[30] Sandra Bartky, 'On Psychological Oppression' (1979) 10 Southwestern Journal of Philosophy 190.
[31] Jenkins (n 1) 191.
[32] ibid.
[33] Stephen Darwall, 'Two Kinds of Respect' (1977) 88 Ethics 36, 38.
[34] ibid.
[35] ibid.

to respond appropriately to their moral status, enacting a kind of diminishment, and mistakenly creating the impression that the person's moral value is less than it really is.[36]

In the case of criminal labels, an ontic injustice exists when legal and social norms fail to reflect the proper moral status of the person labelled a (particular kind of) offender.

In the context of criminal labels *that function as punishments* (what I call 'punitive criminal labels'), the mismatch between a specific label and the moral entitlements one is owed comes to the fore as a classic concern of fair labelling. As Cornford argues, fair labelling is required as a principle of justice.[37] Cornford's argument is as follows. Fair-labelling duties have characteristic features akin to duties derived from principles of justice.[38] Primarily, they govern allocating blame.[39] Principles of justice require that 'relevantly like cases be treated alike, different cases be treated differently and that it is wrong to blame the blameless when allocating blame.'[40] It then follows that our blaming practices should reflect how blameworthy the targets of our blame are and for what.[41]

These duties arise especially when blaming is institutionalised. As John Gardner points out, 'raw' moral rights and duties are not allocated by anybody.[42] They exist regardless of their use, observance, recognition, or adoption; instead depending on the reasons for and against their existence for their validity.[43] Therefore, in the context of 'raw' morality, 'there is no question of anyone's having such rights and duties either justly or unjustly.'[44] However, questions of justice

[36] Jenkins (n 1) 196. See also Jean Hampton, 'Correcting Harms versus Righting Wrongs: The Goal of Retribution' (1991) 39 UCLA Law Review 1659, 1684.
[37] Andrew Cornford, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 Oxford Journal of Legal Studies 985, 997.
[38] ibid.
[39] ibid.
[40] ibid.
[41] ibid.
[42] John Gardner, 'What Is Tort Law For? Part 2. The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 339.
[43] ibid.
[44] ibid.

arise in the context of legal decision-making or social recognition when rights and duties have to be conferred or imposed by human agents and institutions.[45]

Understood in this way, fair labelling seeks to avoid instances when the criminal law – as an institutionalised blaming practice – fails to accord with critical morality in the distribution of blame. The ontic injustice that flows from being categorised as a certain kind of offender, when this conflicts with the blame warranted and justified in critical morality for that offender, is the core concern of fair labelling. When one blames another, one is holding them responsible as an agent for their conduct.[46] To blame someone more than they deserve is to disrespect them by misrepresenting the nature of their blameworthy conduct, and so failing to give due recognition to or ignoring some aspect of his nature or situation, in this case their actual blameworthiness.[47] The lack of respect in this case flows from the situation that some important fact about the person is not properly attended to or is not taken account of.[48] Frankfurt argues that the implications of such a fact are as follows:

> 'In other words, the person is dealt with as though he is not what he actually is. The implications of significant features of his life are overlooked or denied. Pertinent aspects of how things are with him are treated as though they had no reality. It is as though, in denying him suitable respect, his very existence is reduced.'[49]

Thus, when the institution of the criminal law labels someone improperly as a specific kind of offender (overlooking or denying some aspect of his blameworthiness), they disrespect him by categorising him unjustly and so denying or overlooking the importance of such blameworthiness.

---

[45] ibid.

[46] R Jay Wallace, 'Hypocrisy, Moral Address, and the Equal Standing of Persons' (2010) 38 Philosophy & Public Affairs 307, 318.

[47] Harry Frankfurt, 'Equality and Respect' (1997) 64 Social Research 3, 12. Andrew Simester makes a similar point, see AP Simester, 'Is Strict Liability Always Wrong?' in Andrew Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005) 33–34.

[48] Frankfurt (n 47) 12.

[49] ibid.

Some theorists argue that the principle of fair labelling is concerned solely with the *effects* of such a failure to deal with someone as they actually are.[50] This is because it is not always all-things-considered wrong to lie about or misrepresent someone.[51] It is only pro tanto wrong to do so.[52] Thus we must separate the action of being inappropriately labelled from its effects. Focus on any intrinsically wrongful aspect of misrepresentation in fair labelling is therefore apparently unhelpful.[53]

However, such an argument misses the point of the concept of an ontic injustice. Here, one is concerned not simply with the action of labelling, but with how this alters or creates a status for an offender that purports to justify treating them in an unjustifiable manner. Ontic injustice concerns *both* the action of being convicted as a certain kind of thing incorrectly, *and* the treatment one receives from the false message that such a status alters the rights of an offender so that he may be treated in that manner. The action of convicting and the effects on the offender are tied together by the concept of a 'status'. As Darwall argues, the recognition respect of another person's status requires both identifying some morally important quality of theirs and then regulating one's behaviour to respect such a quality.[54] Appropriate blame of an individual is such a quality that requires this kind of recognition respect once we have properly identified someone's blameworthiness. There is no need to reduce the concern *only* to the effects of the inappropriate label when the effects are connected to and flow from being (incorrectly) labelled as someone who may be treated as such.

If I am correct about this kind of injustice, then it means there are two types of injustice operating here concerning blame. First, one may overstate blame through incorrect categorisation.

---

[50] James Manwaring, 'Capacity and Culpability' (PhD, Oxford 2019) 7 <https://ora.ox.ac.uk/objects/uuid:ad68726b-ad24-4f58-946f-9c0571480e84/download_file?file_format=application%2Fpdf&safe_filename=Manwaring%2C%2BCapacity%2Band%2BCulpability%2B%282020%29.pdf&type_of_work='Thesis>.

[51] ibid.

[52] ibid.

[53] ibid.

[54] Darwall (n 33) 38.

Second, one may understate blame through incorrect categorisation. Likely, the second kind of ontic injustice is more controversial. The mis-categorisation of an offender by underplaying the blameworthiness of their criminal conduct thus wrongs both offender and victim. This does not mean that there cannot be arguments of mercy or leniency that may give us reasons to tolerate this ontic injustice, but those arguments would have to grapple with and reconcile this ontic injustice with calls for leniency or mercy.[55] For instance, it may be easier with less serious offences such as minor theft to do so, but much more difficult to overcome concerns about underplaying correctly allocated blame for serious offences such as torture or sexual assault. Regardless, one must first acknowledge the ontic injustice when framing a scheme of criminal offences even for cases of underplaying blame.

Importantly, none of what I have said suggests that issues of offence naming (distinct from issues of offence differentiation) are irrelevant, especially when one considers the social impact of being criminally labelled. The point is that offence differentiation precedes naming issues since one must first determine the nature and definitional criteria of an offence before deciding if the name given to the offence is suitable.[56] The offence label may later be deemed inappropriate or fall short of communicating the offence's criteria or nature, but this assumes that offence differentiation or categorisation in a criminal code has already been settled.

Ontic injustices can also arise when a person is socially labelled without any authoritative finding underpinning the label; this is the kind of label addressed next to bring out the similarities and differences between punitive social labels and punitive criminal labels.

---

[55] Giordana Campagna, 'The Miracle of Mercy' (2021) 41 Oxford Journal of Legal Studies 1096, 1104–1110. More radical accounts of mercy in fact claim it is an essential component of justifying punishment in John Tasioulas, 'Punishment and Repentance' (2006) 81 Philosophy 279.

[56] I make a similar point about concepts preceding language or the names we give them for purposes of fair labelling in Khomotso Moshikaro, 'The Moral and Legal Foundations of Fair-Labelling in Our Criminal Law' (2018) 135 South African Law Journal 262, 281–282.

IV. Punitive social labels

It is an important feature of criminal labels that they remain attached to an offender for an extensive period. Someone who is the subject of a purely social label, such as for example that of being 'a womanizer' or 'a liar', may hope to shed this label by simply ignoring its application and hoping that sufficient time will pass, and enough people will forget the label ever applied. The passage of time usually erodes the applicability of the label due to the changing social norms and the limited attention span of informal recording of wrongdoing.[57] Criminal labels, however, persist since they are assigned by the state claiming *authority* to do so and added to criminal records kept that do not allow one to be free of the label concerned. The authority of the state in such a case is the authority the law claims to alter the rights and duties of the offender.[58] This aim is aided by criminal records that make enforcement of this alteration easier to effect because it makes it easier for the state to identify, trace and track offenders.[59] The criminal record is thus an instrument to better enforce the alteration of an offender's status.

The authoritative nature of a criminal label strives to provide reasons regarding how to treat an offender. The fact that it is an authoritative pronouncement means that these reasons are intended and expected to make a practical difference in the decision-making of others.[60] This also means that the mere passage of time alone cannot be allowed to alter the status of offenders unless a specific period was stipulated by law for when the respective reasons that make a practical difference apply.[61] In this way, criminal labels are different from purely social labels due to their

[57] Social labelling on internet platforms will be dealt with below.
[58] For an exposition of how law makes these claims see John Gardner, 'How Law Claims, What Law Claims' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012) 34–38.
[59] I discuss criminal records and their role in contributing to the persistence of criminal labels in greater detail in Chapter 7, Section *IV* of this thesis.
[60] Jules L. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis Special Issue: Postscript to H.L.A. Hart's the Concept of Law, Part II' (1998) 4 Legal Theory 381, 383.
[61] I discuss the arguments in favour of spending or 'living down' convictions in Chapter 7, Section *II*.

institutionalization, despite the obvious social impact of criminal labels on the esteem in which offenders are held.

One modern phenomenon that puts some pressure on the conceptualization of criminal labels as persistent compared to social labels are social labels acquired online. This kind of social label functions as a response to a perceived violation of a social norm by publicly shaming an individual.[62] Where the social label marks the labelled individual out as someone who has committed a criminal offence, there are aspects of online labels that trouble the neat divide between punitive criminal labels and punitive social labels. First, given their potential permanence, these online labels have the same 'adhesive' quality as criminal labels. In fact, given the limits on who can access a criminal record, online labels may be more persistent.[63] Second, like criminal labels, they may require some kind of suffering to shed the label. Labels acquired online and on social media entail some kind of shaming to enforce the norm.[64] These acts of shaming impose suffering in a modern context, much as a scarlet letter would name and shame an adulterer in a puritan society.[65] This is because shame entails a lowering of one's esteem or social standing.[66] Given the publicity of online shaming, there may also be further social consequences from instances of shaming such as loss of employment, ostracization and harassment. Furthermore, online labels are publicly available for significant periods of time, discoverable by anyone through internet search engines or social media platforms. This makes it difficult to simply shed the label over time.[67]

---

[62] Jon Ronson, *So You've Been Publicly Shamed* (Riverhead Books 2015) 116; Kate Klonick, 'Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age Focus on Cyberlaw' (2015) 75 Maryland Law Review 1029, 1033–1037.

[63] I discuss the who may access criminal records and the implications for fair labelling in further detail in Chapter 7, Section *IV* of this thesis.

[64] Klonick (n 62) 1032.

[65] The concept of a scarlet letter was popularised by the classic novel of the same name, see Nathaniel Hawthorne, *The Scarlet Letter* (Reprint edition, Wordsworth Editions 1992); and the discussion by Klonick (n 62) 1033–1035.

[66] Toni M Massaro, 'Shame, Culture, and American Criminal Law' (1991) 89 Michigan Law Review 1880, 1900–1903. See also John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989) 72–73.

[67] The difficulty of shedding online labels is further highlighted by the emergence of a 'right to be forgotten'. Advocates of this right argue that individuals ought to have the right to have information concerning them removed from internet

These similarities between 'online' punitive social labels and punitive criminal labels might suggest that the distinction between social and criminal labels is illusory, given that one particularly prevalent kind of social label – a non-authoritative punitive label imposed online – is more like a criminal label than not. This suggestion should, however, be rejected. Rather, closer consideration of how certain social labels come to resemble criminal labels helps to explain and reinforce the importance of the distinction between the two kinds of labels. In particular, it helps one see that the driving force behind the greater similarity of online labels to criminal labels is that these online labels function not just as labels per se, but *as punishments* for violating a norm or standard.[68] The aim is to ensure that certain adverse consequences are visited on an individual who has transgressed some societal standard, or perhaps as a warning to others should they transgress similarly.[69] As Gardner points out, individuals punish each other outside the context of the criminal law, including by inflicting suffering on each other in private life.[70] Identifying instances of online shaming as instances of social labelling allows us to understand them coherently and highlights their capacity and function to alter the social rights and duties of the people to whom the label applies.

search engines due to the negative consequences on their future employment prospects and other areas of social life. The intellectual roots of a right to be forgotten are to be found in the French notion of 'droit à l'oubli' or the 'right of oblivion', which allows a convicted criminal who has served his time and been rehabilitated to object to the publication of the facts of his conviction and incarceration. The leading case on this literature is the European Court of Justice decision of *Google Spain SL, Google Incv Agencia Española de Protección de Datos and Mario Costeja González* (2016) Case C-131/12 (CJEU (Grand Chamber)).See also the discussion of the history of such a right in Orla Lynskey, 'Control over Personal Data in a Digital Age: Google Spain v AEPD and Mario Costeja Gonzalez' (2015) 78 Modern Law Review 522, 522–523. Lynskey points out that the label 'right to be forgotten' may be inappropriate to apply to the Gonzalez decision since the finding of the Court did not rely on a 'right', but on a violation of an EU directive and policy (at 528). This distinction, however, is not material for one to accept the general point concerning the adhesive-like quality of online labels.

[68] Klonick (n 62) 1051–1057.

[69] ibid. This is not to deny that online social labels can also serve to warn others about a person's violent or predatory instincts and so have a risk-prevention function. Instead it is to highlight how online labels mirror their equivalents in the criminal law.

[70] John Gardner, 'Introduction' in HLA Hart, *Punishment and responsibility : essays in the philosophy of law / by H.L.A. Hart* (2nd ed., Oxford 2008) xlix.

V. Punitive criminal labels as the paradigm case for fair labelling

I have argued so far that fair labelling concerns itself with a specific kind of ontic injustice operating in the context of institutionalized blaming in the criminal justice system. Here, I build on this argument and explain why punitive criminal labels, particularly convictions, are the paradigmatic case of criminal labels and best explain the point and role of fair labeling. Importantly, this paradigm case does not negate the application of fair labelling to other kinds of criminal labels. However, it does help explain how, when theorists examine fair labelling, they often have in mind criminal convictions and not some other kind of criminal label.[71] First, I describe why a paradigm analysis is a valuable method of analysing fair labelling. Second, I apply this methodology to the case of criminal convictions and their connection to fair labelling.

A paradigm-based explanation of a practice (in this case fair labelling) requires examining the basic role and point of the practice.[72] The paradigm is the most basic and simple form (sometimes called the 'central case') of the practice.[73] This does not just mean that it is a clear and simple exemplar, but also that it could best explain the reason why we engage in the practice – its rationale.[74] A paradigm-based explanation does not simply analyse the necessary and sufficient conditions of a concept, but also explores the relationship the concept has with related, non-

[71] An example of this is Chalmers and Leverick (n 2) 221–222. See also Cornford (n 37) 1004. The most explicit claim in this vein (mentioned in the title of the piece) is Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 Cambridge Law Journal 85, 85–86.

[72] Miranda Fricker, 'What's the Point of Blame? A Paradigm Based Explanation' (2016) 50 Noûs 165, 165. Fricker is analysing blame as the relevant practice, but legal theorists are also accustomed to adopting this method of analysis, see John Finnis, *Natural Law and Natural Rights* (First Edition, Oxford University Press 1980) 9–11.

[73] Fricker (n 72) 165. For the terminology of the 'central case', see Finnis (n 72) 10. Importantly, Finnis explains that this is not to be confused with 'statistical frequency' of the selected case.

[74] Fricker (n 72) 166. See also Finnis (n 72) 11. To quote Finnis: 'Rather, one's descriptive explanation of the central cases should be as conceptually rich and complex as is required to answer all appropriate questions about those central cases. And then one's account of the other instances can trace the network of similarities and differences, the analogies and disanalogies, for example, of form, function, or content, between them and the central cases. In this way, one uncovers the 'principle or rationale' on which the general term is extended from the central to the more or less borderline cases.' Finnis here is trying to explain and justify the central case of law (a much more ambitious and sweeping project than this one), hence his stress on complexity and richness being brought to bear on the central case. Nonetheless, one should not assume that a simple and basic form cannot be conceptually rich or complex depending on the context.

paradigmatic cases.[75] The rationale or point of the paradigm case then allows one to provide a thicker and richer account of the practice.

The conviction is such a paradigmatic case for fair labelling. It is not only a punitive label that allocates blame, but closely references a particular offence in a way other labels do not. One is convicted of a specific offence, such as murder, theft or robbery. This in turn closely connects convictions to issues of offence naming and offence differentiation. Offenders are convicted of specific offences with specific names and so the fairness of the state's blame allocation can be assessed through the lens of convictions by comparing how different categories of offenders are treated. By referencing specific offences, the conviction also plays an essential role for purposes of blaming in criminal punishment. It allows the state to specifically name the offence for which the offender is being punished and so the offender (and the public at large depending on the circumstances) is then informed of the nature of their culpable wrongful conduct. It allows the state to communicate its distinctions in the nature and degree of blameworthiness which is essential for fair labelling. Therefore, focusing on the conviction allows one to assess the basic role, point or rationale of fair labelling – to justly allocate blame. These connections between conviction and issues of offence naming and differentiation makes the conviction a sensible paradigm case through which to assess fair labelling concerns.

VI. Criminal labels other than convictions and their relation to fair labelling concerns

Convictions are the paradigm case of a criminal label for the purpose of fair labelling, but there are other kinds of criminal labels that are relevant for fair labelling and may raise fair labelling concerns. This section considers these other criminal labels, and how these labels differ from labels bestowed through convictions, including in terms of fair labelling. It pays particular attention to

[75] Finnis (n 72) 11.

whether these labels have a distinct function from punitive criminal labels (those aimed at punishing offenders) and what the implication of the answer is for fair labelling. The labels considered are: (i) discharges; (ii) what I will call 'incapacity labels', such as being found not guilty by reason of insanity; (iii) 'non-crime incidents'; and (iv) Anti-Social Behaviour Orders (which used to exist in England and Wales and still exist in Scotland[76]). In each case the deviation of these labels from the central case of the conviction will be discussed since they each have their own functions that are connected to blame and punishment, but are not necessarily identical to punitive labels.

The aim of the discussion below is to elaborate on this particular connection that these non-central cases of criminal labels have to the central case of convictions, and how it can shed light on the manner in which 'unfairness' in criminal labelling may arise. This approach then aims to include as part of the analysis labels that are present in, and used by, the criminal justice system for various purposes despite these labels not being directly connected to specific offences. An example of this kind of non-central case criminal label which will be discussed below is an anti-social behaviour order which is not connected to the commission of a specific offence, but nonetheless is used by the criminal justice system to discourage certain behaviour that may disturb public order and potentially become criminal. These labels can in this sense be said to be 'criminal' labels although they are not convictions. It is in this specific sense that I use the term 'criminal' below to mean 'part of the criminal justice system despite not being the central case of a criminal label'. This sense of a 'criminal' label is also used to underscore that these labels form part of the criminal justice system and its various purposes (which may include harm prevention, deterrence,

[76] Anti-Social Behaviour Orders were repealed in England and Wales and replaced by the combination of a civil injunction before the commission of an offence and a criminal behaviour order after conviction, see Part 2 of the Anti-Social Behaviour, Crime and Policing Act 2014. This later development highlights the problems of risk assessment logic in criminal law which will be discussed in later chapters. For the Scottish position see Part 2 of the Antisocial Behaviour (Scotland) Act 2004.

punishment etc). This is so despite not authoritatively describing a person as having engaged in behaviour that meets the definitional criteria of a specified criminal offence.

a. Discharges

The first complication to our discussion so far is the case of the conditional or absolute discharge. In this section I will first justify why if one is determining whether a discharge is a criminal label is best done by evaluating the purpose of the discharge and assessing if there is a change in the status of the person who has received a discharge. I will then discuss the conditional discharge and subsequently the absolute discharge.

i. The purpose of discharges and the importance of a change in status

Many jurisdictions contain disposal options for criminal cases in the form of discharges, where such a discharge may be granted when a judicial officer thinks that an offender has committed a legal offence, but due to some factor such as the character of the offender, the triviality of the offence or some further circumstantial factor, it would be improper to 'convict' and apply the usual consequences of a conviction to that person.[77] One of these avoided consequences is that the finding of guilt does not count, formally, as a conviction, and thus does not form part of this person's criminal record, thereby avoiding the effects that follow from having a criminal record.[78]

Therefore, the question arises whether a discharge may be properly termed a criminal label to which fair labelling applies, given that it is not an instance where an offender has been formally convicted, although we know that the official granting the discharge (or a jury) found beyond

[77] E.g. Crimes (Sentencing Procedure) Act (New South Wales) 1999, section 10; Penalties and Sentences Act (Queensland, Australia)1992, section 19 (1); Criminal Procedure Act (South Africa) 1977, section 297 (1)(c); Martin Wasik, 'The Grant of an Absolute Discharge' (1985) 5 Oxford Journal of Legal Studies 211, 211–212. For purposes of our discussion see especially sections 79-82 of the Sentencing (Pre-consolidation Amendments) Act 2020.
[78] Wasik (n 77) 212–218.

reasonable doubt that the defendant had committed a crime. The relevant question here is how does one properly determine the purpose or function of the discharge? To answer that question, one must first establish if there has been a relevant change in the status of the discharged offender which affected his rights or duties. At first blush, it might appear that a discharge evinces no such alteration of the status of an individual precisely because of the absence of a conviction, formal criminal record and other ordinary consequences of a finding of guilty beyond reasonable doubt. However, I will argue below that both conditional and absolute discharges still alter one's status for specific purposes that serve broader criminal justice aims. It is to this I now turn.

ii. Conditional discharges

Discharges are generally alternatives to ordinary legal punishments that usually follow a determination of guilt. However, this does not mean that they are not still a kind of criminal label. For instance, conditional discharges allow courts to require the offender not to commit further offences to continue enjoying the suspension of punishment for the specific offence for which they have been discharged, or be subject to other conditions of good behaviour.[79] This continues to draw a line between those to whom such conditions apply as opposed to those to whom they do not apply. Those to whom these conditions apply occupy a different legal status from non-offenders more generally. Importantly, these conditions are indications of separate categorization and so entail a separate legal status being assigned in the circumstances, and when it comes to discharges, the status in question is that of a person who is authoritatively described and categorized as having committed a criminal offence.

Furthermore, for certain prospective job opportunities (such as law enforcement) the fact that one has been conditionally discharged may make a difference as to how one must answer

[79] ibid 234.

certain questions posed by a prospective employer.[80] One is not treated as though one were like applicants who have never been conditionally discharged. If a prospective employer such as the police commissioner enquires if one has been found guilty of an offence, the recipient of a conditional discharge must answer in the affirmative to the question. (If one were instead asked if one has been convicted of an offence, it may be acceptable to answer in the negative despite having been conditionally discharged.) This approach distinguishes what one may call 'formal conviction', which involves the formal recording of an offence as part of a criminal record with the usual legal consequences that flow from conviction applying, from 'factual findings of guilt' based on which no other legal consequences apply to an individual except for the conditions of the discharge, and official disclosures for certain relevant fields of employment. In the words of Lord Justice Hughes in *R v Patel* concerning an application by someone conditionally discharged who failed to disclose this when applying to be a police officer, 'We entirely accept that in sensitive employment such as this the Commissioner [of Police] is entitled to be interested not only in a conviction as defined by section 14 [of the then relevant legislation regarding discharges] but *in the antecedent offence which in this case had been committed* [emphasis added].'[81]

Turning to a consideration of the *purposes* of discharges, one can accept that conditional discharges are a form of criminal label which involves a change in one's status, without assuming that they have the same purpose as convictions. The purpose of discharges is to nullify (or at least suspend) punishment or to apply to cases where it is 'inexpedient to inflict punishment' depending on the nature of the offence and character of the offender.[82] After all, the discharge aims to allow offenders to avoid having a criminal record with immediate effect by avoiding the ordinary adverse

[80] *R v Patel* [2006] EWCA Crim 2689 [17]. The Court was interpreting section 14 of the Powers of Criminal Courts (Sentencing Act) 2000, which was repealed by the Sentencing (Pre-consolidation Amendments) Act 2020. However, the relevant sections dealing with discharges (sections 79-82 of the Sentencing Act 2020) are similarly phrased.
[81] ibid.
[82] Section 80 (4) of the Sentencing Act 2020.

consequences of acquiring such a record.[83] Therefore, it may be arguable that discharges are criminal labels, but that they are not labels that function to punish those to whom the label applies.

Moreover, one must consider the possibility that discharges may have more than one function. Conditional discharges have a risk prevention function as well. The purpose of the conditions that attach to the discharge is to prevent the person conditionally discharged from reoffending by suspending punishment subject to not committing an offence in the period that the discharge applies.[84] In essence, the individual concerned is identified as a risk by the fact that they are found to have committed an offence and are placed under certain terms for a specific period. If they do not commit an offence in this period, then they cease to be such a risk. Therefore, conditional discharges have two functions – to nullify punishment and to enable risk control.

That discharges serve these two functions does not rule out the possibility that other non-punishment functions may also apply. Certain burdens of disclosure can be imposed in cases where one, for instance, applies for a position of public authority such as judicial office or law enforcement. The nature of these official law-applying, law-creating and law-enforcing positions require a certain moral standing to justify the claims to authority someone in such a role will make.[85] Specifically, this is to avoid endangering the legitimacy of that authority due to accusations of possible hypocrisy and indifference to the prohibitions of the criminal law that may threaten values such as the rule of law itself.[86] If several applicants have been found guilty of having committed criminal offences (despite being discharged) and yet are appointed to positions of legal authority where they may convict people of or otherwise enforce similar offences, this may undercut their moral standing to claim such authority in the first place. To ignore the previous factual finding of guilt by a court may in effect be indirectly self-defeating for purposes of the role

[83] Wasik (n 77) 215.
[84] Section 80(1) and (5) of the Sentencing Act 2020.
[85] Nicole Roughan, 'The Official Point of View and the Official Claim to Authority' (2018) 38 Oxford Journal of Legal Studies 191, 215.
[86] Ekow Yankah, 'Legal Hypocrisy' (2019) 32 Ratio Juris 2, 7–10. On hypocrisy more generally see R. Jay Wallace, 'Hypocrisy, Moral Address, and the Equal Standing of Persons' (2010) 38 Philosophy & Public Affairs 307, 328–330.

or position itself. This would be a possible defence of the conclusion reached by the court in *Patel*. Considering the purpose of the official role that the applicant would perform and asking whether for someone occupying this role the factual determination of guilt would still matter, despite the person involved not having been punished for any crime, the answer could be that the discharge has still altered the discharged offender's status, not for purposes of punishment but for purposes of risk prevention and for the purposes of legitimising authority by avoiding hypocrisy.

Hence, discharges do not place those who have been conditionally discharged in the same position as those who have never been found guilty of any offence concerning certain law-applying or law-enforcing employment opportunities. Furthermore, the employer ought to still take account of the nature of the offence the person was discharged for and their character in determining whether to appoint them.

This purposive understanding of the difference between being found guilty of an offence as opposed to being convicted may be useful in other areas where such disclosures may or may not be relevant. For instance, in English and Welsh immigration law it is yet to be determined if a conditional discharge ought to be disclosed if immigration authorities properly enquire whether someone has been found guilty of an offence.[87] How one answers that question must depend on how one construes the purpose of the inquiry, and whether, considering the nature and function of a discharge, it is defensible to consider it a false statement to answer 'no' in the circumstances. One's answer, however, cannot appeal to punishment since the purpose of the discharge is to nullify punishment. But other purposes may be invoked.

iii. Absolute discharges

[87] The closest English law has come is in the case of *Omenma v Home Secretary* [2014] UKUT 314 where immigration authorities only asked about previous convictions and did not broaden the question to findings of guilt.

This brings me to the question whether an *absolute* discharge can also constitute a criminal label. If a discharge does not have any conditions attached to it, can it still draw a line between non-offenders and offenders? In other words, can it still be a *status* of any kind, especially considering that it emphasizes the 'absoluteness' of the discharge itself?

One way to understand the absolute discharge may be that it is a narrower legal status that only adjusts one's rights concerning the special role considerations of law-applying and law-enforcing positions, whilst not identifying the person discharged as a risk of reoffending or committing any further offences. Thus, it is a status that only alters one's rights for specific and narrow purposes. Of course, one may instead think it is not a legal status at all and so 'absolutely' absolves the person concerned of any legal consequences, returning them to the position of being like every other legal subject who has never been found to have committed a crime. This would, however, be a hasty assumption.

The 'absoluteness' concerned here is more reasonably construed as referring to a discharge from hard treatment such as imprisonment, risk prevention measures or conditions being applied to you, or some other purpose of the criminal justice system.[88] This does not, however, mean that law (as in the case of appointing officials who wield public power) may not have legitimate purposes in caring about whether a person has ever been found guilty of an offence even if they have not been 'punished' (meaning imprisonment etc.) for it. For instance, Martin Wasik argues that the purpose of the absolute discharge is to avoid the *harshest* aspects of a criminal label applying to a person due to the prior mentioned special factors and circumstances that justify departure from the ordinary legal and social consequences.[89] He reasons that the absolute discharge may be seen as sitting at the foot of the sentencing tariff and the conditional discharge sits immediately

[88] I will discuss 'avoiding the reality or perception of hypocrisy in law-enforcement or law-applying officials such as the police, prosecutors or judges' as a further purpose of the criminal justice system below.
[89] Wasik (n 77) 234–235.

above it in a broader scale of punishment.[90] However, arguing that the absolute (or indeed the conditional) discharge forms part of this tariff is difficult to accept because there is no express blaming or condemnation of an offender in this context as implied by the moniker 'absolute'.[91] The purpose of these two statuses (absolute or conditional discharge) is exactly the opposite. To reconstruct the absolute discharge as a form of punishment stretches the legislative scheme too far and ignores the importance of accepting that the criminal law can have other functions aside from punishment.

It is preferable to accept that absolute and conditional discharges nullify or suspend punishment, but need not exempt one from risk prevention measures (conditional discharge) or other legitimate purposes (conditional and absolute discharges). A further benefit of this approach is that it need not deny the relevant moral distinction between being found not to have committed a crime after an investigation and it being inexpedient to punish you despite your guilt. Indeed, as with conditional discharges, it may very well be that the fact that one committed an offence, but received an absolute discharge because it was deemed inexpedient to punish you, would still be relevant for deciding your suitability as an applicant for a position such as a police officer, judge, or prosecutor. I do not necessarily argue that this is the case, but that a reasonable argument anchored in a concern with avoiding hypocrisy or loss of public trust in the authority of law-enforcing or law-applying officials may provide reasons to still consider someone's absolute discharge. This is because despite the finding of it being inexpedient to punish, this does not mean that the law must be blind to the fact that an offence was committed, despite the absence of a criminal record or punishment.

Further, it is possible that there are certain ontic injustices that apply to absolute discharges. For instance, X may inappropriately receive a conditional discharge when his behaviour merited

[90] ibid 234.
[91] ibid.

an absolute discharge. Although discharges are aimed at nullifying punishment, this does not mean that persons to whom they apply cannot be incorrectly categorized as one kind of discharge and not another, particularly when one considers the relevance of the discharge when applying to certain employment opportunities. Although this is not the central case of 'mislabeling' in the criminal justice system, it is plausible that cases of mislabeling can still occur with respect to discharges. The crucial point in dealing with such cases, however, is to recall the purpose of the discharge and that it cannot simply be dealt with in the same manner as one would consider mislabeling concerning convictions.

To summarise, discharges are still criminal labels, but they are labels that do not punish offenders. The purpose of discharges is to exempt the individual concerned from punishment (perhaps with conditions attached).

b. Incapacity labels

A further type of criminal label that warrants consideration is the broad category of what I call 'incapacity labels'. These are an alteration of an individual's rights and duties by the criminal law where the status function of the label is not to punish or blame the offender but to exculpate them from criminal liability due to some incapacity they suffer.[92] The types of incapacity labels that are relevant and will be discussed are (i) someone being found not guilty by reason of insanity; and (ii) unfitness to plead.

iv. Not guilty by reason of insanity

[92] Partial defences such as provocation or diminished responsibility and complete defences such as duress operate to reduce or exculpate blame without assigning their own distinct criminal labels and so are not considered here. However, this does not mean that fair labelling concerns cannot apply to them. I am only interested in, for the moment, sketching a topology of different criminal labels and their connection or relation to the conviction.

The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 ('CPIUP') provides that a person may be found not guilty by reason of insanity.[93] 'Insanity' is determined by asking whether at the time of committing the act, the accused was impaired by a defect of reason, arising from a disease of the mind, such that he did not know the nature and quality of the act, or that what he was doing was wrong.[94] The reference to disease of the mind in this instance means an impairment of one's mental faculties.[95] Defects in mental faculties can be said to be synonymous with 'capacities'.[96] Thus, if some disease or condition affects the capacities of an accused to reason about or understand the nature of their act, or recognise that it is wrong, then this implies that the offender cannot be blamed for such behaviour in the eyes of the law.[97] A court then has the discretion to issue disposals comprising of (i) a hospital order with or without restrictions (ii) a guardianship order (iii) a supervision order or (iv) an absolute discharge.[98] 'Insanity' is thus a broader category of criminal label that can have a subset of orders or 'sub-labels' made depending on the cause of incapacity and the circumstances.

The logic of the insanity label, however, remains to exculpate blame and responsibility of a potential offender. It is in a sense a mirror image of the conviction, which is concerned with distributing and assigning blame, whilst the insanity verdict aims to exculpate blame to varying degrees depending on the nature and degree of the incapacity. This is why considering the conviction a paradigm case of fair labelling allows us also to consider the fair labelling implications of insanity. The nature and degree of the incapacity allows us to assess the fairness of various insanity labels and how far they deviate from the usual allocation of blame by a conviction. Insanity

---

[93] Section 1 of the CPIUP.

[94] *R v M'Naghten* (1843) 8 E.R. 718 at 210. See also the discussion in Phil Fennell, 'Criminal Procedure (Insanity and Unfitness to Plead) Act 1991' (1992) 55 Modern Law Review 547, 549.

[95] *R v Sullivan* [1984] AC 156, 172.

[96] Manwaring (n 50) 36.

[97] Jill Peay, 'Mental Incapacity and Criminal Liability: Redrawing the Fault Lines?' (2015) 40 International Journal of Law and Psychiatry 25, 27. See also Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press 2012) 121. To quote Loughnan: 'The insanity doctrine actually operates in two ways: it either negates an element of the offence (mens rea) or it has a more global impact, exculpating an individual although he or she performed the actus reus with the requisite mens rea.'

[98] Section 5 of the CPIUP.

also involves risk assessments and the degree of dangerousness of an offender.[99] This is not to be ignored. However, the exculpating role it plays remains crucial for assessing the fairness of a label depending on these circumstances.[100] It also allows one to consider whether the name given to the label is appropriate considering the stigma attached to the word 'insanity' similar to other descriptions of mental health conditions.[101] Reflect, for example, on the common criticism of English law that diabetics who fail to take their insulin, become hyperglycaemic and inflict harm in that state must rely on 'insanity' as a defence.[102] The label of 'not guilty by reason of insanity' is exculpatory, I argue, but it is exculpatory in a particular manner. And that manner might be 'unfair' insofar as it suggests a mental disorder in such cases where one does not exist.[103]

The exculpatory role that insanity labels play references the mirror image central case of the conviction. The conviction remains the standard case of a criminal law that can inform how various disorders and conditions affect the capacities that the criminal law would rely on as the ground to allocate blame.

v. Unfitness to plead

[99] Loughnan (n 97) 26–29.

[100] One can think of this as an inability to 'respond to reasons', see John Gardner, 'The Mark of Responsibility' (2003) 23 Oxford Journal of Legal Studies 157, 158. One may also think of this as an inability to conform to reasons see RA Duff, 'Cliff-Top Predicaments and Morally Blemished Lives' (2019) 19 Jerusalem Review of Legal Studies 125, 127. The 'conformability' explanation for exculpation is discussed and supported at greater length in Manwaring (n 50) 144–149. Although I am more sympathetic to the 'conformability' view, neither approach makes much difference to my argument on labelling.

[101] See the stigmatising effects of the word 'schizophrenia' in Jordan Termeer and Andrew Szeto, 'Mental Illness Stigma in Criminal Justice: An Examination of Stigma on Juror Decision-Making' (2021) 13 Inquiries Journal <http://www.inquiriesjournal.com/articles/1865/mental-illness-stigma-in-criminal-justice-an-examination-of-stigma-on-juror-decision-making> accessed 15 December 2022. It is not hard to consider how these stigmatic views may apply to terms such as 'insanity' and result in unfair labelling of medical conditions.

[102] Gerry Maher, Judith Pearson and Brian M Frier, 'Diabetes Mellitus and Criminal Responsibility' (1984) 24 Medicine, Science and the Law 95, 99. The main critique by the authors is directed at the decision in *R v Quick* [1973] QB 910.

[103] ibid. To quote the authors, 'However, it is unsatisfactory to attach the label of insanity to diabetes. Diabetes itself, as opposed to hypoglycaemic episodes which may follow from its treatment, is not a mental but a physical illness and the standard medical treatment for controlling the disease is not that of psychiatry.'

Being found not guilty by reason of insanity is not the only kind of incapacity label. A further incapacity label to consider is the being found to unfit to plead and stand trial. Specifically, this incapacity label is assigned when the defendant is unable to plead to an indictment, is unable to understand the proceedings so as to be able to challenge jurors, understand and give evidence, and to make a proper defence.[104] The court must determine if the accused committed the offence mentioned and also determine the particular cause of his inability to plead.[105] The same sub-orders concerning hospitalisation, guardianship, supervision and absolute discharge available in the case of a finding of not guilty by reason of insanity apply.[106]

Fair labelling concerns may still arise depending on the nature and degree of the cause of the unfitness to plead. It matters that this kind of incapacity affects the ability of the offender to stand trial, not necessarily that they were unable to understand or reason about their crime at the time of commission. It may very well be that the accused was blameworthy when he committed a murder, but it would not now be fair or appropriate to place him on trial. Indeed, the law still determines whether the offender performed the *actus reas* of the relevant crime.

This distinction may matter for fair labelling purposes considering the different kinds of judgments it makes about the offender. For purposes of blame allocation the finding that an offender was capable of being blamed at the time he committed the crime, but cannot now stand trial, still acknowledges that had the incapacity not later arisen, the offender may have been convicted.

On the other hand, the insanity label communicates that an offender was not of sound mind when the crime was committed and so a determination of blameworthiness was always pointless since the incapacity applied from the very beginning (depending on the condition or disease) as opposed to the incapacity arising later as in the case of a verdict that one is unfit to

[104] Section 4 of the CPIUP and *R v Pritchard* (1836) 7 C & P 303.
[105] Section 4A of the CPIUP.
[106] Section 5 of the CPIUP.

plead. The temporal aspect of when the 'disease of the mind' or insanity arises matters for purposes of blame allocation, or in this case exculpation, hence the different incapacity labels. This does not mean that the victim cannot care about the 'fairness' of the trial to the offender, only that this temporal distinction makes a difference to the degree of blame assigned to the offender by the victim. One can still sensibly blame an attacker who was of sound mind when they raped or assaulted you, but later developed a mental illness rendering them unfit to stand trial. One may even support your attacker not being tried by reason of being unfit to plead (whilst still acknowledging that they were responsible for their actions when they committed the offence). It is more difficult to make sense of blaming someone who was not of sound mind when they committed the offence. This distinction between insanity and unfitness to plead thus makes a difference to the allocation or exculpation of blame.

Regardless, the label of being 'unfit to plead' is related to a conviction as a paradigm case of fair labelling since it itself is a deviation from the ordinary course of a trial, which had as one of its purposes determining whether an offender ought to be convicted of a criminal offence. It therefore matters how and for what reason the trial (which has as a possible result the conviction of an offence) deviates from its standard process. Determining when the illness that exculpates blame (at least outside of having committed the actus reus, for purposes such as a lack of mens rea etc) pre-supposes that determining blame is the overall 'normal' course of a trial. The conviction being the standard criminal label that allocates such blame thus remains the general paradigm case of comparison. This affirms the position of a conviction as a suitable paradigm case of a criminal label for fair labelling purposes of allocating (or rather exculpating) blame.

c. Non-crime incidents

Non-crime incidents are recorded by the police to monitor and prevent potential hate crimes.[107] Any incident which is perceived by the victim or any other person as being motivated by hostility or prejudice against the victim can be recorded as a 'non-crime hate incident'.[108] This 'hate incident' must be recorded regardless of whether there is any evidence beyond the victim or other person's perception of prejudice.[109] These incidents may then be disclosed to potential employers as part of an enhanced criminal record certificate at the discretion of the chief constable in local police stations.[110] Police officers are not required to notify the person who is the object of a complaint that a non-crime hate incident has been recorded.[111] Thus, one may be oblivious to being categorized and recorded as having committed a non-criminal hate incident and this may be communicated to prospective employers without one's knowledge.

Recently, the Court of Appeal has found that although this perception-based recording process has a legitimate aim, namely preventing disorder or crime, it is an unjustifiable intrusion into the right to freedom of expression.[112] The case dealt with a former police officer who posted a mocking limerick ridiculing proposed reforms to the Gender Recognition Act 2004 that was interpreted as transphobic on social media.[113] He was later recorded and categorized by police for his posts and challenged the College of Policing Guidance that empowered and advised police to do so once someone lays a complaint. The Court granted Mr. Miller's challenge that this process had violated his rights. To quote the Court:

> 'I have already said that knowledge that the police are categorising and recording as non-crime hate speech, speech of the kind with which we are concerned, has the potential to create a chilling effect

[107] Section 6 of the Hate Crime Operational Guidance (2014) ('Hate Crime Guidance'), issued by the College of Policing in terms of section 123-124 of the Anti-Social Behaviour, Crime and Policing Act 2014. See also the discussion of this in *Miller v College of Policing* [2021] EWCA Civ. 1926 par 13-16.
[108] Section 1.2.1. of the Hate Crime Guidance.
[109] *Miller v College of Policing* par 18.
[110] Ibid par 27.
[111] Ibid par 30.
[112] Ibid par 108.
[113] Ibid par 31-33.

> on public debate on issues of controversy and public importance in an area of expression where the scope for lawfully restricting such debate is very limited. As I have also said, in my view, the interference, while not at the highest end of the spectrum, is nonetheless real and significant.'[114]

What I want to consider here is whether the status of being a person who is categorized as having committed a non-crime hate incident constitutes a criminal label, even though the official description of the recorded event is that of a 'non-crime hate incident'.

The reason a 'non-crime hate incident' is still a criminal label is that an individual whose conduct constitutes a 'hate incident' occupies a separate status from ordinary members of the public, and more precisely a status where one's rights to free expression and privacy are altered to pursue aims that serve the criminal law. One may wrongly assume that although this is some kind of legal label, it may not necessarily be a criminal label. However, the aims of the status change are to pursue and secure the aims of the criminal justice system, namely crime prevention and increasing community confidence in policing.[115] The historical context of how these non-crime hate incidents came into being is also instructive in revealing the rationale of the labels. They were introduced into law following the recommendations of the MacPherson Report that investigated the racially motivated murder of a young black man (Stephen Lawrence) and police failures to investigate the murder, and revealed institutionalized racial bias in policing.[116] The background context of these non-crime hate incidents was a failure of the criminal justice system that these labels were introduced into law to remedy. Thus, their origins and reason for existing is located squarely in the criminal justice system.

Further, it is difficult to say what else these labels would be, if we focus on their rationale, if not criminal labels. These are not measures aimed at preventing private indirect discrimination

[114] Ibid par 102. The Court then found there were less restrictive means that may have been used to achieve the legitimate aims of the Guidance.
[115] Ibid par 96.
[116] Ibid par 10.

(such as diversity training or some such initiative), but complaints that conscript the police to monitor behavior that may escalate into becoming criminal conduct and present a threat to public order – two aims the criminal justice system is ordinarily concerned with.[117] One also ought to be wary of the incentives governments have to re-define criminal justice measures as merely 'administrative' measures in order to circumvent the protections that the norms of the criminal justice system grants to offenders. Lucia Zedner explains the problem as follows:

> '[R]esort to administrative and civil channels involves procedural side-stepping that allows for the evasion of core criminal process protections, such as the presumption of innocence, the burden of proof on the prosecution, a standard of proof beyond a reasonable doubt, rules of evidence, the right to legal defence and a fair trial. Even within the criminal process, erosions of these protections are common but at least they set standards to which existing penalties can be held, evasions measured, and miscarriages identified. Civil and administrative channels impose fewer procedural hurdles, set lower evidentiary bars and permit measures to operate unconstrained by the criminal process protections whose very purpose is to uphold the rights of defendants and guard against unwarranted state intrusion in individual liberty.'[118]

The purpose of this classification is thus related directly to crime prevention and to maintaining public order despite the name 'non-crime' hate incident. Further, in relevant cases, one's speech is subjectively classified as (albeit 'non-criminal') hate speech, and one is officially labelled accordingly, which may lead one to suffer professional consequences. The label 'non-crime hate incident', in other words, has a clear status function that triggers the alteration of rights and duties. The ontic injustice, in this case, flows from being inappropriately classified and categorized as someone who is prejudiced and racist and who, therefore, poses a risk to the public at large or certain classes of people. In this sense, this is not a mere investigation in the normal course of

[117] Ibid par 18.
[118] Lucia Zedner, 'Penal Subversions: When Is a Punishment Not Punishment, Who Decides and on What Grounds?' (2016) 20 Theoretical Criminology 3, 9.

police work, but a status assigned by the state that alters one's rights with the function of crime prevention. It is, therefore, a site of ontic injustice if falsely ascribed.

For fair labelling purposes, these non-crime hate incidents are still related to the conviction as a paradigmatic case of criminal labelling. The aim of recording the non-crime incident is to prevent the eventual commission of an offence for which one would be convicted. True, non-crime incidents are not as directly concerned with blame in the way that convictions are. Non-crime hate incidents have a preventive logic that is not directly aimed at censuring someone. Nonetheless, the concern of those recording the non-crime hate incident is to prevent and regulate behaviour that has already been judged as so serious and blameworthy as to warrant such resources committed to preventing it in a manner that other 'harmful' conduct does not warrant. For instance, the behaviour that concerns the non-crime hate incident is qualitatively different from the 'anti-social' behaviour that will be discussed below. This distinction is a distinction in blameworthiness. 'Seriousness' of harm, simply meaning the *degree* of harm, does not explain this distinction since the threshold for the non-crime hate incident is very low.[119] Furthermore, presumably racist or bigoted behaviour may be 'anti-social', but a separate category of preventive label was created to monitor this particular kind of behaviour informed by a judgment of blameworthiness for potentially bigoted or prejudicial conduct.[120]

Moreover, one is indirectly censured as a potentially prejudiced or bigoted person by the application of the label. Its chilling effect on free speech did not just come from the mere fact of police monitoring, but the racially concerned rationale of the label and the implication and stigma

[119] Ibid par 17.

[120] This is especially true when one recalls the historical background of racialised policing revealed by inquiry into the murder of Stephen Lawrence. See for instance the testimony of Doreen Lawrence (Stephen's mother) in William Macpherson, 'The Stephen Lawrence Inquiry' (Home Office 1999) Cm 4262-I par 4.4. In her own words: 'Basically, we were seen as gullible simpletons. This is best shown by Detective Chief Superintendent Ilsley's comment that I had obviously been primed to ask questions. Presumably, there is no possibility of me being an intelligent, black woman with thoughts of her own who is able to ask questions for herself.' The concern with prejudiced criminal justice enforcement and prevention aims to prevent a specific form of future wrong-doing distinct from other forms.

of bigoted conduct that will be assumed by potential employers.[121] Although not an outright ban on speaking, the incentives and pressure to stop speaking or alter one's language and views is an adjustment of their rights and status. It creates a distinction between one category of speakers who are suspected of holding bigoted views (which pose a danger to minority groups) and other categories of speakers which are not. This is a distinction in status between persons who have expressed bigoted speech (and may thus have their rights adjusted) and those who have not. The former category of bigoted speakers must then be subjected to monitoring and perhaps adverse professional consequences as a result of the status they hold as person who have been reported for a non-crime hate incident.

In order not to be classified within the category of persons who express suspect speech of this kind, one must avoid speaking or altering their expression. The lack of usual protections that apply to offenders in the case of the conviction may also be useful in assessing the fairness or otherwise of the procedural protections those labeled with a non-crime incident are afforded. Thus, the conviction may still be an instructive comparator of the non-crime incident even if the non-crime incident has a preventive logic. This does not mean background issues of blame and stigma are irrelevant. The conviction may still prove useful for explaining the fairness or otherwise of the non-crime incident's application as a criminal label when considering any ontic injustice and even additional background issues of blame and stigma with which fair labelling is concerned.

d. Anti-social behaviour orders

[121] *Miller* at par 116.

Another kind of authoritative, criminal label that also does not necessarily require conviction for a criminal offence is the Anti-Social Behaviour Order (ASBO).[122] This is a criminal justice measure which aims to prevent anti-social conduct, which includes conduct that has caused, or was likely to cause, harassment, alarm or distress to any person, or to annoy and cause a nuisance concerning that person's occupation or residence or other housing-related nuisance.[123] These measures are formally 'civil injunctions' since anti-social behaviour is not a criminal offence.[124] However, the consequences of breaching any such order include being arrested, remanded or evicted from one's home depending on the circumstances.[125]

This means that ASBOs have some features that are important for our discussion. First, the ASBO categorises one as a threat to public order who may be likely to harass or disturb members of the public. Having an order made against you places one under certain obligations to desist from certain conduct. This is done to serve risk prevention objectives that concern the criminal law and general public safety. For instance, ASBOs are not made to prevent one from breaching contracts or committing torts. Instead, they impose these requirements to prevent the escalation of conduct that can easily become criminal or disturb the peace. The function of these orders is a criminal justice function.[126] The broad category of behaviour covered by the order is also perception-based with no requirement that this must actually cause disturbance to the safety of a local community.[127] One may, therefore, be subjected to such an order for conduct that stemmed from unreasonable or baseless beliefs that one was displaying anti-social behaviour. As

[122] Although there have been significant amendments to the ASBO regime, I will use the present tense to discuss them since they are still in force in Scotland and, as I will argue further, still present similar problems as the old regime in substance despite being categorsied by legislative amendments as 'civil' measures. Since I do not believe that the legislature simply naming a measure 'civil' makes it so (as do other scholars such as Lucia Zedner (n.118) 9), I believe it is still important to interrogate the function of ASBOs as still being possible criminal labels even if they are called differently by a legislature. For a critical analysis of the problems of the current regime see Andrew Cornford, 'Criminalising Anti-Social Behaviour' (2012) 6 Criminal Law and Philosophy 1, 9–17.

[123] Section 1(1) of the Anti-Social Behaviour, Crime and Policing Act 2014.

[124] Before amendment, breach of an ASBO was a criminal offence punishable by 5 years, see the repealed section 1 (10) of the Crime and Disorder Act 1998.

[125] Section 9-13 of the Anti-Social Behaviour, Crime and Policing Act 2014.

[126] Cornford refers to it as a criminal justice measure, see Cornford (n 122) 1.

[127] ibid 3.

Cornford argues, a group of teenagers may be loitering outside a housing estate and so alarm local residents who baselessly believe these teenagers pose a threat of some kind.[128]

Therefore, it is reasonable to conclude that the ASBO: (i) creates a status that deems one 'anti-social'; (ii) places duties on one to refrain from specified anti-social behaviours; (iii) does so to serve legitimate ends of the criminal law; and (iv) may place such duties on one inappropriately or baselessly. Therefore, ASBOs are criminal labels that may result in a kind of ontic injustice. Much like the non-crime hate incident, their aim is to prevent the kind of behaviour escalating into conduct one may be convicted of. For similar reasons the conviction may still be a useful comparator as a central case from which ASBOs deviate due to their primarily preventive logic and lessened protections for offenders prior to having the label apply to them and alter their status.

The point here is to demonstrate how comparing them to the central case of criminal labelling and how it deals with, or responds to, fair labelling concerns may provide some guidance to the appropriateness of applying the ASBO. For instance, if one took Cornford's hypothetical seriously, perhaps greater thought might have to be placed into how one establishes the basis for applying the ASBO. If one considers the indirect stigma and blame an ASBO makes, where it labels someone 'anti-social' and a 'potential threat to public order', this is a kind of indirect censuring function despite the primarily risk-focused logic of the ASBO. Comparisons of how and when censuring is deemed appropriate when convicting offenders (especially the kinds of protections of due process and other protections entitled to offenders) may provide guidance into when the label may appropriately apply both for preventive and censuring purposes. I cannot fully explore the varying potential ontic injustices and unfair labelling concerns that may arise for ASBOs in this thesis.[129] My main point, however, is to highlight how fair labelling concerns may

[128] ibid 7.

[129] For a lengthy discussion of the various concerns about the misapplication of the ASBO see ibid 4–13.

affect various kinds of criminal labels and how examining the paradigm case of the conviction may shed light on how to consider these other kinds of criminal labels.

VII. Conclusion

Criminal labels are more than mere instances of describing or categorizing offenders and other persons subject to the various aims or functions of criminal law. Labels in criminal law also possess a 'status function' or purpose that alters an individual's rights and duties. In cases where there has been a mismatch between how criminal labels alter an individual's rights or duties and what they are morally due under critical morality, this is an ontic injustice. Fair labelling understood as the misallocation of blame is thus a kind of ontic injustice. Specifically, fair labelling is rightly concerned with issues of offence differentiation and naming in a criminal justice system. It is then potentially fruitful to explore the operation of fair labelling concerns in the central case of criminal labelling – the conviction. Since such a label is concerned with the kind of ontic injustice that occurs when criminal labels with the status function of punishing offenders are incorrectly applied to an individual, it may be instructive for evaluating similar kinds of unfairness in labelling for other kinds of criminal labels.

If one accepts the conviction as a sound paradigm case to evaluate fair labelling concerns, then the distinct features of punitive labels of this sort must also be examined. Specifically, punitive labels do not just categorize offenders and allocate blame – they also intentionally communicate such allocations to the public. Criminal labelling is not merely a matter between the state and an offender. Fair labelling's concern with correctly categorizing offenders also matters because convictions are communicated to members of the community other than criminal justice officials. The next chapter examines possible explanations of these features of punitive labels (such as convictions) by exploring the relevant definitional features of criminal punishment that may shed

light on punitive labels. This will unpack certain key features of punitive criminal labels – specifically, features such as communication of punishment, public wrongs, and the intentional aspect of punishment – to better understand fair labelling as it applies to punitive labels. One cannot make sense of the importance of offence differentiation and naming without understanding the role that communication plays in punishment. It is to analysing these definitional components of punishment that I now turn.

Chapter 2: Labelling and Legal Punishment

I. Introduction

As established in Chapter 1, criminal labels function not only as a means to describe and categorise criminal offences but also serve to alter an offender's legal and social status. It was also suggested that some criminal labels – paradigmatically convictions – in themselves form a component of the punishment an offender receives. This is because when ascribing labels to offenders the law not only acts to describe their offending behaviour for administrative purposes, but also to authoritatively censure a breach of the criminal law. By doing so, the law communicates both to the offender and the broader community that certain harmful consequences will follow as a response to the offender's criminal wrongdoing. In this chapter I focus on punitive labels in particular.

The chapter homes in on the 'punitive' aspect of punitive criminal labels. Having established that the practice of criminal labelling concerns the alteration of one's status, rights and duties in order to serve a particular purpose (communicating blame, and/or preventing future offending), this chapter in section II addresses how the communication of blame involved in conviction must be understood against the backdrop of punishment. It unpacks certain key features of punitive criminal labels – specifically, features such as the significance of the communicative component of state punishment (subsection (c)), the importance of the 'public' nature of public wrongs (also in subsection (c)) and the intentional aspect of punishment (subsection (e)-(f)) – in order to better understand fair labelling as it applies to punitive labels. One cannot make sense of the importance of offence differentiation and naming without understanding the role that communication plays in punishment. Both legal officials and ordinary members of the public infer distinctions in seriousness and wrongfulness depending on how offences are

separated from one another in terms of their labels. Where the distinctions are unjustified or inappropriate, they result in fair labelling concerns since they are then sites of ontic injustice.

This chapter also defends the importance of seeing criminal offences as public wrongs that necessarily concern the community. It relies on the work already done by Antony Duff in understanding why criminal offences, and hence convictions, are about wrongs that concern the public.[1] Establishing that offenders are convicted of public wrongs is key to explaining why an offence's commission and the status change that will apply to the offender may be communicated to the community and not just the offender themselves. The thought is that because the offender has committed a public wrong, punishment of the offender concerns the public. This does not mean anything and everything about the offender must be communicated, only that this is not just a matter between the offender and the state. The public also has an interest in the punishment of the offender and in learning about such punishment.

Furthermore, because the state intentionally imposes burdens and duties on offenders when it punishes them, the scope and ambit of such intentional punishment must inform our understanding of fair labelling. The focus on status and its intentional assignment helps one to understand not only the limits of what counts as a conviction, but also how long the conviction persists. Fair labelling cannot be seriously understood without properly determining the limits of the kind of paradigm punitive labels to which the principle applies.

[1] RA Duff, *Punishment, Communication, and Community* (Oxford University Press 2003) 63–73. See Duff's further development of the concept in RA Duff, *The Realm of Criminal Law* (Oxford University Press 2018) 52–101 and RA Duff, 'Criminal Law, Civil Order and Public Wrongs' (2019) 7 Law, Ethics and Philosophy 233-269.

II. Labelling and Punishment

A legal punishment can most expansively be defined as authorized, reprobative, retributive or 'responsive'[2] and intentional harm visited on an individual.[3] The definition is certainly not uncontroversial[4] but it serves us well for present purposes because of its breadth. The claim I will advance in this chapter is that the core case of a criminal label, a criminal conviction, is a form or kind of punishment and not merely *incidental* to punishment. This claim is defended by demonstrating how criminal labelling complies with the above definition of legal punishment.

a. Harm or suffering

Labels in the criminal law that function as punishments require that some harm, suffering, or burden be imposed on an offender before such a person's conviction can be considered spent, or it can otherwise be argued that it is not appropriate to have that label applied to them any longer. 'Harm' can be considered as some treatment applied to an individual that has negative value or is bad for them.[5] Similarly, Joel Feinberg defined harm as a setback to an individual's interest.[6] For present purposes, either conception is appropriate. When one is labelled as an offender at conviction one is singled out to be harmed in some manner. This is the case irrespective of what kind of hard treatment one is subjected to through imprisonment, a fine or some such equivalent

[2] I will avoid using the term 'retributive' because it may be confused with a retributivist justification for punishment. I will use 'responsive' instead.

[3] David Boonin, *The Problem of Punishment* (Cambridge University Press 2008) 12–26. This definition incorporates aspects of the widely accepted Flew-Benn-Hart account of punishment. See HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law / by H.L.A. Hart* (2nd ed., Oxford 2008) 4–6; Antony Flew, 'The Justification of Punishment' (1954) 29 Philosophy 291; and SI Benn, 'An Approach to The Problems of Punishment' (1958) 33 Philosophy 325. However, it does add a 'reprobative' element to the definition of punishment.

[4] Michael Cholbi, 'Compulsory Victim Restitution Is Punishment: A Reply to Boonin' (2019) 25 Public Reason 85, 87; and Victor Pinedo, 'Let's Keep It Civil: An Evaluation of Civil Disabilities, a Call for Reform, and Recommendations to Reduce Recidivism' (2017) 102 Cornell Law Review 513, 522–523.

[5] Boonin (n 3) 6. For a more recent and extensive treatment of what it may mean to suffer harm see Yan Kai Zhou, 'What It Means to Suffer Harm' (2021) 13 Jurisprudence 26, 27–28.

[6] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press 1987) 32–36. One could also think of harm as a setback to one's well-being, see Yan Kai Zhou, 'More on What It Means to Suffer Harm' (2022) 13 Jurisprudence 516, 518-523.

measure. In some sense one will be worse off in their person or fortunes because of one's status as an offender. This is the line drawing quality of punishment.[7] Legal punishment marks out one group of persons to be subjected to different treatment than others who are not deemed deserving of punishment.[8] Therefore, to shed or spend this kind of criminal label one must first suffer or be harmed in some way. As labelling involves the alteration of one's rights and duties, an offender has duties imposed on them that harm or cause suffering upon them. The key idea is that such suffering or harm imposed on them is claimed to be justified (a point I will explore in detail in Chapter 3 of this thesis).

To be clear, I am not only interested in the dimension of the status change brought about by the label to function as a gateway for further legal consequences, including the imposition of penal hard treatment, but the way in which the label, understood as a legal and social status, constitutes a punishment that not only requires hard treatment, but also allocates blame to an offender. How it does so becomes clear when we reflect on the communicative dimension of punishment.

b. Reprobative declaration and blame

We have already seen that the criminal labels to which fair labelling applies are not just a declaration of one's status, but also express condemnation of the conduct that led to one occupying such a status. One is blamed for one's criminal conduct. In other words, one is 'held responsible' for failing to meet a standard and later held criminally liable when one's conduct is determined by law

[7] Boonin (n 3) 28.
[8] ibid.

to be without any justification or excuse.[9] This is an important and perhaps unique feature of criminal labels with punishment as their function.

Thus, the status-creating aspect of criminal labels is reprobative in its expression. This is particularly true of the paradigm case of the criminal label, the criminal conviction. This does not mean that such expression of disapproval is morally permissible, but only that it is a definitional component of punishment and so part of the paradigmatic case used to discern the demands of fair labelling.[10]

c. Communication and public wrongs

There is a further manner in which punitive criminal labels are distinct from other kinds of labels that is implicit in the reprobative aspect of legal punishment. Such labels communicate this disapproval not only to the individual concerned but to the public at large.[11] Andrew Ashworth refers to this as the 'public communication' function of labelling.[12] Specifically, a criminal label symbolizes the degree of condemnation that should be attributed to the offender and signals to society how that particular offender should be regarded.[13] These signals mean that the disapproval entailed by the criminal label is regarded as a matter of public concern. This adds a further dimension to why criminal labels are both difficult to shed and persist for such an extended period.

[9] R Jay Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press 1994) 11–15. In the context of criminal law see RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 19–23. Duff makes the distinction between being held responsible as a precondition for being held liable.
[10] Boonin (n 3) 23.
[11] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217, 225.
[12] Andrew Ashworth, *Principles of Criminal Law* (5th ed, Oxford University Press 2006) 89.
[13] ibid.

They are in the public domain because the wrongs they identify concern the public and not just the victim of a crime. This may result in such labels lingering in the public's memory.

It might be thought that this 'stickiness' or persistence of the criminal label is not a unique feature of criminal law. Online social labels are assigned and shared on platforms that are easy to access and publicly available on most internet search engines.[14] Furthermore, other kinds of legal labels are usually applied to individuals following proceedings held in open court and if the case involves a public or famous figure will likely evoke public curiosity. It follows then that there is nothing distinctive or special about the way in which criminal labels are 'public'.

However, to say criminal labels communicate information concerning an offender is to mean that criminal labels are not only labels that concern the public, but that they concern the public in a particular manner. Namely, that they concern public wrongs and so the public claims an interest in the punishment of the offence.[15] This is because all members of the polity have such an interest by virtue of their shared membership in a political community.[16] Therefore, these wrongs are 'shared' amongst a community and their recognition and punishment assist in constituting it as such a community.[17] It then follows that these labels are not just matters of private conscience or matters that only those directly involved have standing to pronounce, but matters that a community takes a stand on through the authoritative voice of the law, thus disapproving of that particular conduct.[18] In contrast, online social labels are public because opinions or information are shared on a public platform. This may occur irrespective of the subject matter or whether such information is properly the business of the public. The same argument applies to other legal labels if they are considered 'public' simply because the matter was heard in open court.

[14] See the discussion in Chapter 1, section *IV* of this thesis.
[15] Duff, *Punishment, Communication, and Community* (n 1) 61.
[16] SE Marshall and RA Duff, 'Criminalization and Sharing Wrongs' (1998) 11 Canadian Journal of Law and Jurisprudence 7, 20.
[17] ibid.
[18] Duff (n 1) 61.

This view of shared public wrongs, which I adopt here following Duff's work, is not without its critics. Andrew Simester and James Edwards argue that it confuses what we value with what is actually of value when analyzing the wrongs that form the proper focus of the criminal law more broadly, and criminal labels in particular.[19] In their view, this leads us to distort our focus as to why we criminalize certain wrongs and shifts concern away from the impact of the wrongs themselves.[20] This in turn leads to a 'self-absorbed' communal concern, namely a concern of citizens with their own character and values qua community members, as opposed to genuine concern for the wrongs themselves and their victims.[21] They therefore argue that it would be appropriate to do away with the very notion of 'public wrongs'. Instead, it would be better to substitute the notion of a public wrong with a principle of 'public responsibility'. This entails public officials possessing the right to take on the claims of victims to hold wrongdoers responsible only when these officials are better placed than victims to do so due to possible risks of intimidation, lack of resources or some other reason.[22] Therefore, they suggest that we ought to bypass the notion of a public wrong altogether and focus only on the reason to criminalize a wrong and whether public officials are better placed to take up the cause of holding wrongdoers responsible.

It is doubtful, however, that the 'public responsibility' principle can explain key features about the 'public' nature of the kinds of wrongs the criminal law is interested in. Asking whether public officials are 'best placed' to protect certain interests or values misses the mark in the criminal law context. It has more traction in the context of private law, where we may think of private individuals as co-opting courts and other public officials when they demand that courts recognize and enforce their claims based in contract, tort, or property, thereby 'institutionalizing' these

[19] James Edwards and Andrew Simester, 'What's Public About Crime?' (2017) 37 Oxford Journal of Legal Studies 105, 112–114.
[20] ibid 116.
[21] ibid 117.
[22] ibid 125–128.

claims.[23] One can think of private litigants as having successfully co-opted the court and its public resources to settle this dispute and this co-opting has been deemed appropriate and correct by the court.[24] One could then argue that doing so has made the matter, and the subsequent label attached to a defendant, in the event of an adverse finding against her, 'public' in nature. The matter becomes more than just a dispute heard in a public forum, but adopts a public aspect because it has been judged to be a common good and is no longer merely a matter of commutative private justice between the parties.[25] On that basis, state jurisdiction and enforcement of private law claims can be thought of as meeting the criteria Simester and Edwards stipulate for 'public responsibility'.

This is because the principle of public responsibility is *procedural* in nature. It does not tell us which wrongs are appropriate to merit how public officials treat offences and their punishment in the criminal law as opposed to civil wrongs.[26] To put it bluntly, the reason why we confer particular investigatory and prosecutorial powers onto public officials is not merely because they are well placed to get answers from wrongdoers, but because it is their responsibility as public officials to hold wrongdoers accountable in a particular way.[27] This is because to take the approach of identifying the process most suitable for public officials to punish criminal wrongs is to presuppose that these wrongs are the kind of wrongs that ought to be punished, as opposed to being handled as a matter of reparation or some other remedy.[28]

Additionally, Simester and Edwards' suggestion that the conception of criminal offences as public wrongs distorts the reason the wrong matters and encourages a self-absorbed concern with 'our community' (instead of concern for the victim's interest) is unpersuasive. One response

[23] John Gardner, 'What Is Tort Law For? Part 2. The Place of Distributive Justice', *Philosophical Foundation of Tort Law* (Oxford University Press 2014) 346–350.
[24] ibid.
[25] John Finnis, *Natural Law and Natural Rights* (Second Edition, Oxford University Press 2011) 173–184.
[26] Jesse Wall, 'Public Wrongs and Private Wrongs' (2018) 31 Canadian Journal of Law & Jurisprudence 177, 192–193.
[27] ibid 194.
[28] ibid 194–195.

is to insist on the correctness of the view of criminal wrongs as wrongs that violate values and interests that a community values highly, as opposed to those the community share to constitute itself.[29] The aim of the criminal law is, therefore, to punish conduct that evinces blameworthy disrespect for interests and values that public officials are responsible for safeguarding.[30] The behaviour in question demonstrates a refusal to be guided sufficiently by a particular value or interest.[31] In this view, the reason to punish may be that a community values that interest or value highly precisely because of the interest or value itself and not their sense of identity or the pursuit of their self-constitution. The value or interest itself must do the work.

But it does not follow that just because valuing something happens to also constitute a certain group of people as who they are, they only care about that value in order to constitute themselves as a community. They can care about the value for its own sake and for the community's sake. For instance, a judge sitting in a multi-member panel such as a Supreme Court can care about how each of their colleagues' commitment to the rule of law and justice matters for the Court as an institution, and as a valuable thing to pursue for its own sake. This kind of judge would care both about the well-being of the institution of the Court alongside the importance of doing justice according to law for its own sake at the same time. There is no 'self-absorption' present here since the judge does not *exclusively* care about the institution at the risk of the actual value. Properly understood, *both* the constitutive role and the importance of the value itself contribute to the flourishing of a just legal system. The institution of the Court and the solidarity of its judges amongst each other ensures that there is the collegiality and mutual respect necessary for the Court to function as an institution that can carefully decide contentious and difficult cases justly according to law.

[29] Grant Lamond, 'What Is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609, 617–618.
[30] ibid 621.
[31] ibid 622.

Similarly, a society must have common, shared values by which it constitutes itself for it to properly protect these values when they are violated. For instance, one can sensibly consider the protection of life to be important for its own sake (and for the sake of those alive) and also because it helps constitute a community as an entity that is willing to protect life. The constitutive function of the value of life creates a community that is willing to respond seriously and committedly to violations of the value by proscribing not only its intentional violation but also its reckless endangerment. A community, in other words, can be thought of as a 'purposive group' concerned with the good of its members as its own good.[32] This community has an 'end' or point, mainly its own common good and flourishing.[33] This community is then 'characterized by, and depends on, a shared willingness amongst these persons to trust one another, to sacrifice for their common good (say, risking death in defence of others)'.[34] This particular kind of solidarity helps not only constitute the community through its shared values, but also aids the community in properly blaming and holding responsible those of its members who violate these shared values.[35] This need not be to solely protect the identity of the community, but also to secure the individual good of the persons who are the direct victims of these violations.[36]

Importantly, this community having a common good need not be a utilitarian aggregation amounting to the greatest good for the greatest number.[37] The shared values that the criminal law proscribes violating are not only protected because on average it is better to proscribe them than not, but also a concern with the specific good of particular individuals who have been harmed or may be harmed in the future. However, this common good need not then be 'privatised' in a myopic focus only on individual harms, but can be considered a public concern that is important

[32] Richard Ekins, 'How to Be a Free People' (2013) 58 American Journal of Jurisprudence 163, 170.
[33] ibid. See also George Duke, 'The Common Good' in George Duke and Robert P George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press 2017) 374.
[34] Ekins (n 32) 170.
[35] Victor Tadros, 'Fair Labelling and Social Solidarity' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012) 75.
[36] ibid.
[37] Duke (n 33) 374.

for both the common life of the community that values these interests and because these interests vest in specific individual persons.[38] And so criminal law pursues the protection of particular interests or values through prohibition and then punishment, whilst private law may protect the same interest through the imposition of obligations for reparation in the event of a violation of a right conferred by law.[39]

Thus, the public dimension of criminal labels flows from the public nature of the wrongs entailed. This means that the disapproval expressed by the criminal label addresses not only the offender, but also the public who have an interest in the protection of the interest or value that has been violated. Importantly, this does not mean that the means of such communication are necessarily justified or that the public wrongfulness of such conduct requires the keeping of a public criminal record indefinitely. However, it does explain this particular aspect of criminal labels that possess a status function that is distinct from other kinds of labels – the label does not just disapprove of or blame the offender, but communicates this disapproval to a broader community. This communicative aspect is, therefore, a definitional feature of a criminal label that is derived from the general reprobative nature of punishment and the 'public' nature of the wrong involved.

d. Responsiveness and legal authority

The discussion so far has highlighted aspects that define criminal labels which possess the function of legal punishment. Namely, this form of legal punishment entails harm or suffering inflicted by a legal authority by altering the legal and social status of an offender and thereby communicates reprobation or blame to the offender and other members of a community. As argued, when the law creates a private law right it also recognizes the right for claimants to co-opt the courts in

[38] Alasdair MacIntyre, 'The Privatization of Good: An Inaugural Lecture' (1990) 52 Review of Politics 344, 347.
[39] Wall (n 26) 187.

compensating the violation of the right. This is because the remedial obligation is premised upon the continuation of the reasons the obligation-bearer had to perform his or her primary obligation to the rights-holder.[40] In tort law, the remedial obligation represents the best available means for the obligation-bearer to conform to these reasons.[41] In criminal law, punishment responds to a previous wrong – it imposes duties on an offender flowing from the reasons not to commit the offence in the first place.[42] Boonin argues that this responsive quality to some transgression is a definitional component of punishment.[43] The public wrong is then transformed into a specific legal wrong through criminal legislation by which the wrong is recognized by a legal authority in the form of an offence. This does not mean it is a simple translation from wrong to offence, since criminalization considers several factors beyond the wrong, but criminalization means that the wrong is given authoritative legal recognition.[44] The prior reason to criminalize conduct then continues to have force as the basis for punishment of prohibited conduct and the conscription of public officials in doing so.

That the criminal label is imposed by a legal authority as a punishment matters because law entails an authoritative pronouncement by the state that should make a practical difference to the decision-making of others.[45] Jules Coleman has coined this claim the Practical Difference Thesis.[46] These pronouncements do so by providing reasons to legal officials and legal subjects generally to alter their practical deliberation in structure or content.[47] The change in deliberation can occur in two ways. First, law can provide motivational guidance where law is believed to be a legitimate standard of conduct and those to whom it is directed act on that belief.[48] Second, law can provide

[40] John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 33–34.
[41] ibid.
[42] Wall (n 26) 190.
[43] Boonin (n 3) 17.
[44] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007) 55–58.
[45] Jules L. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis Special Issue: Postscript to H.L.A. Hart's the Concept of Law, Part II' (1998) 4 Legal Theory 381, 383.
[46] ibid.
[47] Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach* (Oxford University Press 2003) 134.
[48] ibid 135.

epistemic guidance where a law provides clarity as to what one's legal obligations actually are, even if one is not necessarily motivated to follow the law.[49] Thus, law can provide such epistemic guidance by mediating between conflicting standards of conduct, all of which purport to demand compliance on the merits of the particular law. Notably, this practical difference will be a result of law's legality and *not* its content, due to law's 'authoritative mark'.[50] However, Coleman argues that this does not entail that the practical difference thesis holds true for each and every law, only law in general.[51] To hold otherwise would be to commit a composition fallacy of thinking that whatever is true of a component of a concept must be true of the concept as a whole.[52]

One can grant that Coleman is correct that not every law in a legal system must necessarily provide motivational and epistemic guidance to legal subjects. However, there are reasons to think criminal offence definitions are distinct from other areas of law. This is because offences are legal prohibitions calling for authoritative censure once violated. Von Hirsch and Ashworth correctly point out that penal censure conveys a critical normative message to a relevant actor concerning his conduct.[53] For citizens to make sense of the critical message of the criminal law they at least have to be able to distinguish between offences since some offences are more serious than others and so with a more serious critical message. Murder is more serious than theft. Sexual assault is more serious than trespassing and so on. This pre-supposes that legal subjects can act in ways that distinguish between various offences in their actions. Every offence definition presupposes that it is capable of clarifying the legal obligations of citizens and represents an attempt to affect their decision-making either to desist or accept the alteration of their status through punishment. This is so because the prohibition also claims the authority to criticize each violation through censure

[49] ibid.
[50] ibid 137.
[51] ibid 146–147.
[52] ibid.
[53] Andreas von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005) 17.

once an offender is convicted of the offence.[54] This claim is not true of the entirety of the legal system, nor of every legal rule or principle outside of the offences created by criminal law. It is not, therefore, a composition fallacy. Furthermore, when one is then classified as an offender, the alteration of one's rights and duties is justified by the allocation of blame for failing to heed this critical message and be guided by the authoritative pronouncements of the criminal law.

e. The intentional harm component of punitive criminal labels

The most obvious intentional harm of a criminal label being assigned to an individual is at conviction. This is usually the moment when the state draws a line between those who are to be subjected to punishment and those that are not, marking out offenders as the former. One's legal and social status usually changes at this point. This of course includes new infringements on one's freedom of movement if one is subject to imprisonment or house arrest and infringement of other rights including property rights if one is ordered to pay a fine or has one's assets seized. This is also the moment that one usually acquires a criminal record that allows the various state institutions that form part of the machinery of punishment to track and administer the declared punishment. These are the legally prescribed changes to one's legal status as a direct result of a conviction.

As already suggested, the line drawing exercise at conviction not only affects an individual's legal rights but their social status too. This is because normally one is convicted in a public forum and so the public would be aware of the conviction and subsequent alteration of one's legal rights. This also negatively impacts upon an individual's reputation.[55] It follows that if the alteration of an offender's legal rights is negative and they are found to have committed an offence, the effect

[54] Importantly, the criminalisation of conduct will have various interests and reasons inform the decision to proscribe conduct (including the public wrong committed), but once proscribed, punishment must follow as the appropriate response for breach of the criminal offence, see Wall (n 26) 190.
[55] Chalmers and Leverick (n 11) 227.

will be that this declaration 'lowers the [offender] in the estimation of reasonable, right-thinking members of society, or causes such citizens to shun or avoid the offender'.[56] Therefore, conviction alters both the legal and social status of an individual. Much like the status 'wife' there is both the legal and social dimension to carrying the status of an offender.[57]

A possible objection to this account is that it is not the case that the negative alteration of one's legal status at conviction must necessarily lead to a negative effect on one's social status. Consider the case of certain political prisoners of an authoritarian regime. In Apartheid South Africa, Nelson Mandela and others were convicted of conspiracy to commit treason and sentenced to life imprisonment.[58] Despite the obvious negative alteration of the offender's legal rights, it did not follow that their social status was negatively affected. In fact, international and some domestic newspapers reported positively about Mandela and his co-accused.[59] Importantly, it was in part the public aspect of the trial and conviction that led to this opposite social effect.[60]

However, this was not for the state's lack of effort. The presiding judge in the matter stated that Mr. Mandela and his co-accused could not have acted for purely altruistic reasons. In his words 'people who plan a revolution usually plan to take over the government and personal ambition cannot be excluded as a motive.'[61] However, as Evans notes 'the government's attempts to recast Rivonia as the defeat of a communist plot failed miserably, and the trial instead helped to construct him as a global icon.'[62]

What is important in the present context is that even though the alteration of Mandela's legal status did not result in a lowering of Mandela's social status, it was nonetheless *intended* to do

---

[56] John Murphy, *Street on Torts* (12th ed, Oxford University Press 2007) 515. I have substituted the word 'offender' for 'claimant' since this is the criminal and not the private context, but the same understanding of lowered reputation applies for present purposes.
[57] Katharine Jenkins, 'Ontic Injustice' (2020) 6 Journal of the American Philosophical Association 188, 190–191.
[58] *S v Mandela and Others* (1964) TPD 1.
[59] Martha Evans, 'Nelson Mandela's "Show Trials": An Analysis of Press Coverage of Mandela's Court Appearances' [2020] Critical Arts 1, 11–12.
[60] ibid 13.
[61] *S v Mandela and Others* (1964) TPD (Judge's remarks in passing sentence) at 1.
[62] Evans (n 59) 13.

so. What we can see from is that, although circumstances may obtain where a conviction for an offence has a neutral or positive impact on the convicted person's social status, the state intends that the lowering of one's social status ought to form part of one's punishment as a result of the criminal label. This is because the state acts as an authority giving reasons that seek to alter a community's judgments as to how to treat the offender.[63] When the South African government found Mandela and his co-accused guilty of conspiracy to commit treason, it was not only inviting other members of the community to merely consider if this was a good or bad thing under the circumstances – the label was intended to be received as a negative and reprehensible status to occupy.

In Mandela's case, it is worth observing that the legal punishment itself instead of merely failing to alter the social status of the offender negatively instead did the exact opposite. This was most likely due to the loss of legitimacy of the state as an authority.[64] This is what ultimately undermined the state's desired results. Therefore, the alteration of the offender's social status is dependent on the state's actual legitimacy (or at least the state cannot completely lack such legitimacy) with the broader political community, whereas the direct alteration of an offender's legal status is dependent only on the state's legitimacy with law-applying and law-enforcing officials. None of this, however, undermines the argument that the state intends to alter both the legal and social status of the offender at conviction through its authoritative declaration of an offender's guilt.

f. Intentional punishment, scope and the length of the label

[63] Joseph Raz, 'The Claims of Law', *The Authority of Law* (Oxford University Press 1979) 29. Raz famously defines protected reasons as 'reasons for taking the action they indicate and for disregarding (certain) conflicting considerations. In other words, they are *both* 'first-order' and 'exclusionary' reasons, in the Razian scheme.
[64] ibid 28.

Intention also helps us in determining what aspects of a punitive label are part of the punishment and what are not, including the length of punishment. Intention obtains when the harm concerned is the aim, object or purpose of the act of punishment.[65] Therefore, the harm with which we are concerned must either be a means or end, not a side effect, of punishment.[66] As previously stated, the change in legal status is meant to communicate to others how a legal authority itself declares that the offender ought to be harmed as a form of punishment. In other words, legal authorities adopt a *plan or proposal* of punishment.[67] This 'planned' component is what allows us to delineate what parts form part of punishment and for how long the offender is intended to be punished by the state. It is easy enough to see that the conviction and the resulting formal, legal duties imposed on an offender (including imprisonment etc.) are part of the planned aspects designed by the state and so intended as punishment, since they are explicitly required by the state. It is also easy to see that conviction only ends when one no longer occupies the status of an offender as this is also part of the plan of punishment. This is when the line-drawing function of punishment that separates offenders from non-offenders falls away.

To summarise, the status change wrought by a criminal conviction is not just a description and categorization of an offender's wrongdoing, but a censuring act that intentionally punishes the individual across time for as long as they occupy that status. The state had the option not to label offenders publicly or create criminal records and other restrictions for classes of offenders and rejected whatever alternatives were available to respond to criminal conduct, opting for the practice of punitive labelling. Therefore, for as long as the state intends an offender to carry a label, and so maintain the state of affairs it deliberately created, this ought to be considered continued punishment of the offender.

---

[65] Andrew Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th edn, Hart Publishing 2019) 140; and RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Basil Blackwell 1990) 60–63.

[66] Andrew Simester and others (n 63) 141; and John Finnis, 'Intention and Side Effects', *Intention and Identity* (Oxford University Press 2011) 173–174.

[67] Finnis (n 66) 176.

III. Conclusion

Having established that the practice of criminal labelling concerns the alteration of one's status, rights and duties in order to serve a particular purpose (communicating blame, or preventing future offending), this chapter addressed how the communication of blame involved in conviction and labelling must be understood against the backdrop of punishment. It unpacked certain key features of punitive criminal labels – specifically, features such as communication of punishment, public wrongs and the intentional aspect of punishment – in order to better understand fair labelling as it applies to punitive labels. One cannot make sense of the importance of offence differentiation and naming without understanding the role that communication plays in punishment. Both legal officials and ordinary members of the public infer distinctions in seriousness and wrongfulness depending on how offences are separated from one another in terms of their labels. Where the distinctions are unjustified or inappropriate, they result in fair labelling concerns since they are then sites of ontic injustice.

This chapter also defended the importance of seeing criminal offences as public wrongs concerning the community. It defended the idea that criminal offences, and hence convictions, are about wrongs that concern the public. Establishing that offenders are convicted of wrongs that concern the public is key to explaining why an offence's commission and the status change that will apply to the offender may be communicated to the community and not just the offender themselves. The thought is that because the offender has committed a public wrong, punishment of the offender concerns the public. This does not mean anything and everything about the offender must be communicated, only that this is not just a matter between the offender and the state. The public also has an interest in the punishment of the offender, and the offence label is part of that punishment.

Furthermore, because criminal law intentionally imposes burdens and duties on offenders when it punishes them, the scope and ambit of such intentional punishment must inform our understanding of fair labelling. Intention helps delineate the ambit of the kinds of criminal labels aimed at punishment, such as convictions. The focus on status and its intentional assignment helps one to understand not only the limits of what counts as a conviction, but also when the conviction can be considered to be spent. Fair labelling cannot be seriously understood without determining the limits of the kind of paradigm punitive labels to which the principle applies.

This intentional component of punishment also reveals that the state deliberately imposes harms and suffering on offenders and so punishment must be justified. The stakes are high for if punitive labels cannot be justified then the state seriously wrongs offenders by altering their duties with the aim of causing suffering. Thus the next chapter of this thesis turns to questions of justification.

Chapter 3: Justifying Punitive Labels, Communication and Fair Labelling

I. Introduction

The previous chapters have addressed criminal labels as forms of punishment. This chapter aims to justify criminal labelling as a form of legal punishment from the perspective of penal theories that make communication central to punishment's function and justification. These theories are particularly important for my focus on fair labelling. This is because they rely on some version of allocating blame in punishment and so form a sensible basis for a sound theory of fair labelling. In this context, I will also address the role of civil society, focusing on the significance of moral education and its role in explaining the practices of criminal labels that function as punishments.

The chapter will then discuss why punitive labels are justified. Broadly, this position follows from, and builds on, the arguments already discussed in Chapters 1 and 2. Here, more will be said about how the communicative aspect of punishment plays an important part in explaining why blame allocations in the form of offence distinctions are communicated to criminal justice officials and the broader public. The argument will be advanced that, since fair labelling is about the allocation of blame across different offences, the communication of judgements that assign blame to those who are labelled must be accurate and fair. Furthermore, such communication of offences must also be in the common good. The proper communication of blame must align with the aims of respecting the agency of the individual, civic moral education and holding the state accountable through transparent communications regarding its convictions.

II. Censure

A first step in justifying criminal labelling as a form of legal punishment is establishing a general justification for state punishment – that is, showing why persons found to have committed proscribed conduct should be dealt with through state imposed criminal penalties, rather than by some other possible means.[1] In what follows, I will assume that a compelling justification will (as von Hirsch has argued) need to justify the two elements of punishment that require immediate attention, namely censure for wrongdoing and a sanction that imposes some kind of deprivation or burden.[2]

Let us turn first to the role of censure. Following von Hirsch, central to justifying the kind of state punishment practices we actually have in modern societies is the role that censure plays by blaming an individual and so morally communicating the wrongfulness of the conduct to the act's perpetrator.[3] Blame then communicates a critical moral message to the perpetrator disapproving of their conduct and treating him as an agent capable of moral deliberation.[4] A person is treated as a moral agent if the reasons he is offered for specific choices are of a moral character and he is assumed capable of comprehending and acting on such reasons.[5] This is separate from whether the choices of the person are good all things considered or not.[6]

Crucially, this creates an opportunity for an offender to properly engage with such a critical message.[7] Added to this, such censuring possesses an authoritative character. That is, what constitutes prohibited conduct, which procedures are used to prove guilt, and what are acceptable excuses are determined by the formal criminal law and not a free interchange of reasons between

[1] Andrew Von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005) 12.
[2] ibid 17.
[3] ibid.
[4] ibid. See also P.F. Strawson., 'Freedom and Resentment' (1962) 48 Proceedings of the British Academy 1, 8–10.
[5] Von Hirsch and Ashworth (n 1) n (e).
[6] ibid.
[7] ibid 18.

censor and censured.[8] Importantly, however, the normative message censure communicates is not merely disapproving of an offender breaking some legal rule, but also disapproving of the substance of the wrongdoing involved.[9]

From this summary of censure one can see how the more specific form of labelling as punishment may be derived from the general practice of punishment. The key point is that, as we have seen, a label is not merely a description of conduct or an act that categorises it, but a status. This blaming function of censure comes with a particular focus on its role in directing moral criticism of the particular conduct that the offender has committed. It places at its centre the feature of labelling as legal punishment that is likely the most difficult to justify for most liberal democracies – the state directing moral criticism at individuals as opposed to merely guiding their conduct to avoid harm.

We can begin to do so when we recall that an individual being blamed takes them seriously as a moral agent capable of moral deliberation.[10] This implies that a failure to blame them is (where blame would be warranted on account of what they have done) a kind of *disrespect* for such a person's agency. That is, a failure to censure would not sufficiently recognise the status of the perpetrator as a moral agent capable of reflecting upon the desired ends of their actions in light of moral principles.[11] This leads one to conclude that a criminal label properly understood, aims to take the agency of a person seriously in this specific way. However, the authoritative component of punishment ensures that this interaction with an offender is not 'conversational' wherein one can continuously engage the state about the wrongfulness of their actions. This tracks the

[8] ibid 19.
[9] ibid 20.
[10] R Jay Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press 1994) 11–12. According to Wallace the unique quality of reactive attitudes such as blame (including guilt and indignation) is that hold people responsible for violating or failing to meet moral requirements. It involves 'a commitment to moral justifications' (at 11).
[11] Andrew von Hirsch, 'Warum soll die Strafsanktion existieren? Tadel und Pravention als Elemente einer Rechtfertigung' in Andrew Von Hirsch, Ulfrid Neumann and Kurt Seelmann (eds), *Strafe - warum? Gegenwärtige Strafbegründungen im Lichte von Hegels Straftheorie* (1. Auflage, Nomos 2011) 50. See also Kurt Seelmann, 'Does Punishment Honour the Offender' in AP Simester, Ulfrid Neumann and Antje L Du Bois-Pedain (eds), *Liberal Criminal Theory: Essays for Andreas Von Hirsch* (Hart Publishing 2014) 112. See also Wallace (n 10) 12.

application of criminal labels to offenders where, upon conviction, an offender carries that label without constant revision of the appropriateness or otherwise.

This particular quality of labels is justified by the argument that the state creates only the *opportunity* for a person who has committed a wrong to reflect on their actions without expecting such a person will fully internalise the criticism directed against them. The point is that this person has the capacity to do so due to their agency and so has the capacity to morally deliberate.[12] The state, therefore, takes this agency seriously by placing the individual in such a situation as to engage this capacity through the creation of a legal status imposed by a criminal label. This justifies why an offender has his legal rights altered – to grant him an opportunity to reflect as to why he has been identified for different legal treatment than his fellow legal subjects. It is left to the offender to determine how to behave in light of the criticism.

Von Hirsch's theory of punishment also identifies and aims to justify the fact that legal punishment responds to the actual wrongfulness of an offence and not just any and all law-breaking. This is the 'responsive' aspect of punishment – the fact that punishment must respond to a specific prohibited offence. Specifically, censure does not just communicate that the offender broke some legal rule, but also disapproves of the substance of the wrongdoing involved.

Notably, von Hirsch's account of punishment argues that censure *necessarily* entails notions of proportionality. The blameworthiness of the conduct itself requires an equivalent response of censure that cannot be more or less than warranted, lest it be unjust.[13] Therefore, the degree of blame necessitates proportionality in the punishment. Thus, if one sets up a condemnatory institution such as legal punishment through labelling, the labels themselves must be assigned and allocated in a manner that reflects the logic of blame.[14] Proportionality also entails principles of scaling punishment between different offences. This is what von Hirsch terms 'ordinal' scaling of

[12] Kurt Seelmann (n 11) 112.
[13] Von Hirsch and Ashworth (n 1) 134.
[14] ibid 135.

proportionality, which determines how severely crimes should be punished relative to each other.[15] Ordinal scaling has three sub-requirements – parity, rank and spacing.[16] More will be said of ordinal proportionality below when discussing how we justify fair labelling, but for now we need only accept that it requires that the differences in gravity between offences be reflected. It is enough to note that proportionality flows from justified censure itself and that the ordinal aspects of proportionality must apply to criminal labels if such labels are intended to censure the offender. This will include the sub-principles of parity, rank and spacing where applicable.

III. Complicating censure

a. What of deterrence?

Quite a few theorists are wary of a practice of punishment if it does not possess any preventive logic.[17] Fortunately, an account of punishment justified by censure may also be concerned with giving people *prudential* reasons to comply with its proscriptions.[18] Specifically, these prudential reasons are aimed at securing the compliance of those 'bad men' who do not accept the law's standards qua standards.[19] Further, it also incentivises those who may accept the law's standards from an internal point of view, but suffer from a weakness of will or some kind of deliberative failure in placing proper weight to the interests of others to comply with offence prohibitions.[20] Weakness of will may be due to some temptation causing them to still commit an offence overriding their better judgment despite their acceptance and knowledge of the wrongfulness of

[15] ibid 138.
[16] ibid 139–140.
[17] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edition, 2008) 8–13. See also Zachary Hoskins, 'Deterrent Punishment and Respect for Persons' (2011) 8 Ohio State Journal of Criminal Law 369, 369–371.
[18] Von Hirsch and Ashworth (n 1) 22–26.
[19] Scott Shapiro, 'What Is the Internal Point of View?' (2006) 75 Fordham Law Review 1157, 1159.
[20] ibid 1161–1163. See also Michael Plaxton, 'The Challenge of the Bad Man' (2012) 58 McGill Law Journal 451.

the criminal prohibition.[21] A deliberative failure may exist where one fails to give sufficient weight to the interests or rights of another protected by an offence under the misapprehension that there is some justification or excuse for one's action.[22]

For instance, one may criminally leak an individual's private information under the impression that it is in the public interest to do so. Such a person may be well-known (perhaps even a celebrity), but the nature of the information does not pertain to any issue that properly concerns the public because it concerns criminal behaviour. The unpleasant consequences of being shamed oneself for committing such an offence through publication by the state may then act as a prudential disincentive in one's deliberative reasoning in case purely normative appeals fail.[23] On this account, persons to whom the criminal law applies include those who are not angels moved purely by appropriate normative appeals or necessarily brutes moved by threats alone.[24] They may be fallible creatures who at times require prudential intervention to comply with the criminal law's standards.[25]

These prudential reasons perform a *supplementary* deterrent role in punishment in the case of criminal labelling.[26] This publication aspect doesn't just communicate a message to the offender to desist, but also threatens the same to members of the public should they not comply and so aims to provide an additional reason to the substantive moral reasons for not committing a particular offence.[27] Originally, von Hirsch had characterised the censure and hard treatment or sanction functions of his theory as two analytically separable justifying reasons for punishment.[28]

---

[21] Donald Davidson, 'How Is Weakness of the Will Possible?' in Joel Feinberg (ed), *Moral Concepts* (Oxford University Press 1970) 22. See also Joshua May and Richard Holton, 'What in the World Is Weakness of Will?' (2012) 157 Philosophical Studies 341, 356–358.
[22] Benjamin Eidelson, *Discrimination and Disrespect* (Oxford University Press 2015) 77.
[23] Von Hirsch and Ashworth (n 1) 23.
[24] ibid.
[25] Anthony Bottoms, 'Five Puzzles in von Hirsch's Theory' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford University Press 1998) 81–82.
[26] Andrew von Hirsch, 'Censure and Hard Treatment in Punishment's Justification: A Reconceptualisation of Desert-Oriented Penal Theory' in Antje du Bois-Pedain and Anthony Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart Publishing 2019) 90.
[27] ibid 91.
[28] Von Hirsch and Ashworth (n 1) 26.

However, recently he has argued that hard treatment could be seen as the 'currency' through which censure is expressed and accepts Kleinig's characterisation of punishment as a single practice with bifocal censure and sanction aspects.[29] However, this does not mean that von Hirsch now rejects the role of deterrence in justifying punishment. Instead, he argues that the prudential reasons are additional to this single practice conception.[30] To justify this supplementary deterrent role of sanctions, he turns to a Hobbesian argument.[31] Von Hirsch argues that without an element of prudential compulsion, the exhortations of law would be insufficient constraints, and this would render citizens' co-existence unbearably hazardous.[32]

Nevertheless, it is difficult to justify punishment by relying exclusively or primarily on the virtue of communication when one considers the extreme costs of the criminal justice system, and the burdens it places both on offenders and society.[33] One possible response to this challenge is to invert the 'hierarchy' of the two components – the protection of people from harms and wrongs is the primary justification for punishment, whilst communication plays a supplementary role.[34] Alternatively, one can accept that it would be unconvincing to point to the need to communicate wrongs in and of itself as a justification for modern criminal justice systems but reject the need to necessarily rank which is the primary and which the secondary justification for modern practices of punishment. It may be the case that caring about protecting people from harms and wrongs performs an important role in explaining the deterrent function of punishment. That is consistent with accepting that the need to take seriously the agency of offenders and hold them accountable for their ill will or deliberative failures with respect to the interests of others explains the backwards-looking aspects of communicating blame to an offender. If this is correct, there is no

[29] Andrew von Hirsch (n 26) 90.
[30] ibid 91.
[31] Andrew Von Hirsch, *Deserved Criminal Sentences* (Bloomsbury Publishing 2017) 37–38.
[32] Andrew Von Hirsch (n 30) 91. See also Von Hirsch (n 31) 37.
[33] Victor Tadros, *The Ends of Harm : The Moral Foundations of Criminal Law* (Oxford University Press 2011) 89–90.
[34] ibid 89. Tadros grounds his deterrence logic in a 'defensive' or 'duty-view' theory of punishment, drawing analogies between punishment and self-defence. For our purposes, it is sufficient to accept that Tadros considers his theory a kind of general deterrence theory even though he does not justify it on consequentialist terms (at 266).

need for ranking the reprobative or deterrent functions of the criminal justice system in the first place. This is a false choice.

It is also important to note that subordinating the protective role of the criminal justice system in preventing harms and wrongs risks failing to take seriously the moral significance and status of victims.[35] Prior to committing a criminal offence, one has the duty not to commit wrongs and harms against persons identified by the criminal law. Criminal punishment not only acts to prevent such harms or wrongs being committed but works to demonstrate to the victim that protecting or affirming their rights is important to the state and evinces a commitment to do so in the future.[36] Von Hirsch tacitly acknowledges this point by his reliance on the Hobbesian line that insufficient constraints on behaviour would make co-existence amongst citizens too hazardous. However, because von Hirsch still sees this as a supplementary role in justifying punishment, the need to affirm these citizen's rights takes a back seat to the need to hold the offender accountable. This leads me to an important qualification of the 'censure' theory of punishment. The proper understanding of punishment, especially in the context of assigning a status to offenders, is that we ought not to rank either function at the general level as doing so risks a tunnel-vision approach to how and why we impose duties on offenders.

Convictions are concerned with the backward-looking aspects of punishment aimed at holding offenders responsible. Specifically, holding offenders responsible may affirm the moral significance of victims after a violation has occurred and pursue the further general aim of protecting victims future harms through deterrence. However, the crux of my argument is that the immediate aim of punitive criminal labels (convictions) is focused on censure as a means of holding offenders responsible. Blaming is built into the very structure of the status of a convicted offender. It is an essential part the rationale of convicting offenders in the first place. Thus, even if one were

[35] ibid 91.
[36] ibid 92.

to adopt a general justification of punishment for which censure is less central, these specific criminal labels are aimed at censure and so at blaming offenders. That would be so even if the *ultimate* aim of the conviction were to protect victims by permissibly using offenders to deter further wrongdoing.[37]

This means that even on a view that sees punishment as justified by deterrence, the allocation of blame has an important moral function when pursuing the aims of general deterrence. Creating an opportunity for the offender to reflect on the moral criticism directed at him, while not any kind of guarantee of efficacy and reform, does show respect to an offender even as one permissibly uses them for some other ultimate end. Blame saves the entire enterprise of imposing the duties involved in serving the aims of deterrence on an offender by appealing to and reminding them of the standards they failed to pay adequate attention to in their deliberations and holding them answerable for this failure. The importance of this point becomes evident when we compare our likely reaction to discovering that a particular offender's conviction failed to protect future violations as opposed to our likely reaction upon discovering that this person was innocent and, therefore, wrongly convicted. We would be much more dismayed by the latter discovery than by the former. This suggests that any justification of punishment that builds on deterrence of future violations cannot rely on such expectations alone. Blameworthiness must be a precondition for this further, ultimate aim of protection to get off the ground. Thus, even on an understanding of state punishment that views it as ultimately justified by deterrence, a conviction remains a label centred on and structured by blame allocation.

[37] ibid 275–279.

b. Only a social status change without altering legal status

A possible objection to this justification for labelling as a form of punishment is that even if we accept that the state may punish, it is not clear that censure must entail labels that alter the legal status of an offender. For example, as part of his many arguments against legal punishment, Boonin imagines a court empowered only to issue an official statement of censure, in much the same way that legislative bodies sometimes issue a statement censuring one of their members.[38] At the conclusion of a trial when the offender was found guilty, the judge could make a public proclamation that society disapproves of what the offender has done, the statement could be reprinted in the newspaper, and so on.[39] In other words, only one's social status would be affected by publication of one's wrongdoing, without this declaration of offending altering one's legal status for purposes of punishment in any serious way.

There are broadly two responses to this kind of objection. The first response would deny that this proclamation would in fact be an instance of a merely social status change and insist that such a public denunciation would amount in effect to a legal status-change. The law has decided in such a case to mark out certain persons who have been condemned to have their names published in newspapers and to be berated before their peers. Publishing their names merely *amplifies* the condemnation of criminal wrongdoing similar to the case of imprisonment or hard treatment.[40] Therefore, the offender's rights to reputation, dignity, and privacy are altered not only as a matter of fact, but of law. All one has done is merely alter the kind of sanction that forms part of the status, not remove the status entirely. A separate question would be whether such a practice of public denunciation would be an instance of legitimate criminal labelling, given the risk that it

[38] David Boonin, *The Problem of Punishment* (Cambridge University Press 2008) 177.
[39] ibid.
[40] Andrew von Hirsch (n 26) 88.

might deteriorate into a shaming exercise that turns the offenders into objects of disgust and contempt, rather than treating them as responsible agents.[41]

The second response to this objection would be that a mere statement of condemnation uttered by a legal authority would not properly reflect the seriousness (in terms of its wrongfulness) of the prohibited conduct.[42] As a mere speech act, the condemnatory statement would not accurately express the seriousness of the state's condemnation of the action or the seriousness of this wrong.[43] The expression of censure involves more than a formalised rebuke that stigmatises.[44] Censure is a *single* practice with two foci of condemnation and hard treatment.[45] In instances when the law fails to reflect the seriousness of the offence through a sanction that amounts to a mere 'slap on the wrist', part of the problem is that the light treatment fails to communicate the seriousness of the wrongdoing with accuracy.[46] The particular seriousness of criminal offending is a further reason why it is appropriate to think of the criminal label as a kind of status that alters the duties of an offender as an equally resinous response to wrongdoing, rather than as a mere speech act.

IV. Justifying public communication of offences

a. Addressing blame to third parties

It is one thing to argue – as I have done – that criminal labels aimed at punishment are justified, but another to justify why these labels are communicated to the public. Exactly what business

[41] Lucy McDonald, 'Shaming, Blaming, and Responsibility' (2020) 1 Journal of Moral Philosophy 1, 139–141. I address many arguments related to contempt in Chapter 6, section *IV* of this thesis.
[42] John Kleinig, 'Punishment and Moral Seriousness Justice in Punishment: Theories of Punishment' (1991) 25 Israel Law Review 401, 416–417.
[43] ibid 417.
[44] John Kleinig, 'The Architecture of Censure' in Antje du Bois-Pedain and Anthony Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart Publishing 2019) 11.
[45] ibid. This is a view that von Hirsch seems to accept as well. See Andrew von Hirsch (n 26) 88.
[46] John Kleinig (n 44) 12.

could it possibly be of the public that a specific individual, X, has been convicted of an offence? At first glance, such a practice looks a lot like a perverse shaming practice that invites third parties to participate in an unjustified and outdated ritual of public humiliation.[47] However, we can hold someone responsible and invite others to do the same without thereby sliding into sordid scarlet-letter practices that are not interested in responsibility, but in turning their targets into objects of disgust.[48] Publicly available convictions of an offender are the former kind. Although often morally dubious in private contexts such as enforcing norms around manners and sex, involving third parties in blaming need not be impermissible in the context where it follows the commission of a public wrong through criminal conduct.[49]

We may take as a starting point that individuals form part of a community and so are already in association or solidarity with others.[50] Individuals then require good reasons to detach themselves from such associations.[51] These associations exist on the basis of shared values.[52] This thought lays the groundwork for an understanding of certain wrongs that violate a community's values being 'public' wrongs.[53] These are wrongs that are not just matters of private conscience that merit a public, communal response.[54] The law identifies these wrongs and imposes an obligation on citizens to answer for violating them through the criminal process.[55] These duties can only exist because a criminal justice system exists giving expression to these wrongs in the public realm of communal life.[56] As argued in the previous Chapter of this thesis, a community

[47] McDonald (n 41) 139–141.
[48] ibid 132.
[49] McDonald raises the unjust treatment to which Monica Lewinsky was subjected to as an example of private agential shaming. See ibid 146.
[50] RA Duff, *Punishment, Communication, and Community* (Oxford University Press 2003) 51.
[51] ibid.
[52] ibid 51.
[53] See the discussion in Chapter 2, section II (c) of this thesis.
[54] ibid 61. See also RA Duff, *The Realm of Criminal Law* (Oxford University Press 2018) 79–85.
[55] Duff (n 50) 63.
[56] Not all values a community shares necessarily fall into the public realm since they are not properly speaking res publica or matters for the public in which the public has an interest in criminalising. The public realm is not only normative as discussed in Chapter 2 of this thesis but also context-relative, see Duff (n 54) 82–83.

can be thought of as a group which pursues its own common good including through the mechanism of the criminal law.[57]

b. Moral education

Accepting the importance of a common good in a society does not deny the existence of individual rights, which prevent the state forcing individuals to adopt a rigid conception of the good life.[58] In turn, moral independence or freedom from coercive state power does not exclude the important role of society in the shaping and forming of an individual's moral sensibilities.[59] In fact, even liberal theorists envisage an active community and civil society within the liberal order.[60] This civil society is what Jonathan Jacobs calls a 'complex metabolism' comprised of voluntary associations that are not subsumed by, yet may be influenced by, the state.[61] Thus, civil society is itself not totally separate from the state in functions and aims.[62] The two inform and shape the general norms under which individuals find themselves relating to each other.

And so the roles of both civil society and the state pursuing the common good opens up space for the state to legitimately engage in moral education around criminal public wrongs and the consequent individual cases where persons are convicted. To explain this further: in the classical tradition, law was understood as possessing an educative function.[63] Jean Hampton in a

[57] See Chapter 2, section II (c) of this thesis.
[58] Jonathan Jacobs, 'Censure, Sanction and the Moral Psychology of Resentment' in Antje du Bois-Pedain and Anthony Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart Publishing 2019) 20. See also Michael Foran, 'Rights, Common Good, and the Separation of Powers' (2023) 86 Modern Law Review 599, 606.
[59] Jonathan Jacobs (n 58) 20–22.
[60] Jonathan Jacobs, *The Liberal State and Criminal Sanction: Seeking Justice and Civility* (Oxford University Press 2020) 24–26.
[61] ibid 24. These include institutions involved in education, economic activity religious life, sports and media.
[62] Edward Shils, 'The Virtue of Civil Society' (1991) 26 Government and Opposition 3, 4.
[63] St. Thomas Aquinas *Summa Theologica*. ([1485] 1947). Translated by Dominicans. English Province. 1st complete American ed. New York: Benziger Bros. Part I-II Q95 A1 and Aristotle *Nichamachean Ethics* (353 BC) translated by WB Ross, Book II, 1. For an excellent recent discussion see Anna Lukina, 'Legal Nurturing: The Educational Function of Law in the Soviet Union' (2021) 18 Ideology and Politics Journal 57.

well-known paper applied this kind of logic to criminal punishment.[64] However, one may possibly doubt that direct punishment itself is an ideal educative tool. Conviction may be heavy handed if its purpose is primarily to educate. However, this need not mean the practice of giving members of society access to convictions and criminal records needs to be subject to such an objection. Given that affirming and protecting the rights of victims is important, it is useful for the law to educate the populace about the boundaries of behaviour it sets by informing them about how it applies these boundaries in specific cases.[65] Such public access to the conviction of offenders humanises offenders by providing details of the context of their wrongdoing and may even encourage rational compassion from members of the public.[66]

While the publicising of a conviction is aimed at altering the social standing of the offender, this need not be done with the aim of turning them into an object of disgust. It is arguable that the state opts to communicate censure to the community at large in the hope that civil society will play a supplementary role in moral education of an errant individual. The publicity of convictions need not mean that the state is hounding an individual, nor do criminal records have to be publicly available in perpetuity, or ever in cases where the lives of offenders are at risk. An individual must be able to 'live down' their offence (depending on the nature of the public wrong committed) once civil society has had the opportunity to evaluate his case.[67]

Public scrutiny need also not be to an offender's prejudice. Civil society, in the form of the media, and independent religious or civic organisations, for instance, aid in preventing state abuse and corruption in the context of punishment through campaigning and lobbying to alter unjust convictions and criminal justice regimes. One ought to avoid incentivising secret state punishment by shunning public access to specific instances of convicting offenders. Publicising convictions

[64] Jean Hampton, 'The Moral Education Theory of Punishment' (1984) 13 Philosophy & Public Affairs 208.
[65] ibid 226.
[66] Paul Bloom, *Against Empathy: The Case for Rational Compassion* (Ecco 2016) Ch 6.
[67] I explore this point in further detail in Chapter 7 of this thesis.

thus serves this function of moral education in both directions – educating the public about the public wrongs individuals have committed and which duties have been imposed on them as a consequence, whilst subjecting state punishment to public evaluation to determine if these sorts of alterations to an offender's status are just or in need of reform.

Take the role of civic organisations such as the Innocence Project in the United States whose mission is 'to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone.'[68] This organisation relies on the accessibility of specific criminal records and other materials to be publicly available in order to perform its work.[69] This advocacy and scrutiny has led to criminal justice reform measures around evidence gathering that help reduce wrongful convictions or other injustices in the application of criminal labels.[70] This kind of work assists in exposing misapplications of labels and in further informing and educating the public both about the flaws of the system and encouraging measured judgement towards convicted offenders since they may not be as monstrous as one may assume. Therefore, the centrality of civil society in a well-ordered political community allows us to assess the practice of public declaration of an offender's criminal status as a legitimate practice of punishment that permissibly communicates an individual's public wrongdoing to a community. Thus, norms of moral education justify the public availability of criminal records and convictions. Importantly, the state in this instance does not have to be aiming at creating individuals who possess all or most of the virtues to the requisite degree.[71] Instead, the state would be aiming to prevent future harm doing by communicating such public wrongs to a community hoping that civil society will respond properly and so reform the individual.

---

[68] Innocence Project 'About' sourced at https://innocenceproject.org/about/
[69] Innocence Project 'Cases' sourced at https://innocenceproject.org/all-cases/
[70] Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council *Strengthening Forensic Science in the United States: A Path Forward* (2009) 42, available at https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf. See also Laurie Robinson and Charles Ramsey President's Task Force on 21st Century Policing (2015), 75 available at https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.
[71] Jacobs (n 59) 26.

V. Justifying fair labelling

a. Blame allocation

As established in the first chapter of this thesis, fair labelling is aimed at addressing a specific kind of ontic injustice that is present when there is a mismatch between an offender's actual moral entitlements (as owed to them in terms of critical morality) and the entitlements or duties imposed on them by the criminal justice system.[72] Fair labelling homes in on the misallocation of blame in offence differentiation.[73] However, this does not mean fair labelling is unconcerned with questions of offence naming.[74] After all, differentiation is a prerequisite for naming because differentiation is concerned with concepts, and concepts precede names.[75] The concepts of 'fear', 'love' or 'justice' exist prior to our naming them in a specific language. Nonetheless, the overall rationale of fair labelling is to reflect the nature and seriousness of wrongdoing.[76] The offence name is basically the descriptive aspect of labelling, as Chalmers and Leverick explain.[77]

However, it is important to distinguish between the symbolic power that a given offence description may have and accurate name description for fair labelling purposes. Sometimes one could use an offence name to harness a word's emotive or symbolic power for some other end unrelated to fair labelling. For instance, a legal system might use the word 'rape' to label instances of sexual intercourse between young people close in age where consent is not really the concern of the prohibition, but rather discouraging young people from engaging in sexual relationships for

[72] See Chapter 1, section *III* (d) of this thesis.
[73] Andrew Cornford, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 Oxford Journal of Legal Studies 985.
[74] ibid 988.
[75] ibid 988–989. This is because distinctions in concepts precede distinctions in the name(s) which later describe the concept. See Khomotso Moshikaro, 'The Moral and Legal Foundations of Fair-Labelling in Our Criminal Law' (2018) 135 South African Law Journal 262, 281–282.
[76] Andrew Ashworth, 'The Elasticity of *Mens rea*' in C Tapper (ed), Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross (Butterworth 1981).
[77] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217, 220–221.

purposes of protecting minors from risky sexual behaviour or moral education.[78] It could be argued that this is not, strictly speaking, an instance that raises fair labelling concerns because it is purely about leveraging the stigma attached to the word 'rape' for instrumental purposes to achieve some other goal, rather than allocating blame by highlighting the non-consensual aspects of rape and sexual assault. However, such examples of instrumentalising the symbolic power of a word commonly associated with a particular kind of wrong (unwanted and non-consensual sexual assault) to describe in negative terms, and thereby discourage, unwise sexual activity between young persons creates its own concerns about possible ontic injustice. Alternatively, one could instead argue that consent may always be implicated even in the case of minors sexually experimenting with each other since neither party can legally consent to such activities. Nonetheless, this is not my core concern because I am focusing on the use of the label for blame allocation purposes.[79]

Fair labelling's central concern with the proper allocation of blame, however, would be in issue if the minor who is held criminally responsible for sleeping with another teen below the age of consent was inappropriately blamed for doing so.[80] Furthermore, cases of sexual intercourse between a teenager who is above the age of consent and a minor who is not might warrant the name descriptor 'rape' on the basis that there would be a power differential between the parties

[78] This was the argument run by the South African government to justify a prohibition of sex between teenagers, see *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC) par 80-81. The South African Constitutional Court stated that 'the purposes of discouraging adolescents from prematurely engaging in consensual sexual conduct which may harm their development, and from engaging in sexual conduct in a manner that increases the likelihood of the risks associated with sexual conduct materialising, are legitimate and important' (at par 81) but ultimately found that criminalisation in that case was disproportionate and there were less restrictive means to control the relevant risks (at par 97).

[79] I will later address the duties that follow when the state creates ontic injustice concerns in the course of allocating blame (specifically mens rea) through labelling in Chapters 4 and 5.

[80] *R v G* [2008] UKHL 37 par 46. Baroness Hale was of the opinion that the 15-year-old offender who had sexual relations with another minor who was just below 13 years old (who he believed was 15) was still reckless with respect to confirming her age and so was not held strictly liable. In her words: 'He takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do with what is capable of being, not only an instrument of great pleasure, but also a weapon of great danger.'

that undermines the very possibility of legal consent.[81] Take a case of sexual intercourse between a seventeen year-old and a fifteen year old where the age of consent is sixteen. On one hand one could argue the word 'rape' fits appropriately the distinct offence even were the minor to say that they factually 'consented' to the conduct. It is properly understood as non-consensual due to the difference in the stage of development between the two teenagers, thus undermining any consent-forming abilities of the fifteen-year old and so making it impossible for them to give consent legally. On the other hand one may be concerned that the seventeen year old may suffer inappropriate stigma since the two parties were close in age, both still teenagers, and had both 'factually' consented.

The example of sexual intercourse between teenagers close in age given above, however, already suggests that there may be instances where arguments in favour of leveraging the name of a crime to deter certain undesirable, high risk conduct (despite the factual consent of both parties) conflict with arguments in favour of fair labelling as concerned with blame-allocation. To pursue this use further: one may think that it would help combat sex crimes if we used the word 'rape' to describe *any and all* unwanted sexual advances. This would, however, be in tension with fair labelling concerns focused on just blaming that would militate against such a justification for naming a criminal offence. What we can see from this hypothetical example is that fair labelling cannot weigh the utility of mislabelling for some other purpose.

An extension of this kind of logic applies to proportionality in punishment. Ordinal proportionality in punishment has three components of parity, rank and spacing. Parity requires that criminal conduct of equal seriousness receive punishment of comparable severity.[82] Rank entails that punishing one crime more than another expresses more disapproval of said conduct.[83]

[81] I also assume in this example that consent explains the wrongness of rape, which is debatable, see John Gardner and Stephen Shute, 'The Wrongness of Rape' in John Gardner (ed), *Offences and Defences* (Oxford University Press 2007) 4–8. For a response to these doubts see Karamvir Chadha, 'Sexual Consent and Having Sex Together' (2020) 40 Oxford Journal of Legal Studies 619, 622–639.
[82] Von Hirsch and Ashworth (n 1) 139.
[83] ibid 140.

Spacing requires that, for example, if crimes are of different degrees of seriousness, this seriousness must be reflected when comparing the punishment ranges of crimes relative to each other.[84] These principles of proportionality are principles of justice that give effect to the maxim of treating like cases alike and different cases differently when one punishes. Similarly, fair labelling is an expression of these justice principles to blame justly through offence differentiation. Understanding labels as having a status function aimed at punishment helps one see the link between proportionate punishment and fair labelling. Parity, rank and spacing all traditionally apply to instances of sentencing. They ensure that if punishment is narrowly understood as imprisonment or fines then there aren't too many disparities in the allocation of these sanctions. Fair labelling builds, or ought to build, on this logic and applies it to all the alterations to the rights and duties of offenders done as a result of convicting an offender and so categorising him as a certain kind of entity for purposes of punishment. Fair labelling forces deeper inspection of the parity, rank and spacing of convictions understood as status functions, going beyond sanctions narrowly understood (imprisonment or fines).

b. Stigma and wrongful condemnation

Additionally, one may think of fair labelling as justified by a principle against wrongful condemnation or disproportionate stigma. Certainly an instance of wrongful condemnation or conviction can qualify as mislabelling, but fair labelling goes beyond questions of wrongful conviction into the tailoring of offences. One can accept it is wrong to blame the blameless, but fair labelling requires more than that.[85] It requires that those who are blameworthy must be blamed *correctly* in the categorisation and description of offences. This is not always the same as preventing wrongful stigma. Fair labelling demands that offence differentiation reflect blameworthiness even

[84] ibid.
[85] Cornford (n 73) 993.

when wrongful stigma is not implicated.[86] For instance consider possible 'mitigated offences' such as unintentional, drunk-driving killings.[87] In this case, one may wish to introduce a less stigmatic, mitigated offence in order to improve conviction rates due to unwillingness of juries to convict. However, this may violate fair labelling since the price is that the new label may 'under describe' the seriousness of the underlying conduct and its blameworthiness. In such a case accurate blame allocation comes apart from issues of wrongful stigma.

Another point arises from the fact that stigma relies on empirical facts about the social opprobrium which attaches to a criminal offence in a way that is distinct from the purely normative judgement that blame allocation requires.[88] If we accept stigma as the point of fair labelling, this gives rise to the possibility that one can be mislabelled by being convicted of a criminal offence that is incorrectly stigmatised, even though blame has been *correctly* allocated to it. I argue here that the correct allocation of blame ought to take precedence instead of trying to have the criminal offence track some morally mistaken public understanding of the 'wrongness' of a crime. Imagine that A is convicted of an offence labelled 'rape', and that in his society there is a misleading stigma associated with the label 'rape' that incorrectly assumes physical force as well as lack of consent is involved in all offences called 'rape'. However, A raped B whilst B was unconscious in hospital under sedation and did not use physical force to overcome the will of B.[89] Nonetheless, if the core wrong of the crime is non-consensual sex, then, given the absence of consent which A was aware of, A would be *correctly* blamed and convicted of the crime of 'rape' *despite* the incorrect social stigma arising from assumptions made about physical force being used by any perpetrator of rape in his society. Thus, the incorrect public understanding that for the stigma associated with rape A must have used force cannot exonerate the rapist in our case, or make the label 'rape' inappropriate.

---

[86] ibid.

[87] Sally Cunningham, 'Vehicular Homicide: Need for a Special Offence?' in CMV Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Routledge 2008).

[88] Alan Brudner, 'Proportionality, Stigma and Discretion' (1995) 38 Criminal Law Quarterly 302, 304–306.

[89] John Gardner, 'The Wrongness of Rape' in John Gardner (ed), *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 5.

c. Communication and fair labelling

Ultimately, the justification for punitive labelling rests on fairly allocating and communicating blame. As stated, criminal labels may be punitive or non-punitive. Critical to a criminal justice system is the accurate communication of punitive labels, especially convictions, both to criminal justice officials and to the broader community that an offender forms part of. Now, it is easy to see that the imposition of penal duties upon an offender would be pointless if this imposition was not properly communicated to criminal justice officials.[90] After all, it is these officials who will enforce and apply the law. These officials are obligated to treat the offender differently from non-offenders due to the offender's altered status. But even so, this does not always require that these officials must always have these distinctions of blame between offenders communicated to them.[91] It depends on the context. For instance, in English law for purposes of sentencing judicial officials at least know the broad categories of offences that the person being sentenced has previously been convicted of (usually violent versus non-violent offences) so as to enable them to distinguish between different offenders for purposes of sentencing.[92]

Granted, these broad categories themselves are attempts at allocating blame and judging the apparent 'seriousness' of the offence. We see here an unrefined allocation of blame. It may paint a better picture to consider the distinctions in offences with the role of a parole board officer as opposed to a judicial officer in mind. Accurate and more offence-specific communication of the conviction would matter more to a parole board than to the judge in a subsequent case, since part of the purpose of a parole board is to make a more holistic and individualised judgment about

[90] Chalmers and Leverick (n 77) 231.
[91] Cornford (n 73) 998.
[92] Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (7th edition, Hart Publishing 2021) Ch 4.

the punishment and reform of the offender.[93] The context matters. It matters to whom and for what purpose information is communicated. For punitive labels, the context shapes how much information concerning the conviction is required for the specific official to perform their particular duties.

The same may be said when it concerns communications to the general public about convictions. I have argued above that Jacobs is correct that the conditions and circumstances under which a state attempts to morally educate its populace cover not only the list of offences on the books, but also what kinds of duties will be imposed on the offender once convicted. This context of moral education will determine the specificity of the information required concerning the conviction. The context of this exercise is that it would be circumstances when the state aims both to educate offenders and also transparently hold itself accountable to the public so that its practices of punishment may also be scrutinised by civil society, as in the example of the Innocence Project. Thus, not every sordid detail of a criminal offence need be communicated since civic education is done in the interests of the commons or public and must be connected to appropriately discouraging public wrongdoing. After all, law is a public asset, intended to serve the public good and so cannot be reduced to inappropriate ends.[94] Vindictiveness and sensationalism in communicating criminal wrongdoing borders on being the kind of pursuit that undermines a measure's very status as law and does not serve the public good.[95]

---

[93] Victoria J Palacios, 'Go And Sin No More: Rationality and Release Decisions by Parole Boards' (1993) 45 South Carolina Law Review 567, 578–580. See also Edward E Rhine, 'The Present Status and Future Prospects of Parole Boards and Parole Supervision' in Joan Petersilia and Kevin R Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press 2012) 634–637.

[94] Compare TRS Allan, 'Why the Law Is What It Ought to Be' (2020) 11 Jurisprudence 574, 575. To quote Allan: 'The law must be regarded as a public asset, intended to serve the public good: it cannot be merely an instrument for promoting the interests of a ruling elite.'

[95] TRS Allan, 'Law as a Branch of Morality: The Unity of Practice and Principle' (2020) 65 The American Journal of Jurisprudence 1, 7–8. As Allan says, 'A vindictive measure, masquerading as law, could make no discernible improvement to existing arrangements for the good governance of the community. From the perspective of anyone who affirms an allegiance to the law, conceived as a set of collaborative arrangements for the pursuit of justice and the public good, no such wicked measure could qualify as law.'

Thus, the point of public communication is to identify particular individuals who are convicted and how they are treated by the state both for the purpose of moral education as well as transparency. For the purposes of this exercise, distinctions between convictions would matter. Furthermore, an important aspect of morally educating Western societies about racial bias in the criminal justice system, or about racially motivated hate crimes, has been the availability of such offence-specific information where comparisons can be made between not only large samples of offenders and victims, but individual instances that display a broader pattern. Additionally, the powerful stories of the victims of racist hate crimes have been instrumental in sparking criminal justice reform measures, not only for broad punishment purposes, but additionally in thinking about the mens rea and blame-related difficulties of determining such offences.[96]

However, the communicative value of punishment being the relevant context explains why it cannot justify all the demands of fair labelling. It may be the case that only broad categories matter for certain criminal justice contexts, and it may be that public moral education would require safeguards to protect offenders from being vilified, targeted or harassed (hence one would need to apply for disclosures stating the reason for wanting access to someone's criminal record). Nonetheless, unlike stigma, communication does not come apart from blame allocation. Blame is a precondition for all such communications and needs to be communicated appropriately if the communicative exercise is to be successful at its goal. Parole officers must be given correct information about the blameworthiness of the offender in order to determine what it would take for the offender to reform or not pose a danger to the public. The public would need correct information concerning the offender's blameworthiness if they are both to properly internalise the moral lessons of why committing public wrongs is wrongful and serious, but also to hold the state accountable as to its punishment practices.

[96] Ekow N Yankah, 'Ahmaud Arbery, Reckless Racism and Hate Crimes: Recklessness as Hate Crime Enhancement' (2021) 53 Arizona State Law Journal 681, 681–693. Yankah frames his analysis by discussing the horrific case of the killing of Ahmoud Arbery (at 681) before discussing exactly the kinds of problems relating to blame and culpability for 'reckless racism' that fair labelling would be concerned with (especially at 686-693).

All this follows from proper blame allocation in offence differentiation. Thus, it is better to think of fair labelling requiring that blame is properly allocated and *then* communicated to officials and the broader community. That said, communication alone would fail to do all the justificatory lifting required by fair labelling, due to its context sensitive nature about what needs to be communicated and for what purposes. Equally, a justification that ignores communication's role in explaining why labels are communicated both to officials and the public is deprived of an important lens through which to understand fair labelling's role in allocating blame since such allocations must be properly communicated to their relevant audiences to fulfil aims such as moral education and transparency. Failure to appreciate this point risks rendering current practices around access to criminal records of offenders inexplicable, malicious or aimed at shaming. This would be an unfortunate and false view considering the good that both transparency and civic moral education play in punishment and criminal justice reform.

VI. Conclusion

This chapter justified penal criminal labels from the perspective of penal theories that make communication central to punishment's function and justification. As argued, these theories are particularly important for my focus on fair labelling. This is so because they rely on some version of allocating blame in punishment and so form a sensible basis for a sound theory of fair labelling. I further elaborated in this chapter on the role of civil society in punishment in the context of a liberal order, focusing on the significance of moral education and its role in explaining the practices of criminal labels that function as punishments.

This discussion of theories of punishment then helped understand what in turn justifies fair labelling. The argument advanced was that, since fair labelling is about the allocation of blame across different offences, the communication of judgements that assign blame to those who are labelled must be accurate and fair. Furthermore, such communication of offences must also be in

the public interest or common good. Instead, the proper communication of blame must align with the aim of respecting the agency of the individual, civic moral education and holding the state accountable through transparent communications regarding its convictions. Although communication for these purposes does not exclusively justify fair labelling, it plays an important part in explaining why blame allocations in the form of offence distinctions are communicated to criminal justice officials and the broader public.

Now that I have provided a justification for fair labelling in the context of punishment, I can turn to investigating various issues related to applying fair labelling as a principle of blame allocation. The easiest area to begin is to explore the allocation of blame as it relates to the culpability or mens rea requirements of criminal offences. If fair labelling is concerned with the ontic injustice of unfairly distributing blame in a manner that creates a mismatch with one's moral entitlements then I will put forward a scheme of how to understand and justify distinctions in mens rea requirements such as to avoid this kind of ontic injustice as it relates to mens rea requirements. It is to these issues that I now turn.

Chapter 4: Fair Labelling, Blame and Fault

I. Introduction

Having argued that punitive labels can be justified, this chapter explores the application of that justification to the differentiation of criminal offences and, accordingly, their labels. Accounts of the principle of fair labelling in criminal law typically focus on achieving the virtue of reflecting the moral 'gist' or 'essence' of an offence.[1] This 'essence' captures the moral significance of the interest protected by an offence in offence differentiation.[2] But it does more than this: it also captures the degree to which the defendant is *to blame* for the violation of that interest.[3] This is because the extent of the defendant's blame for wrongdoing informs the amount of change in status that will be wrought through conviction.[4] This chapter will explore the implications of this culpability component of fair labelling in practice.

Specifically, it analyses the extent to which mens rea states (purpose, knowledge, recklessness, negligence, etc.) must be communicated by offence labels. I contend that different mens rea states in relation to similar wrongs must, at least presumptively, be communicated through discrete offence labels. Blame is a reactive attitude that hinges on the quality of ill will that one's culpability with regard to wrongdoing demonstrates. It will be argued that different mens rea requirements disclose a particular kind of ill will to a victim that warrants different treatment in punishment. The focus will be on the most famous mens rea states employed in Anglo-American

[1] Jeremy Horder, 'Rethinking Non-Fatal Offences against the Person' (1994) 14 Oxford Journal of Legal Studies 335, 339.

[2] Cornford uses the term blameworthiness to refer to both wrongdoing (that is, the conduct for which a person is to blame) and culpability (the extent to which they are at fault for that conduct), see Andrew Cornford, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 Oxford Journal of Legal Studies 985, 989. This is not an indisputable view of blameworthiness. In this chapter I pick out the culpability and the importance of an interest protected by an offence as a key point of discussing distinctions in blameworthiness for purposes of offence differentiation, but these are not the only lines upon which distinctions in blameworthiness may be drawn. Later in this chapter, I will address distinctions of acting together with others (when discussing the limits of fair labelling).

[3] In this chapter, I tend to use 'blame', 'fault' and 'culpability' interchangeably.

[4] For an alternative account of the relationship between blame and fair labelling, see Cornford (n 2) 999-1001.

systems of criminal law, namely purpose, knowledge, recklessness and negligence.[5] Although countervailing considerations may point against doing so, the argument will be that, in principle, offence labels should clearly communicate the defendant's mens rea state, and not remain opaque on that front.

II. *From* mens rea *to ill will*

Criminal theorists tend to think an individual's state of mind, or 'culpability', makes a marked difference to how we ought to regard the blameworthiness of their action.[6]

For instance, when someone treads on your foot it matters, intuitively, for determining the appropriateness of your blaming responses whether they: (a) did so on purpose;[7] (b) did so realising it was virtually certain that your foot would be trodden on;[8] (c) saw you standing where you were, and foresaw a risk of treading on your foot, but were busy on their mobile phone and so unjustifiably did not take evasive action;[9] or (d) never even considered the risk they would step on your foot because they were so enthralled with their conversation on the phone, but one thinks they ought to have watched where they were going, and that their failure to do so constituted a major deviation from expected standards of care?[10]

The states described in (a)-(d) track Anglo-American criminal law's distinctions between purpose, knowledge, recklessness, and negligence. I argue that the intuition underlying the example above can be defended in principle. These four states of mind are distinct kinds of mental states that are conceptually distinct and move on a sliding scale of blameworthiness with purpose being

[5] Section 2.02 of the Model Criminal Code of the United States.
[6] Findlay Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge University Press 2016) 2–3.
[7] This is the general definition of 'purpose' according to Section 2.02 (a) of the Model Penal Code.
[8] This is 'knowledge' according to Section 2.02 (b) of the Model Penal Code.
[9] This is 'recklessness' according to Section 2.02 (c) of the Model Penal Code.
[10] This is 'negligence' according to Section 2.02 (d) of the Model Penal Code.

the most serious to negligence being the least. There is one exception to this: if the value of the interest that is violated is high enough, it may mean that although there is a conceptual distinction between purpose and knowledge, acting with knowledge is as significant, and so blameworthy, as purposive action. This acknowledgement does not, however, collapse the two states of mind conceptually, and the criminal law will still have cause to distinguish between offences premised on purpose and on knowledge.

My argument for this conclusion emphasises the importance of one's attitude towards their actions, and what this can tell us about the appropriateness of blaming for them. To make this argument, I will build upon Strawson's account of reactive attitudes. Strawson argues that a reactive attitude is one we hold that responds to the good or ill will disclosed in the attitudes of others who stand in interpersonal relationships with us.[11] We cannot help but hold these reactive attitudes to people we are in interpersonal relationships with because, in general, we demand some degree of goodwill or regard on the part of those who stand in these relationships to us (though the forms we require it to take vary widely in different connections).[12] These attitudes are, therefore, in a sense fundamental to our nature as human beings and, when directed appropriately, help us express this nature.[13] For instance, consider the difference in one's responses if someone steps on your hand accidentally while trying to help you, as opposed to a malevolent wish to injure you.[14] Resentment or blame is an appropriate response to the second case and not the first.[15] The reactive attitude of blame is thus informed by the attitudes of the wrongdoer towards the victim or as Strawson puts it, the 'ill will' of the wrongdoer.

[11] P.F. Strawson., 'Freedom and Resentment' (1962) 48 Proceedings of the British Academy 1, 6–7.
[12] ibid 7.
[13] ibid 17, 20, 23 and 27.
[14] ibid 6.
[15] ibid.

Each mental state introduced above discloses a unique kind of attitude an individual has towards their actions that is important for allocating blame. To give an introductory summary of the argument presented below:

- purpose or intention discloses an attitude of endorsement towards one's actions and their consequences;
- knowledge discloses an attitude of reconciliation with the practically certain consequences of one's actions even if they are not one's purpose and are not endorsed;
- recklessness demonstrates an attitude of unjustified indifference towards the interests of another; and
- Negligence is a failure of one's self-governance that discloses an unresponsiveness to moral principles and reasons that actually apply to one in specific circumstances.

The next subsections flesh out these claims.

a. Purpose/Intention

Let us begin by examining the attitude underlying intended or purposeful action. In this section I make two claims: (i) committing an act with purpose is to act with intent and (ii) intention can be a broader concept which includes knowledge or oblique intention. I turn to the first claim. Intention is a state of mind that is a conduct-controlling, 'pro-attitude' that resists reconsidering one's decision.[16] A pro-attitude is an attitude in favour of a certain course of action or state of affairs. Pro-attitudes reveal a level of commitment to one's action and its consequences.[17] From

[16] Michael Bratman, *Intention, Plans, and Practical Reason* (Harvard University Press 1987) 22.
[17] ibid.

this kind of commitment one can infer a degree of *endorsement* or approval of the action and its aims.[18]

This endorsement is not to be confused with enjoyment. Endorsing an action is not the same as finding it pleasant. One can for instance regret hurting someone by telling them an unpleasant truth, but still do so with intent or purpose, thus endorsing one's actions and their consequences, despite not necessarily enjoying the experience.[19] This 'endorsing' quality has much to do with appreciating that the moral significance of intended action is linked to treating certain aims and purposes as reason-giving and explanatory.[20] By this I mean that the agent treats the aim or goal they intend as a reason not only to perform the action, but also as explaining their action when they are held responsible for their behaviour.[21] This explanatory aspect of intended action flows from the fact that achieving one's purposes or aims usually instantiates an intelligible good, which is the reason one acts for that purpose.[22] For our discussion, it is important to understand that part of the exercise of allocating blame is assessing the reason for someone's action as disclosed by their pro-attitudes towards their victim.

Adding to the significance of intended action is the importance of choice.[23] Choosing to pursue one end and not another reveals that an agent deliberately engaged their practical reason and usually pursues a thing they deem worthwhile or good.[24] This is because human beings are

---

[18] Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press 1999) 173.
[19] This is similar to a point about the difference between a decision and desire as discussed by Frankfurt, see Harry Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge University Press 1988) 66–67.
[20] Michael Bratman, *Structures of Agency: Essays* (Oxford University Press 2007) 95. See also RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 64. The classic work on this point is GEM Anscombe, *Intention* (Harvard University Press 1957) 7–9.
[21] Bratman (n 20) 95.
[22] John Finnis, *Intention and Identity: Collected Essays Volume II* (Oxford University Press 2011) 178. I say 'usually' here because a purpose is often, but not always, the missing piece in explaining why the agent thought the action was a good thing worth doing. For various examples explaining this subtlety see Christine Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford University Press 2009) 12–14.
[23] Finnis (n 22) 176. Many morally significant actions are spontaneous, not preceded by an episode of drawn-out prior deliberation. 'Choice' here need not mean ponderous reflection. See R Jay Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press 1994) 128.
[24] Some noted theorists doubt that choice is relevant at all for intentional action, see Thomas Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press 2008) 59–60. For the opposite position see Victor Tadros, *To Do, To Die, To Reason Why: Individual Ethics in War* (Oxford University Press 2020) 115–117.

different from the other animals in an important way – we are self-conscious in a specific way since we are conscious of the grounds on which we act and are therefore in control of them.[25] When human agents decide what sorts of effects they will bring about in the world, they are deliberately deciding what sort of cause they will be.[26] They are, in short, constructing a kind of practical identity that is important for holding them responsible for their actions since they can account for the grounds on which they act.[27]

This is why some theorists consider intended action as the paradigmatic case of responsible action.[28] To act with the intention of bringing about a result is to make myself fully responsible for that result.[29] 'Fully responsible' here refers to the kind of agency one has in this case as the proper author of the result and the attitude one has towards it.[30] One can be reasonably regarded as *endorsing* it coming into being as a result of one's choices.[31] Although one can also be held responsible for knowing, reckless or negligent actions (I will address this later), there is not the same authorship of the result by the agent. A person can knowingly impose harm on another without in any means endorsing that harm.

If one considers our earlier example, when someone intends to step on your foot and you blame them for this, they may indeed appeal to some good as the reason for their action. The opposite is also true. If they stepped on your foot because they are sadists who wished to see you suffer pain for its own sake, this increases the degree of blame one rightly allocates to them since they clearly have endorsed the opposite of a good. This reveals a certain kind of commitment that they have towards this project that one rightly blames them more severely for than if they had not paid attention to where they were going.

---

[25] Korsgaard (n 22) 19.
[26] ibid.
[27] ibid 19–20.
[28] RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Blackwell 1990) 99.
[29] ibid.
[30] ibid.
[31] Frankfurt (n 19) 166.

The revelation that someone endorsed the harm they did to you reveals the ill will they have towards you, thus being more serious than unendorsed harms from the standpoint of the reactive attitude of blame. This judgement comes from the background framework provided by how we understand the intended action of others. When they harm us, we demand to know why they did not choose an alternative course of action. We wonder if they chose this course of action with the purpose of harming us because we wish to determine the quality of their good or ill will towards us.

If one then properly grasps fair labelling as part of a broader practice of legal punishment aimed at justly allocating blame, one sees the importance of respecting the distinctions between intended and other forms of action.[32] The endorsement of one's actions and their consequences revealed by intended actions is judged properly by the law to be generally more serious than other kinds of mens rea.

b. Knowledge

What of the case where one does not necessarily have the purpose of bringing about the results of an action, but knows that by so acting those results will, or almost certainly will, come about? As is well known, it is a live philosophical question whether these foreseen side effects, or at least a subset of them, should be subsumed within intention – what Bentham classifies as an 'oblique' intention.[33]

Imagine a bomber blows up an aircraft for the purpose of collecting on insurance.[34] It is not his aim to cause the death of the passengers on the plane. However, he knows that success in his plan will unavoidably lead to their deaths as a side-effect. Arguably, this conduct seems less

[32] Cornford (n 2) 999.
[33] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Dover Publications 1780) 70. See also Glanville Williams, 'Oblique Intention' (1987) 46 Cambridge Law Journal 417, 420.
[34] This is an example made famous by Glanville Williams in Williams (n 33) 423.

blameworthy than the case where one endorses the death of his victims as the aim of his conduct. This is because one does not identify with or endorse the action in the same way as when one's *purpose* is at issue. In the case of purpose, one integrates the action into one's plans and shows a kind of commitment to such plans that endorses such results as proper exercises of their full agency.[35] In the case of purpose, our endorsement of a consequence is an instance where we fully exercise our autonomy and *identify* with the result.[36] In assessing the ill will of another, such identification with an act discloses greater ill will than oblique intention discloses. One certainly knows that such a result is wrong but does not take a stand with respect to it in the same way.

Instead, knowledge discloses instead a kind of *reconciliation* as the proper quality of ill will properly directed to another.[37] One *accepts* that you will harm another and is reconciled to such an eventuality. This involves adopting a different posture towards the result in that harming the person is not fully endorsed or treated as reason-giving with respect to one's actions despite one's knowledge. The word 'despite' is important here. It indicates that one knew of the proper morally sound reasons not to act in a certain way, ignored them and instead acted for other reasons.[38] This knowledge of the reasons that prohibited the action, and the choice to act despite them, is what marks one out to be blamed. Ordinarily such knowledge ought to guide one's action to comply with the reasons that apply to you. To instead be reconciled with the result is to hold a kind of ill will towards another, but it is not the ill will demonstrated by purposive harmdoing.[39]

[35] Victor Tadros, *Criminal Responsibility* (Oxford University Press 2005) 233.
[36] ibid. See also Korsgaard (n 22) 19.
[37] Duff uses the word 'reconcile' whilst not distinguishing it from 'endorse'. He is inspired by German law in this case. See RA Duff, 'Two Models of Criminal Fault' (2019) 13 Criminal Law and Philosophy 643, 650.
[38] John Gardner and Heike Jung, 'Making Sense of *Mens rea*: Antony Duff's Account' (1991) 11 Oxford Journal of Legal Studies 559, 571.
[39] This point about reconciliation is similar to what Alan Michaels calls 'acceptance' as a mental state. Importantly, Michaels demonstrates that acceptance can include knowledge but that the two are not co-extensive. See Alan Michaels, 'Acceptance: The Missing Mental State' (1997) 71 Southern California Law Review 953, 955–956.

Before moving to consider the ill will demonstrated by recklessness, it is worth dealing with two objections to the proposition that purposeful harmdoing is more blameworthy than knowing harmdoing.

i. The significance of the interest at stake

The first objection concerns cases where there is an apparent equivalence in blameworthiness between actors who have these mental states. The objection would go as follows: if fair labelling is about communicating *blameworthiness*, then notwithstanding the fact that purpose and knowledge involve different attitudes, there is no need for offence labels to distinguish between them.

This equivalence in blameworthiness may suitably apply in cases where the value of the interest that was infringed is extremely high. The thought is that this fact erodes the distinction in moral significance that ordinarily holds between intention and knowledge (although the conceptual distinction in attitudes remains). Consider the interest one has in life or sexual autonomy. Someone knowingly treading on your foot due is one thing, but someone knowingly killing you is another matter.[40] The ordinary importance between the two attitudes fades into the background, being overshadowed by the value of the interest that has been infringed. There is no difference in moral *significance* between knowingly killing someone and intentionally doing so if one values the importance of human life all the same. The same may be true of sexual autonomy. One may purposefully sexually assault someone or may knowingly do so. However, the usual distinction between intention and knowledge falls away in the context of the importance of the interest in sexual autonomy and consent.[41]

[40] Tadros (n 35) 230.

[41] Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 Oxford Journal of Legal Studies 82, 93–99. See also Kimberly Kessler Ferzan and Peter Westen, 'How to Think (Like a Lawyer) About Rape' (2017) 11 Criminal Law and Philosophy 759, 774–779.

The argument here is that the conceptual distinction in attitudes remains (endorsement and reconciliation) but the significance of the difference is lessened due to the weight and importance of the interest infringed such as life or sexual autonomy. However, with less important interests, the distinction holds. Consider for instance the case where an individual walks across someone's lawn intending to damage their property as opposed to someone walking across the lawn knowingly in order to get to a meeting they are running late for.[42] The interest in property here is not as highly valuable as the interest in the life possessed by another, thus one can properly place meaningful significance in moral weight between the case of purposefully damaging the property of another or trespassing as opposed to doing so knowingly.[43] The reconciliation towards the death of others is distinct in moral significance to reconciliation towards damage to property.

English law grappled with this problem and came to a position that knowledge in the context of killing ought to be considered murder due to such a practical certainty of death, as opposed to the less serious offence of manslaughter. In *Woollin*, a father lost his temper and threw his three-month-old son on to a hard surface, fracturing the child's skull and so causing his death.[44] Lord Steyn argued that, where death or grievous bodily harm are virtually certain to occur as a result of the defendant's action, and the defendant had foreseen as much, a jury may 'find' that the defendant intended to bring about those results.[45] He maintained that there is an important distinction between a risk that is a virtual certainty and one that is merely substantial.[46] This was later interpreted as merely a rule of evidence in directing a jury and not a substantive principle of criminal law.[47] Arguably, Lord Steyn's intuition was that when one threw an infant against a hard surface, such a risk being practically certain is as morally significant as intentionally killing the

[42] This is an example Tadros uses. See Tadros (n 35) 232.
[43] ibid.
[44] *R v Woollin* [1999] AC 82 (HL).
[45] Ibid at 95.
[46] Ibid.
[47] *R v Matthews and Alleyne* [2003] EWCA Crim 192 at par 45.

child.[48] The aspect of reconciling one's will to the certainty of such an infant's death can be sufficiently morally significant to constitute 'murder'. This does not necessarily mean that intended killing cannot still be more serious for purposes of sentencing than knowingly killing. However, it does mean that reconciliation is sufficient ill will to fall in the same category of offence as purposeful killings.

The consequence of the analysis so far is threefold. First, knowledge discloses a particular kind of ill will to someone of being reconciled to virtual certainty of harm one causes to be inflicted on them. Second, reconciliation as a kind of ill will towards someone can be sufficient to be regarded as morally significant as intended actions if the interest at stake is valuable enough. Third and last, this does not mean that the distinction between purposeful (endorsement) and knowing (reconciled) actions falls away for all purposes, just for offence differentiation. This means that it is not a straightforward exercise of always having a particular offence, let's call it 'murder', necessarily reflecting one kind of mens rea such as purposeful killing. 'Murder' can also mean 'knowingly' killing someone since reconciliation towards causing someone's death may be sufficiently morally serious to constitute murder. Fair labelling thus does not necessarily always mean that an offence must have only one kind of mens rea that may qualify to accurately allocate blame. It also means that offence differentiation is complicated by the interest at stake and so must be argued out as to whether this is properly allocated and communicated to offenders and the public at large.

ii. The significance of motivations

A second objection to the argument that purpose is more blameworthy than knowledge concerns cases of 'inseparable effects'.[49] Holders of this view submit that intention fails to delineate aspects

[48] Lord Steyn still quashed the conviction for murder due to the jury being misdirected by the trial judge.
[49] Kimberly Kessler Ferzan, 'Beyond Intention' (2007) 29 Cardozo Law Review 1147, 1150.

of an action that motivate the action. Consider the example of Albert (who is white) shooting Barney (who is black). Albert knows that Barney is black. Imagine that there is hate-crime legislation in force that considers a hate crime as an offence committed for racial reasons or motives. The problem is that intention is supposed to already mark out these motivational questions for us. However, in this example knowledge of a practically certain side effect of one's action (killing a black man) will certainly materialise by the decision to bring about another consequence (kill another human being). Thus, the example suggests that intention does not properly identify the motivational aspects of the action in question and so is not a particularly useful concept to explain mens rea.

This conclusion does not follow. Although it is true that in the case of Albert and Barney, Albert intends to shoot a man who happens to be black, it is not *because* he is black. We can accept that Barney being black was not treated as being reason-giving for Albert.[50] So whilst it is descriptively true that he shot a black man knowingly, he did not shoot him because he was black. Albert did not *endorse* the proposition that Barney being black was a reason for Albert to shoot him. Barney's blackness is, therefore, a morally inert fact about Barney. For our exercise of allocating blame, this fact is as relevant as his height or university grades.

However, this does not mean that Albert did not have the purpose of shooting Barney, but just that he did so for a reason other than Barney's being black. The point here is that in blaming someone and so determining the quality of their ill will towards us we do so against a background of moral principles. This is because blaming someone only occurs as a response to the violation of some moral principle or obligation.[51] Albert already complied with the moral injunction not to kill on the basis of race. Therefore, he already complied with the reasons that applied to him in that regard.[52] He also did not kill Barney 'despite' him being black. There could

[50] Bratman, *Structures of Agency* (n 20) 95.
[51] Wallace (n 23) 130–131.
[52] Gardner and Jung (n 38) 571.

not be any 'despite' to act as a counter reason to make his knowledge capable of forming an oblique intention. There is no obligation to shoot people because they are black and no reason to act against this despite one's knowledge of their blackness. There was thus no 'reconciliation' concerning Barney's blackness even though there was an 'inseparable target' in this case. One can easily make sense of our intuitions about the difference between intention and knowledge and our allocation of blame regardless of the lack of 'motivational significance'.

We do not need to abandon intention at all for purposes of blame allocation because we understand that blame itself acts within a context where it must respond to the demands of morality. To accept this kind of motivational scepticism towards intention is to remove intention from its blaming context and to remove blame from its broader moral context. The fact that intention has a specific role to play in this exercise and would not have 'motivational significance' in the hypothetical proposed takes nothing from the role it plays in ordinary blaming practices. It was never the case that any defenders of intention in this context have ever thought it explains all motivational questions – only that this is the most culpable and paradigmatic form.

c. Recklessness

The concept of recklessness has proved difficult for legal systems to define. Let us assume that recklessness amounts to advertent risk-taking of an unjustifiable risk.[53] This exhibits the moral vice of insufficient concern for the interests of others.[54] Recklessness is plotted on two axes comprising of first the degree of risk the actor believes he is imposing on others' interests and second his

[53] Larry Alexander, 'Insufficient Concern: A Unified Conception of Criminal Culpability' (2000) 88 California Law Review 931, 932. See also Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009) 25. Ferzan and Alexander argue that unjustifiability does all the moral heavy lifting. I will assume this to be the case since it is not important for my latter arguments.
[54] Alexander (n 53) 931.

reasons for doing so.[55] In this section, I will first address whether any meaningful distinctions between recklessness and the other mens rea forms can be maintained. I subsequently deal with whether recklessness can ever be more blameworthy than purpose or knowledge. I then deal with whether recklessness can be equivalently blameworthy as purpose or knowledge for purposes of offence differentiation.

i. Collapsing culpability

Alexander and Ferzan argue further that purpose and knowledge are simply extreme forms of recklessness.[56] The implication of this argument is that they all demonstrate the same form of blameworthiness, and so there is no use in labelling offences to recognise the distinctions between purpose, knowledge, and recklessness.

This argument begins by proposing that knowledge represents the extreme on the first axis (the degree of risk the actor believes he is imposing on others' interests), and purpose is the extreme on the second axis (the actor's reasons for imposing the risk).[57] Regarding knowledge as a kind of recklessness allegedly allows us to avoid deeming all cases of knowledge as more culpable than recklessness cases, even if the harm risked is the same.[58] For instance, someone may impose a very high risk of harm on another that is short of a practical certainty for a very frivolous reason, such as a thrill. Such a person is, on the definitions offered above, reckless. And such a person is more culpable than one who imposes a practically certain harm for a quite weighty, yet insufficient

[55] Alexander and Ferzan, *Crime and Culpability* (n 53) 24.
[56] Alexander and Ferzan, *Crime and Culpability* (n 53) 23–24.
[57] ibid 24. Concerning purpose, Ferzan and Alexander think it's because when you want to bring about harm, you will be consciously unleashing a risk of that harm onto the world, which will be difficult to justify if it was purposeful.
[58] ibid 33.

reason such as protecting their livelihood.[59] Considering knowledge as a kind of recklessness also apparently prevents us from regarding cases of wilful ignorance as a kind of knowledge.[60]

Ferzan and Alexander argue further that because purpose or intention is a comparison of risks (of an actor's purposes being fulfilled) and reasons, it is also just a special case of recklessness.[61] They argue that by intending to bring about a result, you are unlikely to be able to justify risking that same action.[62] Thus, the reasons to impose the risk collapse into the same enquiry as reasons for pursuing a result.

However, this does not follow. Mainly, the differences in the attitudes of the actors discloses the difference in blameworthiness. As argued above, intention is a pro-attitude that reveals a level of commitment and endorsement of the results. One can impose a risk entirely not wanting it to materialise or even of having the kind of level of commitment to it. Driving recklessly due to a lack of attention because of a bad day does not reveal a similar commitment or endorsement.[63] However, the driver who drives recklessly for the thrill of it is certainly imposing such a risk intentionally with a kind of commitment to it as a reason to do so that is absent in the other cases. One need not collapse intention or purpose into recklessness to accept that purpose can be seen as both results achieved but also as 'tryings' even if they fail.[64]

This is why the attitude an agent possesses matters for blameworthiness in precisely the way that Alexander and Ferzan deny. Recklessness has a definite core attitude of *indifference* towards the interests of others as opposed to the other kinds of attitudes that inform the allocation of blame.[65] However, there is an interesting snag in our current line of reasoning. Recklessness itself

[59] ibid.
[60] ibid.
[61] ibid 39.
[62] ibid.
[63] Alexander and Ferzan would likely respond that they are not saying that all recklessness is the same, only that there is one culpable mental state that is scalar. I address the importance of these distinctions even on their view, but for the moment it is not necessary to wade into that point.
[64] Alexander and Ferzan, *Crime and Culpability* (n 53) 37.
[65] ibid 44.

also requires some aspect of choice concerning the risk imposed, thus indifference is not sufficient on its own to ground culpability. For instance, to use the example given by Alexander and Ferzan, Daniel runs a red light to get to a football match, acknowledging that there is a substantial risk of harm to others. Daniel is reckless because, although he understands the substantiality and unjustifiability of the risk, he chooses to disregard it. His practical reasoning might place the value of the football match at 100 and the lives of others at 10 (in terms of his desire to avoid bringing about their deaths). Or he might value the game at 10, but the lives of others at 9. Ferzan and Alexander contend that it is the *choice*, to pick the game over others' interests, whatever values David gives these variables, that makes David's conduct culpable.[66]

This seems right. However, it may prompt the question as to how this indifference towards the interests of others is not the same as chosen intentional action. The difference lies in the role choice plays in purpose by considering a result as reason-giving (the reason to act that way) as opposed to choice here being about choosing to ignore or not properly weigh the interests of others. The latter does not exercise the choice in pursuit of the reason-giving quality of the result whereas the former does. This is another reason why intention (in the guise of purpose) cannot simply be reduced to recklessness.

Now that the conceptual topography is clarified, objections can be considered. First, is it possible that recklessness can ever be more serious than purpose or knowledge? Second, is it always the case that recklessness (indifference) is less blameworthy than purpose (endorsement) and knowledge (reconciliation)? These two issues are distinct and deal with very different arguments purporting to be in their favour.

[66] ibid 45.

ii. More serious than purpose?

It might be objected that there is no reason to blame purposeful or knowing actors more than reckless actors. In fact, is it possible that there are cases where intended action can be less serious than, say, reckless action? Kimberley Ferzan argues that this is possible.[67] She aims to demonstrate this through relying on Harry Frankfurt's distinction between the bullshitter and the liar.[68] This argument suggests that the liar who deceives with intent is less culpable than the bullshitter who does not even acknowledge the importance of the interest in truth. The bullshitter's indifference to the truth is thus worse than the of uttering an intentional untruth. This argument, therefore, apparently demonstrates that indifference can be worse than purposeful or intended action.

However, the comparison falls apart because the liar's actions apparently reinforce the norm of truth telling, whereas intentional killing does not. For instance, there is no acknowledgement by the intentional killer that reinforces the general norm of not killing. To put it another way, the liar must assume the importance or existence of the norm of truth telling in order to deceive. The killer does not have to make any equivalent assumption.

Furthermore, it does not follow that because the liar acknowledges the norm of truth-telling they are necessarily less blameworthy than the bullshitter. For instance, it may be the case that whilst the liar reinforces the norm, they still wrong the person lied to more seriously. If the liar deceived someone in order to induce them to act in a certain way, they have integrated their victim more deeply into their plans than if they lie or deceive as a side effect or are indifferent to the truth.[69] The victim in such a case is not treated as a truly autonomous agent with control over her own life and affairs, instead they are a mere instrument for the good or ends of another.[70] Therefore, in the end, even on this particular argument, intentional deception of another person

[67] Kimberly Kessler Ferzan, 'Act, Agency, and Indifference: The Foundations of Criminal Responsibility' (2007) 10 New Criminal Law Review 441, 448.
[68] Harry Frankfurt, *On Bullshit* (Princeton University Press 2005).
[69] Tadros (n 24) 123.
[70] ibid.

is still more seriously wrong than indifference. This is the case even though intentionally violating the general norm of truth telling at least acknowledges the value of truth. One need not reject the seriousness of intention in order to take account of Frankfurt's insights into bullshit.

iii. The comparative blameworthiness of recklessness

As noted above, sometimes the significance of the value at stake can inform our decisions about how blameworthy someone is, even if they have different attitudes towards the violation of that value. Some theorists have alleged that the same can be said of recklessness. For example, Tadros has suggested that, under certain circumstances, taking substantial risks with the life of another which result in death might be properly characterised as murder even where the wrongdoer does not wish those risks to materialise, and is not reconciled to their occurrence.[71] Once again this is because of the high value placed on the particular interest and its impact on one's blaming responses. Purpose, knowledge and recklessness are all *sufficiently blameworthy* here to satisfy the minimum level of blameworthiness for the offence, or at least that is the claim. Importantly, this does not mean that the comparative differences in ill will are irrelevant all things considered, only that the minimum threshold for an offence is met.

Canadian law has adopted a similar line of reasoning in so far as a minimum 'subjective' baseline of recklessness must be present. Consider the case of *Vaillancourt*.[72] During an armed robbery, Mr Vaillancourt's accomplice shot and killed someone. Vaillancourt was charged and convicted of second-degree murder as a party to the offence according to section 213(*d*) of the Canadian Criminal Code (1985).[73] Vaillancourt claimed that at the time of the robbery he

[71] Tadros (n 35) 232.
[72] *R. v Vaillancourt* [1987] 2 S.C.R. 636.
[73] Section 213(*d*) provided: Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit ... robbery ... whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if ... he uses a weapon or has

believed that his accomplice's gun was unloaded. He also claimed that he had initially agreed to commit the robbery armed only with knives and that his accomplice assured Vaillancourt that the firearm was unloaded. Therefore, Vaillancourt claimed that he never intended to commit, or be party to the commission of, a murder. He thus argued that his conviction was a violation of section 7 of the Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act, 1982) which states as follows:

> 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

Vaillancourt argued that the fundamental principle that had been violated by his murder conviction was that, before Parliament can impose any criminal liability for causing a particular result, there must be some degree of subjective mens rea in respect of that result.[74] The Court found in his favour, but for narrower reasons.

Lamer J (as he was then), writing for the majority, found that there are certain crimes where, because of the special nature of the stigma attached to a conviction or the available penalties, the principles of fundamental justice require a mens rea reflecting the particular nature of that crime.[75] To understand such a conclusion requires some engagement with the court's reasoning. To quote Lamer J in relevant part:

> '[M]urder is distinguished from manslaughter only by the mental element with respect to the death. It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction. I am

---

it upon his person during or at the time he commits or attempts to commit the offence ... and the death ensues as a consequence.

[74] *Vaillancourt* par 6.

[75] Ibid par 28.

> presently of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight [of death].'[76]

The Court approaches the question of determining the 'principle of fundamental justice' in this case by considering the states of mind distinguishing murder from manslaughter. The Court also specifically views the problem of the requisite blameworthiness between manslaughter and murder as an allocative problem. Importantly, Lamer J argues that distinctions in blameworthy states of mind are justified by ensuring that both stigma and sentence concerned match some kind of blameworthy mens rea criterion.

Importantly, the last part of the Court's reasoning is what matters most as a matter of proper interpretation of fair labelling in this area. The Court requires only a form of subjective foresight of death be required for murder, which can include recklessness towards the causing of death.[77] This would seem odd considering Lamer J's recognition of the heinousness and seriousness of murder if one did not think that the weight placed on the interest of life did not mean the Court regarded the blameworthiness of violating this interest as sufficiently morally significant in the circumstances to convict someone of murder. What may matter in the circumstance is that the wrongdoer would already have contemplated the violation of another serious interest such a bodily integrity and so their recklessness with respect to life is additional to the intentional violation of bodily integrity.

The Court revisited this issue in *Martineau*.[78] Martineau intended to commit an offence of breaking and entering, but his accomplice then shot and killed the occupants of the home they had broken into.[79] Relying on the decision in *Vaillancourt*, the appellant argued that he could not be

[76] Ibid. English law as a matter of statutory construction presumes that if a statute is silent as to the mens rea requirement, then recklessness is presumed as the requisite state of mind, see *B (a Minor) v DPP* [2000] 2 A.C. 428, 462.
[77] *Vaillancourt* par 27 and 53.
[78] *R v Martineau* [1990] 2 SCR 633.
[79] Ibid.

convicted of murder if he had no subjective foresight or direct intention to take the life of another.[80]

Lamer CJ on appeal elaborated on the principle he laid down in *Vaillancourt*. Relying on Hart, Lamer CJ argued that punishment must be proportionate to the moral blameworthiness of an offender. [81] The principle that at least subjective foresight of death is required before a person is labelled and punished as a murderer flows from this prior principle.[82] Thus, depending on the interest at stake, it may be sufficiently morally significant to meet the baseline blameworthiness for a certain crime such as murder despite this not being a case of purpose or knowledge of virtual certainty of harm. This is important to keep in mind for questions of fair labelling and the allocation of blame.

If the law is to ensure that the public and the offender understand that an offence can have a base-line threshold of seriousness that various forms of mens rea sufficiently satisfy, it must properly communicate the fact that just because someone has been convicted of a crime (e.g. murder or manslaughter), it does not mean that they have the same mens rea as the most serious form of the offence, i.e. purposeful commission. This can mean that the law must demonstrate this in the offence name or in offence differentiation. For instance, a crime may simply be called 'intentionally, knowingly or recklessly causing death' instead of the traditional common law name 'murder'. Alternatively, if this is too complicated or technical for the general public to understand, then the distinction would have to be shown in separate offences for 'intentionally or knowingly causing death' and 'manslaughter' on the other hand. The traditional distinction between murder and manslaughter generally attempted to track such a distinction, but as argued above, the interest at stake often raises the stakes enough for recklessness concerning someone's life to be seen as

[80] This is complicated by the fact that this is a case of secondary liability, but that is addressed later when I discuss rule of law concerns with fair labelling.
[81] Ibid 648. See also HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edition, 2008) 162.
[82] *Martineau* ibid.

sufficiently blameworthy to qualify as murder. More will be said about the appropriateness of the distinction between murder and manslaughter later in the next chapter, but for now it is enough to understand that the interest at stake may push even recklessness towards an important interest to be sufficiently morally significant that it meets the criteria of an offence that is paradigmatically intended. The point made in *Vaillancourt* and *Martineau* is that the baseline mens rea must *at least* be some kind of subjective foresight of the relevant result, which includes the kind of advertent risk taking we call recklessness.

In short, then, the distinction between blameworthiness in cases of purpose, knowledge and recklessness is always a difference of kind, or at least a *modal* difference.[83] The attitudes of endorsement, reconciliation, and indifference disclose distinct aspect of another's ill will that are relevant for allocating blame because of the qualities of blame being a reactive attitude that responds to breaches of moral principles or obligations. If fair labelling involves demarcating distinct types of blameworthiness, as has been argued throughout this thesis, then this suggests that there is reason to believe that purpose, knowledge and recklessness ought to be distinguished between in the labelling of offences and offenders. However, this does not mean that the interest at stake warrants an exception to this general rule. It may very well be that the modal differences remain, but that recklessness or knowledge concerning a particular weighty interest is at least sufficiently blameworthy to fall in the same offence and instead the modal distinctions remain relevant for other purposes such as sentencing. Fair labelling must then properly respond to the challenge of communicating this kind of allocation of blame.

[83] Tadros (n 35) 232. See also FM Kamm, *Morality, Mortality Volume II: Rights, Duties, and Status* (Oxford University Press 2001) 229–230.

iv. A lesson in labelling

Another reason to reject Alexander and Ferzan's account, and on directly related to a concern with labelling and culpability, is their startling proposal that there should be only one crime, albeit with different magnitudes of culpability.[84] The argument is that although legally protected interests are legion, crimes that threaten those interests are just different manifestations of a single crime – any act that demonstrates the actor's insufficient concern for those legally-protected interests.[85] The culpability of an act is then allegedly a product of all the harms the defendant believes he is risking.[86]

It is not clear why it follows that, if one accepts Alexander and Ferzan's approach to culpability, then one must accept all offences collapsing into a single criminal offence.[87] After all, one could accept that all culpable states can be reduced to a single type, but it is a further stretch to reduce risks regarding all legally protected interests to a single offence.[88] It is especially surprising considering the requirements of fair labelling.

Ferzan and Alexander also reject intention as a necessary aspect of determining blame for purposes of fair labelling.[89] They argue that labels of this kind obscure, rather than clarify, the blameworthiness at issue given their doubts about the importance of the modal distinction between purpose and recklessness.[90] Perhaps they follow the same logic as it applies to legal interests and their single offence. They do state that their proposed criminal code would still be

[84] Larry Alexander and Kimberly Kessler Ferzan, *Reflections on Crime and Culpability: Problems and Puzzles* (Cambridge University Press 2018) 7.
[85] ibid.
[86] ibid.
[87] Douglas Husak, 'Larry Alexander and Kimberly Kessler Ferzan on Omissions and Normative Ignorance: A Critical Reply' (2021) 16 Criminal Law and Philosophy 3.
[88] ibid 4.
[89] Larry Alexander and Kimberly Kessler Ferzan, 'Beyond The Special Part', *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 262.
[90] ibid.

complex and would not consist of only one rule.[91] And they provide scope for a legislature to specify those interests worthy of legal protection.[92]

It is, however, difficult to reconcile this position with Alexander and Ferzan's argument that the criminal law ought to consist of one criminal offence, which is maintained despite the assertion that this notional criminal code remains complex. Perhaps this would be a system that would defer recognition of protected interests to the legislature, but these would still have to be interpreted by judicial officers and made sense of with relevant distinctions in degrees of blameworthiness, assuming of course that there is only one form of culpability. Exactly how judicial officers may do so without distinct offences to track these distinctions is not stated. The point is that even though such a system would formally consist of a single offence, when the law is interpreted, the distinctions in degrees of blame would as a matter of substance begin to look at the very least like distinct offences. This is because although a single legal interest may be protected by several offences, as we see in the case of sexual offences, this does not mean that sexual autonomy is not distinct from the interest of life or any other interest.

The particular interest protected by an offence will carry its own distinctive weight and make its own demands about how the imposition of risk is factored into judgements of blame in our practical reasoning. Recall the difference in how the interest in life as opposed to property alters our reasoning when we consider the degree of blameworthiness between intention and knowledge. The value we place on the interest in life demands that we consider its violation more seriously than we would other interests. The substantive fragmenting of the Ferzan and Alexander criminal code that would follow is entirely a feature of the different value demanded by different interests. This fragmentation of the single offence would be compounded by the continued explicit

[91] ibid.
[92] ibid.

recognition by the legislature of a growing list of protected interests. Substantively maintaining the singular integrity of such a criminal code would be exceedingly difficult.

The response seems to be that substantively this notional criminal code would comprise of a single offence even if there are all sorts of formal distinctions in legal interests. Ferzan and Alexander suggest as much by arguing that their view is grounded in a standard (insufficient concern for interests of others) and not a rule.[93] The problem with this position is that even if one accepts that there is only one form of culpability and so a single substantive criminal offence is that the differences in the degree of the single form of culpability still requires that like cases be treated alike and different cases be treated differently. Of course, different offenders will impose different degrees of risk, some much more serious than others that will require different treatment. The standard they propose itself begins to separate the status of offenders. Serious offenders begin to occupy a different legal and social status than less serious offenders.

Once again, fair labelling will require that relevant differences in degrees of blameworthiness be respected. This is because standards carry different *weight* depending on the circumstances and interests involved. [94] The application of this recklessness writ-large principle applied to particular circumstances begins to look a lot like separate offences, despite the insistence on reduction to a single form of culpability and crime. This will then require principles of fair labelling to be applied. But having abandoned the modal or type differences that could apply to culpability, it is difficult to imagine what distinctions could be brought to bear to begin treating genuinely different cases differently and so comply with just allocation of blame.

The only answer is that Alexander and Ferzan's approach must be abandoned. This is not just because it is difficult to imagine a legal system that could make sense of it, but one of the main reasons why it is difficult to imagine such a system – its violation of fair labelling. It turns out that

[93] ibid 271.
[94] Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 28.

the elegance and simplicity that is supposedly the great strength of this recklessness writ-large approach is also its undoing.

d. Negligence

Negligence requires that one is unreasonably unaware of a substantial and unjustifiable risk that the forbidden result may occur or that the relevant circumstances exist.[95] For instance, English law criminalises gross negligence manslaughter, dangerous driving, or the causing or allowing of a child or vulnerable adult to die or suffer serious bodily harm.[96] These offences usually require that the offender 'was, or ought to have been, aware' of 'a significant risk of serious physical harm being caused' to the victim.[97] The approach that will be defended here for negligence is that it demonstrates a lack of good will towards the interests of another person. This builds on the quality of will approach advanced so far. That is as much as intention, knowledge and recklessness disclose different kinds of ill will one person may have towards another, negligence reveals a lack of good will towards another.

Despite its presence in many criminal law jurisdictions, liability for negligence is controversial in theory.[98] Academics have contended that one is not morally culpable for taking risks of which one is unaware, and accordingly the criminal law should not employ negligence as a culpability concept.[99] As Alexander and Ferzan put the problem:

> 'An injunction to notice, remember, and be fully informed about anything that bears on risks to others is an injunction no human being can comply with, so violating this injunction reflects no

[95] Alexander and Ferzan, *Crime and Culpability* (n 53) 23–24.
[96] Domestic Violence, Crime and Victims Act 2004, ss. (1)(c), (1)(d)(i); Road Traffic Act 1988, ss. 2A(1)(a)–(b) and Alexander Greenberg, 'Why Criminal Responsibility for Negligence Cannot Be Indirect' (2021) 80 Cambridge Law Journal 489, 491.
[97] Domestic Violence, Crime and Victims Act 2004, ss. (1)(c), (1)(d)(i). See also the discussion by Greenberg at ibid 490–492.
[98] Alexander and Ferzan, *Crime and Culpability* (n 53) 70–71.
[99] ibid 71.

> moral defect. Even those most concerned with the wellbeing of others will violate this injunction constantly.'[100]

Such arguments might easily lead one to discount negligence as a valid form of culpability, making the problem of fair labelling one limited to the choice-based culpability concepts discussed above. After all, the standards demanded become not just unjustified, but unworkable. One arguably takes these sorts of risks frequently precisely because they are inadvertent and thus unchosen. And, because these risks are unchosen, they are uncontrolled, and it might be contended that the act of risk-taking evinces no ill will that could be relevant to criminal blame.

It is not clear, however, that one has no control over what one is aware of. Ferzan and Alexander give the example of a wealthy couple who are bathing their child but are disturbed by guests early for a party they are hosting.[101] They get carried away chatting to their guests and their child drowns in the bathtub. Ferzan and Alexander argue that the couple cannot be blamed for their inattentiveness and its results because this was caused by their forgetting and their forgetting is not the sort of thing they have control over. Once the thought slipped out of their minds, they had no power to retrieve it.[102] The couple thus cannot be held liable for their inattentiveness since at the time of their negligent act the criminal law could not guide their conduct by providing them reasons to act otherwise as there are simply unaware of such reasons.[103]

However, someone who is merely unaware that he is taking a risk does not lack the capacity to recognise that risk. Certainly, they can fail to exercise this capacity, but it does not follow that they lack it.[104] Further, one's priorities and concerns can be manifested by not only what they pay

[100] ibid.
[101] ibid 77.
[102] ibid 78.
[103] ibid 80.
[104] Alexander Greenberg, 'Epistemic Responsibility and Criminal Negligence' (2020) 14 Criminal Law and Philosophy 91, 102.

attention to, but by what they fail to pay attention to.[105] In this way, one can more concretely demonstrate one's lack of good will towards the interests of others. The culpable practical attitude present in negligence is a blameworthy inattentiveness to the interests of others. The case of Ferzan and Alexander's couple demonstrates this lack of concern for the interests of their child.[106] As Mayr correctly puts it, 'whether an agent cares sufficiently about morality is not only manifested in his decisions and voluntary reactions, but also in how he deliberates, in what he attends to, *in what he neglects and fails to realize etc.*'[107] Negligence, properly understood, may demonstrate a lack of concern for the interests of others through inattention as opposed to the advertent risk-taking behaviour present in recklessness which evinces indifference.

Another way of putting this point is that 'autonomy' and 'control' are not merely about acts of positive will embodied by active choices.[108] Autonomy also implies not only 'active' will, but also what Gary Watson calls 'self-governance'.[109] Self-governance is a broader notion than mere positive will in that it refers to one's capacities to respond to considerations and requirements to which we are subject.[110] Where one fails to properly respond to requirements or standards that actually apply to them, this is an instance of faulty self-governance. It is a failure to respond to standards that one ought to and so necessarily implicates one's agency and decision-making capacities. The things we fail to do that we ought are, therefore, failures for which we can rightly be held responsible for. This is important for our blaming practices because it means that we can blame someone not just for their positive ill will towards us but for their *lack of good will.*

[105] See the discussion in Findlay Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge University Press 2016) 219–225.
[106] Greenberg (n 104) 106.
[107] Erasmus Mayr, 'Unwitting Omissions, Mistakes and Responsibility' in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Agency, Negligence and Responsibility* (Cambridge University Press 2021) 51(emphasis added.).
[108] Gary Watson, 'The Possibility of Pure Negligence' in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Agency, Negligence and Responsibility* (Cambridge University Press 2021) 113.
[109] ibid. See also Thomas Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) 269.
[110] Watson (n 108) 113.

Importantly, this need not mean a vague type of liability that is overly demanding on citizens. It will be remembered that moral blame is only appropriate as a reaction to the flouting of moral demands and standards.[111] One can only be morally blamed for faulty self-governance where the lack of regard for moral requirements is properly related to those principles and values which were relevant for the agent's moral obligation *in the particular situation at hand*.[112] This is why any test for negligence is context specific, whilst referring to more general values and principles.[113] The point is that morality itself delineates the reasonableness of the regard one ought to have and so of the degree of good will one ought to show towards another. Further, these moral obligations one fails to fulfil negligently do not have to apply purely in the abstract without regard to specific obligations owed to a specific person or category of persons.[114] Thus, contrary to what Ferzan and Alexander suggest, criminal liability for negligence need not necessarily be overbroad and can be narrowly tailored through intermediary moral principles.

Furthermore, it is not the case that merely because a state may hold one responsible for the consequences of one's negligence that they necessarily ought to do so through the machinery of the criminal law. That is not the argument presented here. Naturally, there would be a range of considerations including over-criminalisation, harm prevention or institutional failures etc to consider as to whether or not negligence must be criminalised.[115] The point here is that one can make sense of negligence as an aspect of culpability in ordinary moral judgements that can later play a role in allocating blame for purposes of fair labelling.

The advantage of the quality of will approach in this context is that it holds someone *directly* responsible as opposed to the indirect approaches of justifying responsibility for negligence

[111] Mayr (n 107) 49.
[112] ibid 50.
[113] Benjamin C Zipursky, 'From Law to Moral Philosophy in Theorizing about Negligence' in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Agency, Negligence and Responsibility* (Cambridge University Press 2021) 227–228.
[114] Mayr (n 107) 52.
[115] Stark (n 105) 260–266.

supported by some theorists.[116] Indirect approaches argue that one is culpable when we can trace their negligence back to some prior advertent culpable action or omission that led to their inadvertent risk-taking.[117] This is because according to such a quality of will approach one is held responsible for their attitude of inattentiveness to the particular requirements of morality applicable to them in the circumstances. This form of responsibility is not parasitic upon any separate prior fault of an agent and so not subject to the myriad objections that follow from indirect justifications of negligence where the moral work is done by the blameworthiness of some other preceding act or omission.

III. Conclusion

It has been argued that each of the particular blameworthy states has its own distinct practical attitude that is relevant for allocating blame. Purpose involves an agent endorsing a particular state of affairs they brought into being. Knowledge reveals reconciliation to practically certain effects. Recklessness demonstrates indifference to the risks imposed on others and negligence shows unjustified inattentiveness to the interests of others and the demands of morality in those circumstances. These differences explain why the reactive attitude of blame considers these distinctive attitudes of the agent since it reveals something of their ill or lack of good will towards the victim.

If fair labelling is about communicating blame accurately, then, the criminal law ought, in principle, to reflect these states of mind in distinct offence labels. For the law of homicide, for example, one can treat knowledge and purpose as of the same kind of moral significance due to

[116] Anthony Kenny, *Free Will and Responsibility* (Routledge 1978) 85. See also Jean Hampton, '*Mens rea*' (1990) 7 Social Philosophy and Policy 1, 27–28.
[117] ibid 85. See also Greenberg (n 96) 511–513.

the importance of life and the similarities between reconciliation and endorsement in disclosing qualities of ill will. This is, largely, the approach of English criminal law.

Recklessness is indifference towards this important interest, yet ought to still take note of the modal difference of disregarding that purpose and knowledge contain from recklessness. This is what manslaughter indicates. Not merely the importance of the interest in life, but also the quality of ill will for which we blame someone. These differences are clearer when the interest is not as important as life.[118] However, the point here is that the four traditional kinds of mens rea are perfectly defensible as a starting point to argue for separate offences.[119]

Part of the problem for fair labelling is that offences seldom explicitly provide for specific types of mens rea when drafted in legislation and so it is often left to judges to interpret what the men rea criteria is for a particular offence. This makes it difficult to determine what the culpability of an offender is by just looking at the description of the offence. This is the case not only for the offence name (e.g. murder, manslaughter etc) but also for offence differentiation where two kinds of mens rea may be sufficiently morally significant for a specific offence. The criminal law must then insure that it is at the very least communicated to the public and an offender that if they are convicted of crime X, such a crime can be committed either intentionally or, say, recklessly.

Further, because of the importance of communicating such distinctions, it matters how public understanding affects the effectiveness of properly labelling mens rea distinctions in offence naming and differentiation. This particular challenge of distinction drawing between offences to properly track distinctions in mens rea also potentially raises rule of law objections. These rule of law objections argue that creating more offences in a criminal code dilutes the ability of the criminal

[118] For instance, vandalism ought to be a separate offence from reckless criminal damage if property is the interest concerned.

[119] I have not and do not defend strict or constructive liability. It should be obvious given the arguments defended here that these forms of liability ought to be viewed sceptically considering their lax attitude towards mens rea. For some of the problems with strict liability and fair labelling see AP Simester, 'Is Strict Liability Always Wrong?' in Andrew Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005) 33–37.

law to properly guide conduct since multiple offences may create great confusion to citizens. Further, this inflationary logic in fair labelling as it concerns creating offences also allows for abuses of prosecutorial discretion in overlapping charges that prejudice offenders. This brings us to the following chapter (Chapter 5) where I address these concerns and argue that, although relevant, they are not incompatible with fair labelling as a principle of criminal law. Subsequently, I now confront the challenge of public understanding and its relationship to blame.

Chapter 5: Public Understanding and Rule of Law Challenges for Fair Labelling

I. Introduction

The previous chapter analysed how offences ought to be differentiated to reflect mens rea requirements. However, this distinction-drawing (and the names given to offences) is not only aimed at allocating blame to an offender, but also to communicate the allocation of such blame to the public. The audience of such communications is thus critical to understanding the practice of labelling and assessing its fairness. In section *II* of this chapter, I argue that public perceptions set the outer limits of permissible communication about blame. If one accepts that punitive labels are partially justified by educating the public and conscripting them into the practice of punishment, it follows that this communication of blame must be successful. Cases where there is a mismatch between what the public assumes a label means and the correct allocation of blame according to critical morality must then be addressed as a potential source of unfair labelling. This does not mean that the law must track social morality as opposed to its critical dimension, but that for the law to be successful in its educative role, and likewise for society to properly hold the law accountable for its blame allocations, there must be alignment of moral understandings between the criminal law and the public. The chapter will explore this idea through consideration of the labels 'murder' and 'rape', and what public (mis)understandings of that term could mean for employment of that label, even when it is connected explicitly with mens rea concepts such as intention or recklessness.

In section III, I then address the objection that fair labelling is hyperinflationary in terms of the number of criminal offences it causes to be created. This hyperinflationary objection is anchored in the concern that offence proliferation might give rise to concerns grounded in the rule of law and the possible abuse of overlapping charges by prosecutors. In answering the challenge of the tension between fair labelling and the rule of law, discussions from the area of

complicity will be used to demonstrate that a particular understanding that is not pessimistic about fair labelling and does not assume it to be in tension with the rule of law, may fruitfully address concerns about mislabelling in a theoretically satisfactory manner. Further, taking fair labelling seriously even when deciding whether to charge offenders in the exercise of prosecutorial discretion may itself ameliorate the problems that may occur as a result of fair labelling creating new offences. I discuss this topic in section *IV* of the chapter. The answer to concerns such as those raised by Cornford is not to give up on fair labelling, but to deepen one's commitment to the principle. If one does so, then it becomes evident that the rule of law is enhanced by fair labelling. Equally, fair labelling cannot do without the rule of law since it is a principle of legal justice.

Thus, the chapter first addresses issues of blame and public understanding and then turns to countering the hyperinflationary concerns or objections to fair labelling.

II. Blame and Public Understanding

Douglas Husak argues there is a basic requirement that the substantive criminal law should track critical morality closely.[1] This does not mean that the law cannot diverge from morality, but that it must justify its deviations.[2] Abiding by the principle of fair labelling is an instance of the law giving effect to this broader concern of tracking morality in so far as it requires the criminal law to reflect distinctions in blameworthiness through offence differentiation.[3] This is because fair labelling is also a principle of justice. It is concerned with a question of allocation – as all principles of justice are.[4] If fair labelling as a principle of just allocation of blame is taken seriously, much

[1] Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press 2010) 69.
[2] ibid 70. Husak also addresses the application of this injunction to *mala prohibita,* see Chapter 14 of his *Philosophy of Criminal Law*.
[3] Andrew Cornford, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 Oxford Journal of Legal Studies 985, 999.
[4] John Gardner, 'Hart on Legality, Justice and Morality' (2010) 1 Jurisprudence 253, 260.

about the debate regarding culpability and fair labelling becomes clear. The aim of the exercise as far as fair labelling is concerned is to treat like cases alike and different cases differently.[5] This particular exercise of treating like cases alike also presumes that there is no mismatch between the moral blameworthiness of an offender and the law's allocation of such blame. The exercise assumes that there is no ontic injustice in how an offender's status is altered by a criminal label.

However, there are limits that public understanding of offences places on the ability of the law to communicate the blameworthiness of offenders. Whilst the criminal law ought to track critical morality where possible, social morality and public understanding complicate how this is achieved. Recall that the paradigm case of blame is communicative blame, which aims to communicate not only with actors within the criminal justice system, but also lay actors including defendants, victims, and the public more generally. For the communicative exercise of blaming by the state to be successful, the law cannot be oblivious to how the public understands the meaning of differences in offences, and what words such as 'murder', 'rape' and 'vandalism' imply about blameworthiness.

For the sake of clarity, and due to concerns of space, this part of the chapter will focus on two examples – homicide offences and sexual offences. I shall use these examples to analyse how the law ought to respond to public misunderstanding of the allocation of blame, especially in the realm of culpability. The argument here is that although fair labelling does not require perfect alignment between public perceptions of the allocation of blame across offences, fair labelling does require that there be reasonable alignment between what the law regards as the correct allocation of blame across offences and what the public understands this allocation to be. In the course of justifying this position, I will focus specifically on how an offence may be misleading concerning the allocation of blame to an offender. In these kinds of cases there are several options open to the law to better achieve the kind of moral alignment that communicative punishment strives

[5] Cornford (n 3) 999.

towards. This does not mean that one ought to assume that all kinds of public misunderstandings must be eliminated. It may very well be the case that current public understanding, whilst not allowing perfect clarity in communicating blame allocation to offenders and the public, is still adequate. The perfect is not the enemy of the good.

Public perception of culpability in homicide law is a thorny and difficult issue for fair labelling. I will first address the situation where a particular offence can be satisfied through proof of more than one kind of mens rea and the challenges this presents for fair labelling. I will then address cases where an offence carries such a heavy stigma that juries are unwilling to convict people of it in some contexts, and this leads to misunderstandings by the public of what the culpability requirements of the offence truly are. Last, I will analyse the costs of improving public understanding for purposes of fair labelling.

a. An offence with several forms of mens rea

Whilst the public in countries such as England and Wales may believe that there are more culpable forms of homicide, and this should be reflected in offence differentiation, their perceptions do not always follow the law's position on correct blame allocation.[6] This is not limited to miscommunication in the realm of mens rea. For instance, the public may believe that a passer-by has a legal obligation to save a drowning woman if the passer-by can swim and that failure to do so evinces a disregard for human life.[7] However, the law may not think that that such duties be imposed on persons and that this should not qualify as the crime of murder. When faced with the problem of misalignment between the law and public perceptions, there are several options open

[6] Barry Mitchell, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38 British Journal of Criminology 453, 467–469.
[7] ibid 468.

to the law on this front. Below I will deal with misalignment between the law and public perception relating to mens rea problems, but such misalignment may occur in other areas of criminal law.

First, the law can attempt to correct these misconceptions by adding greater textual clarity to the name of an offence. What would have been called 'murder' can be renamed 'intentional or reckless killing of a human being', specifically excluding negligence as a form of culpability. This would hopefully reasonably inform the public through greater specificity what the particular blameworthy state of mind is for the offence. Another option would be to do the same with the 'lesser' offence of manslaughter. One can rename the offence to 'reckless manslaughter' once again to emphasise the culpability requirement.[8] A third option is to use adjectives that emphasise the serious degree of negligence that would be necessary to make someone liable for the offence. It can be '*gross* negligence manslaughter' to properly communicate the culpability standard required.[9]

However, such approaches are not uncontroversial. Recently, the Scottish Law Commission has undertaken a review of the mental element of their law of homicide.[10] Amongst the many interesting features of the law that is under review is the fact that Scotland's definition of murder requires 'wicked' intention or 'wicked recklessness'.[11] Whilst this attempt at communicating the gravity of the degree of recklessness is understandable, it has led to some criticism. The intention aspect of murder also acquired its own qualifier and one committed murder if you 'wickedly intended to kill' another.[12] It also transpired that 'wicked recklessness' is not so clear. Scottish courts later found there was an implicit intention requirement built into wicked recklessness and this includes an 'intention to injure'.[13] Thus, it is not necessarily a solution to the problem to simply tag on any given adjective since the form of mens rea still has to be given

[8] Findlay Stark, 'Reckless Manslaughter' [2017] Criminal Law Review 763, 779.
[9] *R v Adomako* [1995] 1 AC 171.
[10] Scottish Law Commission, 'Discussion Paper on the Mental Element in Homicide' (2021) 172 par 1.1-1.4.
[11] John Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th edn, 1948) 89. See also *Drury v HM Advocate* 2001 SCCR 583 ('*Drury*') para 2.
[12] *Drury* 583.
[13] *HM Advocate v Purcell* 2007 SCCR 520.

content. At the very least the adjective indicates that this must be a *serious* form of recklessness.[14] Present adjectives such as 'wicked' have been described as 'old-fashioned, moralistic, emotive, and vague'.[15] Therefore, this apparently impedes communicative blame and better moral alignment between the law and public understanding. Lord Gill in *Petto v HM Advocate* elaborated as follows:

> ' … [i]n Scotland, we have a definitional structure in which the mental element in homicide is defined with the use of terms such as wicked, evil, felonious, depraved and so on, which may impede rather than conduce to analytical accuracy.'[16]

This may result in there being a mismatch between the label 'murder' and what the public understands to be the requisite mens rea of the offence. The public would be forgiven for thinking that one must have an especially evil or wicked intention or display an evil or malevolent kind of recklessness to commit murder. Alternately, some juries might interpret 'wicked' recklessness simply to mean a person was grossly lacking in concern for the life of another, without necessarily requiring *evilness*. This confusion relates to the complaint that the term wicked is anachronistic and so confusing to modern communities. To ameliorate these concerns, one can instead use more modern adjectives such as 'serious'.[17] Victor Tadros has suggested that one could substitute the term 'heinously' exposing another to risk of death to substitute wicked recklessness.[18] However, my only criticism of Tadros' suggestion would simply be that the word 'serious' could be substituted for 'mortal' or 'heinously' on the basis that 'mortal' and 'heinous' may themselves be old-fashioned. But this is not to detract from the basic point that anachronism is easily solvable through replacing the word wicked to communicate the same concept. After all 'heinous' is still

[14] Importantly, 'recklessness' is not always understood 'subjectively' to require awareness of risk in Scots law, see Joshua Barton, 'Recklessness in Scots Criminal Law: Subjective or Objective?' 2011 Juridical Review 145–155.
[15] Scottish Law Commission (n 10) 38. I will analyse each of these objections below.
[16] *Petto v HM Advocate* 2011 HCJAC 80 par 21.
[17] The Law Reform Commission of England and Wales chose to also use the word 'serious' in their description of the kind of risk one may recklessly undertake to qualify as murder. See English and Welsh Law Commission, Murder, Manslaughter and Infanticide (2006) 28. To quote the Commission's proposed reforms: 'We recommend that first degree murder should encompass: (1) intentional killings, and (2) killings with the intent to do *serious* injury where the killer was aware that his or her conduct involved a *serious* risk of causing death.'
[18] Victor Tadros, 'The Scots Law of Murder' in Jeremy Horder and David Hughes (eds), *Homicide Law in Comparative Perspective* (Bloomsbury Publishing 2007) 206.

more in modern usage than 'wicked'. Further, the authors of the Scottish Law Commission's Draft Criminal Code for Scotland ('Draft Code') have alternately suggested the word 'callous' instead of 'heinous' as a replacement for 'wicked' recklessness.[19] However, the authors of the Draft Code themselves admit that 'callous' is meant to capture the distinction between ordinary recklessness and a more serious form.[20] My argument here is to simply use the word 'serious' to highlight such a distinction and also possibly capture the 'heinousness' of the crime. However, it is possible that 'callous' may very well do the same work and so it is a matter of legislative discretion which is picked and not too much will turn on either phrasing. The objective ought to be that the replacement is not outdated, be capable of capturing the distinction between ordinary and callous recklessness, and the especially morally blameworthy indifference it reveals to qualify as murder.

However, this does not necessarily do away with the 'vagueness' complaint. After all, 'serious recklessness' is less anachronistic, but not necessarily more precise or exact than 'wicked recklessness', anachronism aside. Nonetheless, it should not sit too uncomfortably with us that the law does not require absolute certainty, even in criminal law, as to the contours of an offence. To quote the South African Constitutional Court when it considered the principle that laws ought not to be vague: 'What is required is reasonable certainty and not perfect lucidity.'[21]

However, this does not mean that there cannot be better broad indicators about either intention or recklessness that can be clearer. For instance, Tadros argues that the concept of recklessness can be retained but reformulated where one commits murder 'believing that he was

[19] Scottish Law Commission, 'A Draft Criminal Code for Scotland with Commentary' (2003) 84 ('Draft Code'). The authors of the Draft Code are Eric Clive, Pamela Ferguson, Christopher Gane, and Alexander McCall Smith.
[20] ibid. To quote the Draft Code: "Callous' describes well the type of recklessness required. It must be more than ordinary recklessness.'
[21] *Savoi & others v National Director of Public Prosecutions & another* 2014 (5) SA 317 (CC). See also the jurisprudence of the European Court of Human Rights on clarity in criminal statutes at *Kafkaris v Cyprus* 2008 ECHR (Grand Chamber) par 140.

exposing another to mortal danger' or 'heinously exposed another to risk of death'.[22] This seems like workable alternate formulations.

The complaint that the word 'wicked' is too moralistic is equally unpersuasive. This complaint assumes that less morally laden language would be a clearer or better guide. However, this misses the fact that the law is exercising a judgement in determining wicked recklessness and not a mathematical calculation that determines the probability of risk.[23] As long as the term 'serious', 'callous' or even 'heinous' can still support reasonable judgments in particular cases then it need not be considered as too imprecise because of its morally pregnant language.

Last, I turn to the complaint that 'wicked' is too emotive or vague and thus undesirable to describe the mens rea required for murder. Importantly, one should not assume that public understanding is simply to be dismissed as emotive or irrational since historically legal conceptions of mens rea requirements may be sanitised or narrowed in an effort to protect the interests of the powerful and deny the poor or marginalised further defences that would have relied on a lack of mens rea.[24] For instance, Alan Norrie argues that motive was stripped from the mens rea of murder because it may possibly have granted the poor far too much lee-way to argue an absence of mens rea during times of socio-economic hardship and increasing seizure of property by the wealthy.[25] Thus, sanitised and clinical legal concepts stripped of any moral residue do not have a particularly illustrious heritage in the criminal law. The particular danger highlighted here is not to commit a genetic fallacy that non-emotive concepts must be viewed with suspicion because of their origins, but to highlight that emotive concepts should not be easily or casually dismissed since they may very well have the advantage of providing sound moral and legal defences to the marginalised. For

---

[22] Tadros (n 18) 205-206.

[23] Gerald Gordon & Michael Christie *The Criminal Law of Scotland: Volume II* (3rd edn, W Green 2001) par 23.21. If the criticism is that the term 'wicked' is excessively stigmatic (and so too moralistic) such that it leads to juries fearing to convict anything except the most heinous or malevolent murders then I will address this concern in the next sub-section of this chapter (titled 'Heavily stigmatic offences and public understanding').

[24] Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn, Cambridge University Press 2014) 45.

[25] ibid.

instance, one may find it easier to argue that one's mens rea was not serious, callous or even heinous in nature if the circumstances allow. This may also aid in avoiding a criminal law that is overly punitive and systemically unjust.

Furthermore, emotive responses can be both apt and rational as responses to wrongdoing. Specifically, Amia Srinivasan argues that anger or outrage may be not only rational, but is of epistemic value in clarifying and focusing public attention on injustice and horror.[26] The rationality and epistemic value of emotive responses is possible due to its specific relationship to moral standards. Apt emotive responses are sensitive to the violation of a normative standard or moral violation.[27] In the case of serious, callous or possibly even 'heinous' recklessness, the emotive response embodied by the adjectives for recklessness is aimed at identifying and responding to the normative standard that one ought not to engage in unjustified risk-taking that is serious, callous or heinous with respect to someone's life. These adjectives may not clarify law in some technical sense that lawyers can firmly pin down, but may instead be fruitfully clarifying to ordinary citizens that the law is not just concerned with any kind of recklessness, but recklessness of a weighty degree and kind.

It is insufficient, therefore, to simply argue that the term 'wicked' or equivalent modern updates (serious, callous, heinous) are emotive. Claire McDiarmid argues that this search for certainty presupposes that other words such as 'recklessness' or 'consent' have a plain meaning which is unchanging and universally understood.[28] Given that this is not necessarily the case, one

[26] Amia Srinivasan, 'The Aptness of Anger' (2018) 26 Journal of Political Philosophy 123, 132 and 141. For a sound account of the rationality and aptness of crimes we can describe as 'horrific', see John Stanton-Ife, 'Horrific Crime' in RA Duff and others (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010) 138, especially 140-149.
[27] ibid 128.
[28] Claire McDiarmid, '"Something Wicked This Way Comes": The Mens Rea of Murder in Scots Law' 2012 Juridical Review 283, 289–290.

must at least accept that 'wicked', or any adjective used to replace it need not have an unambiguous meaning for it to be sufficiently clear.[29]

Additionally, McDiarmid argues that there is symbolic and expressive value to using non-technical, emotive terms such as wicked.[30] Although she does not elaborate, likely this is an aid in the censuring and communicative aspect of punishment that appropriately condemns the nature and degree of the conduct in question. Stripping the law to be purely clinical risks doing without this important function of punishment. Thus, behind the many claims against the use of the word 'wicked' it may just be that the strongest reason anchored in concerns about fair labelling are that the word is anachronistic and not necessarily because it is too emotive, moralistic or vague. Therefore, addressing fair labelling concerns need not mean stripping down an entire area of law to be exactly precise for purposes of aligning public perception and the law despite the limits public perception sets. Instead, it requires reasonable alignment with public perception that can still make the law intelligible and avoid unreasonable ambiguity. It seems then that at least in the case of Scots law, the anachronistic objection is the most compelling objection to the use of the word 'wicked'.

b. Heavily stigmatic offence names and public understanding

The second kind of 'mismatch' between an offence and the public's understanding of its culpability and blameworthiness is present where the offence name itself (rather than an adjective in front of it) has such a high degree of stigma misleads the public into thinking that only intention (usually the most serious form of mens rea) can qualify as the mens rea element for the offence. Sometimes the offence can be so stigmatically powerful that juries may be unwilling to convict because they

[29] ibid 290.
[30] ibid. See also Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49 Monist 397.

assume that it must be an especially heinous crime that only intention can qualify.[31] If this is what critics of the word 'wicked' in relation to Scots mens rea requirements for homicide are driving at as being too 'moralistic' then there is some merit to this. However, an important difference between that previous discussion and what follows below is that in Scots law the word 'wicked' is used in tandem with the specific mens rea state concerned ('wicked recklessness' etc), whereas the issue below is the name of the overall offence of murder or rape (rather than the mens rea element of wicked recklessness) itself creating false mens rea impressions. Therefore, the 'moralistic' objection is not quite the same as it was previously.

Importantly, even if the moralistic objection was similar, for scholars such as Tadros, one would always use the expressive replacement for the word 'wicked' (his preferred term being 'heinous') in tandem with a description of the mental state.[32] Presumably, this tandem use of the adjective (heinous) and the specific kind of mens rea is to avoid confusion as to what the mens rea requirements for the offence is. Nonetheless, one can perhaps argue that the word 'murder' itself is as stigmatic as the word 'rape' and creates similar problems. Therefore, in exploring the problem of the stigmatic aspects of rape below, I will also be addressing those who are concerned that murder has the same stigmatic baggage.

In answering this stigmatic concern leading to public misunderstanding, I will consider Canadian reforms to their sex crimes regime, specifically the crime of 'rape'. The public may find that the stigma attached to a crime such as rape is so powerful that it must indeed be only the clearest cases of intention that qualify to commit the crime and not instances of recklessness towards establishing consent.[33] This assumption often leads to under-reporting instances of sexual

[31] I accept that this could be true of murder, but rape is an easier example to discuss due to the example of such reforms having already been attempted in Canada. What I say below may very well also apply to murder and ought to then be considered when reforming homicide law too.
[32] Tadros (n 18) 205-206.
[33] Gillean Chase, 'An Analysis of the New Sexual-Assault Laws' [1983] Canadian Woman Studies 53. It may be possible that this was also affected my mistaken notions that rape requires force be used or that marriage qualifies as consent, see *R v R* [1991] UKHL 12.

assault to police.[34] Further, the public may have a different understanding of the reasons why rape is morally wrong. For instance the public may assume rape is exclusively a crime of sex and not aggression or abuse of power as well.[35] Thus, the Canadian Parliament amended the law to create a single offence of 'sexual assault' with three sub-categories, which mirror the non-sexual, non-fatal offences against the person found in the Criminal Code.[36]

Removing the word 'rape' arguably takes the stigmatic sting out of the label and allows jurors to focus on establishing the culpability of the offender using both recklessness and intention.[37] It also does not connote necessary violence or 'depravity' as an element of the offence, which jurors may think is necessary for a stigmatically powerful offence name such as 'rape'. There is also evidence to suggest that such programs to educate the public, both by the state and by civil society organisations, are successful in educating the public about such reforms and altering attitudes towards sexual assault.[38] Roberts, Gossman and Gebotys remark on the success of rape reform in Canada in changing public perceptions of sexual assault as follows:

> 'Two factors seemed to have played an important role. First, the intensity of the media campaign launched by the federal government in 1983 to educate the public may be responsible … A second explanation may lie in the social and media ethos relating to sexual aggression in Canada. Since the early 1980s, there has been a dramatic increase in public awareness of crimes of violence against women. Advocacy groups are in large part responsible; they have placed sexual assault firmly on

[34] Julian V Roberts and Robert J Gebotys, 'Reforming Rape Laws' (1992) 16 Law and Human Behavior 555, 556–557.
[35] Julian V Roberts, Michelle G Grossman and Robert J Gebotys, 'Rape Reform in Canada: Public Knowledge and Opinion' (1996) 11 Journal of Family Violence 133, 134.
[36] Sexual assault simpliciter (Criminal Code, s. 271), sexual assault causing bodily harm (Criminal Code, s. 272) and aggravated sexual assault (Criminal Code, s. 273).
[37] England and Wales thought it was vital to retain the word 'rape' in order to emphasise the especially 'personal' violation of penetration by a penis with its attendant risk of STD infection or pregnancy, see Home Office Report 'Setting the Boundaries: Reforming the Law of Sex offences' Volume I (2000) ('Home Office: Setting the Boundaries') par 2.8.4. and section 1 of the Sexual Offences Act 2003. In the absence of the kind of confusion that Canada was faced with, it is perfectly legitimate that the emotive and expressive value of the term may be retained. My objection is not to the word in the abstract, but only when it leads to a confusion about mens rea requirements.
[38] Roberts, Grossman and Gebotys (n 35) 141–142. Importantly, the results were mixed and subdued concerning the use of the actual label of 'rape' whereas the substance of the reforms concerning culpability and degrees of seriousness was much more successful, see ibid 149.

> the agenda of the news media in this country. The result was intense coverage of and commentary upon the 1983 reform legislation.'[39]

What is noteworthy is that it is not just the state simply changing the law of rape or sexual assault, but it's making a concerted effort to publicise and inform people about these reforms.[40] Thus, if the state is aiming to alter public attitudes concerning the allocation of blame of an offence and correct one of the kinds of mismatches between an offence and the mens rea requirements, there must be a concerted effort by the state to inform the public well and beyond simply amending statutes. The state must understand the exercise as being truly communicative and take the effort to explain its reasons for reforming the law both in the legislation and in a broader campaign to educate the public.

Another important lesson from the Canadian experience is the role of civil society in calling for reforms and in educating the public and assessing the effectiveness of reforms.[41] These complimentary roles in communication between the state and civil society are vital to achieving the paradigmatic case of blame, which is communicative blame as previously argued.

However, nothing I have said above calls for the abolition of the word 'rape' as a general rule absent the context of a public that is misled by the moralistic baggage of the word into thinking that only purposeful coercion of consent (denying knowledge or recklessness) or only physical violence is a prerequisite for a conviction. Similar misconceptions may exist in the case of murder where one may also assume that murder is only purposeful action or some other false belief about the mens rea requirements for the crime. This moralistic baggage itself must lead to the misunderstanding of the mens rea requirements such that it risks the misallocation of blame to notional offenders. One cannot lose sight of the fact that although all public perception sets outer

[39] Roberts, Grossman and Gebotys (n 35) 141–142.
[40] This is not to suggest that the media may not use terms such as 'rape' but that the information campaign may alter what one understands the term to mean and may even use the term less.
[41] Roberts and Gebotys (n 34) 556.

limits to how the criminal law may design a criminal code, the effort to alter public attitudes about an offence must only be engaged in when there is sufficient cause for concern that a particular offence name is leading to fundamental confusion and grave injustice as to how blame is allocated. There is thus a basic threshold for a narrower version of the moralistic objection surrounding offence names – confusion as to the material offence requirements. This essentially means an instance where the offence name misleads people (especially those who will serve on juries) as to the proper offence differentiation in terms of the offence requirements.

So far, I have accepted two arguments justifying legal reform on the basis of public misconceptions. First, cases where the law is anachronistic in its terminology leading to misconceptions about mens rea requirements evinced by the term 'wicked' in Scots law. Here, I expressed reservations about the other usual kinds of objections (vagueness, emotiveness and moralistic meaning referring to moral terminology at all in offence elements). Second, I argued that where the offence name is so stigmatic and full of moralistic baggage it leads to misunderstandings about requisite mens rea requirements this is reason to alter the name of the offence. I turn now to a slightly different problem. This is the problem of someone who had an honest, but unreasonable belief that their sexual partner consented to the sexual act. The question of reasonable belief touches on issues related both to public understanding and to 'objective' reasonableness being a problem of liability based on negligence (despite the subjective quality of the individual actually having to hold the belief). It is worth exploring this particular example because it highlights the role of public understanding of a crime where the law itself invites

communal standards to be applied by juries in determining the reasonableness of the belief an accused possessed.

c. Public understanding and reasonable belief

Crisply described, there are broadly two camps concerning what the appropriate defence of mistaken belief in consent would be. One position is that the legal standard should simply be an honest belief where the test is purely 'subjectivist' and does not apply 'external' standards of reasonableness.[42] This was broadly the position in *Director of Public Prosecutions v Morgan*[43] and *Jamieson v HM Advocate*.[44] The other position is that due to the potential for abuse of this defence, such an honest belief must be reasonable and cannot be purely subjective. This is the position later adopted by section 1 (1) –(2) of the Sexual Offences Act 2003 (in England and Wales)[45] and section 1 (1) of the Sexual Offences (Scotland) Act 2009[46]. The reforms related to the defence of reasonable belief raise important questions about the place of negligence in rape law. Specifically, whether negligence ought to play its part as a defence as it currently does in English law or if there ought to be a separate offence of 'negligent rape'. I argue in favour of a separate offence of negligent rape because of challenges related to fair labelling (especially avoiding public confusion

[42] Home Office: Setting the Boundaries (n 37) par 2.13.6.
[43] [1976] AC 182.
[44] 1994 JC 88.
[45] The provision reads:
(1) A person (A) commits an offence if—
(a)he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
(b)B does not consent to the penetration, and
(c)A does not reasonably believe that B consents.
(2)Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
[46] The provision reads:
(1)If a person ("A"), with A's penis—
(a)without another person ("B") consenting, and
(b)without any reasonable belief that B consents, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.

about *mens rea* requirements for rape) and false public understandings concerning rape myths and other beliefs about rape rooted in erroneous social morality.

Due to unique features of negligence as a lack of good will – it is preferable there be a separate offence of 'negligent rape' where rape is not too stigmatic an offence name as in the Canadian example, or 'negligent sexual assault' in the alternative.[47] Recall that one can be blamed for the lack of good will revealed through one's inattentiveness to the interests of another and subsequent faulty or negligent self-governance of one's capacities.[48] Thus, having negligence as valid mens rea for the criminal law is permissible. Nevertheless, one must in principle admit that all things being equal, negligence is not as blameworthy a state of mind as purpose, knowledge or recklessness. However, this is not the end of the inquiry. The importance of the interest in sexual autonomy may weigh in favour of including negligence liability as part of the crime of rape without the need for a separate offence. The approach defended in this thesis so far yields no obvious answer as to whether negligent rape ought to be a separate offence.

However, the main objection concerning negligent rape being a separate offence seems to be that it would be seen as a 'lesser' offence that feeds into all sorts of odious rape myths.[49] Nonetheless, it should not be assumed that simply because negligence is a separate offence, it is necessarily a lesser offence. It is possible to require similar sentences for negligent rape if the circumstances allow. Further, negligence need not be so narrow. In fact, the flexibility of negligence may very well be in its favour. It's context-dependent nature may be capable of capturing *both* serious (as in particularly gross or serious negligence) and less serious (but still serious enough to warrant punishment) forms of infringing sexual autonomy by failing to reasonably ascertain consent. This is because the assessment of what we as a community may

[47] See Chapter 4, Section II (d) of this thesis.
[48] Erasmus Mayr, 'Unwitting Omissions, Mistakes and Responsibility' in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Agency, Negligence and Responsibility* (Cambridge University Press 2021) 49–50.
[49] Irish Law Commission 'Knowledge or Belief Concerning Consent in Rape Law' (2019) 91.

reasonably demand of persons in certain situations in order to hold them negligent is not simply a metaphysical question.[50] It is a *political* question related to the desirability, attractiveness, efficiency and fairness of (more generally the reasonableness) of what we may demand of others in such circumstances.[51] Including negligence in the same criminal offence as other forms of mens rea that are harder to potentially prove unfortunately risks offering juries an 'all or nothing' brinkmanship for determining guilt where more nuance in the allocation of blame is appropriate. When faced with this choice a jury may indeed err on the side of caution and acquit when it ought not do so.

Furthermore, the risks of public confusion about negligence as compared to other mens rea offences is high. The political nature of determining if someone was negligent already gives great leeway for attitudes anchored in incorrect *social* morality (rather than its critical dimension) to muddy the waters. This is especially true concerning the prevalence of rape myths that 'no' really means 'yes' or that women like to be overborne by a dominant male etc.[52] Consider further that the subjectivist error of thinking criminal liability applies only to positively willed acts is one that may be more common as a matter of social morality than expected.[53] Thus, it may very well aid fair labelling and the concern for proper blame allocation if the unique qualities of negligence are contained in a separate offence. Interestingly, in Sweden where an offence of negligent rape was introduced in 2018,[54] there is some evidence showing that the new rape regime actually helps dispel rape myths since it focuses on the reasonableness of the accused's actions in the circumstances, shifting the focus away from the victim's behaviour.[55] All this at least makes one cautiously

[50] John Gardner, 'The Negligence Standard: Political Not Metaphysical' (2017) 80 Modern Law Review 1, 20.
[51] Ibid.
[52] Home Office: Setting the Boundaries (n 37) par 2.13.7.
[53] There is some evidence that rape convictions in England and Wales have not significantly increased since the reforms, see Wendy Larcombe and others, "'I Think It's Rape and I Think He Would Be Found Not Guilty": Focus Group Perceptions of (Un)Reasonable Belief in Consent in Rape Law' (2016) 25 Social & Legal Studies 611, 614.
[54] Section 1, Chapter 6 of the Swedish Criminal Code (1965).
[55] Lisa Wallin and others, 'Capricious Credibility – Legal Assessments of Voluntariness in Swedish Negligent Rape Judgements' (2021) 22 Nordic Journal of Criminology 3, 16–17.

optimistic that a separate negligence offence for rape may in fact aid in combatting rape myths and avoiding unjust blame allocation.

d. The costs of changing public understanding

Nevertheless, significant criminal justice reform can be costly.[56] One possible point of objection to any of the reforms proposed in this thesis is that public education is demanding in terms of resources and 'message discipline', as the Canadian example demonstrates.[57] Further, success in public education concerning criminal offences is not guaranteed to be hugely successful. One can improve public sensibility around the seriousness or blameworthiness of an offence, but not necessarily have successful uptake by the public of the nuances of reforms.

However, one wonders whether much of this scepticism of reform is mostly a question of social change requiring time before it bears fruit. The important consideration here is that reforming stigmatic offences is especially hard precisely because there will be engrained attitudes and assumptions about the criminal law that the public will be attached to. However, there has been successful attitude changes on criminal offences such as domestic violence,[58] child sex abuse,[59] and hate crimes[60] that also took time to bear fruit. Thus, it may very well be the case that the Canadian style reforms may properly correct public perceptions over time.

[56] Leslie Green, 'Should Law Improve Morality?' (2013) 7 Criminal Law and Philosophy 473, 489.
[57] Roberts, Grossman and Gebotys (n 35) 149.
[58] Deborah M Weissman, 'The Personal Is Political - and Economic: Rethinking Domestic Violence' (2007) Brigham Young University Law Review 387, 393–403.
[59] Katie Wright and Alasdair Henry, 'Historical Institutional Child Abuse: Activist Mobilisation and Public Inquiries' (2019) 13 Sociology Compass 6–9.
[60] Valerie Jenness and Ryken Grattet, *Making Hate A Crime: From Social Movement to Law Enforcement* (Russell Sage Foundation 2001) 42. See also Nicola O'Leary and Simon Green, 'From Invisible to Conspicuous: The Rise of Victim Activism in the Politics of Justice' in Jacki Tapley and Pamela Davies (eds), *Victimology: Research, Policy and Activism* (Springer International Publishing 2020) 159–183. For an account of the struggle to change attitudes in the Stephen Lawrence Inquiry see Simon Cottle, 'Mediatized Public Crisis and Civil Society Renewal: The Racist Murder of Stephen Lawrence' (2005) 1 Crime, Media, Culture 49, 59–60.

Returning to other costs to changing public understanding, Leslie Green further argues that law can have an unfortunate 'legalistic imprint' on social morality.[61] This is because it is undesirable for people to think, for instance, that all promises are contracts, or that their spousal obligations are only ones that the law enforces.[62] There is the danger that people take minimally lawful behaviour as establishing a social norm.[63] This is especially dangerous in the realm of sexual ethics where the law would give only minimal ethical guidance proscribing the most serious cases through the criminal law, leaving out entire areas of sexual ethics (such as sexual harassment or pornography) unregulated (or minimally regulated) by the criminal law.[64] Thus, before adopting a process of criminal law reform aimed at improving public understanding, one must consider if current public understanding, although likely imperfect, may not still be morally adequate.[65] In other words, one must guard against making the perfect the enemy of the good. Public understanding can still at times have sufficient clarity that is close enough to critical morality that the law's intervention may do more harm than good in increasing public understanding.[66]

Fortunately, my approach largely respects this injunction. It is only if social morality is particularly stigmatic or anachronistic such that it leads to a fundamental misunderstanding or misconception with the correct mens rea requirements that one needs to intervene. Further, since negligence would always be inevitably informed by social morality in jury trials (assuming juries cannot align precisely with critical morality) I do not fail to appreciate the value of social morality.

---

[61] Green (n 56) 489.
[62] ibid.
[63] ibid.
[64] Sexual harassment is regulated by areas such as labour law, but this is still only in the workplace. One would not want the rules of sexual harassment in the workplace, which also set only minimum standards for professional workplace behaviour, to be taken by the public to exhaust the realm of sexual ethics for similar reasons as apply to the criminal law.
[65] Green (n 56) 489.
[66] John Gardner 'Rationality and the rule of law in offences against the person' in his *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) 45. The flexibility that morality grants in interpretation is also a possible consideration to prefer moral clarity, see the discussion of the trade-off between flexibility and clarity in Gerald Gordon (James Chalmers and Fiona Leverick (eds)), *The Criminal Law of Scotland: Volume II* (W Green 4th edn, 2017) par 30.21.

However due to the prevalence of rape myths and other misunderstanding about rape, it can hardly be said that social morality is likely to be adequate as is.

e. Proposed Amendments

It may now be best to give a draft example of an acceptable offence for murder or rape as discussed up to this point. Given my various qualifications and caveats, this will depend on the existence of priors such as actual misalignment existing between public perception and actual mens rea requirements. Below, I shall assume that murder is not so stigmatic that the offence name must be replaced due to the moralistic objection discussed above. I also include culpable homicide for the sake of completeness:[67]

> Version A: murder occurs where A kills someone unlawfully and unjustifiably with –
>
> a) purpose, knowledge or serious recklessness
>
> Culpable homicide (in Scots law) occurs where A kills someone unlawfully and unjustifiably with
>
> a) recklessness or negligence
>
> Version B (for those who prefer a more expressive adjective): murder occurs where A kills someone unlawfully with –
>
> a) purpose, knowledge or callous recklessness[68]
>
> Culpable homicide (in Scots law) occurs where A kills someone unlawfully with –
>
> a) recklessness or negligence

Alternatively, if 'murder' is too stigmatic the above remains the same except the name of the offence can be the 'purposeful, knowing and seriously (or callously) reckless killing of another

[67] I am aware that culpable homicide is simply regarded as 'not murder' (see *Drury* (n 11) at 583 par 13) and so prefer to rather expressly state the only other available degree and forms of mens rea available that would not qualify as murder. I do not necessarily take a hard position on this since according to the Scottish Law Commission most practitioners interviewed find culpable homicide is 'working well in practice', see Scottish Law Commission (n 10) par 5.13. However, one may worry that such an overbroad offence may fail to give relevant information about the offence in a manner that violates fair labelling, see James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217, 223.

[68] Recall that I am happy to use Tadros' (n 18) term 'heinous' provided that it is not anachronistic. My only objection to 'wickedness' is the confusion caused by its outdatedness where it will give the impression that the act must be especially evil.

human being' with a separate offence for 'negligent killings'. For similar reasons given in the section on negligent rape, I would keep negligence separate precisely to avoid confusion about *mens rea* forms.

As for rape, it would take much the same structure as the Sexual Offences Act 2003 except there will be a separate offence of 'negligent rape' (provided that rape is not too stigmatic as per the Canadian example and so would simply be called sexual assault). It would read as follows:

(1) A person (A) commits rape if—
   a) he purposefully or recklessly penetrates the vagina, anus or mouth of another person (B) with his penis,
   b) B does not consent to the penetration, and
   c) A does not reasonably believe that B consents to the penetration.

(2) A person (A) commits 'negligent rape' if
   a) A intentionally or recklessly penetrates the vagina, anus or mouth of another person (B) with his penis where B did not consent to the penetration, and
   b) A does not reasonably believe that B consents to the penetration, where reasonableness is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

It has been argued that offence names must remain within the boundaries of common understanding, even if they are necessarily more precise than it. The final section of this chapter confronts a challenge to the consequences of this argument: will it not result in the creation of an extremely large number of criminal offences, threatening the law's ability to guide conduct and allowing prosecutors to abuse overlap?

III. Offence Inflation and the Rule of Law

Andrew Cornford has drawn attention to what he terms the 'inflationary logic' of fair labelling. By this, he means that fair labelling, if followed to its apparent logical conclusion, leads to absurd

levels of offence differentiation.[69] A similar objection could be made to the account defended here, and so Cornford's work must be explored further.

Cornford concedes that this inflationary logic is not *entailed* by a commitment to fair labelling.[70] Instead, he argues that practically it possesses this logic because it is nearly always invoked in favour of new offences or in keeping present complexity in offences.[71] This is because Cornford views fair labelling as concerned with justly allocating blame, and such allocations are always alleged to be capable of more precision.[72] The danger of this inflationary logic is what leads Cornford to argue that fair labelling ought not to be the sole or main principle in offence differentiation.[73] He argues it is one principle among many to consider when deciding how to structure offences, because:

> 'First, the demands of fair labelling will tend to conflict with rule-of-law values. Adherence to the principle, we have seen, will tend to produce a large and complex array of narrowly defined offences. This result threatens ideals of clarity and intelligibility in the law. Even advocates of the principle, in its presumptive form, acknowledge that this concern is valid: they worry that complexity risks inefficient decision-making by criminal justice actors. They rarely acknowledge, by contrast, the related risks of inconsistency in that decision-making and consequent unpredictability. From a rule-of-law perspective, these are arguably the greater risks: they limit the extent to which the law both governs official conduct and guides that of citizens.'[74]

When fair labelling is not offset by other principles, Cornford suggests, it leads to the unsound creation of new offences that no reasonable advocate of the principle can support.[75]

---

[69] Cornford (n 3) 987–988.
[70] ibid 987.
[71] ibid.
[72] ibid 997-999.
[73] ibid 986.
[74] ibid 1003-1004.
[75] Cornford describes this view as follows: 'Every possible configuration of these factors would, as an ideal matter, be reflected in a distinct offence. We should thus create offences of, say, intentional and premeditated breaking of a vulnerable victim's nose, motivated by revenge; or of recklessly creating a low risk of destroying property worth under

Advocates of this view conclude that this 'inflationary logic' must be constrained by other competing principles, which are *external* to the concept of fair labelling and exist in tension with it. Cornford suggests that the logic of fair labelling pulls in one direction, whilst the logic of the rule of law pulls in another. Since both justice and the rule of law are moral values, this point of departure gives us some insight into how Cornford sees the practical reasoning involved in deciding whether to arrange offences in a particular way. One begins with this tension as a likely default and aims to resolve it by weighing the costs and benefits of reform. The costs in particular of fair labelling are brought to the fore since complexity usually threatens clarity and intelligibility.

Cornford's view is that accounts of fair labelling like that perhaps given in this thesis thus present *part* of the picture of offence differentiation, but cannot constitute the *whole* of it. It will be argued here that this view misunderstands the relationship between fair labelling and other principles such as the rule of law and the problem of overlapping offences.

a. A reminder of why fair labelling urges offence creation

One reason that advocates of fair labelling commonly argue in favour of *creating* offences is the belief that the current law is unjust. That is, there is a gap the law may rightly fill to justly allocate blame and status. Fair labelling concerns do not, on this view, point towards the creation of more offences for their own sake. After all, simplicity in this context would also not be good for its own sake. One may imagine that a criminal code with only a few or a single offence would indeed be simple, but – as argued above – not necessarily just.[76] The allegedly inflationary logic of fair labelling is more indicative of its advocate's belief that there is much in the present criminal law of

£100, mitigated by mental disorder. This result is, I assume, absurd: no reasonable law reformer endorses or would endorse it. Yet it seems inevitable if, in decisions about offence differentiation, our duties to blame justly exclude or typically override any countervailing concerns.' (ibid 1001.)

[76] See Chapter 4, Section *II* (c) (iv) of this thesis.

various jurisdictions that is unjust. As Glanville Williams pointed out, it is difficult to argue for *un*fair labelling.[77]

Note, however, that fair labelling need not be 'inflationary' at all. The concept might be deployed in aid of simplifying an area of criminal law where there is a multiplicity of offences. On an appropriate understanding of fair labelling, such as that developed in this thesis, fair labelling applies to remedy unjust allocations of blame. It acts as the trigger to consider reforms to offence taxonomy where there is an injustice. Should *reducing* the number of crimes available best achieve this, then fair labelling would not only encourage simplifying such a taxonomy of offences, but require it.

Further, even if one accepts achieving greater predictability as sufficient reason to reform the taxonomy of offences in a criminal code, fair labelling advocates may argue that this is subject to the caveat that the new simplification does not unjustly allocate blame.

With this summary of the apparent 'inflationary' potential of fair labelling in hand, it will be argued that Cornford is wrong to view fair labelling as existing in *competition* with other values. Instead, those values are *internal* to the practice of fair labelling.

b. <u>The relationship between fair labelling and the rule of law</u>

There are reasonable doubts about Cornford's account of fair labelling. Advocates of fair labelling could understand the archetypical or ideal form of fair labelling as an instantiation of the special relationship that law has with justice, and the rule of law as a moral ideal.

As Nigel Simmonds argues, 'while justice and legality are distinct and can compete with each other, legality can only fully be achieved where justice is achieved also.'[78] The argument here

[77] Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 Cambridge Law Journal 85.
[78] Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press 2008) 198.

is that only when the law is just will legal interpretations that require weighing values be a smooth and natural *fit* for the law.[79] Just law is also plausibly easier for judges to apply and citizens to follow than unjust law, especially in the realm of the incentive structure of punishment.[80] That is, if the law is just in its application of punishment (which, as argued above, *requires fair labelling*), this plausibly tends to secure the compliance of citizens and allow them to predict punishment even when they are unaware of the law's content since they would rely on the law generally tracking critical morality.[81]

Simmonds also reminds us that the reverse also holds for the relationship between the rule of law and justice: justice cannot be fully realized without legality.[82] This is because a judicial ruling is just only if it can be shown that, say, a certain punishment is not arbitrary.[83] In other words, it must flow from a general consideration that applies impartially to everyone.[84] However, principles of justice contain a degree of indeterminacy that risks arbitrariness and so may lead to possible injustice in the application of laws to concrete disputes.[85] This risk can be overcome through rules of law that implement some specific scheme of justice.[86] It should not surprise us then that fair labelling as a principle of justice aims to create more specific schemes of just allocation since justice has an indeterminacy that it aims to rectify through the specificity of law. Courts and legislatures when constructing criminal offences act as allocative institutions distributing punishment.[87] These legal institutions will rely on the virtue of law to attain the virtue of justice.

---

[79] ibid.

[80] ibid 89–96. Matt Kramer disputes this intuition and argues the rule of law is 'morally neutral' and does not rely on justice in any clear way, see Matthew H Kramer, 'On the Moral Status of the Rule of Law' (2004) 63 Cambridge Law Journal 65, 66–77. I need not make the strong claim that the rule of law *needs* justice, but only the claim that just law is *likely* to aid and support the rule of law.

[81] John Gardner makes a similar point, although he claims one can rely on social and not critical morality for such assumptions, see John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' in *Offences and Defences* (Oxford University Press 2007) 83–93.

[82] Simmonds (n 78) 198.

[83] ibid.

[84] ibid.

[85] ibid.

[86] ibid.

[87] John Gardner, 'The Virtue of Justice and the Character of Law' in *Law as a Leap of Faith* (Oxford University Press 2012) 268.

The point here is that fair labelling *requires* adherence with the rule of law and justice. Without such adherence, one does not have fair labelling.[88] It is, on this view, not the case that fair labelling is limited externally through a balancing exercise in tension with rule of law values. This explains the optimism of fair labelling advocates who account for the rule of law, but do not then think this tends to render fair labelling unfeasible.

This view allows us to appreciate that fair labelling may go wrong where the indeterminacy of justice is not properly ordered by the rule of law. Justice has a structure that requires both individual justice (allocating the amount of blame that a particular offender deserves) but also of justice at the level of general categories (treating like cases alike). The cause of the inflationary logic for fair labelling is likely motivated by the attempt to individualise and tailor offences such that they cater for further aspects determining blame beyond existing categories. However, appreciating the mutually supportive relationship between justice and the rule of law reveals that a better characterisation of the cause of fair labelling's inflationary logic may be the vice of legalism (the opposite of the virtue of the rule of law) which defeats the ends of rule of law values such as predictability and non-arbitrariness through proliferated offences that confuse and undermine the action guiding ability of criminal proscriptions.

It can be the case, then, that fair labelling can remain the *main* principle of offence differentiation. By this I mean that fair labelling is best understood as being the *rationale* for offence differentiation. In legal interpretation, a rationale posits a value that justifies a legal practice requiring what it requires.[89] In this case, fair labelling is such an end of offence differentiation. That is, the very point of differentiating between offences once the decision to criminalise certain

[88] To be clear, this does not mean equal emphasis in every context. However, it does mean that one value cannot be sacrificed for another and be called fair labelling.

[89] N Stravapolous 'Legal Interpretivism' Stanford Encyclopaedia of Philosophy (2003) available at https://stanford.library.sydney.edu.au/archives/fall2008/entries/law-interpretivist/. In a later edition, Stravapolous substitutes the word 'rationale' for 'ground', but this makes no conceptual difference and seems to be mostly stylistic. Therefore, I will keep the earlier phrase although 'ground' works just as well for my purposes. For the later edition of this discussion, see N Stravapolous 'Legal Interpretivism' Stanford Encyclopaedia of Philosophy (2021) available at https://plato.stanford.edu/entries/law-interpretivist/#:~:text=1.

conduct has been taken is to properly allocate blame and communicate these allocations in service of the common good and the moral educative functions identified in earlier chapters.[90] This does not mean that other principles do not inform the general exercise of offence differentiation, but that the rationale is not only what justifies the practice, but also grants the exercise coherence, connecting these other values and principles into a single intelligible practice.

To place my disagreement with Cornford in sharp relief, he believes that we balance predictability, justice and other values in offence differentiation. My argument, however, is that we rationalise all of these values under the general aim of just allocation of blame. Just allocation then not only decides where the 'balance' falls, but establishes the very point of the exercise in the first place. If reform were to make a criminal code simpler, yet unfair, it should not be pursued. If reform of a criminal code's labels were to make it more just yet introduce complexity in the form of a further offence being created then it ought to be done. This does not mean that the injustice resulting from unfair labelling cannot be addressed through sentencing or some other manner such as creating excuses or defences. It only means that in the realm of debating offence differentiation, the just allocation of blame is the overarching purpose that makes sense of the various considerations that a legal system must apply.

The assumption is that legal rules (in our case criminal offence labels) 'provide the bridge between general considerations of justice and the particular decision of the case'.[91] This is why it is better to call fair labelling a *legal* principle of justice. It is only properly realised when it leverages the virtue of the rule of law.

Indeed, this may explain why advocates of fair labelling have intuitively thought that fair labelling must have something to do with communicating blame.[92] The ideal is one that most effectively communicates such blame to legal subjects. This communication of blame helps to

[90] See Chapter 3 and 4 of this thesis.
[91] Simmonds (n 78) 198.
[92] Chalmers & Leverick (n 67) 226.

justly allocate blame by providing clarity in the distributive scheme of punishment – who gets how much blame and to what degree, and to what extent their status is amended. Convictions altering a citizen's legal status could indeed happen in secret with no great clarity or consistency. However, this allocation of blame would not only violate the rule of law, but would likely also be unjust.[93] And so to be a just distribution, it requires that such distribution must be communicated properly and clearly to offenders, legal officials and the community (depending on the circumstances).

None of this is to deny the concern underlying Cornford's overall point – fair labelling advocates often underestimate the potential costs of pursuing the principle. There is too often casual handwaving away of other values and concerns about the effects of more offences being created. However, it is better to think of the problem as one of the dangers of *legalism*.[94] In the next subsection, it will be contended that legalism is distinct from general rule of law concerns, avoiding Cornford's critique.

c. Legalism

Legalism in the *overvaluation* of legality, at the expense of other virtues. It leads to the 'alienation' of law from life.[95] This may result in legal rules that risk becoming remote, technical, and arcane.[96]

Rather than warning about the potential for fair labelling to defeat the ends of the rule of law, Cornford would do better to warn advocates of fair labelling away from falling into a kind of legalism that creates new offences at a rate and in such a manner as to render them remote, overly technical and arcane, undermining their capacity to secure the compliance of citizens clearly and predictably. In other words, Cornford relies on a version of the 'law professor's dream' of an ideal

[93] See Chapter 1, Section III of this thesis.
[94] Leslie Green, 'Positivism And The Inseparability Of Law And Morals' (2008) 83 New York University Law Review 1035, 1057.
[95] ibid 1058.
[96] ibid.

scheme of fair labelling becoming the 'citizen's nightmare' of onerous, confusing criminal offences that one cannot reasonably obey.[97] Elaborate and obsessive minor distinctions between offences, which will defeat the action-guiding role of the criminal law, is not fair labelling properly understood. Fair labelling remains a principle of justice and so will require the degree of indeterminacy that reasonably allows a legal rule to avoid confusing and onerous pedantry. It is justice, in short, which prevents the vice of legalism.

This is why seeing the mutually constitutive relationship between fair labelling and the rule of law's values matters. It helps one grasp how the excesses of fair labelling can be avoided on its internal logic. Indeed, fair labelling may require creating more offences, but these need not collapse a criminal code into legalism. Consider also that legalism would likely defeat or undermine the rationale of fair labelling and the broader rationale of offence differentiation. A remote, technical and arcane scheme of differentiating offences would only exacerbate the potential injustices fair labelling aims to address. Just allocation of blame is unlikely to occur when applying or interpreting such a scheme, least of all ordinary citizens being able to follow such a scheme of criminal law.

Appreciating this can give us a sense of comfort that one can be optimistic about fair labelling being the main principle of offence differentiation, without being ambivalent or dismissive about how implementing the principle can go wrong in practice.

A good example of this is the debate between advocates of fair labelling in the realm of complicity or aiding and abetting principles in criminal law. In this context, we see the difference in approach between those who are committed to fair labelling but diverge as to whether its demands can be practically realised in the real world. The disagreement is demonstrative of how the two sides see the ideal of fair labelling being realised in practice and just how much 'complexity' fair labelling creates. It is an instructive example of the difference between those who may see fair

[97] Andrew Ashworth, *Principles of Criminal Law* (5 edn, Oxford University Press 2006) 90. See also Douglas Husak, 'Abetting a Crime' (2014) 33 Law and Philosophy 41, 64.

labelling as only one principle among many and are implicitly suspicious of the degree of its demands or consider them potentially unreasonable for some other reason, as opposed to those who see just allocation as the overarching rationale of offence differentiation and that as a point of departure, this enterprise can be done sensibly.

The main issue with complicity and the allocation of blame is that a wrongful act is 'attributed' from one person (P) to another (S), notwithstanding P still being liable in his own right for commission of the offence. On this basis, S is held 'responsible' for what P did.[98] Importantly, one is convicted of the offence of 'murder' and not, say, 'aiding and abetting a murder'. This presents challenges for fair labelling because in order to commit murder as an accomplice one must still possess the required mens rea of the offence and so properly allocate blame for their criminal conduct.[99] This is especially challenging where one convicts someone for the aid provided to another of the same offence as that other person (principal). The basis on which such blame is then allocated to offenders is critical.[100] Thus, the concern is that a criminal code that has accomplice liability as a principle or doctrine must reflect these distinctions and may find it impossible to do so.

On one side is the pessimistic view that forcing accomplice liability to comply with fair labelling concerns would impractically require several new offences be created that account for the various ways in which an accomplice may aid or abet the main perpetrator that could not be applied in 'the real world'.[101] For instance, one may aid someone by encouraging, promoting, planning, distracting others from noticing the perpetrator committing a crime etc. These various means of aiding, the argument goes, must then be reflected in law to comply with fair labelling. Husak argues that fair labelling in this area demands more detail about the manner and type of assistance

[98] Husak, 'Abetting a Crime' (n 97) 51.
[99] Ibid 43.
[100] Ibid 59-60. Husak argues that some scholars merely think that this basis is 'derivative' of the principal offender and cannot be sustained morally. I need not take a stance on the plausibility of any 'derivative' liability since I will be concerned below with the blameworthiness of the accomplice on their own terms.
[101] ibid 44.

rendered.[102] Because this is impractical, a second-best moral option must be found.[103] Husak's view embodies the objection to fair labelling based on potential hyper-inflationary effects. Complying with fair labelling could easily render a criminal code unwieldy through its demand for complexity. Husak states how such practical, real-world concerns ought to be balanced against fair labelling demands.[104] And so the law professor must wake from his dream for offence differentiation to be practical in any way.

i. Lessons from English law: an argument for cautious optimism

However, such pessimism is unwarranted. For purposes of just apportionment of blame, one ought to identify a sound basis for attributing responsibility in complicity. Some think this is a question of causality, hence the focus on the mode of aiding.[105] However, causation may only be a necessary, but insufficient basis to ground responsibility. The point here is that the nature of the wrongdoing involved must be identified and that one needs more than causation to ground such wrongdoing for purposes of holding some responsible for their complicitous conduct.[106] Proponents of fair labelling are interested in why aiding someone in the context of complicitous conduct is wrong and not merely that one caused such wrongs.

The beginnings of an answer may be to consider the difference between two kinds of participatory conduct that can be wrong for our purposes – co-perpetration where one joins together with someone else to commit a crime and secondary participation where one facilitates

[102] ibid 61.
[103] ibid 44.
[104] ibid.
[105] Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press 2010) 280–323. Husak admits he is sympathetic to this view, see Husak, 'Abetting a Crime' (n 97) 67.
[106] Antje du Bois-Pedain, 'Complicity' in Larry Alexander and Kimberly Kessler Ferzan (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Springer International Publishing 2019) 197. For an account of accomplice liability as merely a form of causal responsibility see John Gardner, 'Complicity and Causality' in John Gardner (ed), *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 70–71.

or instigates the commission of a crime.[107] In the former case the wrong we are concerned with is the joint commission of the crime as such, whereas the latter wrong is one person affecting the choices in a particular way.[108] In the first case, two or more parties act in concert regarding their own actions as contributing to a collective outcome and responding to what the others do in order to secure this outcome.[109] This is an example of teamwork where members act together for a common purpose.[110] The distinct reason why this particular kind of complicity is wrong as such may include increased risk of harm by group action, increasing its seriousness.[111] In the case of teamwork this may flow from the increased commitment to a cause that solidarity amongst members of the group engenders.[112]

The second case of complicity is trickier. The wrong must be grounded with a particular view about the impermissible influence that one person has on another's behaviour. One may see this as a composite wrong that lies partly in the influence that S may exert on P *and* partly in P's commission of the crime reflecting badly on S due to S's deliberate contribution and so is a kind of indirect attack by S on the victim's interests.[113] This indirect quality of the second part of the composite wrong has a purposive aspect since it is also intentional action.[114] Here, we see that the wrong of accessory liability is less a shared intention, but far more one of one person intentionally influencing another to attack the interests of the victim. The two main relevant manners of influencing someone may be as an instigator or mastermind and as a facilitator where the mastermind or instigator may be more blameworthy.

---

[107] ibid 198. Du Bois-Pedain identifies a further instance where one can act alongside someone where neither party affects the decisions of the other, but this would be a case of two separate actors who are unrelated for purposes of complicity.
[108] ibid.
[109] Christopher Kutz, 'The Philosophical Foundations of Complicity Law' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 157.
[110] John Gardner, 'Reasons for Teamwork' (2002) 8 Legal Theory 495.
[111] Kutz (n 109) 151; Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press) 452. The South African Constitutional Court justifies common purpose partially by this logic, see *Thebus and Another v S* 2003 (6) SA 505 (CC) at par 40.
[112] Gardner, 'Reasons for Teamwork' (n 107) 504.
[113] du Bois-Pedain (n 106) 200.
[114] ibid 201.

When it comes to the level of specificity and fair labelling, English law provides several useful examples of how these distinctions in philosophy may do work in criminal law itself. Let us begin with aiding and abetting. Specifically, section 8 of the Accessories and Abettors Act 1861 states as follows:

> 'Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.'

Ordinary accomplice liability thus requires that one aid, abet, counsel or procure the commission of a crime with the requisite mens rea being intention meaning purpose and knowledge.[115] This allows one to still allocate blame to an accomplice on the basis of their contribution to a criminal offence and their mens rea of either intention or knowledge about the crime committed. So far, this seems a sensible attempt to address accomplice liability and allocating blame appropriately by accounting for contribution of the accomplice and their requisite mens rea.

Courts had also previously recognised a controversial form of liability where the accomplice was allegedly 'parasitically' liable for further crimes committed by P beyond the scope of a common criminal purpose shared by S and P.[116] Importantly, for this kind of complicity, the accomplice need not have assisted or encouraged the further crime, but need only have foresight that it was a possible incident of the common purpose.[117] Therefore, this doctrine of parasitic liability expanded the culpable grounds of responsibility to include foreseeability and not just intention, raising fair labelling concerns.

---

[115] Findlay Stark, 'The Demise of "Parasitic Accessorial Liability": Substantive Judicial Law Reform, Not Common Law Housekeeping' (2016) 75 Cambridge Law Journal 550, 550–551. See also AP Simester, 'Accessory Liability and Common Unlawful Purposes' (2017) 133 Law Quarterly Review 73, 75.

[116] Matthew Dyson, 'Shorn-Off Complicity' (2016) 75 Cambridge Law Journal 196. See also *R v Chan Wing-Siu* [1985] A.C. 168 and *R v Powell* [1999] 1 A.C. 1. For arguments why one should not consider secondary parasitic liability as an issue flowing from section 8 but as a stand-alone principle developed and narrowed over time see Stark (n 115) 552–578.

[117] Dyson ibid 196.

However, fortunately this was remedied by the Supreme Court in *R v Jogee*.[118] Here the Court reasoned that S must directly and with intention physically assist or encourage every crime for which he is to be held liable.[119] By rejecting parasitic complicity, it is now the case that where S participates in crimes within a common purpose with P, S does not automatically assist or encourage other crimes that S foresees P might commit. Further, the fault element in the case to expand liability is intention to assist or encourage *each* of P's crimes.[120] Thus, the existence of a common purpose need not bleed into establishing some kind of secondary accomplice liability without the facts and circumstances establishing a separate 'composite wrong' committed where S now influences P to commit a crime as a main perpetrator.

On the other hand, consider the various provisions dealing with 'inchoate complicity'. These are: (i) intentionally doing an act capable of encouraging or assisting an offence;[121] (ii) encouraging or assisting an offence believing it will be committed;[122] and (iii) encouraging or assisting offences believing one or more of a range of offences will be committed.[123] As Ashworth (and later Horder) points out:

> 'Simplicity and clarity were not high on the draftsman's agenda… Substantively, there are concerns about the breadth or indeed the virtual absence of the conduct requirement for assisting—any act that is capable of providing assistance is sufficient ... The absence of definition of the two key terms, encouragement and assistance, is an ironic feature of this technically complex edifice.'[124]

However, the bad drafting in this instance is not a matter of failing to identify what the relevant actus reus of the crime is, but failing to provide for exactly what encouraging, or assistance would entail for inchoate offences. This would not involve creating more criminal offences but clarifying

[118] [2016] UKSC 8.
[119] Ibid at par 76.
[120] Ibid at par 99.
[121] Section 44 of the Serious Crime Act 2007.
[122] Ibid section 45.
[123] Ibid section 46.
[124] Horder (n 111) 423–424.

an existing mode of committing a crime. In such a case, the advocates of fair labelling who see the principle as constituted by the rule of law would find no objection to greater clarity and it would not necessarily entail the creation of new offences. The Act may also be criticised on the basis that it does not provide guidance to when each mens rea form applies to what circumstance.[125] However, this may be developed through careful, latter interpretations by a court which would not require the creation of further offences to comply with fair labelling, but only a proper matching of the appropriate mens rea requirement with a relevant manner of encouraging or assisting. Thus, fair labelling can still be complied with without creating innumerable offences to cater for complicity.

Overall, Husak seems to have assumed that complicity cannot ever meet the seemingly strenuous demands of fair labelling because fair labelling will require granular exposition through individual offences addressing all the various ways in which one may aid or abet a principal. However, fair labelling does not require such an infinite regress. Only distinctions that make a difference relevant for the allocation of blame need call for serious reform. It is thus not necessarily the mode of aiding alone that is relevant but the mens rea and allocation of blame that concerns fair labelling. Even those who accepts that Husak's worries will lead to new offences do not accept that this need be the unreasonable and unwieldy incarnation imagined by Husak for it to be morally satisfactory not in a 'second-best' manner.[126]

Thus, a certain defeatism that is assumed by scholars such as Husak ought to be rejected when considering the demands fair labelling sensibly makes. The fair labelling concerns Husak

[125] Section 47 of the Serious Crime Act 2007.

[126] M Beth Valentine, 'Abetting a Crime: A New Approach' (2022) 41 Law and Philosophy 351, 354. Valentine was inspired by Nagel's work on the law of war, see Thomas Nagel, 'War and Massacre' (1972) 1 Philosophy and Public Affairs 123, 124–144. Valentine's proposal supports creating new offences by making aiding specific crimes distinct crimes, with their own mens rea requirement and own sentencing guidelines. However, due to Valentine's focus on what kind of *capacity* one aids another in, this approach need not devolve into creating crimes for the endless ways in which one may aid, only where one helped another in their capacity as a criminal. The primary offence of murder, rape or whatever they were aiding then works to delineate the kind of wrong concerned, see Valentine 364.

raises are not as stringent or intractable as he assumes. One may still prefer the approach that English law broadly takes of distinguishing between common purpose and the 'composite' wrong of influencing another's actions whilst curbing the mens rea requirement to one of intention. In fact the English approach avoids some of the proliferation of offences that worries Husak because the structure of the English law is something like 'do not do X, intending that X be helpful to P in committing a crime, and if P finds X helpful, we will convict you of P's crime'.

The demands of fair labelling may accommodate simple solutions that do need relentless complexity in practice to be acceptable. Merely because one adds offences does not mean that the risk of complexity increases. Part of the problem in assuming the inflationary logic of fair labelling is too unwieldy and requires 'balancing' is assuming that inflationary is the same as 'infinite regress', 'overly onerous' or 'unreasonable'.

Avoiding this particular assumption is not just a matter of prudence, but also one of principle. It depends on understanding the proper relationship between the rule of law and justice and how these principles constitute fair labelling. Specifically, fair labelling is not merely an abstracted moral principle that is applied to offence differentiation. It is instead a value internal to the criminal law that is derived from the general principles of justice and the rule of law. In other words, the archetype of fair labelling is an ideal that has been pulled from various aspects of both justice and the rule of law. It is not exclusively a demand for an abstract form of justice unmoored from legal practice. One must not assume that because fair labelling's overall purpose is just allocation of blame it cannot be properly constituted by values of the rule of law. The opposite is true especially, in its ideal, archetypal state. The cure for unwieldy offences, in other words, comes from within in the internal logic of the principle and not from without.

IV. Overlapping charges and the potential for abuse of prosecutorial discretion

It has been argued that Cornford is wrong to view fair labelling as a principle that will lead to out-of-control offence creation. A separate argument concerns the potential for fair labelling to create offences that could be abused by prosecutors.[127]

The argument consists of two parts. First, more offences being created for fair labelling reasons results in more charge bargaining where defendants plead guilty to one charge in exchange for prosecutors dropping another.[128] Second, what follows is an increased risk of prosecutorial abuse where an increase in the number of offences allows prosecutors to threaten defendants with more serious offences to get them to admit to lesser ones.[129] This is especially troubling because it may very well be that the defendant ought not to be charged with any offence at all, but a large number of possible offences is used as a cudgel to beat him into pleading guilty in an instance where any court or jury would not convict. However, since this plea will never be examined closely by either judge or jury and so a serious injustice occurs.[130] Additionally, this may lead to an increased risk of guilty defendants being convicted of a less serious offence—and thus receive a less appropriate label and amount of blame—than the evidence warrants.[131] Thus, the very logic of fair labelling may be defeated by a greater imbalance of power resting in the hands of prosecutors due to creating more possible offences with which to charge offenders. This means that fair labelling advocates at least must reckon with these possible abuses and how they impact the general goals of fair labelling.[132] Importantly, because Cornford's critique is aimed at the

[127] Cornford (n 3) 1006-1010.
[128] ibid 1007.
[129] ibid.
[130] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007) 36–38. See also Mary Vogel, 'Plea Bargaining under the Common Law' in Darryl K Brown, Jenia I Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019).
[131] Cornford (n 3) 1007.
[132] Richard Nobles and David Schiff, 'Criminal Justice Unhinged: The Challenge of Guilty Pleas' (2019) 39 Oxford Journal of Legal Studies 100, 109–117.

systemic incentives more offence differentiation creates, the response from those who think fair labelling is the main principle of offence differentiation must engage his critique at this level.

The first possible response to this perverse incentive is to argue that the problem is not with fair labelling, but instead with the criminal justice system more generally. Specifically, it may call for greater oversight by judges of guilty pleas in cases of overlapping offences with extreme differences in blame between possible charges. However, this is too quick a dismissal. Courts are slow to accept such supervisory powers over discretionary decision-making by law enforcement officials such as prosecutors or police.[133] Thus, we cannot fall into complacency and assume that judicial officers will act as a bulwark against prosecutorial abuse. This is particularly true where judicial officers themselves are unwilling to take up further 'supervisory authority' over prosecutorial discretion.[134]

Taking a different approach to the problem may begin with recognising the truth in the maxim 'abuse does not take away from rightful use'.[135] The maxim does not deny the existence of abuses of a principle but seeks to retain the integrity of the initial principle by identifying the conditions under which it is rightfully used so that one can more readily identify and prevent its abuse.[136] The essential point is that the abuse of the principle is not inherent to the principle per se, as conceded by Cornford.[137] Bad incentives that are not inherent to the system should not undermine our pursuing a worthy principle, especially where they may be ameliorated. Importantly, this approach does require that where abuses may be inevitable due to corrupt officials, they must

---

[133] Robert L Misner, 'Recasting Prosecutorial Discretion Criminal Law' (1995) 86 Journal of Criminal Law and Criminology 717, 746–747.

[134] The United States of America is one such example where the Supreme Court has narrowed any supervisory power for what they term 'harmless errors' that tend to incentivise prosecutorial abuse. See the cases of *Rose v Clark*, 478 U.S. 570, 580 (1986) and *United States v Russell*, 411 U.S. 423, 435 (1973) as discussed in Angela J Davis, *Arbitrary Justice: The Power of the American Prosecutor* (Oxford University Press 2009) 127–130. For the English position prohibiting courts from staying prosecutions as disciplinary tools for supervising prosecutorial power see *R v Crown Court at Norwich ex parte Belsham* [1992] 94 Cr. App. R. 382, QBD.

[135] Translated from the Latin 'abusus non tollit usum'. For an example of the maxim deployed in argument see Brian Tierney, 'Historical Roots of Modern Rights: Before Locke and After Symposium: Rethinking Rights: Historical, Political, and Theological Perspectives: Keynote Address' (2005) 3 Ave Maria Law Review 23, 43.

[136] ibid.

[137] Cornford (n 3) 987.

not be embraced on a large scale.[138] And so how can one ensure fair labelling does not at the very least embrace the abuse of overlapping charges?

The first step may be to accept that one cannot make an argument in favour of fair labelling lightly where one does not believe that a described behaviour ought to be properly differentiated as a matter of justice, rather than of mere legalism. The second step would argue for the development of prosecutorial ethics such that fair labelling is properly considered by prosecutors in the realm of charge bargaining as a factor forming part of prosecutorial guidelines.[139] Prosecutors have every right to negotiate with defendants within a permissible scheme of offences in a manner that does not have to result in the two kinds of injustices previously discussed. It is a matter of consistently implementing fair labelling where a prosecutor would have to ask if there is a 'baseline' appropriate offence with which to charge an offender. That is, the least serious offence must still reasonably fall within an appropriate area of blame given the seriousness and culpability requirements it possesses. For instance, someone accused of maliciously causing grievous bodily harm[140] should not be charged with assault unless the assault penalty and meaning reasonably communicate the defendant's level of apparent blame.

This is not a perfect solution that eliminates any possible abuse, but it at the very least aims not to encourage it by not only applying fair labelling at the level of creating the offence but also following through with its implementation. To fail to follow the principle through to the exercise of prosecutorial discretion would violate important aspects of the rule of law which help constitute fair labelling. Specifically, the injunction that there must be congruence between official action and a declared rule.[141]

---

[138] Tierney (n 135) 43.

[139] See the discussion of the factors guiding the exercise of charging discretion in the American Bar Association prosecutorial guidelines by K Babe Howell, 'Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System' (2014) 27 Georgetown Journal of Legal Ethics 285, 317–320.

[140] Section 20 of the Offences Against the Person Act 1861.

[141] Lon L Fuller, *The Morality of Law* (Revised edition, Yale University Press 1969) 81.

Prosecutorial discretion ought to be exercised against background principles of fair labelling and just punishment that informs the very exercise of such discretion. This should not be too surprising since one of the justifications for the wide charging discretion afforded to prosecutors is that this better achieves individualised justice.[142] The discretion is supposed to consider the fact that a criminal code cannot account for the particular facts and circumstances in which an offence is committed due to the generality of offences.[143] Behind this aim of individualised justice lies a concern for the just allocation of blame. As discussed when justifying fair labelling as the primary principle of offence differentiation, a criminal code is not to be applied as though it were a mathematical formula since this would devolve into legalism. Similar concerns for justice apply to the logic of justifying prosecutorial discretion. Importantly, this discretion is vested in prosecutors to ameliorate the risk of overcriminalisation where a legislator did not intend to have certain conduct be punished under law but if broadly interpreted may do so.[144] Prosecutorial discretion is supposed to cut in favour of not prosecuting such conduct. Thus, an important justification for prosecutorial discretion entails fair labelling aims to secure the just allocation of blame and avoid the kind of overcriminalisation that Cornford identifies. One cannot then take umbrage to ameliorate abuses of such prosecutorial discretion since to do so would be self-defeating considering one of the very purposes of the discretion in the first place.[145] Thus, fair labelling can reasonably apply to prosecutorial ethics not only as a background principle, but also as a sensible expression of the need to balance individualised justice and overcriminalisation.[146]

---

[142] Peter Krug, 'Prosecutorial Discretion and Its Limits' (2002) 50 American Journal of Comparative Law Supplement 643, 646.
[143] Cynthia Kwei Yung Lee, 'Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines' (1994) 42 UCLA Law Review 105, 165.
[144] ibid 165–166.
[145] This would be at least indirectly self-defeating, see Derek Parfit, *Reasons and Persons* (Oxford University Press 1986) 5–6.
[146] This kind of concern may fall under the already existing proportionality concerns guiding prosecutors that would require one to weigh the costs of bringing prosecutions against the level of culpability of the suspect in order to act in the public interest, see Crown Prosecution Service *Code for Crown Prosecutors* (2018) at 4.14 (b) and (f) sourced from https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf.

Importantly, this cannot lead to the conclusion that fair labelling is the very aim of prosecutorial discretion, only that it can be a relevant constraint to preventing abuses of charge bargaining. The justification for wide prosecutorial discretion covers much larger considerations that take account of various public interest considerations.[147] This is also obviously true of the wide discretion granted to legislators to criminalise conduct.[148] The point here is that fair labelling may be an important aspect to consider in cases of overlapping offences. Furthermore, this is not equivalent to merely assessing the 'seriousness' of a crime when deciding to prosecute. That particular aspect is best understood as an appeal to a compelling reason to justify punishing an offender's conduct (deterrence, communication etc) and 'seriousness' is at best redundant to the exercise.[149] The purpose here is to determine the 'fit' of certain charges being brought against an accused and if the behaviour falls within the acceptable range of offences such that it does not excessively or unnecessarily punish an offender.[150] The possibility of such abuse as admitted flows from the potential creation of new offences by fair labelling as a principle of offence differentiation. However, this need not mean that prosecutors cannot expressly consider the principle when exercising their discretion. They may very well have to already. The suggestion is that they be permitted or possibly required to do so explicitly as a matter of prosecutorial guidelines.

The basic difference between the approach of this thesis and Cornford's once again comes down to optimism or scepticism about how fair labelling affects criminal justice reform. This scepticism or optimism is a difference of emphasis on the 'cost-benefit' scale of debates about pursuing fair labelling. Neither party denies either the rewards or pitfalls of fair labelling. Instead,

---

[147] Jonathan Rogers, 'Restructuring the Exercise of Prosecutorial Discretion in England' (2006) 26 Oxford Journal of Legal Studies 775, 778–787.

[148] This does not of course mean that legislators may criminalise conduct for almost any reason, see Husak, *Overcriminalization* (n 130) 4–33.

[149] Rogers (n 147) 783–787.

[150] Rogers recognises this kind of distinction between different senses of 'serious' in the case of overlap as opposed to the very aim of punishment, see ibid 786.

the ordering of the weight attached to the values that inform not only its justification but also its implementation is different. There is certainly cause to be suspicious of zealous or unbothered application of the principle. It may be true that sometimes the costs of applying the principle of fair labelling are not considered. However, these costs should be placed in perspective relative to the reason for the principle existing and the pursuit of justice. When one considers the justice considerations that ground fair labelling and offence differentiation, properly informed by the rule of law, one is possibly more optimistic about the application of the principle whilst not dismissing its costs. Regardless, the challenge for optimistic advocates of fair labelling remains to keep our eye on these costs and properly integrate them in our application of the principle.

V. Conclusion

This chapter explored the application of fair labelling to the differentiation of criminal offences and, accordingly, their labels. I specifically addressed the extent to which mens rea states (purpose, knowledge, recklessness, negligence, etc.) must be communicated by offence labels. I contended that different mens rea states in relation to similar wrongs must, at least presumptively, be communicated. I specifically advanced an approach anchored on assessing the quality of ill will (or lack of good will) that one's culpability with regard to wrongdoing demonstrates. The argument presented was that different mens rea requirements disclose a particular kind of ill will to a victim that warrants different treatment in punishment. Although countervailing considerations may point against doing so, the argument is that, in principle, offence labels should clearly communicate the defendant's mens rea state, and not remain unclear in that respect.

The second, connected, issue explored in this chapter is the relevance of public understandings of certain offence labels, and what these might communicate about the holder's blameworthiness. In Section III, I argue that public perceptions set the outer limits of permissible communication about blame. If one accepts that punitive labels are partially justified by educating

the public and conscripting them into the practice of punishment, it follows that this communication of blame must be successful. Cases where there is a mismatch between what the public assumes a label means must then be addressed as a potential source of unfair labelling. This does not mean that the law must track social morality as opposed to its critical dimension, but that for the law to be successful in its educative role, and likewise for society to properly hold the law accountable for its blame allocations, there must be a rough alignment of moral understandings between the criminal law and the public. The chapter explored this idea through consideration of homicide and sexual offences. The point drawn out is that public understanding ought to be improved in instances where current public perceptions are not morally adequate.

The third main matter discussed in this chapter is the extent to which communicating blame in offence labels might lead to a proliferation of offences, compromising Rule of Law values. The rule of law concerns that fair labelling usually requires new offences to be created and this threatens the clarity and intelligibility of criminal offences were evaluated. This ostensibly threatens the predictability of the criminal law by introducing too much complexity such that the law fails to govern official behaviour and to guide citizens. The concern with overlapping charges is that if more offences are created, this would result in prosecutorial abuse and charge bargaining. Specifically, the argument is that the creation of less serious versions of an offence may result in prosecutors incorrectly charging someone because of charge bargaining, thus incorrectly allocating blame and violating principles of fair labelling. In answering the challenge of the tension between fair labelling and the rule of law, discussions from the area of complicity were used to demonstrate that a particular understanding that is not pessimistic about fair labelling, not assuming it is in tension with the rule of law, may fruitfully address concerns about mislabelling in a theoretically satisfactory manner. Further, taking fair labelling seriously even when deciding whether to charge offenders in the exercise of prosecutorial discretion may itself ameliorate the problems that may occur as a result of fair labelling creating new offences. It is vital to grasp that the answer to concerns such as those raised by Cornford is not to give up on fair labelling, but to deepen one's

commitment to the principle. If one does so, then it becomes evident that the rule of law is enhanced by fair labelling. Equally, fair labelling cannot do without the rule of law since it is a principle of *legal* justice.

Having analysed how fair labelling applies to these various issues of mens rea, the importance of the interest at stake and the rule of law in offence naming and differentiation, I can turn to concerns related to offence *persistence* and fair labelling. Although fair labelling has traditionally been seen as a principle applicable only to offence naming and differentiation, I argue in the chapters that follow that this is not the hinterland of the principle's application. If fair labelling is concerned with the ontic injustice of incorrectly allocating blame, one can allocate blame in such a manner as not only to assign the wrong status to an offender by simply miscategorising them by convicting them of an incorrect offence such as 'murder', 'manslaughter' etc but also one can allocate blame in such a manner as to essentialise or treat an offender with contempt. Treating someone with contempt in turn treats them as someone who warrants an inferior status. Not paying attention to the duration of an offender's punitive criminal label risks treating him as irredeemable and thus, I will argue, as an inferior. This issue of offence persistence is therefore related to an incorrect categorisation and treatment of an offender as an inferior due to the mistaken idea that this is permissible because it is a justifiable allocation of blame. Offence persistence thus implicates fair labelling principles. I now pivot to discussing these matters in the chapter that follows.

Chapter 6: Essentialising, Contempt and Dignity

I. Introduction

It has been argued that fair labelling is concerned with the just allocation of blame. In this chapter, I will begin to explore the implications of this position. Recall that unfair labelling is a type of ontic injustice where one is categorised as a certain kind of thing such that one's rights and duties are mismatched with one's actual moral entitlements. The particular mismatch in question is that a person is inappropriately blamed due to an unjust allocation of such blame in the context of punishment. Of course, this could be an unjust allocation of blame because the criminal law fails to consider important distinctions in culpability or wrongfulness for purposes of blame allocation – the problem I addressed in Chapters 4 and 5. The discussion so far in this thesis has mostly addressed the process of labelling in the form of a conviction and how this allocates blame.

In this chapter (and Chapter 7 that follows) I focus on the kind of ontic injustice that results when labels, in particular convictions, persist inappropriately. The process of conviction and the persistence of a label are related because one reason we care about fair labelling as a principle is that we envisage a situation where there will be publicity and communication of the label. It is thus difficult to discuss fair labelling without discussing whether convictions can be 'spent', i.e. when an offender may no longer be labelled as such. Another reason to care about the persistence of a criminal label is that inappropriately persistent labelling would also alter a person's status in a manner that conflicts or creates a mismatch with that person's dignity.[1] This possibility is my concern in this chapter.

[1] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2012) 50–51.

Importantly, I use dignity here as a status-concept.[2] For instance, historically people may have thought that torture was an acceptable punishment for serious crimes. However, when one is tortured one is treated as an inferior and may be treated in a manner that no human being ought to be treated.[3] In this case, the victim of torture is treated as if they were a different kind or category of human being that deserves lesser rights against cruel and inhumane punishment than everyone else.[4] This is thus not just an instance of serious harms committed against someone in a 'disproportionate' manner, but an instance of them being demeaned and so not granted their due moral entitlements. This does not mean that disproportionate harms do not matter, but that the kind of injustice concerned here is the injustice of one ignoring or disrespecting the entitlements that flow from the status one occupies as a result of one's dignity. This kind of diminution is a kind of ontic injustice where the state blames or punishes an offender in a manner that violates their dignity. This is relevant for offence differentiation and persistence because one may believe that certain serious offences warrant the kinds of punishment that may create a mismatch with their moral entitlements as a result of their dignity.

The focus of this chapter will be on the factors that potentially render labels unfair due to concerns that labelling may essentialise, disrespect or demean offenders and so fail to take account of their equal moral status as a certain kind of entity. The most common reference point is as a human being, but this need not be the case. It may be as a citizen, a member of a specific political community, etc.[5] First, I will address the concern based on essentialising an offender. In doing so my discussion will begin with the objection from what Kimberley Brownlee terms 'social contribution injustice'.[6] I then proceed to discuss another form of the argument concerning

[2] See Jeremy Waldron, 'How Law Protects Dignity' (2012) 71 Cambridge Law Journal 200, 202.
[3] ibid 218.
[4] In the worst cases one is not treated as a human being at all, but a terrified beast, see Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973) 441.
[5] See, further, Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford University Press 2019) 113. See also John Rawls, *A Theory of Justice* (revised, Harvard University Press 1999) 386.
[6] Kimberley Brownlee, 'Don't Call People "Rapists": On the Social Contribution Injustice of Punishment' (2016) 69 Current Legal Problems 327, 332.

essentialising – the complaint that labels and punishment make global assessments of a person's character and conduct. Last, I discuss objections against labels that disrespect and demean offenders by treating them as irredeemable and thus potential moral inferiors.

II. The argument from social contribution injustice

a. What is a social contribution injustice and when do we essentialise?

As discussed in previous chapters, labelling as a form of punishment involves not only the communication of an offender's wrongdoing to said offender and the community, but also an alteration of this offender's status. The categorisation of someone as an offender as a result of conviction is what allows for the state and community to see and treat such as person as possessing different rights and duties. Furthermore, some offenders are treated in significantly different ways as compared to other offenders depending on the *nature* of their wrong, which fair labelling will communicate. For instance, sex offenders, or those who commit political crimes such as terrorism, may face different status changes and disqualifications from other categories of offenders. At a more granular level, there will be further distinctions in rights and duties as a matter of the *degree* of the wrong concerned where more serious sexual offences such as rape carry different penalties to, say, sexual harassment. Again, fair labelling argues in favour of making such clear distinctions. Giving an accurate reflection of these distinctions in nature and degree of the wrong are what I have argued imbue labelling with its 'fairness'.[7]

To concretise these concerns: labelling as a form of punishment may affect how an offender views themselves in an unjustified manner because of its impact on their status classification. That is, by labelling someone an offender the state may essentialise that individual

[7] See, similarly, Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 Cambridge Law Journal 85, 85.

and render them incapable of seeing themselves as anything other than a particular kind of offender,[8] occluding any other identities that individual may possess.[9] This in and of itself could constitute a wrong against an offender.[10] Brownlee argues that this wrong is a kind of social contribution injustice.[11] That is, it wrongs the person convicted of a crime as a social contributor and a social being who is a part of, and in need of, a social world.[12] For Brownlee, that the legal status change and language used to describe offenders makes it hard for them to see themselves as any kind of valuable contributor to society in and of itself constitutes the wrong of 'social contribution injustice'.

Elaborating on this argument, Brownlee contends that labelling robs convicted persons of opportunities to form connections with others since it alters their rights and duties in such a manner that they have limited opportunities to properly contribute to the well-being of others and to their community.[13] This is because criminal labels reduce the offender only to their offence and treat them as though they were either dangerous or unworthy of the regard due to other members of a community.[14] Central to this argument is a rejection of what Brownlee sees as a lack of acknowledging the possibility of redemption that in her view follows from such essentialising practices.[15] Accepting her argument would require reforming many practices of labelling as currently practised. The labels themselves and the attitudes they give rise to would have to be abandoned.[16]

---

[8] Brownlee (n 6) 336. See also Harry Frankfurt, *Necessity, Volition, and Love* (Cambridge University Press 1998) 151–152.
[9] Brownlee (n 6) 342.
[10] ibid 332.
[11] ibid.
[12] ibid 334. See also Kimberley Brownlee, 'Social Deprivation and Criminal Justice' in Francois Tanguay-Renaud and James Stribopoulos (eds), *Rethinking Criminal Law Theory : New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Hart Publishing 2012) 223–226.
[13] Brownlee (n 6) 340.
[14] ibid 350–351.
[15] ibid 343–344.
[16] ibid 352.

Brownlee bases her views on what she sees as a basic right against social deprivation, which she conceives of as a right of access to social interactions that ensure a minimally decent life for persons.[17] As she explains, having minimally adequate opportunities for decent or supportive interpersonal contact and social inclusion is a necessary condition for a minimally decent human life.[18] This right against social deprivation is not an entitlement that is earned; rather, it flows from our status as human beings.[19] At a normative level, this right against social deprivation imposes a duty that entails 'respecting persons as reasoning and feeling beings, whose identities and autonomous choices draw much of their content, meaning, and significance from meaningful opportunities for social inclusion.'[20] Social inclusion, on this view, has intrinsic value. The upshot of this is that one cannot dismiss as a regrettable side-effect the burdens borne by people who are coercively deprived of social contact for the sake of punishment.[21]

b. <u>When is one's status as a social contributor denied?</u>

In response to Brownlee, I argue, firstly, that she is wrong to think that all labelling necessarily essentialises the labelled. As I will show, the concern about essentialising an offender does not necessarily preclude labelling per se, but merely *unjust* instances of labelling. Concerns about essentialising must be placed in their proper context – specifically punishment. A principal component of punishment is the censuring of an offender in response to culpable wrongdoing. In this sense punishment is visited on an offender because it is as an appropriate response to such wrongdoing. On such views, one cannot be punished in a way that denies your status as a social contributor. However, does it follow that because one is a social contributor, one's social status

[17] Kimberley Brownlee, 'A Human Right Against Social Deprivation' (2013) 63 Philosophical Quarterly 199, 200.
[18] ibid.
[19] ibid 209.
[20] ibid 212.
[21] ibid.

and interactions cannot be adjusted by an authority? No: not all labelling denies the status of a person as a social contributor.

It is one thing to say that humans are social beings with certain social needs. It is another thing to say that it is always impermissible when punishing someone to negatively affect a person's social needs. Justified punishment allows forms of hardship or burdens to be imposed in order to censure individuals who commit criminal offences. The point of the label adjusting an offender's status classification is to communicate that the manner in which the said individual has contributed to society and to others is of *disvalue* since such a person has committed a criminal offence against other members of a community. Such a status change, in other words, responds to an offender having already acted as a negative social contributor. The question of the needs of such an offender must then be set against this particular background of this person having been proven to have violated the rights and indeed social needs of others. Criminal offences of various kinds impair the ability of victims to properly access and contribute to a social world. Consider cases of sexual assault as the prime case of a victim having their social needs severely impaired by the trauma of experiencing such offences.[22] Specifically, victims of this kind of offence may find it difficult to trust others and to participate in various aspects of social life that they may have been able to engage in prior to the offence. Arguably, even non-violent offences such as theft or fraud if serious enough may impair the ability of someone to properly contribute to or participate in a social world as a social contributor. For instance, if a Ponzi-scheme defrauds a person of their life savings, such a person would find it difficult to participate in the various aspects of ordinary social life that are dependent on financial resources to do so. The question then is whether, when the perpetrator of such an offence labelled as such through conviction, the particular burdens upon him deny him

[22] See Patricia Resick, 'The Psychological Impact of Rape' (1993) 8 Journal of Interpersonal Violence 223, 225–234. See also Dean Kilpatrick, *Factors Predicting Psychological Distress Among Rape Victims* (Routledge 2013) 139; and Barbara Olasov Rothbaum and others, 'A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims' (1992) 5 Journal of Traumatic Stress 455.

the possibility of functioning as a social contributor in an unjust manner that amounts to a denial of this status.

A clear example of someone being denied the status of a social contributor is when they are placed in solitary confinement.[23] This kind of treatment amounts to social deprivation of exactly the kind that treats such a person as something other than a social contributor with no opportunities to form any meaningful relationships with any person or as someone who has anything worth to contribute to a broader community, or at least the prison community. They are instead caged, isolated and treated as something other than a social being with a valuable contribution to make. I have no quarrel with condemning this as a case of the kind of allocation of blame that treats someone as an inferior, thus violating their basic dignity or status as a social contributor. However, it does not necessarily follow that all criminal convictions deny the status of a person as a social contributor. An offender can find their social interactions limited and more difficult, rather than somehow unavailable to them. Consider if someone is convicted and placed under house arrest. In this case, their opportunities and ability to contribute to their community are made more difficult, however, it does not mean they are denied their status as a social contributor. They may still receive visitors, communicate via telephone and online, and leave their home within an acceptable radius. They may also live with other people. The point here is that the limitations of their social contribution must be bearable and something that can be endured without requiring that an offender abandons their elementary human functioning.[24]

For the requirement that punishment must be compatible with offenders being , as human beings, necessarily social beings with valuable contributions, to have bite, it must take issue with the kinds of restrictions that no human being can reasonably bear or that cannot be endured without asking them to cease basic human functioning. This is the sort of restriction that treats a

[23] For an analysis of the effects of solitary confinement see Peter Scharff Smith, 'The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature' (2006) 34 Crime and Justice 441, 441–528.
[24] Waldron (n 2) 219.

person as something other than a social contributor, rather than a social contributor subject to just punishment. The nub of the issue is that criminal labelling adjusts one's legal status in such a manner that one is marked out for some defined treatment. By doing so, it necessarily limits one's opportunities to be a social contributor. But this is acceptable. Criminal punishment is not triggered by any and all acts of an offender. Instead, it focuses on only those actions deemed public wrongs that warrant punishment.[25] In doing so, it does not automatically essentialise a person. Essentialising is dependent on the content of the label, and its relationship with a labelled person's moral entitlements.

The argument concerning essentialising must then be narrowed to the specific kinds of labelling that indeed essentialise an offender, generating or consisting in unbearable restrictions that deny the person their basic human functions as a social contributor, such as solitary confinement. These sorts of social contribution injustices must be carefully identified in the context of humane criminal justice systems that do not, in principle, deny convicted individuals their fundamental and important status as social contributors. It is not the case that restrictions per se deny one's status as a social contributor, rather than simply altering it justifiability.

With this said, it is also the case that denying one's status as a social contributor is not the only way that they can be essentialised. Essentialising can occur when one act or conduct by a person is emphasised such that it gives a *global* assessment of a person. In other words, by reducing a person only to that particular conduct through labelling one presents that conduct as representative of the whole person's character. One can argue that focusing on a particular act in this manner by lowering their legal and social status violates their dignity in treating them as an inferior. These versions of the essentialising objection will now be discussed.

[25] RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 88.

III. Global assessments

One can oppose criminal labelling as a practice in instances when it essentialises an offender by representing their criminal wrongdoing as *globally representative* of their character or personality. This reductive aspect of a label crowds out all other information about the offender in society. As Frankfurt argues, one can fail to respect someone by ignoring the relevance of some aspect of his nature or of his situation.[26] This disrespect occurs if some important fact about the person is not properly attended to, or is not taken appropriately into account in a judgement or decision pertaining to that individual.[27] In other words, the person is dealt with as though he is not what he actually is.[28] The implications of significant features of his life are then overlooked or denied.[29] In our case, this would be all the other practical identities (including their social status) and valuable capacities a convicted person possesses.[30] Offenders are still fathers, mothers, teachers, citizens, etc and so these other identities beyond their being offenders form integral parts of their overall characters and identity.[31] To ignore these other identities and aspects of a person thus results in a kind of distortion of who they are. This may be related also to the context of criminal punishment itself. After all, punishment is intended to impose this kind of hardship on an individual.[32] A person's wrongdoing is intentionally communicated to other members of the community in order to inform their judgment about how to treat a convicted person.[33] Further information is not communicated pertaining to their other practical identities and actions to the community.

Therefore, it is possible that all members of a community can see about this person is their being an offender due to the authoritative censure of the state. The state then arguably plays a role

[26] Frankfurt (n 8) 153.
[27] ibid.
[28] ibid.
[29] ibid.
[30] Christine Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford University Press 2009) 22–25.
[31] ibid.
[32] David Boonin, *The Problem of Punishment* (Cambridge University Press 2008) 6, 12.
[33] Andrew Von Hirsch, *Deserved Criminal Sentences* (Bloomsbury Publishing 2017) 34.

in distorting the overall character of an offender by amplifying only one of the various practical identities a person occupies. Thus, pertinent aspects of how things are with the convicted person are treated as though they had no reality.[34] That is, it is difficult for the person convicted in any real sense to amplify their other practical identities for consideration when others make judgments as to how to treat them.

This is especially the case where other members of the community are required by the law to treat them in certain ways precisely because the law has determined them to be offenders. Consider especially employment or housing restrictions in this respect. The authoritative aspect of legal punishment is intended to give members of a community reasons to treat such a person in a manner attending primarily to their identity as an offender. The challenge for an offender to highlight other practical identities is drowned out by the censuring voice of the law. In Frankfurt's words, 'it is as though, because he is denied suitable respect, his very existence is reduced.'[35] This line of argument becomes more pressing in instances when an offender has served a sentence of hard treatment and has to carry a criminal label after the fact. The challenge for an offender to re-integrate or be a social contributor is particularly inhibited by the global assessment of who a person may be by altering such a person's legal and social status.[36]

However, the 'globalism' of the essentialising quality of the label is that it presents some traits as more important than others in an overall assessment of the target.[37] It follows then that the other practical identities or conduct of an offender are deemed as less important by the criminal law. This proposition is not in and of itself unjustified. To provide an example: assume that Harry is a loving father and very talented philosopher. Moreover, last summer Harry saved another swimmer's life. However, Harry also raped his research assistant. The judgment the criminal law

[34] Frankfurt (n 8) 153.
[35] ibid.
[36] Added to this, the nature of the hard treatment may inform community assessments. For instance, someone who has been in prison may be treated as violent, or dangerous, when they might have been in prison for theft.
[37] Macalester Bell, *Hard Feelings: The Moral Psychology of Contempt* (Oxford University Press 2013) 76.

makes of the other practical identities Harry holds, such as father, philosopher and rescuer, is that these are less important to the relevant criminal wrongdoing, namely rape. This does not mean that in a case of sentencing an offender one cannot consider other aspects of their circumstances and respective practical identities such as their being a parent or having dependants, but that this is not the most important identity-related fact about the offender in sentencing and the application of a criminal record. There is, in other words, an evaluative prioritization of the particular conduct.[38]

This is not, then, an instance of the state ignoring the relevance of some aspect of an offender's nature or of his situation. Instead, the criminal law gives due *weight* to the various aspects of an offender's nature or his situation for purposes of punishment – specifically criminal wrongdoing. One's care-responsibilities as a father remain relevant for purposes of sentencing, but are afforded less weight in this context than in cases of child custody. And one's philosophical aptitude is relevant for whatever professional awards one is entitled to, but has nothing to do with one being punished for raping one's research assistant. Likewise, one's parental identity does not crowd out the wrongfulness of one's sexual misconduct even after hard treatment for purposes of the criminal law.

That said, one must consider the possibility that the criminal justice system has placed too much importance on criminal wrongdoing by imposing overbroad restrictions unconnected with the initial offence. For instance, one could have been convicted of raping one's research assistant and denied custody for one's children, a driving license, social housing, or the right to work as a beautician by the state.[39] In this instance, there seems a very good case that the state has given

[38] ibid 77. One interesting facet of such examples is the relatively modern phenomenon of 'cancelling'. For instance, it may in the past have been the case that people would not trust Harry to not be a sexual predator, and he would almost necessarily lose his job, because his offending is a relevant consideration. But I imagine his philosophical work would still have been read and cited. Nowadays, one can quite imagine a situation where this is deemed unacceptable, even if his philosophical work is on causation or epistemology.

[39] In Tennessee in the United States, the state cosmetology board may deny a beautician's license to anyone convicted 'of a felony or of any misdemeanour involving moral turpitude.' See Tenn. Code Ann. § 62-4-127.

undue weight to one's criminal wrongdoing (and one's resulting change in status once convicted) in comparison to one's other identities. In such cases, the global assessment forced by the essentialising nature of a criminal label as communicated to a community does not take proper evaluative priority in the circumstances.

It seems appropriate then to say that determining a case of essentialising requires a proper assessment of the specific, individualised offence in question and the particular restriction or measure post imprisonment. It is in this sense that essentialising is properly concerned with the 'fairness' of a label. One must remain sensitive to the important distinctions in the nature and degree of the wrong in order to determine if one has been essentialised in a specific instance. Therefore, it is a matter of both the wrongdoing itself and the context in which an assessment of that wrongdoing is conducted (e.g. sentencing, a hiring process etc)

Another kind of objection concerned with globalising an offender's wrong doing is related to how we use language. The claim is that the language used to describe offenders may essentialise them by reducing a person's identity to a feature, trait, or act that ostensibly sums up the core of who he is.[40] This language may be patronizing, demeaning, and potentially harmful in its essentialist characteristics.[41] The careless use of language to describe offenders may be deemed unfair due to the unexamined language used when one labels an offender.[42] In legal and social discourse, those who commit offences will often be referred to as 'offenders', as opposed to '*people* who have offended'.[43] The same phenomenon occurs in respect of more specific offence labels. That is, a convicted person may be referred to, and essentialised, as a 'rapist' or 'murderer', as opposed to a 'person convicted of rape' or a 'person convicted of murder'. This concern is advanced to

[40] Brownlee (n 6) 336. See also Lynn Branham, 'Eradicating the Label "Offender" from the Lexicon of Restorative Practices and Criminal Justice' (2019) 9 Wake Forest Law Review 53, 55–57.
[41] Brownlee (n 6) 336.
[42] ibid.
[43] ibid.

demonstrate how the law fails to place the personhood of the offender at the fore and occludes the various other identities and capacities they possess.[44]

Referring to someone as disabled, as opposed to a person with disabilities, is a non-criminal law example of a similar type of concern.[45] Once again, a single feature about a person is identified and then amplified in such a manner that occludes the full humanity of the person by reducing them only to that single feature. To give a blunt illustration, imagine if one refers to a member of a racial or sexual group as simply 'a black' or 'a gay'. One then essentialises such a person by reducing them only to that particular aspect of their multiple identities. However, if one adds the qualifier 'a gay person', one reminds an audience that there is more to such a person than their particular sexual orientation or race. Thus, this argument goes, convicted persons are entitled to the same protections against being reduced to, and essentialised as, mere offenders (even if their offence is fairly labelled) and not persons with multiple identities and characteristics.

The evaluative priority of the criminal offence that such language (describing someone merely as a 'rapist' or even more broadly 'offender') displays is connected to its communicative component. Courts and other legal officials deal with individuals convicted of offences by primarily focusing on the wrong committed by the convicted person. Further, censure itself focuses on the wrong as a feature of taking the moral responsibility of an offender seriously by condemning such wrongdoers. The reference to the wrong itself, therefore, is at the fore of this justification of punishment. By contrast, the labels discussed above (a black, gay etc) describe features that are not responsive to agency – these are features of a person, and aren't descriptions of things a person has *done*.

However, to mitigate against such concerns, criminal law theory may rightly make a distinction between how state functionaries refer to convicted persons and how civil society does

[44] ibid. See also Branham (n 40) 61–63.
[45] Brownlee (n 6) 336.

so. State functionaries could adopt such language that avoids occluding the personhood of convicted persons through implication depending on the context. That is, it is not the case that it is the direct language of being called an 'offender' that essentialises a person. The essentialising effect, if it obtains, rather arises from what Grice would call a conversational implication of the word.[46] For instance, after an offender has had their criminal record expunged, it would be inappropriate for state functionaries to still refer to him as an offender, or even a rapist, even if it is factually true that he did commit a criminal offence. There may even be contexts outside of punishment where it may be inappropriate for state functionaries to refer to him as such. For instance, an offender may have been released from prison for good behaviour and still referred to by social services (assuming he seeks the aid of a social worker to help him manage his re-integration into society) as an offender. If he is still referred to as simply 'an offender' once their record is spent or upon his release when seeking social care, the argument is that other members of a community would infer several things about such a person. Namely, that such a person is dangerous, deviant or merits continued stigma.[47] These inferences may then in turn essentialise the offender as *only* an offender and so it may be inappropriate for state functionaries to refer to the offender as such, even though it is indeed true that he offended.

However, there is good reason to place burdens on state functionaries that we would not wish to place on members of civil society, because of the value of certain linguistic practices and commitments to social solidarity with victims of crime. There is value in the ability of ordinary citizens in civil society who have been victimised to use certain criminal status descriptors such as 'rapist' or 'murderer' in political activism. This is mainly because of the visceral value of such terms in displaying appropriate political anger.[48] The term 'rapist' in such a context is not merely a

[46] HP Grice, *Studies in the Way of Words* (Harvard University Press 1989) 26–27.
[47] Charles Wellford, 'Labelling Theory and Criminology: An Assessment' (1975) 22 Social Problems 332, 341.
[48] Amia Srinivasan, 'The Aptness of Anger' (2018) 26 Journal of Political Philosophy 123, 131–136. See also Agnes Callard, 'On Anger' [2020] *Boston Review* 8, 17–21. For an alternative position see Martha C Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford University Press 2016) 14–56.

descriptor, but relies also on the speech act engaged in, namely campaigning or protesting. For instance, in campaigning against domestic violence one can speak of 'abusers' in public speeches instead of the less heated terminology 'persons who have committed domestic abuse'. The status descriptor 'abuser' emphasises the evaluative priority about this person's identity and character in question by an alleged victim. The value of such activism remains in cases where the person has had their criminal record expunged. After all, a survivor of rape would still rightly call the person who raped her a rapist regardless of the person having completed their sentence, and perhaps even after the perpetrator's conviction has been spent. The context here is that the rape victim is interested in talking about the factual occurrence of the rape in order to raise awareness of the issue and to campaign. The expunging of a criminal record does not undo the wrong done to her nor does it render it irrelevant for broader conversations about appropriate policymaking.

The South African Constitutional Court followed a similar line of reasoning when it decided that someone who was granted amnesty for crimes committed under Apartheid may still be called a 'murderer' by a newspaper despite the effect of amnesty being that he cannot be punished for any such offences.[49] The Court found as follows:

> 'The Reconciliation Act did not render it untrue that Mr McBride committed murder. And it did not prohibit frank public discussion of his act as 'murder'. Nor did it proscribe his being described as a 'criminal'. The Citizen's comments, deriving from the fact of Mr McBride's deed, were based on adequate exposition of the pertinent facts. … It was also important that public debate about his fitness should, within the constitutional bounds protecting Mr McBride's dignity and reputation, be untrammelled. Public debate in South Africa has always been robust. More than fifty years ago, within the then-constrained perimeter of racially-defined public life, a court noted that in this country's political discussion, '[s]trong epithets are used and accusations come readily to the tongue.' The Court also found that allowance must be made 'because the subject is a political one, which had aroused

[49] *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC).

> strong emotions and bitterness', of which readers were aware, and that they 'would not be carried away by the violence of the language alone.'[50]

Significantly, the plaintiff (Mr McBride) was applying for an important public position and so this counted heavily in the Court's reasoning. However, the Court's reasoning emphasises that in the context of public debate, even when one was granted amnesty from criminal punishment, this does not erase the fact of the commission of the public wrong. The important factor is that a term such as 'murderer' is used in the context of public debate relating to the common or public good. An anti-rape campaigner may claim similar protections on the basis that campaigning against rape is a political issue connected to the common or public good. Simply having one's criminal record expunged does not 'privatise' the conduct for purposes of campaigning.

Consider also that, in public forums such as on television, victims when speaking of their specific circumstances may speak of 'my abuser' or 'my rapist' to personalise the kind of wrong done to them. These utterances arguably essentialise a victim's perpetrator both through the descriptor and a personalised qualifier. All these activities are especially appropriate in facilitating the kind of activism one may deem appropriate for victims of serious offences to rely on in raising awareness of the impact of certain crimes on victims. Therefore, although it may be inappropriate for a state functionary engaged in punishment to essentialise someone in that manner, it is permissible for civil society in their activism to do so.

Furthermore, allowing the use of such essentialising descriptors by civil society also promotes the kind of solidarity with victims that does not compromise the legitimacy of the state being perceived as too punitive. I stress here that, whereas the state should allow such essentialising by victims, state functionaries or representatives must not actively promote or engage in it in their official capacities. In any case, such solidarity relates not only to the victims themselves, but also that a specific ideal of public commitment to a shared scheme of law that values the moral

[50] Ibid at par 96 and 99.

significance of all citizens is compromised by the commission of such an offence. Tadros describes such a commitment as follows:

> 'When a person violates the criminal law she will often attack a particular victim or set of victims, and it is important to recognize this fact. But beyond that, the offender sets back an ideal that we strive towards through a public system of laws. The ideal is that we, as members of a political community, live by a fair scheme of shared public laws that provide each with confidence that her moral significance is protected, and her interests are advanced on equal terms with all other members of the political community. Breaching a just criminal law not only attacks the particular victim whose interest the law is there to protect. It also erodes our ability to advance towards this ideal.'[51]

The particular violation of such an ideal of equal moral significance can be permitted by allowing leeway in cases of valuable political activism and civic campaigning provided the state prohibits its own officials from behaving in such a manner. This also does not mean the state cannot be expected to safeguard and protect an offender from harm, say by an outraged community. However, this does require that the state stand in solidarity with those who are confirmed as victims of crime after a fair trial, especially those who wish to protest or campaign against such violations. To be clear, such solidarity shown by a tolerance for heated protest language etc does not undermine the ordinary prohibitions against defamation or libel. It does, however, allow the state in certain contexts to tolerate status descriptors whose point is to stress the evaluative priority of criminal wrongdoing and to do so in an essentialising manner by civil society. This particular kind of solidarity is reconcilable with liberal values of free speech where controversial speech is protected if undertaken for purposes such as protesting or campaigning in order to affirm the equal moral significance of citizens.[52] Thus, the concern about essentialising language may be best placed where state officials describe offenders and a more permissive attitude with respect to the

[51] Victor Tadros, 'Fair Labelling and Social Solidarity' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012) 73.

[52] Another reason why one can allow greater latitude to the public as opposed to officials may be that when officials use such language they are vested with legal authority and so it is easier for them to make a practical difference to how others treat an offender than the campaigner, see Chapter 2, section II (d).

formulations of victims, or of ordinary members of the public. The stakes when state officials label offender's with potentially essentialising language are higher than when ordinary members of the public do.

IV. The argument from inferior status and contempt

a. Inferior status and moral worth

However, this is not the only argument that deals with the appropriate response to expunging a criminal record and its essentialising effects. There is a further form of the argument rooted in dignity. Specifically, the objection is that when offenders are forced to carry criminal labels after imprisonment, this itself essentialises an offender as irredeemable. That is, one will be regarded as an offender for the rest of one's life. Thus, the law treats convicted persons as holding not only a separate legal and social status, but an *inferior* status. One must make a distinction between the moral worth of an offender's conduct, as opposed to the dignity due to such an offender by virtue of their status as a human being or some other relevant status.[53] Kramer explains the distinction as follows:

> 'Human dignity attaches to a person regardless of what he has done. It is not a product of his moral responsibility, and is not lost or lessened by his perpetration of misdeeds. By contrast, the worth of a person (or the worth of his life) is determined by what he has done. If what he has done is monstrously evil, then the worth of his life is strongly negative.'[54]

[53] Matthew Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford University Press 2011) 115.

[54] ibid. Kramer here is justifying capital punishment specifically, but the distinction holds for punishment more generally of a non-capital nature. Punishment is predicated on this distinction between worth and dignity. Kramer also means monstrous evil to be a narrow subcategory of wrongdoing.

Margaret Falls makes a similar point by distinguishing how moral worth is about the earned desert of an offender and 'unearned' desert is concerned with a person's dignity.[55] Labels with the status function of punishing communicate this negative worth of an offender's conduct both to the offender and the community. Mainly, this is a result of the proper resentment or blame directed at the offender as a moral agent capable of appreciating the reasons why their conduct is wrongful. Therefore, as Jacobs argues, morally proper resentment can reflect regard for the dignity and agency of *both* victim and offender.[56] The dignity concerns of both victims and perpetrators need not be mutually exclusive when one labels an offender as such.

This distinction between dignity and assessments of worth is also made in legal reasoning. Courts have recognised the intrinsic and thus unearned quality of dignity and stressed its importance in adjudication. For instance, the South African Constitutional Court has anchored its jurisprudence in this norm:

> 'The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.'[57]

Whilst the Court uses the word 'worth' it nonetheless correctly qualifies what it means by asserting its intrinsic nature and that it is not dependent on conduct or character assessments. American jurisprudence has similarly recognised the 'basic' nature of dignity and thus its intrinsic value.[58]

Concerning the offender's dignity, an appropriate test for essentialising whether the dignity of an offender has been violated may be to ask if such a person has been disrespected by the label.

---

[55] M Margaret Falls, 'Retribution, Reciprocity, and Respect for Persons' (1987) 6 Law and Philosophy 25, 40. See also Stephen Darwall, 'Respect as Honor and as Accountability' in *Honor, History and Relationship: Essays in Second Personal Ethics II* (Oxford University Press 2013) 19.
[56] Jonathan Jacobs, *The Liberal State and Criminal Sanction: Seeking Justice and Civility* (Oxford University Press 2022) 153.
[57] *Dawood & another v Minister of Home Affairs & others* 2000 (3) SA 936 par 35.
[58] *Obergefell v Hodges* 576 U.S. 644, 670 (2015).

Respect entails a way of conducting oneself, and more indirectly, of being disposed to conduct oneself towards the object of respect.[59] It includes states of mind that consist in taking (or failing to take) certain considerations such as the status of the person as reasons for or against certain actions.[60] In other words, one disrespects another by failing to attend to reasons afforded by the proper recognition of the offender's status as a human being.[61] Specifically, what is an act of disrespect in this context is to treat such a person as an inferior qua human status.[62] Therefore, in what ways may the state disrespect offenders by allegedly essentialising them?

Linking these thoughts back to labelling, the first may be a question of the length of time an offender carries the label. As previously argued, a label applies to an offender long after hard treatment or any other forms of sanction have been served. A person may be released from prison, but still carry a criminal record he only 'spends' much later, if at all. A criminal record may also entail various other restrictions and burdens applying to an offender, including voting restrictions, deportation or employment bans. As argued, essentialising treatment constitutes reducing a person to something that person did or is, with that reductionist perspective allowing or authorising treatment as an inferior human being in some manner. Arguably, adjusting someone's rights and duties for an indefinite period in response to a single act highlights this one and only wrongful act in an impermissible manner. That is, it renders an offender who has served his sentence inferior because it ignores the status that any human being deserves. However, before one rushes to the judgment that this *disrespects* an offender, one should consider the opposite case of blame and censure – praise. The state in several instances may recognise the service of an individual to their community by praising such a person and indeed altering their legal and social status in such a manner as to indicate its gratitude. For instance, in England and Wales one may be knighted or

[59] Joseph Raz, *Value, Respect, and Attachment* (Cambridge University Press 2001) 138.
[60] Benjamin Eidelson, *Discrimination and Disrespect* (Oxford University Press 2015) 78.
[61] Stephen Darwall, 'Two Kinds of Respect' (1977) 88 Ethics 36, 38.
[62] Thomas Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press 2008) 73. See also Eidelson (n 60) 81.

appointed a life peer in the House of Lords for services to one's profession or the public more broadly. These endure for the rest of an individual's life. Similarly, in the United States if one is awarded a Presidential Medal of Freedom, such an honour applies to one for the rest of one's life. Is it fair to say that the state then essentialises such a person in the opposite direction? That is, it is unduly praising such a person due to the extended period of time and the high social capital enjoyed is in some sense disproportionate to their actions?

Not necessarily. If, say, one's action was especially morally worthy and courageous it may very well be the case the nation 'owes you a great debt' for your services since they may be especially heroic and perhaps merit such prolonged praise. Could a similar position be true in the opposite direction? Put differently, could it be argued that, even after hard treatment, the state may still behave in a manner that signifies that your action is such that it merits condemnation for such a prolonged period?

Some may think that the only justification for applying a criminal record to an offender post hard treatment is to prevent reoffending.[63] That is, criminal records act as both deterrent and risk prevention. Now, this may be the main reason for the existence of criminal records, but it need not be exclusive. Like the case of praise, it may be that the moral worth of the conduct itself is so blighted and so of such pernicious worth that it still merits condemnation even after such hard treatment. In such a case, there would be no disrespect in continuing to apply the label. Where disrespect may be pertinent is whether there is a violation of dignity per se in the post-imprisonment application of a criminal record or if the nature and kind of wrong committed is central to determining if one is treated as an inferior human being. I turn below to exploring this idea of inferiority and its connection to convictions.

[63] Rhys Hester, 'Prior Record and Recidivism Risk' (2019) 44 American Journal of Criminal Justice 353, 355–358. See also Antje Du Bois-Pedain, 'Once a Sex Offender, Always a Re-Offending Risk?' (2010) 69 Cambridge Law Journal 428.

b. Contempt and redemption

A helpful concept to assist determining the correct approach may be the concept of contempt. Historically, contempt has mostly been studied in interpersonal contexts of morality.[64] However, recently theorists have begun to explore the role of contempt in an institutional setting.[65] Specifically, its role in institutions of criminal punishment has inspired commentary.

Broadly, contempt involves treating a person as one ranking low in worth due to falling short of some standard.[66] As a result, it is what philosophers' term 'person-focused' as opposed to 'act-focused'.[67] That is, where blame and resentment are responsive to what a person has done, contempt responds to who a person is.[68] Contempt, therefore, seemingly violates the Augustinian ideal of hating the sin and not the sinner.[69] In this sense, contempt is a more global attitude than blame or resentment. It tends to pervade all of our interactions with the person concerned.[70] Contempt also tends to result in a cool withdrawal from interpersonal engagement with the object of our contempt and so tends to make forgiveness difficult.[71] This is because, additionally, contempt tends to consider the question of one's status settled and so unlikely to reform.[72] This then makes one unlikely to forgive those one holds in contempt.

Contempt likely describes the attitude one has when one treats another as beneath them in such a manner as to disrespect them. This in turn violates their dignity. It is especially the case in punishment if one dismisses such a person as irredeemable and incapable of reform. To treat

[64] See Bell (n 37) 147–151 and Michelle Mason, 'Contempt as a Moral Attitude' (2003) 113 Ethics 234.
[65] Hoskins (n 5) 101.
[66] Mason (n 64) 240–241.
[67] Hoskins (n 5) 103.
[68] ibid.
[69] Mason (n 64) 247.
[70] Hoskins (n 5) 103.
[71] ibid 105.
[72] ibid.

someone as irredeemable is to treat them as an inferior and so violate their dignity. At least, this is how a potential argument against labelling grounded in contempt may proceed.

However, this simplistic argument is not precisely correct. We must first determine if being treated as though one is capable of reform is a necessary feature of the respect due to every human being by virtue of their status as such a being. Keeping in mind the distinction between earned and unearned respect (or worth and dignity) may be helpful. Macalester Bell argues that contempt as a moral attitude concerns itself with the character of an individual and is thus a form of what we can term 'appraisal respect'.[73] Appraisal is an assessment of character, rather than necessarily conduct.[74] Therefore, when contempt lowers the regard one held for another it does not necessarily need to lead to treating them less than a human being, violating what is due to every human by reason of their basic dignity. Instead, one must be clear of exactly how the loss of appraisal respect leads to a loss of basic dignity.

Consider for instance one holding a political leader in contempt for their controversial policies or statements. At a dinner with such a political leader, one then turns their back to such a person or refuses to shake their hand. One may believe such a person has lowered themselves as a result of a loss of appraisal respect through their conduct which is evidence then of their overall character. This does not mean that by holding them in contempt one violates their basic human dignity. However, imagine one refused to shake their hands because this politician is a Jewish person. This reason would fail to properly take account of a very basic feature of a politician's human status – their right and interests in freedom of religion and conscience and not being unduly targeted for their ethnic heritage. The mistake of anti-Semitism or equivalent bigotry such as racism (amongst other reasons) is to categorise, and so label, someone as not only a different kind of person, but as being a moral inferior. This false inferiority is a classification that creates an ontic

[73] Bell (n 37) 37-44.
[74] ibid 40.

injustice in that you categorise the person as an inferior contrary to their moral entitlements. The person's rights and interests are due to every human being by virtue of being human. Applied in the realm of punishment, the challenge in the case of criminal records is to determine if there is an equivalent right to be regarded as capable of reform or redemption that is a feature due to all human beings.

Hoskins argues that a state has the obligation not to hinder an offender's reform as a result of a commitment to treating all persons with equal concern and respect.[75] These impermissible hinderances include measures that have people see themselves as irredeemable and so negatively affecting their self-worth as a free and equal citizen.[76] Furthermore, if punishment is overly harsh then it may weaken an offender's capacity for moral reflection and commitment to a community's values as reflected in its criminal law.[77] The failure of the state to provide resources for such projects of reform may also communicate that the state considers offenders irredeemable.[78] He presents as an example a statement by a prisoner in Leavenworth Penitentiary asserting 'In society's eyes you're a worthless piece of shit. Now, you can buy into what society says and decide you really are a piece of shit, or you can say, "Fuck society, I'll live by my own rules."'[79]

The issue is then a right to non-interference with a process of self-reform. Punishment carries with it the risk of negatively affecting one's self-worth. It is, after all, a condemnation and rebuke of one's actions directed at an individual. This is not intended to be an encouragement of the worth of an individual's conduct or character. Indeed, proper reflection of one's wrongdoing includes a reckoning with harm and wrongs committed against others and their interests. This is not supposed to be an edifying experience qua one's status as a free and equal citizen, but a rebuke of having failed to respect the equivalent status of others whom one has wronged. Therefore,

[75] Hoskins (n 5) 111.
[76] ibid 113.
[77] ibid.
[78] ibid 114.
[79] ibid 113–114.

punishment holds one responsible and so reaffirms one's position as a free and equal citizen who ought to have respected the rights and interests of others through censure. Redemption, if possible against this background, is likely to be personally costly work, not positive self-affirmation. The question is whether punishment's negative effects on self-worth have violated the dignity-based conception of what is owed to you by virtue of one's status (self-respect) as an individual.[80]

Second, the argument from overly harsh punishment demotivating people to reform and alienating them from communal values depends heavily on the harshness of punishment itself. That is, it matters whether or not the wrong committed justifies the harsh response. Thus, it is possible that a wrong is so serious that it warrants a harsh response in the form of an extended period during which the criminal label applies. Therefore, it is less compelling to worry about the commitment of a serial rapist or genocidaire to a community's values if their crimes already evince a deep rejection of that community's core values. This does not mean that person does not still possess their dignity, but that the concerns regarding their lack of commitment again must be viewed against the backdrop of prior repudiation of communal values.

However, the gist of Hoskins' argument about incentives is not without merit. It is quite reasonable for one to argue that it is self-defeating for a criminal justice system to disincentivise people from reform. Therefore, this is a matter of reasonable, instrumental judgment. It is not, however, a matter of dignity. Dignity is properly implicated in these circumstances if some quality about a person's status is being ignored or they are demeaned as less than human or a 'free and equal citizen'.[81] This is what the Leavenworth prisoner is alleging – society has treated him as less than human hence the colourful reference to being treated like excrement. To use his phraseology, the criminal justice system has categorised (and so labelled) him a 'piece of shit' and proceeded to treat him accordingly. Following the ontic injustice to its conclusion, if he is treated like a piece of

[80] I am aware that Hoskins' argument concerns one's status as a free and equal citizen and not necessarily human being. I shall address that point below. For now, the point is to only grasp that self-worth is distinct from self-respect.
[81] I will again address the issue of which status (human or citizen) below.

shit, he is necessarily not treated as a human being or free and equal citizen. The question then is how criminal labelling demeans one in this manner. It is a problem of how one's change in status treats you as an inferior contrary to the basic human dignity you possess. This status change itself also assumes that one is the sort of thing or entity that may be treated as such. Behind the effects or consequences of such treatment lies the error in categorising someone as an inferior who may then in turn be treated in this manner.

Offence differentiation and persistence are more prone to this kind of mislabelling since it is unlikely an offence name would expressly deny the status of one as a human being or citizen. However, the insight of ontic injustice and a criminal label seen as a status (rather than merely an offence name) is that it allows us to see the error in categorisation behind a decision to punish someone in a dehumanising or citizenship-denying manner. It is an error of thinking they do not have equal moral status as human beings or citizens with certain properties that demand recognition respect as a result of this status from the state when it punishes. Offence differentiation and especially persistence may thus punish someone and so allocate blame to them in a manner that treats (specifically blames) them as inferiors, committing this error of categorisation flowing from mislabelling them as inferiors. Merely not stating as much in an offence name does not remedy treating the offender in that way.

c. Being impervious to redemption

The crux of the issue of categorising and treating offenders as inferiors (thus failing to give them basic recognition respect) is the relevant quality concerned is when one *imperviously* ignores the prospect that an offender may reform *despite evidence to the contrary*. That is, it is not a general claim that every offender is entitled to be treated as though they will reform as a result of their dignity as a human being. It may be prudent not to disincentivise people from reforming, but this would

not be by reason of their dignity as opposed to other instrumental considerations. Instead, dignity is entailed when one is impervious to the possibility of reform because one has decided an offender is not a moral agent capable of reflective reform despite their efforts, or that they cannot even be a Holmesian 'bad man' who is responsive to the prudential avoidance of future punishment. This imperviousness to any kind of evidence demonstrating a capacity for reform is the kind of deliberative failure that fails to give proper weight to a universal feature that ought to reasonably be afforded to every human being.

This is distinct from Hoskins's argument that all human beings must be treated as redeemable or that they cannot be treated as irredeemable once hard treatment is served. There may very well be arguments to this effect, but they would not be arguments grounded in dignity. Instead, it is much more cogent to argue that the state *ignoring* one's reform efforts is the relevant dignity concern as it fundamentally disrespects a key component of one's agency – the exercise of serious moral deliberation. It is akin to treating someone as say a minor or mentally ill without any grounds to do so.[82] Therefore, it constitutes a deliberative failure to account for a basic criterion of one's status qua human being and overall capacity for reform.

Importantly, this argument provides for the possibility that some offenders may indeed be irredeemable (for instance being habitual re-offenders) and the state may treat them as such. That is, they may commit (serious) crimes for which they refuse to repent or show any remorse for and so are forced to carry a criminal record for life with attendant employment and monitoring

[82] The argument concerning minors or the mentally impaired and their agency does not imply lacking ordinary deliberative capacity makes one unworthy of personhood. In fact precisely the opposite. It does, however, recognise a key feature of a person that is morally and legally relevant in certain cases and the limits or challenges to their decision-making under which they operate. For further discussion see Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 International Journal of Law in Context 81, 88–89; and Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2017) 23–30.

restrictions.[83] The state doing so in these circumstances does not violate the dignity of an individual.

However, the state doing so *despite* the offender's efforts, or some other evidence of reform holds them in perpetual contempt of a kind that does violate their dignity. To use the correct philosophical terms, it is at this point that one's appraisal of another becomes a kind of moral recognition or status disrespect.[84] Recall that contempt properly speaking is about a lowering of one's estimation of a person. This does not mean that contempt is inherently incompatible with recognition respect, but may become so.[85] Contemptuous responses pose a risk of violating a person's dignity precisely if they lead one to refuse to forgive them in appropriate circumstances. Or rather, they lead one to ignore appropriate reasons to consider forgiveness. Therefore, extrapolating this interpersonal point to the institutional, the state's appraisal of the worth or earned desert of the offender cannot make it impervious to evidence to the contrary of changed character or decreased risk. This is akin to simply regarding someone as unforgivable whilst they have properly sought forgiveness through remorse or some other action. Hoskins' approach identifies the risks that contempt carries qua dignity. However, the argument presented here homes in and focuses on the instances when these risks actually materialise.

A final and pressing clarification is that Hoskins argues specifically about recognition respect not just due to a human being, but to one as a free and equal citizen. The possible qualms about the argument I advance is that it violates the equality principle implicit from the kind of respect due to such *citizens* of a liberal polity, rather than merely human subjects. This is not so. Respect for the equal status of citizens need not prohibit differential treatment, but rather treatment as an inferior. In the case of redemption, a liberal polity may assume that everyone is

[83] RA Duff, 'Dangerousness and Citizenship' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford University Press 1998) 141–143.
[84] Bell (n 37) 170–171; and Darwall (n 61) 40.
[85] Bell (n 37) 170–172.

capable of being redeemed and so respect their equal status as citizens, but require that this be demonstrated considering the wrong committed. It need not assume that everyone has been redeemed post hard treatment and may easily re-integrate into society as they wish in order to do so. A polity is entitled to consider questions of what conditions for re-entry into civil society they may attach in light of the nature and degree of the wrong committed. The failure to respect the implicit distinctions in the nature and degree of wrongful conduct behind fair-labelling considerations is what leads to the kinds of unform, blanket application of restrictions that apply post hard treatment.

These distinctions were at the heart of the original concerns with fair labelling concerning kind and degree of wrongfulness in offences first identified by Glanville Williams and Andrew Ashworth.[86] Admittedly, they were originally concerned only with the specific descriptions of such offences. Nonetheless, the logic of recognising labels as not only descriptions, but legal and social statuses places greater significance on the importance of distinctions of degree and kind. They centre blame allocation and cut to the heart of fair labelling concerns. Failure to recognise these distinctions is what encourages the trenchant and dignity-denying contemptuous views that all offenders are equally condemnable without variations and adjustments to their legal status tailored to suit their particular wrongdoing.

Therefore, it is not the failure to simply presume that all offenders are redeemable that violates their equal dignity, but the failure to recognise that their equal capacity for redemption must be suitably responsive to their prior wrongdoing. It is harder to redeem yourself from rape than petty theft. Recognising this fact even post hard treatment is not failing to recognise the equal capacity one still has for redemption. The denial of equal dignity qua free and equal citizen would be to fail to recognise the attempts of those make the *actual* serious and concerted effort to do so. Demanding that such actions be observable is a recognition not only of the equality of one's status,

[86] Williams (n 7).

but of the 'free' component of 'free and equal citizen'. These principles and practices need not be in tension if one keeps in mind the importance of distinctions in blameworthiness and the subsequent legal status created by criminal labels. In fact, they are mutually supportive.

V. Conclusion

The main thrust of this discussion of essentialising and dignity is to narrow and make more concrete the general arguments that scholars have recently launched against this emerging kind of unfair labelling ranging from the effects on the social contributions of offenders, how we assess their actions, linguistic objections and the application of criminal records post hard treatment. Across all these various sub-elements of labelling is a common theme of unease with how we judge the worth and dignity of offenders when we label. Whilst seemingly reasonable, these concerns require more careful thought than the complete abandonment of important aspects of labelling practices and the allocation of blame as they stand. Calls for complete bans on language applying to both the state and general public and a hard position concerning the potential ability of all persons to reform add more heat than light as to how to properly take account of the dignity of offenders when we allocate blame. It also fails to properly frame current practices in light of the background of punishment. Instead, an approach that actually aims to consider these issues more carefully sheds better light as to what kinds of appropriate limits ought to be set on labelling practices so that they are not unfair to offenders by disrespecting them.

The discussion on essentialising and contempt then opens up the possibility of exploring how long is it appropriate for a criminal label to apply post hard treatment. If we accept that treating someone as irredeemable risks treating them with contempt by falsely categorising them as inferiors, it follows that one needs some criteria for deciding when a conviction as a legal and social status may no longer apply to that person. This is the issue of 'living down' or 'spending'

convictions. Specifically, the labels' persistence concerns the social status issues of allowing the socially exclusionary effects of a label to continue when an individual is entitled for such treatment to come to an end. Adjusting the rights and duties, and thus the legal *and* social status of an offender, beyond the period their offence deserves creates a mismatch between their moral entitlements and the social status imposed on them and so is an ontic injustice. The social status concerns I am interested in exploring deal mostly with revealing convictions and criminal records to non-state third parties other than the offender.

It is to these social status issues of the persistence of a label that I now turn in the next chapter.

Chapter 7: Persistence of a Label and Social Exclusion: Living Down Convictions

I. Introduction

The previous chapter explored the argument that labelling reduces offenders to their offence, thus having them treated as inferior, second-class citizens and ignoring their capacity to reform. This chapter focuses on a specific application of these themes of essentialising, contempt and redemption by assessing the position of an offender after they have served their prison sentence, fine or some other direct and formal punishment as ordinarily understood (I follow Von Hirsch `and call this 'hard treatment'.)[1] I shall examine the persistence or 'stickiness' of a criminal label and the challenges of social exclusion of offenders after hard treatment where convictions are still publicly accessible by application for access to criminal records of offenders for purposes of safe-guarding and employment.[2]

The claim here is not that offenders must automatically have their criminal records expunged after hard treatment. Rather, it is that *if* their status (for example as a 'rapist') is to continue being adjusted such that there is a discernible 'line' drawn between how they are treated, as opposed to other members of the community, *then* this must align with their moral entitlements to avoid ontic injustice. As argued previously, fair labelling is a principle aimed at avoiding the ontic injustice that results from an incorrect allocation and communication of blame. Allowing a label to persist with socially exclusionary effects constitutes a continuation of blame of the offender for their criminal offence. Such continued blaming is appropriate only where it aligns with an offender's moral entitlements.

---

[1] Andrew von Hirsch, 'Censure and Hard Treatment in Punishment's Justification: A Reconceptualisation of Desert-Oriented Penal Theory' in Antje du Bois-Pedain and Anthony Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart Publishing 2019).

[2] See the discussion in Chapter 2, Section *II* (f) of this thesis.

This chapter is in three parts. First, I will discuss the arguments in favour of allowing offenders to 'live down' their criminal record and the legal regime in place in England and Wales to facilitate this. One aim of such laws is to address the persistence of a criminal label and its change in status. Second, I will discuss the position of sex offenders as an example of how blaming continues in the context of labels that persist in pursuit of a risk-control purpose. I will focus specifically on sex offender registers and access to criminal records by members of the public. I argue that it is vital to not only see that the sex offenders are mandated to register as a general risk reduction tool, but also that a sex offenders' register contributes to the persistence of a criminal label. Third, I will discuss how access to a criminal record by employers also allows a criminal label to persist and blame to continue despite the overall risk control or preventive logic of disclosure of an offender's record.

II. The case for living down criminal convictions

Gerald Dworkin frames the case for living down criminal convictions by asking us to consider the case of a person who is denied employment, or whose family life is damaged, by the disclosure of a past conviction, which he had hoped had been forgotten long ago.[3] This is the situation legislation such as the Rehabilitation of Offenders Act 1974 ('ROA') is intended to deal with in England and Wales.[4] According to Dworkin, in terms of the ROA, an offender has a right to 'spend' their conviction, amounting to a privacy or non-disclosure right either to have their conviction expunged or to prohibit such disclosure to third parties.[5] Thus, in Neil Cohen's words, 'the basic mechanism of the [Rehabilitation of Offenders] Act is secrecy'.[6] Specifically, the Act

[3] Gerald Dworkin, 'Rehabilitation of Offenders Act 1974' (1975) 38 Modern Law Review 429, 429.
[4] ibid.
[5] ibid. See also sections 1 and 4 of the ROA.
[6] Neil P Cohen, 'Forgiving the Criminal Offender British Style: The Rehabilitation of Offenders Act' (1976) 14 Harvard Journal on Legislation 111, 113.

aims to bar disclosure of a conviction such that an offender may 'live down' their criminal history.[7] An important pre-condition for a conviction to be spent is a 'rehabilitation period' during which an offender must not reoffend following the end of imprisonment or a suspended sentence etc.[8] Therefore, in the light of the ROA, the criminal conviction is not automatically spent upon completion of the sentence, the conviction persists for a further period during which the offender would demonstrate that they have been rehabilitated. The label persists. Following from previous arguments made concerning what constitutes a criminal label, it is best to focus on the fact that the legal and social status of an offender continues to be adjusted post hard treatment and so the criminal label itself persists beyond the sentence of the order received.[9]

The issue of the persistence of the label for our purposes is connected to the issue of ontic injustice in the following way. If an offender is entitled to live down their conviction as a matter of critical morality grounded in a right to privacy, the state failing to recognise and effect this entitlement creates the kind of 'mismatch' between legal/social status and the moral entitlements of an offender. Specifically, the offender may be treated with contempt, as an irredeemable figure, or as an inferior who is categorised as a kind of second-class citizen. It is a kind of ontic injustice that the criminal law must address, and fair labelling helps respond to.

Importantly, according to the ROA, the capacity for an offender to 'live down' their offence depends on the length of the sentence received, rather than on the nature or seriousness of the initial offence.[10] Thus, it is possible that someone who committed fraud and someone who committed some drug offence may have the same rehabilitation period because they received the same length of sentence. Anyone sentenced for a period exceeding forty-eight months (four years),

---

[7] ibid.
[8] Section 5 of the ROA.
[9] Much has recently been written on the specific *legal* continuation of criminal labels through seemingly administrative measures. The best recent account and unpacking of these measures is in Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford University Press 2019). My focus in this chapter is less on the explicit legal provisions that continue a criminal offender's altered status, but the implications this has for the social status of the offender. I will not ignore legal measures, but rather aim to highlight their social aspects.
[10] Section 5(2) of the ROA.

cannot spend their conviction under the ROA.[11] The United Kingdom's government is considering reform to such a regime in order to allow those who have served prison sentences beyond four years to also have their criminal records spent after a rehabilitation period post release.[12] The government has suggested that the upper limit of imprisonment be expanded to seven years for adults and three and a half years for persons under eighteen.[13] However, persons who commit sexual, violent and terrorist offences are excluded from these reforms and so their criminal records cannot become spent.[14] Thus, serious offences attracting lengthier or life sentences are not capable of being spent under the provisions of the ROA, and that position seems unlikely to change.

a. The meaning of 'rehabilitation'

i. Reasons to clarify what we mean by 'rehabilitation'

Although, the ROA speaks of 'rehabilitation', the rationale and meaning of rehabilitation is not expressly defined. Similarly, in criminal theory, writers do not always explain exactly what they mean by 'rehabilitation'.[15] Pinning down what one means by rehabilitation helps evaluate the plausibility or strength of any claim to live down a conviction. This clarity in meaning thus avoids altering an offender's status inappropriately and eschews the ontic injustice of treating him as an irredeemable second-class citizen or inferior. Further, the socially exclusionary effects of a criminal label being communicated to the public after imprisonment may violate or defeat some sense of

[11] Ibid.
[12] Robert Buckland, Lord Chancellor, 'A Smarter Approach to Sentencing' (Ministry of Justice White Paper 2020) par 258.
[13] ibid 264.
[14] ibid 259.
[15] Lisa Forsberg and Thomas Douglas, 'What Is Criminal Rehabilitation?' (2022) 16 Criminal Law and Philosophy 103, 105–107. See also Ted Honderich, *Punishment: The Supposed Justifications Revisited* (Revised edition, Pluto Press 2006) 112.

rehabilitation, which may be relevant for the present discussion. In particular, the ability to live down a conviction raises questions as to whether there are some offences one can in fact never live down and thus if the ROA is correct to deny the ability to live down certain serious convictions. Thus, to avoid any confusion, 'rehabilitation' should be defined.

ii. The different meanings of 'rehabilitation' pursued by the ROA

Forsberg and Douglas provide the most exhaustive taxonomy of what several theorists may mean when they speak of 'rehabilitation'. For the purposes of the ROA, three senses of rehabilitation are relevant. The first is rehabilitation as 'anti-recidivism'.[16] The second is rehabilitation as 'restoration'.[17] The third is rehabilitation as 'moral improvement'.[18] I will briefly discuss each in turn.[19]

Rehabilitation as anti-recidivism is concerned with reducing the likelihood that an offender will re-offend.[20] Lowering the risk of recidivism need not be the ultimate goal of punishment for this aim to play a role in punishment.[21] The period of rehabilitation provided for in the ROA may be interpreted as a risk reduction measure aimed at ensuring an offender does not re-offend upon their release from prison or the end of their suspended sentence. Although the 'thin' purposes of merely reducing the risk of recidivism is relevant,[22] it cannot justify the broader aims of 'living

[16] Forsberg and Douglas (n 15) 110.
[17] ibid 116.
[18] ibid 113.
[19] All of these senses of rehabilitation concern the *aims* of rehabilitation, see ibid 110. One can also refer to rehabilitation as a means (applicable perhaps to moral improvement), see ibid 117.
[20] Forsberg and Douglas (n 15) 110. See also Ministry of Justice of the United Kingdom, *Transforming Rehabilitation. A Strategy for Reform,* May 2013, available at https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation/results/transformingrehabilitation-response.pdf.
[21] ibid.
[22] Forsberg and Douglas consider anti-recidivism as so 'thin' it is non-normative, see ibid 110. I need not go so far for my argument. I only argue it is thin in comparison to the other senses of rehabilitation.

down' one's conviction that may be concerned with a 'thicker' sense of rehabilitation than merely preventing recidivism.

The distinctions made between different sentence periods that provide for how long a conviction obtains before it is spent or lived down in the ROA do not expressly reference preventing any kind of risk of re-offending. This omission gives one reason to doubt that anti-recidivism explains entirely what the ROA means by rehabilitation. It is only the narrow 'rehabilitation period' that may incentivise an offender not to re-offend for that particular period if they wish to live down their offence. However, even here, the relevant period depends on distinctions in the length of sentences, and not necessarily the risk of re-offending of any nature.[23] Importantly, the sentences do not require any actual specific risk assessment to justify the difference in treatment created by the various sentence periods that require different rehabilitation periods. This absence of a specific risk assessment implies that these different rehabilitation periods are not primarily concerned with any actual risk posed by offenders, but instead with the seriousness of the offence relying on background distinctions in wrongfulness or blame. One could argue that perhaps the assumption is that any sentences beyond forty-eight months carry a general risk of re-offending. However, such a general risk would have to depend on the criminal offence committed and the circumstances and motivations of an individual offender. For instance, a murder can easily be motivated by a specific animus to a particular person (a jilted lover, abusive boss or inflammatory politician) with little risk of re-offending. The crime is still serious, but hardly one where we would think there is indeed a pronounced risk of re-offending.

Further, a criminal justice measure may have more than one rationale. I do not aim to discuss risk reduction measures directly in this chapter. The point of noting the absence of risk assessments informing the various distinctions in sentences is to rather suggest that, whilst risk is

[23] Sections 5A and 5B of the ROA.

relevant, it is not the sole and exhaustive explanation for the ROA's structure and goals for living down convictions. It is too thin an aim to explain the rehabilitative aims of living down convictions.

Rehabilitation as restoration has the opposite problem. Rehabilitation is here defined as aiming to restore an offender's moral or social relationships or standing.[24] Despite the ROA's prohibition of disclosure and publication of spent convictions, the Act does not aim to restore the moral or social relationships of the offender explicitly beyond these prohibitions. Restoration's advocates often argue that restoration may include restoring the ruptured bonds between offender and victim, including an apology or payment of damages.[25] The ROA does not aim to ensure that such measures are available. Perhaps, these restorative aims may be part of a larger scheme in the criminal justice system, but it does not address the arguments in favour of living down a conviction. The arguments for living down a conviction do not expressly have to closely connect the offender and victim and include making amends directly to the victim after hard treatment. Disclosures covered by the ROA are concerned with effects on employment and not necessarily with expressly with the full restoration of one's standing in society. Where reducing risk of recidivism may have been under-inclusive, rehabilitation as restoration is over-inclusive and too demanding a bar to meet in order to explain what is meant by rehabilitation in the ROA.

However, restoration or anti-recidivism failing to account for the sense of 'rehabilitation' pursued by ROA should not be cause for despair. I argue that rehabilitation in terms of ROA refers to rehabilitation as moral improvement.[26] This means that these measures may require an offender to demonstrate not only that they would simply not re-offend, but that they appreciate the moral or normative reasons for not doing so and so improve their behaviour.[27] Demanding

[24] Forsberg and Douglas (n 15) 116. See also Kathleen Daly and Gitana Proietti-Scifoni, 'Reparation and Restoration' in Michael Tonry (ed), *The Oxford Handbook of Crime and Criminal Justice* (Oxford University Press 2013) 207. Brownlee also seems to have been concerned with such an aim in Kimberley Brownlee, 'Don't Call People "Rapists": On the Social Contribution Injustice of Punishment' (2016) 69 Current Legal Problems 327.
[25] Forsberg and Douglas (n 15) 116–117. See also Lucia Zedner, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57 Modern Law Review 228, 234–235.
[26] Forsberg and Douglas (n 15) 113.
[27] ibid.

versions of this version of rehabilitation require one to actually reform their character either globally or concerning the specific offence.[28] These demanding versions seem not to accord with the ROA since the Act does not actually require express evidence of moral improvement where remorse or deep reflection of wrongdoing is demonstrated.

However, this less demanding standard of the ROA does not deny that the aim of the rehabilitation could be to ideally provide the opportunity for moral reflection and improvement demonstrated through non-recidivism. In other words, moral improvement may be the *end*, but non-recidivism the expressed *manner* in which this end is demonstrated. There may be practical reasons for not searching the soul of an offender, but also reasons of principle concerned with respecting their rational capacities by not demanding they display full repentance for less serious offences through exacting demonstration.[29]

More serious offences may reasonably require more searching means or longer periods of rehabilitation. For instance, the logic may be that less serious offences do not require excessive displays of moral improvement because the lesson concerning the wrongfulness of the offence is not especially demanding and relatively easy to learn. However, those who have killed or violated the sexual autonomy of another require greater demonstration of having internalised their reform. This reform must go beyond merely not re-offending, taking account of the importance of the interest that was violated. These serious offences reveal a greater moral flaw or impediment in the soundness of their moral reasoning than revealed by less serious offences. In other words, if those who commit serious offences had appreciated the reasons that apply to them better they would

[28] ibid 114. Compare Jean Hampton, 'The Moral Education Theory of Punishment' (1984) 13 Philosophy & Public Affairs 208, 213.

[29] For an account of 'repentance' assessing its various meanings see John Tasioulas, 'Punishment and Repentance' (2006) 81 Philosophy 279, 305–312. See also RA Duff, *Punishment, Communication, and Community* (Oxford University Press 2001) 80–82. Duff speaks only of the 'hope' of repentance and that punishment only 'attempts' to garner repentance.

not have committed such a serious offence. Lapses for less serious offences are thus seen as less seriously flawed instances of moral reasoning.

This is a combination of two conceptions of rehabilitation under the ROA. Moral improvement explains the distinctions between various sentences which would require longer periods of reflection for more serious offences falling under forty-eight months, not necessarily connected to an assessment of the risk posed by the offender. However, the ROA may then assume that after the prescribed rehabilitation period, the offender may at least possibly have morally improved enough not to re-offend, rather than merely only fearing punishment for prudential reasons. Thus, the different rehabilitation periods offer longer or shorter rehabilitation periods depending on the length of the sentence, presenting an opportunity for moral improvement. However, the ROA does not require invasive or demanding evidence of such moral improvement beyond exhausting such a period. The law does not treat offender's eligible to have their offences regarded as spent either as sites of pure risk to be managed, but neither does it require explicit repentance. It provides an opportunity for an offender to reform whilst attempting to live life outside the restrictive monitoring of the state as they would be in prison or under other non-custodial sentences.

Importantly, the chapter so far has aimed to understand the principle of living down convictions as expressed in the structure and provisions of the ROA. There may very well be several other more general arguments due to one's commitment to a particular understanding of rehabilitation outside the meaning of this particular legislation. I cannot address all of these arguments about what the ideal scheme for living down convictions may be in this thesis. I can, however, aim to understand the rationale of the present law in England and Wales and from there address the broader arguments concerned with living down convictions in sections that follow. As I proceed in this chapter, I will address arguments for believing living down ought to be a general principle applicable to all offences without distinction, specifically through prohibiting

communication or disclosure of all such offences. This may open the door for future research into the further ethics of rehabilitation as a broader aim of the criminal justice. However, for present purposes, it is not necessary to address this broader challenge in order to address the problems that apply to the persistence of a criminal label beyond the sentence. Recall that the persistence of a label is also continued allocation of blame if the label still possesses a punitive logic. If such persistence is unfair in that it does not match an offender's blameworthiness then it is an instance of unfair labelling and the resultant ontic injustice that flows from this state of affairs.

III. The persistence and exclusionary effect of a conviction through the sex offenders register[30]

a. Overlap between prevention and penal logic

Measures that apply to offenders after conviction may possess a preventive and/or penal rationale.[31] However, simply because a measure has an overall preventive rationale does not mean that blame or background penal logic plays no part in the operation of the measure concerned. This is mostly because conviction is a pre-condition for the preventive logic to be applied. Simply because the preventive logic takes over once an offender re-enters society does not mean that blame is irrelevant to how the criminal label applies to an offender. The law may not intend the preventive civil measure to carry any blame associated with it, but the ordinary responses of a community concerning the base criminal wrongdoing concerned may still prejudice an offender

[30] See Sexual Offences Act 2003, Part 2.
[31] Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford University Press 2019) 32–36 and 177–184.

despite the state's intentions. In this sense, such measures are not formally punishments but may acquire a penal dimension due to how and for how long the civil measure is applied.

This is the case with the sex offenders' register. Although it is a preventive measure to ensure lowered risk of recidivism and protect communities and vulnerable groups by imposing notification requirements to police of one's residence and whereabouts, the serious nature of sex offences would mean such communities would still view offenders with a certain stigma as a result of the allocation of blame, even if the register does not have a penal rationale.[32] The time periods for notification depend on the severity of the offence and the length of the sentence issued.[33] During such time the offender must notify the police of changes in their circumstances and failing to do so is a criminal offence.[34]

Significantly, the notification periods track the seriousness of the offence and not an explicit, independent risk assessment. 'Seriousness', therefore, is still informed by blame and not wholly risk or preventive logic. As Thomas and Thompson argue, 'The sentence becomes the determining factor rather than the assessment of any risk of harm posed to the community.'[35] Thus, if the sentence and the assessment of risk come apart, it is not the case that it is the preventive logic alone that operates when the label is applied to an offender.

Given this particular problem of overlapping preventive and penal logic, it follows that in a sense, the sex offenders register amplifies the conviction's persistence. An offender is not only

[32] Section 80-87 of the Sex Offences Act 2003. See also Terry Thomas, 'When Public Protection Becomes Punishment? The UK Use of Civil Measures to Contain the Sex Offender' (2004) 10 European Journal on Criminal Policy and Research 337, 348–349.

[33] Section 82 of the Sex Offences Act 2003. These periods apply from two years for a police caution to an indefinite period for a custodial sentence of more than 30 months. Conditional discharges apply for the period of the conditional discharge. Young sex offenders aged 10–17 years receive half the period of an adult unless they have received a life sentence.

[34] Section 91 of the Sex Offences Act 2003.

[35] Terry Thomas and David Thompson, 'Applications to Come off the UK Sex Offender Register: The Position after *F and Thompson v. Home Office 2010*' (2012) 51 Howard Journal of Criminal Justice 274, 276. The fact that the law is designed to emphasise the sentence in this manner also at least implies it is part of the plan or proposal of punishment in the criminal justice system and so is an intentional part of the application of a conviction as argued in Chapter 2, section (II)(e).

required to subject themselves to monitoring by the state, but this obligation is tied to their conviction and sentence, not necessarily to the actual risk of re-offending they pose. Presently, an offender may challenge their inclusion on a register and argue that they ought to be removed because the actual risk they pose does not warrant inclusion on the register despite their sentence.[36] The UK Supreme Court found that the absence of any right to review one's inclusion on the register renders the notification requirements disproportionate to their stated purpose.[37] Therefore, the right to challenge being placed on the register is available to an offender, but this places the onus on the offender to seek such a review to remove the persistent effect of the criminal conviction. The duties of disclosure to the police are not then entirely risk focused and retain a persistent focus on the conviction.

Even if one argues that the legislation presumes all sex offenders pose a risk of re-offending, this initial assumption of the generalised risk of re-offending is not supportable on risk-logic alone since the empirical data does not show that all sex offences present high risks of re-offending.[38] Sex offenders are not a homogenous group presenting the same risk of re-offending.[39] Further, it bears noting that the sex offenders register competes with the sexual harm prevention order as measures performing similar functions.[40] Sexual harm prevention orders are also aimed at protecting the public and vulnerable groups from sexual harm.[41] However, the sexual harm prevention order seems more directly targeted at disabling the person concerned from possibly causing any sexual harm to a person, since it may prohibit them from doing any act or require them to do an act in terms of the order to reduce the risk of re-offending.[42] It also applies for a

[36] R *(on the application of F (by his litigation friend F)) and Thompson (FC) (Respondents) v Secretary of State for the Home Department (Appellant)* [2010] UKSC 17 par 56-58.
[37] Ibid.
[38] Kimberley Kaseweter and others, 'High-Risk Sexual Offenders: Towards a New Typology' (2016) 47 Journal of Criminal Justice 123, 123–124.
[39] ibid.
[40] Section 103A of the Sexual Offences Act 2003.
[41] Ibid, section 103A (b).
[42] Ibid, section 103C (1).

specific time as stated in the order or until a further order is made.[43] This much more direct and targeted measure of risk control stands in contrast to the general notification requirements of the register. If risk can be addressed more directly, then it is possible that the register not only performs a risk control function but one that also overlaps with penal logic since it would be redundant to have two measures exclusively focused on risk control.

The penal logic of blame still remaining means that this risks persistence of incorrect, blame-oriented messages regarding an offender's status. It risks creating an ontic injustice that unfairly persists in allocating blame. It thus becomes an issue of fair labelling.

b. The challenge of the overlap for living down

The previous analysis on sex offenders registries complicates the principle that an offender ought to be able to 'live down' their conviction. If the ability to live down a conviction is taken seriously, the continued persistence of the conviction by other means cannot escape notice. This means that sex offenders that receive a sentence falling within the time periods of the ROA may continue to be punished by other means through the register if a proper risk assessment is not conducted. Once again, my focus here is not the risk prevention aspects of the register, but the continuation of the conviction and its socially exclusionary effects. The continuation of the conviction can itself constitute an ontic injustice by the manner in which it may still continue the changed status of an offender in a manner that is in conflict with their actual moral entitlements. It can create a mismatch of allocating continued blame when no blame ought to apply in the circumstances. It becomes, in short, a problem of unfair blame allocation and thus of unfair labelling. This once again vindicates the idea of the conviction as the central case of fair labelling, even when applying to clearly preventive labels concerned with risk allocation. Further, it allows

[43] Ibid, section 103C (2).

us to see the position of the offender post-sentence as not only a problem of risk, but a problem of potentially mislabelling and persistent punishment.

Additionally, the aim of rehabilitation is complicated by the application of registries. Imagine a person who is rehabilitated, meaning they have improved morally post sentence and completed their rehabilitation period that was less than forty-eight months. Such a person having their conviction extended through the register is a case of incorrect blame allocation and thus unfair labelling since they are treated as though they have not been censured or properly reformed. It raises the spectre of contempt being shown towards the offender who is not placed on the register because of the specific risk they pose, but because of their sentence. Despite also exhausting their rehabilitation period, this offender still has the label apply. They are treated then as if they are irredeemable.

IV. The persistence and exclusionary effect of the conviction through access to the criminal record and conviction

a. Structure of the access to criminal records scheme

The second manner in which an offender could have their conviction extended such that they fail to live it down is in allowing access to the criminal record of an offender by employers or other interested persons.[44] Before explaining how these disclosures can add to the persistence of the conviction and impact on the offender's ability to live down an offence, it is important to understand exactly what information employers and other interested persons may request. According to the Police Act 1997, there are three kinds of disclosure available. First, one may

[44] Outside of employment, other kinds of persons have access to criminal records. For instance, as Nicky Padfield states, 'The Criminal Injuries Compensation Authority, the body which authorizes compensation for victims of crime from public money, is also told of an applicant's criminal record in order to help the assessment of the merit of the application.' See Nicky Padfield, 'Judicial Rehabilitation? A View from England' (2011) 3 European Journal of Probation 36, 40.

request 'enhanced' disclosure, which discloses the criminal record and further 'non-conviction information' provided by the police to the Criminal Records Bureau (CRB).[45] Despite the CRB catering for enhanced disclosures, the police are still responsible for maintaining the database created by criminal records on the Police National Computer ('PNC').[46] This kind of disclosure is aimed at screening people wanting to work with children or other vulnerable groups.[47] The disclosure would include evidence presented in court, details of acquittals or decisions not to prosecute where there was still cause for concern.[48] Second, 'standard' disclosures disclose an offender's criminal record without non-conviction information.[49] Third, there are 'basic' disclosures which disclose convictions for less serious offences, provided that they comply with the sentence periods exempt by the ROA from disclosing offender's convictions.[50]

b. Overlap between preventive and penal logic in access to criminal records

All three kinds of disclosures have an obvious preventive logic.[51] Nonetheless, depending on the kind of disclosure in question, the penal logic of the conviction can still re-appear and pose a challenge for living down offences to which the ROA applies. Specifically, the cases of 'enhanced' and 'standard' disclosures pose this challenge. Basic disclosures are explicitly envisaged as being reconcilable with the aims of the ROA. Enhanced disclosures have heightened scrutiny for

[45] Section 115 of the Police Act 1997. The CRB was created in 2002 to give effect to the provisions of the Police Act which required the creation of a record-keeping agency. The aim of the CRB is to provide access to criminal record and other relevant information to organisations employing individuals in England and Wales. See Nageen Mustafa, Paul Kingston and Derek Beeston, 'An Exploration of the Historical Background of Criminal Record Checking in the United Kingdom: From the Eighteenth to the Twenty-First Century' (2013) 19 European Journal on Criminal Policy and Research 15, 24–25.
[46] Padfield (n 44) 39.
[47] Terry Thomas and Bill Hebenton, 'Dilemmas and Consequences of Prior Criminal Record: A Criminological Perspective from England and Wales' (2013) 26 Criminal Justice Studies 228, 231.
[48] ibid. See also Protection of Children: disclosure of criminal background of those with access to children (Home Office Circular 102/1988) par 17.
[49] Section 113 of the Police Act 1997.
[50] Section 112 of the Police Act 1997.
[51] Mustafa, Kingston and Beeston (n 45) 19–22.

protecting vulnerable groups and often concern serious offences that fall outside the operation of the ROA. Due to the important imperative of protecting children and vulnerable groups, it ought to be harder to live down than offences that attract lower sentences. However, this does not mean 'enhanced' disclosures are not without further problems.

The main source of issues with this category of disclosures is the meaning of 'non-conviction' information. Such information functions to further reduce the risks of re-offending and harm to vulnerable groups. However, the legal regime risks incorrect blame allocation and ontic injustice. This is because part of the test for disclosure of non-conviction information requires chief constables in a specific area to make the decision to disclose based on the relevance of the information to aid in protecting vulnerable groups.[52] Chief Constables consider factors such as seriousness, credibility and the information being sufficiently current.[53] As will be discussed below, so-called 'non-conviction' information includes allegations and charges made against an offender where for whatever reason these allegations were not tested in court and so no conviction was secured.

Whilst this non-conviction information is not a conviction against the offender, the information's release to any prospective employer would identify and categorise the person concerned as having *possibly* committed a criminal offence. This 'non-conviction information' has punitive effects and risks allocating blame on the basis of such untested information. It may also be the case that the non-conviction information identifies and categorises someone not only as having possibly committed an offence, but *likely* having done so. This categorisation or labelling exercise (of the offender as someone who could have possibly, perhaps, likely committed other related offences) is not performed in a vacuum. It is performed at the same time as convictions

[52] Home Office, 'Statutory Guidance to Chief Officers of Police on Providing Information for Inclusion in Enhanced Criminal Record Certificates' (2021) Statutory Guidance 13. The other factors include the impact on the private life of the offender or accused, the opportunity to make representations, whether despite the other factors information should be included and avoiding bias in favour of disclosure or non-disclosure.
[53] ibid 16–19.

are released. If a conviction is the paradigmatic case of a criminal label for purposes of fair labelling, then the non-conviction information may at the very least *amplify* the penal logic that endures because of the persistence of the conviction. After all, the non-conviction information forms part of the criminal record of the offender and is released alongside requests concerning convictions. An employer must then presumably consider *both* the conviction and non-conviction information together, forming a character assessment of the holder of a criminal record. Thus, concerns about the moral entitlements not only not to be blamed in excess, but also to be presumed innocent, raise the possibility here of serious ontic injustice and mislabelling.

c. Inconsistency and ontic injustice

Furthermore, the problem with the test for disclosing 'further information' other than the conviction is a common problem plaguing all factors tests – a lack of consistency.[54] This inconsistency is exacerbated by the statutory guidance failing to give the decision-maker any direction as to the priority that should be given to each of the factors, or how factors ought to be weighed against the countervailing objectives of disclosure.[55] Revealing this additional information alters the social status of an offender in very significant ways. This is because if the decision about relevance is inconsistently applied it increases the likelihood that it would be *incorrectly* applied too, thus creating a possible ontic injustice. This would alter someone's status in a manner inconsistent with their actual moral entitlements and the blame appropriate for their conviction and vitally, involves non-conviction material.

[54] Joe Purshouse, 'Non-Conviction Disclosure as Part of an Enhanced Criminal Record Certificate: Assessing the Legal Framework from a Fundamental Human Rights Perspective' [2018] Public Law 668, 673.
[55] ibid.

Consider someone who is convicted of sexual harassment for intentionally and non-consensually sending explicit sexual material to a victim.[56] A prospective employer specialising in care for vulnerable groups requests an enhanced criminal record from the police. It turns out that the applicant for the position was also charged, but not convicted, of a separate sexual harassment allegation. The employer wants to hire the applicant but thinks they ought to be diligent in their background check, so they request an enhanced certificate from two separate constabularies where the applicant has worked and lived.[57] Constabulary X decides the allegations are relevant. Constabulary Y decides the opposite since the allegations are historic and without corroboration.[58] The inconsistent disclosure of further non-conviction information ensures that allegations follow the offender. Added to an actual conviction, this amplifies both the blame allocated for the wrong and casts the offender as a habitual sex offender who ought not to work with vulnerable groups. Assuming Constabulary Y is more correct, then should the employer act on Constabulary X's disclosure, this miscategorises the seriousness of the offender's wrongdoing because of the amplification not just of risk, but arguably of blame. I do not deny that it also inappropriately increases risk. The point here is that the conviction's seriousness itself may be amplified by further information and allegations persist to follow the offender despite not having been tested in court or without a legal finding of guilt. This has clear implications also for the right to be presumed innocent that forms part of the moral entitlements of the person concerned. Instead, now such an individual is treated as though they were found guilty of such an offence by an employer. This is in itself a further ontic injustice and unfair labelling in so far as one's status is altered such that you are treated as if you warrant the blame that would be allocated if you had been convicted of such an offence.

[56] I assume in my example that sexual harassment is a distinct criminal offence too. Again, this is for the sake of argument and not a statement of the positive law.
[57] This hypothetical example is inspired by the facts of the case of *R (L) v Chief Constable of Kent Police* [2014] EWHC 463 (Admin) where an enhanced record was obtained from Kent and from Hertfordshire police stations about the same applicant requesting information about past allegations (not convictions) against the prospective employee.
[58] Ibid at par 17.

Standard disclosures where only the conviction is revealed are also not without problems. Imagine the following set of facts:

> 'W was convicted by Dewsbury Magistrates' Court on 26 November 1982 of assault occasioning actual bodily harm... At the time of the offence he was 16 years old. The assault had occurred in the course of a fight between a number of boys on their way home from school. He received a conditional discharge, and has not offended since. In 2013, when he was 47, he began a course to obtain a certificate in teaching English to adults. His conviction has not been disclosed, but he believes that he would need to disclose it and obtain a criminal record certificate if he were to apply for a job as a teacher, and that this will prejudice his chances of obtaining employment.'[59]

The case of W illustrates the point of how a criminal record persists across time. The criminal label, understood as a change in legal and social status of an offender, in this case persists for a period of thirty-one years after commission. For the sake of argument, imagine that the duty to disclose was not incumbent on W, but that an employer may choose to request a standard disclosure. W is not covered by the provisions of the ROA.[60] Again, putting the overall risk assessment function of disclosures aside, W is still socially excluded based on the seriousness of the conviction and not a current risk assessment. Since such seriousness is derived from the blameworthiness of the offence,[61] it follows that blame allocation continues despite the overall risk function of the label's communication to the prospective employer. The ontic injustice of such a continuing blaming practice where W cannot lived down this conviction is clear in so far as W is forced to occupy a criminal label that persists for such an extensive period of time. W is still allocated blame in a manner that affects his ability to potentially be employed even though his sentence is long exhausted. This also treats him as an irredeemable inferior and second-class citizen

[59] These are the facts of one of the applicants ('W') as summarised by Lord Sumption in *In re on application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (P, G & W) v Secretary of State for the Home Department; R (P) v Secretary of State for the Home Department* [2019] UKSC 3 par 2.

[60] Ibid at par 69.

[61] Recall that in this thesis I have defined blame as Cornford defines it as including both culpability and wrongfulness of the conduct, see Andrew Cornford, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 Oxford Journal of Legal Studies 985, 989.

who cannot ever properly be the moral equals of others in society thirty-one years later. This is another species of contempt that offenders face as a result of the current scheme applicable to disclosures and certain offences where the conviction can never truly be spent or lived down.

One may argue that the State in this case is only disclosing information that an employer has the discretion to act on, but is not mandated to. Therefore, the argument may go, the disclosure is not really as serious as I have argued. However, I argue that this uncertain situation the offender finds himself in is as serious as if he were simply barred from applying for certain jobs. The offender is subjected to a kind of arbitrariness depending on the good or ill will of a prospective employer. Whilst no applicant is entitled to a job, an applicant may be entitled at least to non-arbitrary consideration of their application. Not knowing if employer X will consider the conviction relevant places the offender in a *precarious* position from which they cannot properly plan their lives. An offender can upskill as much as possible, perform as well as possible in the application and interview process, but not know if their conviction will be the reason they are not ultimately hired. Merely demurring and saying that some future employer may hire them does not address the point that this disclosure is the very cause of this precarious position the offender finds themselves in at the time that they apply. The very logic of the ROA is that privacy or secrecy is necessary precisely to give an offender some measure of certainty or security to think they may have an equal opportunity or shot at a position. To place them in a worse off (in the sense of more arbitrary or precarious) status is to treat them as someone who is not entitled to equal treatment.[62] Importantly, it is not just unequal treatment broadly defined that is at issue, but unequal treatment of a specific kind – it treats one as a different class or category that is inferior to other applicants. Therefore, what makes this unequal treatment of particular moral concern is that it treats the offender as an inferior who *merits* this precarious and arbitrary status. This constitutes unfair labelling in so far as treating this offender as an inferior and continuing to blame him for an act

[62] Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford University Press 2019) 111.

committed so long ago is at odds with their moral entitlements. Properly understood, the criminal labelling persisting for such a period whilst remaining at odds with his moral entitlements is thus a problem of fair labelling.

V. Conclusion

In this final substantive chapter, I have examined the persistence and exclusionary effects of convictions after serving hard treatment. I have argued that the problem for fair labelling and ontic injustice caused by this is the goal of avoiding treating offenders as second-class citizens or irredeemable inferiors and continuing to allocate blame to offenders when it is no longer merited and so inappropriately altering their (especially social) status. The logic or rationale of living down convictions I have also argued is some version of rehabilitation that combines some measure of moral improvement and reducing recidivism. The means for achieving such living down is some measure of privacy or 'secrecy' afforded to the offender after a period of rehabilitation. Although the aims of living down are laudable, they are complicated by the fact that many preventive civil measures apply to offenders after hard treatment for particular offences. Specifically, sex offenders have positive duties of disclosing their movements and circumstances to authorities and disclosure of offender criminal records is allowed upon application to members of the public or prospective employers to protect the public and vulnerable groups. Although these measures are preventive in their rationale, this does not mean that the conviction and its penal logic falls away completely.

The seriousness of the initial conviction affects the persistence of the label and its socially exclusionary effects since the public would still continue to blame an offender upon discovery of their previous criminal conduct. This is especially true in the employment context. This indirect continuation of the conviction can itself constitute an ontic injustice. It creates a mismatch of allocating continued blame when no blame ought to apply in the circumstances. It becomes, in

short, a problem of unfair blame allocation and thus of fair labelling. The problem becomes a fair labelling concern particularly because of the status change that results in an ontic injustice in this case.

Having examined the persistence of convictions and issues related to their exclusionary effect post hard treatment, I turn now to conclude the thesis.

Conclusion

This chapter restates the arguments in the thesis's seven substantive chapters.

I. Chapter 1

Chapter 1 examined the concept of a criminal label. The chapter argued that a criminal label is a legal label that authoritatively describes a person as having engaged in behaviour that meets the definitional criteria of a specified criminal offence. The chapter then argued that describing someone in this manner performs a status-altering function in respect of the labelled individual. This change in status alters the rights and duties of offenders. The chapter then argued that a subset of these criminal labels are punitive labels.

Further, I argued that the kind of wrong and injustice committed against someone who is mislabelled is an ontic injustice. An ontic injustice is the wrong of categorising someone incorrectly as a certain sort of person falling into a particular category and so assigning them the wrong legal and social status. This kind of injustice creates a mismatch between a person's legal and social status with the person's actual entitlements in critical morality. Therefore, the incorrect alteration of someone's status in criminal labelling entails altering their rights and duties inappropriately. The chapter also argued that the punitive criminal label is the paradigmatic case of criminal labelling. This in turn means that the central case of fair labelling addresses the 'mislabelling' that occurs in the context of blame allocation. I argued here that features of fair labelling in the context of blaming can illuminate the relationship between these non-punitive labels (and their non-blame allocations) and punitive labels. I concluded the chapter by analysing the relationship between the conviction as a punitive label and other kinds of criminal labels such as discharges, insanity labels, non-crime hate incidents and ASBOs.

II. Chapter 2

This chapter focused on the definitional criteria of punishment for a punitive label. To understand certain features of criminal labelling, it is fruitful to analyse the component features of punishment since these shed light on the overall function or purpose of punitive criminal labels. Aside from the blaming and communicative aspects of punishment, the key aspect of punishment that was stressed was the importance of seeing criminal offences as public wrongs, i.e. wrongs that concern the community. I argued that this is why an offence's commission and the status change that will apply to the offender may be communicated to the community and not just the offender themselves. As the offender has committed a public wrong, punishment of the offender concerns the public. This does not mean anything and everything about the offender must be communicated, only that punishment is not just a matter between the offender and the state. The wider public also has an interest in the punishment of the offender.

Furthermore, because the state intentionally imposes burdens and duties on offenders when it punishes them, the scope and ambit of such intentional punishment must inform our understanding of fair labelling. The state's intention helps delineate the ambit of the kinds of criminal labels aimed at punishment, such as convictions.

III. Chapter 3

This chapter argued that (i) the practice of labelling offenders and (ii) the constraints imposed on labelling by the principle of fair labelling are both morally justified. The chapter examined what was termed the educative function of labelling (made possible only by the communication of blame to the public). I argued here that the educative function of labelling explains why punitive criminal labels are communicated to the community at large, rather than kept secret or published using anonymous labels or pseudonyms. I argued further that the reasons for communicating such labels

to the broader community are apparent only when one appreciates the role of civil society in the process of punishment. Building on this point, the chapter then argued that the point of communicative blame is to bring about a greater alignment of moral understandings. Although punishment cannot achieve a full and deep mutual understanding of an offender's blameworthiness between the public and the offender themselves; it may still aspire to achieve a basic alignment of moral understandings between the public and offender. Communicating the change in status of an offender, especially the alteration of duties imposed on them, allows the public to assess whether the state has justly or appropriately assigned such a status to an individual. In turn, it also allows the state to communicate the blameworthiness of an individual's conduct to the public and the individual themselves. When this is done correctly, it allows for an alignment of understanding between the state, public and individual offender about the blameworthiness of the conduct committed and the change in status wrought by it.

IV. Chapter 4

Since fair labelling is concerned with blame allocation, this chapter dealt with the extent to which mens rea states (purpose, knowledge, recklessness, negligence) must be communicated by offence labels. I argued that the presence of different mens rea states concerning similar wrongs must, at least presumptively, be communicated using separate labels. Blame is a reactive attitude that hinges on the quality of ill will that one's mens rea state demonstrates about an individual's wrongdoing. It was argued that different mens rea requirements disclose a particular kind of ill will to a victim that warrants different treatment in punishment. The focus was on the mens rea states employed most commonly in Anglo-American systems of criminal law, namely purpose, knowledge, recklessness and negligence. Although countervailing considerations may point against doing so, the argument was that, in principle, offence labels should communicate the defendant's mens rea state, and not remain opaque on that front.

V. Chapter 5

This chapter expanded on the discussion in chapter 4 by exploring the relevance of public understanding of certain offence labels, and when such labels might in the light of those understandings communicate something inappropriate about the holder's blameworthiness. I argued that public perceptions set the outer limits of permissible communication about blame. If one accepts that punitive labels are partially justified by educating the public and conscripting them into the practice of punishment, it follows that this communication of blame must remain within these broad limits. Cases where there is a mismatch between what the public assumes a label means must then be addressed as a potential source of unfair labelling. This does not mean that the law must track social morality as opposed to its critical dimension, but that for the law to be successful in its educative role, and likewise for society to properly hold the state accountable for its blame allocations when the state punishes, there must be a rough alignment of moral understandings between the criminal law and the public. The chapter explored this idea through consideration of debates related to the labels of 'murder' and 'rape'.

The chapter also analysed the objection that the approach developed in Chapter 4 will be hyperinflationary in terms of the number of criminal offences created. The chapter assessed the argument that rule of law concerns conflict with fair labelling because fair labelling usually requires new offences to be created, thus threatening the clarity and intelligibility of criminal offences. The chapter also analysed the concern that the creation of more offences would lead to possible prosecutorial abuse of charge bargaining relating to overlapping charges. Broadly, the chapter argued that the rule of law and fair labelling (understood as a principle of justice) ought to be understood as mutually supportive and co-constitutive of each other. On one hand fair labelling cannot be realised without the rule of law. On the other hand, the rule of law in punishment requires justice (expressed in the need to allocate blame justly as expressed in fair labelling). Thus,

fair labelling is a principle of legal justice constituted by both the rule of law and justice. The assumption that these two values inevitably will compete, and one must trump the other, is flawed. Instead, optimism is warranted since, although some new offences would be created, this need not be understood as hyper-inflationary logic. The aim of this discussion culminated in evaluating accomplice liability and its compliance with fair labelling concerns. This evaluation demonstrated the case for optimism in fair labelling, rejecting the arguments of theorist's such as Douglas Husak who argue that there is little choice but to adopt less morally satisfactory solutions which do not give complete expression to fair labelling.

VI. Chapter 6

As already suggested, fair labelling does not only concern issues of offence naming and differentiation, but also the persistence of a label. In this chapter, I argued that there is a certain kind of ontic injustice that results when labels persist inappropriately. This is because altering a person's status in a manner that conflicts with or creates a mismatch with that person's dignity. In this vein, the chapter analysed the essentialising objection to criminal labelling. This objection avers that criminal labels (including convictions) essentialise an offender; offenders are represented entirely by their criminal offence, rather than other features of their life. Whilst I did not accept the most strident versions of this objection, I instead argued that a reconceptualised version of it would object to treating offenders with contempt and in turn as irredeemable. However, labelling them as an offender does not *per se* treat them as an inferior human being or citizen. Instead, the problem is treating someone as irredeemable and so lacking the *capacity* to reform. Specifically, I argued here that to be treated and regarded as irredeemable by the state in a manner that is impervious to any evidence to the contrary is to be labelled unfairly. However, I argued that the state need only avoid being impervious to acts of reform or redemption, not that it must wipe the slate clean automatically upon serving hard treatment.

VII. Chapter 7

In Chapter 7 I then examined the persistence of the criminal label as it relates to the social status of an offender. Specifically, I argued that the communication and publicity of a criminal label may extend the altered status of an offender. I examined in particular the disclosure of convictions and criminal records after an offender has served a period of hard treatment such as imprisonment. The chapter assessed the arguments in favour of why an offender ought to be allowed to 'spend' or 'live down' convictions. These arguments concerned some kind of 'rehabilitative' logic (understood as a combination of non-recidivism and moral improvement) and aim to allow an individual to live down an offence by affording some measure of privacy that prohibits disclosure of an offender's criminal record. I then examined how measures such as sex offender registries and access to criminal records granted to employers may extend the label (and its penal logic) despite being mostly concerned with reducing the risk of re-offending. This persistence of a label may inappropriately create a mismatch between an offender's right to live down a label.

VIII. Overall Conclusion

This thesis presented a normative account of the principle of fair labelling in criminal law. It explored three broad aspects that concern the 'unfairness' that fair labelling aims to address. First, fair labelling concerns the *naming* of various offences. Second, fair labelling may also concern the manner in which offences are *differentiated* from one another. Third and last, fair labelling may also mean the duration or *persistence* of a criminal label. The main proposition of the thesis was that fair labelling is concerned with blame allocation in criminal labelling, where possessing a criminal label is understood as a status that alters the rights and duties of offenders.

Importantly, the thesis argued that fair labelling is not so exacting a standard that it requires absolute and perfect allocation of blame in pedantically precise terms. Instead, fair labelling requires reasonable compliance such that it avoids an ontic injustice where the offender's moral entitlements are at odds with their legal and social status when they are labelled by the criminal law. The thesis has highlighted that fair labelling also includes a conception of punishment that has an important role for the public and civil society in holding the state accountable for its labelling practices and so requires some concern with how the state communicates the allocation of blame in offence naming, differentiation and persistence. Perhaps the least discussed aspect of fair labelling the thesis illuminates is the concern with persistence. Here, the thesis highlights how inappropriate persistence of a criminal label may treat someone as an inferior or second-class citizen who is irredeemable and worthy of contempt. More thought must be given to this dimension of labelling if fair labelling is to be taken seriously. Overall, this thesis brings attention to the need to theorise fair labelling more deeply as a legal principle of justice that is indispensable in any system of criminal law.

Table of Legislation

I. Australia

- Crimes (Sentencing Procedure) Act (New South Wales) 1999
- Penalties and Sentences Act (Queensland, Australia) 1992

II. Canada

- Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act, 1982)

III. England Wales

- Accessories and Abettors Act 1861
- Anti-Social Behaviour, Crime and Policing Act 2014
- Crime and Disorder Act 1998 (repealed)
- Criminal Procedure (Insanity and Unfitness to Plead) Act 1991
- Domestic Violence, Crime and Victims Act 2004
- Gender Recognition Act 2004
- Offences Against the Person Act 1861
- Police Act 1997
- Rehabilitation of Offenders Act 1974
- Road Traffic Act 1988
- Sentencing (Pre-consolidation Amendments) Act 2020
- Serious Crime Act 2007
- Sexual Offences Act 2003

IV. Scotland

- Antisocial Behaviour (Scotland) Act 2004
- Sexual Offences (Scotland) Act 2009

V. South Africa

- Criminal Procedure Act 1977

VI. Criminal Codes

- Criminal Code of Canada (1985)
- Criminal Code of Sweden (1965)
- Draft Criminal Code for Scotland (2003)
- Model Penal Code of the United States (1962)

Table of Cases

I. Canada

- *R v Martineau* [1990] 2 SCR 633
- *R v Vaillancourt* [1987] 2 SCR 636

II. England and Wales

- *B (a Minor) v DPP* [2000] 2 A.C. 428
- *Director of Public Prosecutions v Morgan* [1976] AC 182
- *In re on application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (P, G & W) v Secretary of State for the Home Department; R (P) v Secretary of State for the Home Department* [2019] UKSC 3
- *Miller v College of Policing* [2021] EWCA Civ 1926
- *Omenma v. Home Secretary* [2014] UKUT 314
- *R v Adomako* [1995] 1 AC 171
- *R v Chan Wing-Siu* [1985] AC 168
- *R (L) v Chief Constable of Kent Police* [2014] EWHC 463 (Admin)
- *R v Crown Court at Norwich ex parte Belsham* [1992] 94 Cr. App. R. 382
- *R v G* [2008] UKHL 37
- *R v Jogee* [2016] UKSC 8
- *R v Matthews and Alleyne* [2003] EWCA Crim 192
- *R v M'Naghten* (1843) 8 ER 718
- *R v Patel* [2006] EWCA Crim 2689
- *R v Powell* [1999] 1 AC 1
- *R v Pritchard* (1836) 7 C & P 303
- *R v Quick* [1973] QB 910
- *R v R* [1991] UKHL 12
- *R (on the application of F (by his litigation friend F)) and Thompson (FC) (Respondents) v Secretary of State for the Home Department (Appellant)* [2010] UKSC 17
- *R v Sullivan* [1984] AC 156
- *R v Woollin* [1999] AC 82

III. Scotland

- *Drury v HM Advocate* 2001 SCCR 583
- *HM Advocate v Purcell* 2007 SCCR 520
- *Jamieson v HM Advocate* 1994 JC 88.
- *Petto v HM Advocate* [2011[HCJAC 80

IV. South Africa

- *Dawood & another v Minister of Home Affairs & others* 2000 (3) SA 936
- *S v Mandela and Others* (1964) TPD 1
- *Savoi & others v National Director of Public Prosecutions & another* 2014 (5) SA 317 (CC)
- *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1)
- *Thebus and Another v S* 2003 (6) SA 505 (CC)
- *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC).

V. United States

- *Obergefell v Hodges* 576 U.S. 644 (2015)
- *Rose v Clark* 478 U.S. 570 (1986)
- *United States v Russell*, 411 U.S. 423 (1973)

VI. European Court of Human Rights and European Union

- *Google Spain SL, Google IncvAgencia Española de Protección de Datos and Mario Costeja González* (2016) Case C-131/12 (CJEU (Grand Chamber))
- *Kafkaris v Cyprus* 2008 ECHR (Grand Chamber)

VII. International Tribunals

- *Prosecutor v Germain Katanga* (2014) ICC, Trial Chamber
- *Prosecutor v Ruto* et al., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, (2012) ICC, Pre-Trial Chamber
- *Prosecutor v Tadić* (1999) ICTY, Appeals Chamber

Bibliography

A.

- Alexander L, 'Insufficient Concern: A Unified Conception of Criminal Culpability' (2000) 88 California Law Review 931
- Alexander L and Ferzan KK, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009)

  ——, 'Beyond The Special Part', *Philosophical Foundations of Criminal Law* (Oxford University Press 2011)

  ——, *Reflections on Crime and Culpability: Problems and Puzzles* (Cambridge University Press 2018)
- Allan TRS, 'Law as a Branch of Morality: The Unity of Practice and Principle' (2020) 65 The American Journal of Jurisprudence 1

  ——, 'Why the Law Is What It Ought to Be' (2020) 11 Jurisprudence 574
- Anscombe GEM, *Intention* (Harvard University Press 1957)
- Arendt H, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973)
- Ashworth A, 'The Elasticity of Mens rea', in Colin Tapper (ed.), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, London, 1981)

  ——, *Principles of Criminal Law* (5th edn Oxford University Press 2006)
- Ashworth A and Kelly R, *Sentencing and Criminal Justice* (7th edn, Hart Publishing 2021)

B.

- Bartky S, 'On Psychological Oppression' (1979) 10 Southwestern Journal of Philosophy 190
- Barton J, 'Recklessness in Scots Criminal Law: Subjective or Objective?' 2011 Juridical Review 143
- Bell M, *Hard Feelings: The Moral Psychology of Contempt* (Oxford University Press 2013)
- Benn SI, 'An Approach to the Problems of Punishment' (1958) 33 Philosophy 325
- Bentham J, *An Introduction to the Principles of Morals and Legislation* (Dover Publications 1780)
- Betts G, 'Robbery and the Principle of Fair Labelling' (2019) 83 Journal of Criminal Law 205
- Bloom P, *Against Empathy: The Case for Rational Compassion* (Ecco 2016)
- Boonin D, *The Problem of Punishment* (Cambridge University Press 2008)
- Bottoms A, 'Five Puzzles in von Hirsch's Theory' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford University Press 1998)
- Braithwaite J, *Crime, Shame and Reintegration* (Cambridge University Press 1989)
- Branham L, 'Eradicating the Label "Offender" from the Lexicon of Restorative Practices and Criminal Justice' (2019) 9 Wake Forest Law Review 53

- Bratman M, *Intention, Plans, and Practical Reason* (Harvard University Press 1987)

  ——, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press 1999)

  ——, *Structures of Agency: Essays* (Oxford University Press 2007)

- Briere JN and Elliott DM, 'Immediate and Long-Term Impacts of Child Sexual Abuse' (1994) 4 Future of Children 54

- Brownlee K, 'A Human Right Against Social Deprivation' (2013) 63 Philosophical Quarterly 199

  ——, 'Don't Call People "Rapists": On the Social Contribution Injustice of Punishment' (2016) 69 Current Legal Problems 327

  ——, 'Social Deprivation and Criminal Justice' in Francois Tanguay-Renaud and James Stribopoulos (eds), *Rethinking Criminal Law Theory : New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Hart Publishing 2012)

- Brudner A, 'Proportionality, Stigma and Discretion' (1995) 38 Criminal Law Quarterly 302

C.

- Callard A, 'On Anger' [2020] Boston Review 8

- Campagna G, 'The Miracle of Mercy' (2021) 41 Oxford Journal of Legal Studies 1096

- Chadha K, 'Sexual Consent and Having Sex Together' (2020) 40 Oxford Journal of Legal Studies 619

- Chalmers J and Leverick F, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217

  ——, *The Criminal Law of Scotland: Volume II* (4th edn, W Green 2017)

- Chase G, 'An Analysis of the New Sexual-Assault Laws' [1983] 4 Canadian Woman Studies 53

- Cheng M, '"Disturbing": Experts Troubled by Canada's Euthanasia Laws' *Associated Press* (11 August 2022) <https://apnews.com/article/covid-science-health-toronto-7c631558a457188d2bd2b5cfd360a867> accessed 12 February 2023

- Cholbi M, 'Compulsory Victim Restitution Is Punishment: A Reply to Boonin' (2019) 25 Public Reason 85

- Clarkson CMV, 'Theft and Fair Labelling' (1993) 56 Modern Law Review 554

  ——, 'Context and Culpability in Involuntary Manslaughter: Principle or Instinct' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press 2000)

- Cohen NP, 'Forgiving the Criminal Offender British Style: The Rehabilitation of Offenders Act' (1976) 14 Harvard Journal on Legislation 111

- Coleman JL, *The Practice of Principle: In Defence of a Pragmatist Approach* (Oxford University Press 2003)

  ——, 'Incorporationism, Conventionality, and the Practical Difference Thesis Special Issue: Postscript to H.L.A. Hart's the Concept of Law, Part II' (1998) 4 Legal Theory 381

- Cornford A, 'Beyond Fair Labelling: Offence Differentiation in Criminal Law' (2022) 42 Oxford Journal of Legal Studies 985

—— 'Criminalising Anti-Social Behaviour' (2012) 6 Criminal Law and Philosophy 1

——, 'The Architecture of Homicide' (2014) 34 Oxford Journal of Legal Studies 819

- Cottle S, 'Mediatized Public Crisis and Civil Society Renewal: The Racist Murder of Stephen Lawrence' (2005) 1 Crime, Media, Culture 49
- Cunningham S, 'Vehicular Homicide: Need for a Special Offence?' in CMV Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Routledge 2008)

D.

- Daly K and Proietti-Scifoni G, 'Reparation and Restoration' in Michael Tonry (ed), *The Oxford Handbook of Crime and Criminal Justice* (Oxford University Press 2013)
- Darwall S, 'Two Kinds of Respect' (1977) 88 Ethics 36

  ——, 'Respect as Honor and as Accountability' in *Honor, History and Relationship: Essays in Second Personal Ethics II* (Oxford University Press 2013)
- Davidson D, 'How Is Weakness of the Will Possible?' in Joel Feinberg (ed), *Moral Concepts* (Oxford University Press 1970)
- Davis AJ, *Arbitrary Justice: The Power of the American Prosecutor* (Oxford University Press 2009)
- De Souza-Dias T, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18 International Criminal Law Review 788
- Dixon L, 'Tackling Hate by Driving Diversity: A New Labour Success Story? Comment' (2010) 57 Probation Journal 314
- Du Bois-Pedain A, 'Complicity' in Larry Alexander and Kimberly Kessler Ferzan (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Springer International Publishing 2019)

  —— 'Once a Sex Offender, Always a Re-Offending Risk?' (2010) 69 Cambridge Law Journal 428
- Duff RA, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Blackwell 1990)

  ——, 'Dangerousness and Citizenship' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford University Press 1998)

  ——, *Punishment, Communication, and Community* (Oxford University Press 2001)

  ——, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007)

  ——, *The Realm of Criminal Law* (Oxford University Press 2018)

  ——, 'Cliff-Top Predicaments and Morally Blemished Lives' (2019) 19 Jerusalem Review of Legal Studies 125

  ——, 'Two Models of Criminal Fault' (2019) 13 Criminal Law and Philosophy 643

  ——, 'Criminal Law, Civil Order and Public Wrongs' (2019) 7 Law, Ethics and Philosophy 233.
- Duke G, 'The Common Good' in George Duke and Robert P George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press 2017)
- Dworkin G, 'Rehabilitation of Offenders Act 1974' (1975) 38 Modern Law Review 429

- Dworkin R, 'The Model of Rules' (1967) 35 University of Chicago Law Review
- Dyson M, 'Shorn-Off Complicity' (2016) 75 Cambridge Law Journal 196

E.

- Edwards J and Simester A, 'What's Public About Crime?' (2017) 37 Oxford Journal of Legal Studies 105
- Eidelson B, *Discrimination and Disrespect* (Oxford University Press 2015)
- Ekins R, 'How to Be a Free People' (2013) 58 American Journal of Jurisprudence 163
- English and Welsch Law Reform Commission, Murder, Manslaughter and Infanticide (2006) 28
- Evans M, 'Nelson Mandela's "Show Trials": An Analysis of Press Coverage of Mandela's Court Appearances' (2020) Critical Arts 1

F.

- Falls MM, 'Retribution, Reciprocity, and Respect for Persons' (1987) 6 Law and Philosophy 25
- Feinberg J, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press 1987)

  ——, 'The Expressive Function of Punishment' (1965) 49 Monist 397
- Fennell P, 'Criminal Procedure (Insanity and Unfitness to Plead) Act 1991' (1992) 55 Modern Law Review 547
- Ferzan KK, 'Beyond Intention' (2007) 29 Cardozo Law Review 1147

  ——, 'Act, Agency, and Indifference: The Foundations of Criminal Responsibility' (2007) 10 New Criminal Law Review 441
- Ferzan KK and Westen P, 'How to Think (Like a Lawyer) About Rape' (2017) 11 Criminal Law and Philosophy 759
- Finnis J, *Natural Law and Natural Rights* (Oxford University Press 1980)

  ——, *Intention and Identity: Collected Essays Volume II* (Oxford University Press 2011)

  ——, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011)
- Flew A, 'The Justification of Punishment' (1954) 29 Philosophy 291
- Flynn E and Arstein-Kerslake A, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 International Journal of Law in Context 81
- Foran M, 'Rights, Common Good, and the Separation of Powers' (2023) 86 Modern Law Review 599
- Forsberg L and Douglas T, 'What Is Criminal Rehabilitation?' (2022) 16 Criminal Law and Philosophy 103
- Foster C and Herring J, *Identity, Personhood and the Law* (Springer 2017)
- Frankfurt H, 'Equality and Respect' (1997) 64 Social Research 3

  ——, *On Bullshit* (Princeton University Press 2005)

——,*The Importance of What We Care About: Philosophical Essays* (Cambridge University Press 1988)

——, *Necessity, Volition, and Love* (Cambridge University Press 1998)

- Fricker M, 'What's the Point of Blame? A Paradigm Based Explanation' (2016) 50 Noûs 165
- Fuller LL, *The Morality of Law* (Revised edition, Yale University Press 1969)

G.

- Gardner J, 'Reasons for Teamwork' (2002) 8 Legal Theory 495

——, 'The Mark of Responsibility' (2003) 23 Oxford Journal of Legal Studies 157

——, 'Complicity and Causality' (2007) 1 Criminal Law and Philosophy 127

——, 'Rationality and the Rule of Law in Offences Against the Person', *Offences and Defences* (Oxford University Press 2007)

——, 'Crime: In Proportion and in Perspective' in John Gardner (ed), *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007)

——, 'The Wrongness of Rape' in John Gardner (ed), *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007)

——, 'Hart on Legality, Justice and Morality' (2010) 1 Jurisprudence 253

——, Introduction' in HLA Hart, *Punishment and responsibility : essays in the philosophy of law / by H.L.A. Hart* (2nd ed., Oxford 2008)

——, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1

——, 'How Law Claims, What Law Claims' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012)

——, 'The Virtue of Justice and the Character of Law', *Law as a Leap of Faith* (Oxford University Press 2012)

——, 'What Is Tort Law For? Part 2. The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014)

——, 'The Negligence Standard: Political Not Metaphysical' (2017) 80 Modern Law Review 1

- Gardner J and Jung H, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) 11 Oxford Journal of Legal Studies 559
- Gibson M, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 Oxford Journal of Legal Studies 82
- Gibson M and Reed A, 'Reforming English Homicide Law' in Alan Reed and others (eds), *Homicide in Criminal Law: A Research Companion* (Routledge 2018)
- Gordon G and Christie M *The Criminal Law of Scotland: Volume II* (W Green 2001
- Green L, 'Positivism And The Inseparability Of Law And Morals' (2008) 83 New York University Law Review 1035

——, 'Should Law Improve Morality?' (2013) 7 Criminal Law and Philosophy 473

- Greenberg A, 'Epistemic Responsibility and Criminal Negligence' (2020) 14 Criminal Law and Philosophy 91

——, 'Why Criminal Responsibility for Negligence Cannot Be Indirect' (2021) 80 Cambridge Law Journal 489

- Grice HP, *Studies in the Way of Words* (Harvard University Press 1989)

H.

- Hampton J, 'The Moral Education Theory of Punishment' (1984) 13 Philosophy & Public Affairs 208

  ——, 'Mens Rea' (1990) 7 Social Philosophy and Policy 1

  ——, 'Correcting Harms versus Righting Wrongs: The Goal of Retribution' (1991) 39 UCLA Law Review 1659

- Hart HLA, *Punishment and Responsibility : Essays in the Philosophy of Law* (2nd ed., Oxford 2008)
- Hawthorne N, *The Scarlet Letter* (Reprint edition, Wordsworth Editions 1992)
- Hester R, 'Prior Record and Recidivism Risk' (2019) 44 American Journal of Criminal Justice 353
- Honderich T, *Punishment: The Supposed Justifications Revisited* (Revised edition, Pluto Press 2006)
- Horder J, 'Rethinking Non-Fatal Offences against the Person' (1994) 14 Oxford Journal of Legal Studies 335

  ——, *Homicide and the Politics of Law Reform* (Oxford University Press 2012)

  ——, *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press 2019)

- Hoskins Z, 'Deterrent Punishment and Respect for Persons' (2011) 8 Ohio State Journal of Criminal Law 369

  ——, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford University Press 2019)

- Howell KB, 'Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System' (2014) 27 Georgetown Journal of Legal Ethics 285
- Husak D, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007)

  ——, *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press 2010)

  ——, 'Abetting a Crime' (2014) 33 Law and Philosophy 41

  ——, 'Larry Alexander and Kimberly Kessler Ferzan on Omissions and Normative Ignorance: A Critical Reply' (2021) Criminal Law and Philosophy

I.

- Irish Law Commission, Knowledge or Belief Concerning Consent in Rape Law' (2019)

J.

- Jacobs J, *The Liberal State and Criminal Sanction: Seeking Justice and Civility* (Oxford University Press 2020)

——, 'Censure, Sanction and the Moral Psychology of Resentment' in Antje du Bois-Pedain and Anthony Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart Publishing 2019)

- Jacobs JB and Blitsa D, 'US, EU and UK Employment Vetting as Strategy for Preventing Convicted Sex Offenders from Gaining Access to Children' (2012) 20 European Journal of Crime, Criminal Law and Criminal Justice 265
- Jenkins K, 'Ontic Injustice' (PhD, Sheffield 2016) <https://etheses.whiterose.ac.uk/13453/1/Jenkins%20Ontic%20Injustice%20Thesis.pdf> accessed 9 December 2022

  ——, 'Ontic Injustice' (2020) 6 Journal of the American Philosophical Association 188
- Jenness V and Grattet R, *Making Hate A Crime: From Social Movement to Law Enforcement* (Russell Sage Foundation 2001)

K.

- Kamm FM, *Morality, Mortality Volume II: Rights, Duties, and Status* (Oxford University Press 2001)
- Kaseweter K and others, 'High-Risk Sexual Offenders: Towards a New Typology' (2016) 47 Journal of Criminal Justice 123
- Kenny A, *Free Will and Responsibility* (Routledge 1978)
- Keown J, 'The Logical Link between Voluntary and Non-Voluntary Euthanasia' (2022) 81 Cambridge Law Journal 84
- Kilpatrick D, *Factors Predicting Psychological Distress Among Rape Victims* (Routledge 2013)
- Kleinig J, 'Punishment and Moral Seriousness Justice in Punishment: Theories of Punishment' (1991) 25 Israel Law Review 401

  ——, The Architecture of Censure' in Antje du Bois-Pedain and Anthony Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (2019)
- Klonick K, 'Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age Focus on Cyberlaw' (2015) 75 Maryland Law Review 1029
- Korsgaard C, 'The Reasons We Can Share', *Creating the Kingdom of Ends* (Cambridge University Press 1996)

  ——, 'On Having a Good' (2014) 89 Philosophy 405

  ——, *Self-Constitution: Agency, Identity, and Integrity* (Oxford University Press 2009)
- Kramer M, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford University Press 2011)

  ——, 'On the Moral Status of the Rule of Law' (2004) 63 Cambridge Law Journal 65
- Krug P, 'Prosecutorial Discretion and Its Limits' (2002) 50 American Journal of Comparative Law Supplement 643
- Kutz C, 'The Philosophical Foundations of Complicity Law' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011)

L.

- Lamond G, 'What Is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609
- Larcombe W and others, "'I Think It's Rape and I Think He Would Be Found Not Guilty": Focus Group Perceptions of (Un)Reasonable Belief in Consent in Rape Law' (2016) 25 Social & Legal Studies 611
- Lee CKY, 'Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines' (1994) 42 UCLA Law Review 105
- Loughnan A, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press 2012)
- Lukina A, 'Legal Nurturing: The Educational Function of Law in the Soviet Union' (2021) 18 Ideology and Politics Journal 57
- Lynskey O, 'Control over Personal Data in a Digital Age: Google Spain v AEPD and Mario Costeja Gonzalez' (2015) 78 Modern Law Review 522

M.

- Macdonald JHA, *A Practical Treatise on the Criminal Law of Scotland* (5th edn, 1948)
- MacIntyre A, 'The Privatization of Good: An Inaugural Lecture' (1990) 52 Review of Politics 344
- MacPherson W, 'The Stephen Lawrence Inquiry' (Home Office 1999) Cm 4262-I
- Maher G, Pearson J and Frier BM, 'Diabetes Mellitus and Criminal Responsibility' (1984) 24 Medicine, Science and the Law 95
- Manwaring J, 'Capacity and Culpability' (DPhil thesis, Oxford 2019) <https://ora.ox.ac.uk/objects/uuid:ad68726b-ad24-4f58-946f-9c0571480e84/download_file?file_format=application%2Fpdf&safe_filename=Manwaring%2C%2BCapacity%2Band%2BCulpability%2B%282020%29.pdf&type_of_work=Thesis>
- Marshall SE and Duff RA, 'Criminalization and Sharing Wrongs' (1998) 11 Canadian Journal of Law and Jurisprudence 7
- Mason M, 'Contempt as a Moral Attitude' (2003) 113 Ethics 234
- Massaro TM, 'Shame, Culture, and American Criminal Law' (1991) 89 Michigan Law Review 1880
- May J and Holton R, 'What in the World Is Weakness of Will?' (2012) 157 Philosophical Studies 341
- Mayr E, 'Unwitting Omissions, Mistakes and Responsibility' in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Agency, Negligence and Responsibility* (Cambridge University Press 2021)
- McDiarmid C, '"Something Wicked This Way Comes": The Mens Rea of Murder in Scots Law' (2012) 4 Juridical Review 283
- McDonald L, 'Shaming, Blaming, and Responsibility' (2020) 1 Journal of Moral Philosophy 1
- Michaels AC, 'Acceptance: The Missing Mental State' (1997) 71 Southern California Law Review 953
- Misner RL, 'Recasting Prosecutorial Discretion Criminal Law' (1995) 86 Journal of Criminal Law and Criminology 717

- Mitchell B, 'Public Perceptions of Homicide and Criminal Justice' (1998) 38 British Journal of Criminology 453
- Moore MS, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press 2010)
- Moshikaro K, 'The Moral and Legal Foundations of Fair-Labelling in Our Criminal Law' (2018) 135 South African Law Journal 262
- Murphy J, *Street on Torts* (12th edn, Oxford University Press 2007)
- Mustafa N, Kingston P and Beeston D, 'An Exploration of the Historical Background of Criminal Record Checking in the United Kingdom: From the Eighteenth to the Twenty-First Century' (2013) 19 European Journal on Criminal Policy and Research 15

N.

- Nagel T, 'War and Massacre' (1972) 1 Philosophy and Public Affairs 123
- Nobles R and Schiff D, 'Criminal Justice Unhinged: The Challenge of Guilty Pleas' (2019) 39 Oxford Journal of Legal Studies 100
- Norrie A, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn, Cambridge University Press 2014)
- Nussbaum MC, *Political Emotions: Why Love Matters for Justice* (Harvard University Press 2013)

  ——, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford University Press 2016)

O.

- O'Leary N and Green S, 'From Invisible to Conspicuous: The Rise of Victim Activism in the Politics of Justice' in Jacki Tapley and Pamela Davies (eds), *Victimology: Research, Policy and Activism* (Springer International Publishing 2020)

P.

- Padfield N, 'Judicial Rehabilitation? A View from England' (2011) 3 European Journal of Probation 36
- Palacios VJ, 'Go And Sin No More: Rationality and Release Decisions by Parole Boards' (1993) 45 South Carolina Law Review 567
- Parfit D, *Reasons and Persons* (Oxford University Press 1986)
- Peay J, 'Mental Incapacity and Criminal Liability: Redrawing the Fault Lines?' (2015) 40 International Journal of Law and Psychiatry 25
- Pinedo V, 'Let's Keep It Civil: An Evaluation of Civil Disabilities, a Call for Reform, and Recommendations to Reduce Recidivism' (2017) 102 Cornell Law Review 513
- Plaxton M, 'The Challenge of the Bad Man' (2012) 58 McGill Law Journal 451
- Purshouse J, 'Non-Conviction Disclosure as Part of an Enhanced Criminal Record Certificate: Assessing the Legal Framework from a Fundamental Human Rights Perspective' [2018] Public Law 668

R.

- Rawls J, *A Theory of Justice* (revised, Harvard University Press 1999)
- Raz J, *Value, Respect, and Attachment* (Cambridge University Press 2001)

  ——, 'The Claims of Law', *The Authority of Law* (Oxford University Press 1979)
- Resick P, 'The Psychological Impact of Rape' (1993) 8 Journal of Interpersonal Violence 223
- Rhine EE, 'The Present Status and Future Prospects of Parole Boards and Parole Supervision' in Joan Petersilia and Kevin R Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press 2012)
- Roberts JV and Gebotys RJ, 'Reforming Rape Laws' (1992) 16 Law and Human Behavior 555
- Roberts JV, Grossman MG and Gebotys RJ, 'Rape Reform in Canada: Public Knowledge and Opinion' (1996) 11 Journal of Family Violence 133
- Rogers J, 'Restructuring the Exercise of Prosecutorial Discretion in England' (2006) 26 Oxford Journal of Legal Studies 775
- Ronson J, *So You've Been Publicly Shamed* (Riverhead Books 2015)
- Rothbaum BO and others, 'A Prospective Examination of Post-Traumatic Stress Disorder in Rape Victims' (1992) 5 Journal of Traumatic Stress 455
- Roughan N, 'The Official Point of View and the Official Claim to Authority' (2018) 38 Oxford Journal of Legal Studies 191

S.

- Scanlon T, *What We Owe to Each Other* (Harvard University Press 1998)

  ——, *Moral Dimensions: Permissibility, Meaning, Blame* (Harvard University Press 2008)
- Scottish Law Commission, Discussion Paper on the Mental Element in Homicide (2021) 172

  ——, Report on Rape and Other Sexual Offences (Scot Law Com No 209, 2007)
- Searle J, *Making the Social World: The Structure of Human Civilization* (Oxford University Press 2010)

  ——, *The Construction of Social Reality* (Free Press 1997)
- Seelmann K, 'Does Punishment Honour the Offender' in AP Simester, Ulfrid Neumann and Antje L Du Bois-Pedain (eds), *Liberal Criminal Theory: Essays for Andreas Von Hirsch* (Hart Publishing 2014)
- Shapiro S, 'What Is the Internal Point of View?' (2006) 75 Fordham Law Review 1157
- Shils E, 'The Virtue of Civil Society' (1991) 26 Government and Opposition 3
- Simester AP, 'Is Strict Liability Always Wrong?' in AP Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005)

  ——, 'Accessory Liability and Common Unlawful Purposes' (2017) 133 Law Quarterly Review 7
- Simester AP and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th edn, Hart Publishing 2019)

- Simmonds N, *Law as a Moral Idea* (Oxford University Press 2008)
- Smith Scharff P, 'The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature' (2006) 34 Crime and Justice 441
- Srinivasan A, 'The Aptness of Anger' (2018) 26 Journal of Political Philosophy 123
- Stanton-Ife J, 'Horrific Crime' in RA Duff and others (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010)
- Stark F, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge University Press 2016)

  ——, 'Reckless Manslaughter' [2017] Criminal Law Review 763

  ——, 'It's Only Words: On Meaning and Mens Rea' (2013) 72 Cambridge Law Journal 155

  ——, 'The Demise of "Parasitic Accessorial Liability": Substantive Judicial Law Reform, Not Common Law Housekeeping' (2016) 75 Cambridge Law Journal 550
- Strawson PF, 'Freedom and Resentment' (1962) 48 Proceedings of the British Academy 1

T.

- Tadros V, *Criminal Responsibility* (Oxford University Press 2007)

  ——, 'The Scots Law of Murder' in Jeremy Horder and David Hughes (eds), *Homicide Law in Comparative Perspective* (Bloomsbury Publishing 2007)
  ——,*The Ends of Harm : The Moral Foundations of Criminal Law* (Oxford University Press 2011)

  ——, 'Fair Labelling and Social Solidarity' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012)

  ——, *To Do, To Die, To Reason Why: Individual Ethics in War* (Oxford University Press 2020)
- Tasioulas J, 'Punishment and Repentance' (2006) 81 Philosophy 279
- Termeer J and Szeto A, 'Mental Illness Stigma in Criminal Justice: An Examination of Stigma on Juror Decision-Making' (2021) 13 Inquiries Journal <http://www.inquiriesjournal.com/articles/1865/mental-illness-stigma-in-criminal-justice-an-examination-of-stigma-on-juror-decision-making> accessed 15 December 2022
- Thomas T, 'When Public Protection Becomes Punishment? The UK Use of Civil Measures to Contain the Sex Offender' (2004) 10 European Journal on Criminal Policy and Research 337

  ——, 'The Sex Offender "Register": A Case Study in Function Creep' (2008) 47 Howard Journal of Criminal Justice 227
- Thomas T and Hebenton B, 'Dilemmas and Consequences of Prior Criminal Record: A Criminological Perspective from England and Wales' (2013) 26 Criminal Justice Studies 228
- Thomas T and Thompson D, 'Applications to Come off the UK Sex Offender Register: The Position after F and Thompson v. Home Office 2010' (2012) 51 Howard Journal of Criminal Justice 274
- Thomas T and Tuddenham R, 'The Supervision Of Sex Offenders: Policies Influencing The Probation Role' (2002) 49 Probation Journal 10

- Tierney B, 'Historical Roots of Modern Rights: Before Locke and After Symposium: Rethinking Rights: Historical, Political, and Theological Perspectives: Keynote Address' (2005) 3 Ave Maria Law Review 23

V.

- Valentine MB, 'Abetting a Crime: A New Approach' (2022) 41 Law and Philosophy 351
- Vogel M, 'Plea Bargaining under the Common Law' in Darryl K Brown, Jenia I Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019)
- Von Hirsch A, *Deserved Criminal Sentences* (Bloomsbury Publishing 2017)

  ——, 'Warum soll die Strafsanktion existieren? Tadel und Pravention als Elemente einer Rechtfertigung' in Andrew Von Hirsch, Ulfrid Neumann and Kurt Seelmann (eds), *Strafe - warum? Gegenwärtige Strafbegründungen im Lichte von Hegels Straftheorie* (1. Auflage, Nomos 2011)

  ——, 'Censure and Hard Treatment in Punishment's Justification: A Reconceptualisation of Desert-Oriented Penal Theory' in Antje du Bois-Pedain and Anthony Bottoms (eds), *Penal Censure: Engagements Within and Beyond Desert Theory* (2019)
- Von Hirsch A and Ashworth A, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005)

W.

- Waldron J, 'How Law Protects Dignity' (2012) 71 Cambridge Law Journal 200

  ——, *Dignity, Rank, and Rights* (Oxford University Press 2012)
- Wall J, 'Public Wrongs and Private Wrongs' (2018) 31 Canadian Journal of Law & Jurisprudence 177
- Wallace RJ, *Responsibility and the Moral Sentiments* (Harvard University Press 1994)

  ——, 'Hypocrisy, Moral Address, and the Equal Standing of Persons' (2010) 38 Philosophy & Public Affairs 307
- Wallin L and others, 'Capricious Credibility – Legal Assessments of Voluntariness in Swedish Negligent Rape Judgements' (2021) 22 Nordic Journal of Criminology 3.
- Wasik M, 'The Grant of an Absolute Discharge' (1985) 5 Oxford Journal of Legal Studies 211
- Watson G, 'The Possibility of Pure Negligence' in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Agency, Negligence and Responsibility* (Cambridge University Press 2021)
- Weissman DM, 'The Personal Is Political - and Economic: Rethinking Domestic Violence' (2007) Brigham Young University Law Review 387
- Wellford C, 'Labelling Theory and Criminology: An Assessment' (1975) 22 Social Problems 332
- Wenar L, 'The Nature of Claim-Rights' (2013) 123 Ethics 202
- Williams G, 'Convictions and Fair Labelling' (1983) 42 Cambridge Law Journal 85

  ——, 'Oblique Intention' (1987) 46 Cambridge Law Journal 417
- Wilson W, 'What's Wrong with Murder?' (2007) 1 Criminal Law and Philosophy 157

- Wright K and Henry A, 'Historical Institutional Child Abuse: Activist Mobilisation and Public Inquiries' (2019) 13 Sociology Compass

Y.

- Yankah EN, 'Legal Hypocrisy' (2019) 32 Ratio Juris 2

  ——, 'Ahmaud Arbery, Reckless Racism and Hate Crimes: Recklessness as Hate Crime Enhancement' (2021) 53 Arizona State Law Journal 681

Z.

- Zedner L, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57 Modern Law Review 228

  ——, 'Penal Subversions: When Is a Punishment Not Punishment, Who Decides and on What Grounds?' (2016) 20 Theoretical Criminology 3

- Zhou YK, 'What It Means to Suffer Harm' (2021) 13 Jurisprudence 26

  ——, 'More on What It Means to Suffer Harm' (2022) 13 Jurisprudence 516

- Zipursky BC, 'From Law to Moral Philosophy in Theorizing about Negligence' in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Agency, Negligence and Responsibility* (Cambridge University Press 2021)