Criminal Culpability and Moral Luck

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Andrew Simester's *Fundamentals of Criminal Law*,[1] displays his customary mix of deep knowledge, insight, and creativity in exploring the central doctrines of criminal liability. His account of those doctrines is complex, bringing considerations of moral philosophy, the rule of law, the proper basis for criminalisation, and the practicalities of the criminal justice system to bear on his analysis. His discussion is consistently stimulating, challenging common orthodoxies about the function and justification of the central doctrines of the common law, and forcing the reader to think again about familiar topics in criminal law theory. All of this applies with particular force to the focus of this paper: Simester's discussion of the problem of criminal culpability and moral luck.

The issue of moral luck arises most vividly in the criminal law with the question of whether the outcome of the defendant's actions should make any difference to the defendant's liability; whether, for instance, a defendant who attempts to kill their victim yet fails by chance should be treated any differently to the would-be killer who succeeds.[2] The relevance of the outcome of the defendant's actions to their criminal liability is part of a far broader philosophical question of moral luck, which extends to the role of chance in the circumstances that individuals confront and the fortune in how their characters are constituted.[3] Some of us are lucky enough never to face the dire choices which befall others, yet we are judged on how we respond to the circumstances that actually confronted us, not for how we would have responded to a circumstance that did not, fortunately, confront us. Similarly, we are often assessed for our characters, yet we have very limited influence over the characters we possess. But *should* we be judged on the basis of the chance outcomes of our actions, or the chance circumstances that unluckily befall us, or the chance of what characters we possess? The literature on moral

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[1] Hereafter *FoCL*.

[2] My focus throughout this paper is on 'complete' attempts, i.e. those where the defendant has fully carried out their plan to bring about an outcome; and similarly on those cases of recklessness where the defendant has actually taken the unjustified risk of bringing about an outcome.

[3] The *locus classicus* is T. Nagel's paper 'Moral Luck' in his *Mortal Questions* (Cambridge, 1979). In this discussion I disregard Nagel's fourth category of moral luck—luck in how our choices are determined by antecedent circumstances (p. 35)—which relates to the problem of the freedom of the will.

luck is vast, and inconclusive. It is a notoriously intractable problems in moral philosophy.[4]

It is outcome luck that has generated the sharpest debates in criminal law theory. On the one hand there are those who argue that outcome luck is irrelevant to the defendant's blameworthiness: an attempt and a completed crime are equally blameworthy. Similarly, recklessly risking an outcome and recklessly bringing that outcome about are equally blameworthy. Indeed, some go further and argue that outcomes are irrelevant to liability, not just punishment. In an ideal criminal code all offences would be defined in an inchoate mode: attempting to injure some protected interest, or recklessly endangering such an interest.[5] It is the defendant's intention or recklessness that grounds criminal culpability, and results are irrelevant to this. On the other hand there are those who argue that outcomes *are* relevant to the defendant's blameworthiness.[6] The defendant is blameworthy for what they have *done*, and what they have done is either intentionally (or recklessly) bring about an outcome, or merely to have tried to bring about (or knowingly risked bringing about) that outcome. So their degree of blameworthiness depends on how things actually turn out, not just their intentions or advertence to risk when they acted. It is morally worse to kill than to attempt to kill (or recklessly endanger life), so it is more blameworthy to have intentionally (or recklessly) killed. The criminal law rightly marks both the liability for the outcome and the additional blameworthiness for bringing it about.

Simester's book makes two distinctive contributions to the debate on outcome luck. The first is to reject both of the standard views. Contrary to those who reject moral luck and think that all offences should be in an inchoate mode, he argues that outcomes *are* relevant to the definition of offences, and that it is appropriate for a criminal code to have completed offences such as murder as well as inchoate offences such as attempted murder. On the other hand, he argues that those who intentionally kill and those who attempt to kill are *equally* blameworthy for their actions, and (*ceteris paribus*) deserve equal punishment. (Similarly, those who recklessly endanger life and those whose reckless endangerment causes death are equally blameworthy.) Outcomes, therefore, can make a

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[4] See recent surveys in D Enoch, 'Moral Luck' in *The International Encyclopedia of Ethics*, H Lafollette ed (Blackwell, 2013) and D Nelkin, 'Moral Luck' in *The Stanford Encyclopedia of Philosophy*, Edward N Zalta (ed), Summer 2019 Edition.

[5] E.g. A Ashworth, 'Taking the Consequences' in J Gardner, J Horder and S Shute (eds), *Action and Value in Criminal Law* (Oxford, 1993) and L Alexander and K Ferzan, *Crime and Culpability* (Cambridge, 2009).

[6] E.g. RA Duff, *Criminal Attempts*, chapter 12 (Oxford, 1996), J Gardner, *Offences and Defences*, chapter 11 (Oxford, 2007) and M Moore, *Placing Blame*, chapter 5 (Oxford, 2010).

defendant culpable for bringing about a worse wrong, and this should be reflected in the label of the crime, but they do not make the defendant more blame*worthy* for that outcome, and thus do not justify heavier punishments where an outcome occurs. Simester's other distinctive contribution to the outcome luck debate is to reject the common argument that outcomes are irrelevant to blameworthiness because their occurrence or non-occurrence is outside the defendant's control. Instead, he argues, outcomes are irrelevant because the defendant's *degree* of blameworthiness is fixed at the moment the defendant acts, and depends exclusively on their defective engagement with reason in acting.

These conclusions concerning moral luck flow from Simester's overall account of criminal culpability, and it is to this account that I will briefly turn. For Simester, the central case of criminal culpability has four elements: (a) a wrong, for which the defendant is (b) ascriptively responsible and (c) morally responsible, and for which the defendant is (d) morally culpable. A defendant who satisfies (a)–(d) is liable to being punished, though the amount of punishment—and indeed whether any punishment should actually be imposed in a specific case—may turn on further considerations. Let me say a little more about each element in this account.

First of all, criminal liability is paradigmatically for moral wrongs, understood as breaches of moral duties.[7] The criminal law is concerned with situations in which the defendant is deserving of censure for their behaviour, and it is breaches of duty that bring such censure into question. Or, to be more precise, it is the defendant's *unjustified* wrongs that bring censure into question.[8] In addition, the defendant can only deserve censure if the breach of duty is *their* wrong. To be the *defendant's* breach it must be appropriate to ascribe or attribute the breach of duty to the defendant.[9] Such ascriptions can be made on the basis of causation,[10] those omissions where the defendant had a duty to act,[11] and some situations of complicity.[12] The defendant must also be *morally* responsible for the breach. Even if the breach of duty can be appropriately attributed to the defendant, the defendant must be eligible for moral assessment in respect of that breach.[13] And the defendant can only be eligible for moral assessment if their actions

[7] E.g. *FoCL* §§1.4, 2.1, 11.1.1. (This includes offences that are *mala prohibita*, not merely those that are *mala in se*: see *FoCL* §11.1.1.)
[8] See *FoCL* §11.1.1.
[9] *FoCL* §14.2.
[10] *FoCL* ch 5.
[11] *FoCL* ch 6.
[12] *FoCL* ch 7.
[13] *FoCL* §§ 1.3, 4.1.

were susceptible to the control of the defendant's rational capacities. So if the defendant is physically incapable of controlling their actions, or their deliberative capacities are sufficiently impaired (as in some instances of automatism), or they are insufficiently capable of recognising and acting on moral reasons (infancy, insanity), then they lack moral responsibility for their actions.

Wrongs, ascriptive responsibility and moral responsibility are the preconditions for criminal culpability. Without a wrong that can be properly attributed to the defendant, and for which the defendant is morally responsible, no question of criminal culpability arises. But such conditions are merely necessary, rather than sufficient, for culpability. The term 'culpability' is used by Simester to denote blameworthiness.[14] To say that the defendant is culpable for some wrong is to say that they are blameworthy for that wrong. What makes a defendant culpable, according to Simeseter, is their defective engagement with reason. Or to be more precise, a defendant is culpable when their engagement with the reasons not to ϕ (where ϕ-ing is an action constituting a breach of duty) is defective in a manner that reflects badly on the defendant, because it reflects a moral vice on the part of the defendant.[15] Moral vices, on this account, reflect certain shortcomings in the defendant's own values, principally in their concern for the interests of others.[16] So a defendant is culpable for committing a wrong when, in their engagement with the reasons they had not to ϕ, they were insufficiently motivated by—cared insufficiently about—the interests of others.[17] Simester uses this general account of culpability to argue that defendants can be culpable for negligence as well as intention and recklessness.[18] My interest, however, will be restricted to the cases of intent and recklessness, and the significance of the engagement account of culpability for moral luck.

How then does Simester's account of criminal culpability bear on the issue of moral luck? In two ways. The first pertains to whether defendants can be properly convicted of result crimes, such as murder or criminal damage, or whether all liability should be cast in an inchoate mode—attempted murder or recklessly endangering property. The common argument in favour of the inchoate mode relies upon what is known as the 'control principle', viz., the idea that people cannot be morally assessed for what is due to factors

[14] *FoCL* §1.2, fn 30; 11.0 fn 2.
[15] *FoCL* §§11.0, 11.3.1.
[16] *FoCL* §11.0.
[17] *FoCL* §11.0.
[18] Understanding recklessness to require some advertence to a risk, whereas negligence does not. See *FoCL* chapters 11 and 12.

beyond their control.[19] When a defendant attempts to kill, whether or not they succeed is due to the contribution of many factors that are beyond the defendant's control. It is, in a real sense, a matter of luck whether they succeed or fail. And since success is not under the defendant's control, they cannot be morally assessed in respect of it, whereas they *can* be morally assessed for trying to kill or recklessly running the risk of damaging property, since that *was* under their control. Hence it is the defendant's intentions and beliefs in acting that render them culpable, not the results of those actions.

The weakness in this argument, as Simester points out[20] and as Michael Moore has argued previously,[21] is that it slips from the thought that we are not responsible for what is beyond our control (i.e. where we have *no* control) to the idea that we are not responsible for whatever is not under our total control (i.e. where we are not *completely* in control). But we can have *sufficient* control over an outcome for its occurrence not to be a matter of sheer luck or mere chance (at least in any ordinary sense of those terms). Take the case of a victim being intentionally shot dead by the defendant. The victim would not have died if the defendant had not pointed the gun at them and pulled the trigger. It is of course possible that the gun might have jammed, or that the victim might have suddenly moved, or someone else might have jostled the defendant's arm, but the more important fact is that the death would not have occurred without the defendant firing the gun, and firing the gun *was* under the defendant's control, at least on any ordinary conception of control.

So the defendant is culpable for the death because: the death was due to the defendant's shooting; the defendant was capable of not firing; the defendant both understood the significance of the reasons against firing and was capable of acting on those reasons; yet the defendant decided to shoot, and in doing so their engagement with reason was defective, inasmuch as they failed to be sufficiently concerned about the interests of the victim in deciding to shoot. The defendant has culpably committed an unjustified wrong, and is properly blameworthy for the wrong of killing, not just the wrong of attempting to kill. And the criminal law is justified in convicting the defendant of murder, not simply attempted murder.[22]

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[19] Nagel, 'Moral Luck', 25. This is not true of Alexander and Ferzan, however: *Crime and Culpability*, ch 5. Instead, they regard the case for the relevance of outcomes not to have been established, and that outcomes give rise to insuperable problems within doctrines such as causation.
[20] *FoCL* §14.1.
[21] Moore, *Placing Blame*, 211–18.
[22] For more detail see *FoCL* §14.3.

Overall, I agree that the question of control does not prevent us from holding agents culpable for wrongs that involve results, such as death, injury or damage. Of course, some will argue that we only have duties not to *try* to kill or hurt or harm, rather than duties not to bring about these outcomes, and so even on Simester's approach we cannot be culpable for outcomes; but most of these arguments are premised on some version of the (total) control principle, so if one rejects that principle, there is no need to deny the existence of duties not to bring things about.[23]

But if all of this is true, why is the defendant who succeeds not *more* blameworthy than if they fail? After all, the defendant who 'succeeds' has committed a more serious wrong (killing) than the defendant who 'fails' (risking death),[24] and intending or being reckless as to a more serious wrongs is, *ceteris paribus*, more blameworthy than intending or being reckless as to a less serious wrongs. Here Simester argues that although the defendant who kills is culpable for more than the defendant who fails, they are not more culpable, i.e. their degree of culpability is not greater. Why is this? Because the defendant demonstrated an equally defective engagement with reason at the time they acted, whether or not they succeed. They fully understood the reasons against killing the victim, and had no justification for trying to kill the victim, but went ahead anyway, showing a gross disregard for the victim's interests. Whether the defendant succeeds or fails, their defective engagement with reason is the same, and it is that defective engagement which determines their degree of blameworthiness. So the defendant's beliefs, motivations, attitudes and reasons for trying to kill the victim are the same whether the victim dies or not. Because the defendant's degree of blameworthiness is determined by their defective engagement with reason, their degree of blameworthiness is unaffected, whether or not the victim dies. So although it is true that a defendant who *intends* a more serious wrong or is reckless as to a more serious wrong (e.g. killing), is, *ceteris paribus*, more blameworthy than a defendant who intends a less serious wrong (e.g. property damage), a defendant who intends to bring about an outcome is just as blameworthy whether or not the outcome occurs, despite the outcome constituting a more serious wrong than the mere attempt to bring it about.

This all suggests that the defendant's level of punishment should be unaffected by the outcomes of their actions. But this is subject to one further qualification. Although it is true that the murderer and attempted murderer are equally blameworthy, it may be that

[23] For deeper argument on duties to try and duties to succeed, see J Gardner, 'Obligations and Outcomes in the Law of Torts' in *Torts and Other Wrongs* (Oxford, 2019).
[24] As Simester readily acknowledges, e.g. §§ 14.0, 14.2.1, 14.3.

the amount of blame and punishment we direct at the defendant can be affected by factors other than the defendant's blameworthiness. In criminal law, the defendant's attempts to conceal evidence of the offence, or to wrongfully blame another person for the offence, can justify a more serious sentence for the crime. Similarly, remorse can be a mitigating factor.[25] Simester does not pursue the question of whether outcomes might justify more blame or punishment, despite being just as blameworthy as attempts and endangerments.[26] It is always open to those who deny the existence of outcome luck but wish to vindicate the common practice of harsher penalties for outcomes to argue that such treatment is justified on grounds other than the defendant's blameworthiness. I will leave this question to one side, and focus instead on the question of whether the defendant's degree of blameworthiness can turn on outcomes.

The gist of Simester's argument for the equal blameworthiness of the defendant, whether or not they bring about a prohibited outcome, is the engagement theory of culpability. According to the theory the defendant's blameworthiness is fixed at the time of their engagement with reason in acting, and depends exclusively on the way in which that engagement was defective. To bolster the case for the engagement theory of culpability, Simester relies on two arguments: (a) that the basis for praise (rather than blame) is similarly fixed at the time of acting; and (b) the fact that the doctrine of concurrence in criminal law requires the *mens rea* for a result crime to coincide with the conduct element of the *actus reus*, not the outcome element. Let us consider these two arguments.

That the degree of praise a person deserves is fixed at the time they act, and not affected by outcomes is defended through three examples.[27] In the first:

> (1) Suppose that, in a bid to cheer him up, Jane sends Keith some roses. Unfortunately, through no fault of Jane's, the florist delivers the flowers to the wrong address. On the account offered here, Jane deserves just as much praise for trying to cheer Keith up as she would for having succeeded. Her efforts reflect equally morally well upon her: 'it's the thought [behind the action] that counts.' Analogous to cases deserving blame, the admirable motivation behind her action is crystallized at the point of her behaviour.

However, there is a possible ambiguity in this example. In saying that Jane deserves as much praise as she would have deserved had she 'succeeded', is it that:

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[25] E.g. Sentencing Council of England and Wales: General Guidelines: Overarching Principles at www.sentencingcouncil.org.uk.
[26] *FoCL* §§14.2 fn 13.
[27] All found in *FoCL* §14.2.4.

(a) Jane deserves just as much praise for *sending* the flowers as she would have deserved had the flowers been successfully *delivered* by the florist to Keith;

or

(b) that she deserves just as much praise for sending the flowers as she would have deserved had she succeeded in actually cheering Keith up.

In case (a), it is true that Jane is just as deserving of praise, because in sending the flowers to Keith she tried to cheer him up, and whether they were delivered or not she still acted to try to cheer him up. Her attempt, and the credit for that attempt, is not affected by it having miscarried through no fault of her own. It is still an attempt. But it is not at all clear that she deserves as much praise for trying to cheer Keith up as she would have deserved for actually cheering him up. The sense that she does deserve the same amount of praise seems to gain some support from the possibility that what is in issue is (a) rather than (b). An outcome luck affirmer can allow that in case (a) Jane is equally praiseworthy, without agreeing that in case (b) she is equally praiseworthy. After all, had Jane actually succeeded in cheering Keith up, there would be more to praise than merely the attempt to do so.

In the second case:

(2) … Diane supports a charitable endeavour by gifting a painting that she thinks is worth $5,000. Unexpectedly, the painting proves to be much more valuable, facilitating additional charitable activities. Diane may take the 'credit' for those additional benefits, in as much as they lie, ascriptively, at her door. But they shine no favourable light upon her moral virtues, and they do not increase the degree of her praiseworthiness.

This is an interesting case, and brings out a distinction between two different varieties of outcome luck—what might be called (i) 'constructive' outcome luck; and (ii) 'advertent' outcome luck.[28] In the case of blame, constructive outcome luck maintains that if one culpably commits a wrong, and a further bad outcome ensues, then in an appropriate situation one is liable for the outcome as well as the original wrong. Not that every undesirable outcome is attributable to the wrongdoer. To be liable for the outcome there must be some appropriate *link* between the wrong and the outcome, for instance that the outcome was (part of) the justification for the first action being wrong.[29] So it might be said that part of the justification for the wrongfulness of causing very serious injury, quite

[28] These are not two mutually exclusive categories. One would expect constructive luck affirmers to also endorse advertent moral luck. But advertent luck affirmers need not endorse constructive outcome luck.
[29] Simester explores an idea along these lines for constructive liability in *FoCL* §13.5. He does not, however, regard constructive liability, when it is justified, as making the defendant more *blameworthy*.

apart from the pain and harm it causes the victim, is that it creates a risk of death. In which case holding someone liable for homicide when they simply intended to cause very serious injury but the victim died is, in principle, defensible, even if they did not foresee the risk of death; and punishing them more severely for the homicide is also defensible, since they have committed a more serious wrong.[30] On the other hand, the focus of advertent outcome luck is on the question of whether a defendant who intends to bring about a result or who is reckless as to bringing it about is more blameworthy if the result actually occurs. Example (2) bears on constructive moral luck, but not on advertent luck. In example (2) Diane did not foresee the possibility that the painting would be more valuable (—its greater value is 'unexpected'). So it is not equivalent to blaming cases where the defendant intends a harm or recklessly foresees the risk of harm. And even affirmers of constructive outcome luck might question whether (2) is strictly parallel to cases of linked outcomes. It's not clear, for instance, that part of the rationale for what makes the gift of a painting a desirable act is the possibility that it may turn out to be more valuable than it is believed to be.

At the very least example (2) is not equivalent to cases where the defendant acts intending to cause (or being aware that they are taking an unreasonable risk of causing) a prohibited outcome, i.e. cases of *advertent* outcome luck. And it is this variety of outcome luck that is the focus of my concern in this paper. An example that *would* parallel advertent outcome luck is the following:

> (2*) Diane supports a charitable endeavour by gifting a painting that is valued at $5,000. She also believes, however, that it may be worth $50,000 due to an expert's (disputed) attribution of the canvas to a more significant artist. The painting in fact sells for $50,000 due to the attribution.

If the painting sells for $50,000, it *does* seem that Diane deserves more praise than if it sells for $5,000, since she reasonably believed that it might turn out to be much more valuable.[31] She gave it knowing that it would do some good, but believing it might do even more, and as a result of the sale the charitable endeavours are much better served by the additional money.[32]

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[30] An affirmer of constructive outcome luck might argue, for example, that this provides a possible rationale for some version of the common law's felony-murder doctrine. But one could endorse constructive outcome luck whilst rejecting the felony-murder rule.

[31] Our reactions would be more ambivalent, I think, if Diane's belief in the greater value of the painting was not reasonable, but based on an unsubstantiated 'gut feeling'.

[32] Diane's praiseworthiness of course also depends upon her motives. If she hopes that the painting is worth more and will thereby further the charitable endeavours, she is worthy of more praise. If she hopes the painting is worth more because it will bring her a heftier tax deduction, and is indifferent to the charitable endeavour, then she does not deserve praise regardless of the value of the painting.

A different case again might also be cited by the affirmers of moral luck:

> (2**) Diane supports a charitable endeavour by gifting a painting that she thinks is worth $50,000. Unexpectedly, the painting proves to be a fake, and is worthless.

Here the gift giving does of course still reflect well on Diane, and is praiseworthy, but it would seem odd to praise Diane just as much as if the painting had turned out to be genuine. Despite her good intentions, things have not turned out well, and it seems reasonable to mark that in the degree of praise that Diane receives.

Simester's third example is the following:

> (3) … David visits his sick grandmother and gives her pills that he thinks will kill her, hoping thereby to accelerate his inheritance. As it happens, David has mixed up the pills, and the ones he gives to his grandmother have the unforeseen result of curing her instead. David has done two actions, one wrong (attempted murder) and one right (curing his grandmother). But the *degree* of his blame- or praise-worthiness is, once again, determined by his motivation for administering the pills. He chose to do so in order, unjustifiably, to kill. His actions disclose a moral vice. They reflect badly upon him regardless of the outcome.

Here it can be agreed that David deserves to be blamed for trying to kill his grandmother, and does not deserve any credit for her cure. It can of course be said that the cure is irrelevant because it was *unforeseen* by David, and so the issue of *advertent* outcome luck doesn't arise on these facts. But the example can be modified to bring out the question of the relevance of outcomes:

> (3*) David visits his sick grandmother and gives her pills that he believes will either kill her or cure her, though he does not know which effect it will have. He hopes it will kill her. Luckily for the grandmother it in fact cures her.

Here David *does* foresee the risk of a cure (as well as the risk of death). Yet the cure does not go to his credit, or mitigate the seriousness of his attempt to kill.[33] What matters to his culpability is that he gave the pills in the hope that he would kill. Because he did not wish for the cure it does not redound to his credit, even though he foresaw it as a possibility. But none of this establishes that if his grandmother *had* died David would not be more blameworthy for having actually killed her, rather than for simply trying to kill her. Instead, the example bears on a separate issue. It helps to show that outcomes are, on their own, neither necessary nor sufficient for culpability. Culpability is established by the defendant's defective engagement with reason in acting. That is why attempts and

[33] I assume that David does 'intend' to kill his grandmother: his aim in giving her the pills is to kill her, even though he knows that it might not have this effect.

endangerments can be appropriately blamed and criminalised. The defendant's defective engagement with reason is both necessary and sufficient for culpability.[34] The contribution of outcomes to culpability (according to outcome luck affirmers) is to *aggravate* the defendant's blameworthiness, not to establish it.[35]

So the three examples do not establish that praise is not dependent on outcomes. The (advertent) moral luck affirmer can happily accept the equivalence of praise and blame, but on the basis that the degree of praise that an agent deserves can turn on outcomes in addition to motives and beliefs.[36] What then of the argument that the criminal law doctrine of concurrence supports the idea that the defendant's degree of culpability is fixed at the time of acting, and is unaffected by the actual outcome of their actions? As Simester points out, the doctrine of concurrence generally requires the defendant to have had the requisite *mens rea* for an offence at the time they acted, and it is irrelevant whether in the interim between acting and the outcome occurring the defendant ceases to have the *mens rea*.[37] So if the defendant puts a slow-acting poison in the victim's drink, it is irrelevant that the defendant repents of the attempt before the victim dies. This, it is said, reflects the engagement theory of culpability, i.e. that blameworthiness is fixed at the moment that the defendant acts, and any change of heart or attitude on the part of the defendant does not affect this.[38] However, the moral luck affirmer need not deny the need for concurrence at the time of acting, nor deny the irrelevance of a change of heart between action and outcome. Proponents of outcome luck argue that if the defendant acted in order to kill or foreseeing an unreasonable risk of death, then the defendant is more blameworthy if the death occurs than if it does not. They are not arguing about the relevance of an interim change of view by the defendant.

Are there additional grounds for favouring the view that blameworthiness is fixed at the time of acting? In an earlier co-authored article, on which the chapter in *Fundamentals*

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[34] This is common ground among most criminal law theorists, e.g. Moore, *Placing Blame*, 191–3 and Alexander and Ferzan, *Crime and Culpability*, 172–3.

[35] Outcomes might be seen then as simply 'weight-affecting' reasons (J Raz, *Practical Reason and Norms*, 2nd ed, Princeton, 1990, 34–5) or as 'intensifying' consideration (J Dancy, *Ethics Without Principles*, Oxford, 2004, 41–2.)

[36] I will not pursue this issue here, but example (3*) also points to some asymmetries between praise and blame. In (3*), David might still have been blameworthy, even if he had hoped to *cure* his grandmother, if the risk of death was an unreasonable risk to take in the circumstances (and indeed, even if the pills turned out to cure her). But he would be *more* blameworthy if his grandmother died, than if she was cured.

[37] *FoCL* §14.2.4.

[38] Of course, it could be argued that repentance and remorse do affect the appropriate punishment for a crime. But it is more debatable whether they alter the defendant's *blameworthiness*, or are simply another factor to be taken into account in addition to the defendant's blameworthiness.

of Criminal Law is based, two additional arguments were raised.[39] I am not sure if Simester still agrees with these arguments, but it is worth briefly considering them. The first argument is by way of an example created by Alexander and Ferzan, called the 'Satanic Cult':[40]

> The Satanic Cult: Members of a gang kidnap someone. They strap him to a chair behind a partition, with the barrel of a rifle running through a small hole and pointing at the kidnapped victim's heart. The rifle holds twenty rounds, and the gang loads it with nineteen blanks and one live shell. No one has any idea which shell is the live one. Twenty gang initiates who want to become full-fledged gang members are required as a condition of membership to pull the rifle's trigger once. (The initiates are unknown to one another and are not in any way acting in concert.) Each initiate pulls the trigger, and at the conclusion of the rite, the victim is found to have been killed. No one can tell which initiate fired the round that killed him.

It is argued that all of the initiates are equally blameworthy:

> Each person knew there was a chance that he might kill an innocent victim and chose to take that risk to join the cult. Each has shown the same disrespect for the victim's life. … The one who pulled the trigger that fired the live round, whoever it was, is no more culpable than the other nineteen.

One limitation of this example lies in the fact that, contrary to Alexander and Ferzan's assertion, the initiates *are* acting in concert, despite not knowing each other. They have all agreed to participate in an enterprise where it is certain that (barring something unforeseeable) the victim will be killed, and where each has a one-in-twenty chance of actually being the killer. The death is the inevitable product of the enterprise, although it is not clear at whose hands it will occur. Here it seems quite reasonable to say that they are *all* morally responsible for the victim's death, because they all lent their support to the enterprise by participating in it, knowing its nature and outcome. There is a separate sense in which the initiates are equally culpable. We are told that we do not know who the actual killer is. As a matter of the ordinary rules on causation, then, we cannot say which initiate was the immediate cause of death. All we know is that all twenty willingly took the same risk of killing the victim. So it's also true that each initiate is equally individually blameworthy for deliberating imposing the risk of death on the victim. Barring any information on which initiate was the actual killer, it is at least true that they are equally blameworthy for deliberately imposing the risk. The example of the Satanic Cult, then, does not establish that blameworthiness is fixed at the time of culpably acting, irrespective of how things turn out. A moral luck affirmer can plausibly explain the sense

[39] J Edwards and A Simester, 'Crime, Blameworthiness, and Outcomes' (2019) 39 *Oxford Journal of Legal Studies* 50.
[40] Alexander and Ferzan, *Crime and Culpability*, 175–6.

that all twenty of the initiates are equally blameworthy, despite only one initiate having fired the lethal bullet.

Another argument advanced in the earlier article builds upon Nagel's observations about the significance of moral luck:[41]

> We are unable to view ourselves simply as portions of the world, and from inside we have a rough idea of the boundary between what is us and what is not, what we do and what happens to us, what is our personality and what is an accidental handicap. We apply the same essentially internal conception of the self to others. About ourselves we feel pride, shame, guilt, remorse—and agent-regret. We do not regard our actions and our characters merely as fortunate or unfortunate episodes—though they may also be that. We cannot *simply* take an external evaluative view of ourselves—of what we most essentially are and what we do. And this remains true even when we have seen that we are not responsible for our own existence, or our nature, or the choices we have to make, or the circumstances that give our acts the consequences they have. Those acts remain ours and we remain ourselves, despite the persuasiveness of the reasons that seem to argue us out of existence.[42]

Commenting on Nagel, it is suggested:

> On [the engagement] view, passing ducks and errant gusts of wind cannot alter the degree to which we are blameworthy. Only our practical reasoning can do that. Nor is this an *ad hoc* restriction. Rather, it is the natural thought to have for beings who endorse an 'essentially internal' conception of themselves. For if anything belongs on our side of the divide between ourselves and the external world, it is surely our engagement with the reasons that bear on what we do. Grounding our blameworthiness in that engagement is compatible with—indeed, it is supported by—the self-conception we find inescapable. [43]

But I do not think that Nagel's observations about the 'essentially internal conception of the self' count against the relevance of outcome luck. Nagel is not articulating a Cartesian view of the self—where the mind and the external world are two separate substances, and we are essentially minds, although we have effects on the external world. Rather it is a Kantian view of the world, where there are two points of view from which we can conceive of the world: the external and the internal. We can quite properly conceive of ourselves as parts of the physical world, subject to the influences of cause and effect, and determined by those influences. But we also conceive of ourselves as *agents*, as centres of consciousness that are active in deciding what to do on the basis of reasons, and are responsible for what we do and what we bring about. The quandary lies in reconciling these two points of view.[44] Nagel would agree that responsibility and culpability *depend* on the agent perspective, but that does not mean that our degree of blameworthiness *only*

[41] Edwards and Simester, 'Crime, Blameworthiness, and Outcomes', 69.
[42] Nagel, 'Moral Luck', 37.
[43] Edwards and Simester, 'Crime, Blameworthiness, and Outcomes', 70 (footnote omitted).
[44] To which Nagel confesses he (like everyone else) has no satisfactory answer: 'Moral Luck', 36–8.

depends on our engagement with reason at the time of acting. Some of the events that occur in the world belong to us because we have brought them about. Nagel's view is neutral about whether or not those events make us more blameworthy or not.

Ultimately, then, the key thought behind the engagement theory of culpability is this. Because our culpability depends upon our defective engagement with reason when we act, nothing that occurs afterwards can alter the degree to which our engagement was defective, and so nothing can alter our degree of blameworthiness. So culpability does not simply *depend* upon our defective engagement with reason when we act, it is *fixed* by that engagement. Outcome luck affirmers are misled by the fact that the defendant who kills has done something *worse* (the wrong of killing) into thinking that the defendant is more blameworthy than if they had only committed the wrong of trying to kill. While it is a matter of luck whether or not the defendant's actions result in death, the defendant's engagement with reason is identical, and so the gravity of the wrong does not affect their culpability.

What (if anything) can moral luck affirmers say in response to this line of argument? A tempting thought might be the following. Simester allows that recklessly endangering life and reckless killing are both wrongs, i.e. they are both breaches of duty. Could one argue that what makes the reckless killer more blameworthy than the defendant who just recklessly endangers life is that the killer has committed an *additional* wrong to the endangerer? The killer both endangered life and ended life whilst the endangerer only risked death. They have both committed the *same* wrong (risking death), but the killer has committed an additional wrong (killing). It is, *ceteris paribus*, more blameworthy to commit an additional wrong, so the killer is more blameworthy for their actions than the endangerer. In summary:

(a) D1 has culpably committed the wrong of recklessly endangering life

(b) D2 has culpably committed the wrong of recklessly endangering life *and* has also culpably committed the wrong of reckless killing

So (c) D2 is more culpable that D1

The weakness in this argument is that on these specific facts the two wrongs of the D1 are not independent of each other. Of course, if D1 both recklessly killed V1 and recklessly endangered the life of V2, they would be more culpable than D2 who only recklessly endangered the life of V2 (assuming D1's and D2's motivations, beliefs, and attitudes were the same). But when D1 recklessly kills V1, their reckless endangerment of V1's life is what might be called a 'nested' wrong. It involves exactly the same action,

exactly the same victim, and exactly the same engagement with reason. The only difference is the outcome. To regard the killing as an *additional* wrong to endangerment would be a form of double-counting. Just as we do not say that an intentional killer is additionally blameworthy for the wrong of causing serious injury to V (even though death *is* a serious injury), *and* for the wrong of injuring V, *and* for the wrong of applying unjustified force to V, etc, so we do not say that the D2 who recklessly kills V is *additionally* blameworthy for the wrong of recklessly endangering V.[45]

A different line of thought is this. It is a curiosity of the engagement theory of culpability that *ex ante*, in contemplating taking an unjustified risk of causing death, the defendant can think: 'At least I won't be any more blameworthy if the death happens to occur, than I am for creating the risk of death'. Despite the fact that if the risk materialises the defendant will be culpable for causing death, and not just risking it, the death will make no difference to their blameworthiness. So the defendant can console themselves that although they are taking an unjustified risk, and that what makes the risk unjustified is the possibility of causing death, they won't be more to blame if the death occurs. The fact that killing is a more serious wrong than endangering life does not alter the degree of the defendant's culpability. If their luck holds there will be no death, and if not, they will not be any more blameworthy for it. They shouldn't take the risk, of course, but if they decide to do so, then how things turn out will not affect how blameworthy they are. This seems an odd thought: that the defendant can foresee that they may bring about something worse, and be culpable for doing so, but be no more blameworthy for it.

It also seems that the defendant can take comfort from the fact that they will have no reason to feel guiltier if the death occurs, nor more remorseful for killing than for taking an unjustified risk of killing. The defendant is no more blameworthy for the outcome having occurred, and so there are no rational grounds for being guiltier or more remorseful. The defendant who kills can rationally experience the additional emotion of *agent-regret* for the death, a wish that *they* had not been the agent of the killing, i.e. a wish that the killing was not something for which they were responsible, but this is different

[45] This response is still applicable even if one regards the reckless endangerment as applying to many Vs, not just the one who died (V1). D1 and D2 both endanger the same number of possible victims (V1–Vn). If D2 kills V1, then there are still the same number of wrongs, although one of D2's wrongs is the killing of V1. D2's endangerment of V1 is a wrong nested in the killing, and thus does not give rise to extra blameworthiness. The original argument is not that D2 is more culpable because killing V1 is a more *serious* wrong, but that it is an *additional* wrong to the endangerment of V1. Thanks to Miri Gur-Arye for raising this question.

to guilt or remorse, and would be an appropriate response to the death even if they were faultless in causing it.[46]

A rough attempt to capture the preceding thoughts might be the following:

(1) D is under a duty not to ϕ;

(2) D is also under a duty not to bring about X;

(3) The reason that D is under a duty not to ϕ is that ϕ-ing will create an unreasonable risk of X occurring, and the risk of X occurring is the justification for the duty not to ϕ;

(4) Bringing about X is a more serious wrong than ϕ-ing;

(5) D is aware of (1)–(4), but D intentionally ϕ's nonetheless;

(6) D has no justification or excuse for ϕ-ing;

(7) If D brings about X by intentionally ϕ-ing, D will be ascriptively and morally responsible for X;

(8) So if X occurs D will be culpable for X occurring;

(9) In ϕ-ing intentionally, D *accepts* the risk of culpably bringing X about, i.e. D is aware that there is an unreasonable risk of X occurring, but is willing to run that risk;

(10) So D is more blameworthy if X occurs because in ϕ-ing D willingly accepted and ran the risk of committing a more serious wrong

The thought behind this line of argument is that it is *D* who puts themselves in jeopardy by ϕ-ing. D knowingly and willingly runs the risk of culpably committing a more serious wrong (X). By ϕ-ing, D makes themselves hostage to fortune, i.e. to how things turn out, and to the greater blameworthiness that will go with it. In a sense D's culpability is 'locked in' or 'fixed' at the time of ϕ-ing, but in a way that makes it *contingent* on how things turn out. The additional blameworthiness for bringing about X is not something that unexpectedly or unforeseeably befalls D, but something that D has chosen to accept in taking the risk. So it is not that D's blameworthiness is simply subject to a roll of the dice, and D is a mere spectator as the dice fall; it is D who rolls the dice, knowing what the stakes are, and subjects themselves to the outcome of the roll.

This argument highlights a further distinction within the outcome luck debate. Up till now I have treated intention and recklessness as on a par, with outcomes being equally relevant or irrelevant to both. But it is of course possible that blameworthiness is affected by outcomes in one case and not the other, or affected in a different way.

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[46] On agent-regret see B Williams, *Moral Luck*, Cambridge 1981, 27–32; see also Duff, *Criminal Attempts*, 339–42.

Intention and recklessness do seem intuitively different at least to this extent: in the case of attempts, the question tends to be whether the attempter is any *less* blameworthy than those who succeed, whereas in the case of endangerments, the question tends to be whether those who bring about the outcome are *more* blameworthy than those who merely run an unjustified risk. In the case of attempts, we are generally secure in our judgements of the culpability of the killer, and less sure that those who try to kill are any less culpable. In the case of recklessness, we are secure in our judgements of the culpability of taking an unjustified risk, and less clear whether the risk materialising makes any difference to culpability.

The argument outlined above is directly applicable to recklessness rather than attempts. It seeks to establish that D is more blameworthy when they are aware that they are taking an unjustified risk and that risk materialises. Even so, it would be rejected by those who deny the existence of duties not to kill, or harm, or damage, and claim that there are only duties not to intentionally (or recklessly, or—within the defendant's capabilities—negligently) kill, harm, or damage (i.e. those who reject premise [2]). But as noted earlier, such denials are often predicated on the idea that we cannot have duties to succeed, only duties to try, since we can control our trying, but not our succeeding. If one rejects the (total) control principle, one can acknowledge the existence of duties to succeed. And of course one can always avoid culpability for breaching a duty to succeed by simply not attempting to breach it or unreasonably taking the risk of breaching it.

It is also possible to simply reject conclusion (10). It can be maintained that culpability depends exclusively on one's engagement with reason at the time of acting. This is the moment when one makes oneself culpable, by acting for morally unacceptable reasons.[47] The willingness to run the risk of a serious wrong is what makes the defendant culpable, not whether that risk in fact materialises. The challenge for such views is to make sense of the *ex ante* thoughts of a defendant who realises the risk of causing a more serious wrong, yet believes that its occurrence will make no difference to their degree of blameworthiness in acting.

What of attempts? The argument outlined above would need amendment to accommodate attempts. For instance, it is not simply, as premise (5) says, that D ϕ's in the *awareness* that X may occur as a result. Instead, D ϕ's *in order to* bring X about. If D ϕ's in order to bring X about, then D is breaching their duty not to *try* to bring about X (in

[47] This is the gist of Simester's view and also of Alexander and Ferzan's account: see *Crime and Culpability*, chapters 1–5.

addition to their duty not to take an unreasonable risk of ϕ occurring). Furthermore, it could be argued that the duty not to *try* to bring about X is just as stringent as the duty not to X, and thus that the wrong of attempting to bring about X is just as bad as the wrong of bringing about X, contrary to (4):

(4) Bringing about X constitutes a more serious wrong than ϕ-ing;

Unlike recklessness, where the stringency of the duty not to ϕ is (other things being equal) relative to the risk of ϕ-ing bringing about X, the duty not to *try* to X (by doing ϕ) is just as stringent as the duty not to X, regardless of the risk of ϕ-ing resulting in X. I shouldn't try to kill, even if my chances of success are one in a hundred, and the stringency of that duty is unaffected by the chances of success. Hence attempting to kill is just as serious a wrong as killing, and killers and attempters are equally blameworthy. There is something to this argument, and it certainly seems true that our duty not to attempt to kill is just as stringent as our duty not to kill. It doesn't necessarily follow, however, that the *breach* of the duty not to try to kill is equally serious as the breach of the duty not to kill. The wrong of killing is worse than the wrong of attempting to kill because in the first case the victim is dead, whereas in the second the victim is still alive.[48] Still, given that the defendant's *aim* is to kill, and it is not simply that they see death as a risk arising from their pursuit of another aim, it might be argued that the defendant should be assessed on the basis of what they would have brought about if they had succeeded, even if in fact they failed. If that is so, then the relevance of outcome luck is different for attempters than it is for endangerers. But unless an argument of this kind is available, there is a case for attempts being less culpable than killing, because the wrong of attempting to kill is less serious than the wrong of killing.

The preceding argument in favour of outcome luck is quite limited. It applies only to what I earlier called 'advertent outcome luck', not 'constructive outcome luck'. And it applies most clearly to recklessness, rather than intention. It is based on the defendant's decision to ϕ, thereby willingly accepting the risk of X, and knowing that causing X is a more serious wrong than ϕ-ing. Nonetheless, the position is compatible with the general picture of culpability developed by Simester, and could be adopted without doing any violence to the rest of his account.

[48] This is not to imply that killing is always worse than inflicting non-fatal injuries. Some non-fatal injuries may leave victims in such constant agony and deprivation that they no longer feel their lives are worth living (see, e.g., the facts in *Wallace* [2018] EWCA Crim 690). If being in such a state is worse than death, then some breaches of the duty not to harm may be worse than some breaches of the duty not to kill.

Conclusion

In this paper I have not touched on every issue raised by Simester's perceptive discussion of moral luck. I have not discussed his additional arguments for why the criminal law should mark the difference between attempted and complete crimes, in terms of 'fair labelling' for the benefit of defendants, victims, and the general community.[49] Nor have I considered his case for why, despite being equally culpable under the engagement theory, reckless endangerment is generally not criminal, whereas attempts are. Simester argues that it is because of concerns about the limits of criminalisation that recklessly endangering interests is generally not criminal, and that requiring actual injury or damage is a rough proxy for the seriousness of the risk taken by the defendant.[50] Nor have I needed to consider his argument that the engagement view of culpability is compatible with circumstantial and constitutive luck.[51] Outcome luck affirmers are generally content with circumstantial luck, i.e. with the view that we can be judged for the situations we had to confront, and how we handled them. If we handle them badly, that is to our discredit, though sometimes we can be partly or wholly excused for doing so. I am less sanguine about the challenge of constitutive luck.[52] As most theorists acknowledge, it is unrealistic to suppose that we have sufficient control over our characters to be responsible for them.[53] Yet we are still blamed for the choices we make that are guided by our characters. This raises the concern that if we are not sufficiently responsible for our characters, then 'blame' cannot be grounded on the idea that we could (and should) have developed a better character. We are just blameworthy for choices that our poor characters lead us to make, even though we have very limited control over our characters. This implies that blaming is a much shallower concept than it is often thought to be. To blame is simply to hold someone to account for their poor choices.

All of these are very interesting issues, but I have chosen instead to focus on the most significant and striking claims that Simeseter makes about outcome luck. As I said at the beginning, *Fundamentals of Criminal Liability* forces the reader to think again about familiar topics in criminal law theory. In carving out a position that both accepts outcome crimes but rejects greater blameworthiness for them, Simester advances a novel and thought-provoking argument that is informed by his broader account of criminal culpability. Although I have argued that an outcome luck affirmer has resources to resist

[49] *FoCL* §14.3.
[50] *FoCL* §14.3.1.
[51] *FoCL* §14.4.
[52] *FoCL* §14.4.1.
[53] Though many, like Aristotle, take the other view: *Nicomachean Ethics*, III.5.

the arguments for equal blameworthiness, this does not disturb the case for holding defendants culpable for the results of their actions, where those results constitute wrongs in their own right.