



# Culpability and Moral Vice

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## Abstract

This paper raises four queries about Simester’s defective engagement with reason account of culpability found in his *Fundamentals of Criminal Law*: (1) the characterisation of the account in terms of moral ‘vices’; (2) the basis for identifying a vice as a ‘moral’ vice; (3) what is involved in an agent manifesting ‘insufficient care and concern’ for the interests of others; and (4) whether the account is an account of culpability generally, or is instead an account of criminal culpability, i.e., the type of culpability necessary for criminal conviction.

**Keywords** Criminal law · Culpability · Moral vice

## 1 Introduction

Andrew Simester’s *Fundamentals of Criminal Law* contains a rich and complex account of the nature of culpability. The book argues that to be an appropriate subject of criminal conviction, an agent (D) must be culpable for a criminal wrong ( $\phi$ ) that is not justified. And culpability, in a nutshell, involves D’s defective engagement with the reasons against  $\phi$ -ing in a way that reflects badly on D as a moral agent because it reflects a moral vice.<sup>1</sup> As a consequence, D is liable to blame for  $\phi$ -ing and may, subject to other conditions being satisfied, be subject to criminal punishment.

The basic outline of the nature of culpability is found early in Chap. 11 of *FCL*:<sup>2</sup>

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<sup>1</sup> *Fundamentals of Criminal Law* (OUP, 2021), 249–50. (Hereafter *FCL*.)

<sup>2</sup> *FCL*, 237–8 (footnotes omitted).

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Suppose that D  $\phi$ s, and that her  $\phi$ ing is an unjustified wrong. The gist of the argument in this chapter is that D's culpability for  $\phi$ ing does not arise directly from the wrongness of her  $\phi$ ing. Rather, it derives from D's *engagement* with the reasons why she should not  $\phi$ . D is culpable when her engagement with those reasons is defective in a manner that reflects a moral vice on D's part. ... *Moral* vices are concerned with an agent's dispositions, attitudes, and the like, and they are vices in as much as those dispositions reflect certain shortcomings in the agent's own values: shortcomings, principally, in her concern for the interests of others.

Call this the 'defective engagement with reason' (or 'defective engagement') account of culpability. There are two fundamental forms of defective engagement with reason according to *FCL*: (a) moral preference errors, where D chooses to act on bad reasons; and (b) epistemic failings, where D fails to act on the right reasons.<sup>3</sup> Moral preference errors essentially cover intent, knowledge, and advertently reckless forms of wrongdoing, whereas epistemic failings cover some inadvertent forms of wrongdoing.

One of the important pay-offs of this account, as *FCL* argues, is that it leaves space for culpability in criminal law to be grounded on D's negligence. The account, therefore, rejects the view of the choice theory of culpability that D must be *advertent* to (at least the unreasonable risk of) wrongdoing in order to be blameworthy.<sup>4</sup> On the other hand, this doesn't mean that negligence should be widely used as a *mens rea* requirement in the criminal law. *FCL* argues that negligence should be used sparingly, not because negligence is not culpable, but because other principles of the general part, such as the requirement of fair warning,<sup>5</sup> and the protection of a sphere of freedom for those in a liberal society,<sup>6</sup> militate against negligence as a general basis for criminal liability.

In this paper I want to raise four queries about the defective engagement with reason account: (1) the characterisation of the account in terms of moral 'vices'; (2) the basis for identifying a vice as a 'moral' vice; (3) what is involved in an agent manifesting 'insufficient care and concern' for the interests of others; and (4) whether the account is an account of culpability generally, or is instead an account of *criminal* culpability, i.e., the type of culpability necessary for criminal conviction.

## 2 Moral vice

An initial question about the defective engagement account of culpability, or, more precisely, about the way in which the account is presented, is the use of the language of moral 'vices'.<sup>7</sup> According to the account, it is only those defective engagements which reflect a moral vice that render D culpable for their wrongdoing. If the defec-

<sup>3</sup> *FCL*, 249–50.

<sup>4</sup> *FCL*, 265.

<sup>5</sup> *FCL*, 58–64.

<sup>6</sup> *FCL*, 64–7.

<sup>7</sup> Occasionally this is expressed in terms of 'character flaws': e.g., *FCL*, 251, 258.

tive engagement is due to some other type of failing, such as low intelligence,<sup>8</sup> then D is not culpable. As noted above:<sup>9</sup>

D is culpable when her engagement with those reasons is defective in a manner that reflects a moral vice on D's part. ... *Moral* vices are concerned with an agent's dispositions, attitudes, and the like, and they are vices in as much as those dispositions reflect certain shortcomings in the agent's own values: shortcomings, principally, in her concern for the interests of others.

Simester is not alone in connecting culpability to moral vices.<sup>10</sup> But is this the best way of describing the sort of failing that is involved in culpability? The standard understanding of a 'vice' is that it is a character trait, i.e., it is a *settled* disposition of character to respond and react in certain ways in certain circumstances. A vice then is a fairly stable feature of one's character, and will ordinarily be manifested on a regular basis in the appropriate circumstances. But as *FCL* makes clear, the defective reason account of culpability is not restricted to situations in which D displays a moral 'vice' in this sense. It extends to actions that are 'out of character' and would be regarded as untypical of D.<sup>11</sup> On the defective engagement account, then, it doesn't matter that D's failure to engage with reasons was not the product of a *general* tendency on D's part to respond and act in that way. D is culpable for 'one-off' lapses just as much as for those that reflect a pattern of behaviour. Consequently, it is inaccurate to say that culpability depends on D manifesting a moral 'vice', at least as vices are ordinarily understood.

Having said that, the link to vice has some intuitive appeal, and is endorsed by other criminal law theorists. So how can we make sense of the appeal? One suggestion is this. Many culpable actions can be described using 'thick' moral concepts, concepts such as 'dishonesty', 'selfishness', 'callousness', 'indifference'.<sup>12</sup> These concepts capture certain distinctive combinations of thought, feeling, action, and reaction that are ethically significant. An act is selfish, for instance, because it involves D acting in a way that inappropriately puts their own interests or convenience ahead of others' interests or convenience. D knowingly takes more than their fair share of a benefit, or fails to contribute their fair share to a task, or looks only to serve their own interests in participating (or deciding whether to participate) in an activity. Some people have a settled disposition to manifest these ways of behaving, and thus have the vice that corresponds to the ethical failing described by this thick ethical concept. D does not simply act selfishly on *this* occasion, but manifests their being a selfish person in doing so. What matters from the point of view of culpability, however, is not whether D possesses a *general* disposition to act in this way, but whether they manifested the failing on this particular occasion. It is the failing, rather than the vice, that is crucial to culpability. Of course, it will often be the case that D manifests a moral failing on a

<sup>8</sup> *FCL*, 251, 283.

<sup>9</sup> *FCL*, 237–8.

<sup>10</sup> See, e.g., V Tadros, *Criminal Responsibility* (OUP, 2005), ch 3.

<sup>11</sup> *FCL*, 255–7.

<sup>12</sup> On thick moral concepts, see B Williams, *Ethics and the Limits of Philosophy* (Fontana, 1985), 140–45.

particular occasion *because* they possess a moral vice, but possessing the vice is not necessary for culpability, and it is this that distinguishes the defective engagement with reason account from character accounts of culpability.<sup>13</sup>

A better way to describe the defective engagement with reason account of culpability, then, is that it involves D's defective engagement with reason that manifests a moral *failing* on D's part, and I will use this term rather than 'vice' in the remainder of this paper. Which leads to the question: how do we identify which defective engagements with reason manifest *moral* failings, rather than non-moral errors?

### 3 Moral Failings

*FCL* attributes culpability to a defective engagement with reason that manifests a moral failing. It is important to the theory that culpability only arises when the defective engagement is due to a *moral* failing. Not all defective engagements with reason are due to moral failings. D's engagement may be defective because of low intelligence, for instance, rather than laziness.<sup>14</sup> So when is a failing a moral failing? There seem to be two slightly different conceptions of 'moral failing' in the book. The first, wider, conception is this:<sup>15</sup>

**Decent Moral Character view** a moral failing is a defective engagement with reason that manifests a shortfall from what a person with decent values and dispositions (or decent moral characteristics<sup>16</sup>) would do.

The second, narrower, conception is this:<sup>17</sup>

**Insufficient care and Concern view** a moral failing is a defective engagement with reason that manifests a shortfall in D's concern or care for the interests of others.

The wider conception of moral flaws includes the narrower conception.<sup>18</sup> Where D manifests insufficient care and concern for the interests of others, D is also falling short of what a person with a decent moral character would exhibit. But it seems that D *can* manifest sufficient care and concern for the interests of others whilst still falling short of what a person with decent values and dispositions would do.

Take the case of *Adomako*, the anaesthetist who failed to notice that a patient's serious difficulties during an operation were due to the disconnection of a tube providing oxygen to the patient.<sup>19</sup> The patient died. Adomako conceded that in the face

<sup>13</sup> See *FCL*, 252–5.

<sup>14</sup> *FCL*, 283.

<sup>15</sup> *FCL*, 243, 257, 258, 260, 270.

<sup>16</sup> *FCL*, 257.

<sup>17</sup> *FCL*, 238, 250, 252, 286–7.

<sup>18</sup> There are some places where the two views are combined, e.g., *FCL*, 252.

<sup>19</sup> [1995] 1 AC 171, discussed at *FCL*, 285–7.

of the problems he encountered he panicked a bit.<sup>20</sup> There is no suggestion that the mistake Adomako made was due to a lack of care or concern for the patient: as far as one can tell he displayed an entirely appropriate concern for the patient and their well-being. Nonetheless, *FCL* suggests that Adomako's lack of composure in the emergency discloses a moral vice, because: 'Just when it mattered, he fell apart.'<sup>21</sup> Other cases of moral failings that do not necessarily involve insufficient concern for the interests of others (although they might in some cases) include mistakes made due to impatience,<sup>22</sup> and forgetfulness due to 'mental sloth'.<sup>23</sup>

So while the decent moral character view and the insufficient care and concern view generally overlap, there are situations where D fails to act as someone with a decent moral character would, but not because of their insufficient care or concern for others. Which view should be preferred? The narrower (insufficient care or concern) or the wider (decent moral character)? There are a number of reasons why the narrower account seems superior.

Firstly, it is not obvious that the cases where D manifests a shortfall from what a person with decent values and dispositions would do but *does* manifest sufficient care and concern are correctly characterised as cases of moral failings. To panic a bit in an emergency, to be impatient on a particular occasion, or to be forgetful, strike me as failings, but not as 'moral' failings. Instead, they seem to be personal weaknesses that can have unfortunate effects. Tadros, for example, when discussing the case of the anaesthetist Adomako, takes the view that his mistakes did *not* display a moral failing.<sup>24</sup> Failing to manifest sufficient care and concern, on the other hand, is clearly a moral failing.

Secondly, it is not clear what the criterion for distinguishing moral from non-moral failings *is*, on the 'decent values and dispositions' approach. It seems that the question to be asked is whether a person with 'decent values and dispositions' would have manifested the type of failing in question. If they would not have manifested the failing, then the failing is a moral failing. But what does it mean to say that a person has *decent* values and dispositions? In particular, how does decency in this context differ from morality? Does the decent values and dispositions view say anything more than that a person with accurate moral values and dispositions would not have exhibited this failing? It may be true that a moral failing is one that a morally good person would not exhibit, but this is not a very helpful criterion for identifying such failings.

Finally, the insufficient care or concern account provides an explanation for D's failings, rather than just a counterfactual test for them.<sup>25</sup> That a person with decent moral values would not have acted as D did does not provide a positive explanation for D's actions. It leaves open the possibility that D's actions have an innocent or excusatory explanation. That D did not act as a person with decent moral values

<sup>20</sup> Adomako [1995] 1 AC 171, 182.

<sup>21</sup> *FCL*, 287.

<sup>22</sup> *FCL*, 258–9.

<sup>23</sup> *FCL*, 280.

<sup>24</sup> Tadros, *Criminal Responsibility*, 84–5. (Tadros, of course, couches this point in the language of moral 'vices'.)

<sup>25</sup> See the discussion at *FCL* 255–57 in the context of 'out of character' wrongdoing.

would have acted does not, in itself, establish that D's wrongdoing was due to their not having decent moral values.

The attraction of the insufficient care and concern view, on the other hand, is that it addresses these worries. Moral values and reasons extend at the very least to giving the interests of others appropriate regard in one's reasoning and action. And obviously a person with decent values and dispositions would have sufficient care and concern for the interests of others. Failings that are due to insufficient concern to others' interests can, then, be clearly classified as moral failings. And if a defective engagement with reason is due to insufficient care and concern, then it seems a clear instance of a moral failing.

Another attraction of the insufficient concern view of moral failings is that it is a view that is endorsed—in different forms—by a range of other criminal law theorists.<sup>26</sup> So *FCL* can be seen as providing a distinctive version of this influential approach. At the same time, the insufficient concern view still preserves scope for there being culpability for inadvertence. On this approach D can be culpable for epistemic failings (as well as moral preference errors), where those failings are the product of insufficient care and concern. Failings of the kind identified in *FCL*, such as failures of attention,<sup>27</sup> forgetting,<sup>28</sup> and failures of reasoning<sup>29</sup> can still be culpable, therefore, *when* they are the result of D's insufficient concern for the interests of others.

#### 4 Insufficient Care and Concern

This then raises a further question. What is involved in D's defective engagement with reason being due to D's insufficient care and concern for the interests of others? What exactly does it mean to say that D has insufficient 'care'<sup>30</sup> or insufficient 'concern'<sup>31</sup> for the interests of others?

A natural reading of this language (reinforced by the original description of these as being 'vices') suggests that a moral failing or shortfall has an *affective* dimension, and that others' interests do not *matter* sufficiently to D. To care or be concerned with others' interests is for D to have the appropriate emotional and affective engagement with those interests, and the appropriate emotional responses when others' interests are damaged, or interfered with, or threatened. To care or to be concerned about others' interests involves having certain attitudes towards those interests. D is moved by those interests and takes them into account in what D does. D's lacking the appropriate level of affective engagement with the interests of others explains why D makes moral preference errors and commits epistemic failings.

<sup>26</sup> For example Tadros, *Criminal Responsibility*, ch 3; L Alexander and E Sherwin, *Crime and Culpability* (Cambridge, 2009), 41–65; and A Sarch, *Criminally Ignorant* (OUP, 2019), ch 2.

<sup>27</sup> *FCL*, 277–80.

<sup>28</sup> *FCL*, 280–1.

<sup>29</sup> *FCL*, 282–3.

<sup>30</sup> *FCL*, 238, 246, 251, 252, 255, 256, 269, 277, 281.

<sup>31</sup> *FCL*, 238, 250, 252, 277.

On this view, although the insufficient concern view is not a character view of culpability, it preserves the connection recognised in the character view to the affective side of D's psyche. D is to blame where their defective engagement with reason leads them to commit a wrong because the defective engagement (and thus the wrong) would have been avoided if D had cared appropriately about others' interests at the time they acted. D is morally at fault for failing to give others' interests the attention they deserve.

But if this affective reading of 'care' and 'concern' is taken, it might be queried whether they are really the key to the insufficient regard view of moral flaws. Take the case discussed in *FCL* of the parent who, in a fit of anger, refuses to go immediately to the aid of a disobedient child swimming in the sea, despite being aware of the risk of the child drowning.<sup>32</sup> Here it seems unlikely that the parent has insufficient care or concern for their child at the time of acting. What seems to be going on in this case is that the parent is insufficiently *motivated* by their care and concern for the child during the incident. Similarly in some cases of duress.<sup>33</sup> It may be that D succumbs to the threats against them or those they care about *because* D has insufficient care or concern for the interests of others. But it is also possible that D *does* have sufficient care and concern for others' interests, but just can't bring themselves to sacrifice their own (or their loved ones') interests. The failure, again, is one of motivation rather than an affective failure on the part of D.

Of course, it can be argued that to fail to be motivated by others' interests just *is* to fail to have sufficient care or concern for those interests. But this at least isolates what is at stake in this approach. It is not the case that D must lack the appropriate concern for, and the affective engagement with, others' interests: it is just that a failure to be appropriately *motivated* by those interests is what makes the conduct culpable. If this is right, then the moral flaw that is necessary for a defective engagement with reason to be culpable is a failure to be appropriately motivated by others' interests in a particular situation.<sup>34</sup> This failure may be due to a lack of engagement with the interests of others, but it need not be.

The motivational approach to insufficient care and concern also has the advantage of dealing straightforwardly with the situation where it is not that D has insufficient concern for others' interests, but rather that D *overvalues* their *own* interests (or the interests of those close to D). So it is not that D does not care about others, nor that D does not care sufficiently about others (in the sense of lacking an affective engagement with them), it is just that D thinks that their own interests (or the interests of those close to them) are more significant vis-à-vis other people's interests than they really are. Consequently, when there is a conflict between D's interests and the interests of others, D's engagement with reason is defective because D is, *on balance*, insufficiently motivated by others' interests.

The motivational approach also allows that D need not be of a warm or sympathetic temperament towards others in order to avoid committing culpable wrongs. Kant's

<sup>32</sup> *FCL*, 255.

<sup>33</sup> *FCL*, 269.

<sup>34</sup> And *FCL* at times refers to the motivational side of care and concern: e.g., 238, 268.

cool-hearted individual ('who would in truth not be the worst product of nature'<sup>35</sup>) does not need to be emotionally well disposed towards others to act correctly; it is enough that they give others' interests appropriate salience in their reasoning and action. This is all that is required of people.<sup>36</sup>

Having said all this, is it accurate to claim that culpability is *always* due to D being insufficiently motivated by others' interests? Consider a case where D knowingly and wrongfully discloses state secrets. Is this necessarily based on D's being insufficiently motivated by others' interests? It might be, but equally, D might believe (misguidedly) that it *is* in the interests of others for the secrets to be disclosed: D is not acting for gain but acting out of a misplaced sense of altruism. Alternatively, consider a case where D deliberately throws paint on a public statue commemorating an individual who has subsequently been shown to have committed many acts of child abuse. Mightn't it be the case that in splattering the statue D is motivated by an *appropriate* concern for the interests of those who have suffered child abuse, even allowing for the public interest in public property not being vandalised? It can be conceded that being insufficiently motivated by the interests of others is often the *explanation* for intentional and reckless wrongdoing, but it seems there can be other explanations as well.

There is also a question whether the insufficient concern account provides a satisfactory analysis of culpability in the case of negligence. It is worth noting that the account provides a narrower basis for culpability than the standard conception of negligence. Ordinarily, negligence is grounded in the fact that D could and should have acted otherwise than they did. D had the capacity and opportunity to appreciate the risks involved in a course of conduct and the ability to take appropriate precautions (or avoid the action altogether), and D should have taken those precautions (or refrained from the action). Consider a case where D is negligent in making a mistaken assessment of some information ('flawed belief formation'<sup>37</sup>). Given D's own level of intelligence, D could and should have made the correct assessment of the information and acted appropriately.<sup>38</sup> But does it necessarily follow from this that D's mistake was due to D's being insufficiently motivated by others' interests? Everyone makes mistakes from time to time, even the most conscientious. Given ordinary human limitations, we will not always get it right. The fact that D is negligent, therefore, is not enough in itself to show that D was not sufficiently motivated by others' interests. The same can be said of inattention and forgetfulness, two other failings associated with negligence.<sup>39</sup> *FCL* recognises this problem in the case of inattention, and tentatively proposes that what should be expected of D is 'invariably *reasonable*, imperfect attention'.<sup>40</sup> But it's not clear how this standard would be applied. 'Imperfect' attention seems to allow that a conscientious D will occasionally have lapses

<sup>35</sup> Kant, *Groundwork of the Metaphysics of Morals* (G 398).

<sup>36</sup> As *FCL* observes at one point: 'a person who does not care about some risk can still make herself pay attention, and choose to consider whether that risk exists' (278).

<sup>37</sup> *FCL*, 282–3.

<sup>38</sup> *FCL*, 283.

<sup>39</sup> *FCL*, 277–81.

<sup>40</sup> *FCL*, 279.

in their attention. Now the D who is not sufficiently motivated by others' interests will also have lapses in their attention. How can we show that a particular lapse in attention by D was due to insufficient motivation rather than simply due to (ordinary) 'imperfect' attention? If we just say that where (a) D has insufficient concern for the interests of others and (b) has a lapse in attention (or memory, or reasoning), D is culpable, we seem to be resorting to some kind of character account of culpability. So it is unclear on the account developed in *FCL* when a specific negligent lapse is to be attributed to D's insufficient concern for the interests of others, rather than to our standard human limitations.

## 5 Criminal Culpability

The previous section has aired some questions about the insufficient care and concern conception of culpability. I want to turn finally to a more basic issue. It is common ground amongst most criminal law theories that criminal liability (at least for stigmatic crimes) should require D to have acted culpably in committing a wrong.<sup>41</sup> And if D is culpable, they are blameworthy for it, and are liable to punishment (subject to other conditions being satisfied). Even if, as *FCL* argues, the distinctive feature of criminal law is conviction rather than punishment, conviction characteristically renders D liable to punishment.<sup>42</sup>

A further question may be asked about culpability, however. To be culpable is to be blameworthy for some wrongful action. But blame is not the same as punishment. Blame is a milder and less intrusive response to wrongdoing than punishment is. Punishing D presupposes that D has acted in a blameworthy manner, but that D is blameworthy does not necessarily imply they deserve to be punished. So is there a distinctive type of culpability that renders someone liable to punishment, and not simply blame? Is there a form of culpability that makes D 'punishably blameworthy', as Michael Moore puts it?<sup>43</sup>

Looked at in this way, it could be argued that the defective engagement with reason view is not a theory of culpability per se, but a theory of *criminal* culpability, i.e., of culpability that renders D *punishably* blameworthy. In the same vein, it can be argued that the choice theory of culpability is not a comprehensive account of culpability, but a rival account of criminal culpability. This means that the choice theory could concede that negligence renders D culpable (i.e., blameworthy): it is simply that it does not render D *criminally* culpable. Similarly, the defective engagement theory could argue that not *all* cases of negligence are criminally culpable. The criteria for criminal culpability are more demanding than the criteria for culpability generally.

It is not possible in this paper to consider the respective merits of the defective engagement theory and the choice theory of criminal culpability. But I do want to dis-

<sup>41</sup> *FCL* calls this the 'culpability principle': 11–13.

<sup>42</sup> *FCL*, 3–6.

<sup>43</sup> 'Punishing the Awkward, the Stupid, the Weak, and the Selfish' (2011) 5 *Criminal Law and Philosophy* 147, e.g., 152, 170, 176, 183, 184, 191.

cuss one line of argument that might be derived from *FCL* against the choice theory.<sup>44</sup> The choice theory locates culpability in D's choice to commit an unjustified wrong, or to run the unjustifiable risk of committing such a wrong. D knowingly breaches a duty, and is blameworthy for doing so. But, it could be argued, it is not always the case that knowingly committing an unjustified wrong is culpable.<sup>45</sup>

Consider duress, or, more specifically, duress when it does not amount to a justificatory defence, but simply operates as an excuse.<sup>46</sup> Here, D knowingly commits a wrong but may not be blameworthy for doing so. For instance, D may participate in the killing of a third party due to credible threats to torture and maim D's young child. Don't cases of this kind show that we need an account of culpability like the defective engagement with reason account? The point is that where D successfully pleads (excusatory) duress they escape culpability on the basis that despite what they did a person with decent moral characteristics might have acted in the same way.<sup>47</sup> D's behaviour does not, after all, involve a defective engagement with reason that manifests a moral failing.<sup>48</sup> Even a person with decent values and a sufficient concern for others might have done the same.

However, the choice theorist could argue that duress is more exceptional than this analysis allows. After all, there is no *general* defence in criminal law of having been sufficiently motivated by others' interests (or acting as a person with decent moral characteristics might have). Duress involves the situation where D is subject to threats that place D in a dilemma. D must either suffer some extremely serious loss (death or serious injury), or take an action that seriously wrongs another. It involves, therefore, an acute conflict between personal values (i.e., D's own interests or the interests of those close to D) and impartial value (everyone's interests counting equally), and it makes extraordinary demands on D to sacrifice their personal interests. In such a conflict it can be understandable that D is not prepared to make this sacrifice, and that other ordinary people in the same type of situation would similarly be unwilling to make the sacrifice.

How should this defence be understood? Is it that D is not culpable because their conduct does not manifest a moral failing? The choice theorist could argue that, on the contrary, D *is* culpable for acting as they did. After all, what they did was not (*ex hypothesi*) justified—it was not permissible in the circumstances to place their own interests (or the interests of those close to them) above the interests of others.

<sup>44</sup> I should emphasise that this is not an argument advanced in *FCL* itself.

<sup>45</sup> *FCL*, 257–8.

<sup>46</sup> Duress, as it is defined in, e.g., English law, encompasses cases where the D is threatened with a death or serious injury unless they commit what might be a very minor crime. On the grounds of lesser evils necessity, these types of cases provide a justification for the minor crime, not simply an excuse.

<sup>47</sup> There is another issue I will put to one side here. The account of duress is based on D not being culpable where D's conduct did not manifest a moral failing. But in the case of duress, the test for being a moral failing seems to fit more easily with the decent moral character view, rather than the insufficiently motivated by the interests of others view. After all, had D been sufficiently *motivated* by V's interests, D would not have acted in the unjustifiable way D did. D would have sacrificed their own interests rather than the (greater) interests of V. On the other hand, a person with decent morals and motivations might have acted as D did.

<sup>48</sup> *FCL*, 269, 405–06, 460–1.

Ideally D should have made the sacrifice. But when D acts under duress, we have good reasons not to *blame* D for doing so, despite their actions being *blameworthy*. This approach draws upon the distinction between moral blameworthiness per se and justified blame-related reactions.<sup>49</sup> Many threats that pressure D into committing a wrong provide D with mitigating circumstances, even though they do not provide a defence. A more lenient sentence is appropriate in recognition of the fact that D did not willingly commit the offence. When duress operates as an excusatory defence, on the other hand, the situation is such that there are sufficient reasons against blaming D at all. There are not simply reasons not to blame D as much as would have been appropriate if they had acted willingly, but reasons strong enough for D not to be subject to any blame whatsoever. In the extreme situations recognised by the law as providing a duress defence (viz., the threat of death or serious injury), D is, all things considered, *blameless* for the wrong they have committed. And because D is blameless, they should not be subject to conviction for what they have done. On this approach, the defence of duress is compatible with the choice theory.

Of course this account of duress—if it is successful—only defuses one objection to the choice theory of criminal culpability. It does not provide a positive argument in favour of the choice theory. Nor does it provide an argument against the defective engagement theory of culpability. It leaves the merits of the two theories open to further debate.

## 6 Conclusion

In the preceding discussion I have passed over many of the other virtues of Simester's discussion of culpability. Importantly, *FCL* presents a genuine alternative to the choice and character views of culpability. The defective engagement with reason account is used to great effect throughout the book to shed light on issues in *mens rea* and defences, and to put the case for negligence as a form of criminal culpability. The book is also of great value in emphasising the fact that culpability cannot simply be equated with *mens rea*, but is also dependent on the wrongfulness of D's actions and the absence of a defence. Equally, the book illuminates how *mens rea* does not simply contribute to the culpability of D, but can play other important roles in criminal liability, such as making certain actions wrongful.<sup>50</sup>

In this paper I have raised some queries and reservations about the defective reason account, regarding the language of 'vice', the nature of 'moral' failings, and the precise form of insufficient care and concern. But I have no doubt that future discussions of criminal culpability will be enriched and deepened by engagement with Simester's subtle and novel account.

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<sup>49</sup> E.g., D Enoch and A Marmor, 'The Case Against Moral Luck' (2007) 26 *Law and Philosophy* 405, 412–14, 432–4 (noted in *FCL* 237 fn 1).

<sup>50</sup> *FCL*, ch 3.

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