Singapore Journal of Legal Studies
[2025] 1–4

ON CRIMINAL LAW'S FUNDAMENTALS PREFATORY REMARKS

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Fundamentals of Criminal Law ("*Fundamentals*") was completed in Singapore during lockdown in 2020. But it will never really be finished. The project that it undertakes is sufficiently wide-ranging that there will always be opportunities for disagreement and refinement. Even if one accepts its core informing principles, *eg* that D should not be convicted of a criminal wrong unless D is culpable for that wrong, one might well harbour doubts about how those principles apply in the context of particular doctrines. Can inadvertent negligence be culpable, for instance, in the way that many legal systems assume it is? In his essay for this symposium, James Manwaring does not deny that it can: "Sometimes inattention and forgetfulness evidence insufficient care for others." But he denies that the evidential link is a robust one. Drawing on recent studies in the psychological literature, he concludes that such failings of attention or memory, relative to an average person, do not supply robust evidence of a moral failing on D's part. More specifically, they do not offer sufficiently reliable evidence of D's culpability to warrant the kind of condemnatory and punitive response that is inflicted by criminal law. "From the fact that the defendant failed to do what the reasonable person would do, it requires a fragile inference to reach the conclusion that they evinced insufficient care [for the interests of those they harmed]." Yet Manwaring accepts that the inference may be strengthened by relativising the so-called "reasonable person" to more of the defendant's own attributes. He does not offer an account of how that might be done; such an account would be well beyond the scope of a single essay. What he does show, however, is that the existing literature is incomplete. There is more work to be done. There are also new applications to be explored. In her contribution, Miriam Gur-Arye builds on the taxonomy of defences endorsed in *Fundamentals* (and by some other writers) to develop a more sophisticated case for the little-loved "defence" of cultural difference. While differences in cultural practices are sometimes accommodated within a multicultural state (consider, *eg*, the provision in Singapore for adjudicating family-law cases under Sharia law), there is less tolerance to be found within the criminal law. Culturally motivated non-compliance can be seen as incompatible with the rule of law. But for Gur-Arye, this is too crude. Suppose that D perpetrates the actus reus of a crime with its required mens rea. (Call this the *pro tanto* crime.) It does not follow that D is guilty of, or indeed culpable for, that crime.

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D may have a *justification*: perhaps D harmed V in reasonable self-defence, wherefore D's conduct was morally and legally permissible. Alternatively, D may have an *excuse*: perhaps D acted only under duress, wherefore D's conduct was impermissible (and doubtless a tort) but not sufficiently deserving of blame. If we accept a distinction between these rationales, we have the beginnings of a more nuanced set of cultural difference claims that might be defensible within the law. By avoiding traditional "one size fits all" characterisations of "the" cultural difference defence, Gur-Arye moves the debate along. Again, there is more work to be done, but she offers a new platform upon which to build.

Michael Grainger is also concerned with the realm of defences, specifically insanity (or, in Singapore, unsoundness of mind). In *Fundamentals*, insanity is categorised as neither justification nor excuse. Rather, it is seen as an *irresponsibility* defence. The difference is important because, unlike the other two kinds of defence, there is no (explicit or implicit) reference to the moral *quality* of D's reasons – no element of evaluating why D acted in the light of what it was that D did. Self-defence must be proportionate; duress is available only if the threat was sufficiently severe to make D's response understandable. Not so with insanity. Insanity, according to *Fundamentals*, is like infancy. It takes D outside the realm of moral (and legal) evaluation of what D actually did. This view has recently been criticised by Marcia Baron, writing in *Criminal Law and Philosophy*. Grainger, however, presents reasons for thinking that Baron is mistaken. Yet he does not entirely endorse the analysis in *Fundamentals*, which goes on to draw a further distinction between cases of insanity that result in involuntary action and cases that do not. Grainger suggests that the category of insanity found in some jurisdictions and newly in Singapore's Penal Code, covering a person who is "completely deprived of any power to control his actions", puts pressure on that distinction and needs further accommodation.

Suppose, on the other hand, that D is a responsible actor who is proved to have committed a *pro tanto* offence. In general, D's best remaining option is to plead either a justification (that his conduct was in the circumstances permissible) or an excuse (that on this occasion D was not at fault). What is the relationship between these two categories? That is a question which occupies James Edwards. He argues that D can be regarded as justified only if it is also the case that, were the facts such that D was not justified, D would have been excused. "Justifications, simply put, are excuses plus." Or, we might also say, they are *counterfactual* excuses plus. For Edwards, whether D lacked fault is a question prior to whether D's conduct was permissible. That seems plausible. It is important to see, however, that this does not mean that justifications are a *mere* subset of excuses. Edwards discusses the well-known case of *Re A (Children)*, in which the English Court of Appeal ruled that it would be lawful for surgeons to separate conjoined twins, even though doing so would cause one twin to die within minutes. Here, the operation would have been neither lawful nor excusable unless justified. It was done without fault, to be sure, but *only* because it was justified.

Culpability, of course, requires more than simply the absence of excuse. But how close should the criminal law cleave to the moral evaluation of a wrongdoer? Matt Matravers queries whether the criminal law may sometimes be right to depart from imposing liability commensurate with blameworthiness: whether "the structures and demands of the criminal law" can pull in a different direction from those of

morality. There are difficult cases here, including in the civil disobedience literature and, perhaps most strikingly, cases of defendants afflicted with mental health problems falling short of insanity. A theory of justified *convictions* might ask whether D is *sufficiently* culpable to deserve public condemnation for their wrong; beyond that, we need a further theory of sentencing. Such a theory might take account of the type of wrong done, together with the moral failings manifested by D in perpetrating that wrong; *and* of the seriousness of the harm that D's wrong was likely to cause – especially where D was aware of those risks when acting.

A related challenge for theories of criminal culpability is posed more generally by the problem of luck. Other things equal, if two assassins attempt to kill their victims, and one misses (because the victim luckily moves his head at the last moment) while the other succeeds, should the difference in outcomes make any difference to their culpability? In *Fundamentals*, it is argued that the grounds of *culpability* crystallise at the point when D pulls the trigger, whereas the outcome (death) changes the *wrong* that D does. In law, that difference should be reflected by labelling murder and attempted murder as distinct offences; but the attempter need be punished no less severely than the successful assassin. In a thoughtful essay, John Stanton-Ife extends this analysis by exploring the extent to which labelling should be sensitive to outcomes, and why. It is a familiar feature of what are sometimes called "conduct crimes" like perjury and fraud that, at least in many jurisdictions, they are insensitive to outcomes – *eg*, to whether anybody was actually deceived. Stanton-Ife offers some persuasive reasons for distinguishing such crimes, where the core of the wrong lies in the very attempt, from crimes like (attempted) homicide, where the core of the wrong derives from the harm it is likely or designed to cause.

The role of luck in criminal liability depends, of course, upon doctrines of causation. In *Fundamentals*, it was argued that there is a core thread of causation – "direct causation" – which is pre-moral and common to both criminal and civil law. Direct causation, being unfiltered by moral constraints, helps us to distinguish between the successful and the failed assassin: whatever their deserts, only one is a killer. Findlay Stark, though, doubts whether there is *any* dimension of causal responsibility that is unfiltered by moral norms. In part, this is because he tends to assimilate "direct" with "factual" (that is, "but for") causation. The latter assuredly does require moral filtration, because it is not truly a form of causation at all; but it is less clear the same is true for direct causation. If a doctor unforeseeably and unlawfully refuses to treat the victim of a knife fight, and V dies from the wound, V's being stabbed is still a (direct) cause of death. What Stark contests is whether that ought to suffice for causal responsibility in the criminal law. He also has a second line of attack: what about omissions? Conventionally, omissions are seen as involving a distinctive form of causal relationship. As Stark points out, though, we are yet to see an account of how direct causation can accommodate the causal significance of omissions, notably in the kinds of double-prevention cases described by Schaffer and other writers. Until such an account is on offer, the law may be better to stick with the traditional approach, and commence its inquiry by looking for but-for causation.

Which brings us back to our starting point. There is always more work to be done. In striving to deepen our understanding of the structure and moral foundations of the substantive criminal law, the contributors – like all good academics – engage

with and build upon the writings of others. No law professor can prosper in isolation. The papers in this symposium arose out of a conference in Singapore in September 2022, supported by the Ministry of Education (grant A-0001429-00-00), the Centre for Legal Theory at NUS Law, and by the Yeoh Tiong Lay Centre for Politics, Philosophy and Law at King's College London. We are grateful to them, as well as to the many colleagues at NUS who helped to organise the conference and make it a success. Thanks are due also to the editors of the Singapore Journal of Legal Studies, who have supported this project from the outset, and to the excellent student editors, for their superb assistance in reviewing and revising the essays into house style.