Singapore Journal of Legal Studies
[2025] 80–91

NUANCE AND MORALITY IN THE CRIMINAL LAW

Matt **Matravers***

In this paper, I offer some thoughts inspired by Andrew Simester's magisterial book, *Fundamentals of Criminal Law*. The starting point is Simester's account of culpability as grounded in moral vice. The initial parts of the paper examine this account, and the language of "morality" and "vice" contained within it. Of particular concern is the legitimising role of invocations of morality and the complexities that come with that role. The latter parts of the paper raise two puzzles and examine their implications: the first is when moral judgements and legal judgements of blameworthiness come apart; the second when there is a gap between crime seriousness and individual culpability. Both puzzles allow us to tease out aspects of Simester's theory and their implications for sentencing.

Andrew Simester's *Fundamentals of Criminal Law* (hereafter, *Fundamentals*)[1] is a genuinely monumental work, and its arguments are spread across many interconnected chapters. As a result, there is always the danger that anything one says about one part of it is addressed elsewhere or, worse, misinterprets the whole. Fortunately, these risks are mitigated in this paper as my main concerns are not with the analytically acute reconstruction of the criminal law found in *Fundamentals*, or with proposing a rival theory to Simester's. Rather, I aim to tease out aspects of his discussion and, especially, to show some of the complexities and further questions they raise.

My main focus, or launch-pad, is Simester's account of culpability and the account he gives of culpability in terms of "moral vice". In *Fundamentals*, Simester argues that D's culpability for a given criminal wrong rests on D's defective engagement with the reasons not to perform that wrong where that defective engagement "reflects a moral vice" on D's part. In the first section of this paper, I examine this account of culpability. The second section considers what is meant by a "vice". In these two sections, the paper also engages with a recent critique of *Fundamentals* by Grant Lamond.[2] The third section considers what is added to the theory by

* I am grateful to Andrew Simester for comments on this paper and to Michael Grainger, Marcus Lin, Mark McBride and others for their discussion of it at a Criminal Law Theory Workshop at NUS, generously funded by the Singapore Ministry of Education (grant A-0001429-00-00). Finally, I am grateful to the Leverhulme Trust for a Major Research Grant – MRF-2020-090: Criminalisation and Punishment: Philosophical Theory and Practical Reality that provided time when I was first thinking of these issues.

1 A.P. Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford: Oxford University Press, 2021) [Simester, *Fundamentals*].

2 Grant Lamond, "Culpability and Moral Vice" (2024) Criminal Law and Philosophy. As befits a book of the significance of *Fundamentals*, its publication has been followed by several journal special issues. As I was working on this paper for the Singapore Journal of Legal Studies, Grant Lamond's paper for *Criminal Law and Philosophy* was published.

invocations of "morality", and the problems this creates. The fourth and fifth sections explore what happens when crime seriousness and a moral(ised) account of culpability are in tension with one another.

I. Culpability

Simester helpfully provides a summary – the gist – of his account of culpability:

> Suppose that D φs, and that her φing is an unjustified wrong. The gist of the argument in this chapter is that D's culpability for φing does not arise directly from the wrongness of her φing. Rather, it derives from D's *engagement* with the reasons why she should not φ. D is culpable when her engagement with those reasons is defective in a manner that reflects a moral vice on D's part.[3]

So, what is it to engage with reasons in a defective manner? There are two varieties. The first arises when a person "prefers bad reasons to good ones". For example, assuming that a person has the necessary capacities for moral responsibility, then when he chooses to "stab his opponent [rather] than walk away", he acts on his own "preferences or evaluations" despite it being the case that he should not do so and has reason to act differently. These Simester calls "moral-preference errors". The second arises when a person ought to recognise that a reason applies to them and yet the person makes "some sort of mistake, some inadvertence or ignorance" about what she ought to do (an epistemic failing).[4] This is important to Simester's work as it allows him to argue that, in very limited circumstances, criminal culpability can apply to negligent acts (covered by epistemic failings) in addition to intentional and reckless ones (covered by moral preference errors).[5]

Although the latter type of case – for example, stabbing one's opponent rather than walking away – may seem familiar, it is worth emphasising that this is not a standard 'choice' theory of culpability. What matters is what the choice reveals about the agent's engagement with reasons. The target of our culpability judgements is "the-defendant-in-respect-of-her-action".[6] Be that as it may, the former type of case is (even) more radical given the orthodox view that criminal culpability for negligence is unwarranted. Consider the example provided by Simester:

> D is lying on the beach and does not think to check on her children who are playing in the water. The children drift too far out and are drowned. Here, we might blame D, not for choosing to allow the children to drown, but for failing to engage with that risk…. This is not just, although it involves, an evaluation of what happened…. It is also an evaluation of D with respect to what happened. D's failure to think about the situation is blameworthy because it tells us about her.[7]

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3 Simester, *Fundamentals*, *supra* note 1 at 237.

4 *Ibid* at 249-50. I explore the place and significance of the assumption of moral responsibility in M Matravers, "Remaindered Culpability: Comment on Fundamentals of Criminal Law" (2021) Jerusalem Review of Legal Studies 23, at 138–48.

5 It is also important in Simester's discussion of justifications, excuses, and lawfulness in Chapter 17.

6 Simester, *Fundamentals*, *supra* note 1 at 253.

7 *Ibid* at 250.

In both cases, Simester's claim is that the agent's defective engagement with reasons – whether "in-respect-of-her-action" or "in-respect-of-what-happened" – reveals, and presumably is the result of, "moral vice". In the next two sections, I consider each element of this phrase beginning with "vice".

II. The Language of Vice

It is clear that the language of "vice" in *Fundamentals* is not, say, a matter of an author choosing one word over another for variety or aesthetic value. "Moral vice" appears early in the book when Simester is sketching his account: "it matters *why* the defendant φed, and whether her doing so reflects badly on her by disclosing a moral vice on her part".[8] It then plays a central part in chapters 11 and 12 on culpability, and Simester uses the phrase to "name" his account – "a theory of culpability in terms of moral vices" – when comparing it to the choice- and capacity-based alternatives.[9]

Of course, it is an author's privilege to specify the meanings of the terms she uses; a privilege that is often used in philosophical texts. However, there is no sense in *Fundamentals* that "vice" is meant particularly technically, or as a term of art. Moral vices, Simester, tells us,

> 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.[10]

In a recent paper, Grant Lamond takes issue both with the language of "vice" and with Simester's identification of those "engagements-with-reason" that demonstrate vice. Let me take each issue in turn.

With respect to language, Lamond is concerned that "vice" is misleading. Vice, he argues, is normally understood as a character trait, "a *settled* disposition of character to respond and react in certain ways in certain circumstances".[11] This suggests a character theory of culpability, but the defective engagement account is not such a theory. On the defective engagement account, culpability is for (in) actions (paradigmatically, wrongs) whether those are one-off or persistent, whether they are in- or out- of character. The "attachment of blameworthiness", as Simester puts it, "is event-specific and therefore time-stamped. What counts is whether D exhibited some moral vice *on that occasion* – in that moment of behaving".[12] It is this usage, Lamond thinks, that is in tension with the ordinary understanding of "moral vice".

In trying to explain the appeal of the language of vice, Lamond admits that a person can act selfishly or cruelly even if they are not in general selfish or cruel,

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8 *Ibid* at 16.

9 *Ibid* at 251.

10 *Ibid* at 237–38, internal note omitted. Simester adds that "failure to value one's own interests properly" can also be a moral vice.

11 Lamond, *supra* note 2.

12 Simester, *Fundamentals*, *supra* note 1 at 256.

and we can legitimately call them to account for those selfish and cruel actions. Nevertheless, he goes on to argue:

> 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 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.[13]

For that reason, Lamond prefers the language of "moral failing" to "moral vice".

Although I am sympathetic to Lamond's worries, his solution also invites misunderstanding. This is because we need to be careful as to where the "failing" is to be found. Consider again D, who is lying on the beach while her children drown. It seems natural to say that D failed to check on her children. However, it is not *that* failure that matters, at least not by itself. Rather, it is that that failure is the result of a defective engagement with the reasons that applied to D (assuming it is). In that sense, there is a deeper moral failure in D that we infer from her failure to check on her children. This is, I think, what Lamond means, but I am not convinced that his substituting "moral failure" for "moral vice" is less problematic from the point of view of ordinary language use.

That said, I think there is an additional worry one might have about the use of the term "vice". This is that the terms we use in criminal justice have "remainders" or "resonances". While not intended, the language of moral vice too easily slips into that of moral viciousness suggesting, as Lamond notes, a settled and perhaps irredeemable character trait and reinforcing the idea that "we", the law abiding, are in some way different and superior to "them", the morally vicious. To be clear, I don't think that is what Simester thinks or intends but words matter and when authors send them out into the world they have a duty to be sensitive to the uses that might be made of them.

Perhaps, in the end, it would be better to stick with "morally defective engagement" and "non-morally defective engagement", but that is clunky. Moreover, "failures" better captures the phenomenology of many criminal offences (as will be discussed later). So, despite my reservations, in the rest of this paper I follow Lamond in using "moral failings".

With respect to the identification of those "engagements-with-reason" that demonstrate vice, or what we might now think of as those failings that are moral failings rather than failings of some other, non-culpable, kind, Lamond argues that *Fundamentals* offers two slightly different accounts. These are the "Decent moral character view" and the "Insufficient care and concern view".

On the "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) would do".[14] On the "Insufficient

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[13] Lamond, *supra* note 2.

[14] *Ibid*.

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".[15]

Lamond argues that the second, narrower, characterisation is better on three grounds. First, where an agent fails to do what a person with decent values and dispositions would do, but nevertheless does give due concern for the interests of others, this does not always seem like a moral failing. Second, the first characterisation risks circularity: a moral failing is not what a decent moral person would do. Third, insufficient concern for the interests of others provides both a test for, and an explanation of, moral failings, whereas comparison with what a decent moral person would do only provides the former.

I will return to these characterisations of moral failings (or moral vices) below. Before that, however, I want to explore what the idea of "moral" brings to "moral vice".

III. The Language of Morality

It might be thought that we have already been dealing with the moral element in the phrase "moral vice" (or "moral failing") and indeed Lamond, takes his own discussion of the criteria for a failing's being moral as exactly that. However, I am interested in a broader question: not in how we identify which failings are moral, but in what is being done when invoking the language of morality in the first place. To put it starkly, what purposes are being served by talking about *moral* failings/vices or, for that matter, a person with a decent *moral* character, rather than, for example, failings with respect to what is expected of us by the criminal law?

There is a deep question here about how we should think of the criminal law and about what forms of reasoning are appropriate guides when doing that thinking. Simester argues that "the criminal law speaks with a moral voice".[16] Vincent Chiao, among others, might disagree and point to the many and various ways in which the criminal law speaks in the non-moral language of regulation.[17] That debate takes us far beyond the scope of this paper, but a derivative question does not. The derivative question concerns the degree to which theorising about the criminal law is helped or hindered – or, indeed, appropriately done – by reference to issues in interpersonal morality.

Consider, for example, the opening lines of Simester's chapter on Culpability:

> When is a person culpable? When does she deserve the kind of moral indignation that we paradigmatically associate with blaming judgements and, in the criminal law, with pronouncements of guilt?[18]

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[15] *Ibid*.

[16] Simester, *Fundamentals*, *supra* note 1 at 4. See also A P Simester and von Hirsch A, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart 2011).

[17] Vincent Chiao, *Criminal Law in the Age of the Administrative State* (Oxford: Oxford University Press 2019).

[18] Simester, *Fundamentals*, *supra* note 1 at 237.

What is presupposed by this is that analysis of interpersonal blaming judgements is relevant to analysis of criminal law blaming judgements. Yet, throughout *Fundamentals* Simester is sensitive to the particularity of criminal law and of the ways in which the demands that arise from that particularity in one area – *eg*, with respect to criminalisation – might have implications for understanding another, such as strict liability.

What explains Simester's insistence that culpability is tied to morality; that D's failing is a moral one rather than (or in addition to) a failing to accord the due care and concern for others as specified by law? One answer is that *if* we accept that the criminal law speaks with a moral voice – not just in the sense that there is overlap between criminal law rules and the rules of morality – then, as Simester puts it, "it should tell the truth". That is, if the state through its criminal law *labels* someone as, say, a murderer and *blames* them for their murderous conduct, then it should only do this when there is moral culpability.[19] This is itself a moral argument and accepting it depends on accepting the antecedent claim that the criminal law does, indeed, speak with a moral voice.

A second, related, answer is the assumption that moral blameworthiness is essential in legitimating what would otherwise be the horrific moral atrocity that is the state's use of its immense coercive powers to deprive people of their property or freedom. No-one, I think, has put this better than Oliver Wendell Holmes Jr In his lecture on "The Criminal Law". Holmes famously declared,

> It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.[20]

To put it in more ordinary terms, the thought is that if we ask, "what makes it permissible for the state to inflict hard treatment on those it punishes?", the answer, "in part, the fact that they are morally blameworthy" goes a long way as a legitimising answer. Yet, moral and legal blameworthiness are not the same.

Of course, Simester knows this, and this is reflected in *Fundamentals* in the discussions of, among other things, the scope of the criminal law, *mala prohibita* offences, and strict liability. Yet, for all the sophistication of those arguments, I argue below that there are other areas where the invocation of morality and *moral* vice or failure, and the structures and demands of the criminal law, if not come apart, then at least pull in different directions. Section IV, next, returns to the issue of the two characterisations of moral failure identified by Lamond and asks whether an individual's legitimate criminal responsibility always reflects his lack of proper concern for others. In some cases, I will argue, criminal responsibility aligns not with the individual's lack of concern for others, but with his failure to live up to certain standards. In those cases, moral and legal responsibility can come apart.

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[19] *Ibid* at 232.

[20] Oliver Wendell Holmes Jr, *The Common Law* (The John Harvard library: The Belknap Press of Harvard University Press, 2009) at 47.

Section V is concerned with a potential gap between the "labelled" wrongful conduct and the account of culpability. None of the arguments in what follows present a challenge to Simester's account. Rather, they explore some possible implications of it. It might be that Simester thinks that they are best addressed at sentencing, in which case the debate between us about what can and should be "remaindered" to sentencing continues.[21]

IV. Individual Responsibility in Morality and Law

Recall Lamond's distinction between the "decent moral character" and the "insufficient care and concern" views of how an agent's defective engagement with reason manifests a moral vice or failing, and his argument for the latter. This section presents two different types of case where our moral and legal judgements seem to me, at least, to pull in different directions.

Consider, first, what seem to be clear instances where D fails to meet the standards required by law, but not because he has insufficient care and concern for the interests of others.

Lamond offers the following examples:

> 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?[22]

Disclosing state secrets and vandalism are not *mala prohibita*, but Simester could appeal to his arguments deployed in his discussion of *mala prohibita* offences to the effect that people have a duty to uphold legal regimes that are themselves valuable.[23] Here, perhaps, one might argue – as some do in the civil disobedience literature[24] – that the concerned civil servant ought to engage with his superiors before disclosing state secrets just as the paint thrower ought to convince his Local Authority to remove the statue rather than take matters into his own hands. However, in Lamond's example they might indeed have done those things, and having been unsuccessful in getting what they wanted, reverted to direct action.

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[21] See the exchange in my article at *supra* note 4, and A P Simester, "Reckonings" (2021) Jerusalem Review of Legal Studies 23 [Simester, *Reckonings*].

[22] Lamond, *supra* note 2.

[23] Simester, *Fundamentals*, *supra* note 1 at 240–42.

[24] Paradigmatically, see Rawls J, *A Theory of Justice* (Boston: Brill 2013).

Whether or not they have gone through the proper channels before taking action, in both cases it seems as if the perpetrators, far from lacking concern for others, are precisely motivated by that concern. Of course, they may be mistaken, but where their mistake is genuine and sincere, and our criterion is whether the agent displays care and concern for others, it seems that moral and legal judgements of culpability come apart.

Simester (and others) may disagree with me on this, as one's intuitions here roughly track one's views of morality. That is, imagine the leaker of state secrets genuinely and sincerely believes in the moral rightness of a race-based English nationalism and believes it will be ultimately beneficial both to "the ethnic English" (in his terms) and to those who will be expelled, since he believes everyone is better off living in ethno-culturally homogenous groups. These beliefs strike me as abhorrent: nonetheless, I am inclined to think him less morally culpable, albeit no less legally so, for leaking the secrets. I suspect Simester, who leans more to moral realism and to the view that moral reasons apply to human beings irrespective of their engagement with them, would disagree. This is perhaps where the "decent moral character" view bites. My racist English nationalist is clearly not a decent moral character, but he *is* the particular individual in the dock.

The second type of case reflects the fact that our moral judgements are often (and I think ought more often to be) relativized to people's abilities. This is particularly true when it comes to overcoming adversity. Think, for the moment, about our response to athletes who are clearly less talented than others in a race, or who suffer from cramp during the last lap, but struggle on even though the race is long decided. It is not that we think they deserve the gold – that is reserved for the person who wins – but we admire their efforts even if they fail. Analogously, Havi Carel asks, "whether a person deserves additional moral brownie points if in order to act virtuously they had to overcome a vice. Are they more virtuous than the person who is naturally kind, thoughtful, or friendly?".[25] The answer seems to me to be yes, and to remain yes even if they try but fail.

What is the relevance of this to criminal law in general and to Simester's book, in particular? It is this: Simester several times points out that "[n]ot all vices are moral. Being of low intelligence, for example, is not a ground of blame."[26] And, similarly, "[l]ow intelligence may be a deficiency by reference to standards of an 'ordinary' or average person, but it does not involve any deficiency of moral character."[27] I agree. Yet we can and do, for example, praise someone who tries hard to complete a test despite being of low intelligence, so the relationship between non-moral aspects of personhood and evaluative judgements is perhaps not as clear-cut as these quotations suggest.

Consider a typical offender of the kind you will find in any number of prisons: he is a young man with some degree of childhood trauma in his background; he was, and is, a habitual user of drugs and/or alcohol; he has mental health problems, which have largely gone undiagnosed and untreated; he has a history of being excluded from school; finally, although these do not rise to the level that would provide a legal

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[25] H Carel, "Virtue in Deficit: The 9-year-old hero" (2017) 389 Lancet at 1094–95.

[26] Simester, *Fundamentals*, *supra* note 1 at 237.

[27] *Ibid* at 251.

excuse, he suffers from a degree of emotional dysregulation, executive dysfunction, and various social deficits.

I do not say this to burnish my bleeding heart liberal credentials – although I am inclined to agree with Victor Tadros that, when it comes to criminal justice, "[a]t least we can say that the hearts of bleeding hearted liberals have good reason to bleed"[28] – but simply because it reflects the sad reality of criminal justice on the ground. None of these things – trauma, addiction, mental illness, *etc* – is a moral vice but each is relevant to our moral judgements of those we encounter in prison. Now consider one of these young men, recently released and trying his best to live a non-criminal life. He may well fail at times; we know that those who desist from crime do not do so in a straight line but rather their offending becomes less frequent and tails off (desistance is usually a matter of deceleration, not of stopping all at once).[29] Does he "deserve additional moral brownie points" when he succeeds and, more importantly, even when he tries but fails? It seems to me that he does.

The question of whether our young man deserves additional *legal* brownie points is more ambiguous. In a previous exchange, Simester pressed me to recognise the significance of the fact that conviction is binary as, on his account, is moral irresponsibility: either our young man's deficits rise to the level to exclude him from responsibility (or to give him a defence) for re-offending or they do not.[30] I think that's right.[31] Yet, when he commits an offence on the way to desisting, I am more confident in my judgement that he is legally blameworthy, and that he falls short of the standards we expect of our fellow citizens, than I am that his offence is the result of his defective engagement with the reasons he has to show concern for the interests of others.

Perhaps on this Simester and I are not far apart. In the end, the young man does offend and if we assume a victim, he does *act* in a way that does not reflect the concern he ought to have for others. Yet, his moral brownie points might be reflected in legal brownie points at sentencing. If so, then Simester's analysis, at least as understood by me, offers an interesting way of thinking about mitigation in cases such as the one above. It complicates the relationship between the "non-moral" and the "moral", but that is as it should be since that relationship *is* complicated.

V. When Crime Seriousness and Culpability Come Apart

In this final section, I explore a different way in which tensions between the moral and the legal generate interesting questions. Here, my concern is with a possible tension *within* the account of culpability; a tension that arises when there is what we might call an "imbalance" between the assessment of the agent and that of the action.

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[28] V Tadros, "Poverty and Criminal Responsibility" (2009) 43 J Value Inquiry at 391–413.

[29] For a discussion of desistance, and references to relevant literature, see my 'Leading Non-Criminal Lives', in A Bottoms & J Jacobs eds., *Criminology as a Moral Science* (Oxford: Hart, 2023).

[30] Simester, *Reckonings, supra* note 21.

[31] Although I think it adds to the reasons to use "failures" instead of "vices" and perhaps to temper our language when it comes to conviction.

It is an attractive feature of Simester's account that, as noted above, he argues that when we blame, we disapprove not of the action in isolation, or of the agent in isolation, but of *the agent for doing that action*. As he puts it,

> Blame is *not*, it seems to me, for the choice or character – or indeed the moral vice – that lies behind the action, as some writers seem to think. *Both* the action itself, and the moral flaw(s) by which it is explained, are basic.[32]

The issue explored in this section is whether the two basic elements always match. What I mean by this can be illustrated by a case where they do. Return to the example Simester gives of a man who chooses to "stab his opponent [rather] than walk away" (let us assume in order not to lose face). In this case, the criminal wrong – possibly attempted murder or murder – is serious and so is his failure to attend to the reasons that applied to him. In other words, the degree of moral vice or failure, *as revealed in his lack of concern for others*, is also serious and his culpability is thus high.

However, there seem to be cases where the two elements do not march in step. Moreover, these cases seem to go both ways. In some, the agent's action may not seem particularly serious, but the moral vice behind the action is significant; in others, the action is serious, but the moral vice not so. The result, I think, is pressure on either or both sentencing and criminalisation/fair labelling.

Here is an anecdotal example where the action is of seemingly low seriousness, but the disregard for others is very significant. For some years, I lived in London, and I relied on a bus that travelled down the main arterial road into King's Cross Station (one of the main transport hubs in the city). As the road had developed organically, it was lined by shops including newsagents and, as it gentrified, bakeries. It was (and is) not very wide for the volume of traffic it carried. Regularly during the morning rush hour, drivers would park illegally so as to pick up their morning papers (the internet not yet being available) and/or breakfast pastries. The result of even of a brief stay was catastrophic for traffic flow as the cars and buses backed-up, blocking not only the main road but the side roads that fed into it. I regularly used to think, "how selfish do you have to be to rate your convenience in getting a croissant over the lives of thousands of commuters?".

The criminal wrong here is a parking offence, which is characteristically not regarded as serious or stigmatic. The driver's engagement with the reasons that apply to him, though, is seriously defective in that he is utterly inconsiderate; he fails to show due concern for the interests of others (far in excess of, say, a shoplifter). Of course, the interests of each affected person may not be set-back by very much, but the cumulative effect is enormous. If both the action and the moral flaw are basic, how should we regard cases of this kind?

If this case is too idiosyncratic, here is a recent case from England. It deals not with convenience, but with something closer to the civil disobedience examples discussed above. Nevertheless, it illustrates a similar point when it comes to cumulative harm.

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[32] Simester, *Fundamentals*, *supra* note 1.

D, and his co-defendants had conspired to cause disruption on one of the UK's busiest roads: the M25 orbital motorway around London. They were charged with and convicted of conspiracy to cause public nuisance. Perhaps because they were protesting against policies promoting climate change, or because the offence is not generally regarded as particularly serious and D and his co-defendants did not have prior records, there was outrage at the sentence given to D of 5 years' imprisonment. The "scandal", as their supporters thought of it, extended to the Special Rapporteur on environmental defenders under the Aarhus Convention, Michael Forst, who described it in an open letter as a "dark day" for peaceful protest.[33]

The judge, perhaps anticipating such a reaction, carefully described his rationale for the sentence, which related almost entirely to the cumulative degree of harm done. In his remarks, he noted,

> the total extent of the delay was calculated to be 50,856 hours. The vehicles affected were calculated to number 708,523. The economic cost was calculated to be £769,966, without even taking into account the cost of policing. People missed flights and funerals; mock exams were delayed; a child with special needs missed part of his school day, and was not timeously administered necessary medication; someone suffering from cancer missed a crucial appointment, which was re-scheduled for a date two months later; an HGV driver was unable to deliver £5,000 worth of food to a hospital; and, amongst other harms, a number of people missed work, having to work extra hours in order to make up the time.[34]

One possibility is to think that the system is working as it ought to do. The wrong is conspiracy to cause public nuisance – not usually considered a particularly serious wrong[35] – but this instance of that wrongdoing is more blameworthy and so attracts a sentence at the top end of the permissible range. Yet, this does not seem satisfactory in general or under Simester's theory. Imagine another case in which D was convicted of the same offence, but as her actions only inconvenienced a handful of people, she was sentenced to a fine. The worry is that the message sent in the two cases – and the label attached to the offenders – are the same. However, sentencing is meant to reinforce, not constitute, the censorious message of conviction. Where there is a gap between the seriousness of the criminal wrong and the degree of culpability disclosed in the doing of that wrong, it seems as if something is awry in criminalisation and fair labelling.

In the actual case cited, the degree of wrongdoing as represented by the conviction is low, but the "moral vice" – the disregard for others – as reflected in the sentence is high. In other cases, it will be the reverse: the degree of wrongdoing as represented by the conviction will be high, but the "moral vice" – the disregard

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[33] "Statement regarding the four-year prison sentence imposed on Mr. Daniel Shaw for his involvement in peaceful environmental protest in the United Kingdom" <https://unece.org/sites/default/files/2024-07/ACSR_C_2024_26_UK_SR_EnvDefenders_public_statement_18.07.2024.pdf>.

[34] Sentencing remarks of *R v Hallam & Others* (18 July 2024), <https://www.judiciary.uk/wp-content/uploads/2024/07/R-v-Hallam-and-others.pdf>.

[35] I should note that the history of public nuisance would have made it an even more interesting example. The common law crime carried a maximum penalty of life imprisonment. See J R Spencer, "Public Nuisance — A Critical Examination" (1989) 48 Cambridge LJ at 55.

for others – as reflected in the sentence will be low. The civil disobedience cases mentioned above might be like this, but so might even more serious crimes such as so-called "mercy killings".

Perhaps this is just part of the messiness of the criminal law in practice, and perhaps it is a reason to welcome the formalisation of offences and the role of sentencing in adding nuance to conviction. However, given the coherence of the account in *Fundamentals* from criminalisation through to conviction, I wonder if cases like these increase the pressure for greater offence differentiation than we have at present or for greater transparency in sentencing (or both) if we are to give effect to Simester's integrated account of blame as of an agent for an action.

VI. Conclusion

Fundamentals of Criminal Law is a great book, both in the ordinary sense of that phrase and in the sense invoked in "Great Books" courses across the world. I suspect that its scope and sophistication will not be matched for some time, if ever. It is revealing, and chastening, that such is its richness my comments in this paper revolve for the most part around roughly thirty of its nearly five hundred pages. What I have aimed to do is not to challenge the arguments in any fundamental sense – not least, because I agree with many of them – but to raise some questions about aspects of the account of culpability and about its possible implications thinking both backwards towards criminalisation and forwards towards sentencing. If anything unites these questions it is a sense that invocations of morality legitimise, but also make things messy, and that when a detailed, sophisticated, and coherent account of the criminal law meets the shoddy and often sad real world of criminal justice, there are always remainders.