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Criminal Culpability after the Act

Mark Dsouza*

INTRODUCTION

This article is concerned with criminal culpability—culpability relating to criminal blame—which I treat as separate from moral culpability, which is concerned with moral blame. In it, I propose a refinement in the organisation of the theoretical analysis of criminal culpability. I argue that this refinement improves the criminal law's ability to generate fair blaming judgments and labels.

I begin by outlining in Sections 2 and 3 the manner in which existing theories fail to provide a satisfactory account of culpability in the criminal law, especially in relation to some cases involving culpability assessments made by comparing the actions of the defendant to those of the notional reasonable person. In Section 4, I argue that these failings are symptomatic of a deeper problem in the *organisation* of the culpability analysis —they are attributable, at least in part, to a failure to recognise that the concept of culpability performs different functions at the different temporal stages of the criminal law. I suggest that we need one conception of culpability for the criminal law's advance conduct guidance formulation stage, and another for the conduct evaluation stage which begins after the commission of a prima facie criminal act. I develop a conception of criminal culpability that better explains the culpability analysis at the second ('after the act') stage of the criminal law in Section 5. I start by explaining that criminal culpability after the act should be located in failing to choose one's actions in accordance with the criminal law's advance conduct guidance. Next I identify the sources of guidance in the criminal law. Finally, I distinguish between blame and blameworthiness in order to demonstrate that this account of criminal culpability does not compel us to embrace a result-independent conception of the criminality of conduct. Section 6 is dedicated to exploring the practical implications of theorising criminal culpability separately for the criminal law's advance 'guidance' and subsequent 'evaluation' stages, and of adopting the proposed account of criminal culpability after the act. I demonstrate that

* Lecturer in Law, School of Law and Social Justice, University of Liverpool. Drafts of this paper were presented at the University of Liverpool Law Research Seminar Series, and at the Faculty of Law, University of Cambridge. I am grateful to the participants for their comments. Particular thanks are due to Antje du Bois-Pedain, Findlay Stark, Mike Gordon and Matt Gibson for their insightful comments and suggestions. Email: Mark.Dsouza@liverpool.ac.uk

the model of criminal culpability proposed herein can account for blaming judgments made in respect of all instances of advertent wrongdoing, as well as most instances of inadvertent wrongdoing. In doing so, it isolates intuitively troubling criminal blaming judgments, and allows us to argue for the rejection of only those judgments. The resulting system of law is both recognisably related to existing systems of the criminal law, and an improvement on them in terms of the ability to generate fair blaming judgments. Furthermore, it allows us to sidestep vexed doctrinal questions relating to which characteristics of a given defendant ought to be attributed to the reasonable person by reference to which she is sometimes judged.

I. FAULT LINES IN CRIMINAL CULPABILITY

The conception of criminal culpability that has become dominant in England and Wales occasionally generates blaming outcomes that are deeply troubling. Consider for instance the following example.

D is infatuated with V, and would never do anything to hurt or offend her. Based on his several previous interactions with V, D comes to believe that V reciprocates his feelings. Unlike most people, D is keenly aware that almost every aspect of his life—his love life included—is regulated by the law, and so he does some research. He notes that the Sexual Offences Act 2003, s 1, says that a person (A) will be guilty of rape if he intentionally has penetrative sexual intercourse with another (B), when B does not consent to the penetration, and A does not reasonably believe that B consents. D studies this provision in order to identify the range of things he may do vis-à-vis his feelings for V, while not committing rape. D notes that he must not have penetrative sex with V unless he believes that V consents to the penetration. He further notes that his belief in V's consent must not be capricious—D must make sure that his belief is reasonable.

One evening, D initiates heavy petting with V, and V does not dissuade him. This reinforces D's belief that V is a willing participant. Moreover, D is convinced that his belief is founded on reasonable grounds—V has always seemed happy to see him, and D and V have had several interactions that appeared flirtatious to D. One thing leads to another, and D has sexual intercourse with V. In fact, V does not consent to sexual intercourse, but also does not resist, because she is terrified of D—her 'flirtation' had actually been behaviour designed to keep D from reacting aggressively to overt rejection, rather than to encourage him.

At his trial for rape, it emerges that D has been suffering from previously undiagnosed learning difficulties and a personality disorder that cumulatively make it very difficult for him to perceive and correctly interpret social cues and the behaviour of others. However, in terms of the criminal law's idiosyncratic conception of insanity, he is not insane. An objectively reasonable (ie, not mentally ill) person would not have interpreted V's pattern of behaviour towards D as suggesting consent to sexual intercourse, but D honestly (and in his own eyes, very reasonably) believed that V was consenting all

along. Given that D had correctly identified the guidance contained in the Sexual Offences Act 2003, s 1, and had selected his behaviour by reference to that guidance, one might expect that D would be entitled to an acquittal. However, in the recent case of *R v B (MA)*,[1] the Court of Appeal strongly suggested that on such facts, D would be guilty of rape.[2] It held that in principle, since a reasonable person would not have believed that V was consenting, D should be labelled a rapist even though *he* genuinely thought that his belief that V was consenting to—even welcoming—sexual intercourse, was objectively reasonable. Understandably, the court was not willing to attribute D's mental illness to the reasonable person—in law, the notion of a reasonable mentally ill person is oxymoronic.

Arguments about doctrine apart, this sort of ruling would give rise to two concerns about culpability in the criminal law. First, if we momentarily set aside our sympathy for the plight of V, there seems to be something deeply disturbing about the labelling outcome generated by this approach. It would assign the label of 'rapist' to a person who would never dream of forcing himself upon another—who in fact who had deliberated carefully before concluding that his prospective sexual partner was really consenting—mainly because mental illness has affected his ability to correctly analyse a situation. Even more worryingly, this label is shared by offenders who are unambiguously contemptuous of the sexual autonomy of others. And second, if the Court of Appeal's ruling is correct, then it seems difficult to identify the source of D's culpability, given that D made every effort to follow the advance guidance contained in the Sexual Offences Act 2003, s 1.

Similar concerns potentially arise each time a defendant's culpability at trial depends on comparing her actions with that of the reasonable person. But how real are these concerns? In the context of the example stated, one preliminary response to the concerns identified might be to dispute D's distillation of the advance guidance contained in the Sexual Offences Act 2003, s 1. Specifically, one might say that the guidance to D was not that D must assure himself that his belief in V's consent was reasonable

1 [2013] EWCA Crim 3; [2013] 1 Cr App R 36.

2 Strictly, this part of the ruling was *obiter dicta*. However, it does flow from the doctrinal and common law principles the court identified as governing this area of law. The court expressly stopped short of saying that a person with the sort of difficulties described would definitely be convicted:

> Whether (for example) [… the belief of …] a particular defendant of less than ordinary intelligence or with demonstrated inability to recognise behavioural cues might be [… *not* unreasonable, even though it would not have been held by most people …], or whether his belief ought properly to be characterised as unreasonable, must await a decision on specific facts. [41]

Even so, it held in no uncertain terms that:

> … unless and until the state of mind amounts to insanity in law, … under the rule enacted in the Sexual Offences Act beliefs in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness and not by taking into account a mental disorder which induced a belief which could not reasonably have arisen without it. [40]

(ie, reflect on the grounds on which his belief in consent is held, and satisfy himself that they are reasonable)—rather, it was that D's belief must *in fact* be reasonable. So stated, D does not obey the advance guidance, because his belief in V's consent is not, in fact, reasonable. Thus, the premise of the second concern fails, and the first concern is simply rejected.

This response is unsatisfactory. It is true that the requirement that D's belief not be unreasonable has been stated such that it appears to require the objective existence of a state of affairs viz, the existence of a belief in D's mind, which belief does not possess the quality of being reasonable. This would make the 'reasonable belief in consent' element seem like a circumstance element of the *actus reus* of rape. However, it is in fact part of the *mens rea* of the offence of rape, and has repeatedly been treated as such both by courts and commentators.[3] As such, one of its functions is to provide fair warning to D as to what D should *do* to avoid criminal liability.[4] Advance guidance as to what state of affairs should objectively exist is no guidance—or at least no useful *conduct* guidance—to the public at all. The concerns identified therefore remain real. Moreover, as will be explained in the next section, existing accounts of criminal culpability struggle to adequately address these concerns, without generating distortions elsewhere.

II. WHERE CURRENT ACCOUNTS OF CRIMINAL CULPABILITY FALL SHORT

Culpability theorists see their task as explaining the link between a moral agent, D, and a proper blaming judgment for causing some prohibited consequence 'φ'[5]—as identifying, that is, the circumstances in which it is legitimate to blame D for causing φ. They

3 See for instance AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 5th edn 2013) 477–78; Jonathan Herring, *Criminal Law Text, Cases and Materials* (Oxford University Press, 6th edn 2014) 446–51; HM Keating and others, *Clarkson and Keating: Criminal Law* (Sweet & Maxwell, 8th edn 2014) 661–66.

4 John Gardner, 'Wrongs and Faults' in AP Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005) 70. See also Winnie Chan and AP Simester, 'Four Functions of Mens Rea' (2011) 70(2) *Cambridge Law Journal* 381, 389–94. Chan and Simester accept the general point that *mens rea* facilitates fair warning, but caveat that the fair warning principle is not absolute. Thus they defend the imposition of criminal liability for some inadvertent harming (ie, negligence-based crimes), especially in the context of the performance of specific, chosen, activities (like sexual intercourse, for instance), in which the actor can be treated as having implicitly been put on notice of a requirement for special alertness. Notice however that even in their argument, the actor is put on notice of what she should *do*—ie, 'take care', or exhibit special alertness. See also George Sher, *Who Knew? Responsibility Without Awareness* (Oxford University Press 2009) 112, who considers and rejects the same proposition—that guidance relates to what one should *do*—in the context of guidance emanating from morality and prudence. Whatever the merits of Sher's argument, the weight of criminal legal theory suggests that morality and prudence, at least when translated into the *mens rea* requirements of a criminal offence, is meant to be action-guiding.

5 See AP Simester, 'A Disintegrated Theory of Culpability' in Dennis J Baker and Jeremy Horder (eds), *The Sanctity of Life and the Criminal Law* (Cambridge University Press 2013) 180.

attempt to do so by reference to theories focusing on factors such as the defendant's choice,[6] capacity[7] and character.[8] Since the primary focus in this paper is the *organisation* of the culpability analysis, rather than the details of the various current theories of culpability, I will not recount the extant culpability theories in any detail here. For the present purposes, it suffices to briefly identify the areas of weakness usually identified in each type of culpability theory, as applied to the criminal law.[9]

In general, choice theories of criminal culpability or blameworthiness explain that D is criminally culpable or blameworthy for causing φ only if she chooses not to exercise her capacity to avoid causing φ.[10] Therefore, a choice theorist would not find the hypothetical defendant in *R v B (MA)* culpable. However, choice theorists struggle to explain the widespread incidence of negligence-based criminal liability for inadvertent φing. They either resort to contrived and unconvincing choice-based explanations of criminal liability for negligence,[11] or propose implausibly revisionist accounts of the criminal law in which criminal liability for inadvertent φing is excluded altogether.[12]

Still, the fact that choice theories do not explain all criminal law blaming decisions that can be observed in doctrine means at least that they are capable of critiquing extant criminal justice systems for being over-inclusive. It seems arrogant and implausible to suppose that criminal law doctrine has developed to the point that it is never over-inclusive.[13] Capacity and character theories, which find it easier to link inadvertent φing to D, struggle to replicate the choice theories' ability to critique criminal law doctrine for over-inclusiveness. On a standard capacity theory, D is culpable for φing if (a) she failed to take those precautions against φing which any reasonable person with

6 Michael S Moore, 'Choice, Character, and Excuse' (1990) 7(2) *Social Philosophy and Policy* 29. See also Michael S Moore and Heidi M Hurd, 'Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence' (2011) 5 *Criminal Law and Philosophy* 147, 172–73.

7 See for instance HLA Hart, 'Negligence, Mens Rea, and Criminal Responsibility' in HLA Hart and John Gardner (eds), *Punishment and Responsibility* (Oxford University Press, 2nd edn 2008) 154.

8 See for instance Michael D Bayles, 'Character, Purpose and Criminal Responsibility' (1982) 1(1) *Law and Philosophy* 5.

9 Admittedly, this section does not do justice to the variety of versions of each type of culpability theory, and different accounts of culpability are able to deal with the criticisms recounted here to differing extents. This section should therefore be taken as merely a sketch, providing context for the discussion to follow.

10 Moore (n 6) at 57; Claire Finkelstein, 'Responsibility for Unintended Consequences' (2005) 2 *Ohio State Journal of Criminal Law* 579. See also in this connection Simester (n 5) at 185.

11 See for instance Jean Hampton, 'Mens Rea' (1990) 7(2) *Social Philosophy and Policy* 1, 27–28 for one such unconvincing attempt. Hampton tries to depict negligence-based liability as liability for a prior choice to not develop a responsible character. For a critique of Hampton's attempt, see Jeremy Horder, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12(2) *Law and Philosophy* 193, 196–98.

12 See for instance the choice-based theories proposed in Moore (n 6); Moore and Hurd (n 6); Finkelstein (n 10). See also in this connection Simester (n 5) at 185, 191; AP Simester, 'Responsibility for Inadvertent Acts' (2005) 2 *Ohio State Journal of Criminal Law* 601, 603.

13 In fact, it is often the contrary view that is expressed, at least by academics. Consider for example, A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225; DN Husak, 'The Criminal Law as Last Resort' (2004) 24(2) *Oxford Journal of Legal Studies* 207, 208; SH Kadish, 'The Crisis of Overcriminalization' (1967) 374 *Annals of the American Academy of Political and Social Science* 157.

normal capacities would in the circumstances have taken; and (b) she could herself, given her mental and physical capacities, have taken those precautions.[14] A capacity theorist might therefore have to conclude that the hypothetical defendant in *R v B (MA)* was culpable, because that defendant did not act as a reasonable person would have acted, despite being legally sane, and therefore, capable of having so acted. Furthermore, capacity theory has been strongly criticised for providing an incomplete account of culpability. It has been pointed out that the capacity to have taken steps to avoid φing, while a necessary condition for culpability, is certainly not a sufficient condition for it. A person must have the capacity to do otherwise in order to be culpable, but every instance of unexercised capacity is not culpable.[15] For instance, it is not ordinarily criminally culpable to be indifferent to the occurrence of harm to others when one is capable of intervening without any difficulty, even if a reasonable person would have so intervened. Yet a capacity theory of criminal culpability would support a finding of culpability here as well.

Character theories of culpability argue that the moral (and therefore criminal) appraisal of D is properly focused on D's character rather than purely her choice. The moral character of D's actions, and so her moral condition as the agent of those actions, does not depend primarily upon what she chooses to do. Instead, it depends upon the motives, concerns and values which inform her actions; on 'the structures of attitudes and feeling from which action and choice flow—on, that is, the character which her actions manifest'.[16] So according to character theories, D is personally culpable because her actions reveal that she possesses a blameworthy character trait, which is often spelled out as the trait of 'being insufficiently concerned for the interests of others'.[17] On this account, since the hypothetical defendant in *R v B (MA)* failed to act as a reasonable person would have acted, despite being legally sane, he has (arguably) displayed an insufficient level of concern for the interests of V. This simultaneously evidences, and constitutes, an underlying blameworthy character trait for which he may rightly be held culpable. However, in making this argument, character theories attract criticism for defining the 'in principle' domain of criminal culpability too broadly.[18] Such theories would suggest that in principle, all instances of negligent wrong causation, including those that are not criminalised, are criminally culpable, since (by the very virtue of being attributable to negligence) they all evidence a lack of sufficient concern for the interests of others. This would compel us to argue that most (merely) negligent wrongdoings are not criminalised for reasons to do with factors other than culpability—factors like the intrusiveness of regulation in respect of the behaviour concerned, the cost of policing, and the possible social side effects of criminalising

14 Hart (n 7) at 154.

15 RA Duff, 'Choice, Character, and Criminal Liability' (1993) 12(4) *Law and Philosophy* 345, 355. See also Simester (n 5) at 183–85.

16 Duff (n 15) at 362.

17 See for instance Simester (n 5) at 192–94; Duff (n 15) at 362.

18 Duff (n 15) at 368; Simester (n 5) at 195.

them. This is quite a counter-intuitive suggestion, and appears almost as radically revisionist a view of the criminal law as that generated by choice-based theories of culpability.

These problems have led to scepticism about whether a unified theory that comprehensively explains the criminal law's conception of culpability is even possible, and suggestions that different accounts of culpability may be needed to explain different types of crimes.[19] Perhaps this is true. However, if so, it is not especially helpful. A theory that says that culpability in the criminal law is 'disintegrated', ie, that it may be founded on the alternative bases of choice and character in respect of different offences,[20] seems to amount to less than the sum of its parts. In jettisoning the choice theory's claim to exclusivity, it loses much of the choice theory's ability to provide guidance as to the appropriate scope of the criminal law. One can no longer criticise the criminal law for being over-inclusive on the basis of its application to inadvertent φing, and in at least some cases, such a criticism would have intuitive appeal. Although the choice theory's inability to explain all observed instances of criminal blame was its weakness, in a sense, it was also one of its greatest strengths. Moreover, a disintegrated theory of culpability also retains the character theory's arguable inability to limit the in-principle domain of the criminal law to only those instances of φing that are generally accepted to merit criminal blame. In sum, we should be reluctant to succumb to the sort of scepticism implicit in this version of a disintegrated theory of culpability.

III. CRIMINAL CULPABILITY AND THE STAGES OF THE CRIMINAL LAW

In fact, I do think that such scepticism may be premature. This is not to suggest that a single, integrated, conception of culpability operates throughout the criminal law. Far from it; in this section, I accept that the concept of criminal culpability ought, in a sense, to be disintegrated. However, I will suggest that it be disintegrated in terms of the temporal stages of the criminal law, rather than in terms of different categories of crime.

Let me explain what I mean by 'the temporal stages of the criminal law'. In the context of their attempt to situate the role of deterrence in criminal justice, Simester and von Hirsch highlight the fact that the criminal justice system operates in stages, and has different functions at each stage.[21] The first stage of criminal justice is prospective or forward-looking, and has to do with its purely norm-setting function. At this stage, the criminal law communicates to the public at large, and ex ante proscribes

19 See for instance Simester (n 5) at 180; Horder (n 11).

20 As suggested by Simester (n 5).

21 AP Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs* (Hart Publishing 2011) 3. The authors divide the operation of substantive criminal law into three stages: criminalisation; adjudication and conviction; and punishment. In this piece, I focus on the first two stages. See also Paul H Robinson, *Structure and Function in Criminal Law* (Clarendon Press 1997) 125.

harmful conduct by criminalising it. In doing so, it creates norms that guide their addressees as to what they should or may, do or avoid doing,[22] on pain of criminal sanction. The second stage of criminal justice is backward-looking—it is adjudicatory and evaluates a defendant in light of her past conduct. Once a general norm of the criminal law is violated, the system must evaluate the prima facie offender's conduct ex post facto to see whether she deserves a blaming judgment and, if so, whether she also deserves punishment. At this stage, the criminal law communicates primarily with the particular defendant. In this paper, I will adopt this description of how the criminal law functions.

The foregoing review of the extant theories of culpability reveals that none of them has focused in any sustained manner on whether the criminal justice system relies on the same conception of culpability across both temporal stages of the criminal law. Undisputedly, the concept of culpability has a role to play at both the ex ante and the ex post stages of the criminal law. However, it should not be assumed that it plays the *same* role at each stage.

A. Culpability at the Ex Ante Stage

At the ex ante criminalisation stage, a theory of culpability performs at least two separate functions. First, it helps identify the instances of wrong-causation that ought to be criminalised.[23] A crime is not committed every time someone suffers a wrong at the hands of another. For instance, although V suffers a wrong when she suffers an undeserved deprivation of her property, for reasons to do with culpability, we may decide that only instances in which V was deprived of her property dishonestly and with intention permanently to deprive, should be criminalised as theft.[24] Careless or negligent deprivation of V's property is not a crime, although it remains true that V suffers a wrong, and is entitled to the return of her property (or failing that, its value). Similarly, although undeserved damage to V's property wrongs V, we may maintain that only intentional, knowing or reckless damage to V's property should amount to criminal damage, whereas negligent damage to V's property should not be criminal damage.[25] In relation to some other wrongs, we may feel that even some instances of negligently bringing

22 One may of course maintain, with Sher (n 4), and Holly M Smith, 'Non-Tracing Cases of Culpable Ignorance' (2011) 5(2) *Criminal Law and Philosophy* 115, that *morality* may guide us about both what one should do and what kind of person one should be. That said, even those that theorise culpability on the basis of character accept that for the criminal law at least, actual conduct (by act, or an omission where there was a duty to act) is essential conduit for culpability. Thus for Bayles (n 8) at 13, 17, actual conduct is evidence of culpable character, whereas for Duff (n 15) at 372, it is constitutive of culpable character. As such, it is generally accepted that the *criminal law's* advance guidance to members of the public focuses on conduct, rather than character. See in this connection Duff (n 15) at 371–74, 380.

23 Chan and Simester (n 4) at 382–88.

24 Theft Act 1968, s 1.

25 Criminal Damage Act 1971, s 1.

them about should be criminalised. So although negligently causing V's death is not homicide, we may stipulate that causing V's death due to *gross* negligence is.[26] Culpability theory gives us the vocabulary at the ex ante stage of the criminal law to identify the *mens rea* that must accompany the causation of a wrong, to attract criminal sanction.

The second role of culpability at the ex ante stage of the criminal law is to arrange different cases involving the same harm in terms of the causal agent's blameworthiness, and to label and punish them differently.[27] Thus we differentiate between murder and manslaughter based on factors to do with the defendant's culpability. Similarly, we differentiate between inflicting grievous bodily harm with intent, and inflicting it recklessly, and assign different labels and punishments to them in rules that contain the criminal justice system's ex ante guidance.[28] Current culpability theories explain this gradation of offences by reference to different *mens rea* states, and much has been written on why it is more culpable to cause a wrong intentionally, than recklessly, or negligently.

Most current accounts of culpability are well suited to the analysis at this stage—they attempt to explain which instances of wrong causation should be criminalised by reference to the (future) agent's choice or character, etc as evidenced by her causative role in the wrong. Much of the debate about the culpability and criminality of negligent wrong causation belongs to this stage of the criminal law, since the arguments primarily focus on questions of criminalisation. I will not be commenting on the respective merits and demerits of the theories that compete with each other at the ex ante stage of the criminal law here. Instead, I will briefly comment on why culpability at the ex post stage of the criminal law ought to be analysed differently from culpability at the ex ante stage, and then offer some suggestions on how ex post culpability judgments ought to be made.

B. Culpability at the Ex Post Stage

At the ex post criminal trial stage, we no longer need to explain why some actions ought to be criminalised only if they are performed advertently vis-à-vis circumstances and consequences, whilst others may be criminalised even when performed inadvertently but negligently. Similarly, we no longer need to explain why an action committed with one mental state is a more serious crime than the same action committed with another mental state. These tasks have been carried out at the criminalisation stage. If the task of the ex ante stage of the criminal law is to issue guidance to the public about what to *do* and what *not to do*, then the inquiry at the ex post stage

26 *R v Adomako* [1995] 1 AC 171 (HL); *R v Misra* [2004] EWCA Crim 2375, [2005] 1 Cr App R 21.
27 Simester (n 5) at 187.
28 Compare s 18 and s 20 of the Offences Against the Person Act 1861.

ought to focus on whether the particular defendant heeded the said ex ante guidance.[29]

An account of culpability that is sensitive to the stages of the criminal law would recognise that in the criminal law's institutionalised normative system, it is *criminalisation* theory (and through it, the ex ante conception of culpability) that is directly concerned with the prohibited consequence, φ. *It* establishes the connection to φ, linking it with the criminal law's normative guidance to behave so as not to cause φ. It is a mistake to identify the basic challenge of culpability *at the evaluative stage* of the criminal law as explaining the link between a moral agent, D, and a proper blaming judgment for causing some prohibited consequence 'φ', because this ignores the central role played by the criminal law's system of conduct guiding rules. Once the prohibiting norm is in place, at the ex post stage, culpability theory need only provide an account of the link *between D and the prohibiting norm*. The challenge of culpability, in the sense of ex post blame*worthiness* then, is to explain why D's failure to be guided by the prohibiting norm results in a negative evaluation of D.[30] I think that at the ex post stage of criminal justice, culpability theories that try to trace our negative evaluation of φ to D start at the wrong place.

IV. (RE)DEFINING CRIMINAL CULPABILITY AFTER THE ACT

A. Criminally Culpable Responses to Guidance

If we start at the right place—the guidance contained in doctrinal criminal law as it stood when D caused φ—our culpability assessment takes on a very different flavour. It is easy to trace our negative evaluation of the fact that D acted contrary to the norm back to D. Since the criminal law's conduct norms are meant to guide us as to how we choose our conduct or behaviour, D shows due regard to them when she chooses her actions in deference to the guidance that they contain. Conversely, when she does not let the conduct rules guide her behavioural choices, D acts culpably (or blameworthily).

29 Note that the ex ante guidance to which I refer comes from a system of conduct norms that is drawn from, but not necessarily identical to, the words of criminal law statutes or the dicta set out in cases. The expression that this underlying system of conduct guiding norms finds in doctrine may be clear or opaque, elegant or clumsy. While all of this doctrinal expression provides fodder for lawyers and judges to dissect, the general public is guided by the underlying norms. Whereas members of the general public may not (and usually will not) be able to restate the criminal law's conduct guidance with technical accuracy, they will usually have a fairly good sense of how at least the most central (and most frequently publicised and enforced) criminal laws require them to behave. See in this connection Karl Binding who, in the German language monograph *Die Normen und ihre Übertretung*, argues that the guidance in the criminal law is actually contained in a set of norms separate from, and underlying, doctrinal law. Hampered as I am by the language barrier, I refer instead on this point to the summary of Binding's thesis in Albin Eser, 'Justification and Excuse' (1976) 24 *American Journal of Comparative Law* 621, 625.

30 The idea that culpability is connected to norms rather than wrongs is not entirely novel. For a previous attempt to link criminal culpability to the criminal law's norms see Hampton (n 11).

Accordingly, D's criminal culpability (ie, her deservingness of criminal blame) depends on her attitude[31] towards the criminal law conduct rules, and not on her causing the consequence sought to be avoided by the applicable conduct rule.[32]

This is a significant revision of the traditional way of understanding ex post culpability because the expression of an inappropriate attitude towards a norm is not equivalent to causing the harm that the norm was designed to prevent. Although choosing to ignore or behave contrary to the norm usually coincides with causing the outcome that the norm is calculated to avoid (and vice versa), it need not. D may display a deplorable attitude towards the norm's guidance without causing the feared outcome, as in the case of a failed attempt to violate a norm. Similarly, she may cause the feared outcome without displaying a blameworthy attitude towards the norm, as in the case of harm inadvertently caused to another's rights.

With that in mind, we must determine when it is possible to say that D displayed an inappropriate attitude towards the criminal law's guiding norms. A person may fail to obey the guidance in the criminal law's norms in several ways, not all of which necessarily merit blame. First, she may fail to select her behaviour by reference to the criminal law's guidance advertently—choosing not to follow it, despite knowing that it applies. She may do so because she disagrees with its content, or simply does not wish to take the trouble to obey it. This is certainly an inappropriate attitude towards the criminal law's guiding norms, and even a character theorist would agree that D's knowing choice not to be guided by an applicable norm can support a finding of culpability (albeit through a revelation about D's character).[33]

Secondly, she may fail to select her behaviour by reference to the criminal law's guidance inadvertently—because at the time that she chooses her conduct, she is unaware

31 My reference to an 'attitude' here should be understood in contradistinction to Sendor's usage of the same term in his explanation of the desert of criminal liability. See Benjamin B Sendor, 'Mistakes of Fact: A Study in the Structure of Criminal Conduct' (1990) 25 *Wake Forest Law Review* 707, 726–27. Sendor is concerned with the defendant's attitude (in particular, the attitudes of respect or disrespect) towards the right protected by a norm, whereas I am interested in the defendant's attitude to the norm itself. Sendor's reference to the defendant's attitude to the right protected by the norm allows him to consider, in addition to *mens rea* factors, aspects of the defendant's mental state generally relevant at the supervening defence stage. In contradistinction, the defendant's attitude to the criminal law's norms (which is the attitude in which I am interested) is not influenced by aspects of the defendant's mental state primarily concerned with establishing the existence of a supervening defence.

32 A similar argument was also made by Karl Binding in *Die Normen und ihre Übertretung*. See in this connection, the summary of Binding's thesis in Eser (n 29), 625. For Binding, a criminal act breaches a norm drawn from a set of norms separate from, and underlying, doctrinal law, and a person was guilty of acting wrongfully when she directed her will towards violating these underlying norms. See also Hampton (n 11). Duff (n 15), 363–64 too briefly considers the possibility that an improper attitude towards the criminal law's norms may be the basis for culpability, although he identifies having and acting upon that attitude as a character trait. Thus he would explain that an agent's criminal culpability arises from her possession of that character trait. Although this move is open to him, it seems somewhat unnatural to identify the 'having and acting upon of an improper attitude towards the criminal law's norms' as a character trait. It bears little resemblance to other (more recognisable) character traits that Duff also identifies—traits such as honesty, dishonesty, courage, cowardice, generosity, meanness, compassion and callousness.

33 Simester (n 12) at 603.

of the norm. This may be because she is unaware of situational facts that make the norm applicable, or she is unaware of the content of the applicable norm.[34] For the purposes of the present piece, we can set aside the latter possibility. In most cases, ignorance of the norm is dealt with by a stipulative meta-rule, which usually, but not inevitably, deems a person to be informed of all the conduct guidance in the criminal law. Theorists like Ashworth[35] and Husak[36] have criticised the intransigence of such a meta-rule, and I have considerable sympathy for their arguments. However, entering into a debate on the merits of this meta-rule here would entail too great a deviation from the central theme of this paper, and so for the present purposes, I will assume that such a meta-rule exists and applies. Therefore, in this paper, I will treat the explanation that one was ignorant about the applicable norm as being unavailable to the agent.

The importance of the shift in focus from blaming based on the outcome contemplated by a norm to blaming based on the agent's responsiveness to the norm is best showcased by what it suggests about whether ex post criminal blameworthiness can stem from the other form of inadvertence. Since *criminal* blameworthiness (though not necessarily moral blameworthiness), depends on the agent's attitude towards the norm, a person cannot be *criminally* culpable without displaying an inappropriate attitude towards the criminal law's normative guidance. It seems unlikely that one can display an attitude towards a norm without adverting[37] to it. The suggestion that 'if D can display an "attitude" of "I cannot be bothered to be careful not to be in violation of a right" when she negligently causes the prohibited outcome, she can also display the attitude of "I cannot be bothered to be careful not to be in violation of a norm"' misses the point. An attitude towards 'being in violation of a norm', is not the same as an attitude towards the norm itself. To be in violation of a norm is to have caused the harm that the norm was designed to prevent, and as previously explained, causing or avoiding harm is not coterminous with accepting or rejecting the corresponding norm's guidance.[38] Of course, one can be careless

34 Note that the reference here is to ignorance of the content of an underlying norm, rather than ignorance of the proper technical statement of a doctrinal rule. See in this connection the discussion in n 29. Ignorance of the content of the underlying norm is likely to be less common than ignorance of the legal technicalities that are almost always generated by an attempt to precisely express the content of the norm in statute or case law.

35 Andrew Ashworth, 'Ignorance of the Criminal Law, and the Duties to Avoid It' (2011) 74 *Modern Law Review* 1.

36 Douglas N Husak, 'Mistake of Law and Culpability' (2010) 4 *Criminal Law and Philosophy* 135.

37 For a sophisticated account of what it means to advert to something (in that case, a risk of harm, as opposed to my proposed alternative focus on the norm guidance), see Moore and Hurd (n 6), 152–56, who also, citing different arguments, conclude that liability in the criminal law ought to be predicated only on advertence, and that criminal liability based on inadvertence is normatively illegitimate.

38 The same logic also tells us that the attitude of 'I cannot be bothered to be careful not to be in violation of a right' is not an attitude towards the right itself. This is the difference between causing harm negligently and doing so advertently. Sendor (n 31), 727 errs in treating carelessness as an attitude towards the underlying right. Carelessness is actually an attitude towards being in violation of a right, and that is why, vis-à-vis the underlying right, it is inadvertent. Blameworthiness for inadvertently φing derives from deficiencies in identifying and analysing situational facts, and not (in the absence of additional norms) from a deficient attitude vis-à-vis norms.

about finding out the normative guidance available. However, in view of the meta-rule mentioned previously, ignorance (careless or otherwise) of the content of the criminal law's guidance does not exculpate an agent either.

In order to truly deserve criminal blame then, a person should advert to a criminal law norm, and display an inappropriate attitude to its guidance. She must, that is, at least be subjectively reckless about, or wilfully blind to, the possibility of disobeying the normative guidance offered. In other words, she must at least advertently choose not to exercise her capacity to avoid violating the norm. Inadvertent criminal law norm violations are not criminally blameworthy.[39]

On the view of ex post criminal culpability described, a finding of criminal culpability only makes sense in relation to the set of norms containing the criminal law's ex ante guidance. One may be ex post criminally culpable vis-à-vis the criminal law's guiding rules, but one cannot directly be ex post criminally culpable vis-à-vis a wrong.

B. Where Is the Guidance?

This of course means that we need to identify the parts of the criminal law that contain its guidance, so that we may use them as the touchstone for determining an agent's ex post criminal culpability. Undisputedly, at least some of the criminal law's guidance is contained in its offence stipulations. Additionally, it is generally accepted that criminal law justifications may also guide the behaviour of the public.[40] Furthermore, most theorists also agree that criminal law excuses ought not to guide the conduct of the public.[41] This is because in general, when an agent acts with justification, she is seen as having acted in a desirable (or at least permissible) manner—the law encourages, or at least permits, others to act as she did. On the other hand, when she is excused for her actions, she is seen as having acted in principle impermissibly, even though she is excused from a criminal conviction on the special facts of the case. The law discourages

39 Moore (n 6) at 58 also tentatively suggests the same conclusion.

40 See for instance Hamish Stewart, 'The Role of Reasonableness in Self-Defence' (2003) 16 *Canadian Journal of Law and Jurisprudence* 317, 333–36; John Gardner, 'Justifications and Reasons' in AP Simester and ATH Smith (eds), *Harm and Culpability* (Clarendon Press 1996) 124.

41 See for instance AP Simester, 'On Justifications and Excuses' in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (Oxford University Press 2012) 108; Simester (n 5) at 193; John Gardner, 'The Gist of Excuses' (1998) 1(2) *Buffalo Law Review* 575, 597; Meir Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97(3) *Harvard Law Review* 625, 671; Kent Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84(8) *Columbia Law Review* 1897, 1899–900; Malcolm Thorburn, 'Justifications, Powers, and Authority' (2008) 117 *Yale Law Journal* 1070, 1095. Amongst the few voices of dissent is that of RA Duff, 'Rule-Violations and Wrongdoings' in Stephen Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press 2002) 61–68. However, Duff's argument treats the criminal law's guidance as addressing not only what the criminal law expects of D, but also what the criminal law will grudgingly tolerate from D. This is, at least, a contentious extension of the concept of 'conduct guidance', and it is not a view that has gained much currency.

other people from following her example, even as it excuses the agent from a criminal conviction. If excuses ought not to guide conduct (and the argument supporting that is certainly persuasive), then rules that make excuses available do not form part of the benchmark by reference to which we assess the agent's ex post culpability.

This, however, seems to create a bit of a problem. Many culpability theorists, including some of those that argue that excuses cannot guide conduct, treat an agent as being not culpable if she is either justified or excused.[42] If this is correct, then it casts doubt on the suggestion that ex post criminal culpability has to do with the quality of D's response to guidance. If (Proposition 1) D is not culpable when excused from criminal liability, and (Proposition 2) rules relating to excuses do not guide D's conduct, then how can a theory that ties D's culpability (or non-culpability) to her response to the criminal law's conduct guidance explain her non-culpability when she is excused?

The problem outlined is a false one. Culpability theorists who treat excused agents as being non-culpable are working with a moral conception of culpability,[43] rather than the uniquely criminal conception offered here. Usually, this works tolerably well because we expect some correspondence between moral culpability and criminal liability. For instance, we might legitimately expect persons who are not morally culpable not to suffer criminal liability. However, we should be careful not to conflate criminal liability and criminal culpability[44]—a criminally culpable person may nevertheless be excused from criminal liability, if, for instance, she is not morally culpable. Whereas a defendant's access to an excusatory criminal law defence may coincide with her being able to demonstrate moral non-culpability, it need not depend on her ability to demonstrate criminal non-culpability. It is therefore at least potentially a mistake to criticise a theory of *criminal* culpability for its failure to generate the results intuitively expected from a theory of moral culpability.[45]

This response does not fully address the concern raised. To do that, one would need to offer an account of excuses in the criminal law that does not depend on the negation of criminal culpability. Whilst a demonstration of such a model of excuses would require a separate paper, it is certainly not implausible to suppose that there can be such a model.[46] Some excuses, like insanity and infancy, are denials of responsible

42 See for instance John Gardner, 'Crime: In Proportion and in Perspective' in *Offences and Defences* (Oxford University Press 2007) 227; John Gardner, 'Fletcher on Offences and Defences' in *Offences and Defences* (Oxford University Press 2007) 151; Moore (n 6); Simester (n 5) at 200; Chan and Simester (n 4) at 382.

43 See for instance Gardner, 'Crime' (n 42) at 225; Chan and Simester (n 4) at 383–84; Simester (n 5) at 180, 188–89, 192–94, 198; Moore (n 6) at 30–31; Peter Arenella, 'Character, Choice and Moral Agency: The Relevance of Character to our Moral Culpability Judgments' (1990) 7(2) *Social Philosophy and Policy* 59; Duff (n 15) at 345, 361.

44 Simester (n 5) at 195.

45 One such critique is the critique of some choice theories of culpability offered by Duff (n 15) at 350–61, 380. Duff summarises his objections to the choice theory by saying that 'anyone who begins with "choice" as supposedly definitive of criminal liability is forced to move from "choice" toward "character" by the need to explain such excuses as duress and insanity … '.Duff (n 15) at 380. Whereas theories of moral culpability may need to be capable of accounting for excusatory defences, it does not follow that theories of criminal culpability must also be capable of doing so.

agency.[47] Exculpation in such 'irresponsibility' excuses have nothing to do with culpability—the inquiry never gets that far, because there is no point in investigating the culpability of someone who is not a responsible moral agent. On the other hand, excuses like duress do not deny the defendant's responsible moral agency; quite the contrary, they affirm it. But even in these excuses, exculpation need not depend on the negation of criminal culpability. It might, for instance, depend on the negation of moral culpability *despite the subsistence of criminal culpability*. In fact, that proposition might explain why, despite excusing the defendant from criminal liability, the criminal law does not encourage other persons to act in the same way as the defendant did. Moreover, such an explanation of non-irresponsibility excuses is not entirely without foundation in the extant literature on excuses—Gardner's suggestion that the gist of a non-irresponsibility excuse is that the defendant lived up to the standards of character *societally* expected of her[48] can be seen as laying the foundations of such an explanation.

If we take 'culpability' to refer to ex post culpability vis-à-vis the criminal law's guiding rules, then hardly anyone would dispute that a person who successfully pleads a non-irresponsibility excuse remains culpable. The challenge to this paper's account of culpability after the act seemingly posed by theorists who treat excused actors as not being culpable therefore dissolves. This paper deals with criminal culpability, whereas those theorists are concerned with moral culpability.

C. Blameworthiness and Blame

It remains true that a person may choose to accept the criminal law's normative guidance, and still φ and conversely, that she may reject the normative guidance, but still fail to φ, because we as humans simply cannot control all our circumstances.

By the yardstick of culpability suggested, a person may deserve criminal blame depending on her attitude towards the criminal law's norms even if the apprehended outcome does not materialise.[49] Intuitively, we do think that two persons who do their utmost to commit a murder are equally bad persons, even when due to blind luck, only one of them succeeds, and the conception of culpability proposed here

46 Indeed scepticism has previously been voiced about how closely criminal culpability and excuses can be tied. See for instance Simester (n 5) at 182–83, 187.

47 Gardner (n 41) at 587–90; John Gardner, 'In Defence of Defences' in *Offences and Defences* (Oxford University Press 2007); Simester (n 41) at 96–97.

48 Gardner (n 41).

49 In this context, see Matthew H Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* (Oxford University Press 2011) 204–06 for a general discussion of failed attempts and unmaterialised risks. I do not adopt Kramer's view without reservation—in particular, I have reservations about his assertion that the degree of harm that actually occurs in some way positively correlates with the degree of evilness attributable to the conduct. Nevertheless, I agree with the underlying assertion that moral blame may be deserved even when no harm actually materialises.

explains why. In fact, Alexander and Ferzan argue that in cases of this sort, equal criminal liability should ensue for both the successful attempter and the failed one.[50]

The argument made herein about how we should conceptualise culpability in the criminal law does not commit us to going as far as Alexander and Ferzan. There is a difference between the defendant's blame*worthiness* (which is addressed by the argument on the nature of ex post culpability) and the blame that the criminal justice system can actually award a defendant. For a liberal criminal justice system to blame a defendant, it must have something *for which to blame* her.[51] When no one or nothing is affected by the defendant's actions, those actions would prima facie continue to lie within the private domain of the defendant, and it would, in general, be illiberal for the criminal law to intervene.[52] In other words, the finished product of criminal blame (understood in terms of the criminal law's ex ante guidance) requires both something for which to blame (φ), and blameworthiness on the part of the person that brought about φ. The outcome of the agent's actions creates the (blamer's) entitlement to blame, whereas the agent's attitude to the norm creates her own desert of blame.[53] Both blameworthiness, and something for which to blame, are necessary, but not independently sufficient, preconditions for the criminal law to assign blame. Hence, while both the successful and the unsuccessful attempters may be equally blameworthy in respect of the norm designed to prevent φing, the criminal law's entitlement to blame for φing extends only to the successful attempter.

D. In Summary

The argument made here is sensitive to the distinction between the enterprise of criminalisation and the enterprise of determining blameworthiness. We criminalise the causing of φ by creating a criminal law conduct norm against doing or causing φ, because, for instance, φ is harmful. Having done that, it is redundant for us again to refer to the occurrence (or otherwise) of φ when determining an agent's blame*worthiness* in respect of said conduct norm. I argue that the agent's blame*worthiness* at the criminal law's 'after the act' stage should instead depend on her attitude towards the applicable conduct norms. Furthermore, I suggest that these conduct norms may be found in the criminal law's offence stipulations as well as in the justifications it makes available in respect of these offences.

50 Larry Alexander and Kimberley Kessler Ferzan, 'Results Don't Matter' in Paul H Robinson, Stephen Garvey and Kimberly Kessler Ferzan (eds), *Criminal Law Conversations* (Oxford University Press 2009). See also Gardner, 'Crime' (n 42) at 227.

51 Even if this something is the mere fact of the attempt.

52 See in this connection JS Mill, 'Of the Limits of the Authority of Society over the Individual' in Jonathan Riley (ed), *Mill On Liberty* (Routledge 1998); Joel Feinberg, *The Moral Limits of Criminal Law Vol 1: Harm to Others* (Oxford University Press 1984); Joel Feinberg, *The Moral Limits of Criminal Law Vol 2: Offense to Others* (Oxford University Press 1988).

53 This is a conclusion with which I think Michael Moore would agree. See Michael S Moore, 'The Independent Moral Significance of Wrongdoing' (1994) 5 *Journal of Contemporary Legal Issues* 237.

Although an agent's criminal blame*worthiness* depends on her attitude towards the criminal law's conduct norms, I argue that the criminal law ought only to blame blameworthy agents if there is something *for which to blame* them. For that reason, the proposed account of criminal culpability does not compel us to embrace a result-independent conception of the criminality of conduct.

V. CRIMINAL CULPABILITY AFTER THE ACT AND LIABILITY FOR INADVERTENT ΦING

A. The Guidance in Crimes of Negligence

If this is an accurate sketch of criminal culpability after the act, then criminal culpability cannot arise from carelessness or negligence vis-à-vis the proscribed outcome, and so in principle, criminal liability should not flow from inadvertently φing. While this conforms to our intuitive association of the label 'criminal' with being wicked or evil, rather than being not observant enough, or poor at understanding the significance of what one does observe,[54] the criminal law often punishes for φing negligently or with objective recklessness.[55] In doing so it seemingly designates a person criminally blameworthy because of her carelessness or negligence vis-à-vis φ. Since negligence-based liability is relatively commonplace in the criminal law, it would seem that carelessness or

54 As Kramer (n 49) at 188 notes:

> Numerous wrongs are committed through negligence. Although some negligent wrongs are extremely harmful … none of them is properly classifiable as wicked. Carelessness is a vice, and it can lead to horrifically injurious consequences in some settings; but the gravity of the culpability of a careless action, even when calamitous results ensue therefrom, is not sufficient to render the action evil.

55 As Sendor (n 31) at 714, and Victor Tadros, *Criminal Responsibility* (Oxford University Press 2005) 81, note in other contexts, negligence is an adequate threshold for legal blame. Since the criminal law is, amongst other things, a tool for social regulation, the extension, for regulatory reasons, of the criminal law to making blaming judgments in respect of deficiencies in identifying and analysing situational facts, even in the absence of special normative guidance, is tempting, and indeed some would say pervasive in modern legal systems. On this point, see also Lord Rodger's separate concurring judgment in *R v G* [2003] UKHL 50, [2004] 1 AC 1034. For the reasons I have stated, I consider such a use of the criminal law to be philosophically inappropriate. Lord Bingham too voiced a similar opinion in *R v G*, noting that:

> … it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication …) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment. [32]

Nevertheless, I do accept that there is some scope for legitimate criminal liability when the criminal law chooses to offer normative guidance as to how much care one should take while identifying and analysing situational facts.

negligence can, and regularly does, found criminal liability. It would therefore appear that the normative proposition I make is implausibly revisionist. In fact it is not.

Most cases in which the criminal law seems to impose liability for carelessness or negligence may be explained in a manner that is compatible with the arguments I make. These cases may be seen as instances in which, in addition to the primary conduct rule (which may direct its addressees not to bring about φ), the criminal law has also adopted an institutionalised benchmark for the quality of care it expects to be taken by the addressees of the primary conduct rule, in ensuring that they are appropriately guided by it. This benchmark is often (though not inevitably) set by reference to the objective reasonable person, who is sometimes imbued with selected capacity-limiting characteristics that are also possessed by the defendant. There is extensive literature on exactly which characteristics of the defendant should be so selected, but I do not propose to comment on that issue at this stage (although I will return to it later in this paper). Instead, I propose that in adopting an institutionalised benchmark, the criminal law supplements its primary conduct norm with a secondary one as well. Since it is within the agent's control to be more, or less, careful while gathering facts about a given situation and extrapolating conclusions on the basis of these facts, normative guidance as to this aspect of the agent's behaviour is conceptually plausible. Moreover, it is easy to see that when an agent ignores such normative guidance, this would evidence an inappropriate attitude towards the criminal law's guiding rules, and support a finding of criminal culpability relatable to the secondary norm. Consider for instance, special regulations that require persons who offer adventure-sports activities to take special care to ensure the safety of their equipment. When the subject of this normative guidance does not take the required amount of care, she is culpable vis-à-vis the said regulations.[56]

So where the criminal law proscribes an outcome φ, and institutionally requires that each person take as much care as a reasonable person would, to make sure that she does not cause φ, the cumulative normative guidance offered to the addressee is the following:

> Primary Norm: Do not cause φ; and
>
> Secondary Norm: Take as much care as a reasonable person would, not to inadvertently cause φ.

These norms are only violated when D (advertently) does not choose her behaviour by reference to them.[57] D violates the Primary Norm when she advertently chooses not to exercise her capacity to avoid φing[58] (whether or not she actually φs). She violates the Secondary Norm when she advertently chooses not to exercise her capacity to comply

56 See also Jeremy Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 *University of Toronto Law Journal* 495, 508–10, 517–20, for observations that are, at least in part, compatible with the propositions made here.

57 Or is treated as having done so in terms of a meta-rule of the type described previously.

58 Although, depending on the wording of the Primary Norm, this may also include being subjectively reckless as to φing.

with the Secondary Norm, ie, to take as much care to avoid inadvertently φing as a reasonable person would. Of course the same failing might also be described as negligence vis-à-vis the outcome, but the criminal liability that is imposed is better understood as being predicated on the display of an inappropriate attitude towards the Secondary Norm. Here too the defendant's blameworthiness can be traced to an advertent failure to conform to normative guidance.

This explanation of blaming decisions within the institutionalised system of the criminal law helps us to make sense of both cases involving *advertent* φing and most cases that have hitherto been seen as instances of criminal liability for inadvertent φing. It does so in a manner that replicates the certainty of the link offered by choice-based approaches to culpability, between our judgments about what the agent did, and the agent herself. So for instance, when the law's standing to blame is generated by the death of a person, criminal blame for murder ensues if the causal agent displayed an inappropriate attitude to the criminal law norm against killing another,[59] whereas criminal blame for gross negligence manslaughter ensues if she displayed an inappropriate attitude to the criminal law norm requiring each person to take enough care to not be grossly negligent in the performance of her duties, when such negligence might result in the death of a person. Similarly, consider the law relating to rape (and most sexual offences) in England and Wales. Prior to the Sexual Offences Act 2003, the *mens rea* requirement in relation to the complainant's lack of consent was the absence of an *honest* belief that the complainant was consenting.[60] So a defendant who honestly believed that the complainant had consented could not commit rape. This formulation treated negligence vis-à-vis forming the belief that the complainant was actually consenting as irrelevant to the sort of blame apportioned by the criminal law. The normative guidance offered in relation to consent in the pre-Sexual Offences Act 2003 era was as follows:

> Primary Norm: Do not have sexual intercourse with V without her consent.

If D genuinely believed that V was consenting, then no matter how unreasonable that belief was, D was not culpable vis-à-vis the Primary Norm, and could not be convicted of raping V. This outcome was compatible with the proposition that at its core, a criminal conviction signals at least that the convict did not have due regard for the criminal law's conduct rules.

The law on this point was changed by the Sexual Offences Act 2003. Under section 1(1)(c) thereof, the *mens rea* now required in relation to consent for the rape offence is an absence of *reasonable* belief in the complainant's consent. Again, section 1(2) of the Act explains that '[w]hether a belief is reasonable is to be determined having regard to all the

59 I ignore for the moment doctrinal oddities that mean that in some jurisdictions, a person can be convicted of murder even without intending to kill the deceased, if she intended to inflict serious injury upon the victim, and death resulted.

60 *DPP v Morgan* [1976] AC 182 (HL). See also the Sexual Offences Act 1956, s 1(2)(b).

circumstances, including any steps [D] has taken to ascertain whether [V] consents'. With some slight simplification for ease of explanation, the normative guidance now offered in relation to consent ought to be parsed as follows:

> Primary Norm: Do not have sexual intercourse with V without her consent.
> Secondary Norm: Take as much care as a reasonable person would to ensure that any evaluation you make that V is consenting is correct.

On this view too, if D genuinely believed that V was consenting, then no matter how unreasonable that belief was, D would not be culpable vis-à-vis the Primary Norm. However, if D refused the guidance of the Secondary Norm, and did not take as much care as a reasonable person would have taken to ensure that his evaluation about V's consent was correct, then D would be culpable vis-à-vis the Secondary Norm. If the proscribed consequence (ie, non-consensual sexual intercourse) occurred, then D could be criminally convicted, because D would be criminally blameworthy vis-à-vis the Secondary Norm, and there would also be something for which to blame D. Of course, it remains open for the culpability theory applicable at the ex ante criminalisation stage to tell us that a person who φs by violating a Primary Norm (ie, φs intentionally or recklessly) is more culpable than someone who φs by violating a Secondary Norm (ie, φs negligently), and should therefore be punished differently.

It is important to unpack the criminal law's conduct norms in an offence that apparently blames for negligence vis-à-vis the proscribed outcome in this manner because doing so helps us avoid the unfortunate rulings like *R v B (MA)*[61] discussed earlier. That ruling arose out of the erroneous belief that the Sexual Offences Act 2003, s 1 (and, more generally, the criminal law as a whole) blames for negligence vis-à-vis the outcome. It could be avoided by recognising that when the criminal law appears to blame for negligence vis-à-vis an outcome, it is in fact:

(a) issuing additional normative guidance requiring addressees to take special care in forming judgments about the existence and significance of situational facts that affect their ability to comply with other criminal law norms, and
(b) blaming addressees for their failure to choose their actions by reference to this additional guidance.

On this account of criminal culpability after the act, D deserves blame relatable to the Secondary Norm only if he chooses not to exercise his capacity to achieve the standards of care in identifying and analysing situational facts that a reasonable person would have attained.[62] Even assuming that incapacity-based defences are unavailable, as they were in

61 See n 1.

62 This is a slight modification of the standard account of choice-based culpability proposed by theorists like Moore (n 6) at 57 and Finkelstein (n 10), and recounted by others like Simester (n 5) at 185. The standard account proposes that a moral agent, D, is (prima facie) culpable or blameworthy for causing the proscribed outcome, φ, only if she chooses not to exercise her capacity to avoid causing φ. In terms of the

R v B (MA), if D honestly tried, but was unable, to achieve the prescribed standards of care in identifying and analysing situational facts, D would not be culpable vis-à-vis the Secondary Norm, because he obeyed the guidance in the Secondary Norm.

Such an outcome has intuitive appeal, and criminal law doctrine does try to accommodate it to some extent. It does so by, in fitting cases, moderating the benchmarks set by the law in order to minimise the injustice that would be caused by judging persons with capacity-limiting (though not capacity-denying) characteristics by reference to the standards of the objectively reasonable person. Hence, the objectively reasonable person is usually attributed the defendant's age, gender and physical disabilities. But this approach is inadequate and inelegant. The identification of the features of the defendant that ought to be so attributed has consistently proved to be controversial, and it has been difficult to defend the selection of any exhaustive list of such features by reference to principle. Hence, when cases like *R v B (MA)* arise, courts proceeding on the basis that the criminal law blames for negligence vis-à-vis an outcome are still forced to make rulings that even they find disturbing[63] in order to preserve doctrinal integrity. The alternative approach argued for herein sidesteps these problems by offering a clear and principled basis for exonerating any person found to have honestly tried to meet the prescribed standards of care in identifying and analysing situational facts, even when she fails.

Of course, it is also open for the criminal law to adopt a Tertiary Norm relating to the reasons for which D may fail to achieve the standards prescribed in another norm, and in fact, it often does just that. Consider for instance a defendant who fails to comply with a criminal law norm because she is in a self-induced state of automatism, or is voluntarily intoxicated. The criminal law often holds such a person criminally blameworthy when the outcome proscribed by the Primary Norm occurs. So for instance, the subtext of:

(a) rules that inculpate persons who offend in a self-induced state of automatism,[64]
(b) rules that inculpate voluntarily intoxicated persons[65] (or if you prefer, prevent them from raising evidence of their voluntarily intoxicated state to negate *mens rea*[66]), and
(c) rules that prevent defendants from relying on mistakes attributable to their voluntarily intoxicated state,[67]

argument made in this section, I have replaced the reference to the causing of the proscribed outcome φ, with a reference to the violation of the norm that proscribes φing.

63 See for instance the manner in which the Court of Appeal in *R v B (MA)* tried to moderate the effect of its statement of the law in [40]–[41].

64 See for instance *R v Quick* [1973] QB 910 (CA); *R v Bailey* (1983) 77 Cr App R 76 (CA); and *R v Coley* [2013] EWCA Crim 223, [2013] Crim LR 923.

65 See for instance, *DPP v Majewski* [1977] AC 443 (HL) at 474; *R v Kingston* [1995] 2 AC 355 (HL) at 369 and AP Simester, 'Intoxication Is Never a Defence' (2009) 1 *Criminal Law Review* 3. Cf *R v Heard* [2007] EWCA Crim 125, [2008] QB 43 at 53–54.

66 Simester and others (n 3) at 702–03.

67 See for instance the Criminal Justice and Immigration Act 2008, s 76(5).

is that there is (tertiary) normative guidance in the criminal law against voluntarily doing something that jeopardises the effective exercise of one's capacity to comply with another criminal law norm, and a person who displays an inappropriate attitude to this Tertiary Norm is criminally culpable. This guidance tends to be supplemented by a special rule that restricts D's liability for φing due to a failure to be appropriately guided by the Tertiary Norm, to liability for a basic intent offence involving φing.

B. Outlying Cases

It appears to me that a large majority of seemingly negligence-based convictions can be explained on the basis of this version of culpability theory. Of course, even such a culpability theory would not inculpate a defendant of the sort contemplated in the dicta in *R v B (MA)*. The arguments made herein offer a normative case for rejecting for the small minority of convictions that cannot be explained on the basis of secondary or tertiary normative guidance. Since the number of cases so rejected would be small, the theory of culpability proposed would not seem to be implausibly revisionist. Moreover, the rejection of cases of the type contemplated in *R v B (MA)* improves the criminal law's ability to deliver fair culpability judgments, and is therefore to be welcomed.

Embracing an acquittal in *R v B (MA)* would not require us to deny that V suffered a wrong. Whether V suffered a wrong, and whether the person who authored that wrong deserves to be blamed for it, are two separate questions. It is conceptually possible for the law to exonerate D from criminal blame while still recognising that V suffered an undeserved wrong, and on that basis, continue to make civil law remedies available to V for the wrong she suffered.[68] Neither is an acquittal worrying from a crime prevention perspective. It is possible to empower the court to order compulsory remedial treatment for a defendant of the sort considered in *R v B (MA)* while nevertheless exonerating him from criminal blame.

VI. CONCLUDING THOUGHTS

The crux of the argument presented in this paper is that the culpability analysis appropriate for the 'after the act' stage of the criminal law is different in scope from the one appropriate for the criminalisation stage. I suggested that criminal culpability at the 'after the act' stage arises from advertent failures to show due regard to the criminal law's guiding norms, and that it must be coupled with the actual creation of a proscribed outcome in order to generate criminal blame.

The main significance of this argument in terms of criminal legal theory lies in the separation of the question 'Is it appropriate to convict D for φing?' from the question 'Is

68 *Ashley v Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 AC 962.

it appropriate to criminalise φing?' In this paper I suggest that the former at least may be answered primarily by reference to procedural morality. We need only ask:

(1) Was advance guidance issued telling people (including D) not to φ because φing is a crime? And
(2) Did D choose not to exercise her capacity to be guided by the advance guidance?

If the answer to both these questions is 'Yes', then it would be appropriate (at least given the criminal law guidance that exists) to convict D for φing.

On the other hand, when analysing whether it is appropriate to criminalise φing, we should consider different factors. These would include the substantive morality of φing, the effectiveness of criminalisation as a means to reduce φing, and the possible side effects of criminalising φing.[69] I do not examine these factors here, except to point out that they are not directly relevant to determining culpability after the act. Therein lies the value of keeping these inquiries separate. In apportioning these factors according to the inquiry to which they are germane, we avoid confusing issues. It is therefore hoped that this paper will clarify the terms of the existing theoretical discourse on culpability, and better focus future debates on the subject.

This paper also has something of value to offer to doctrinal criminal law. The approach to determining criminal culpability after the act proposed herein generates blaming outcomes that are fairer and that have greater intuitive palatability than the outcomes generated by judges working within the framework of existing accounts of criminal culpability. It treats offence stipulations and justification defences as sources of conduct guidance and relates culpability to responses to this guidance, rather than to outcomes. In this way, it allows criminal courts to base culpability rulings on factors wholly within the defendant's control (viz, how she chooses to respond to the guidance) rather than on matters that may be influenced by happenstance (viz, consequences). Additionally, it allows courts to sidestep convoluted, and possibly unanswerable, questions about which characteristics of a given defendant may fairly be attributed to a hypothetical reasonable person.

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69 See for instance Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law: Volume 1* (Oxford University Press 1984) 26; AP Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs* (Hart Publishing 2011) 35, 54–56; Victor Tadros, 'Harm, Sovereignty, and Prohibition' (2011) 17 *Legal Theory* 35; Simester and others (n 3) at 643–67.