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How to theorise about the criminal law: thoughts on methodology prompted by Alex Sarch's *Criminally Ignorant*

Aness Kim Webster 

Department of Philosophy, University of Nottingham, Nottingham, UK

1. Introduction

Alex Sarch's recent book, *Criminally Ignorant: Why the Law Pretends We Know What We Don't* is a wonderfully rich work.¹ Sarch provides and defends an explanatorily powerful theory of criminal culpability that concerns insufficient regard for interests, values, and reasons (manifested by a criminal action) that are recognised and protected by the criminal law.² This theory, combined with his formulation and defence of a restricted version of the Equal Culpability Thesis – according to which, *ceteris paribus*, a wilfully ignorant actor who is culpable (to a sufficient degree) for a breach of the duty to reasonably inform herself is as culpable as a knowing actor – provides a compelling theory of the substantive wilful ignorance doctrine that exists in the US federal criminal law.³

One of the explanatory virtues of Sarch's account of (posited) criminal culpability is that it not only explains various features and doctrines of the US federal criminal law (even though this jurisdiction is his focus), but, given the similarities between doctrines in the various criminal legal systems in the Anglo-American jurisdictions, it can explain features of Anglo-American criminal law more generally. For instance, Sarch can accommodate the fact that, typically, motives are not relevant to findings of (criminal) guilt by appealing to the fact that, in general, 'one's subjective motives or aims do not impact the amount of insufficient regard' that is manifested when performing criminal acts.⁴

Another virtue of Sarch's picture is that it can provide a promising *defence* of many existing doctrines of (Anglo-American) criminal law, such as the Culpability Hierarchy which claims that '[a]ll else equal, it is more culpable to do a prohibited act with a mens rea that is higher up in the hierarchy than an act that is identical in every relevant respect except that it was done with a lower mens rea'.⁵

Importantly for Sarch, these two virtues – explanatory power and a promising defence – are unified. This is because Sarch's explanatory story is supplied by his account of

CONTACT Aness Kim Webster  Aness.Webster@nottingham.ac.uk

¹Alexander Sarch, *Criminally Ignorant: Why the Law Pretends We Know What We Don't* (Oxford University Press 2019).

²*ibid* 44–46.

³The precise definition of the Restricted Equal Culpability Thesis that Sarch defends is as follows:

Suppose A1 and A2 each perform the actus reus of a crime requiring knowledge of an inculpatory proposition, p. A1 and A2, and their respective actions, are identical in every respect except one: while A1's action is performed with knowledge of p, A2's action is performed with a form of willful ignorance toward p that involves a sufficiently culpable breach of the duty to reasonably inform oneself. On these suppositions, A2 is (at least) as culpable for her action as A1 is for his. (*ibid* 110.)

⁴*ibid* 56. Sarch also shows how his picture can explain 'the tangle of doctrines pertaining to unmanifested mental states' (64). See especially Chapter 2, Section III.C 'How Much Insufficient Regard Is Manifested' (50–58).

⁵*ibid* 60.

posited criminal culpability which concerns insufficient regard that is manifested by a criminal action for ‘interests, values, or reasons that the criminal law recognizes in a given jurisdiction’ while his justificatory story is supplied by *normative (criminal) culpability* which concerns insufficient regard that is manifested by an action for interests, values, and reasons that the criminal law *should* recognise and protect.⁶ This similarity between these two notions of posited and normative culpability is what helps to unify the explanatory or descriptive theory and the justificatory or normative theory of the (substantive) wilful ignorance doctrine.

Sarch further claims that another virtue of his picture is that ‘it neatly preserves continuity between moral blameworthiness and criminal culpability, while also respecting the differences between them’.⁷ This is important for Sarch because the continuity or ‘structural analogy’ between normative criminal culpability and moral blameworthiness provides ‘a more solid normative foundation for the criminal law’s practice of imputing mental states on equal culpability grounds’.⁸ Hence, Sarch appeals to the continuity between these notions – posited culpability, normative culpability, and moral blameworthiness – to do important justificatory work for him. Although he does not explicitly state why this continuity is regarded as a good thing, I take it that he is emboldened by the following thought: if there is a tight connection between moral blameworthiness and normative culpability, and a tight connection between normative culpability and posited culpability, then the arguments for the (substantive) wilful ignorance doctrine can come, not only from a defence of the legal notion of culpability, but they can be supported by a morally and metaphysically robust notion of moral blameworthiness (via an intermediary notion of normative culpability).

Later in this paper, I shall raise some challenges to those who, like Sarch, are animated by this thought. However, it would be amiss to fail to mention another important virtue of Sarch’s book: explicit statements of his methodology on how to best theorise about the criminal law (although this is not touted as a virtue by Sarch himself). He claims, for instance, that it is ‘[b]etter to start by seeing how far we can get by defending in the law’s core features, given their development through centuries of practical experience’.⁹ This methodological statement plays an important role in Sarch’s overall argument because this methodology involves starting with an analysis of the (criminal) law’s core features and *presuming* that these core features are justifiable. This methodological presumption seems innocuous. After all, one natural way of proceeding is to describe and make sense of the existing law first and then critically evaluate it. Indeed, the claim that we should start with a ‘rational reconstruction’ of the criminal law is a widespread methodological presumption.¹⁰ However, I attempt to put pressure on this presumption by

⁶ibid 45–46.

⁷ibid 64.

⁸ibid 265.

⁹ibid 10.

¹⁰See, for instance, Antony Duff’s description of a normative theory of criminal law and the role of rational reconstructions of existing criminal law in providing such a theory in his *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 6–7. For some critical comments on Duff’s methodology, see contributions to a symposium on Duff’s latest book, *The Realm of the Criminal Law The Realm of Criminal Law* (OUP Oxford 2018). In particular, see Nicola Lacey ‘Approaching or Re-Thinking the Realm of Criminal Law?’ [2019] *Criminal Law and Philosophy*. and Patrick Tomlin ‘Duffing Up the Criminal Law?’ [2019] *Criminal Law and Philosophy*.

unpacking it and seeing what is involved in this presumption and to show that this presumption has substantive implications.

In addition, he explicitly states that his focus is on particular justificatory arguments for the substantive wilful ignorance doctrine. In his view, ‘the court’s preferred rationale should be taken seriously and adhered to at least as our starting point’.¹¹ This suggests that Sarch’s methodology not only involves presuming that the court has ‘got things right’ substantively (that is, the core substantive doctrines are correct or, at least, justifiable), but it also involves presuming that the court’s preferred rationales for these core substantive doctrines are correct. If these methodological presumptions are justified, then Sarch’s choice to focus on the substantive wilful ignorance doctrine (arguably a core feature of the US federal criminal law) and his choice to omit discussions of arguments for the wilful ignorance doctrine which are not court’s preferred rational would also be justified.¹²

The fact that Sarch is explicit about his methodology is commendable. But this clarity also provides an opportunity to reflect critically on methodology. I take up this opportunity in this paper. I hope that my reflections on Sarch’s methodological presumptions have a more general lesson as these presumptions are ubiquitous.

2. Methodological presumption 1: core features

Let us first turn to the presumption according to which the core features of the criminal law are correct or justifiable. For this methodological presumption to be relevant to the examination of wilful ignorance, the wilful ignorance doctrine itself must be a core feature of the criminal law. Moreover, since one of the explanatory virtues of Sarch’s picture is its generalisability to various Anglo-American jurisdictions, the wilful ignorance doctrine itself must be a core feature of the criminal law in these different legal systems. However, while wilful ignorance is a recognised legal notion in many criminal jurisdictions, the particular version of the wilful ignorance doctrine as articulated by the US federal courts is not shared by other jurisdictions. Sarch argues that wilful ignorance is a *substantive* doctrine in the US federal criminal law according to which a defendant who is wilfully ignorant of some inculpatory proposition is as culpable as potential counterpart who knows that proposition even though the defendant does not, in fact, know that proposition. This can be contrasted with treating wilful ignorance as an *evidentiary* doctrine according to which the finding that a defendant was wilfully ignorant of an inculpatory proposition is *evidence* for the defendant’s actual knowledge of that proposition.¹³ As Mark Dsouza argues in his contribution to this book symposium, wilful ignorance is plausibly an *evidentiary* doctrine (rather than a substantive one) in England and Wales.

I should clarify that I am not rejecting Sarch’s descriptive analysis of the substantive wilful ignorance doctrine as implemented by the US federal courts. But I give this as an example that illustrates a certain shortfall of the presumption of correctness or justifiability of the core features of the criminal law in one jurisdiction.¹⁴ Perhaps this shortfall

¹¹Sarch (n 1) 16.

¹²One might think that the second presumption that I attribute to Sarch is too strong. After all, Sarch might merely be committed to the claim that the court’s preferred rationale is justifiable. I turn to this point in §3.

¹³Sarch (n 1) 12–13.

¹⁴Here, I am treating the U.S. federal criminal law as one jurisdiction.

is not particularly significant. After all, when one aims to defend a particular doctrine that exists in a particular jurisdiction, the presumption that this doctrine is correct or justifiable may not have any substantial implications. But note that this methodological presumption means that some sources of argument or avenues of exploration are omitted in an otherwise rich and comprehensive treatment of wilful ignorance. To make this more concrete, imagine a legal philosopher who holds the same methodological commitments as Sarch but is one who is embedded in the English criminal legal context. Suppose also that in England, the best description of the wilful ignorance doctrine, as articulated by the relevant courts, is an evidentiary one. Given the significant differences between the evidentiary and substantive versions of the wilful ignorance doctrine, this work might culminate in a picture that is substantially different from Sarch's picture. I find this possibility unsettling. Of course, it is possible that this hypothetical work is less compelling than Sarch's picture. Perhaps the examination of the arguments for the evidentiary wilful ignorance doctrine would result in arguments for the substantive version of the doctrine. Nonetheless, the fairly reasonable possibility that the same methodological presumptions would lead to a significantly different treatment of wilful ignorance doctrine makes me question the justifiability of the first of Sarch's methodological presumption that it's better to start with the core features of the law in one jurisdiction.

This methodological presumption also has another substantive implication. For instance, Sarch considers but rejects a broader notion of wilful ignorance which includes a species of negligence because 'this broad notion is *not* the concept of willful ignorance that the criminal law employs.'¹⁵ This is an example of omission that is justified only if Sarch's first methodological presumption is justified. I discuss the implication of this below at the end of §2.1.

One might respond by noting that this methodological presumption is fairly weak. We have to start somewhere, and this may be as good a way as any to decide the boundaries of a topic given various constraints on our time and resources (let alone word limits). Hence, limiting one book-length treatment of a topic to one jurisdiction may be justifiable and the best way of proceeding. However, we should note that this innocuous-seeming presumption involves at least two claims. The first claim is that (A) the criminal law has something called 'core features' and the second claim is that (B) the core features of the criminal law are justified or at the very least, justifiable. Moreover, as we shall see, there is an unstated assumption behind this first methodological presumption, namely that (C) the core features of the criminal law are to be justified in terms of *a single theory of culpability*.

2.1. (A) core features

Claim (A) that the criminal law has some core features is widely held. However, we should note that in order to rely on this claim (and hence accept the first methodological presumption), one needs to make claims about what counts as core features of the criminal law. But, of course, what counts as a *core* feature of a particular system depends on various assumptions. To illustrate, consider the claim that '[m]otives generally don't

¹⁵Sarch (n 1) 20 my emphasis.

matter' which is treated by Sarch as a core feature of the criminal law.¹⁶ This core feature of the criminal law is justified by the fact that 'one is not criminally culpable for acting lawfully even for bad reasons' (43) and by the fact 'substantive criminal law doctrine usually is not concerned with one's reasons for violating the law'.¹⁷

I agree that these two facts support the claim that motives *generally* don't matter to substantive criminal law where 'substantive criminal law' is concerned with the guilt-determining phase of criminal proceedings.¹⁸ But it is less clear that these two facts support the even more general claim that motives generally don't matter to criminal law *simpliciter*. This is because, as Sarch acknowledges, motives affect sentencing. The underlying assumption appears to be that although motives are relevant to sentencing and to a few offences, this is not sufficient to override the general irrelevance of motives to criminal law. However, given the substantial implications of sentencing to offenders and given that sentencing is one significant aspect of the criminal law, in absence of further argument, the claim that motives generally don't matter to criminal law seems insufficiently supported. Moreover, when one reasonably claims that sentencing ought to be proportional to the crime committed, one is plausibly claiming (among other things) that the degree of culpability manifested in the crime should be considered when identifying sentencing that is proportionate.

This is not to deny that (i) *substantive* criminal law can be distinguished from other aspects of the criminal law (such as sentencing or plea bargaining); or (ii) that motives generally do not matter to *substantive* criminal law. But the claim that motives are generally irrelevant to the criminal law *simpliciter* and that this is a core feature of the criminal law (*simpliciter*) requires justifying some controversial claims about the criminal law (*simpliciter*), namely that the guilt-determining stage of criminal proceedings is much more significant to criminal law than the sentencing stage. (As we shall see, this is particularly pressing because of claim (C) that the core features of the criminal law are to be justified in terms of a single theory of culpability.)

In addition, Sarch rejects a broader notion of wilful ignorance that includes a species of negligence on the grounds that this broad notion is not the concept that is employed in US federal criminal law. But the examination of Sarch's first methodological presumption shows that for this rejection to be justified, there must not only be a compelling case for the claim that this broad notion is not a concept employed by the criminal law (in the particular jurisdiction), but that there is also a compelling that this is a *core* feature of the criminal law (in that jurisdiction). Hence, even the fairly modest claim that the criminal law has core features has significant implications and claims about what features count as the core features are in need of more robust justification.

¹⁶ibid 43. This is his datapoint (vi) which outlines the complex role of motives in the criminal law.

¹⁷ibid 43–44. Sarch is careful to acknowledge that 'there are exceptions to substantive criminal law's general indifference to motives' and gives examples of treason, kidnapping, and hate crimes as offences that include bad motives as an element (ibid 30).

¹⁸This does not entail that these two facts provide *sufficient* grounds for thinking that motives don't generally matter to substantive criminal law. For instance, motives may be relevant to determining the validity of a justificatory defence. (See Mark Dsouza's contribution to this symposium.) If so, then motives are relevant to determining guilt. The question then is whether we have sufficient datapoints from (substantive) criminal law to vindicate the claim that motives are generally irrelevant to determining guilt.

2.2. Core features and culpability

Recall that Sarch's first methodological presumption is not merely that we ought to start with the best *description* of the core features of the criminal law in a particular jurisdiction. The presumption also entails that once we have identified and analysed the core features of the criminal law (in one jurisdiction), we should assume that these features *are* justified and try to defend them. But, importantly, Sarch assumes that we should look for a single coherent theory of culpability to explain and justify these core features. If we *reject* this unstated assumption (claim (C) from above), we allow for the possibility that the core features can be justified by various argumentative sources. Perhaps some features are justified by appealing to moral blameworthiness (which is a pre-legal notion) whereas some features can only be justified by appealing to a legal notion of culpability. Moreover, some features might be justified by pragmatic considerations and yet others may be justified by reasons of justice that are neither merely pragmatic nor culpability-based (such as the principle that convicting an innocent person is much worse than failing to convict a guilty person). Furthermore, when we reject claim (C), it is possible to justify a single core feature by appealing to different kinds of arguments.

To make this more concrete, consider a core feature of the criminal law that 'one should not be punished for bad attitudes, or a willingness to offend unless it's manifested in action'.¹⁹ The three claims that make up Sarch's first methodological presumptions yield a theory of culpability according to which one's degree of culpability is not affected by the fact that 'one would be willing to act in worse ways that one actually did' and hence concerns insufficient regard that is *manifested* by the criminal conduct in question.²⁰ But instead of defending a theory of culpability that is restricted to manifested insufficient regard, one could justify the manifestation requirement by appealing to the broader (moral or at least pre-legal) notion of blameworthiness that concerns insufficient regard *simpliciter* and then provide legally relevant reasons (such as pragmatic and epistemic reasons as well as reasons to do with justice and the rule of law) for why the criminal law is not – and should not be – solely interested in blameworthiness and why manifestation of insufficient regard should be required in criminal law.

I agree that this alternative picture of the criminal law is messier and so perhaps Alex can defend this theory on the grounds of parsimony. However, I worry that this – perhaps more parsimonious – theory of culpability rules out other forms of argument for the core features of the criminal law. For instance, Sarch claims that his theory of culpability with his explication of the manifestation requirement is better than an alternative that takes an epistemic approach to manifestation. He claims that appealing to pragmatic considerations to explain the manifestation requirement is 'unsatisfying' because '[i]t does not capture the full strength of the principles to which criminal law is committed'.²¹ But for this argument to work, we need reasons for favouring an explanation of the various principles or core features of the criminal law in terms of culpability. This, I hope, further motivates the need for arguments for the first methodological presumption despite its initial plausibility.

¹⁹Sarch (n 1) 43.

²⁰*ibid.*

²¹*ibid.* 42.

To further illustrate the substantive implication of claim (C) of the first methodological presumption, recall that according to Sarch, the fact that motives are generally irrelevant to the criminal law is a core feature of the criminal law. Given his methodological presumption, this core feature plays a crucial role in Sarch's theory of posited (and normative) criminal culpability. This is because the fact that motive is irrelevant to the criminal law is taken as supporting the claim that motives are irrelevant to whether or not a defendant is *culpable* as well as the claim that motives are irrelevant to the degree of the defendant's *culpability*. This appears to assume that it would be best if general irrelevance of motives to the criminal law could be explained solely in terms of culpability, but again, this assumption requires support.

Relatedly, one might question why we should want a motive-free notion of criminal culpability. Sarch's rationale appeals to the claim that 'coarse-grained, motive-free description[s] [are] the most suitable way to define the act types to be criminalized'.²² But this raises the question of why culpability should track these descriptions especially when more fine-grained and motive-laden descriptions might be more appropriate in sentencing. Although we may have good reasons why the legislature should provide coarse-grained motive-free descriptions when defining criminal offences, it is unclear why *culpability* should track substantive criminal law or which act-type counts as a distinct criminal offence.

Sarch claims – and I agree – that some factors that are relevant to sentencing concern deterrence and rehabilitation and so 'culpability is not the only relevant sentencing factor'.²³ Nevertheless, as Sarch notes, not *all* factors to do with sentencing are pragmatic; some, in fact, concern (moral/pre-legal notion of) blameworthiness. For example, some aggravating and mitigating factors that affect sentencing – including motives – are relevant to blameworthiness.²⁴ But in claiming that *culpability* should be motive-free, this puts pressure on Sarch's reliance on the supposed continuity between culpability and blameworthiness to justify his theory of culpability. (I examine this issue in detail in §4.) More importantly at this juncture, however, whether or not motives are relevant to culpability is a contentious issue. This illustrates the substantive commitment that Sarch's methodological presumptions can imply.

I highlighted two core features of criminal law: (i) the manifestation requirement; and (ii) general irrelevance of motives. My worry here is not that these features are not core features (notwithstanding my comments concerning whether this general irrelevance can be attributed to the criminal law as a whole), but rather the unsupported assumption that the best way to defend these features is by proposing a particular theory of culpability that can explain and justify these features. I agree that making this methodological presumption results in continuity between Sarch's theories of posited culpability and normative culpability.²⁵ Moreover, given the structural similarity between normative culpability

²²ibid 58.

²³ibid.

²⁴Perhaps this explains why Sarch himself used to think motives affected culpability. He indicates that he has changed his mind on the relevance of motives to culpability (ibid. 86; footnote 4.). Cf. 'Willful Ignorance, Culpability, and the Criminal Law' (2014) 88 St. John's Law Review 1023.

²⁵Recall that posited culpability concerns insufficient regard, manifested by a criminal action, for interests, values, and reasons that *are* recognised by the criminal law (in a given jurisdiction) whereas normative culpability concerns insufficient regard, manifested by a criminal action, for interests, values, and reasons that *should be* recognised by the criminal law (in a given jurisdiction).

and moral blameworthiness, the hope is that this methodological presumption yields a defence of the substantive wilful ignorance doctrine that is normatively solid. In addition, since the defence of this doctrine is based on the idea of equal culpability, a more general theory of mens rea imputation can be defended on normatively solid grounds.

However, it is unclear to me whether there are sufficient similarities between normative culpability and moral blameworthiness such that normative culpability can inherit the normatively solid foundation of moral blameworthiness. But before I explain these worries in more detail, let us turn to the other methodological presumption.

3. Methodological presumption 2: official rationales

Recall that Sarch does not only presume that we should start by defending the core features of the criminal law (in a given jurisdiction) in terms of a single coherent theory of culpability, but that we should start by defending the particular *rationales* for the doctrines that are endorsed by the courts (in that jurisdiction). Relying on this second methodological presumption, Sarch justifies omitting discussions of consequentialist forms of argument that appeals to the thought that although a defendant who is wilfully ignorant is not as culpable as a defendant guilty of a knowledge crime, *ceteris paribus*, criminalising those who are wilfully ignorant and/or and punishing them to the same extent as those who knowingly commit crimes is a good way of preventing more knowledge crimes.²⁶ Furthermore, Sarch bypasses another form of argument that appeals to the thought that ‘when one has deliberately preserved one’s ignorance of some inculpatory fact, one should be estopped from denying that one knew it’.²⁷

I agree wholeheartedly that the court’s official justifications should be considered seriously. But it is less clear to me why they should be ‘adhered to ... as our stating point’.²⁸ This worry is compounded by the fact that there is no single US federal criminal court that speaks with one voice and makes judgements consistently and uniformly. This means that what is regarded as *the official* justification itself is doubly contingent: it is not simply a matter of what particular judges decide in particular cases (and what gets included in the majority opinion), but which judgements and phrases get taken up by particular judges at a later point.²⁹

Put another way, this methodological presumption raises a burden of proof issue. Given the careful and sophisticated arguments provided by Sarch in defence of the court’s official justification for the substantive wilful ignorance doctrine, a heavier burden must now be shouldered by those who want to defend alternative justifications. Here, I am not attributing to Sarch the claim that those who prefer alternative justifications shoulder a heavier burden of proof (or even that Sarch is attempting to benefit from distributing a heavier burden of proof on those who prefer alternative justifications). But I take it that given that Sarch has provided arguments for the court’s official rationales for the substantive wilful ignorance doctrine, those who prefer alternative justifications

²⁶As Sarch mentions Paul Robinson who discusses a justification of this kind for imputing a different mens rea and criminalizing (and punishing) a mens rea not had by the defendant. See Paul Robinson, ‘Imputed Criminal Liability’ (1984) 93 Yale Law Journal 609.

²⁷Sarch (n 1) 16. Sarch attributes this argument to David Enoch.

²⁸*ibid.*

²⁹Indeed, Sarch mentions conflicting decisions regarding wilful ignorance doctrine itself. For example, he claims that the First and Fourth circuits issue conflicting decisions on whether wilful ignorance in the basic sense suffices. *ibid* 23.

cannot now merely show that the substantive wilful ignorance doctrine *can* be justified on deterrence grounds, say, but that they need to examine the relative merits of these different arguments and show why we need to appeal to deterrence grounds to justify the substantive wilful ignorance doctrine. But it seems that this differential distribution of burden of proof is only justified if the methodological presumptions can be justified.

I think there are interesting challenges to both of Sarch's methodological presumptions. I hope to have suggested some reasons for being sceptical of these presumptions, especially in light of the fact that these presumptions can have substantive implications.

4. Continuity between culpability and blameworthiness

As I mentioned, Sarch appeals to the continuity between these notions – posited culpability, normative culpability, and moral blameworthiness – to do important justificatory work for him. The structural analogy between these notions mean that culpability-based arguments for the substantive wilful ignorance doctrine as well as the general theory of mens rea reputation is on a 'normatively solid foundation'. Moreover, given the dominance of 'quality of will' theories of moral blameworthiness, a theory of culpability that concerns insufficient regard can be seen as particularly attractive. But here, I raise some challenges for thinking that culpability can inherit a 'normatively solid foundation' from blameworthiness by noting some important differences between culpability and blameworthiness.

The first issue concerns the role that manifestation plays in culpability and blameworthiness. I agree with Sarch that manifestation is important to the criminal law. We have seen that Sarch takes the manifestation requirement to be a necessary condition on culpability itself. Sarch maintains some similarity between culpability and blameworthiness by claiming that according to a quality of will theory, 'an act is morally blameworthy to the extent it *manifests* insufficient regard for the moral reasons bearing on whether to do that act'.³⁰ However, it is not clear whether the *kind* of manifestation that is plausibly required in the criminal law is also plausibly required for blameworthiness. This is due to the fact that Sarch's account of the manifestation requirement appeals to his version of the lenity principle in determining *how much* insufficient regard is manifested in an action. He claims that 'D's action, A, only manifests *the least amount* of insufficient regard for legally protected interests or values ... that is needed to explain why a rational and otherwise well-motivated person would do A ... in the circumstances a D believed them to be'.³¹ Moreover, he claims that the 'motivation for this principle is that the state, given its superior power, should resolve any ambiguity in its punishment practices in favour of accused citizens'.³² But if manifestation is a metaphysically robust notion such that it plays an important role in moral blameworthiness, it is unclear why how much insufficient regard is manifested in an action should be subject to any principle of lenity. If there is a fact of the matter about how much insufficient regard is manifested by an action and this is a moral or at least non-legal matter, then the amount of

³⁰Sarch (n 1) 64. In support of this analysis of the quality of will theory of blameworthiness, he cites Julia Markovits, 'Acting for the Right Reasons' (2010) 119 *The Philosophical Review* 201. He also cites, in—accompanying footnote (64: footnote 101)—Nomy Arpaly & Timothy Schroeder, *In Praise of Desire* (Oxford University Press 2014) 170.

³¹Sarch (n 1) 51.

³²*ibid.*

insufficient regard manifested should not be affected by the fact that the inquiry is a legal one involving the state with its superior power.

If, on the other hand, manifestation is not a metaphysically or morally robust notion, or there is no fact of the matter about how much insufficient regard is manifested, then invoking a principle of lenity makes sense in the context of the criminal law. As Sarch claims, there are design constraints, epistemic limitations and other institutional reasons such as the need for laws to be ‘simple and stable enough to serve as a publically available guide to action.’³³ Given this, one could argue that the amount of insufficient regard that *counts* as being manifested is calculated by determining the smallest possible departure from the amount of regard of a law-abiding counterpart. However, Sarch claims that his principle of lenity and therefore the resulting account of manifestation is ‘nonepistemic’ and contrast his account with an epistemic approach:

An action A manifests a level of insufficient regard n if and only if (and because) a rational, unbiased observer would infer from the relevant evidence that the defendant who did A possessed a level of insufficient regard equal to n when doing A.³⁴

He challenges this epistemic approach to manifestation on the basis that when there is no ambiguity, the epistemic approaches lead to incorrect verdicts about the degree of culpability that is manifested. However, it is unclear whether this criticism is well-founded given that, on this version, there is no fact of the matter about how much insufficient regard is manifested. Moreover, given that the motivation of Sarch’s own principle of lenity concerns the superior power of the state and resolving ambiguities in favour of defendants, it is unclear the extent to which his principle is nonepistemic.

In sum, it is unclear whether the kind of manifestation that plays a role in the criminal law (and so in determining culpability for Sarch) also plays a role in determining moral blameworthiness. I agree that there are legal design constraints that should affect the severity of defendant’s punishment. But since these design constraints do not determine the degree of moral blameworthiness, we need an argument for thinking that these design constraints affect the degree of *culpability* rather than claiming that there are design constraints that affect the severity of punishment (so that the state does not always punish in accordance with the degree of culpability). Moreover, given that these design constraints are *not* relevant to moral blameworthiness, but are relevant to culpability – at least, on the theory defended by Sarch – it is unclear on what basis culpability can inherit a ‘normatively solid foundation’ from blameworthiness.

The second, related, issue concerns Sarch’s claim that culpability is a legal notion and that because of the aforementioned legal design constraints, ‘the landscape of legally recognized reasons that determine criminal culpability properly will be more anemic than the richer landscape of moral reasons that affect blameworthiness’.³⁵ The question here is whether we can square this with the claim that ‘despite distinguishing normative culpability (a legal notion) from moral blameworthiness, the insufficient regard theory reveals deep continuities between these two notions’.³⁶ Perhaps there is a ‘structural’ analogy between these two notions if culpability concerns insufficient regard for legal

³³ibid 65.

³⁴ibid 40.

³⁵ibid 65.

³⁶ibid 266.

reasons and moral blameworthiness concerns insufficient regard for moral reasons. But it is unclear how significant this *structural* similarity is such that latter can justify the former and thereby justifying the substantive wilful ignorance doctrine as well as the more general equal culpability imputation. After all, there are substantive differences between culpability and moral blameworthiness, such as the (ir)relevance of motives, the applicability of the principle of lenity as well as the kind of manifestation that is required.

Finally, there appears to be a difference between legally recognised and protected interests and values and legal reasons that concern design constraints and epistemic and pragmatic considerations. Suppose that there should not be a crime of adultery. This means that being free from being cheated on by your partner is not a legally protected interest. But this claim seems different from the thought that convicting an innocent person is much worse than failing to convict a guilty person or the principle that we should account for the superior power of the state (over the individual defendant). Given that the latter kind of legal reasons are invoked in determining culpability (which is exemplified by Sarch's appeal to the lenity principle), but do not seem relevant at all to moral blameworthiness, the mere *structural* analogy cannot provide a more solid normative foundation.

5. Concluding remarks

I end by making a general point about how to adjudicate between different kinds of arguments for some feature of the criminal law. In particular, examining some of the methodological presumptions employed by Sarch leads to question whether it is better for some feature of criminal law to be explained by a theory of culpability or whether that feature is best addressed as an epistemic or pragmatic consideration about the public institution that is the criminal law.

Sarch prefers the former and defends a sophisticated theory of normative culpability that is a distinctly legal notion that bears a structural similarity with moral blameworthiness. The explanatory burden of various core features of the criminal law, on Sarch's picture, is shouldered by this legal notion of culpability. But if one aim is to inherit the normatively solid foundation of moral blameworthiness, there may be a better alternative: core features of the criminal law reflect the concern for moral blameworthiness, but there are legal design constraints that justify departing from doctrines that always perfect match claims about the defendant's moral blameworthiness. On this picture, we do not have to posit a single coherent theory of culpability that can explain and justify all of the core features of the criminal law. Rather, we provide various reasons – some to do with the severity of crime, some to do with moral blameworthiness of the defendant for committing the crime, some to do with pragmatic or epistemic considerations, and some to do with demands of justice. On this picture, the kinds of arguments for the wilful ignorance doctrine, omitted by Sarch on the basis of the second methodological presumption, would need to be explored.

I agree that Sarch's sophisticated theory of culpability can provide a parsimonious explanation of (the core features of) the criminal law. But I wonder if the virtue of parsimony outweighs the value of arguments that address – at least, more directly – criminal law as a political institution. I would like to conclude by thanking Alex for the

opportunity for me to indulge in these methodological musings and I look forward to many fruitful discussions about how to theorise about the law.

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ORCID

Aness Kim Webster  <http://orcid.org/0000-0002-3143-2055>