Canadian Journal of Law & Jurisprudence 2025, 1-27

 doi: 10.1017/cjlj.2024.23

Motivating Reasons, Moral Culpability, and Criminal Law

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Abstract

Consider the following argument: (1) Whether, or the degree, persons are morally culpable ultimately depends on the (final) reasons that motivate their actions; (2) The degree to which persons are morally culpable should be a central concern of criminal law; (3) Criminal law in many countries focuses more on the beliefs and intentions of agents and less on their motivating reasons; therefore (4) Criminal law in many countries is unjust and should be revised. The premises of this argument are appealing and widely accepted, yet its conclusion is radical. Therefore, the argument is interesting and important. However, the argument is not entirely clear in several respects, and the attempt to clarify it reveals several significant (although not necessarily decisive) doubts regarding its soundness. In this paper, I examine these doubts as well as a related, more general, lesson concerning normative arguments about the law.

Keywords: *Motivating Reasons; Culpability; Intentions; Beliefs; Criminal Law*

1. Introduction

Consider the following argument:

(1) The moral status of persons—including whether, or to what degree, they are morally culpable—ultimately depends on the (final) reasons that motivate their actions (the 'Motivating Reasons Conception');
(2) The answer to the questions of whether, or the degree to which, persons are morally culpable should be a central concern of the criminal law (the 'Culpability Principle');
(3) The criminal law in many countries focuses (explicitly or implicitly) more on the beliefs and intentions of agents concerning their actions and less on the (final) reasons that motivate these actions (the 'Beliefs & Intentions Model');
(4) Therefore, the criminal law in many countries (those that adopt the Beliefs & Intentions Model) is unjust and should be revised.

In other words, the argument is that criminal law in many jurisdictions, especially its liability rules, focuses more on the immediate goals of agents—whether they (believe and) intend that their actions will have certain features (for example, harm, kill, or take the property of another)—and less on their more fundamental goals, including, especially, their final (ultimate) goals that explain why they

performed their actions (for instance, if the plan was to use the property to alleviate poverty or to satisfy greed). Yet, the argument continues, what determines if or the degree to which agents are culpable and should be held criminally liable and punished is their final goal rather than their immediate one.[1] Accordingly, the argument concludes that to the extent to which criminal law does not consider the motivating reasons of agents, it is unjust and should be revised.

The premises of this argument are appealing and widely accepted. However, together they suggest an alarming conclusion. Criminal law theorists have occasionally noted both the appeal of this argument and the concern that it highlights regarding criminal law in many countries. Thus, for example, Heidi Hurd and Michael Moore observe that:

> [W]e are sympathetic to the view that *moral* culpability is largely a function of the reasons for which persons act. . . . Inasmuch as we can distinguish the mercy killer from the contract killer only by reference to their relative motivations, and inasmuch as the mercy killer appears as nonculpable as the contract killer appears culpable, our theory of moral culpability clearly departs from our doctrines of legal culpability by weighting an actor's motivations for action far more heavily than the intentionality.[2]

Indeed, they go on to suggest that we should endorse the conclusion of the above argument:

> If one believes that an actor's moral culpability is better measured by his background motivations than by the intentions, knowledge, or degree of conscious awareness possessed concerning the results of his conduct, then one might well think our criminal law should be radically revised so as to better mirror the conditions of true moral culpability.[3]

Similarly, Douglas Husak claims that, contrary to conventional wisdom, the reasons that motivate agents are and should be important to criminal law, while

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1. I focus here on the moral status of persons as agents, namely, whether or the degree to which persons are culpable for their actions. It is often assumed, especially in the context of criminal law, that people may be culpable only for their actions (or even more specifically their wrongful actions). This assumption is not obvious. For the view that it is false, see e.g. Peter A Graham, "A Sketch of a Theory of Moral Blameworthiness" (2014) 88:2 Philosophy & Phenomenological Research 388. Regarding the relationship between the moral status of actions and agents, see Re'em Segev, "Should We Prevent Deontological Wrongdoing?" (2016) 173:8 Philosophical Studies 2049 at 2055-59 [Segev, "Should We Prevent"]; Re'em Segev, "Actions, Agents, and Consequences" (2023) 42:2 Criminal Justice Ethics 99 at 103-108.

2. Heidi M Hurd & Michael S Moore, "Punishing Hatred and Prejudice" (2004) 56:5 Stan L Rev 1081 at 1130-31 [emphasis in original].

3. *Ibid* at 1135. Hurd and Moore reject the conclusion that criminal law should be radically revised. However, it is worth noting that their focus is the narrower question of the justification of hate crimes, and part of their objection to such crimes is based on the claim that they are inconsistent with positive criminal law.

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persuasively refuting common objections to this conclusion.[4] And, more recently, Gregory Antill developed an elaborate version of the argument that criminal law in many countries should be radically revised such that it focuses more on the motivating reasons of agents and less on their beliefs and intentions.[5]

Is the above argument sound? It is difficult to answer this question, since some of its premises are vague and the attempt to clarify them reveals a dilemma. On the one hand, given very strong versions of the relevant premises, the argument is valid, but its premises are false or at least doubtful. On the other hand, while weaker versions of these premises are much more plausible, they do not entail the conclusion. The most important premises in this respect are the second (the Culpability Principle) and the third (the Beliefs & Intentions Model). The Culpability Principle is vague, since it does not specify the degree to which the concern about culpability should be central to criminal law, while the Beliefs & Intentions Model does not identify the extent to which the relevant laws consider the beliefs and intentions of agents in addition to their motivating reasons.

The strongest version of the Culpability Principle—that criminal law should *always* track culpability *accurately*—is doubtful, since while there are often reasons, sometimes weighty ones, against criminal laws that do not track culpability accurately, there may also be strong countervailing reasons, and it is therefore not obvious that the former reasons always defeat the latter. This is especially the case if culpability indeed depends on the final reasons that motivate actions rather than on beliefs and intentions (as the first premise of the argument, the Motivating Reasons Conception, holds).

The strongest version of the Beliefs & Intentions Model—that the relevant criminal laws are concerned only with beliefs and intentions and not at all with motivating reasons—is also false. While the relevant laws indeed consider certain beliefs and intentions, they do not completely ignore motivating reasons. This is the case, first, since beliefs and intentions are usually correlated to some degree with motivating reasons, and therefore criminal laws that consider beliefs and intentions also consider, albeit indirectly, motivating reasons. Second, criminal laws usually consider *some* motivating reasons directly, in addition to beliefs and intentions, most notably as part of defenses and at the sentencing stage.[6]

On the other hand, weaker versions of the above premises are more plausible but do not entail the conclusion of the argument. For example, it is reasonable to hold that criminal law should track culpability to a considerable degree, and that the relevant criminal laws do not consider *all* the motivating reasons that are

4. See Douglas Husak, "Motive and Criminal Liability" in Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press, 2010) 53.

5. See Gregory Antill, "Fitting the Model Penal Code into a Reasons-Responsiveness Picture of Culpability" (2022) 131:4 Yale LJ 1346.

6. The slogan that motives are irrelevant to criminal law is usually limited to criminal liability rather than sentencing (see Section 4). The above argument assumes that the distinction between liability and sentencing is not morally significant in the relevant sense. A distinct but related claim was famously made by James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Holt & Williams, 1873).

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significant in terms of culpability, and only these reasons. Yet these premises do not entail the conclusion that these laws are flawed, since laws that do not ignore motivating reasons may satisfy the requirement to track culpability to the required degree.

These doubts do not entail that every version of the above argument necessarily fails. What they do demonstrate is that it is important to examine its normative and empirical premises more carefully in order to see if (a certain version of) the argument can be salvaged. This is the goal of the paper, which proceeds as follows: Section 2 clarifies the Motivating Reasons Conception and highlights the fact that it is plausible and widely accepted. Section 3 considers what is the best way of constructing the Culpability Principle. Section 4 explains how the Beliefs & Intentions Model considers motivating reasons to a considerable degree. Finally, Section 5 concludes by highlighting, first, the modest nature of the conclusion that may be drawn from the above argument, and, second, the more general lesson for the discussion of normative arguments regarding the law: Such arguments are often too ambitious in an important respect, since they depend on the answers to many difficult normative and empirical questions that are beyond the scope of a single study.

2. The Motivating Reasons Conception

The first premise of the argument—the Motivating Reasons Conception—is the theoretical (evaluative) claim that the moral status of persons—including whether or the degree to which persons are culpable—depends, ultimately, on the (final) reasons for which they act, and not on their beliefs or intentions. The appeal of this claim may be illustrated by the observation that even beliefs and intentions that may seem objectionable can turn out to be commendable. For example, the fact that an agent believes that her action would harm an innocent person, and even the fact that she *intends* to harm this person, do not in themselves entail that the agent is culpable (not even in one respect). Whether or not she is culpable, and, if she is, the degree to which she is culpable, ultimately depends on the final reasons that motivate her action. If, for instance, she intends to harm an innocent person only because (she believes that) this is the only way to prevent much more serious harm to another innocent person; she considers the lesser harm as a reason *against* the action (although one that is defeated by the stronger reason to prevent the greater harm); and, finally, she thinks that it is morally worse to allow the greater harm, she does not seem to be culpable.[7] Indeed, she may well be praiseworthy.[8]

7. Legal systems that follow the Beliefs & Intentions Model often provide a defense in *some* cases of this type, but not in all of them. See Section 4.

8. *Cf* Joel Feinberg, "Some Unswept Debris from the Hart-Devlin Debate" (1987) 72:2 Synthese 249 at 254 (motives affect the degree to which persons are culpable); Larry Alexander, "Insufficient Concern: A Unified Conception of Criminal Culpability" (2000) 88:3 Cal L Rev 931 at 943 (agents who impose low risks of harm purposefully may be less culpable than

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Alexander Sarch objects that a person who brings about a bad state of affairs (for example, harms another) intentionally is more culpable in one respect (albeit not necessarily overall) than a person who brings about the same state of affairs non-intentionally—although he suggests that this is the case only regarding actions that are not justified all things considered.[9] However, if the above conditions are met, I think that the former agent is not more culpable than the latter even in one respect. This is the case, it seems to me, both if the relevant actions are wrong and if they are not.[10] Sarch's suggestion that intentions affect the culpability of agents when their actions are wrongful—but not when they are not—seems to me arbitrary.[11] Thus, a person who harms another to prevent greater harm is not culpable, given the above conditions, even if her action is wrong (this may be the case, for instance, if there is a deontological prohibition on harming persons intentionally that is decisive in this case, or if the agent is mistaken about a relevant fact).[12]

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those who impose huge risks if the former act for better reasons, for example, in order to prevent what they think is more serious harm, and the latter act for weak reasons, for instance, impose the risk for the mere thrill of it).

9. "[T]he defender of DDE could just restrict her claim that purposeful misconduct is worse than knowing misconduct to cases of unjustified action." Alexander Sarch, "Double Effect and the Criminal Law" (2017) 11:3 Crim L & Philosophy 453 at 457 [emphasis removed], [Sarch, "Double Effect"].

Unlike Sarch, I do not think that in the examples that he constructs one agent is at least "a bit" more culpable than the other (*ibid* at 463):

Arson 1: Tony, a mob boss, offers to pay Alan $5000 to burn down a building, but it has to be done before midnight or Alan won't get paid. Alan agrees. He arrives at the building at 11:30 pm, and as he is about to light the fire, he sees that Victor is doing something on the second floor. Victor does not leave, so Alan proceeds to light the fire knowing (i.e., while practically certain) that this will lead to Victor's death. As expected, Victor dies. Alan finds it regrettable that Victor dies, but he decides there's nothing he could do—he "really needed the money."

Arson 2: This case is as similar to Arson 1 as can be, except that now Tony offers to pay Bobby $5000 to see to it that Victor dies tonight before midnight. Moreover, Bobby is to kill Victor by making it look like he was killed by a fire in the building. Tony will not give Bobby the money unless Victor actually dies. (Suppose Tony has a perfectly reliable method for determining this.) Just before midnight, Bobby lights the building on fire and Victor dies. Bobby finds it regrettable that Victor dies, but he decides there's nothing he could do—he "really needed the money." *Ibid* at 462.

See also Alexander Sarch, "Who Cares What You Think? Criminal Culpability and the Irrelevance of Unmanifested Mental States" (2017) 36:6 Law & Phil 707 [Sarch, "Who Cares What You Think?"]: "Suppose our practical limitations are temporarily alleviated. Most simply, the defendant might simply admit (credibly) that he had very bad attitudes while acting. Even then, however, it is doubtful that we should punish him merely for his bad attitudes or do so more harshly for his willingness to commit worse crimes. Still, in such a case, our practical limitations would provide no bar to doing so." *Ibid* at 711 [emphasis removed].

10. I think that the distinction between wrongful and permissible actions is redundant and may be misleading more generally, but this claim is not crucial here. See Re'em Segev, "Continuity in Morality and Law" (2021) 21:1 Theor Inq L 45 at 52-68.

11. In another place, Sarch himself writes that "it seems unstable to maintain both that motives do not impact the culpability calculus for justified actions . . . but that motives do affect the culpability of unjustified acts." Sarch, "Who Cares What You Think?", *supra* note 9 at 721.

12. I assume that the moral status of actions ultimately depends on the morally significant facts rather than on the (actual or justified) beliefs of the agents regarding these facts. See Re'em Segev, "Justification Under Uncertainty" (2012) 31:5 Law & Phil 523.

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Another example that illustrates why culpability ultimately depends on motivating reasons rather than beliefs or intentions is the case of euthanasia. As noted above, Hurd and Moore point out that a mercy killer and a contract killer may not be equally culpable even if they have the same beliefs and intentions—the belief that a certain action will cause death and the intention to bring about this outcome—due to the different reasons for which they act. More specifically, Antill highlights the case of Dr. Jack Kevorkian, who helped terminally ill patients to end their suffering by way of assisted suicide. Despite acting with the intention to cause death, agents such as Dr. Kevorkian may not be culpable, or at least may be much less culpable than the typical intentional killer, if their ultimate reason is to prevent suffering rather than to cause harm. In this respect, the fact that Dr. Kevorkian was tried for one of the most serious offenses—murder—based on the Beliefs & Intentions Model, appears to be unjust. In contrast, Antill argues that the police officer who kneeled on George Floyd's neck and thus caused his death may be *more* culpable than the typical intentional killer (and especially more than agents such as Dr. Kevorkian). This is the case, he argues, even if the police officer did not intend to kill, and even if he did not think that his action would cause death, if his decision not to consider whether this may be the case was due to the fact that he failed to ascribe proper weight to the life of Floyd. Accordingly, the implication of the Beliefs & Intentions Model—that he is liable to punishment that is much less severe than that of the typical intentional killer—seems too lenient.[13]

The precise implications of the Motivating Reasons Conception depend on the nature of the motivating reasons that it identifies as important in terms of the moral status of agents. In this regard, there are many different versions of the Motivating Reasons Conception.[14] Indeed, prominent versions of this conception hold that the extent to which persons are praiseworthy or blameworthy depends on the relationship between their motivating reasons and the good (normative, guiding) reasons that apply to their actions.[15] These versions hold that people are culpable when, and to the degree to which, they engage with

13. See Antill, *supra* note 5 at 1352, 1356-57, 1370-71. I discuss these cases further in Section 4.

14. For relevant discussions of the details of the Motivating Reasons Conception in the context of the criminal law, see e.g. Alexander, *supra* note 8; Larry Alexander & Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009) at 67-68; Douglas Husak, *Ignorance of Law: A Philosophical Inquiry* (Oxford University Press, 2016); Sarch, "Who Cares What You Think?", *supra* note 9; Gideon Yaffe, *The Age of Culpability: Children and the Nature of Criminal Responsibility* (Oxford University Press, 2018); Gideon Yaffe, "Is Akrasia Necessary for Culpability? On Douglas Husak's Ignorance of Law" (2018) 12:2 Crim L & Philosophy 341 at 343-48; James Edwards & Andrew Simester, "Crime, Blameworthiness, and Outcomes" (2019) 39:1 Oxford J Leg Stud 50 at 55-60; Andrew Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford University Press, 2021) at 237-60; Grant Lamond, "Culpability and Moral Vice" Crim L & Philosophy [forthcoming] at 6-8.

15. For the distinction between motivating reasons and intentions, see e.g. Maria Alvarez, "Reasons for Actions: Justification, Motivation, Explanation" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Winter 2017), online: plato.stanford.edu/archives/win2017/entries/reasons-just-vs-expl/.

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normative reasons[16] in a way that is flawed—for instance, in a way that does not track normative reasons appropriately, or (more specifically) does not reflect sufficient concern for the interests of others.[17] These versions thus require not only an answer to the question of what are the reasons that motivate the agent but, in addition, an answer to the question of which reasons are good ones. Thus, the familiar controversies regarding the latter question (for example, between consequentialism and deontology as well as between different versions of these views) affect the details of the Motivating Reasons Conception.

The fact that there are many versions of the Motivating Reasons Conception may trigger the question of whether the Beliefs & Intentions Model may be one version of the Motivating Reasons Conception. In one respect, this is indeed the case. First, some of the mental states that the Beliefs & Intentions Model considers (such as purpose, knowledge, recklessness, or negligence) may reflect some of the reasons that motivate the agents. In addition, as noted above, certain beliefs and intentions may correlate with certain motivating reasons. However, there is an important difference between the Motivating Reasons Conception and the Beliefs & Intentions Model in this respect. Plausible versions of the Motivating Reasons Conception hold that what *ultimately* matters in terms of the moral status of persons is the *final* reasons that motivate their actions—their ends (in the strict sense of final ends) as opposed to reasons that are derived from their final reasons, such as what they consider merely as means to these ends.[18] This is because the final reasons of agents are those that explain their other reasons (at least if they are rational).[19]

This does not entail that other (motivating) reasons are irrelevant to culpability, but it does entail that other reasons are relevant to culpability only if, and to the degree to which, they are related to the final reasons that ultimately matter in this respect. For example, as noted above, the fact that a person intends to harm another does not necessarily entail that she is culpable if her final reason is to prevent greater harm (and she thinks that she is doing the right thing). In contrast, the Beliefs & Intentions Model focuses on mental states that may not refer to the final reasons for which the relevant persons act (as the above examples of harming to prevent greater harm and euthanasia demonstrate). Accordingly, the following discussion is compatible with all of the plausible versions of the Motivating Reasons Conception that go beyond the common categories of mens rea to which the Beliefs & Intentions Model refers.[20]

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16. At least, those who are available to them in some sense.

17. Other versions of the Motivating Reasons Conception hold that what ultimately matters for culpability is whether the motivating reasons of people reflect what they think are good reasons, regardless of whether they are correct in this regard.

18. *Cf* Edwards & Simester, *supra* note 14 at 56.

19. Similarly, final *normative* reasons entail derivative normative reasons. See e.g. Garrett Cullity, "Weighing Reasons" in Daniel Star, ed, *The Oxford Handbook of Reasons and Normativity* (Oxford University Press, 2018) 423 at 428.

20. Some formulations of the view that motivating reasons are important to culpability are unclear regarding the question of whether motivating reasons are the only factor that ultimately matters in this regard, or if certain beliefs or intentions also matter in this respect (in a way that is not

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Given its plausibility, it is not surprising that the Motivating Reasons Conception is widely accepted, including by criminal law theorists. Indeed, the Motivating Reasons Conception is sometimes part of additional arguments regarding criminal law (beyond the argument for the conclusion that criminal laws should consider motivating reasons to a greater degree). For example, James Edwards and Andrew Simester argue, based on this conception, that the degree to which agents are culpable does not depend on the outcomes of their actions (although the latter may affect the moral status of their *actions*).[21]

Furthermore, even when the Motivating Reasons Conception is rejected, the alternative usually triggers a similar concern regarding criminal laws that reflect the Beliefs & Intentions Model. The most important alternative may be the view that the moral status of persons ultimately depends on their *character*. This view does not vindicate criminal laws that reflect the Beliefs & Intentions Model. On the contrary: It suggests an even more acute concern about such laws, since the divergence between beliefs or intentions and character may be even more substantial than the divergence between beliefs or intentions and motivating reasons.[22] In what follows, I focus on the argument that relies on the Motivating Reasons Conception of culpability, but significant parts of the discussion are also relevant to an alternative argument that endorses instead a character-based account of culpability.

Before considering the other premises of the argument, a final terminological clarification should be noted. The relevant literature on criminal law often uses the term 'motives' as a contrast to intentions. This term is ambiguous (as many have pointed out). Indeed, it is often used in senses covering many mental states not part of the Beliefs & Intentions Model. Thus, it is sometimes used in senses that refer to motivating reasons (although not necessarily the final ones). At other times, it is used in senses that focus more on emotions or on considerations that do not motivate actions in themselves.[23] The distinction that matters for the arguments considered in this paper is the one between the (final) motivating reasons

merely derivative). Compare, for example, the following claims: "[A]n actor's bad state of mind consists not in their intentions, purposes, knowledge, or negligence, but rather in the responsiveness of their reasoning capacities, which their actions (given their purposes, knowledge, recklessness, or negligence) evince"; "blame appears to track not just whether some action was intentional or unintentional . . . but also more fine-grained motivational facts about what that intentional action illustrates about the agent's underlying values." Antill, *supra* note 5 at 1351, 1353 [footnotes omitted].

21. See Edwards & Simester, *supra* note 14.

22. For a critical discussion of this view in the context of criminal law, see Hurd & Moore, *supra* note 2 at 1129-38.

23. See e.g. Christine Sistare, "Agent Motives and the Criminal Law" (1987) 13:3 Soc Theory & Practice 303; Guyora Binder, "The Rhetoric of Motive and Intent" (2002) 6:1 Buff Crim L Rev 1; Whitley R Kaufman, "Motive, Intention, and Morality in the Criminal Law" (2003) 28:2 Crim Justice Ethics 317; Elaine M Chiu, "The Challenge of Motive in the Criminal Law" (2005) 8:2 Buff Crim L Rev 653 at 664-66; David Brax, "Motives, Reasons, and Responsibility in Hate/Bias Crime Legislation" (2016) 35:3 Crim Justice Ethics 230; Shachar Eldar & Elkana Laist, "The Irrelevance of Motive and the Rule of Law" (2017) 20:3 New Crim L Rev 433. *Cf* Jerome Hall, *General Principles of Criminal Law*, 3rd ed (Bobbs-Merrill, 1960) at 83-93; Glanville Williams, *Criminal Law: The General Part*, 2nd ed (Stevens & Sons, 1961) at 48-50. In other contexts, the terms 'intention' and 'motive'

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that bear on the culpability of persons (especially as agents) and the mental states that are part of the Beliefs & Intentions Model.[24]

3. The Culpability Principle

The Culpability Principle, recall, is the normative claim that moral culpability should be a central concern of criminal law. This proposition is attractive and widely accepted.[25] However, as noted above, it is vague,[26] and the way in which it is explicated may be important to the question of whether the argument for the conclusion that criminal law in the relevant legal systems should focus more on motivating reasons is sound.

Versions of the Culpability Principle may differ regarding its content, scope, and force, as well as concerning the values that underlie the principle (which entail the answers to the former questions). For example, according to a general version of the principle, criminal law should be concerned with all aspects of culpability. In contrast, more specific versions distinguish between the positive claim that there is a reason to punish those who are culpable to the degree to which they are culpable, and the negative claim that there is a reason against punishing people beyond the degree to which they are culpable. It is common, for example, to accept the negative claim but not the positive one, or to consider the negative claim as (much) more stringent.[27] Even more specifically, some distinguish, within the negative claim, between the claim that there is a reason against punishing those who are culpable beyond the degree to which they are culpable, and the more specific claim that there is a reason against punishing those who are 'innocent', namely, not culpable at all (at least with respect to actions proscribed by criminal law). Often, the latter reason is assumed to be stronger. Indeed, some consider it as decisive in all cases, regardless of the nature and force of countervailing reasons.[28] In contrast, the more general (negative) reason against

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are sometimes used in the same sense. See e.g. Deborah Hellman, "Diversity by Facially Neutral Means" (2024) 110 Va L Rev 1 at 31 [forthcoming in 2024].

24. See also Section 4.

25. This proposition seems plausible regardless of whether or how criminal law is unique in this regard. For the view that culpability-related concerns are especially important in the context of criminal law, see e.g. Heidi M Hurd & Michael S Moore, "The Ethical Implications of Proportioning Punishment to Deontological Desert" (2021) 15:3 Crim L & Philosophy 495; Larry Alexander, "Proportionality's Function" (2021) 15:3 Crim L & Philosophy 361 at 361-62.

26. The fact that this proposition is vague may contribute to the degree to which it is appealing and widely accepted.

27. For a view that nevertheless accepts the positive claim, see e.g. Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford University Press, 1997). For a critical discussion of this claim, see e.g. Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press, 2011). The negative claim is highlighted, for example, by Douglas Husak, *Overcriminalization: The Limits of the Criminal* Law (Oxford University Press, 2007) at 82; R A Duff, "Towards a Modest Legal Moralism" (2014) 8:1 Crim L & Philosophy 217 at 218.

28. See e.g. R A Duff, *The Realm of the Criminal Law* (Oxford University Press, 2018) at 61. For the view that this reason is not necessarily decisive, see e.g. Larry Temkin, "Equality as

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punishing culpable agents beyond the degree to which they are culpable is less often assumed to be necessarily decisive, and no one seems to think that the positive reason to punish culpable agents is always decisive.[29]

Finally, and even more specifically, there seems to be a distinction between two ways of understanding the sense of innocence that the narrow claim employs. The focus in this regard is more often on cases in which a person did not perform an action that is attributed to her (we may refer to such cases as cases of 'factual innocence'). Yet another sense is innocence (which may be labeled as 'normative innocence'), which refers to cases in which a person performed the action that is attributed to her but is not culpable—for example, since (she thinks that) the action is not wrong (some cases of euthanasia may be of this type, for instance). Factual and normative innocence are different in some respects. However, both are cases of moral innocence. This is because what is important, with respect to moral innocence, is (only or also) whether a person is responsible for a wrongful action rather than if she is responsible for an action attributed to her (by someone). An accurate declaration of innocence is "I did nothing *wrong*" rather than "I didn't do what you say I did." The latter claim is significant only if, and because, it entails that the relevant person did nothing wrong. In this respect, both factual and normative are the same.[30] Nevertheless, these types of innocence are often distinguished (usually implicitly). For example, it is more common to hold that the reason against punishing innocents is very strong, and even necessarily decisive, with respect to cases of factual innocence compared to cases of normative innocence.

These differences in the content, scope, and force of the relevant reasons are related to different views regarding the values that ground them. The positive claim that there is a reason to punish culpable agents is often based on the view that desert is valuable in itself.[31] (The same is true regarding the more general claim that criminal law should be concerned with the degree to which people are culpable, since this claim includes the positive claim.) In contrast, the negative claims, and especially the narrowest claim against punishing agents who are (completely) innocent, are more often associated with the view that there is a deontological prohibition (which is often assumed to be necessarily decisive) on punishing innocents or punishing people beyond the degree to which they

Comparative Fairness" (2017) 34:1 J Applied Philosophy 43 at 52: "Do we really think, with Kant, that it would be wrong to falsely imprison an innocent man for even five minutes, if that were necessary to save 1,000,000 innocent lives?" [emphasis removed]; Vincent Chiao, *Criminal Law in the Age of the Administrative State* (Oxford University Press, 2018) at 31-32, 107-09.

29. A common view holds that the degree to which culpable agents are culpable determines a 'sentencing range'. This view is compatible with the proposition that the reason against punishing culpable agents beyond the degree to which they are culpable is necessarily decisive, but it does not entail this proposition.

30. See Re'em Segev, "Moral Innocence and the Criminal Law: Non-Mala Actions and Non-Culpable Agents" (2020) 79:3 Cambridge LJ 549 at 556-57.

31. For an extended discussion of this view, see Shelly Kagan, *The Geometry of Desert* (Oxford University Press, 2012).

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are culpable.[32] (Of course, if or the degree to which agents are culpable may be important also due to other reasons, including reasons that do not consider culpability as important in itself.)

These different accounts of the Culpability Principle entail different versions of the argument from the Motivating Reasons Conception to the conclusion that laws that adopt the Beliefs & Intentions Model are unjust and should be amended. Accordingly, these differences affect the answer to the question of whether (the relevant version of) this argument is sound. For example, an argument that relies on the more general and more stringent versions of the Culpability Principle, such as the one that holds that criminal laws must always track culpability accurately, is more likely to be valid (since it is less likely that laws that reflect the Beliefs & Intentions Model consider motivating reasons to a sufficient degree given these versions). However, since these versions are less plausible (and much more controversial), the argument may not be sound if it relies on them.

It may be thought that we need not resolve these difficult questions regarding the appropriate version of the Culpability Principle in order to conclude that laws that adopt the Beliefs & Intentions Model are unjust. Consider the following argument:

(1) The Motivating Reasons Conception and laws that reflect the Beliefs & Intentions Model are incompatible;
(2) The Motivating Reasons Conception is correct;
(3) Therefore, laws that reflect the Beliefs & Intentions Model are flawed and should be revised.

This argument does not refer explicitly to the Culpability Principle.[33] Therefore, it is important to consider if it is indeed possible to dispense with the Culpability Principle in this way.

The above argument—which compares the Motivating Reasons Conception and laws that reflect the Beliefs & Intentions Model—seems to assume that both are concerned with the same project. Indeed, otherwise, they could not be incompatible. Since the Motivating Reasons Conception is clearly, and explicitly, concerned with assessing the degree to which agents are culpable, comparing it to the laws that adopt the Beliefs & Intentions Model implies that these laws, too, are concerned with evaluating culpability.

32. See e.g. Alexander & Ferzan, *supra* note 14 at 130, 300; Husak, *supra* note 14 at 2-4; John Tasioulas, "Punishment and Repentance" (2006) 81:2 Philosophy 279 at 281.

33. For similar arguments, see e.g. Hurd & Moore, *supra* note 2 at 1131, 1135 (who argue that if the Motivating Reasons Conception is correct, we may need to revise the relevant laws); Antill, *supra* note 5 at 1346-51 (who contrasts the Motivating Reasons Conception and the relevant laws, starting at the first sentence of the abstract of his article). Hurd & Moore and Antill do not state explicitly that they assume that the Motivating Reasons Conception is true but only that it is plausible and widely accepted; Antill, for example, writes that it is endorsed by "most contemporary moral philosophers and criminal-law theorists" (*ibid* at 1350). However, the above argument is not valid if it does not include the assumption that the Motivating Reasons Conception is true.

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It is a common assumption that the laws that adopt the Beliefs & Intentions Model reflect judgments about the degree to which agents are culpable. Thus, for example, Ken Simons writes that the Model Penal Code—a paradigm example of the Beliefs & Intentions Model—"views its four basic mental states or culpability terms as hierarchically ordered: all else being equal, purpose is more culpable than knowledge, which is more culpable than recklessness, which is more culpable than negligence."[34] Similarly, as Sarch points out, "the criminal law is often said to embody a culpability hierarchy. Modern criminal law recognizes four main mental states one might act with—negligence, recklessness, knowledge and purpose—each supposedly more culpable than the last."[35] Sarch himself endorses a similar assumption when he writes that when a legal system does not distinguish between cases in which an agent who commits arson knows that her action may harm a person, and cases in which she does not, "[t]here is a sense in which this jurisdiction attributes the same amount of culpability for both forms of arson."[36] Likewise, Antill writes that:

> Underlying the [Model Penal Code] grading regime appears to be a crucial normative commitment to (1) the view that an agent's responsibility for some act, and hence their subjective culpability, is a function of the proximate mental states behind the act, and (2) a substantive view about which proximate subjective mental states are normatively *worse* (that is, make the agent more culpable) than others.[37]

Thus, he concludes that laws that reflect the Beliefs & Intentions Model are committed to an account of culpability that is rejected by theorists who endorse instead the Motivating Reasons Conception. Indeed, he argues that this conception and the relevant laws reflect "two differing pictures of subjective culpability," one that "attributes culpability to the proximate mental states (like an intention) behind an agent's acts," and another that "attributes culpability to the more distal mental states (like the reasoning behind the intention to act)."[38]

It is not completely clear in what sense exactly laws that reflect the Beliefs & Intentions Model are assumed to assert claims about the degree to which people are culpable. Is this, for example, a purely descriptive claim, for instance, about the intentions of the officials who made the relevant laws,[39] or rather a partly normative claim about the most plausible understanding of these laws?[40]

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34. Kenneth W Simons, "Should the Model Penal Code's *Mens Rea* Provisions Be Amended?" (2003) 1:1 Ohio St J Crim L 179 at 195.
35. Sarch, "Double Effect", *supra* note 9 at 455 [emphasis removed, footnote omitted].
36. Sarch, "Who Cares What You Think?" *supra* note 9 at 726.
37. Antill, *supra* note 5 at 1349 [emphasis in original].
38. *Ibid* at 1378. Antill also claims, more specifically, that an agent who intends to harm another is more culpable than one who believes that her action would harm another but does not intend this result, other things being equal.
39. This hypothesis may seem reasonable, for example, regarding the intentions of those who drafted the Model Penal Code given that the code often includes the term 'culpability' in the relevant sections. See Model Penal Code: Official Draft and Explanatory Notes (American Law Institute, 1985) at 29, § 2.06(2)(a) [Model Penal Code].
40. Antill acknowledges that the theoretical commitment that he ascribes to the Model Penal Code "is rarely articulated explicitly, and even more rarely defended," but nevertheless thinks that

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Regardless of the answer to this question, however, the important point is that the above argument that compares the Motivating Reasons Conception and laws that reflect the Beliefs & Intentions Model is not valid even given the assumption that these laws assert claims about the degree to which people are culpable. Indeed, even assuming that the two premises of the argument are true—namely, that the Motivating Reasons Conception and laws that reflect the Beliefs & Intentions Model assert incompatible accounts of culpability and that the former is correct in this regard, it does not follow that the relevant laws are flawed and should be amended. For this conclusion to follow, the argument should include the additional premise that these laws *ought to* reflect (in some way) an *accurate* account of culpability *and nothing more*.

This claim appears to be false, however. Presumably, laws should reflect the balance of *all* applicable *practical* (normative) reasons that apply to them rather than the most accurate answer to a *single theoretical* question—including the degree to which persons are culpable. Thus, the relevant laws should be concerned with a project that is different (indeed, different in type) than that of the Motivating Reasons Conception. And, of course, if they are indeed concerned with distinct (types of) projects, they are not (and could not be) contradictory.

The above argument fails for this reason, even if (some) laws that follow the Beliefs & Intentions Model reflect a theoretical claim regarding the degree to which people are culpable and nothing more (perhaps because this was the objective of some of those who drafted or voted for the relevant laws and assuming that this objective determines the content of these laws). For if this is the case, the relevant laws are flawed, as they *should not* be concerned (only) with this theoretical question. To the degree to which, due to this error, these laws do not properly reflect the balance of all applicable (normative) reasons, they are flawed and should be amended. However, they need not be amended such that they assert the proposition of the Motivating Reasons Conception but rather such that they reflect the balance of all the normative reasons that apply to them.

This failure of the above argument is instructive more generally (as I explain in the conclusion of the paper). Arguments that criticize laws based only on their alleged incompatibility with a certain moral standard are deficient to the extent to which they do not consider additional applicable reasons.[41]

Thus, in order to conclude based on the Motivating Reasons Conception that laws that reflect the Beliefs & Intentions Model are unjust and should be revised, the argument must include some version of the Culpability Principle. Those who endorse the above argument may implicitly assume some version of the principle. However, since there are many versions of this principle, and different versions may not be equally plausible or entail the same conclusions, such an assumption is not obvious.

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this commitment "provides the most straightforward explanation" for the "mens rea hierarchy" that the code incorporates. Antill, *supra* note 5 at 1350 [footnote omitted].

41. This is the case especially (but not only) if this standard is theoretical rather than practical. I return to this general lesson in Section 5.

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Moreover, the argument is more likely to be valid if it includes the most radical version of this principle, namely, one that holds that criminal law should *always* impose liability in a way that accurately reflects (in some sense) the degree to which the relevant persons are culpable (and never impose liability when they are not culpable or beyond the degree to which they are culpable). Indeed, as noted above, other versions of the Culpability Principle, which do not require that criminal laws always track culpability accurately, may well be compatible with laws that reflect the Beliefs & Intentions Model, given that such laws often consider motivating reasons to some degree.

However, the most radical version of the Culpability Principle is much less plausible and much less common than other versions. Indeed, no one seems to endorse it. For example, no one seems to hold that the (positive) reason to punish culpable agents is necessarily decisive, *inter alia*, since this may require that we invest all resources in criminal punishment. It seems that the suggestion that the Culpability Principle is always decisive is only made regarding its most narrow version, which prohibits punishing people who are not culpable at all, and even then, the focus is usually on cases of factual as opposed to normative innocence. This version of the Culpability Principle accordingly entails only a very limited version of the argument under consideration. Specifically, this version does not apply to the much more common cases in which criminal laws impose liability in ways that do not track culpability accurately. Furthermore, even this very limited version of the Culpability Principle is not, I think, plausible. This is not the place to resolve this familiar controversy. Therefore, I only note a few brief comments that highlight the degree to which this version is radical (and uncommon).[42]

The view that a certain reason (such as the reason to construct and use criminal laws in a way that tracks culpability accurately) is necessarily decisive may take one of two forms. The first is that this is the only moral reason in general, or at least the only one that applies in a certain context, such as that of criminal law. The second is that while there are other (applicable) reasons, they are always defeated by the reason to track culpability accurately.

The first option is uncommon. While criminal law theorists often emphasize the significance of culpability, and accordingly the reason to construct and use criminal laws in ways that track culpability, they typically hold that this is not the only moral concern that is pertinent to criminal law.[43] For example, Moore writes that "retributivists are not monomaniacal about the achieving of retributive justice" and that "there are other intrinsic goods besides giving culpable wrongdoers their due and sometimes these other goods override the achievement of retributive justice."[44] Similarly, Larry Alexander and Kimberly Ferzan hold that

42. For an elaborated discussion, see Segev, *supra* note 30 at 558-76.
43. In addition to the references below, see Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press, 2010) at ch 15.
44. Moore, *supra* note 27 at 186.

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the most plausible theory of punishment must trade off retributive justice "against the values of societal welfare, distributive justice, and corrective justice."[45]

Still, it is worth noting that the option that the reason to track culpability accurately is the only applicable reason is less implausible than it may seem. It may be argued, for example, that there is no reason to promote the well-being of a person who does not deserve more well-being. Similarly, it may be argued (and has been argued) that there is no reason to give priority to the worse off if she does not deserve to be better off. Indeed, the assumption that desert is valuable in itself (which many criminal law theorists accept) does not seem to sit well with the hypothesis that there are other (applicable) intrinsic values (although this hypothesis is also widely accepted). Consider a case in which a culpable agent deserves a certain punishment, given his level of culpability. If we assume that not only desert is valuable in itself, but also, for example, maximizing the sum of well-being or allocating it equally or in a way that gives some priority to the worse off, it seems to follow that in addition to the reason to impose the deserved punishment (given the degree to which the offender is culpable) there are also countervailing reasons, against imposing this punishment—and indeed any punishment—since this would be detrimental to the offender's well-being or make him worse off than others (who are not culpable). Accordingly, the balance of all of these reasons may require that the offender should be punished to a lesser degree than he deserves, given his level of culpability alone. This may seem misguided. There do not appear to be such reasons against imposing deserved punishment, even if, as a result of this punishment, the offender is worse off (than others). In other words, it does not seem that the values of maximizing well-being or giving priority to the worse off provide reasons to promote the well-being of the offender, independently of what he deserves, such that these reasons should be balanced against desert.[46]

However, we need not resolve this issue here. For even if desert is the only pertinent value, a plausible account of this value (for example, one that holds that the currency of desert is well-being) entails not only a reason against undeserved *punishment* but also a reason to prevent *other* forms of undeserved harm, *inter alia* by using criminal laws. Thus, if criminal punishment that is more or less than what a person deserves, given the degree to which she is culpable, would deter crimes more effectively than deserved punishment, the value of desert itself entails a reason in favor of punishment that is more or less than what is deserved.

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45. Alexander & Ferzan, *supra* note 14 at 10. See also Moore, *supra* note 27 at 7, 172.

46. See Ofer Malcai & Re'em Segev, "The Imperialism of Desert", (2024) 11 Ergo: An Open Access Journal of Philosophy 861. *Cf* Shelly Kagan, "Equality and Desert" in Louis P Pojman & Owen McLeod, eds, *What Do We Deserve?: A Reader on Justice and Desert* (Oxford University Press, 1999) 298 (desert is incompatible with the value of equality and priority for the worse off); Kagan, *supra* note 31 at 626; Larry S Temkin, "Illuminating Egalitarianism" in Thomas Christiano & John Christman, eds, *Contemporary Debates in Political Philosophy* (Blackwell, 2009) 155 at 157-58: "egalitarians needn't object if a fully responsible criminal is worse off than a law-abiding citizen, even if the criminal craftily avoided capture, and so is only worse off because, through no fault or choice of his own, a falling [tree] limb injured him."

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Moreover, as noted above, the more common version of the claim that the Culpability Principle is always decisive does not refer to a general reason to give people what they deserve but rather to the much more limited reason against punishing those who are not culpable at all.

The latter claim has considerable initial appeal. However, it is less common than it may be thought, and I think that it is ultimately implausible.[47] Assume, for instance, that there is a deontological reason against harming people who are not culpable, or in a way that goes beyond the degree to which they are culpable (a reason that applies, *inter alia*, to undeserved punishment when it is harmful). The suggestion that this reason is always decisive, namely, necessarily defeats all other moral concerns, appears to be unreasonable. For example, if all else is equal, it is presumably not always wrong to harm even a person who does not deserve to be harmed if this is the only way of preventing much more serious harm to another person—who also does not deserve to be harmed (and indeed deserves the much greater harm less). For instance, it does not seem wrong to direct a trolley that would otherwise kill an innocent person onto a side track in which it would break the finger of another innocent person (assuming that all else is equal and there is no other way to prevent the death of the first person).

The hypothesis that the reason against undeserved *punishment*, more specifically, and especially against punishing innocents, is always decisive may seem more attractive. However, it is doubtful if it is reasonable for similar reasons. For example, traffic offenses often impose mild punishment, such as a small fine, in ways that also apply to some drivers who are innocent (in one of the above senses—the factual or the normative), since this is the only way of saving the lives of several innocent people.[48] While it is no doubt unjust (in one respect) to punish innocents, it is also unjust (in another respect) if innocent persons

47. For example, even Robert Nozick, who begins his book with the claim that "[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights)," later considers the possibility that this radical claim should be qualified. Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) at ix, 30.

48. For further discussion of such examples, see Segev, *supra* note 30 at 558-68. An even more specific possibility is that there is a reason against undeserved *legal* (criminal) punishment (or conviction) that is always decisive. This suggestion is implausible, I think, for the same reasons as the more general ones, and also due to another reason: Since the law is not valuable in itself, but rather merely as a means of promoting goals that are independent of it, it is not a constitutive element of a basic moral standard (as opposed to one that is derived from a more basic one, such as the more general reason against harming people). See Re'em Segev, "Should Law Track Morality?" (2017) 36:2 Crim Justice Ethics 205; Re'em Segev, "The Structure of Criminal Law" (2024) 18:2 Crim L & Philosophy 497. The proposition that the reason against undeserved punishment is not always decisive is compatible with the view that (other things being equal) this reason is more important than the reason to prevent undeserved harm or other bad consequences, as the latter view does not entail that the reason against undeserved punishment always defeats all other moral concerns. Yet it is also worth noting that such a distinction between the costs and benefits of undeserved punishment is not obvious. According to an alternative view, the cost of undeserved harm, for example, is the same when a criminal sanction is imposed on a person who does not deserve it and when undeserved harm that can be prevented by criminal law is not prevented, other things being equal. Of course, often other things are not equal—for instance, since harm that is caused by way of criminal punishment is frequently accompanied by additional harms—but this does not support the above asymmetry.

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are harmed (and there is accordingly a reason to prevent this harm when it is possible to do so). Thus, if enacting and enforcing traffic offenses that impose small fines (also) on some innocent drivers is the only way to prevent serious harm to other innocent persons, it is at least doubtful if doing so is necessarily—and thus always—wrong, all things considered.

Two further points are worth noting in this regard. First, as mentioned above, it is uncommon to hold that the reason against criminal laws that do not track culpability accurately is always decisive, namely, defeats every countervailing reason and every combination of such reasons. Even the more specific claim that the reason against undeserved *punishment* is always decisive is uncommon. What is more common is the much more specific claim that the reason against punishing innocents—those who are not culpable at all—is always decisive. Yet it is doubtful if the distinction between punishing those who are not culpable at all and punishment that exceeds the degree to which a person is culpable is significant such that the reason against the former is always decisive while the reason against the latter is not. Indeed, the reason against punishment that exceeds the degree to which a person is culpable to a very significant degree may be stronger than a mild punishment, for example, a small fine, that is imposed on a person who is not culpable at all.

Second, the hypothesis that the reason that criminal laws accurately track culpability is always decisive is especially implausible given the assumption that culpability ultimately depends on motivating reasons. This is the case since there are likely to be additional countervailing reasons that are due to this assumption. Most obviously, actions performed by agents who are not culpable, or less culpable, given their motivating reasons, may still be wrong and undesirable (for instance, when the agents are mistaken about the relevant normative standards or facts).[49] It is also clear that it may be more difficult and costly in various respects for law enforcement officials (such as prosecutors or judges) to ascertain whether or to what degree people are culpable given their (final) motivating reasons, compared to determining mental states such as beliefs and intentions. This is likely to be the case, since there is often more evidence regarding mental states closer to the agents' actions, such as their immediate goals, and less evidence concerning mental states further removed from these actions, especially their final ends. This difficulty is exacerbated by the fact that agents may have several reasons that motivate their actions and that these reasons may not always be fully transparent, even to the agents themselves.

Additionally, laws that consider motivating reasons may incentivize agents to hide their true motives to avoid criminal liability. In this respect, too, it may be more difficult and costly to prevent this phenomenon, compared to laws that

49. I think that what ultimately matters in the relevant respect is not the moral status of the actions themselves (the fact that they are wrong) but the moral status of their consequences (the fact that they may be bad overall). See Segev, "Should We Prevent", *supra* note 1; Segev, "Actions, Agents, and Consequences", *supra* note 1.

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focus instead on beliefs and intentions.[50] A related concern is that laws concerned with the motivating reasons of agents may be less clear than laws that refer to beliefs and intentions, since there appear to be numerous motivating reasons that may affect the degree to which agents are culpable. As a result, laws that consider such reasons are more likely to take the form of standards as opposed to rules (such as a 'lack of ill will' defense), or to include such standards (in addition to rules).[51] Therefore, when, and to the extent to which, there are reasons against vague laws, these reasons may be more significant with regard to laws that focus on motivating reasons.[52] Finally, *inter alia* given the previous concerns, laws that are sensitive to motivating reasons may make the relevant legal processes more complex and expensive. Overall, then, there are likely to be weighty reasons against laws that consider the motivating reasons of agents. As a result, these reasons may sometimes defeat the countervailing reasons that support such laws.

In light of the doubts regarding versions of the Culpability Principle that hold that it is always decisive, it is worth considering weaker versions of this principle, which may be more plausible and also wider in scope. One suggestion for such a weaker and wider version of the Culpability Principle was recently made by Antill as part of his argument from the Motivating Reasons Conception to the conclusion that laws that adopt the Beliefs & Intentions Model are unjust and should be revised. Although he often seems to suggest the above argument, which compares the Motivating Reasons Conception and the Beliefs & Intentions Model directly, he sometimes appears to recognize that this argument fails without a certain version of the Culpability Principle. Indeed, he emphasizes several factors that are irrelevant to the former argument. First, he acknowledges the possibility of countervailing reasons against laws that track culpability accurately. Second, he considers, in light of this possibility, the hypothesis that beliefs and intentions may be good proxies for what ultimately counts in terms of culpability, namely, motivating reasons.

Third, he rejects this hypothesis based on the claim that the discrepancy between the Motivating Reasons Conception and laws that reflect the Beliefs & Intentions Model may be *substantial*. For example, he argues that a common version of the Beliefs & Intentions Model is committed to the view that an agent

50. A more complex possibility is that actors may even manipulate their reasons in order to perform the same conduct for reasons that mitigate their criminal liability. *Cf* Samuel W Buell, "Good Faith and Law Evasion" (2011) 58:3 UCLA L Rev 611 at 619-20, 625, 640. This option is more complex in two respects. First, it may be especially difficult to alter one's *ultimate* reasons for actions, even compared to one's more immediate intentions. Second, if an agent nevertheless does succeed and performs the same action for a different reason—one that is less (or not at all) blameworthy—she may be less culpable. Of course, the manipulation may still be unwelcome in other respects, such as the bad effects of the relevant action. However, it is not clear if overall this concern is more or less substantial regarding motivating reasons compared to mental states such as beliefs and intentions.

51. For examples of such suggestions, see *ibid* at 639-41; Antill, *supra* note 5 at 1382.

52. This is not always the case. Specifically, the beliefs of agents regarding the law may not affect the degree to which they are culpable. See Dan N Kahan, "Ignorance of Law is an Excuse—But Only for the Virtuous" (1997) 96:1 Mich L Rev 127; Re'em Segev, "Moral Rightness and the Significance of Law: Why, How, and When Mistake of Law Matters" (2014) 64:1 UTLJ 36 at 50-56.

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who harms another intentionally is (always) more culpable than one who harms another unintentionally (for instance, recklessly), while the Motivating Reasons Conception entails that the former is sometimes *much less* culpable than the latter. This may be the case, for example, when an agent who harms another intentionally acts for reasons that are better than those of the reckless agent—for instance, when the former considers the harm to the victim as a strong reason against her action whereas the latter is indifferent concerning the harm or considers it as less important than it actually is. Similarly, he points out that Dr. Kevorkian, who caused death intentionally, may be much less culpable than the officer who killed Floyd unintentionally. Finally, Antill claims that laws that have this result—punishing much less culpable agents more harshly than those who are much more culpable—violate a "weak proportionality principle" that criminal laws should respect.[53] According to this principle, "substantially less culpable agents" should not be held "substantially more criminally liable than substantially more culpable agents for the same criminal act."[54]

This principle is thus another version of the Culpability Principle—one that does not apply only to laws that target those who are completely innocent, on the one hand, and is not always decisive, on the other hand.[55] However, it is unclear if an argument that includes this version of the Culpability Principle, in addition to the Motivating Reasons Conception and the Beliefs & Intentions Model, is sound. More specifically, there are three related doubts regarding this version of the argument: What exactly does the Culpability Principle require if it takes the form of the above proportionality principle? Is this principle correct? And do laws that adopt the Beliefs & Intentions Model violate this principle? These doubts are of course related: Determining the content of the proportionality principle is necessary in order to consider if it is plausible and if the relevant laws violate it.

Consider first the content of the proportionality principle. As noted above, this version of the Culpability Principle does not require that criminal laws always track culpability accurately. This is an advantage since, as noted above, the Culpability Principle is not always decisive. However, it is unclear what exactly the "weak" proportionality principle requires. The above explication of this principle—based on the proposition that "substantially" less culpable agents should not be held "substantially more criminally liable than substantially more culpable agents for the same criminal act"—is vague. As a result, it is unclear if laws that adopt the

53. Antill, *supra* note 5 at 1360.
54. *Ibid*. See also *ibid* at 1350-52, 1355, 1364-68, 1372, 1379, 1383.
55. This is, for example, the way in which Antill presents his argument at the conclusion of this paper. He sometimes depicts his argument not as holding that it is contradictory to accept the Motivating Reasons Conception, the Beliefs & Intentions Model, and the above version of the Culpability Principle, but by using weaker terms such as 'tension' or 'a potential difficulty' that exist if one accepts the above three propositions. See *ibid* at 1351, 1360, 1383. However, if there is no *contradiction*, it is unclear what exactly the problem is—and why he thinks that the relevant laws are flawed and should be amended. The latter conclusion follows only if there is a contradiction in the strict sense. Thus, I consider the construal of the argument that assumes that there is such a contradiction in what follows.

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Beliefs & Intentions Model violate this principle, especially since these laws do consider motivating reasons to some extent (directly and indirectly).[56]

Finally, and most importantly, the appropriate version of the Culpability Principle is that the degree to which criminal laws should track culpability depends on the conclusions entailed by the balance of all applicable (normative) reasons, including both the reason that criminal liability and punishment track culpability accurately, as well as countervailing reasons. Thus, the best articulation of the argument is the following one:

(1) The Motivating Reasons Conception (whether, or the degree, persons are morally culpable ultimately depends on the final reasons that motivate their actions);
(2) Criminal law should treat agents in a way that properly reflects the balance of all pertinent reasons, including but not only those relating to the degree to which they are culpable (the 'Balancing Principle');
(3) The Beliefs & Intentions Model violates the Balancing Principle;
(4) Therefore, the Beliefs & Intentions Model is unjust and should be discarded.

This version of the argument is valid (its premises entail its conclusion). Moreover, the first two premises of the argument (the Motivating Reasons Conception and the Balancing Principle) appear to be correct. The question is therefore whether the third premise is also correct (and accordingly if the argument as a whole is sound), namely, if laws that reflect the Beliefs & Intentions Model violate the Balancing Principle.

The answer to this question is not obvious, since the implications of the Balancing Principle—the degree to which it requires that criminal law tracks culpability—depend on complicated questions and are likely to be contingent. These include difficult normative questions regarding the content of the relevant moral standards and how they should be balanced (when they pull in different directions), and various empirical questions concerning the facts that are morally significant according to these standards—for example, the degree to which constructing or using criminal laws in various ways would deter crimes and thus prevent harm (including undeserved harm). Accordingly, the degree to which criminal law should track culpability may be different at different times and places. Finally, these implications depend on the degree to which laws that take the form of the Beliefs & Intentions Model consider motivating reasons. The next section considers this question.

4. The Beliefs & Intentions Model

The final premise of the argument is the descriptive claim that criminal law often focuses more on the beliefs and intentions of agents and less on their motivating reasons. In order to consider if the relevant legal systems—those that adopt

56. See Sections 1 and 4.

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the Beliefs & Intentions Model—violate the version of the Culpability Principle (the Balancing Principle) that requires that criminal law treat agents in a way that properly reflects the balance of all pertinent reasons, we should consider the degree to which these legal systems consider motivating reasons. The less they do, the more likely it is that they violate the Balancing Principle and vice versa. Before considering this question, however, two preliminary points should be noted.

First, the main defining feature of the legal systems that adopt the Beliefs & Intentions Model is that the central categories of 'mens rea' are certain beliefs or intentions (regarding facts that are legally significant). For example, these legal systems usually impose a harsher punishment when an agent *intends* to harm another, compared to when she *believes* that her action may harm another but does not intend this result (if other things are equal, including, for example, the degree of harm).[57] This is a feature of the criminal law of many countries, including the United States,[58] the United Kingdom,[59] and Canada,[60] for instance (despite some variations).

Second, the claim that criminal law often focuses more on the beliefs and intentions of agents and less on their motivating reasons refers, I assume, to the position of a legal system *as a whole* rather than to a certain part of the legal system, or a certain legal rule, considered in isolation. Thus, when evaluating the position of a legal system in this respect, we should consider not only the content of criminal prohibitions, but also pertinent defenses and sentencing rules, for example. Accordingly, the fact that *substantive* criminal law often does not consider motivating reasons—a fact emphasized by Sarch, for instance—is not important in the relevant respect, given that (as Sarch acknowledges) other parts of criminal law usually consider motivating reasons to a considerable degree.[61] To the extent that the position entailed by a certain part of the law is different from the position of the legal system as a whole, we should focus on the latter. I also assume that the position of a legal system as a whole depends not only on its explicit legal rules, but also on the way in which they are interpreted and applied.[62] What matters, in terms of the argument under consideration, is the degree to which a legal system considers pertinent motivating reasons, and not how this is done.

57. There are, of course, differences in the ways in which different legal regimes endorse the Beliefs & Intentions Model—for instance, regarding the exact boundaries between various categories of beliefs and intentions. These differences are not important to the following discussion unless I note otherwise.

58. See e.g. Joshua Dressler, *Understanding Criminal Law*, 9th ed (Carolina Academic Press, 2022) at 115-40; Model Penal Code, *supra* note 39 at 22, § 2.02(3).

59. See e.g. John Child & David Ormerod, *Smith, Hogan, and Ormerod's Essentials of Criminal Law*, 5th ed (Oxford University Press, 2023) at 100-110.

60. See e.g. Kent Roach, *Criminal Law*, 8th ed (Irwin Law, 2022) at 212-28.

61. See Sarch, "Who Cares What You Think?", *supra* note 9 at 720.

62. Indeed, the latter factor is arguably *all* that matters, as it is doubtful if legal rules that have *no* effect are morally significant in the relevant respect.

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The fact that criminal laws that adopt the Beliefs & Intentions Model usually consider motivating reasons to a considerable degree is widely acknowledged.[63] The slogan that 'motives' (which are often understood to include some motivating reasons) are irrelevant to criminal law is inaccurate.[64] This is acknowledged even by those who argue that the relevant laws are incompatible with the Motivating Reasons Conception, although the latter sometimes downplay the extent to which criminal laws consider motivating reasons.

Laws that follow the Beliefs & Intentions Model consider motivating reasons in various ways. First, while beliefs and intentions do not always align with motivating reasons, this may be the exception. For example, if most people who cause harm to others do not do that for good (praiseworthy) reasons, beliefs and intentions may often be good proxies for motivating reasons.[65] There are also other factors that the Beliefs & Intentions Model considers and that may be proxies for motivating reasons. For instance, Edwards and Simester suggest that the outcomes of one's action may be indicative of how the agent deliberated.[66]

Furthermore, when beliefs, intentions, and other factors are *not* good proxies for motivating reasons, the relevant legal systems often take this into account in various ways. One example is the common rule that criminal prohibitions proscribe only unjustified (or 'unreasonable') risks. According to this rule, the answer to the question of whether actions involve unjustified risks depends also on the reasons for which they are performed. A more important reason may justify greater risk and vice versa.[67]

Another way in which criminal law considers motivating reasons is by providing explicit affirmative defenses, such as self-defense, defense of others,[68]

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63. For a discussion of some of the ways in which criminal law often takes account of motivating reasons, see e.g. Sistare, *supra* note 23 at 313: "The defendant's motives are by no means the only factor considered, but they are often treated as being significant. This seems especially true in cases of 'moral offenders': those who violate the law for reasons of conscience—whether moral conviction, religious belief, and so forth" [footnote removed]; Husak, *supra* note 4 at 61-68; Hurd & Moore, *supra* note 2 at 1118-24; Eldar & Laist, *supra* note 23 at 439: "It is not new to point out that there are myriad examples of where motivations seem relevant to liability in positive law, and supporters of the irrelevance of motive as a normative principle generally do not dispute this phenomenon (though they may tend to undervalue its breadth)."

64. See e.g. Sistare, *supra* note 23; Husak, *supra* note 4 at 68; Binder, *supra* note 23; Kaufman, *supra* note 23; Hurd & Moore, *supra* note 2; Eldar & Laist, *supra* note 23; Sarch, "Who Cares What You Think?", *supra* note 9 at 708.

65. Certain beliefs and intentions may be conditions for acting for certain reasons. see e.g. Michael Hatcher, "Blameworthiness, Control, and Consciousness *Or A Consciousness Requirement and an Argument for It*" (2022) 103:2 Pacific Philosophical Q 389. In addition, some exceptions to the generalization that punishment in response to knowingly harming others (for example) is more substantial than harming people unknowingly may be justified in light of the view that the degree to which agents are culpable depends on their motivating reasons. See Gideon Yaffe, "The Point of Mens Rea: The Case of Willful Ignorance" (2018) 12:1 Crim L & Philosophy 19.

66. See Edwards & Simester, *supra* note 14 at 72.

67. See e.g. Model Penal Code, *supra* note 39 at 21-22, §§ 2.02(c)-2.02(d); Roach, *supra* note 60 at 226-27; Alexander, *supra* note 8 at 931-54.

68. See e.g. Model Penal Code, *supra* note 39 at 44, § 3.04; *Criminal Code*, RSC 1985, c C-46, ss 34-35 [*Criminal Code*]; Roach, *supra* note 60 at 376-407.

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lesser evil,[69] necessity,[70] and duress,[71] which apply in some cases in which people violate legal prohibitions for reasons that are either praiseworthy or less blameworthy than usual.[72] Indeed, such defenses sometimes apply only if the relevant actions are performed for the right reasons.[73] However, these defenses usually apply only in some cases where people act for good reasons. Typically, for example, they are limited to situations that are not covered by any other legal rule and to cases in which no pertinent public official can intervene.

Moreover, in addition to these legal rules that pertain to the question of conviction, motivating reasons are considered even more often as part of sentencing rules, such as those that refer to mitigating and aggravating factors. Indeed, even the misleading slogan that motives are irrelevant to criminal law is meant to apply only to the former type of rules.[74] Thus, for example, hate (or bias) crimes sometimes consider certain motivating reasons as aggravating factors.[75]

Furthermore, as noted above, we should consider not only how legal rules (regarding both conviction and punishment) are formulated, but also how they are interpreted and applied. Motivating reasons are often considered by various legal officials, such as police officers, prosecutors, judges, and juries, even if the legal rules do not refer to them explicitly.[76]

Finally, when a legal system law does *not* consider certain motivating reasons that are relevant to culpability, this is not necessarily because these motivating reasons are (mistakenly) assumed (by those who make or apply the law) to be irrelevant to culpability. Rather, this may be due to controversies and mistakes regarding the question of *which* reasons are (more or less) good or bad (and accordingly which agents are more or less praiseworthy or blameworthy). More importantly, a decision not to consider certain motivating reasons may be based on the assumption that there are decisive (normative) countervailing

69. See e.g. Model Penal Code, *supra* note 39 at 42, § 3.02.
70. See e.g. Roach, *supra* note 60 at 408-419.
71. See e.g. Model Penal Code, *supra* note 39 at 37, § 2.09; *Criminal Code*, *supra* note 68 at s 17; Roach, *supra* note 60 at 420-33.
72. See e.g. Alexander, *supra* note 8 at 943; Douglas Husak, "Broad Culpability and the Retributivist Dream" (2011) 9:2 Ohio St J Crim L 449 at 465, 472-77; Sarch, "Who Cares What You Think?", *supra* note 9 at 708; David O Brink, "The Nature and Significance of Culpability" (2019) 13:2 Crim L & Philosophy 347.
73. See e.g. Husak, *supra* note 4 at 63-68; Roach, *supra* note 60 at 385, 402; Simester, *supra* note 14 at 404-06; Model Penal Code, *supra* note 39 at 37, 42, 44, §§ 2.09(1), 3.02(1)(a), 3.04(1). But see Sarch, "Who Cares What You Think?", *supra* note 9 at 732.
74. See Feinberg, *supra* note 8 at 254; Husak *supra* note 4 at 53: "Roughly, criminal justice is dispensed in two stages: first it is decided whether the defendant is liable; if so, it is next determined to what extent he is to be punished. It is beyond dispute that motive is relevant to the latter inquiry."; Kaufman, *supra* note 23 at 330; Eldar & Laist, *supra* note 23 at 434: "Despite its contentious nature, proponents of the irrelevance principle do not dispute that motives often hold evidentiary significance, e.g., in ascertaining the identity of the perpetrator. Furthermore, they concede that motives can be important to the administration of criminal justice through prosecutors' discretion, sentencing decisions, and parole board rulings. Nonetheless, these commentators have persistently argued that motives ought not to be given weight in determining a defendant's liability."
75. See e.g. Hurd & Moore, *supra* note 2; Brax, *supra* note 23; 18 USC Code § 249 (2011).
76. See e.g. Sistare, *supra* note 23 at 313; *Lockett v Ohio*, 438 US 586 (1978).

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reasons against considering the relevant motivating reasons. And this assumption may be justified in some cases.

These points may be illustrated even regarding the case of Dr. Kevorkian (which was highlighted as an illustration of the opposite proposition—that criminal law is incompatible with the Motivating Reasons Conception). Kevorkian was indeed tried and convicted of one of the most serious offenses (second-degree murder) based on the fact that he acted with an intention to kill, even though he was presumably less culpable than most (second-degree) murderers (and arguably not culpable at all) due to his reasons for action.[77] However, it is important to notice also the following facts, due to which this example is misleading in several respects.

First, and most importantly, using criminal law in response to euthanasia, especially in a way that involves a murder charge, appears to be unusual. As Husak points out, although euthanasia may often seem to violate the prohibition on murder, and is not covered by a formal defense, criminal law is often not employed in response to euthanasia, and one explanation for this is that the agents are not deemed to be culpable or at least sufficiently culpable.[78]

The case of Kevorkian was unusual not only in that he was charged but also in other ways that may explain why he was treated differently. These include the doubts as to whether all the people whom he assisted were indeed terminally ill, suffered pain, and were firm in their desire to end their lives, as well as the fact that he helped many people to end their lives while advocating his actions in a very public manner. Moreover, even when he was finally charged, he was first acquitted several times before his conviction, and his ultimate sentence was very different than that of most murderers.[79]

In addition, to the extent to which euthanasia is not tolerated by the relevant legal systems, this is not necessarily due to the view that motivating reasons are irrelevant to culpability. One alternative explanation is the controversy, which is internal to the Motivating Reasons Conception, regarding the question of whether specific motivating reasons—such as those that may support euthanasia—are praiseworthy.[80]

Furthermore, there may be (normative) reasons against tolerating euthanasia, even assuming that the relevant agents are not culpable (or less culpable than the typical intentional killer). These may include, for example, a concern that allowing euthanasia in some cases, even ones in which it is justified, may encourage unjustified actions. Indeed, such concerns may have been especially salient in the case of Kevorkian, given the fact that he advocated his actions publicly and the doubts as to whether all the people whom he assisted suffered pain and were terminally ill. More generally, a law that imposes the same sentence—regardless

77. See Section 1.
78. See Husak, *supra* note 4 at 62-63.
79. While Antill acknowledges many of the ways in which the relevant laws consider motivating reasons, he downplays their significance. He also does not mention all of the ways in which the Kevorkian case is unique. See Antill, *supra* note 5.
80. This is noted, for example, by Kaufman, *supra* note 23 at 331-32. See also *R v Bipin Desai* (17 November 2017), Guildford T20167261 (Guildford Crown Court).

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of whether the agent acted for a certain reason—may be justified not based on the assumption that this reason does not affect the agent's degree of culpability, but due to other (countervailing) reasons.

The fact that criminal law often considers motivating reasons may also be illustrated regarding another case that was highlighted as an example of the opposite proposition: the case of the police officer who caused George Floyd's death. The officer in this case may indeed have been much more culpable than most of those who cause the death of others unintentionally and without attending to the fact that their actions may cause death, due to his motivating reasons.[81] However, he was in fact convicted of offenses (including second-degree murder) that are more serious than those that are attributed to agents who cause death negligently. And he was accordingly sentenced to a much longer prison sentence (indeed, his eventual prison sentence is likely to be much longer than that of Dr. Kevorkian). It may be objected that these facts are beside the point because they do not reflect the law accurately.[82] Yet, given the many ways in which the relevant laws often consider motivating reasons, it seems that the fact that they were considered in this case, too, is not an aberration.

Overall, then, the relevant criminal laws often take into account motivating reasons that are relevant to culpability to a considerable degree,[83] albeit not always.[84] And since there are sometimes countervailing reasons against doing so—and especially doing so even more than these laws already do—it is unclear if these laws are flawed in this respect. At least, the argument that is based on the Motivating Reasons Conception and the (balancing version of the) Culpability Principle does not demonstrate this. More specifically, the above laws are not necessarily committed to the assumption that agents who intend harm, for example, are always more culpable than those who do not (other things being equal). Of course, it is unlikely that the laws under consideration are perfect in the extent to which they consider motivating reasons, but for all we know they may be flawed not because they do not do that enough but because they do it too much.

5. The General Lesson

The argument that highlights the tension between the proposition that the culpability of agents ultimately depends on their motivating reasons and the fact that criminal laws often focus on their beliefs and intentions is interesting and important. However, an accurate formulation of this argument reveals several difficult normative and empirical questions concerning, for example, the force of culpability-related reasons compared to other moral concerns, and the degree to which criminal

81. See Section 1.
82. See Antill, *supra* note 5 at 1370, n 58.
83. The suggestion to amend the relevant laws such that they are more in line with the Motivating Reasons Conception by introducing a 'lack of ill will' defense (see Section 3) appears to be very close to what these laws often do in their current form in one of the ways noted above.
84. Criminal laws often do not consider the reasons for which people steal: see e.g. Sarch, "Who Cares What You Think?", *supra* note 9 at 718-19.

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laws take account of motivating reasons, directly and indirectly, in addition to beliefs and intentions. Thus, the general conclusion that may be drawn from the above argument is important but modest: Criminal law should consider motivating reasons that affect the degree to which agents are culpable (including in the framework of its liability rules) when the (normative) reasons against doing so either do not apply or are weaker than the (normative) reasons to track culpability accurately. More definite conclusions require addressing the complex normative and empirical questions that impact the relative force of these reasons in specific contexts. Given the contingent nature of the answers to the empirical questions, these conclusions are likely to vary across different jurisdictions and legal frameworks.

The doubts regarding a more definite general conclusion highlight a more general lesson about normative arguments regarding the law. Indeed, the essence of these doubts applies to many arguments for and against various laws. Such arguments are usually very ambitious, as they require addressing two very complicated tasks. One is a consideration of all the normative reasons that are relevant to the question at hand, including general reasons that are not unique to this question.[85] Without considering all pertinent concerns, an argument for a conclusion regarding the question of what the law should be is not valid.

The argument from the Motivating Reasons Conception to the conclusion that laws that adopt the Beliefs & Intentions Model are unjust and should be revised illustrates this point. In order to determine if the normative premises of this argument are correct, we need to resolve, *inter alia*, the controversies regarding questions such as which motivating reasons are praiseworthy or blameworthy (and the degree to which each reason is praiseworthy or blameworthy). In addition, we need to resolve the controversies concerning the content of consequentialist and deontological reasons that may apply—for instance, if there are deontological reasons that require (or entail) that criminal law tracks moral culpability (more or less) accurately (and, if there are, what is their exact content and force). The second task that such arguments must undertake is an evaluation of all the empirical questions that are relevant, given the applicable normative concerns. For example, in order to determine if the above argument is sound, we need to know the degree to which various alternative formulations of criminal prohibitions would deter more crimes and thus prevent more (undeserved) suffering. These tasks are not only difficult but also require different types of expertise. Yet without completing both tasks successfully, normative arguments regarding the law are not sound. Therefore, academic writing about the question of what the law should be may often be too ambitious.

To be sure, this concern is a matter of degree. Some normative and empirical assumptions are more evident than others, and certain assumptions may be fairly

85. For the importance of the latter type of reasons, see Re'em Segev, "General Versus Special Theories of Discrimination" (2021) 18:3 J Moral Philosophy 265; Re'em Segev, "Is the Philosophy of Discrimination Special?" (2022) 25:1 Jerusalem Rev Leg Studies 96; Re'em Segev, "Is the Criminal Law (So) Special? Comments on Douglas Husak's Theory of Criminalization" (2010) 1:1 Jerusalem Rev Leg Studies 3.

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obvious. However, at least most of the interesting and controversial arguments rely on claims that are not of this type. More specifically, it is important to notice that the above concern is not limited to arguments that rely on a consequentialist assumption concerning the applicable normative standards. This is the case since all plausible and prevailing moral theories, including deontological ones, consider (in addition to deontological reasons) also consequentialist reasons.[86] The only view that entails that there is no need to consider countervailing reasons is one that assumes a deontological reason that is necessarily and thus always decisive, regardless of all countervailing reasons. However, as I have pointed out above, this assumption is doubtful and uncommon.[87] Moreover, even those who endorse it do so only regarding certain deontological reasons (for instance, only regarding narrow versions of the Culpability Principle). Accordingly, even given the uncommon assumption that certain deontological reasons are always decisive, it is unnecessary to consider countervailing reasons only in the limited number of cases in which these reasons apply.

Of course, some people—for example, legislators, prosecutors, and judges—must often make decisions about how the law should be constructed and used. In these cases, a decision that is based on limited information, and accordingly on speculations, is unavoidable. But this requirement—and the justification that it entails for such speculations—rarely applies to academic work, which is accordingly justified only to the degree that its contribution is based on a systematic discussion. This usually requires limiting the scope of the discussion to only some of the questions that are pertinent to the overall evaluation of the laws under consideration. As long as academic works nevertheless address the question of what the law should be, all things considered, they accordingly ought to be more modest and acknowledge the assumptions that they rely on but do not argue for—which, as noted above, would typically be many—and clarify that the recommendations regarding the law are accordingly conditional (namely, depend also on these unargued-for assumptions).

Acknowledgments: I am grateful to Nadav Hod for excellent research assistance, and to the editors and two anonymous reviewers of the Canadian Journal of Law and Jurisprudence for their helpful comments. The research was funded by the Israel Science Foundation (grant no. 355/21).

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86. As John Rawls famously noted, "deontological theories are defined as non-teleological ones, not as views that characterize the rightness of institutions and acts independently from their consequences. All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy." John Rawls, *A Theory of Justice* (Harvard University Press, 1971) at 30.

87. See Section 3.

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