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Don't Abandon the Model Penal Code Yet!

Thinking Through Simons's *Rethinking*

Kimberly Kessler Ferzan[†]

Cul*pa*ble: Responsible for wrong or error: blameworthy.¹

Criminal law theorists argue that culpability is a prerequisite for blameworthiness and responsibility. The definition above renders our endeavor circular. What does it mean to say someone is culpable?

For some time, we thought we knew the answer to this question. Culpability was about choosing to commit a wrong, and the nature of this choice determined the degree of culpability.² This is the view of the Model Penal Code. Yet, as this Symposium reveals, our consensus has devolved to dissensus. Criminal law theorists are now challenging the conventional framework's ability to capture culpability adequately. These theorists argue that our current culpability theory pays insufficient attention to the motives, emotions, and desires of the actor and that these elements are a constitutive part of culpability.³

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1. Webster's II, New Riverside University Dictionary (1988).

2. See, e.g., Sanford H. Kadish & Stephen J. Shulhofer, *Criminal Law and Its Processes: Cases and Materials* 203 (7th ed. 2001) ("essentially [mens rea] refers to the blameworthiness in choosing to commit a criminal wrong").

3. Emotions, motives, and desires are distinguishable. Desires are mental states that take intentional objects—I desire x. Motives are most generally viewed as the ultimate purpose of an intentional action (I do X *for* Y). See Douglas N. Husak, *Motive and Criminal Liability*, 8 *Crim. J. Ethics* 3, 5-6 (1989) (discussing this account of motive). Although less relevant for our purposes, one may also be *motivated* by something. See *id.* at 6 (discussing this alternative account of motive). Finally, there are emotions—feelings that one has which are typically accompanied by physiological reactions. Emotions arguably have

In part, this battle over culpability is actually a proxy for a different debate, the question of the proper justifications for punishment. After all, if one adopts a theory of deterrence, then culpability is geared toward how deterrable the actor is. If one adopts a theory based on virtue, one's theory of culpability will be directed at moral failings.

Surprisingly, however, even within retributive theory, there are new rumblings. Theorists are now arguing that retributive desert is somehow linked to the emotions, motives, and desires of the actor. One such theorist is Ken Simons.⁴ Simons presents a thorough and articulate objection to the Model Penal Code's hierarchy, arguing that the Model Penal Code fails to capture culpability adequately because it confuses cognitive and conative mental states.⁵ Simons contends that there are separate cognitive and conative hierarchies that independently speak to the culpability of the actor. Moreover, Simons claims that the Model Penal Code is inadequate because it largely ignores conative states, which are, in his view, more closely linked with culpability.

In this Article, I contend that Simons's argument, properly understood, does not challenge the Model Penal Code's view of culpability. I begin by discussing the "old culpability" theory, which links culpability to choice and wrongdoing. I also show how the Model Penal Code

cognitive content. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 285-96 (1996) (discussing the evaluative view of emotions). Clearly, these three may be related. I may hate X (emotion); desire that X die (desire); and kill X because I want to see him suffer (motive). These categories can be collapsed or manipulated. For instance, one might create a crime that punishes an act done for the purpose of expressing or gratifying a desire, thereby manipulating the distinction between a desire and a motive.

4. Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463 (1992) [hereinafter *Simons, Rethinking*]; Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. Contemp. Legal Issues 365 (1994) [hereinafter *Simons, Culpability and Retributive Theory*].

5. I employ Simons's terminology here. Conative states are desire states, and cognitive states are belief states. See *Simons, Culpability and Retributive Theory*, *supra* note 4, at 372.

implicitly adopts this view. I next explore Ken Simons's competing view of culpability. After discussing some conceptual difficulties with Simons's new culpability hierarchies, I turn to the focal point of Simons's work—culpable indifference. I argue that Simons confuses two different senses of indifference: indifference as desire state and indifference as insufficient moral aversion. I contend that Simons's challenge to the Model Penal Code precariously rests upon this fracture in meaning. Indeed, I uncover four distinct claims that Simons makes, using different conceptions of indifference. I find that two of these claims are morally objectionable and therefore not viable challenges to the Model Penal Code, and two of these claims illuminate, but do not undermine, the Code's position.

I. CHOICE, CULPABILITY, AND WRONGDOING: THE IMPLICIT ASSUMPTIONS OF THE MODEL PENAL CODE

The traditional dichotomy in criminal responsibility is between wrongdoing and culpability. One is the bad act; the other is the guilty mind. What makes an act wrongful is subject to controversy,⁶ as is whether wrongdoing has any independent significance.⁷ Our focus, however, is on the other aspect of criminal blameworthiness—culpability. Culpability appears to be the dominant force in criminal

6. Compare Joel Feinberg, *Harm to Others* 32-36 (1984) (equating "harms" with "wrongs"), with Heidi M. Hurd, *What in the World is Wrong?*, 5 *J. Contemp. Legal Issues* 157, 210-12 (1994) (arguing "wrongful actions are not conceptually identical to actions that cause harm"). Because my argument does not turn on this distinction, I use these two terms interchangeably.

7. Compare Larry Alexander, *Crime and Culpability*, 5 *J. Contemp. Legal Issues* 1 (1994) (arguing attempts are as blameworthy as completed crimes); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 *Ariz. L. Rev.* 117 (1995); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 *J. Crim. L. & Criminology* 679 (1994); and Kimberly D. Kessler, *Comment, The Role of Luck in the Criminal Law*, 142 *U. Pa. L. Rev.* 2183 (1994), with George P. Fletcher, *Rethinking Criminal Law* 472-83 (1978) (taking the opposing view); Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One*, 88 *Cal. L. Rev.* 791 (2000); and Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 *J. Contemp. Legal Issues* 237 (1994).

law.⁸ We punish culpable actors who do no harm in the case of attempts, but find it harder to stomach crimes of strict liability where social harm has occurred but the actor is not culpable.

Despite its primacy in the criminal law, the guilty mind is not completely independent of the bad act. Rather, the traditional view is that content of culpability is dependent on what we determine to be wrong.⁹ An actor is culpable because she is "thinking about" (however we might wish to phrase her subjective state of mind) doing a wrong. Thus, culpability turns on whether the actor perceives her contemplated action to entail wrongful conduct. This is not a character assessment of whether an individual has bad thoughts, but rather an assessment of the actor's choice.

Now, the actor's choice may involve different subjective beliefs about the relationship between her act and a wrong. First, the wrong may be her goal, e.g., Jane fires the gun at George and kills him because she wants him dead.¹⁰ We might further split this goal-oriented action into ultimate purpose and mediate purpose. That is, Jane may want George dead as an end in itself (ultimate purpose) or Jane may want George dead as a means to some other end, such

8. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 251 (1952).

9. Hurd, *supra* note 6, at 194 n.48 ("one is culpable if (1) one subjectively believes that one will act wrongly, or (2) one is epistemically situated so that on the evidence reasonably available to one, one ought to believe that one will act wrongly."); Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. Rev. 319, 320 (1996) ("[O]ne is prima facie culpable when one acts under a representation of one's action that would make that action morally wrongful if the representation were true."); *id.* at 321 ("[C]ulpability is wrongdoing in the possible world created by one's representational states.").

10. Accord Moore, *supra* note 9, at 322. But see Claire Finkelstein, *The Irrelevance of the Intended to Prima Facie Culpability: Comment on Moore*, 76 B.U. L. Rev. 335, 337 (1996) ("This is arguably not a case in which killing is an end in itself, because it is not the killing, but rather pleasure, that is the end.").

as insurance money.¹¹ Either way, Jane's actions are directed toward committing the wrong.¹²

On the other hand, Jane may not be aiming at a wrong, but nevertheless, such a wrong may be a known side effect of her action.¹³ That is, Jane may be escaping from prison and plant a bomb to blow up the prison walls. If she knows that George is on the other side of the wall and will be killed when the wall explodes, she is aware of this side effect, but it is not her reason for acting. Additionally, Jane's belief may be further qualified as to her degree of certainty that George's death will result.¹⁴

Finally, an actor may be unaware that a wrong will occur as a result of her actions. For example, Jane may unreasonably fail to realize that she is running a red light and that she is creating the risk of killing George. When even a reasonable person would fail to acquire the belief or to make the judgment that she is risking a wrong, the actor will not be criminally responsible unless the crime is strict liability.

The Model Penal Code's mental states parallel the different relationships between choice and wrongdoing discussed above. Purpose requires that the forbidden result be one's conscious object or that one is aware, or hopes and believes, that a forbidden circumstance (e.g., that the property is stolen) exists.¹⁵ Knowledge requires

11. Accord Moore, *supra* note 9, at 322.

12. Accord Finkelstein, *supra* note 10, at 337 ("[I]t is doubtful that the distinction between intending something as an end in itself and intending something as a means to a further end is at all significant").

13. See also Moore, *supra* note 9, at 322.

14. Michael Moore offers two qualifications here: "Two variables within the object of any belief determine the degree of its culpability: (1) the probability with which the agent judged that his act would possess those attributes that would make it *prima facie* wrongful; and (2) the probability with which the agent judged that his act, although *prima facie* wrongful, would nonetheless possess other, justifying attributes that would make it not wrongful, all things considered." *Id.* at 325.

15. The Model Penal Code defines purpose as follows:

(a) Purposely. A person acts purposely with respect to a material element of an offense when:

that one be practically certain of the result of one's conduct or that one is aware that such circumstances exist.¹⁶ Recklessness entails the conscious disregard of the substantial and unjustifiable risk that such result may occur or that such circumstances exist.¹⁷ Negligence requires that one is unreasonably unaware of the substantial and unjustifiable risk that the forbidden result may occur or that the circumstances exist.¹⁸ This hierarchy

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes they exist.

Model Penal Code § 2.02(2)(a) (Proposed Official Draft 1962).

Given the debate over whether mental states are properly applied to conduct elements, see Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 *Stan. L. Rev.* 681, 722 (1983), I will confine my analysis to circumstances and results. Accord Simons, *Rethinking*, *supra* note 4, at 535 n.250 ("I largely accept the analysis of Robinson and Grall, who consider 'conduct' an inapposite object of mental states, and would instead simply ask whether the conduct was voluntary. . . . That is, they reject applying element analysis to basic bodily movements. I agree. If you voluntarily broke into another's home, there seems little point to asking whether you purposely, knowingly, or recklessly performed that action."); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 *S. Cal. L. Rev.* 953, 1035 n.24 (1998) (likewise agreeing with Robinson and Grall's analysis).

16. The Model Penal Code states:

(b) Knowingly. A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Model Penal Code § 2.02(2)(b) (Proposed Official Draft 1962).

17. Recklessness is defined as follows:

(c) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Model Penal Code § 2.02(2)(c) (Proposed Official Draft 1962).

18. The Code states:

presupposes that purpose is more culpable than knowledge; knowledge more culpable than recklessness; and recklessness more culpable than negligence.¹⁹

Hence, the traditional view of culpability, and the one adopted by the Model Penal Code, is that culpability entails choosing to commit a wrong. This definition has two aspects. The first is the requirement of choice. We require that the choice be made by someone who has the capacity to understand the choice she is making and the ability to control her actions.²⁰ When choice is impaired, we either partially or fully excuse the actor.²¹

The second aspect of our culpability definition, and my focus, is that the content of the choice determines the degree of culpability. The more certain the actor is of the result or the more the actor identifies with the result as an end or a means to her ends, the more culpable we deem her to be. Why does the content of the actor's choice matter for assessing her culpability?

The actor's subjective assessment of possible wrongdoing has direct bearing on retributive desert. Purpose is more culpable than knowledge because purpose entails aiming at the wrong, while knowledge entails

(d) Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Model Penal Code § 2.02(2)(d) (Proposed Official Draft 1962).

19. Recklessness is the default rule; negligence is generally disfavored in the Model Penal Code. See Model Penal Code § 2.02(3) (Proposed Official Draft 1962).

20. See Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* 548 (1997) ("[W]e are responsible for wrongs we freely choose to do, and not responsible for wrongs we lacked the freedom (capacity and opportunity) to avoid doing.").

21. See, e.g., Model Penal Code §§ 2.09 (duress), 210.3 (reducing murder to manslaughter when the crime is committed under the influence of an extreme mental or emotional disturbance) (Proposed Official Draft 1962).

toleration of the known wrong.²² Hence, when A aims at a wrong, her choice displays that this wrongdoing is part of her identity, her projects, her goals. A knowing actor does not so identify with the wrong, yet the choice the knowing actor makes displays that she is willing to tolerate the occurrence of a wrong.²³ As for recklessness, the actor's epistemic uncertainty means that the actor does not identify with or choose the wrong, in the same manner as knowing and purposeful actors.²⁴ Hence, culpability establishes the defendant's willingness to identify herself with wrongdoing. The more the wrong is part of the actor's reasons for acting, the more culpable she is and the more she deserves to be punished.²⁵

22. Accord Model Penal Code § 2.02 cmt. at 233 (Proposed Official Draft 1962) ("It is meaningful to think of the actor's attitude as different if he is simply aware that his conduct is of the required nature or that the prohibited result is practically certain to follow from his conduct."). The Doctrine of Double Effect turns on the purpose/knowledge distinction, and thus, the moral relevance of the difference between the two mental states is often explored in that context. See, e.g., Charles Fried, *Right and Wrong* 29 (1978) (footnote omitted) (purposeful conduct renders the "harm a part of our projects"); Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 *Phil. & Pub. Aff.* 334, 348 (1989) ("What seems specifically amiss in [instances of purposeful conduct] is the particular way in which victims enter into an agent's strategic thinking.").

23. The actor's knowledge that the harm will occur is part of the actor's *choice* but it is not the part of the actor's *intention*. See Michael E. Bratman, *Intention, Plans, and Practical Reason* 139-164 (Center for the Study of Language and Information 1999) (1987).

24. Recklessness may involve purposeful risk-taking as well. This aspect of recklessness is discussed *infra* note 25.

25. Jeremy Horder argues that criminal culpability is best described by the combination of three theories: capacity theory, character theory, and agency theory. Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 *Law & Phil.* 193, 201-213 (1993). While I call my view that the content of choice determines the degree of culpability "choice theory," Horder, seemingly speaking about the same thing (with exceptions noted below), dubs this "agency theory." See also Simons, *Culpability and Retributive Theory*, *supra* note 4, at 370 n.14 (observing that Horder's agency theory seems to "overlap significantly" with choice theory).

I disagree with Horder in two respects. First, he fails to distinguish between purpose and knowledge. Both are seen by Horder to be intentional and therefore the agent "hits the bulls-eye." Horder, *supra*, at 210 n.44. I fail to see how a knowing harm, where the agent desires something very different, is indistinguishable from a purposeful harm. In one instance, the agent will care

While this framework is perspicuous, some unresolved questions remain. The first is whether we should ever punish for negligence. Culpability for negligence cannot be predicated on the actor's choice to do wrong because the actor makes no such choice. Rather, an alternative account of culpability is required. At this point, choice theorists either abandon liability for negligence or switch horses.²⁶ The latter theorists offer a capacity theory at this point, arguing that the capacity to do otherwise is sufficient for culpability. But how can we justify the switch from one inquiry to another?²⁷

The second question left unresolved is how to understand two outliers to the general culpability scheme: willful blindness and extreme indifference to human life. In instances where the crime requires knowledge of an attendant circumstance but the defendant avoids obtaining that knowledge, courts, by legal fiction, have equated the defendant's willful blindness with knowledge.²⁸ Willful blindness is typically constructed as either knowledge of a high probability without belief to the contrary (the Model

very little if the bulls-eye is hit; in the other, failure to hit the bulls-eye will be a failure of his agency. Second, Horder's descriptive claim fails to take into account the distinction between purposeful and knowing risk taking. To the extent that an actor is aiming at creating a risk of harm to another, and this risk is created, the actor's agency succeeds even if no harm occurs. For example, the "fun" in Russian roulette is not the death of the playmate, but the risk being created.

26. See Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 Soc. Phil. & Pol'y 59, 70 (1990) (discussing the split among choice theorists: the subjectivists who believe conscious awareness to be required and the theorists who rely on H.L.A. Hart's explanation that it is fair to blame negligent actors who had the capacity to act reasonably).

27. This question presupposes that one theory can account for all our mental states. For rejections of a single explanatory theory, see Horder, *supra* note 25; R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 Buff. Crim. L. Rev. 147 (2002).

28. The classic willful blindness example is the drug mule who is asked to carry a suitcase across international borders, but who does not look in the suitcase and fails to obtain "knowledge" that she is carrying a controlled substance. In response to the defendant's willful blindness, courts equate this recklessness with knowledge or carve out another mental state as an alternative to knowledge.

Penal Code's alternative definition of knowledge)²⁹ or purposeful avoidance (the common law's approach that functions in lieu of knowledge).³⁰ But why do we seek to equate these special instances of recklessness with knowledge? We deem them to be of equal culpability, but how and why?

Also raising questions is extreme indifference to human life or "depraved heart" murder. In these cases, we punish some homicides, those that entail "extreme indifference," not as manslaughter but as murder.³¹ Extreme indifference jury instructions vary in focus from the number of victims, to the totality of the circumstances, to the degree of risk involved.³² Why are some instances of recklessness more culpable than others?

Extreme indifference and willful blindness are striking examples of failures in the Model Penal Code's hierarchy. These instances of recklessness challenge the Model Penal Code's implicit assumption that knowledge is more culpable than recklessness. If recklessness can be of equal or perhaps greater culpability than knowledge, we must further inquire as to what constitutes culpability. Are we overlooking some aspect of the actor's choice with this simplistic hierarchy, or is culpability dependent upon more than just the content of the actor's choice? Ken Simons adopts the latter view, arguing that the actor's desires are the missing link.

29. Model Penal Code § 2.02(7) (Proposed Official Draft 1962).

30. See *United States v. Jewell*, 532 F.2d 697, 704 (9th Cir. 1976) ("[Willful blindness] differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid sanctions of the statute while violating its substance.").

31. See, e.g., Model Penal Code § 210.2(1)(b) (Proposed Official Draft 1962). Russian roulette is a classic example of where the actor's sheer insensitivity to the risk of harm created may warrant significant punishment.

32. See Michaels, *supra* note 15, at 1007-12 (discussing these approaches).

II. KEN SIMONS'S CHALLENGE TO THE MODEL PENAL CODE

A. *Simons's Rethinking*

In *Rethinking Mental States*, Ken Simons argues that the Model Penal Code fails to capture culpability because the Model Penal Code's hierarchy of purpose, knowledge, recklessness, and negligence is too simplistic. According to Simons, the Code's hierarchy conceals the distinction between culpable beliefs and culpable desires.³³ By mixing the desire state of purpose with the cognitive conceptions of knowledge and recklessness, the Model Penal Code fails to capture fully the constitutive parts of culpability.

In lieu of the Model Penal Code's approach, Simons offers a different conception of culpability. Culpability is defined not only by the cognitive states of the actor but also by the desire states of the actor.³⁴ The belief and desire state hierarchies independently speak to culpability, and comparisons can be made intra-hierarchy but not inter-hierarchies.³⁵ Hence, an actor's culpability may vary depending on the extent to which she believes an event is certain,³⁶ or alternatively, an actor's culpability may depend upon the extent to which she desires that harm occur.³⁷ Importantly, within the latter desire-state, or "conative," hierarchy, Simons introduces the concept of "culpable indifference," the term of art Simons employs to

33. Simons, *Rethinking*, supra note 4, at 464.

34. Also, a third alternative exists where the actor does not have occurrent belief or desire states, but her conduct deviates from the norm. This third hierarchy has no bearing on criminal liability. See Simons, *Culpability and Retributive Theory*, supra note 4, at 386.

35. Simons, *Rethinking*, supra note 4, at 476, 477 ("[B]eliefs are not categorically more significant than desires, and desires are not categorically more significant than beliefs.").

36. Beliefs can range from relative certainty of X, to substantial possibility of X, to a belief of not X. *Id.* at 476.

37. There is also a desire hierarchy, ranging from desire for X; to no preference about X; to desire that not X. *Id.* In his Appendix, Simons further partitions the middle desire state into equivocal lack of preference about X, desire to create risk of X, and callousness about X, in caring less than one should. *Id.* at app. at 543.

characterize those instances in which an actor cares less than she should.³⁸

Why do we need to rethink mental states according to Simons? While the Model Penal Code's approach "almost works," it is "too simplistic."³⁹ In particular, cognitive recklessness, adopted by the Model Penal Code, ignores conduct (grossly deficient behavior) and conative (culpable indifference) senses of recklessness.⁴⁰ The latter omission is especially troubling to Simons because "[t]he modern account of recklessness, emphasizing cognitive awareness of risk, ignores or conceals the moral quality that 'culpable indifference' expresses."⁴¹ The Model Penal Code also ignores and hides other distinctions, failing, for example, to distinguish purpose (a conative state) from knowledge (a cognitive state).⁴² The Code survives, however, because some crimes combine belief and desire components and because it creates doctrinal exceptions in particularly problematic areas (e.g., willful blindness and extreme indifference to human life).⁴³

Simons believes that his emphasis on desire states has significant explanatory power. For example, Simons claims that culpable indifference underlies the culpability of extreme indifference and willful blindness. Extreme indifference is a conative state, incomparable to the cognitive state of knowledge.⁴⁴ Hence, the Model Penal Code's hierarchy inaptly conceives of all knowledge cases as more culpable than recklessness cases, while Simons contends that indifference can be just as culpable as knowledge is; they are simply in separate hierarchies. Willful blindness is likewise resolved in this manner, as the willfully blind actor displays indifference, even if she lacks

38. *Id.* at 478.

39. *Id.* at 468, 466.

40. *Id.* at 487.

41. *Id.* at 467.

42. *Id.* at 468, 473. Purpose is actually a hybrid, as Simons acknowledges. The actor must desire X and believe that she is capable of achieving X. *Id.* at 477.

43. *Id.* at 468.

44. *Id.* at 486-90.

cognitive knowledge.⁴⁵ Thus, to Simons, our inability to explain these two outliers is directly tied to the Model Penal Code's failure to consider culpable desires in addition to culpable beliefs.

Perhaps most significant is the approach Simons takes to negligence. While in *Rethinking Mental States*, Simons carves out his three hierarchies, culpable indifference is given teeth in *Culpability and Retributive Theory: The Problem of Criminal Negligence*.⁴⁶ Here, Simons addresses the question of whether a negligent actor is culpable under retributive theory. While some theorists vehemently argue that punishment for negligence is not justified,⁴⁷ Simons splits the baby. He finds that negligence that is the product of culpable indifference is sufficient for criminal liability, while belief and conduct-type negligence typically is not.⁴⁸ To determine which negligence cases are appropriately the subject of criminal responsibility, a counterfactual inquiry must be undertaken—would the actor have engaged in the conduct even if she knew that she was risking injury?⁴⁹ The negligent actor may justly be held accountable when she is indifferent to others; that is, in those instances in which she would have proceeded had she been cognitively aware of the risk. Hence, Simons claims that even in the absence of a culpable belief, an actor should be held accountable when she has a culpable desire.

Simons believes that culpability premised upon conative states is consistent with retributivism. "Retributive theory is and should be concerned with the actor's antisocial attitudes expressed in his conduct."⁵⁰

45. Id. at 500-02.

46. Simons, *Culpability and Retributive Theory*, supra note 4.

47. See, e.g., Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 Soc. Phil. & Pol'y 84 (1990); Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963).

48. Simons, *Culpability and Retributive Theory*, supra note 4, at 386.

49. Id. at 381. Simons's contribution to this Symposium places additional demands on the counterfactual inquiry to be undertaken.

50. Id. at 388.

Simons also views responsibility based on conative states as consistent with choice: "culpable indifference could express a choice-based retributivism, though in perhaps a slightly weaker sense of 'choice.'"⁵¹

Thus, Simons views the Model Penal Code as confusing beliefs and desires. The Model Penal Code's most crucial omission is its failure to include culpable indifference because this mental state more fully captures the moral failing of reckless actors. Moreover, culpable indifference explains what the Model Penal Code cannot—willful blindness and extreme indifference. Indeed, not only does culpable indifference have a different emphasis than the Model Penal Code's cognitive recklessness but also it is broader as it includes those actors who are unreasonably unaware of a risk *because of* their indifference.

Why does the Model Penal Code eschew the callousness of the reckless actor in favor of a more cognitive approach? Is it not the desire to kill that makes purposeful killings culpable? Why does the Model Penal Code lack any mention of these evil desire states in favor of its largely cognitive hierarchy?

As we shall see, Simons's culpability triumvirate is unworkable. First, I shall demonstrate that while Simons claims to adopt three culpability hierarchies, he, in fact, adopts only one—the conative hierarchy. Moreover, I contend that separate and distinct conative and cognitive hierarchies cannot coexist within one culpability theory.

B. Simons's Underlying Culpability Theory

While Simons claims that there are three relevant mental state hierarchies, and that comparisons cannot be made inter-hierarchy, he implicitly makes such comparisons and adopts a vision of culpability that includes only conative states. In Simons's view, a belief that one

51. Id.

will risk or cause harm is neither a necessary nor a sufficient condition for culpability.

Consider Simons's argument about knowledge. Simons contends that knowledge masks instances of indifference, although not all cases of knowledge are instances of indifference.⁵² Thus, in those cases where we believe knowledge to be culpable, Simons contends that these are cases where the belief requirement is serving as a surrogate for the desire.⁵³ If X blows up a prison wall knowing Y is on the other side, it is X's indifference that does the work, not X's belief.⁵⁴ On the other hand, a drug company that manufactures a socially valuable drug but that is aware of the statistical probability that one of its consumers will die, is not indifferent and according to Simons, not culpable.⁵⁵ Thus, to Simons, "the 'knowing' element of murder is . . . an error, albeit a largely harmless one."⁵⁶ The indifference determines the culpability, not the defendant's belief. Hence, despite the fact that these defendants "know" they will cause harm, this condition is insufficient for culpability. Rather, according to Simons, we must look to the defendant's conative state.

Beliefs, however, are not even necessary conditions for culpability. Simons is willing to punish those negligent actors who are unaware that they are risking harm, if they would have continued had they perceived the risk.⁵⁷ Thus, Simons is willing to punish these actors for their indifference, despite the lack of any cognitive appreciation of the risk being created.

Now, if beliefs are neither necessary nor sufficient conditions for culpability, one must question whether they do any work in Simons's analysis. He claims that beliefs

52. Cf. Michaels, *supra* note 15, at 963 (premising his argument on the assertion that all cases of knowledge entail the same aspect of indifference).

53. Simons, *Rethinking*, *supra* note 4, at 492.

54. *Id.* at 492.

55. *Id.* at 492-93.

56. *Id.* at 493.

57. Simons, *Culpability and Retributive Theory*, *supra* note 4, at 388. For further qualifications to this counterfactual inquiry, see Simons's contribution to this Symposium.

are more tractable; that the jury's inquiry is simpler; and that beliefs often serve as surrogates for desires.⁵⁸ These are all pragmatic arguments. In no sense does Simons adopt a view that belief states are themselves a constitutive part of culpability.

Moreover, while Simons claims that inter-hierarchy comparisons cannot be made, the thrust of his argument makes these comparisons and implicitly favors conative states. How can the drug manufacturer be compared to the prison escapee? One has a culpable belief; the other has a culpable desire. If inter-hierarchy comparisons cannot be made, then the manufacturer's culpable belief cannot be judged against the escapee's culpable desire. Indeed, given that Simons contends that the drug manufacturer *is not culpable*, one must question how he makes this determination. For Simons, the common denominator for culpability is the conative state.

Most importantly, it is difficult to conceive of both of these separate hierarchies coexisting within one culpability theory. Consider the following scenario offered by Simons. In arguing that beliefs are not equivalent to desires because one may hold the same belief but have different feelings about the belief, Simons presents three alternative scenarios with an actor running a red light.⁵⁹ The first permutation is that the actor is cognitively reckless in running a red light and seeing pedestrians in the crosswalk and is indifferent to pedestrians (cognitive recklessness and culpable indifference). Second, the actor is likewise cognitively reckless for running the light, but hopes not to hit a crossing pedestrian, whom he notices is his friend (cognitive recklessness and no indifference).⁶⁰ The third

58. *Id.* at 390; Simons, *Rethinking*, *supra* note 4, at 493 n.288.

59. Simons, *Rethinking*, *supra* note 4, at 497.

60. This is Simons's assessment. I believe that if you choose to take the risk of hitting your friend this is the only kind of indifference that the law should care about, even if you hope to avoid injury. In e-mail correspondence, Simons relayed that he now views this actor as evincing regret, which does not affect punishment. This retraction does not, I believe, undermine the usefulness of employing this particular example for explicative purposes. This example is also employed *infra* text accompanying note 71 to illuminate the confusion within Simons's analysis.

instance entails the actor being unaware of the pedestrian, but indifferent to pedestrians nevertheless (negligence and perhaps culpable indifference).

How do we rank these cases? This depends on our theory of culpability. The first and third have what Simons would deem to be culpable conative states, while the first and second register on the cognitive culpability scheme. While Simons says that we cannot compare beliefs to desire states, how should a sentencing judge evaluate three defendants each presenting one of these mental states? Which cases are alike and which are different? One needs a theory of why either mental state is relevant to culpability, and then one *should* be able to make culpability comparisons. Simons's isolated hierarchies do not amount to a coherent account of culpability.

Indeed, part of the problem with Simons's culpability hierarchy is that he fails to resolve the underlying conceptual question of what makes an actor culpable in the first instance. While, in *Rethinking Mental States*, he argues that his approach is consistent with both deterrence and retributivism, in *Culpability and Retributive Theory*, he focuses on justifying culpable indifference within retributive theory. But his conception of retributive theory is unclear. He argues that culpable indifference is consistent with a "weak" choice-based view, a character view under Jeremy Horder's ideal agent theory, and arguably a third counterfactual approach to culpability.⁶¹

To illustrate, in claiming that a choice-based retributivist can punish even in the absence of cognitive awareness, Simons turns to Michael Moore's claim that "[w]hat makes the intentional or reckless actor so culpable is not unexercised capacity...but the way such capacity to avoid evil goes unexercised; such wrongdoers are not even trying to get it right."⁶² Likewise, Simons claims, culpably indifferent actors are not even trying to get it right. This

61. As Simons has since indicated to me, he was intentionally agnostic as to the best theory for retributive culpability. The problem is, however, that how we rank these cases is inevitably dependent on the theory selected.

62. Simons, *Culpability and Retributive Theory*, supra note 4, at 389.

failure of culpably indifferent actors to exercise their capacity to get it right, *because* they are culpably indifferent, is sufficient for retributive blame under a choice-based view according to Simons.⁶³ Hence, under this conception of culpability, arguably the first and second actors exercise the most choice and are therefore the most culpable.

Simultaneously, however, Simons claims that culpable indifference may be better understood as part of Jeremy Horder's character theory. Horder argues that our culpability theory is in part explained by character theory. Specifically, Horder claims that we deem individuals to be culpable when they deviate from our conception of the "ideal agent." Yet, Horder himself finds that this ideal agent character theory cannot explain the distinction between mental states and instead relegates character theory to explaining "confession and avoidance" defenses, such as duress.⁶⁴ All three actors depart from our conception of an "ideal agent," but who is least ideal?

Finally, to explain the distinctions between mental states, Simons turns to a third counterfactual inquiry for culpability. In discussing the rationale for distinguishing advertent from inadvertent risk-taking, Simons suggests, "[t]he assumption . . . is that an actor who is unaware of a risk is less at fault than a consciously reckless actor because we cannot be confident that the first actor would have proceeded despite the risk if he had been aware of it."⁶⁵ Simons makes the same claim for the recklessness/knowledge distinction: "the reckless actor, while he was willing to create a substantial risk of harm to another, might not have been willing to cause a harm if he believed that that result was a virtual certainty."⁶⁶ Hence, to Simons, our culpability hierarchy rests on a lack of

63. I take Moore's language to be infelicitous here, and inconsonant with his general theory of culpability, which is clearly predicated on the content of choice and not the degree of unexercised capacity. See generally Moore, *supra* note 9 (distinguishing degrees of culpability). However, Moore's argument is consistent with choice-based responsibility as expressed *infra* Section III.B.3.

64. Horder, *supra* note 25, at 208-09.

65. Simons, *Culpability and Retributive Theory*, *supra* note 4, at 380.

66. *Id.* at 381.

epistemic certainty that the actor would have proceeded had the facts been otherwise. Simons, however, claims that where we can prove the actor would have acted anyway because of the actor's antisocial attitude, the distinctions between mental states no longer hold. According to this view, the second actor is least culpable because we are most certain that he would not act if he knew he would hit his friend.

In summary, Simons fails to ground his culpability theory in a theory of culpability. His failure to define why retributivism cares about character, choice, and/or our epistemic limitations provides the reader with no ruler by which to measure his theory. Hence, Simons flounders, never clearly seeing that he cannot define culpability both cognitively and conatively. Nevertheless, I believe Simons is best understood as endorsing a theory of culpability based on conative states. To him, beliefs are neither necessary nor sufficient for culpability, nor do they seem to be supported by the same rationale as conative states.

With Simons thus understood, we turn to the more fundamental problem with Simons's approach: he confuses different meanings of indifference. Indeed, it is only by resting his argument on this fissure in meaning that he is able to claim that his view is superior to the Model Penal Code's. However, once we unpack the disparate claims made under the indifference umbrella, we find that these claims are either wholly objectionable or consistent with the Model Penal Code.

III. THE MEANING OF INDIFFERENCE

Simons confuses different meanings of indifference. This confusion masks four different claims that Simons is making. Properly understood, two of Simons's claims are morally objectionable. The other two are compatible with the Model Penal Code's current approach to culpability.

A. *Two Conceptions of Indifference*

Consider how Simons defines indifference. "The terms 'indifference,' 'not-caring,' and 'callousness' all describe a culpable *desire* state—not a desire to harm, but an insufficiently strong *aversion* to harm, or a desire or willingness to create a *risk* of harm."⁶⁷ "Although 'reckless indifference' can have many meanings, I use it here as a term of art for any of the following: literal indifference about whether or not something occurs; a desire to create a risk; and 'callousness,' or caring less about a result or circumstance than one should."⁶⁸ Simons lists "three different ways in which recklessness can be a mental state of desire": equipoise; desire to create risk of harm; and caring less than one should.⁶⁹ Simons also states that "[c]aring less than one should' is not a single desire state. Rather, it expresses what philosopher Holly Smith has called 'a reprehensible configuration of desires and aversions.'"⁷⁰

Now consider the following example. Danielle decides to play Russian roulette with Andrew. Danielle does not particularly care for Andrew, and is wholly equivocal as to whether Andrew is killed. Danielle pulls the trigger, and Andrew dies.

Contrast Darla who plays Russian roulette with Abe. Darla is very fond of Abe; indeed, the two are dating. Yet, Darla and Abe enjoy the rush that comes from playing Russian roulette. Darla pulls the trigger, and Abe dies.

In the first example, Danielle can be said to be indifferent in two different respects. First, her desire state about Andrew is indifferent. She cares not whether he lives or dies. Second, she may be said to be indifferent because, although faced with the risk of death, she chooses to pull the trigger.

67. Simons, *Rethinking*, *supra* note 4, at 466-67.

68. *Id.* at 477.

69. *Id.* at 486-87, app. at 543.

70. *Id.* at 487 n.86 (quoting Holly M. Smith, *Culpable Ignorance*, 92 *Phil. Rev.* 543, 556 (1983)).

Darla, on the other hand, is indifferent only in the latter sense. That is, Darla does care, indeed she cares deeply, about Abe. She is *not* indifferent towards his death. Nevertheless, we may still say that her choice, to play Russian roulette, manifests indifference to human life.

The first meaning of indifference is a desire that the actor has. A desire is a mental state. Like any mental state, it takes an intentional object. That is, an actor must desire (or be indifferent toward) *something*. The latter sense is our normative evaluation of the actor's choice. We do not care about how the actor feels when we label her indifferent. Rather, no matter what she may wish, hope, or desire, we may decide that she does not care *enough*. This latter sense of indifference does not belong within a desire state hierarchy, because it is not a subjective mental state of the actor. It is our evaluation of the actor's choice.

Is Darla indifferent under Simons's theory? Note that Simons's alternative definitions yield that Darla is and is not indifferent. She certainly cares less than she should, thus satisfying the normative definition of indifference. Yet, she is not in equipoise. Rather, her desire is for Abe to live.

Upon which sense of indifference does Simons intend to rely? The answer is both. For example, at times, Simons clearly cares about an agent's desires. Consider Simons's driver who runs a red light, hoping not to hit his friend in the crosswalk:

Belief that one will create a risk or cause a harm cannot be equated with a culpable desire-state, however. Our driver could be aware of the harm yet care very much, as in the case where the pedestrian he sees is a friend. Or he could be unaware yet indifferent.⁷¹

Simons takes a similar approach to distinguish Jack from Jill, two actors who are receiving stolen property:

71. Id. at 497 (footnotes omitted).

If Jill hopes, and does not merely believe, that the goods are stolen, perhaps she hopes to be part of an ongoing stolen goods ring, or perhaps she simply finds immoral satisfaction in facilitating crime. In a second scenario, by contrast, if Jack merely believes the goods are stolen, but actually hopes that they are not, then he does not really want to facilitate crime. He simply wants to take advantage of a below-market price. Jill is arguably more blameworthy.⁷²

Simons also claims that the strategic bomber who knowingly kills may be less culpable because he “regrets having to cause civilian casualties.”⁷³

In these examples, Simons looks to the defendants’ desires. The driver cares about whether the pedestrian is killed; Jack hopes the goods are not stolen; the bomber wishes he did not have to cause civilian casualties. All three of these cases rely on the sense of indifference that distinguishes Danielle from Darla: what was the defendant’s desire regarding the harm? All three of these agents did not desire to cause the harm that was going to occur. Thus, Simons may be interpreted as arguing that the Model Penal Code truly ignores desire states.

Now consider a different example where Simons claims there is indifference. “Someone blows up the wall of a prison to help an inmate escape, knowing that she is very likely to kill a guard, but not desiring to kill him. . . . Here, the belief-state is a surrogate for the desire-state.”⁷⁴ This example privileges the normative sense of indifference. Knowing actors are indifferent in the sense that they do not care as much as they should about whether the harm occurs. Here, Simons ignores the very factor that he gave meaning to in the previous examples: whether the agent hoped or desired that the harm occur.

Simons employs a confession and avoidance strategy to deal with the multiplicity of meanings that he gives to indifference. At one point he notes, “[t]hese dramatically

72. *Id.* at 500.

73. *Id.* at app. at 546-47.

74. *Id.* at 492.

different conceptions of culpable indifference again underscore the need for clear articulation of the culpable indifference criterion if it is to be used more widely.”⁷⁵ After recognizing that “caring less than one should” is not really a desire state, Simons footnotes:

I qualify this assertion because the second and third senses of reckless indifference are not, strictly speaking, within the hierarchy. For example, an actor might be recklessly indifferent in desiring to risk harm, or in not caring as much as she should about whether she causes harm, yet she might at the same time desire not to cause harm. . . . And since these senses are not within the hierarchy, one cannot, without further analysis, directly rank them in seriousness.⁷⁶

This confession is unsatisfactory. Simons claims that his conceptual model, containing beliefs, desires, and conduct, is preferable to the reigning hierarchy. Yet, most of the time, Simons is not relying on indifference as a desire state. Thus, to defend the Model Penal Code against Simons’s attack, one must recognize that Simons is not presenting one coherent thesis. Rather, indifference plays different roles for different arguments that Simons makes.

In the next section, I extract what I take to be four separate claims that Simons is making under the penumbra of indifference. I argue that once properly understood, Simons’s view may supplement and illuminate the Model Penal Code, but he does not challenge it.

B. Four Claims Behind the Confusion

In this section, I unpack four claims that Simons makes, each using indifference in a different manner. I contend that the former two do not pose a challenge to the Model Penal Code, as both are inconsistent with choice-based responsibility, and therefore should be rejected

75. Simons, *Culpability and Retributive Theory*, *supra* note 4, at 397.

76. Simons, *Rethinking*, *supra* note 4, at app. at 543 n.271 (citation omitted).

outright. I argue the latter two do not challenge the Model Penal Code's hierarchy, but complement it.

1. Desire States Are Constitutive Parts of Culpability

Simons's suggested hierarchy views "culpable indifference" as a desire state. That is, just as one might desire ice cream; one may have feelings, emotions, and desires about other people. Consider the premise of *Rethinking Mental States*. Simons contends that the Model Penal Code conceals the distinction between belief and desire states.⁷⁷ Hence, Simons constructs separate hierarchies, with beliefs in one hierarchy and desires in another.⁷⁸ Indifference, he claims, is part of the desire hierarchy.⁷⁹ Without debating the ontology of such states, it should suffice to say that indifference, as a desire state, is a mental state, akin to beliefs and intentions.

Hence, the clear thesis of *Rethinking Mental States* is that the Model Penal Code is misguided in that it confuses the distinction between beliefs and desires. This is not a claim that the normative sense of indifference matters, because the normative sense is wholly out of place in the hierarchy. Rather, Simons states that we must pay attention, not just to the agent's beliefs, but also to the agent's desires.

This claim does not present a viable challenge to the Model Penal Code. We should not view desires as constitutive parts of culpability. The first problem is that desires are vague.⁸⁰ While Simons recognizes that reliance on desire states is vague in the sense that it permits significant factfinder discretion and fails to give actors guidance as to what is forbidden by the law, the vagueness

77. *Id.* at 463.

78. *Id.* at 465.

79. *Id.* at 466-67.

80. Cf. Simons, *Culpability and Retributive Theory*, *supra* note 4, at 377. Conversely, Simons criticizes belief states, asking what exactly the actor has to believe and arguing that awareness is difficult to identify. *Id.* at 382, 384. For my partial resolution of this problem, see Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 *J. Crim. L. & Criminology* 597, 627-641 (2001).

problem is not simply tied to pragmatism and legality concerns.⁸¹ There is an epistemic problem—our feelings and desires may be opaque to us. How does one premise culpability on such an indiscernible state of mind?

Indeed, belief states are not just more tractable; they are bounded by rationality. A rational agent cannot have inconsistent beliefs: I cannot believe both that my pen is red and that my pen is not red at the same time. To believe so would be criticizably irrational. On the other hand, desires need not be so reconciled. I can desire both to lose weight and to eat a piece of chocolate cake. Desires *compete* in ways that beliefs do not.⁸²

If we are to rest culpability on desires, how should we do this in those cases where the desires conflict? Are we culpable simply for having one desire? Are we culpable only if the stronger desire is the “bad” one? Arguably, it is the desire that one acts upon that makes one culpable or not. But why? Both desires are a part of me. Why does it matter that one desire won the day? Here, the response seems clear—because I *chose* to act on that desire.⁸³ But then, it seems that culpability is not dependent upon a datable desire state but the *choice* that one makes.

Perhaps most problematic for resting culpability on desires is the free will objection. As Heidi Hurd discusses in her “liberal” objection to hate crimes, punishing for an agent’s dispositions and desires punishes her for something she cannot control.⁸⁴ Indeed, to alter our character, our

81. These concerns are more appropriately levied against the conception of indifference discussed *infra* III.B.3.

82. Cf. Anthony M. Dillof, Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes, 91 Nw. U. L. Rev. 1015, 1066 (1997) (noting, in the hate crime context, that motivations may conflict).

83. Accord Moore, *supra* note 9, at 322 (noting that desires inevitably conflict and intentions are the “resolution of that conflict in the form of a decision”).

84. Heidi M. Hurd, Why Liberals Should Hate “Hate Crime Legislation,” 20 Law & Phil. 215, 229-32 (2001). Hate crimes raise the question of whether motivations and desires can enhance culpability. Heidi Hurd and Anthony Dillof contend that this enhanced culpability theory is incompatible with liberalism. *Id.*; Dillof, *supra* note 82, at 1080. Hate crimes might be independently justified as a different kind of wrong; however, Anthony Dillof has also unpacked this rationale and found it to be lacking under either a “right not to be discriminated

beliefs, our desires, we must go about it indirectly by, for example, going to therapy.⁸⁵ We cannot “will away” our desires;⁸⁶ we can only make the right decisions. Hence, to punish for a factor in the agent’s reasoning, rather than the product of that reasoning, punishes the agent for something beyond her control.

Of course, these examples point to problems with using desires to enhance culpability, but if desires were a constitutive part of culpability, they would also mitigate. Is the hitman less culpable if he wishes that he could earn an honest dollar? Is the Russian roulette player less culpable because she cries when her companion dies? Of course not. These desires are irrelevant because faced with the choice, the actor chose to do wrong.⁸⁷

Hence, we should not view desires as constitutive parts of culpability. They are vague, contradictory, and most importantly, unchosen. Thus, the analytical framework of *Rethinking Mental States*, which emphasizes desire states, is not superior to the Model Penal Code’s conception of culpability.

against” theory (as this gives us a right to another’s thoughts) or a secondary wrong theory (if the legislation is targeted towards these secondary harms, such as fear and unrest in the community, the use of the offender’s motivations is a crude proxy, which is over and under inclusive, and not empirically justified). See *id.* at 1036-62; cf. Allison Marston Danner, 6 *Buff. Crim. L. Rev.* 389 (2002) (defending her view that hate crimes are more wrongful and demanding, in Model Penal Code-like fashion, that the actor be reckless with respect to this element).

85. Hurd, *supra* note 84, at 224-25.

86. Accord *id.* at 224-26 (“[I]t seems less clear to what degree people can will away, or choose not to have, particular character traits, and specifically particular emotions and belief.”); Dillof, *supra* note 82, at 1066 (“[O]ur beliefs and desires are not a result of a direct act of will or free choice.”).

87. There is one way in which desires are relevant to culpability: when the desire to do wrong is the reason for action. Hence, if the hitman desires to hit the victim, believes that by pulling the trigger he will do so, and then pulls the trigger, the hitman has purposefully killed the victim. She chooses to commit a wrong—her desire is her reason for acting, not simply a feeling toward the victim. This view of how desires relate to choice is encompassed by the Model Penal Code’s definition of purpose.

2. Free-Floating Indifference Is Relevant to Culpability

Not only can Simons be understood as believing desires to be a constitutive part of culpability, but also he may be read as adopting a far broader character-based approach. Consider Simons's negligence analysis. Simon has us imagine Betty, who runs a red light, but fails to advert to a pedestrian.⁸⁸ He claims that Betty is culpably indifferent if she satisfies a counterfactual inquiry: would she have run the light even if she had seen the pedestrian?⁸⁹

Here, we are not asking whether an actor showed insufficient aversion to wrongdoing. After all, the actor does not know she is endangering anyone! Rather, we are to ask, if faced with the choice, whether the actor would have proceeded. Thus, we look to how the agent feels about her fellow man at the time she acts negligently.

This approach takes indifference as a desire state one step beyond the previous inquiry. Before, we asked how the agent felt *about the harm* that was about to occur. Here, the agent does not advert to the harm, so she has no attitude directed toward it. Rather, the only attitude she has is toward her fellow man in general. That is, the intentional object of her indifference, rather than being an element of the crime, is all of mankind. Hence, we step from one desire of the agent's to constructing that agent's character. Is she an indifferent person? The indifferent negligent actor, who because of her indifference fails to notice the harm, is blamed for what her choice would have been had she noticed the harm.⁹⁰

Such counterfactual inquiries are highly problematic. Asking this counterfactual question does not amount to punishing the actor for what she did, but for what she would have done had the situation been different. Why not

88. Simons, Culpability and Retributive Theory, *supra* note 4, at 365.

89. *Id.* at 381.

90. Simons limits the reach of his counterfactual inquiry in his contribution to this Symposium. An evaluation of whether these limitations meet my objection will have to await another day.

ask: had Mary not been born rich, would she have robbed this bank? Had Tom been asked, would he have joined a gang? Or, consider the converse: Had Julie known the victim was her sister, would she have pulled the trigger? We often look in hindsight with our “could’ve, would’ve, should’ve,” but are we going to place criminal responsibility on the use of counterfactual inquiries? Are we going to abandon any concept of free will and simply predict what people would have done had the facts been different? To rely on counterfactual inquiries effectively punishes based on prediction and not choice.⁹¹

Thus, while Simons employs a far broader sense of indifference to do the work for his negligence analysis, his attempt at resolving the problem fails. The approach is inconsistent with choice-based responsibility and amounts to punishing for character.

3. Allusive Drafting Styles More Fully Capture Culpability

In contrast to the desire-state approach, which focuses on the actor’s mental states—the things she wants, hopes,

91. Simons might attempt to refine his inquiry by drawing on the work of Samuel Pillsbury. Samuel H. Pillsbury, *Crimes of Indifference*, 49 Rutgers L. Rev. 105 (1996). Pillsbury argues that we may root this indifference in a prior culpable choice, because we choose our perception priorities. *Id.* at 152. Thus, when we do not pay attention because we are indifferent, we are not being punished for what we would have done, but for what we did—choosing not to pay attention because of our indifference to our fellow man. However, to the extent that Pillsbury wishes to refine the inquiry by relying on our chosen perception priorities, he must demonstrate not only that we made a choice of our perception priorities, but *we* (in a morally meaningful sense) made a *choice* (in a morally meaningful sense) of our perception priorities. First, the question is who is doing the choosing of these perception priorities. Is it enough that our bodies do it, or must we consciously consider what we are paying attention to? Certainly, we are not responsible for our heartbeats or reflexes; rather, we require consciousness—it is the central aspect of moral responsibility. Are *we* consciously doing the choosing? Next, is this a morally meaningful *choice*? Is it a choice that demonstrates an understanding of the consequences? If/when we choose our perception priorities, are we making a culpable choice vis-à-vis the eventual result that obtains?

For further elaboration of my objections to Pillsbury’s approach, see Ferzan, *supra* note 80, at 639-641.

and desires—Simons also views indifference as not caring sufficiently about the harm that is about to occur. This is not a claim that the agent is to be blamed for her desires, but a claim that the agent's choice to do wrong reveals that she has failed to give moral prohibitions sufficient respect. Thus, an agent who knows that her action will result in death may strongly desire that the death not occur, but still, her choice manifests a willingness to accept the consequences of her act.

Let us explore this sense of indifference in a bit more detail. Traditional analysis of rational action presupposes that action is the product of a practical syllogism where the actor's major premise is her goal, motive, desire, and the minor premise is the actor's belief that engaging in action will further the major premise.⁹² For example, if I go to the Ben and Jerry's, this is the result of (1) my desire ice cream and (2) my belief that if I go to Ben & Jerry's down the street someone will sell me some. My action, going to the store, is both caused and rationalized by my beliefs and desires.⁹³ While this model accounts for *rational* action, it does not fully account for *culpability*. For example, the actor who receives stolen property will not (in most cases) desire that the property be stolen—it will not be a part of her major or minor premise.

What accounts for the culpability of the knowing actor? Simons, in discussing the crime of receiving stolen property, claims that indifference is manifested because the agent's belief that the property is stolen should have counted as a reason against acting but did not.⁹⁴ Is it the belief that the property is stolen that does the work? Or

92. See Michael S. Moore, *Law and Psychiatry: Rethinking the Relationship* 10 (1984). As Michael Moore explains, our reasons for action are the result of the following practical syllogism:

- (1) The major premise: "the agent's desires (goals, objectives, moral beliefs, purposes, aims, wants, etc.)"
- (2) the minor premise: the agent's "factual beliefs about the situation he is in and his ability to achieve, through some particular action, the object of his desires."

93. *Id.*

94. Simons, *Culpability and Retributive Theory*, *supra* note 4, at 392-93.

should an actor have an aversion to committing a wrong? Here, indifference comes into play in a different manner. If I desire a watch and believe it to be stolen, then I should not take the watch because morality demands that I not possess property taken from its rightful owner. Indeed, all cases of knowledge are cases where committing the wrong is not motivational but where knowledge that the wrong will occur should repel. It is this sense of indifference that Simons taps into when he claims that “the ‘knowing’ element of murder is . . . an error” because the belief requirement is serving as a surrogate for the desire.⁹⁵ Hence, when the prison escapee blows up the prison wall, knowing he will kill the guard on the other side, the willingness to accept the wrong is the indifference at work.

Indifference as insufficient moral aversion is consistent with the Model Penal Code’s scheme set forth in Section I. This approach to indifference focuses on the actor’s choice. While it fails to account for purposeful (and arguably some reckless) action where the wrongdoing is the reason *for* action, the approach encompasses those instances where the actor’s choice entails tolerating a wrong. We expect actors to be dissuaded from conduct that is morally wrongful.

Why does the Model Penal Code call this “knowledge”? Whether one dubs this mental state “indifference” or “knowledge” is really a question about how to draft mens rea. Consider what Samuel Pillsbury dubs “allusive” and “analytic” drafting styles.⁹⁶ While the former “alludes to the central wrong by moralistic description rather than by defining the particular features of the choice or conduct involved,” the latter “defines wrongdoing by describing particular aspects of harm doing, such as the actor’s goal or state of mind, usually without explicit moral language.”⁹⁷ Hence, to commit a crime knowingly (analytic) shows that

95. Simons, *Rethinking*, supra note 4, at 492-93.

96. Samuel H. Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter* 84 (1998).

97. *Id.*

this person has insufficient aversion to moral wrongdoing (allusive).⁹⁸

As we now see, knowledge and indifference are two sides of the same coin: it is not that they are both discrete mental states, but that one is an analytic style of mens rea drafting and the other focuses on the central moral wrong. Hence, while Simons may decide the allusive drafting style is preferable to the analytical style, this determination does not threaten the Model Penal Code's underlying conception of culpability.

4. Attitudes Toward Wrongdoing May Be Relevant to Culpability

There is one final way to understand Simons's thesis about indifference. It relies on the actor's subjective attitudes toward wrongdoing, without relying on the actor's desires or feelings about the wrong. This is the sense of indifference employed by Alan Michaels when he defines "acceptance."

Let us consider Alan Michaels's thesis.⁹⁹ Alan Michaels claims that when we face practical certainty, we not only afford the reason insufficient weight, we *accept* the result.¹⁰⁰ We psychologically resign ourselves to the harm's occurrence. Michaels then argues that we can resolve extreme indifference and willful blindness by recognizing that some of these cases likewise manifest acceptance.¹⁰¹ The actor may have the same resignation that wrong will occur, despite her epistemic uncertainty. When she is

98. Looking at these two drafting styles highlights Simons's confusion. Rethinking Mental States purports to be about analytical drafting styles. Indeed, not only does Simons "aim[] to define wrongdoing into component parts," *id.*, but also Simons claims that we do not currently have enough parts! Simons's stated philosophy is not that we need general attitude language to better capture the essence and expression of culpability, but that we must delve deeper into the mechanics of choice and focus on the separate belief and desire components.

99. I use Alan Michaels's work here because it is a fully developed account of this view of indifference. Moreover, in his contribution to this Symposium, Simons builds on Michaels's thesis.

100. Michaels, *supra* note 15, at 955.

101. *Id.* at 977-1019.

equally willing to tolerate a wrong, whether certain or just likely,¹⁰² why, asks Michaels, should we deem her to be of lesser culpability?¹⁰³ If the actor is determined to commit the crime willy-nilly, why should she “luck out” and only be reckless, just because she is uncertain the harm will occur?¹⁰⁴

This sense of indifference focuses on the defendant's attitudes toward wrongdoing. In this way, it is compatible with the Model Penal Code. The defendant may want the harm (purpose) or she may be willing to tolerate the harm (knowledge) or the risk of harm (recklessness). Rather than focusing on *our* judgment of the actor's attitude—that it

102. To make this determination, Michaels asks whether the defendant counterfactually accepted the harm. This inquiry is not a prediction of what the actor would have done, but a method for determining the actor's degree of indifference to a harm that she knows she is risking.

103. Michaels, *supra* note 15, at 967-70.

104. I think that Michaels does an admirable job of capturing the culpability of a knowing actor. He may very well be correct in arguing that those who have psychologically resigned themselves to potential harms are as culpable as those who face certainty. My concern, however, is that Michaels's approach does not have greater explanatory power in resolving willful blindness and extreme indifference than does the Model Penal Code. Regarding willful blindness, Michaels ignores those cases where an actor would not act had she known, but does everything in her power not to know. Imagine Alex who is given a suitcase to carry into the country. Alex, aware of the criminal law, recognizes that if he looks in the suitcase and he sees drugs, he will be guilty of a drug crime, and decides that it is in his best interest not to know. That being said, Alex hopes that the suitcase does not contain drugs, and if the suitcase were to fall open, and he were to see drugs, he knows he would not have the strength to go forward with the crime. Indeed, Alex is so afraid to learn what is in the suitcase that he tapes the suitcase together so it will not fall open. I submit Alex is willfully blind, but cannot be said to have accepted that he is carrying drugs. Michaels does acknowledge the possibility of Alex's existence but denies that such an actor is willfully blind. Michaels, *supra* note 15, at 998.

Michaels's resolution of extreme indifference is also off-the-mark. First, the Model Penal Code's formulation, and the work of criminal law scholars, largely ignore that recklessness is actually purposeful and knowing risk creation. But see John Gardner and Heike Jung, *Making Sense of Mens Rea: Antony Duff's Account*, 11 *Oxford J. Legal Stud.* 559, 587 (1991). While Michaels contends that extreme indifference fills a gap between recklessness and knowledge, he fails to see that in many cases, it fills a gap between *purpose* and recklessness. That is, the culpability of the Russian roulette player is not his acceptance of the consequences of his actions but rather that his end is itself evil—risking others unjustifiably.

In both of these cases, purposeful action is sometimes involved, and a satisfactory model must account for these cases.

manifests indifference—this use of indifference focuses on, and describes, *the actor's* attitude toward the wrong. Still, this attitude is distinguishable from a desire. The knowing agent may accept a wrong that she desires not to occur.¹⁰⁵

This approach is also consistent with the Model Penal Code.¹⁰⁶ An actor who knows a harm will occur (Model Penal Code) accepts the result (Michaels) and exhibits indifference. While each inquiry focuses on a different aspect of the choice, or a different way to define mens rea, all three view culpability as the defendant's choice to do wrong. Hence, this final interpretation does not challenge the underpinnings of the Model Penal Code's conception of culpability.

In conclusion, Simons's usage of the term, "indifference," masks different senses that do different work. Once his claims come to light, it is apparent that two of his claims should be rejected. The additional two claims Simons makes are compatible with the Model Penal Code's and do not challenge the Code's linkage of wrongdoing and culpability.

CONCLUSION

The Model Penal Code links culpability to the actor's assessment of wrongdoing. Ken Simons has challenged this view, arguing that the Model Penal Code's culpability hierarchy is "seriously inadequate" and should be replaced with hierarchies of belief, desire, and conduct. However, belief states do no work for Simons. Rather, he only cares about what he believes to be the desire-state hierarchy. Yet, once one scratches beneath the surface, one realizes that his centerpiece of the desire-state hierarchy, indifference, does not exist within the desire-state hierarchy at all. Indeed, Simons confuses different meanings of indifference. Underlying this confusion is four different claims, two of which are inconsistent with choice-based responsibility and two of which complement the Model Penal Code's scheme.

105. See Michaels, *supra* note 15, at 962.

106. This leaves open the question of the best drafting style for mens rea, but resolves the question of what makes an actor culpable.