

# Degrees of Criminal Culpability

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One is culpable for a crime, basically, to the degree that one's crime manifests more or less insufficient regard for legally protected interests. On one main account, such manifestation is determined by the defendant's own motives. On Sarch's alternative account, manifestation is determined in a more lenient way (namely by the least amount of insufficient regard that is needed to get an otherwise law-abiding citizen to do the crime). In this paper, I further spell out the controversy, and critically examine Sarch's arguments in favour of his account.

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## 1. Two cases

According to Alexander Sarch, criminal culpability is a special kind of culpability (distinct from e.g. moral culpability), which moreover comes in degrees.<sup>1</sup> This paper critically examines his account of degrees of criminal culpability, on the basis of two of his cases. The first case:

### **Ted the Would-Be Terrorist**

“Ted hates people he perceives as “foreigners” and he resolves to bomb a mosque. But he can't get ahold of any explosives right now. If he had the means to do so, he would carry out the bombing without hesitation. But since he currently is unable to, he does the greatest amount of damage he can under the circumstances, which is to spray-paint anti-Muslim slurs on a public building—a criminal offense where he lives.” (33)

Let us contrast this with Ted the Terrorist, who has the same amount of hate, does have the opportunity to get ahold of explosives, and carries out his plan to bomb a mosque without any hesitation. Now ask: who is more criminally culpable? Or are they culpable to the same degree? According to Sarch, Ted the Would-Be Terrorist is less criminally culpable than Ted the Terrorist.

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<sup>1</sup> Sarch, A., *Criminally Ignorant. Why the Law Pretends We Know What We Don't*, OUP, 2019, ch. 2 (all page references in this paper are to this book); cf. also Sarch, A., 'Who cares what you think? Criminal culpability and the irrelevance of unmanifested mental states', *Law & Philosophy* 36, 2017.

I think we can readily agree that Sarch is right that actual terrorists will in fact be judged more harshly than would-be terrorists. But the interesting question, as Sarch agrees, is whether this is normatively right. That is: why *should* Ted the Would-Be Terrorist deserve less condemnation by the law? I am seriously puzzled by this. After all, it is just circumstantial luck that no explosives were available to Ted, and it is only a matter of time that he carries out the bombing.

One familiar explanation of the difference is *epistemic*. In the case of Ted the Terrorist, we are quite certain that he was willing to bomb a mosque. After all, he did it. But Ted the Would-Be Terrorist may well keep his plans to himself. In that case, we have no access to the depth of his hatred, and he looks just like other “moderate” racists who express slurs. How, then, is the court supposed to treat these defendants differently?

Yet, this is not the answer that Sarch is satisfied with (31, 42, 74). Instead, he is looking for a *principled* explanation, i.e. one that applies even in cases where there are no epistemic limitations. Indeed, if Ted is fully open about his motives and plans in court, then we do know what he would have done in alternative circumstances and will do in the actual future when he can get ahold of explosives. In such a case, we cannot justify the difference between the two Teds by appealing to epistemic limitations.

The key to Sarch’s own explanation is *manifestation*. Basically, Sarch suggests, Ted the Would-Be Terrorist is less culpable *because he manifests less insufficient regard*. My question in this paper will be why Ted the Would-Be Terrorist manifests less insufficient regard.

Here is the second case:

### **Good Thief, Bad Thief**

“Mary’s child is having a hard time at public school, so she steals \$5000 from an ATM to be able to send her child to a better private school. By contrast, Barry is bored and wants to go to Vegas. He steals \$5000 from an ATM to be able to afford the trip.” (38)

Sarch’s claim is that Mary and Barry are criminally culpable to the same degree. They act from totally different motives, but they do the exact same crime. Again, we may agree that Mary and Barry will in fact be considered similarly criminally culpable. But the interesting question is: why *should* they deserve the exact same condemnation by the law?

According to Sarch, Mary and Barry are culpable to the same degree *because they manifest the same amount of insufficient regard*.<sup>2</sup> My question in this paper will be why they manifest the same amount of insufficient regard.

Before addressing the debate, some important distinctions are in place. First, as already noted, we will be interested in *normative* criminal

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<sup>2</sup> As Sarch notes, a comparable argument has been made about moral praiseworthiness rather than criminal culpability (cf. Arpaly, N. & Schroeder, T., *In Praise of Desire*, OUP, 2014, at p. 188).

culpability (44-6). That is, we will not primarily be concerned with the condemnation of crimes by the law as the latter actually may be, but by the law as it ideally would look like. The question is how much condemnation agents like Ted and Mary *ideally* deserve.

Second, Sarch (58) makes a strict distinction between culpability and sentencing. Culpability concerns the issue: what is the kind of offense that the agent should be convicted for? Is Ted merely culpable for painting the slurs (as Sarch maintains)? Or is he culpable to a higher degree for acting from terrorist motives (as Sarch's opponents will say)?

In contrast, sentencing concerns the issue: given the kind of offense that the agent should be convicted for, then what type of sentence is appropriate? For example, in light of protecting the society from people like Berry, he may be punished harsher, or receive a different sentence, than Mary. Alternatively, if deterrence (of other would-be criminals) or rehabilitation (of the criminals in society) are relevant factors, then we may punish Ted the Would-Be Terrorist harsher, or differently, than others who express racist slurs, but not from terrorist motives.

Third, we will take on board the background theory according to which a defendant D is criminally culpable for an act A iff: D's A manifests insufficient regard for the legally protected interests of others or other protected values (28-9). Moreover, we will assume that culpability comes in degrees: D is criminally culpable for A *to the degree that* D's A manifests more or less insufficient regard. What the upcoming accounts do *not* agree on is the latter issue on degrees of manifestation.<sup>3</sup>

Finally, criminal culpability need not be the same as *moral* culpability. As Sarch (35) points out (concerning a different case), Ted the Terrorist and Ted the Would-Be Terrorist may still be *morally* culpable to the same degree (namely for their character, if the latter is solely determined by the amount of insufficient regard they possess).<sup>4</sup> At this point, one may be skeptical that there is such a distinct phenomenon as normative criminal culpability (i.e. distinct from moral culpability), though, as we will see, Sarch's account poses a challenge to such skepticism.

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<sup>3</sup> This is crucial, I take it, to Sarch's overall project on willful ignorance. If willfully ignorant criminals could be criminally culpable to the same degree as knowing criminals, we need a theory of degrees of criminal culpability, and hence of manifestation.

<sup>4</sup> I would agree that the two Teds have bad characters, but would not consider them morally culpable for their conduct. After all, it seems pointless to start a blame conversation with people *who assign zero weight to reasons against bombing mosques*. Mary, in contrast, can be held morally culpable in this sense so long as she assigns at least some (albeit non-decisive) weight to reasons against stealing, and has at least some concern for what makes her conduct problematic. Cf. Wieland, J. W., 'Responsibility for strategic ignorance', *Synthese* 194, 2017; 'Ordinary and detached blameworthiness', *Journal of Moral Philosophy*, 18, 2021.

This paper is structured as follows. In §2, I will explain two different accounts of manifestation. In §3, I will critically examine his arguments in favour of his own account.

## 2. Two accounts of manifestation

Before discussing Sarch's proposal, I will first consider one main alternative account that he rejects (34):

### **Causal account**

D's A manifests insufficient regard to degree  $n$  iff: D does A from  $n$  amount of insufficient regard.

This account has trouble with our cases. Mary steals the money for a private school for her child because the latter has a hard time at public school. Barry steals the money for his trip to Vegas only because he is bored. Thus, it seems, Barry acts from more insufficient regard than Mary (38). If this is so, then, according to the causal account, Barry *manifests* more insufficient regard. But, Sarch maintains, they manifest the *same* amount of insufficient regard, and hence the causal account is mistaken.<sup>5</sup> It will be instructive to consider this reasoning in steps:

- (P1) Barry acts from more insufficient regard than Mary.
- (P2) If this is so, then, if the causal account is true, Barry manifests more insufficient regard and is more culpable than Mary.
- (P3) Barry does not manifest more insufficient regard and is not more culpable than Mary.
- (C) Hence, the causal account is false.

(P2) is uncontroversial, as it simply follows from the causal account. Ultimately, (P3) is the tricky premise, but let us first consider (P1). It may seem natural to agree with Sarch that Barry's insufficient regard is greater, *but why actually is that so?*

One might say: Mary is not so bad, because she would not steal the money if her child would not have a hard time at public school. But something similar holds for Barry: he would not steal the money if he were not bored. We may further think that Mary's motives are better because they are somewhat altruistic rather than self-interested. Mary uses the money for her child. Barry just spends it on himself. Even so, it is unclear that Barry cares

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<sup>5</sup> Sarch (24-8) discusses more problem cases for the causal account, though they do not seem to pose additional issues (except for Kill Your Uncle (35), where there is a deviant causal link between the agent's motive and the crime, and proponents of the causal account might consider adding a non-deviance constraint).

less than Mary about *the legally protected interests of the bank's shareholders*, which is what we should be looking at in this case.

An interesting approach is to look at people's degree of error in weighing reasons:<sup>6</sup>

Comparative principle:

X cares less than Y about the relevant legally protected interests (holding their crime fixed) iff: X makes a greater degree of error in weighing the reasons for and against the crime they both commit.

The idea is that you should assign the same weights as the perfectly law-abiding citizen (in short "perfect citizen", who always assigns the right amount of weight according to the law). Any deviation from these weights will yield some degree of error. But the tricky issue is how to calculate such degrees. Sarch is quite explicit about how we should calculate "the least degree of error" (which is relevant for his own account, as we will see), though how to calculate the degree of error of actual defendants like Barry and Mary?

Suppose that Barry and Mary assign the following weights to the reasons pro and contra stealing:

Agent	Pro stealing	Contra stealing	Degree of error
Perfect	0	2	0
Barry	5	2	5 (5+0)
Mary	3	2	3 (3+0)

Thus, both Barry and Mary assign some weight to the reasons contra stealing. Moreover, they assign the right amount (2 units). But they do not assign the right amount to the reasons pro stealing. They assign too much: Barry assigns 5 units rather than 0, and Mary 3 rather than 0. In this case, Barry's degree of error is indeed greater, and on the comparative principle just given, he would care less than Mary about the legally protected interests of the bank's shareholders. This yields (P1) of Sarch's argument against the causal account, and so I think this is how he may spell out the case.

But, is this interpretation of Barry plausible? Here are a range of possible motives: he hates the bank's shareholders, and wants them to suffer; he cares a lot about himself, and values his own life over that of others; he is fully indifferent, and does not care much about anyone, including himself; to some extent he cares about the bank's shareholders, though he values the lives of his relatives more; normally, he cares about others, though this time he is confused and does not know what he is doing.

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<sup>6</sup> An alternative approach is modal: X cares less than Y about the legally protected interests of the bank's shareholders iff: X does the crime in more nearby possible worlds where it is easier not to do the crime (cf. Wieland, J. W., 'Willful ignorance and bad motives', *Erkenntnis* 84, 2019).

According to the case description, Barry is bored. If so, I think he is somewhat indifferent, and does not assign much weight to the reasons pro stealing, nor to the reasons contra for that matter. Even so, given that he has to do something with his time, he considers the reasons pro stealing slightly stronger. Such a Barry is quite different from a Barry that steals the money with great enthusiasm because he considers himself more important than others. On this interpretation, the table is more likely to be as follows, Barry's degree of error turns out to be the *same* as Mary's.

Agent	Pro stealing	Contra stealing	Degree of error
Perfect	0	2	0
Barry	2	1	3 (2+1)
Mary	3	2	3 (3+0)

One may want to calculate degrees of error differently. So far, I assumed that your degree of error is the sum of your deviation from the weight that the perfect citizen assigns to the reasons pro, plus your deviation from the weight that this citizen assigns to the reasons contra. But, there are alternative ways of calculating degrees of error. Here is one. Degree\*: If the proportion pro/contra (i.e. the weight of the reasons pro divided by the weight of the reasons contra) assigned by the perfect citizen is  $x$ , then your proportion pro/contra should also be  $x$ .<sup>7</sup> Your degree of error, then, is the difference between the proportion pro/contra assigned by you and the proportion pro/contra assigned by the perfect citizen. Example:

Agent	Pro	Contra	Degree* of error
Perfect	1	2	0
Agent A	2	4	0 (2/4–1/2)
Agent B	2	1	1.5 (2/1–1/2)

The idea here is that if you overvalue the reasons pro, you should also overvalue the reasons contra, and this is why agent A makes no mistake in weighing the reasons.

In *Good Thief, Bad Thief*, we assumed that the perfect citizen assigns zero weight to the reason pro stealing, and 2 to the reason against, yielding a proportion of 0/2 (i.e. the “perfect proportion”). Mary assigns 3 to her reason pro stealing, and 2 to her reason contra, yielding a proportion of 3/2. Her degree of error would be the difference with the perfect proportion (0/2), which is 1.5. Barry assigns 2 to his reason pro stealing, and 1 to his reason contra, yielding a proportion of 2/1. His degree of error, then, would be 2.

On this measure, then, Barry's degree of error is still greater than Mary's, yielding (P1) of Sarch's argument against the causal account (“Barry

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<sup>7</sup> Inspired by a comment by Sarch: “In my view, culpability depends on whether one attaches weight to the relevant reasons in the right *proportion*—not the absolute amount of weight one gives them.” (49)

acts from more insufficient regard than Mary”). Irrespective of the details, what Sarch needs is that the causal account treats Barry and Mary *differently*. If Sarch then can show that Barry and Mary should *not* be treated differently (and are in fact criminally culpable to the exact same degree), he has an argument against the causal account. Hence, all depends on (P3) of the argument (“Barry does not manifest more insufficient regard and is not more culpable than Mary”), and so far we are still looking for support for this. Let us first see how (P3) follows from Sarch’s own account.

To introduce his account, Sarch refers to the “principle of lenity” (51):<sup>8</sup> D’s degree insufficient regard is the least amount of insufficient regard needed to get an otherwise law-abiding citizen to do D’s crime. (We are no longer referring to the “perfectly law-abiding citizen”, but to the “otherwise law-abiding citizen”, given that this agent does commit a crime.) For example, to paint the slurs, an otherwise law-abiding citizen would need some amount of hate towards foreigners. That amount is manifested by Ted the Would-Be Terrorist. What is not manifested is the greater amount of hate needed to bomb a mosque. Similarly, to steal the money, an otherwise law-abiding citizen would need some amount of insufficient regard towards the bank’s shareholders. That amount is manifested by Barry and Mary. What is not manifested is the greater amount of insufficient regard they may possess.

Sarch’s official statement of his account is more precise in terms of weighing reasons and degree of error:

**Sarch’s account**

D’s A manifests insufficient regard to degree n iff: degree n is the least degree of error in weighing the reasons for and against A needed to get an otherwise law-abiding citizen to do A.

Ted the Would-Be Terrorist assigns more weight to the reasons in favour of painting the slurs (say, 5 units) than to the reasons against (say, 1 unit). This time, though, what matters is not the weight that Ted assigns, but the weight that the perfect citizen assigns.

Let us suppose that the perfect citizen assigns a weight of 3 units to the reasons against painting the slurs, and zero weight in favour of painting the slurs. In such a case, it takes slightly more than 3 units of error (say, 3.1) to get an otherwise law-abiding citizen to assign greater weight to the reasons in favour of painting (and to subsequently carry out the act and paint the slurs). On Sarch’s account, then, Ted the Would-Be Terrorist manifests insufficient regard to a degree 3.1.

Agent	Pro painting	Contra painting	Degree of error
Perfect	0	3	0
Ted	5	1	7 (5+2)

<sup>8</sup> This principle is partially inspired by: Yaffe, G., ‘The point of mens rea: the case of willful ignorance’, *Criminal Law & Philosophy* 12, 2018.

Ted's own degree of error is 7 (using the first measure discussed above: 5 on the pro side plus 2 on the contra side), but, on Sarch's account, this is not relevant for his criminal culpability for painting the slurs (even though it may still be relevant to assessing Ted on other fronts, like his character).

Surely, the perfect citizen assigns more weight (say, 12 units) to the reasons against bombing a mosque (and again zero weight in favour of doing this). This means that, on Sarch's account, Ted the Terrorist manifests insufficient regard to a higher degree, i.e. 12.1.

Agent	Pro bombing	Contra bombing	Degree of error
Perfect	0	12	0
Ted	5	1	16 (5+11)

One complication of this account concerns the description of the crime. As Sarch (56-7) points out, we can either describe it in a *motive-free* way, or in a *motive-laden* way. For example, in Good Thief, Bad Thief we may either focus on the reasons pro and contra "stealing money", or on the reasons pro and contra "stealing money to afford gambling" or "stealing money to afford a better school for one's child". Now, what if we focus on the latter? In that case, Sarch maintains that, on his account too, "Barry's act would be more culpable than Mary's", for "it plausibly would take more insufficient regard to get [an otherwise law-abiding citizen] to do the act of *stealing to afford gambling in Vegas* than *stealing to afford a fancier school for one's child*." (57)

To see what is going on here, let us apply Sarch's account. In Barry's case, we ask: how much does it take to get an otherwise law-abiding citizen to assign greater weight to the reasons in favour of *stealing to afford gambling*?

Agent	Pro stealing to afford gambling	Contra stealing to afford gambling	Degree of error needed
Perfect	0	2	2.1

The perfect citizen will assign some amount of weight to reasons against stealing to afford gambling, and this will just be the same weight as she assigns to reasons against stealing in general (which we have set at 2). The perfect citizen will not assign any weight to reasons in favour of stealing to afford gambling. Hence, it takes 2.1 units of error to get an otherwise law-abiding citizen to assign greater weight to the reasons in favour of stealing to afford gambling.

Next, in Mary's case we ask: how much does it take to get an otherwise law-abiding citizen to assign greater weight to the reasons in favour of *stealing to afford a better school*?



Agent	Pro stealing to afford a school	Contra stealing to afford a school	Degree of error needed
Perfect	1	2	1.1

The perfect citizen will assign some amount of weight to reasons against stealing to afford a better school, and, here, too, she may plausibly assign the same weight as she assigns to reasons against stealing in general (2). But, in this case, how much weight does the perfect citizen assign to reasons in favor of stealing to afford a better school? The law might well recognize *some* reason to do this (with a weight of, say, 1), even though it is still less weighty than the reasons contra. In that case, it takes 1.1 units of error to get an otherwise law-abiding citizen to assign greater weight to the reasons in favour of stealing to afford a better school.

On Sarch's account, then, Barry manifests insufficient regard to a degree 2.1, while Mary manifests insufficient regard only to a degree 1.1, and hence she is less culpable (i.e. even on Sarch's account). However, we should note that this holds only if Mary has a *partial justification* for her crime, and that is not so clear.<sup>9</sup> If Mary has no such partial justification, as we discussed, then (P3) is true on the causal account, but false on Sarch's—*which view is right?*

### 3. Why go motive-insensitive

On the one hand, we have motive-sensitive accounts: the causal account, as well as Sarch's account with motive-laden descriptions of the crime (the "motive-laden account" in short). On the other, we have a motive-insensitive account: Sarch's "motive-free account". Sarch endorses the latter, and he presents several interesting considerations in favour it, namely arguments from lenity (75-9), from self-conception (69-70), from demandingness (74-5), and from costs (70-2).<sup>10</sup> In the following, I will pose challenges to all of them, and introduce a further consideration.

#### 3.1. Argument from lenity

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<sup>9</sup> Even if existing law does not recognize any justification in Mary's case, one may wonder if it *should* recognize one. For our purposes, we could stay neutral on whether, ideally speaking, Mary should have zero justification, a partial justification, or even a full justification for her crime (cf. 79). Possibly, in some selected cases stealing may be justified to some degree. Yet this is not our discussion, and we are only considering the possibility of a partial justification for illustration.

<sup>10</sup> Sarch (67-7) also briefly considers a legislature-facing argument (according to which states should display virtues like generosity, kindness, and *merci*, and so adopt the most lenient account) that I will not discuss here.

The first argument that I will consider: Sarch’s account is the most lenient and best for defendants, i.e. compared to the causal account. Consider Ted the Would-Be Terrorist:

Agent	Pro painting	Contra painting	Degree of error
Perfect	0	5	0
Ted	5	1	9 (5+4)

According to the causal account, Ted manifests insufficient regard to degree 9 (using our first measure from §2). According to Sarch’s account, Ted manifests insufficient regard to degree 5. Hence, the account seems more lenient and better for Ted. The same goes for Good Thief, Bad Thief:<sup>11</sup>

Agent	Pro stealing	Contra stealing	Degree of error
Perfect	0	2	0
Barry	2	1	3 (2+1)
Mary	3	2	3 (3+0)

According to the causal account, Barry and Mary manifest insufficient regard to 3 (again, using our first measure). According to Sarch’s account, both Barry and Mary manifest insufficient regard to a degree 2.1. Hence, compared to the causal account, Sarch’s account seems again better for defendants. Both Barry and Mary are less culpable than they would have been on the causal account.

In response, I have two points. First, Sarch’s account and the causal account have their own measures of determining degrees of manifestation, and without any common scale, we cannot just compare these account as we just did. It may seem intuitive to think that Ted, Barry and Mary act from more insufficient regard than the amount needed to get an otherwise law-abiding citizen to do their crime (and so manifest more insufficient regard on the causal account than they do on Sarch’s account). Yet, so far we lack the resources to substantiate this claim.

Second, even when a common scale is constructed, and Sarch’s account turns out to be the most lenient, one may wonder why we should be interested in *maximizing* leniency. Sarch explains:

“The state enjoys major advantages vis-à-vis putative defendants given its investigative powers, prosecutory discretion, and leverage in negotiating plea deals. In the criminal law, our weightiest of interests are at stake—up to and including life and liberty. This suggests that we should take reasonable steps to even the playing field by building in protections for would-be defendants.” (75-6)

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<sup>11</sup> Here, I will ignore any partial justifications the defendants might have. For if they apply in one account, they should apply in the others as well.

I agree that we should take reasonable steps to protect putative defendants, though the question is what “reasonable” amounts to here. I think there are two important points to keep in mind. First, as noted in §1, we are not talking about sentencing, but about culpability. If Ted did act from terrorist motives, then according to the causal account it *is* reasonable to consider him culpable to a greater degree than if he acted from better motives. Whether he should also be locked up as a terrorist (for example) is an issue that concerns his sentence, not his culpability.

Second, we may be sure or unsure about the motives of defendants. If we are unsure about Ted’s motives, then it is not reasonable to treat him as a terrorist. Even so, the causal account may well agree on this point. *If* we are sure that Ted’s degree of error is 9, the causal account will hold him culpable to that degree. But, in case we are unsure if Ted’s degree of error is 9, we could play it safe, and assume that it is less than 9 (and so that he is less culpable, also on the causal account).

In many cases, we may well be unsure about people’s motives, and *this* may form a reason to prefer Sarch’s account (as we will discuss later). Even so, I do not think that Sarch’s account follows from the pro-defendant considerations just considered.

### 3.2. Argument from self-conception

The next argument: Sarch’s account best preserves the self-conception of defendants as good, law-abiding citizens. Sarch writes:

“To treat everyone—even those who misbehave—as the least bad version of themselves consistent with what they actually did (as opposed to what they were willing to do) serves valuable functions: it promotes solidarity, prevents alienation from the community, and protects our dearly held identity as upstanding citizens.” (69)

In the case of Ted the Would-Be Terrorist, the idea would be to treat Ted as the best version of himself consistent with what he actually did, i.e. as any other racist who expresses slurs, but do not treat him as a terrorist *even though he acted from terrorist motives*.

You might not like people like Ted, and you might not engage with him and consider him part of your moral community. However, that does not mean that, so long as he keeps it to racist expressions, the state should exclude him too. Why should the state treat him as an insider? As Sarch suggests, this will protect his own self-conception as a good law-abiding citizen, and so prevent his alienation from the rest of society. Surely Ted considers himself a normal citizen. He “just” hates foreigners. If the state would treat him as a terrorist, in contrast, Ted might well feel threatened.

Note first that this argument depends the previous argument from lenity. Sarch’s account best preserves Ted’s self-conception as a good law-abiding citizen only if his account is the most lenient account.

In response, I would agree that the state may treat *some* defendants as insiders for the reasons just mentioned. An example would be a counterpart of Ted who painted the racist slurs only to impress his friends (rather than from any deep hatred).

However, I am not so sure that the state should treat *Ted* as an insider. After all, as the case goes, it was only circumstantial luck that no explosives were available to him, and that he did not cause any greater harms (so far). If there is any expectation that Ted might improve his life, that he might get rid of his hatred, and drop his terrorist plans, then we seem to be changing the case. If we assume that he really acted from deep hatred, and that his terrorist motives were not just a fluke, I do not think that we should want the state to treat Ted as an insider.

### 3.3. Argument from demandingness

The next argument: in contrast to the motive-laden account, Sarch's motive-free account is sufficiently action-guiding.

Sarch does not illustrate this in terms of his cases, but here is an example of what he might have in mind. In the case of Good Thief, Bad Thief, Sarch's motive-free account just considers reasons pro and contra stealing money. In contrast, his motive-laden account considers reasons pro and contra stealing money to afford gambling or pro and contra stealing money to afford a better school (and there may be further motives: to afford expensive medicine for one's partner, to take it from the rich and give it to the poor, etc.). As Sarch points out, considering the latter reasons is too demanding (cognitively speaking) for many people in many situations. Consider Mary:

Agent	Pro stealing to afford a school	Contra stealing to afford a school	Degree of error needed
Perfect	?	2	?

It may well be too difficult for Mary to fill out the question mark, i.e. correctly determine if this is a case of partial justification, full justification, or zero justification. Sarch's motive-free account does not face this problem, since, in order to determine *Mary's* degree of culpability it just asks about the least degree of error needed to get an otherwise law-abiding citizen to do this crime *generally described*, i.e. without any specific motive.

Sarch notes, though, that not all situations are like Good Thief, Bad Thief: "For example, a law prohibiting any act done for the purpose of facilitating terrorism might perhaps be capable of serving as an effective, publically available guide to action for most people." (75) Consider Ted's decision situation:

Agent	Pro acting from terrorist motives	Contra acting from terrorist motives	Degree of error needed

Perfect	?	?	?
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Here, Ted will not have any partial justification, and to most people it will be clear that terrorist motives will not justify crimes, even partially. Even so, is this also obvious to Ted, who hates foreigners? It may still be demanding for Ted to fill out this table. At any rate, what matters is that filling out such motive-laden tables is not so easy in various cases, and, Sarch suggests, this is a reason to prefer the motive-free account *generally*.

But, is it really any easier on the motive-free account? According to it, Mary's decision situation was as follow:

Agent	Pro stealing	Contra stealing	Degree of error needed
Perfect	0	2	2.1

Her dilemma is one of stealing versus not stealing, and on first sight, this looks easier to fill out than the motive-laden table. Yet, Mary might also consider her choice as a dilemma of helping versus not helping her child. To solve such dilemma's, Mary cannot just pick one description and go with it. Rather, she should consider all the relevant considerations pro and contra:

Agent	Pro stealing and helping one's child	Contra stealing and helping one's child	Degree of error needed
Perfect	?	?	?

Such tables do not seem any easier than the motive-laden tables. If this is right, the motive-free account is not any more action-guiding, or any less demanding, than the motive-laden account.

Also, Sarch's motive-laden and motive-free account are not the only contenders here. How action-guiding is the causal account? On this account, the agents may fill out the exact same tables as on the motive-free account. The only difference is that manifestation and culpability are not determined by the least amount of error needed to do the crime, but by the defendant's own degree of error. But, determining culpability is a matter for courts, not for defendants. Hence, the motive-free account does not seem to have advantages here compared to the causal account.

I think the issue is not so much that it is difficult for defendants *themselves* to weigh reasons pro and contra. More important, as we will discuss next, is that it can be difficult for *courts* to reconstruct the defendants' tables.

### 3.4. Argument from costs

The final argument: Sarch's motive-free account is cheaper than alternative accounts. The motive-sensitive accounts (the causal account, but also Sarch's motive-laden account) are costly because in many, or even most,

cases it is not clear why people committed the crimes they did, and then the state would have to inquire into their motives (or, put more technically, into how they filled out the tables pro and con).

First, such inquiries involve worries for citizens concerning their privacy. As Sarch explains:

“Enforcing the rules of [motive-sensitive] regimes would be highly invasive. It requires allowing the state to investigate and concern itself with evidence of whether one possess or was even partly motivated by insufficiently respectful attitudes. This evidence includes utterances, writings, and communications. But that undermines the substantial benefits we get from privacy and unencumbered speech.”  
(71)

To some extent, governments and investigation services already screen our emails, app activity, bank transactions, and travel activities. But, if the motive-sensitive accounts were adopted, this would be a matter of everyday policy.<sup>12</sup>

Second, there are not only costs for citizens, but also serious costs for the state. It is costly to keep track of people’s motives. Thieves like Barry and Mary may be open about their motives, but they may also not be. In the latter case, the state would have to inquire into their bank transactions and travel activities. In Barry’s case, they might well find out that he spend \$5000 on a trip to Vegas, but even then it does not automatically follow that he did it because he was bored, and not, for example, because he wanted to fulfil a lifelong dream, or because he wanted to make an impression on his partner, and further inquiries would be called for.<sup>13</sup>

Also, in some cases it might not even be possible to discover much about people’s motives. We might not even always know our *own* motives. For example, does Ted really know about the exact depth of his hatred, and that he is really willing to bomb a mosque? Generally, is it ever clear that people are willing to commit crimes they do not in fact commit? After all, when the time is there, one may always hold back, and decide to refrain from carrying out one’s plan.<sup>14</sup> (Note that if we admit this uncertainty, we are changing the case. In the case of Ted the Would-Be Terrorist, we are sure (including Ted himself, we may presume) that he would carry out the bombing without hesitation if he had the means to do so.)

Yet, the question arises whether there are not any benefits that can outweigh the foregoing costs. One potential benefit that Sarch (71-2) discusses is deterrence. If we hold Ted not only culpable for expressing racist

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<sup>12</sup> To restrict such inquiries, one could set a threshold for the kind of crimes that are to be investigated (e.g. bombings will plausibly meet it, but small thefts will not).

<sup>13</sup> New technologies (e.g. that track people’s online activities) will make it easier to identify people’s motives.

<sup>14</sup> Cf. Sher, G., *A Wild West of the Mind*, OUP, 2021, ch. 2.

slurs, but also for acting from terrorist motives, then that might well have a higher chance of deterring other racists from acting on their hatred.<sup>15</sup>

One further potential benefit, not discussed by Sarch, is the *protection* of society from people like Ted. If the court considers him culpable for acting from terrorist motives, rather than merely for painting the slurs, then they might punish him accordingly (monitor him, lock him up, put him in a rehabilitation program, etc.).

Sarch might respond that he distinguishes between culpability and sentencing, and that even though we should not consider Ted culpable for acting from terrorist motives, he might still receive a serious sentence so as to prevent him from further racist crimes. However, even though I see this distinction, I do not think that it would help here. If we are interested in preventing terrorist crimes, states would have to inquire into people's motives, and then it does not matter if they make these costs to determine their degree of culpability or to determine the sentence that is appropriate.

### 3.5. Argument from uniformity

To conclude here, we started with the question: is Ted culpable to some moderate degree for expressing racist slurs, or to a higher degree for acting from terrorist motives? As discussed, perhaps none of the arguments suggested by Sarch make a fully compelling case for the former. We said that inquiries into people's motives are very costly, both for citizens and for the state. To avoid such costs, courts may ignore motives, and use Sarch's motive-free account. But, in a few cases, as Sarch pointed out, motives are accessible for free, and then motive-sensitive accounts can also be applied without any additional costs. In some further cases where motives do not come for free, as just discussed, there can still be certain benefits that outweigh the costs.

Even so, perhaps there is no point in using different standards *across different kinds of cases*. Contrast Ted the Would-Be Terrorist to:

#### **Mysterious Ted**

Ted spray-paints anti-Muslim slurs on a public building—a criminal offense where he lives. Yet, we lack any evidence about why he did it: no Facebook posts, no criminal friends, no criminal record, he seems to have a good job, a happy family, etc., and he is silent about his motives in court.

While we can apply the causal account to Ted the Would-Be Terrorist, we cannot apply it to Mysterious Ted (or to further counterparts of Ted for which we have *some*, albeit inconclusive, evidence of why they did it).

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<sup>15</sup> Sarch (72) further points out that punishing defendants harsher for deterrence effects may well be unfair. I think proponents of the causal account may agree with this general point, though still disagree that *their* regime is unfair.

In contrast to the causal account, Sarch's motive-free account can *always* be applied by courts, even if they lack any access to the defendants' motives. Furthermore, there seems to be no rationale for treating Ted the Would-Be Terrorist and Mysterious Ted differently, i.e. according to the standards of different accounts.<sup>16</sup> If this is so, then that may be a reason to prefer Sarch's account *across the board*. These are institutional design considerations, then, that will render criminal culpability distinct from moral culpability.<sup>17</sup>

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<sup>16</sup> A similar worry from uniformity may apply to the epistemic account that Sarch (40) also discusses: D's A manifests insufficient regard to degree n iff: an unbiased observer would infer from the evidence that D possessed insufficient regard to degree n when doing A. If Ted the Would-Be Terrorist is fully transparent about his motives in court, then this account would say that he manifests *more* insufficient regard than Mysterious Ted (i.e. even if they *in fact* act from similar motives).

<sup>17</sup> Many thanks to Alex for discussion, and for his original and stimulating work.