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The Rhetoric of Motive and Intent

Guyora Binder†

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INTRODUCTION

It has often been said that the criminal law is concerned only with intent, not motive. According to Jerome Hall, “hardly any part of the penal law is more definitely settled than that motive is irrelevant.”¹ Alan

† University at Buffalo Distinguished Professor of Law. I am grateful to Markus Dubber for innumerable suggestions, for listening patiently, and for sharing his erudition. I also thank Jim Gardner and Bob Weisberg for extensive comments; and Allison Danner, Antony Duff, Dan Kahan and Betty Mensch for bibliographical help. Jennifer Johnson provided able research assistance. Errors (and sins) remain mine.

1. Jerome Hall, *General Principles of Criminal Law* 153 (1947).

Norrie recently agreed: "It is as firmly established in legal doctrine as any rule could be that motive is irrelevant to responsibility."² In the nineteenth century, juries were told that they need not determine a defendant's motive to find he had intentionally done wrong, and that a religious or benevolent motive would not acquit him.³ Today, the irrelevance of motive is invoked in construing the mental element of offenses and in arguing about a broad array of policy issues in the criminal law. Courts and commentators incant the irrelevance of motive maxim in arguing against hate-crimes liability, for mercy-killing liability, against "transferring" intent from one victim or offense to another, against some versions of the defenses of necessity and provocation, and against criminal negligence. Thus, the irrelevance of motive claim has become a paradox: supposedly a fundamental principle of criminal law, it is nevertheless said to conflict with many established doctrines of criminal law.

This paradox is possible because motive and intent are not stable concepts that pick out perspicuous features of the world. Instead, the distinction between motive and intent and the irrelevance of motive maxim are rhetorical constructs: formulations rendered meaningful by their role within a particular historically and institutionally situated discursive practice.⁴ When the historical and institutional context of such a discursive practice changes, a rhetorical construct can change its function, or become vestigial. It can thereby change its meaning, or be drained of meaning altogether. Oddly, the irrelevance of motive maxim has suffered both of these fates. This accounts for its paradoxical quality. Over time, the irrelevance of motive maxim has fragmented into two different propositions, one lacking authority, and one lacking content.

2. Alan W. Norrie, *Crime, Reason, and History: A Critical Introduction to Criminal Law* 37 (1993).

3. William Lawrence Clark & William L. Marshall, *A Treatise on the Law of Crimes* 149-51 (1900).

4. See Guyora Binder & Robert Weisberg, *Literary Criticisms of the Law* 292-377 (2000) for a fuller explication of the concept of a rhetoric.

Thus, understanding the motive/intent distinction and the irrelevance of motive maxim requires understanding the changing context in which these rhetorical constructions have been invoked. When legal scholars first began to distinguish motive from intent, in the late eighteenth century, courts still had the common law power to create and define crimes. In making criminal law, courts had to apply their views about the purposes of imposing criminal liability and punishment, just as legislatures must do today. But courts are in a different position than legislatures, when they apply theories of punishment in defining crimes. Legislatures typically act prospectively, institutionalizing their values in formal standards and procedures to be applied later by officials with limited discretion. By contrast, courts typically act retrospectively, judging cases that have already occurred. If courts are not restrained by the obligation to apply legislatively imposed standards, they may simply apply their values directly to the facts of a given case. When law is made in the process of adjudication, there are dangers that it will be applied retroactively, and that like cases will be treated differently.

Thus, the original point of the irrelevance of motive maxim was to urge courts to apply formal offense definitions and to encourage legislatures to supply them. Legal reformers associated "intentions" with behavior, which could be compared to rules of conduct. By contrast, they associated "motives" with character, which could only be evaluated by discretionary moral judgment. Thus, the irrelevance of motive maxim implied that courts should assess behavior by applying conduct rules rather than by engaging in discretionary moral judgment. An intention was supposed to be somehow more *legal* than a motive and the irrelevance of motive connoted fidelity to the principle of legality. The motive/intent distinction was part of the rhetoric of the rule of law in criminal law, and stood for a particular allocation of discretion among courts and legislatures.

But as courts and legislatures came to accept the proposed division of their labor, the motive/intent

distinction could no longer carry the same meaning. When legislatures already define offenses, there is no longer any point in urging them to do so. Similarly, when courts already apply legislative offense definitions, they need no further encouragement. Once legislatures have undertaken to define offenses, the important questions become what offense definitions legislatures should supply and how courts should apply them. If the irrelevance of motive maxim has no implications for these questions, it no longer has much to say to modern lawyers.

Thus, when twentieth century lawyers encountered the irrelevance of motive maxim in older cases and treatises, they naturally assumed it had something to say about how to formulate and interpret offense definitions. As a result, they interpreted the distinction between motive and intent as a psychological distinction, among the kinds of mental states that should inculcate offenders. But here they faced the difficulty that the terms "intent" and "motive" are used interchangeably in ordinary language. These terms could only be distinguished as technical terms of art.

Twentieth century legal scholars came up with three different candidates for such a technical distinction between intent and motive. According to one version, intentions were cognitive states of mind, like expectations or perceptions of risk. Motives, by contrast, were desiderative states—desires, purposes, or ends. The difficulty with this version of the distinction was that it seemed to render the motive is irrelevant maxim descriptively false, since criminal law often conditioned liability on these desiderative states.

A second version of the distinction divided desiderative states into immediate and remote goals, identifying intention with the former and motive with the latter. The difficulty with this version of the distinction was that any act might be explained by not just two, but perhaps a very great number of goals. Any goal might be denominated an intention when compared to a more remote goal, and a motivation when compared to a more immediate goal.

In an effort to sort goals into just two categories, some commentators suggested that intentions were only those goals that were offense elements, while motives were any more remote goals. This version of the motive/intent distinction certainly accorded with the motive is irrelevant maxim, but at the price of reducing it to an empty tautology, true by definition.

If the motive is irrelevant maxim is true by definition, it has no normative bite. If the only identifying characteristic of motives is that they are not offense elements, the irrelevance of motive maxim can tell us nothing about how to define offenses. It can have no implications regarding hate crimes, mercy killing, transferred intent, necessity, provocation, or criminal negligence. On the other hand, the irrelevance of motive maxim will have law reform implications if we take it to mean that criminal liability should never be predicated on desiderative states. But this version of the irrelevance of motive maxim has law reform implications only because it is (and has long been) at odds with so much criminal law doctrine. Thus, when understood in light of its origins and development, the irrelevance of motive maxim is revealed to now stand for two different principles, one lacking normative content, and the other lacking legal authority. Changes in the institutional context of the criminal law have eliminated the conditions which made the irrelevance-motive-maxim both a persuasive principle of law reform and a meaningful decision rule for courts.

This article will explain the current predicament of the rhetoric of motive and intent by exploring its origins and changing context. Part one will consider the familiar claim that the common law traditionally conditioned punishment on evil motive. Finding little support for this claim, it will suggest that it amounts to a sort of origin myth for modern culpability analysis. Modern criminal law congratulates itself for being technical, precise, liberal, and value free by contrasting its limited inquiry into intent with the ancient common law's supposedly searching inquiry into the moral worth of defendant's motives.

Parts two and three will show that our received idea of motive as a primitive form of culpability was developed in the nineteenth century to contrast with a new idea of criminal intent as an offense element. This contrast between motive and intent drew on two related intellectual movements of the late eighteenth and early nineteenth centuries. Part two will describe the early efforts of legal scientists to discipline and organize a rapidly expanding criminal law by analyzing offenses into their component elements. This effort led to the widespread use of the terminology of "intent" to refer to criminal culpability. Part three will describe the effort of utilitarian reformers to rationalize the criminal law as a system of legislatively imposed deterrent sanctions. Utilitarians developed a conception of motives as fixed features of human psychology that the law could use in influencing behavior. Both of these movements lent support to the idea that criminal liability should be predicated on some particular intent, but these two movements associated different meanings with intent. To legal scientists, "intention" connoted any legally defined mental state, while to utilitarians "intentions" were cognitive states only, to be contrasted with desires and motives.

Part four will show that by the late nineteenth century, the irrelevance of motive had become a prominent doctrine, invoked by courts and influential scholars. It examines influential formulations of the maxim, by J.F. Stephen and Oliver Wendell Holmes. Stephen exemplified a legal scientist's concern with element analysis, while Holmes urged the irrelevance of motive on utilitarian grounds.

Part five considers logical, empirical, and normative criticisms of the irrelevance of motive maxim developed during the twentieth century. Critics claimed that motive and intent were interchangeable terms for an offender's purposes, and that criminal liability both does and should depend on these purposes.

Finally, part six examines several efforts to apply the irrelevance of motive maxim to contemporary doctrinal and

policy issues, in light of these criticisms. These issues include statutory construction; hate crimes; transferred intent; and felony murder. This discussion is intended to be illustrative rather than exhaustive. Its purpose is not to resolve these contemporary policy debates, but to show that the irrelevance of motive maxim contributes very little to them, for reasons predicted by the logical, empirical, and normative critiques discussed in part five.

This article concludes that the irrelevance of motive maxim was a useful slogan in the nineteenth century campaign for legislative definition of criminal offenses. But with the success of that campaign, the irrelevance of motive maxim has itself become irrelevant.

I. IS THERE AN "EVIL MOTIVE TRADITION" IN CRIMINAL LAW?

It is sometimes argued that, over its history, the criminal law has developed from an emphasis on motive to a concern with intent. In his important article on motive, *The Mens Rea Enigma*, Martin Gardner offers such a thesis. Gardner argues that

the mens rea principle originally required that the defendant perform the criminal act with an evil, wicked, or immoral motive. . . . [T]his concept of mens rea was sensibly abandoned at the offense definition level in favor of a more structured system. . . . [that] links criminal liability to proof that the defendant subjectively possessed a certain level of culpability. This culpability level entails intentional action coupled with awareness of the criminal consequences of the action under the circumstances.⁵

Standard histories of the mens rea doctrine in the common law of crimes support this claim. They suggest that while the common law always conditioned criminal liability on

5. Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635, 697 (footnotes omitted).

mens rea, the content of this requirement has changed over time. Originally, they claim, any evil motive accompanying criminal action could supply the requisite mens rea. More recently, however, only proof of intent to cause or risk some particular proscribed harm could satisfy the requirement of mens rea.

Albert Levitt introduced such an account in his 1922 article *The Origin of the Doctrine of Mens Rea*. Levitt traced the requirement of mens rea to Roman Catholic penitential practices. According to Levitt, the church from the time of Augustine regarded evil motives as the sinful aspect of wrongdoing:

To know if the things [men] do are truly good or evil, one must know what motive animates their acts. The evil motive makes the evil act; the good motive makes the good act. It is for this reason that Augustine in his sermons raises the question of the good or evil mind when discussing perjury. He who speaks with the inclination toward the truth. . . is guilty of no sin, even though he is mistaken in what he says; and he who speaks with an inclination to falsehood is guilty of sin even if he describes accurately what has occurred. "Reum linguam non facit, nisi mens rea." Therefore, know the motive and you know the will. . . .⁶

For Augustine, a sinful action was one determined by an evil will. The will would determine action according to the soul's loves. A properly ordered soul was selflessly devoted to God, and derived its other wants from an appreciation of divine goodness or of the utility of worldly things for divine purposes. Thus the desire to advance one's own welfare was good as long as it derived from a sense of one's self as a useful servant of God. If the pursuit of self-interest derived from self-love, however, it was evil. Thus an act was sinful in so far as it resulted from a sinful desire, and a desire was sinful in so far as it was not regulated by piety. Such a

6. Albert Levitt, *The Origin of the Doctrine of Mens Rea*, 17 U. Ill. L. Rev. 117, 130-31 (1922).

desire expressed a soul in a state of sinful alienation from God.⁷ In short, Augustine's moral thought conceived sin as a bad *desire*, expressing a bad *character*.

Over the second half of the first millennium, the church, especially in England, developed the doctrine that sin required properly motivated good works as a penance.⁸ If the act generating such a debt to God disrupted the king's peace, it might require that the king also be appeased. If it resulted in harm, such an act would also create an obligation to compensate the victim or his family. But the sinfulness of the act was a wrong to God that consisted entirely in its evil motive rather than its effects. Levitt speculated that as the royal courts established exclusive jurisdiction over many crimes, they were expected to take over the clerical function of weighing sin and exacting penance.

It is therefore no surprise that we find in the *Leges Henrici* the legal maxim "Reum non facit nisi mens rea." . . . Men must pay for all the evil they do. . . . But the punishment to be imposed, the penance to be done, depends upon the presence or absence of *mens rea*. That is the effect of Augustine upon the secular law, through the medium of the penitential books. Nor is it to be wondered at that increasingly the reported cases present declarations using the phrases "wickedly and feloniously," "with malice aforethought," "premeditated assault."⁹

So on Levitt's view, *mens rea* was a sweeping requirement of criminal liability from medieval times, and was rooted in an Augustinian moral psychology of sinful motive.

Francis Sayre offered a similar account in his classic 1932 article *Mens Rea*. According to Sayre, canon law influenced the common law of crimes through Henry De Bracton's thirteenth century treatise on English law.¹⁰ Bracton proclaimed that crime depended on a will to injure,

7. John M. Rist, *Augustine: Ancient Thought Baptized* 148-91 (1994).

8. Levitt, *supra* note 6, at 131-32.

9. Levitt, *supra* note 6, at 135.

10. Francis Sayre, *Mens Rea*, 45 *Harv. L. Rev.* 974, 984-85 (1932).

and offered this principle to explain the exemption from liability of infants and the insane.¹¹ Although his treatise was presented as a summary of existing law, Bracton conditioned liability for theft on culpable mental states, at a time when English law did not yet do so.¹² Following canonist writings on sin, Bracton considered the judge who ordered the just execution of a felon guilty of homicide, if he was motivated by malignant intent rather than his duty.¹³ On the other hand, while English law still classified accidental killers as felons, Bracton argued that self-defenders and accidental killers should be pardoned, unless, as the canonists held, they had acted unlawfully or carelessly.¹⁴ In fact, the Crown pardoned homicides rather freely, and with little regard to culpability.¹⁵ Early in the next century Parliament petitioned the Crown to restrict pardons to killings by accident or in self-defense: the crown agreed, but failed to comply.¹⁶ In 1390, however, the Crown finally vindicated Bracton by agreeing to refuse pardons to those who killed with "malice prepense," apparently meaning those who killed neither accidentally nor in self-defense.¹⁷

According to Sayre, clerical notions of sin influenced English criminal law over several centuries and eventually gave rise to an established doctrine that mental culpability was a prerequisite to criminal liability.

It is, in the last analysis, underlying ethical concepts which shape and give direction to the growth of the criminal law. It was almost inevitable, therefore, that the emphasis placed by Bracton upon the mental element in criminality should take permanent root and become part of the

11. 2 Henry de Bracton, *On the Laws and Customs of England* 289, 384 (George E. Woodbine ed. & Samuel E. Thorne trans., 1968).

12. *Id.* at 289, 384, 424; Sayre, *supra* note 10, at 987.

13. Bracton, *supra* note 11, at 341; Sayre, *supra* note 10, at 984.

14. Sayre, *supra* note 10, at 984-86.

15. J.M. Kaye, *The Early History of Murder and Manslaughter*, 83 *L. Q. Rev.* 365, 378; Naomi D. Hurnard, *The King's Pardon for Homicide Before A.D. 1307*, at vii-xiv (1969).

16. Kaye, *supra* note 15, at 378.

17. *Id.* at 390-92.

established law. Under the pervasive influence of the church, the teaching of the penitential books that punishment should be dependent upon moral guilt gave powerful impetus to this growth, for the very essence of moral guilt is a mental element. . . .

Mens rea, in the period following Bracton, thus smacked strongly of general moral blameworthiness. The transition . . . was all the easier because . . . most of the thirteenth century felonies [robbery, rape, burglary, larceny, arson and homicide] from their very nature already involved an intentional element. . . . The early felonies were roughly the external manifestations of the heinous sins of the day. . . .

We can trace the changed attitude in new generalizations concerning the necessity of an evil intent which are found scattered through the Year Books in the remarks of judges and counsel and which later make their appearance as settled doctrines in the writings of Coke and Hale during the seventeenth century.¹⁸

Gardner relies heavily on Levitt and Sayre in presenting motive as an outmoded conception of culpability rooted in a religious morality. Gardner quotes Augustine as saying “The evil motive makes the evil act; the good motive makes the act good,”¹⁹ although Augustine’s term is usually translated simply as will. Like his predecessors, Gardner ascribes a requirement of evil motive to Bracton. Gardner reads Bracton as holding that “not only must an offender’s acts be intended but his ulterior motives or purposes in acting must also be blameworthy.”²⁰ He points to Bracton’s ornate definition of intentional homicide as killing “in anger or hatred or for the sake of gain, deliberately and in premeditated assault . . . wickedly and feloniously and in breach of the King’s peace.”²¹ He contrasts this with Bracton’s exculpation of killings necessary for self-defense and committed “with sorrow of

18. Sayre, *supra* note 10, at 988-89.

19. Gardner, *supra* note 5, at 655 (citing Levitt, *supra* note 6, at 130-31).

20. *Id.* at 658.

21. *Id.* at 659.

the heart.”²² Gardner also emphasizes Bracton’s support of the canonist doctrine that one is responsible for all consequences of an unlawful act, so that any unlawful motive can make one culpable for a resulting harm.²³

Like Levitt and Sayre, Gardner asserts that Bracton’s religious conception of culpability pervasively influenced the development of the criminal law. Gardner quotes Sayre’s conclusion that the early conception of mens rea in English criminal law was “little more than a general immorality of motive.”²⁴ Like Sayre, Gardner assumes that this requirement was met in the vast run of cases in which it was never mentioned: “In cases lacking direct evidence of malicious intent, its presence was likely assumed from the actus reus, placing on the accused the burden of showing absence of blame.”²⁵ Gardner insists that “the early law saw malicious motivation as an essential component of moral blameworthiness, whether or not [it] carried mens rea to its logical conclusion.”²⁶

On the other hand, Jerome Hall was rightly skeptical of Sayre’s historical thesis.²⁷ To be sure, Bracton was influenced by canon law and the Augustinian conception of sin. But as Maitland pointed out, Bracton was not a very reliable reporter of the English law of his day.²⁸ Sayre admits as much.²⁹ As to the incorporation of Bracton’s views in medieval and early modern criminal law, the evidence seems thin. It consists of the quoted phrase in the *Leges Henrici*, a couple of references to felonious intent in fifteenth century cases, and the predication of murder liability on the elusive criterion of “malice prepense” in the

22. Id. at 660.

23. Id. at 656.

24. Id. at 663 (quoting Francis Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in *Harvard Legal Essays* 399, 411-12 (1934)).

25. Id. at 665.

26. Id. at 667.

27. Hall, *supra* note 1, at 143-47.

28. 1 Frederic William Maitland, *The Collected Papers of Frederic William Maitland* 314 (H.A.L. Fisher ed., Cambridge Univ. Press 1911).

29. Sayre, *supra* note 10, at 985-87.

sixteenth century.³⁰ But we cannot simply assume canon law's influence on criminal law. Canon law and criminal law had very different functions: canon law provided the framework for a pervasive regulation of the lives of clerics. By contrast, the criminal law was an inherently limited legal system, ignoring all wrongs and disputes unless they erupted into violent breaches of the king's peace.³¹ The violent and public character of criminal wrongdoing militated against any very great concern with the wrongdoer's mental state.³² The question of culpability arose only when the wrongdoer offered an excuse. We cannot infer that courts always conceived crime as sin, but were always satisfied that criminals had the requisite evil motives. They may simply have seen the sinfulness and the criminality of conduct as two separate questions, to be answered by two different institutions.

Sayre and Gardner infer that evil motive was a "settled" requirement of criminal liability throughout the High Middle Ages and Renaissance because, at the end of this period Coke used the term "mens rea." Sayre quotes a passage in which Coke reasons that theft must involve an intent to steal at the time of the acquiring the goods, because of the principle "actus non facit reum nisi mens sit rea."³³ But Sayre argues that by Coke's day, the exigencies of deciding cases had refined the concept of mens rea from some "vague" notion of blameworthiness or sin in general, to the particular mental elements of different crimes and defenses.³⁴ Sayre comments:

Coke shows that by the seventeenth century the term mens rea had already undergone a revolutionary change in meaning since the time of its adoption from the penitential books. It is used, not with its old connotation of moral guilt,

30. *Id.* at 983, 991-92.

31. Hurnard, *supra* note 15, at 8.

32. Wayne R. LaFare and Austin W. Scott, *Criminal Law* 702-03 (2d ed. 1986); George P. Fletcher, *Rethinking Criminal Law* 76-90 (1978).

33. Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* 107 (William S. Hein Co. 1986) (reprint of 1797 ed.); Sayre, *supra* note 10, at 999.

34. Sayre, *supra* note 10, at 994.

but with reference to a precise intent at a given time. Evidently the term was being employed in a general way during the seventeenth century to denote the mental requirement for any given crime, and this of course differed vastly in respect to different offenses.³⁵

According to Sayre, different offenses required different mental elements, because they protected different societal interests.³⁶ The function of criminal law had shifted from identifying sin to identifying persons willing to endanger those interests. Accordingly, mens rea had shifted from an inquiry into the moral worth of defendant's motives, to an inquiry into defendant's expectations regarding danger to protected interests.

Gardner agrees with Sayre that a "centuries-long" process of adjudication recast "the original normative notion of mens rea . . . in terms descriptive of the specific forms of intent required for each particular offense."³⁷ Like Sayre, Gardner identifies Coke as a leader in this movement, and points to his enumeration of a diverse collection of circumstances that would "imply" the malice required for murder, without regard to the killer's feelings toward the victim. Thus, both Sayre and Gardner assume that mens rea was an accepted requirement of criminal liability throughout the medieval and early modern periods, while treating the fact that Coke's use of the term did not fit the evil motive model as evidence that the content of the requirement had changed. Even Hall treats Coke's use of the term as evidence that it had become common among lawyers over time. Yet scholars apparently have not discovered other references to mens rea between the *Leges Henrici* and Coke. Moreover, Coke is notorious for ascribing his own views to the past, with little supporting evidence.³⁸

35. Id. at 999-1000.

36. Id. at 994, 1017.

37. Gardner, *supra* note 5, at 667-68.

38. See, e.g., James F. Stephen, 3 *History of English Criminal Law* 57-58 (1883) (criticizing Coke's unlawful act murder rule as unsupported by cases cited).

Perhaps a more accurate account would be that centuries of judicial *and statutory* development of the criminal law proliferated diverse culpability requirements without there having *ever* been a general requirement of, or a unified conception of, culpability.

If so, then the “motive to intent” thesis ascribes a false coherence to the supposedly traditional conception of mens rea as motive, and thereby lends to the “modern” view of culpability as intent a similarly false coherence. In short, I suspect that the supposedly ancient conception of mens rea as evil motive is really a modern polemical construct.

II. THE PROBLEM OF OFFENSE DEFINITION AND THE TERMINOLOGY OF INTENTION

The common law still lacked any coherent conception of mens rea when summarized by Blackstone in the late eighteenth century. To be sure, Blackstone held that crime depended on “first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.”³⁹ Yet he did not mean by this that culpability was a distinct element of criminal liability to be proven by the prosecution in every case. Instead, culpability was ordinarily presumed from the performance of some “unlawful” act. Culpability could only be placed in issue by the defense, in attempting to prove some defense of excuse. “All the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will . . . the concurrence of the will . . . being the only thing that renders human actions praiseworthy or culpable.” Such excuses included infancy, insanity, duress, and necessity, as well as accident and mistake.⁴⁰ Significantly, Blackstone discusses these excuses in a chapter on the sorts of persons capable of committing a crime. To act on the basis of mistake or to cause an

39. 4 William Blackstone, Commentaries on the Laws of England 21 (Univ. of Chicago Press 1979) (1769).

40. *Id.* at 20-22.

accident was to act without capacity or competence. It was to be, at least temporarily, deficient in legal personality. Culpability or volition, then, was a characteristic of the actor rather than of the criminal act, and was ordinarily presumed. This may fit a notion of mens rea as general moral blameworthiness, but does not have much to do with any more precise idea of mens rea as evil motive.

When we turn to the particular offenses described by Blackstone, we find that about half of the most serious crimes were not defined by reference to any culpability. Felonies apparently requiring no culpability included rape,⁴¹ robbery,⁴² piracy,⁴³ poaching in disguise,⁴⁴ destroying tollhouses and the like,⁴⁵ exporting wool,⁴⁶ fraudulent bankruptcy,⁴⁷ plague victims violating quarantine,⁴⁸ bigamy,⁴⁹ soldiers wandering without leave,⁵⁰ jailers coercing prisoners to testify,⁵¹ obstructing justice,⁵² escape,⁵³ convicts or Catholic recusants returning from exile,⁵⁴ demanding a reward for the return of property,⁵⁵ serving a foreign prince,⁵⁶ desertion,⁵⁷ and harboring a Catholic priest.⁵⁸ Certain forms of treason also were defined without reference to culpability. These included Catholic priests failing to take an oath of conformation,⁵⁹

41. *Id.* at 210.

42. *Id.* at 241.

43. *Id.* at 71-72.

44. *Id.* at 144.

45. *Id.* at 144.

46. *Id.* at 154.

47. *Id.* at 156. This appears to have consisted in certain inherently deceptive practices, rather than fraudulent intent.

48. *Id.* at 162.

49. *Id.* at 164.

50. *Id.* at 165.

51. *Id.* at 129.

52. *Id.* at 129.

53. *Id.* at 130.

54. *Id.* at 131.

55. *Id.* at 132.

56. *Id.* at 100.

57. *Id.* at 101.

58. *Id.* at 56.

59. *Id.* at 56.

carnal knowledge of the queen or crown princess,⁶⁰ counterfeiting the king's seal,⁶¹ and killing a judge.⁶²

Where serious crimes did require culpability, that culpability was defined in a wide variety of ways. Only two felonies were defined in terms of knowledge: paying with counterfeit coin⁶³ and sending extortionate letters.⁶⁴ Liability as an accessory-after-the-fact required knowledge that the person harbored was a felon.⁶⁵ Crimes were more commonly defined by reference to a wide variety of specific purposes. Such crimes included riot with intent to change the laws or do violence to the privy council,⁶⁶ smuggling in defiance of the law, or in disguise to evade capture,⁶⁷ negligently or connivingly permitting escape,⁶⁸ conspiring or confederating to kill a lord,⁶⁹ attempting to kill an officer,⁷⁰ embezzling the king's arms for gain or to impede his army,⁷¹ and mayhem with intent to maim or disfigure.⁷² Three forms of treason involved special culpability terms. Compassing the death of the king was an inchoate offense which, Blackstone opined, required "purpose or design."⁷³ Making war on the king and adhering to the king's enemies required inquiry into purposes or expected effects of the defendant's actions.⁷⁴

In addition, three more general culpability terms were used: willfulness, malice, and felonious intent. Blackstone lists the offenses of willfully falsifying court records,⁷⁵ and

60. *Id.* at 81.

61. *Id.* at 83.

62. *Id.* at 83-84.

63. *Id.* at 99.

64. *Id.* at 144.

65. *Id.* at 37.

66. *Id.* at 142.

67. *Id.* at 155.

68. *Id.* at 130.

69. *Id.* at 100.

70. *Id.* at 100.

71. *Id.* at 101.

72. *Id.* at 207.

73. *Id.* at 78-79.

74. *Id.* at 82.

75. *Id.* at 128.

willfully or maliciously shooting.⁷⁶ Blackstone did associate the term malice with an open-ended inquiry into the moral quality of defendant's motivation. Thus he conditioned the offense of malicious mischief, on "a spirit of wanton cruelty or black diabolical revenge."⁷⁷ Blackstone followed earlier writers in defining murder as unlawful killing with malice aforethought.⁷⁸ "This is the grand criterion which now distinguishes murder from other killing: and this . . . is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart."⁷⁹ This last colorful phrase was drawn from Blackstone's contemporary, Sir Michael Foster.⁸⁰ It reflected not some ancient Augustinian notion of sin, but trendy eighteenth century ideas about the basis of morality in human sympathy.

While Blackstone defined malice aforethought in these broad terms, he went on to detail its specific forms. First, he divided malice into express and implied malice. Express malice "is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as by lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm."⁸¹ Blackstone added that express malice included the "evil design" to "beat another in a cruel and unusual manner," though without an intent to kill; or to place a group of people in danger of death; or to kill an unknown victim; or to commit an unlawful act "of which the probable consequence might be bloodshed."⁸² The law "implied" malice in a hodgepodge of circumstances, not readily distinguishable from those which "discovered" express malice. These included killings by poison, or

76. *Id.* at 208.

77. *Id.* at 243.

78. *Id.* at 198.

79. *Id.* at 198-99.

80. Sir Michael Foster, *Report and Discourses on the Crown Law* 256-57 (2d ed. 1776).

81. 4 Blackstone, *supra* note 39, at 200.

82. *Id.*

without provocation, or of officer on duty, or accidentally in the attempt to commit a felony.⁸³ Reiterating his earlier view that culpability consisted simply in unimpaired volition rather than some additional quality of depravity, Blackstone concluded that

all homicide is malicious . . . unless where justified by the command or permission of the law; excused on a principle of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent on the prisoner to make out. . . .⁸⁴

Blackstone defined the offenses of larceny and burglary by reference to “felonious intent.” Yet this phrase meant quite different things in these two contexts. The “felonious intent” in larceny consisted in a quality of dishonesty or furtiveness accompanying a taking: “The ordinary discovery of felonious intent is where the party doth it clandestinely; or being charged with the fact, denies it.”⁸⁵ While Blackstone noted that the return of the goods negated felonious intent, he did not define that intent as the intent to permanently deprive.⁸⁶ Nor did he explain the relevance of furtiveness as manifesting awareness that the goods taken belonged to another. Instead, he concluded that the criteria of felonious intent could not be enumerated and must be left to the discretion of fact-finders.⁸⁷ By contrast, the felonious intent required for burglary was simply the unmysterious intent to commit some felony after breaking and entering.⁸⁸

So a snapshot of English criminal law in the late eighteenth century reveals a great diversity of mental

83. *Id.* at 200-201.

84. *Id.* at 201.

85. *Id.* at 232.

86. *Id.*

87. *Id.*

88. *Id.* at 227.

criteria that might be required in inculpatory or exculpatory defendants, and a good many crimes requiring no culpability at all. If *mens rea* was an essential requirement of criminal liability, it was not an offense element to be proven by the prosecution, or a requirement of evil motive. It was a presumed capacity for moral agency to be disproved by the defense. Of course after the fact, we can string together all the disparate forms of culpability, join them to excuses based on incapacity, and claim they stand for one coherent principle. We can treat crimes without culpability requirements as involving acts that offend that principle inherently and so obviate any further proof of culpability. But in doing so we project the concerns of modern criminal law theory onto the past.

While we will not find the modern idea of intent as an essential offense element in Blackstone, we will see some of the assumptions that may have made such an idea attractive. Recall that Sayre associates the idea that each crime has its own mental element with a new conception of criminal law as serving to protect diverse social interests. Blackstone articulated this new conception in his *Commentaries*, where he explained that criminal law was distinguished from civil law by its unique function of protecting the public interest.⁸⁹ He divided his discussion into the different interests protected, and began each chapter with an explanation as to how the interest discussed concerns the public.

The conception of crime Blackstone's new theory replaced was not some moral notion of crime as sin. Crime had long been seen as a threat to the king's peace.⁹⁰ Blackstone's theory of crime as harm to diverse interests simply expanded the public interests protected by the criminal law, beyond the king's peace. Blackstone had to take account of the great proliferation of criminal legislation during the eighteenth century, especially in the

89. *Id.* at 5.

90. 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 45 (Cambridge, The Univ. Press, 2d ed. 1898); Hurnard, *supra* note 15, at 8.

area of property crimes.⁹¹ He also had to contend with a new, more democratic and inclusive conception of political legitimacy, articulated by Locke and brought to bear in the Glorious Revolution.⁹² It was now the function of the state to protect the natural and civil rights of its citizens, not simply to maintain a monopoly on violence.

This more democratic conception of the state entailed an expanded function for the criminal law. But because the process of criminal lawmaking was still not entirely democratic, this expanded conception of the criminal law posed a new problem of legitimacy. This problem of legitimacy perhaps accounts for the tremendous interest in criminal law reform in late eighteenth century England.⁹³ The criminal law was increasingly draconian, but still seemed like an arcane, and highly discretionary, creation of judges. And as the scope and function of the criminal law expanded, so did the power of judges. After all, the power of Parliament to legislate was traditionally understood as a power constrained by the common law's principles and purposes.⁹⁴ According to Blackstone, "statutes are either *declaratory* of the common law, or *remedial* of some defects therein."⁹⁵ On this theory, Parliament can identify a wide array of new public interests and criminalize threats to those interests, only if the common law *already* recognizes and protects these interests, at least implicitly. And if Parliament can declare the common law of crimes, so can courts, *a fortiori*. In this way, the newly democratic theory of the criminal law that was needed to account for new criminal legislation, also expanded the traditionally recognized power of judges to define new common law crimes. Courts could now criminalize any act that seemed to injure or endanger some public interest. Blackstone

91. See generally, Douglas Hay, Property, Authority and the Criminal Law, in Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* 17-63 (1975); Jerome Hall, *Theft, Law and Society* 3-36 (1935).

92. 1 William Blackstone, *Commentaries on the Laws of England* 120-24 (1765).

93. Hay, *supra* note 91.

94. Binder and Weisberg, *supra* note 4, at 36-37 (2000).

95. 1 Blackstone, *supra* note 92, at 86.

devoted a chapter to offenses against the public police and economy, which included such vague categories as vagrancy⁹⁶ and public nuisance: "the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires."⁹⁷

When the concept of crime was associated with a breach of the king's peace, it may have seemed unnecessary to define the elements of offenses with any great precision. Conduct would attract the attention of the criminal law only if it culminated in bloodshed. Thus the criminal law had formerly been concerned with the relatively narrow problem of assigning responsibility for violent conflict. With the concept of a crime no longer anchored by a requirement of violence, however, the criminal law was increasingly rife with uncertainty, and there was a more manifest need to define offenses prospectively. One possible way to cabin the expansion of criminal liability was to condition liability on culpability in a more systematic way. Yet it was difficult to define culpable mental states with any precision unless one tied them to some specific act or harmful result. Thus the expanded conception of crime as harm to any public interest, which Blackstone announced, posed problems of doctrinal determinacy and institutional legitimacy; and one appealing solution was to carefully define act and mental elements of offenses.

The problem was possibly more acute in the newly independent United States, where democratic norms were more firmly established, and where the continuing authority of the British common law was open to question. American reformers criticized British criminal law as excessively harsh and supported legislation reducing the number of capital crimes.⁹⁸ American courts could reasonably assume that the British common law would remain in force until superseded by American legislation.

96. 4 Blackstone, *supra* note 39, at 169.

97. *Id.* at 167.

98. See Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. Pa. L. Rev. 759, 766-773 (1949).

But could they maintain the traditional assumption that legislation served only to fill gaps in the common law? Could they assume that an expansion of legislative jurisdiction expanded the scope of their own lawmaking powers as well? The requirements of developing the infrastructure for a commercial economy and an urban society occasioned much local legislation during the early republican period,⁹⁹ including criminal legislation.¹⁰⁰ Courts also used their common law powers to foster their own vision of development,¹⁰¹ and these powers included defining common law crimes against the public welfare and police.¹⁰² But this ad hoc approach to criminalization rendered the definition of criminal conduct frighteningly indeterminate.

The Pennsylvania case of *Respublica v. Caldwell*¹⁰³ illustrates the problem. Caldwell was charged with public nuisance for erecting a wharf on public property. He argued that his wharf was not an annoyance to the public, because it was in fact, and by design, beneficial to the public. The court, however, refused to hear his evidence, reasoning that, regardless of the consequences, and of his intentions, Caldwell had infringed a common right. But

99. See generally, William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (1996); *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (state and local police power to regulate health, safety and morals); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851) (legislative police power to regulate property).

100. Novak, *supra* note 99, at 15-16, 153-55; Nathaniel Chipman, *Principles of Government: A Treatise on Free Institutions, Including the Constitution of the United States* 209-17 (1833).

101. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977).

102. Joel Prentiss Bishop, *Commentaries on the Criminal Law* 632-74 (Little, Brown & Co., 5th ed. 1872) (doctrine of public nuisance offenses); *Respublica v. Teischer*, 1 U.S. (1 Dall.) 335 (Pa. 1788) (any public wrong is indictable); *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815) (any act "tending to corrupt" public morals indictable); *Commonwealth v. Wing*, 26 Mass. (9 Pick.) 1 (1829) (any deliberate act of mischief indictable); *State v. Buckman*, 8 N.H. 203 (1836) (any act providing an evil example against good morals indictable); *Commonwealth v. McHale*, 97 Pa. 397 (1881) (category of "police offenses" comprises all crimes "affecting public society").

103. 1 U.S. (1 Dall.) 150 (Pa. Ct. of Oyer & Terminer 1785).

how could Caldwell have anticipated what conduct would be deemed a public nuisance? What is the actus reus element of Caldwell's offense? Trespassing on public property? Infringing a common right? Harming the public? Finally, unless the proscribed act is defined, how can we determine the mental element, if any, of this offense? If the offense consists in harming the public, why should not the mental element be, as Caldwell suggested, the intent to harm the public? The less precise the conduct constituting a particular crime, the more appealing it is to condition liability on some very general criterion of culpability like "evil motive." Conversely, the more precise the conduct proscribed, the less necessary is a moral assessment of the actor's state of mind. The *Caldwell* case would later be cited for the proposition that good motive was no defense, but it also illustrates how difficult it is to determine criminal responsibility for an offense with no defined conduct element. The *Caldwell* case illustrates why a broader conception of the interests protected by the criminal law necessitated more precise definition of offenses, including their mental elements; and it shows the need to separate the legislative function of offense definition from the judicial function of evaluating particular conduct.

The maxim that the criminal law is concerned with intent, but not motive, arose as a result of two responses to this problem of offense definition. One response was the effort of jurists to develop a scientific—that is, a systematic and complete—analysis of offenses into elements. The other, discussed in the next section, was the utilitarian project of legislative codification.

The effort to develop a systematic analysis of offenses into mental and physical elements can be traced back to the early eighteenth century jurist William Hawkins. Hawkins offered an account of felony murder liability as the transfer of intent from one felony to another.¹⁰⁴

104. The felony murder rule was first proposed by dictum in the case of *Rex v. Plummer*, Kelyng 109, 84 Eng. Rep. 1103 (1701), and endorsed by several subsequent jurists, including Foster, Blackstone and East, but does not appear to

Hawkins proposed “a general rule, that where ever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony he actually commits.”¹⁰⁵ Hawkins’s “general principal” implicitly divided felonies into an act and an intent, and made the intentions to commit different felonies interchangeable. Hawkins did not clarify whether he thought felony liability always required intent.

Hawkins’s analytic scheme was refined by Justice Sir Peter King, who declined to apply his “general principle” in the 1722 case of *Rex v. Woodbourne and Coke*.¹⁰⁶ Woodbourne and Coke were charged under a mayhem statute punishing the felony of maiming with intent to disfigure. They claimed they had lacked the requisite intent to disfigure but instead had intended to kill (which would have made their attack the mere misdemeanor of attempted murder). King agreed that the offense required an actual intent to disfigure (which he encouraged the jury to find present), reasoning that Hawkins’s principle of transferred felonious intent applied only to certain crimes:

There are some cases where an unlawful or felonious intent to do one act, may be carried over to another act, done in prosecution thereof; and such other act will be felony, because done in prosecution of an unlawful intent. As, if a man shoots at a wild fowl, wherein no man hath any property, and by such shooting happens unawares to kill a man; this homicide is not felony, but only a misadventure or chance-medley, because it was an accident that happened in the doing of a lawful act: but if this man had shot at a tame fowl, wherein another had property, but not with intention to steal it, and by such shooting had accidentally killed a man, he would then have been guilty of manslaughter, because done in prosecution of an unlawful action, viz.

have been actually applied in England or America before the nineteenth century. See Guyora Binder, *The Origins of American Felony Murder Rules* (2002) (unpublished manuscript, on file with *The Buffalo Criminal Law Review*).

105. William Hawkins, *Pleas of the Crown, 1716-1721*, at 74 (Professional Books 1973).

106. 16 St. Tr. 53 (1722).

committing a trespass on another's property: But if he had had an intention of stealing this tame fowl, then such an accidental killing of a man would have been murder, because done in prosecution of a felonious intent, viz. an intent to steal. . . .

But now the indictment on this statute is for a certain particular intent; for purposely, maliciously, and by lying in wait, slitting Mr. Crispe's nose, with an intention in so doing to maim or disfigure.¹⁰⁷

Here we have the idea, although not yet the terminology, of specific and general intent crimes: there are some offenses that require a "particular" intent, and others requiring merely an "unlawful" intent. King made no suggestion that all offenses require intent, whether general or specific.

In 1770, however, Lord Mansfield did make such a suggestion, in the criminal libel case of *Rex v. Woodfall*.¹⁰⁸ Mansfield concluded that criminal libel did not require any intent to injure a victim's reputation, but only the publication of a document, injurious in fact. This, however, was a form of the criminal intent requisite to all criminal liability. Mansfield reasoned: "When an act, in itself indifferent, becomes criminal if done with a particular intent, then the intent must be proved and found; but when the act is in itself unlawful, the proof of justification and excuse lies on the defendant, and in failure thereof, *the law implies a criminal intent*."¹⁰⁹ With this notion of "implied criminal intent," Mansfield reinterpreted all offenses as offenses of intent, while requiring proof of that intent only for inchoate offenses, involving some intended but unaccomplished harm. Mansfield accomplished what Blackstone had not, which was to locate Blackstone's "vitious will" within the definition of each offense.

107. *Id.* at 79.

108. 5 Burrows 2667 (1770).

109. *Id.* (emphasis added). For an American case along these lines, see *Commonwealth v. Hersey*, 84 Mass. 173, 2 Allen 173 (1861) (inchoate crimes require proof of specific intent; intent implied in result offenses).

Mansfield's distinction between inherently unlawful acts and innocent acts rendered criminal by a particular intent, combined with Hawkins's idea of transferrable unlawful intent, gave rise to the nineteenth century distinction between general intent and specific intent offenses. The American commentator Joel Prentiss Bishop popularized this terminology, which he used to explain when an offender was responsible for the unintended consequences of an act. Bishop offered the theory that crimes ordinarily required both an intention to "do a forbidden thing" and a harmful result. Yet the harm produced need not be the specific harm intended: a "general intent" to commit some crime ordinarily sufficed to make the offender criminally responsible for any harm caused. As long as the intended result was roughly as bad as the result produced, the unlawful intent would "transfer" to the actual, but unintended, result. Yet Bishop excepted certain crimes from this doctrine of a transferable or "general" intent to do wrong. These crimes required a "specific intent" that could only transfer to a result of the same kind intended.¹¹⁰ By the mid-nineteenth century, then, lawyers were familiar with the proposition that every offense involved a mental element, which they commonly referred to as some form of "intent." This category of intent seemed to include desiderative states like purposes or motives, as well as cognitive states like expectations.

III. THE DISUTILITY OF PUNISHING MOTIVES

The idea that the intent element of offenses should not include motive emerged out of the utilitarian tradition. Utilitarian penology may be seen as a response to the problem of offense definition posed by Blackstone's account of the common law of crimes. Blackstone's theory of crimes as acts identified by the common law as harming or endangering public interests is partly compatible with

110. 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* 220-22, 229 (1856-58).

utilitarianism. Utilitarians could agree that the function of the criminal law was to protect the public welfare against harm and danger, but they could not agree that common law adjudication was the proper method to identify the public interest. Utilitarianism's democratic premises required that a representative legislature define the public interest through legislation.¹¹¹ The utilitarian concern with effective and optimal deterrence required that proscribed conduct be defined precisely, prospectively, and publicly.¹¹² Even though Blackstone's new, expanded theory of the criminal law had been necessitated by legislative activism, Blackstone still presented the criminal law as essentially a body of judicially developed principle. Thus Blackstone's theory of the criminal law was passably utilitarian at the level of substance, but not at the level of procedure.

Blackstone's ambitious but unsuccessful effort to reconcile the traditional common law with enlightenment political theory¹¹³ provoked Bentham's polemical attack on the common law,¹¹⁴ and his effort to reconstruct British law on wholly utilitarian and democratic premises.¹¹⁵ One of Bentham's main goals was to develop a lucid, value-free language for policy analysis, legal analysis, and legislative drafting. This would enable the public to monitor their legislative representatives to ensure that legislation served the public interest. It would enable legislators to communicate clear conduct norms and sanctions to the public. And it would enable the public to monitor judicial and executive application of legislation to ensure compliance with legislative will. In trying to develop a

111. See Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 Rutgers L.J. 115, 189-200 (2000); Guyora Binder, *Punishment Theory: Moral or Political?*, 5 Buff. Crim. L. Rev. 321, 333-349 (2002).

112. Binder & Smith, *supra* note 111, at 184-89, 200-10; Binder, *supra* note 111, at 333-349.

113. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205, 258-272 (1979).

114. *Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government* (J.H. Burns & H.L.A. Hart eds., Humanities Press 1977) (1776).

115. *Jeremy Bentham, An Introduction to the Principles of Morals and Legislation* (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789).

clear, descriptive language for legislation and legal analysis, Bentham distinguished motive from intent.

Bentham thought that law could exploit motives and desires to regulate behavior, but that motives themselves were products of human nature, beyond the power of law to regulate. Thus, the irrelevance of motive claim is an outgrowth of the great eighteenth century project of redeeming the passions that gave rise to economics as well as utilitarian penology.¹¹⁶ The general idea that tough-minded public policy should eschew the moral evaluation of desires is already visible in Mandeville's *Fable of the Bees*, which argues that "private vices" often yield public benefits.¹¹⁷ Hobbes sounded a similar note in his demonstration that law and the state could be explained as the rationally self-interested creations of egoists. The point was argued more systematically by the Swiss utilitarian, Baron Helvetius. Helvetius' fundamental idea was that the principles of human psychology should be regarded scientifically, rather than morally. The passions driving human action should be seen as healthy and beneficial or, at worst, as morally neutral. According to Helvetius, the same basic human passions—the desire for pleasure and satisfaction, and the fear of pain and want—were the motive force behind both good and bad actions. Actions were good or bad according to their effects on human happiness, rather than their motivating passions. Differing environmental circumstances might channel the same passions into beneficial or harmful actions. The role of moral philosophy was not to condemn the passions, but to accept them as inevitable and to figure out how to use them in enhancing human happiness. Thus, the real task of the moral philosopher was to apply psychology to the problem of designing efficacious laws. The purpose of law, in turn, was to shape the circumstances and incentives facing actors, so as to channel their passions towards

116. Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph* (1977).

117. Bernard Mandeville, *Fable of the Bees: Or Private Vices, Publick Benefits* (1924).

beneficial actions. In so doing, law would define, denounce, and punish harmful behavior, rather than dissolute passions.¹¹⁸

Bentham embraced Helvetius' principles and took up the task of designing utilitarian legislation. In designing criminal legislation, Bentham reasoned that the passions motivating human behavior were an inevitable fixture of human psychology, and so could not be used to distinguish criminal from innocent behavior. Yet, Bentham realized, this did not mean that mental criteria of liability were useless. While the purpose of criminal law was to deter harmful behavior, this could only be done by punishing behavior that actors expected to cause harm. Since deterrence operated on the basis of actors' expectations, it could only work in so far as actors knew they were or might be engaging in punishable conduct. And to the extent that the threat of punishment could not deter, actual punishment was pointless cruelty. Thus there was a utilitarian rationale for conditioning liability on either the expectation of harmful results, or knowledge of circumstances that rendered action harmful. It was not necessary that the actor personally recognize that the forbidden consequences or results were harmful, so long as the actor had notice that they were forbidden and punishable.

While optimally deterring harm required conditioning punishment on the expectation of proscribed results or circumstances, optimal deterrence did not require that punishment be conditioned on actual harm. The behavior to be deterred was behavior likely to cause harm. Limiting punishment to actual harm would create a punishment lottery, reducing the certainty of punishment for dangerous behavior. To compensate for this reduction in certainty, legislators would have to increase the severity of punishment for those actually causing harm. Decision makers and officials might well and rightly balk at

118. Claude Helvetius, *De L'Esprit, Or Essays on the Mind and its Several Faculties* 7, 10, 29, 39, 124-125 (new ed., B. Franklin 1970) (1759).

imposing such severe punishments on those who were morally no worse than others whose dangerous acts had not happened to result in harm. Discretionary and haphazard imposition of draconian punishments would further reduce the certainty of the law's deterrent threat, requiring still greater and still more counterproductive increases in the severity of punishment. All of this meant that laws designed to prevent harm should punish the expectation of harm rather than harm itself. Utilitarian penology therefore favored inchoate over complete offenses.

Bentham's deterrence theory accordingly conceived criminal liability as essentially a matter of expectations accompanying action. It identified motives as the forces that deterrent sanctions were designed to mobilize in controlling behavior; but because these motives were both indestructible and useful, they could not be punished. "By a motive . . . is to be understood any thing whatsoever, which by influencing the will of a sensitive being, is supposed to serve as a means of determining him to act, or voluntarily to forebear to act, upon any occasion."¹¹⁹ For Bentham, a motive is a desire or fear that causes action, while an intention is an expectation accompanying action. Motives are desiderative and intentions are cognitive.

Bentham objected to the language of motives as saturated with normative judgment. Motives are always described in eulogistic or dyslogistic terms. But these terms are also misleading. No motive, Bentham argued, is bad in itself, because all motives are ultimately the same: the desire for pleasure and the fear of pain. And most of the sources of pleasure—physical appetites, curiosity, empathy, and the desire for esteem—are benign, if pursued in harmless ways. Bentham argued that even hatred can be benign in its effects, as when it induces one who is wronged by disutilitarian behavior to testify against a wrongdoer. Thus what makes an action bad or good is its hedonic effects, not its motives. Indeed, the purpose of the threat of criminal punishment is to harness each individual's selfish

119. Bentham, *supra* note 115, at 97.

motives to the public good, and so to render it efficacious. Without self-regard, criminal punishment would have no beneficial effect and would simply impose needless suffering.

So Bentham's distinction between motive and intent combines three ideas: (1) The criminal law should reduce discretion by precisely defining offenses. (2) It should define offenses in neutral descriptive language rather than normative language. And (3) it should define culpability by reference to cognitive states like expectations, rather than desiderative states like purposes. Conduct should be criminalized on the basis of its effects, or better, its likely effects, rather than on the basis of bad character, manifested by an immoral attitude. From the standpoint of the legislator, there is no such thing as an immoral attitude, only dangerous actions to be discouraged by punitive sanctions.

In his *Lectures on Jurisprudence*, John Austin further refined Bentham's distinction between motive and intent. Austin distinguished four concepts: act, volition, intention, and motive. Austin defined acts as bodily movements only, as distinguished from any of their consequences. He defined volition as a desiderative state accompanying acts. He defined intentions as cognitive states, involving awareness of willed acts and their consequences. In Austin's language, motives are desiderative states which cause or "determine" action,¹²⁰ but do not include volitions.¹²¹ Thus motives are always desiderative attitudes towards the consequences of actions. A motivating desire is always a desire for a feeling of pleasure or gratification or relief from suffering or fear. Thus an actor might be motivated by nothing more than the desire to experience joy in physical movement. That joy is still a consequence of the act rather than the act itself, so that the motivating desire to enjoy the act is distinct from the will to act.

120. 1 John Austin, *Lectures on Jurisprudence* 422 (Robert Campbell ed., 3d ed., J. Murray 1869) (1863).

121. *Id.* at 432.

A motive, then, is a wish causing or preceding a volition:—a wish for something not to be attained by wishing it, but which the party believes he will probably or certainly attain, by *means* of those wishes which are styled acts of the will.

. . . [M]otives may precede motives as well as acts of the will. For the desired object which is said to determine the will may itself be desired as a mean to an ulterior purpose. In which case, the desire of the object, which is the ultimate end, prompts the desire which immediately precedes the volition.¹²²

An expected (and so intended) consequence can also be a desired consequence. Thus, “[w]here an intended consequence is wished as an end or a mean, motive and intention concur.”¹²³ Nevertheless, even when intention and motivation coincide, it is the intention that inculcates, rather than the motivation. The desire for pleasure is a constant, and is not punishable. It is the knowledge that gratifying that desire will have the collateral consequence of imposing a proscribed harm or risk that subjects the actor to punishment.

Austin is responsible for developing much of the modern conceptual vocabulary of culpability, later used in the Model Penal Code. Austin pioneered the idea of tying every culpable mental state to some state of affairs in the world. For Austin, acts are unlawful not in themselves, but only by virtue of their consequences. It is only these consequences that can be culpably intended or desired. If intent governs only consequences, not acts, there can be no “general intent.” A criminal intent must be specific: it must be knowledge of some probability of the consequences of action that would render an otherwise innocent action unlawful. Austin therefore distinguished a number of different levels of awareness: negligence (which he called “heedlessness”), recklessness (“rashness”), and intent. Austin also permitted purpose or “design” as a criterion of

122. Id. at 428.

123. Id. at 436.

liability in so far as it implied the expectation of harm,¹²⁴ while nevertheless insisting that motive is irrelevant. "Malice as signifying criminal design . . . is often confounded with malice as denoting malevolence; insomuch that malevolence (though the motive or inducement of the party is foreign to the question of his guilt or innocence) is supposed to be essential to the crime."¹²⁵

IV. THE DOCTRINE OF THE IRRELEVANCE OF MOTIVE

In the second half of the nineteenth century, courts began to contrast motive and intent explicitly. Gardner recounts this process:

As the definition of the criminal law increasingly became more a legislative rather than a judicial matter, legislatures identified the mens rea of various crimes, minimizing the earlier retributive interests of the criminal law in the pursuit of a utilitarian agenda of crime control. With the emergence of legal positivism, the interest in protecting the general welfare from the harmful effects of an emerging industrialized society led to the mid-nineteenth century enactment of a variety of strict liability laws Often legislatures enacted statutes without specifying any mens rea [or] listing myriad, often undefined, mens rea terms as part of the offense . . . relying on the courts to sort matters out. . . . As courts attempted to clarify the mens rea elements of various offenses, they often specifically rejected the original evil motive approach in favor of describing particular states of mind as essential for criminal liability.¹²⁶

Gardner's key examples are two well-known English malicious damage cases from the 1870's.¹²⁷ *Pembliton* was convicted of malicious damage after heaving a stone at another person, which broke a window. In overturning his

124. 2 Austin at 1093.

125. *Id.*

126. Gardner, *supra* note 5, at 671-73 (footnotes omitted).

127. *Id.* at 673-77.

conviction, the Court of Crown Cases Reserved concluded that while Pembliton's motive in throwing the stone may have been malicious, Pembliton did not maliciously damage property because he did not intentionally or recklessly (or perhaps even negligently) damage it.¹²⁸ In attempting to steal rum from a ship's hold, Faulkner accidentally set the ship on fire. His conviction for malicious damage was overturned on similar grounds: his felonious motive for the act causing the fire did not amount to maliciously damaging property. That would require doing so intentionally, or at least negligently in the course of an unlawful act.¹²⁹ For Gardner, these cases represent the repudiation of the rule imposing responsibility for all consequences of an illegal act, and the larger principle that any evil motive whatsoever can supply the mental element of any crime. These cases stand for a new model of culpability as awareness of danger to the particular interests protected by particular offenses.

A number of American cases from the same period sounded a similar theme. In *Commonwealth v. Adams*,¹³⁰ a Massachusetts court held that it was not assault and battery for the speeding driver of a sleigh to run down a pedestrian inadvertently. The court reasoned that the willful violation of a speeding ordinance does not supply the necessary intent for assault and battery. Nevertheless, the court did express willingness to transfer intent from one offense to another if the intended offense were malum in se—suggesting that evil motive would always supply the requisite culpability, even if unlawful motive would not.

American courts were far more likely to invoke the irrelevance of motive maxim in excluding evidence of good motive, as in *Respublica v. Caldwell*. In *Reynolds v. United States*, the U.S. Supreme Court upheld the bigamy conviction of a Mormon in Utah, agreeing that defendant was not excused by his religious belief that he faced damnation if he did not pursue polygamy; “[e]very act

128. *Regina v. Pembliton*, 2 L.R.-Cr. Cas. Res. 119 (1874).

129. *Regina v. Faulkner*, 11 Ir. R.-C.L. 8 (Cr. Cas. Res. 1877).

130. *Commonwealth v. Adams*, 114 Mass. 323 (1873).

necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed," the Court concluded.¹³¹ In *United States v. Harmon*, a federal court upheld a conviction for distributing obscenity despite defendant's claim that the document he distributed was an exposé of the abuses of prostitution, aimed at improving rather than harming public morals; the court inveighed that:

[T]he proposition is that a man can do no public wrong who believes that what he does is for the ultimate public good. The underlying vice of all this character of argument is that it leaves out of view the existence of the social compact, and the idea of government by law. . . . Guiteau stoutly maintained to the end his sanity, and that he felt he had a patriotic mission to fulfil in taking off President Garfield, to the salvation of a political party. The Hindu mother cast her babe to the advouring Ganges to appease the gods. But civilized society says both are murderers. The Mormon contends that his religion teaches polygamy; and there is a school of so-called "modern thinkers" who would abolish monogamy. . . . All these claim liberty of conscience and thought as the basis of their dogmas, and the *pro bono publico* as the strength of their claim to indulgence.¹³²

In *State v. Torphy*, a Missouri court overturned a gambling conviction on the ground that defendant's purpose of gathering evidence against the other gamblers precluded his culpability for joining in the game; but Judge Ellison dissented, arguing

Defendant . . . did the thing prohibited by the statute, and he did it purposefully, that is, intentionally. It will not do to say that he had no intention to gamble, for he *did* gamble, but said he did so with the view of detecting others. That was merely his motive, as distinguished from his intention. His intention was to do the act prohibited and his motive was to catch others. But one's motive, however sincere, will

131. *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

132. *United States v. Harmon*, 45 F. 414, 422 (D. Kan. 1891).

not excuse his violation of the penal statute. . . . 1 Bishop's Crim. Law, sec. 341. . . . 1 Wharton's Crim. Law, sec. 119.¹³³

The irrelevance of motive was also a prominent theme in the criminal law scholarship of the late nineteenth century. The most influential exponents of the irrelevance of motive maxim were James Fitzjames Stephen and Oliver Wendell Holmes. Stephen explained the irrelevance of motive maxim as necessary to the legal scientific program of analyzing criminal liability into its component elements, while Holmes explained the maxim more in utilitarian terms.

Stephen was probably the first author to argue that *mens rea* should be understood simply as the disparate mental elements of offenses rather than as some quality of mind or character common to all offenders. He complained that the maxim '*Actus non facit reum nisi mens sit rea,*'

suggests fallacies which it does not precisely state. It is frequently though ignorantly supposed to mean that there cannot be such a thing as legal guilt where there is no moral guilt, which is obviously untrue, as there is always a possibility of a conflict between law and morals. It also suggests the notion that there is some state of mind called a '*mens rea,*' the absence of which, on any particular occasion, deprives what would otherwise be a crime of its criminal character. This is also untrue. . . . The truth is that the maxim about '*mens rea*' means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. . . . Hence the only means of arriving at a full comprehension of the expression "*mens rea*" is by a detailed examination of the definitions of particular crimes, and therefore the expression itself is unmeaning.¹³⁴

In analyzing the definitions of crimes, Stephen employs a distinction between motive and intent similar to

133. *State v. Torphy*, 78 Mo. App. 206, 209 (1899).

134. 2 James F. Stephen, *A History of the Criminal Law of England* 95 (1883).

Austin's. For Stephen, an actor may choose to act on a motive or not, whereas intentions always accompany actions. Motives are desires, whereas intentions can include expected consequences that may be desired for many reasons, or not at all:

Intention . . . is the result of deliberation upon motives, and is the object aimed at by the action caused or accompanied by the act or volition. Though this appears to me to be the proper and accurate meaning of the word it is frequently used and understood as being synonymous with motives. It is very common to say that a man's intentions were good when it is meant that his motives were good, and to argue that his intention was not what it really was, because the motive which led him to act as he did was the prevailing feeling in his mind at the time that he acted rather than the desire to produce the particular result which his conduct was intended to produce. . . . A puts a loaded pistol to B's temple and shoots B through the head deliberately, and knowing that the pistol is loaded and that the wound must certainly be mortal. It is obvious that in every such case the intention of A must be to kill B. On the other hand, the act in itself throws no light whatever on A's motives for killing B. . . . The motive may have been a desire for revenge, or a desire for plunder, or a wish on A's part to defend himself against an attack by B, or a desire to kill an enemy in battle, or to put a man already mortally wounded out of his agony. In all these cases the intention is the same, but the motives are different.¹³⁵

For Stephen, intentions are compound mental states, combining volitions and expectations. They are consequences not merely desired, but chosen or accepted, as the likely consequences of acts that are chosen. Thus there are intentions (expected consequences of acts) that are not motives, because not desired. And there are motives (desired ends) that are not intentions, because not acted upon.

135. *Id.* at 110.

But there is a problem with Stephen's scheme: for there are many motives (desired ends) which are also intentions, because they are expected consequences of actions that they motivate. Thus, Stephen seems to include among intentions "the desire to produce the particular result which his conduct was intended to produce." At the same time, he seems to exclude from intentions the expectations that a killing will lead to revenge or plunder or defense. So the difference between desire and expectation does not really explain his distinction between motive and intent. Motives seem to be simply desires to produce, or expectations of producing, consequences that are not proscribed by law. Intentions seem to be simply desires to produce, or expectations of producing, consequences that are proscribed. And Stephen's point seems to be that since every action has many consequences, it is possible to have many expectations or hopes about the consequences of an action. As long as the prosecution proves the desire for or expectation of a proscribed result, it need not disprove an additional expectation of a lawful result. Thus, Stephen argues

The maxim [that a man must be held to intend the natural consequences of his act] . . . is valuable as conveying a warning against two common fallacies, namely, the confusion between motive and intention, and the tendency to deny an immediate intention because of the existence, real or supposed, of some ulterior intention. For instance, it will often be argued that a prisoner ought to be acquitted of wounding a policeman with intent to do him grievous bodily harm, because his intention was not to hurt the policeman, but only to escape his pursuit. . . . [N]othing can be more illogical than to argue that a man did not entertain a given intention because he had a motive for entertaining it. The supposition that the presence of an ulterior intention takes away the primary immediate intention is a fallacy of the same sort. It is well illustrated by a case. . . in which Woodbourne and Coke were indicted . . . for wounding Crispe 'with intent to maim and disfigure him.' Woodbourne, at Coke's instigation, struck Crispe about the head and face with a billhook seven distinct blows. Coke . . .

defended himself on the grounds that he intended Woodbourne to kill Crispe, and not to disfigure him; but the judge who tried the case . . . pointed out to the jury that the instrument used . . . was "in its own nature proper to cut and disfigure; and if the intention was to murder you are to consider whether the means made use of to effect and accomplish that murder and the consequence of those means were not in the intention and design of the party."¹³⁶

That one intention, whether guilty or innocent, does not preclude another seems sensible enough. But this hardly shows that the second intention is irrelevant to liability. Sometimes two different intentions are incompatible: the intent to borrow precludes the intent to steal. Sometimes a second intention enhances liability: today, Woodbourne and Coke would be guilty of attempted murder as well as mayhem. Sometimes a second intention exculpates: thus, the intent to prevent a crime or save a life may justify or excuse. In all these cases, nothing turns on calling the second intention a motive. Stephen assumed that talking about intent rather than motive would confine analysis to offense elements and recognized defenses. But he never succeeded in distinguishing the two concepts. Indeed, a few years earlier Francis Wharton had taken much the same position, while using the terms motive and intent interchangeably:

The will . . . acts generally under a variety of motives, some very complex. . . . And the law is that, if among the motives leading to a particular act, one is illegal, this is sufficient to add to the act the essential evil intent, no matter how strong may be other concurrent intents. Thus intending ultimate good is no defense to an indictment for nuisance; intending to return the goods, no defense to an indictment for embezzlement; intending to restore lost goods on a reward, no defense to an indictment for larceny; intending to rid the community of a bad man, no defense to an indictment for homicide. No matter what other intents existed, if the intent

136. *Id.* at 111-12.

to do the particular unlawful act is either proved or implied, the offense if committed, is complete.¹³⁷

Wharton's use of motive and intent as interchangeable terms did not preclude him from arguing that criminal litigation should be confined to offense elements and recognized defenses, which is what Stephen intended to achieve by advocating the irrelevance of motive.

In Holmes's terminology, the motive for an act was one among the many purposes with which the actor acted: the "ultimate" one. Intentions included both purposes and expectations. Yet motive and intent were not really distinct categories, for Holmes. Instead, they were points along an axis between subjective and objective standards of liability. In the utilitarian tradition, Holmes argued that the purpose of punishment was to control external behavior, rather than to judge defendants morally or to reform their desires. From Holmes's point of view, culpability was relevant only because behavior that the defendant could not control was undeterrable. Moreover, even deterrability was relevant only in so far as it could be proven. Accordingly, Holmes sought to replace subjective standards of liability with reasonable person standards. Those who caused harm to societal interests would be criminally liable to the extent that they acted under circumstances which would have alerted a reasonable person to the danger of harm. Enforcing such objective standards of behavior even against individuals who were incapable of meeting them would deter others.

As far as Holmes was concerned, a purpose of doing harm was hard to prove and irrelevant: one who knew his action would cause harm was more dangerous than one who merely hoped it would. In deciding what conduct to deter, what mattered was how dangerous it was, not why a defendant was willing to impose that danger. Thus Holmes concluded that the purpose to kill should be unnecessary for murder liability:

137. 1 Francis Wharton, *A Treatise on Criminal Law* 646-47 (7th ed. 1874).

Malice, as used in common speech, includes intent, and something more. When an act is said to be done with an intent to do harm, it is meant that a wish for the harm is the motive of the act. Intent, however, is perfectly consistent with the harm being regretted as such, and being wished only as a means to something else. But when an act is said to be done maliciously, it is meant, not only that a wish for the harmful effect is the motive, but also that the harm is wished for its own sake. . . . Now it is apparent . . . that of these two elements of malice the intent alone is material to murder. It is just as much murder to shoot a sentry for the purpose of releasing a friend, as to shoot him because you hate him. Malice, in the definition of murder, has not the same meaning as in common speech, and . . . has been thought to mean criminal intention.

But intent again will be found to resolve itself into two things; foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act. The question then is, whether intent, in its turn, can be reduced to a lower term. . . . [I]t can be, and . . . knowledge that the act will probably cause death, that is, foresight of the consequences of the act, is enough in murder as in tort.

For instance, a newly born child is laid naked out of doors, where it must perish as a matter of course. This is none the less murder, that the guilty party would have been very glad to have a stranger find the child and save it.¹³⁸

Having equated motive with intent and intent with expectation, Holmes went further, and argued that reasonable expectation was the functional equivalent of actual expectation.

But again, what is foresight of the consequences? . . . Again we must seek a reduction to lowest terms, If the known present state of things is such that the act done will certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the

138. Oliver Wendell Holmes, *The Common Law* 44-45 (1881).

consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen.¹³⁹

For Holmes, the irrelevance of motive was part of a larger argument that all subjective standards of liability were pointless from a utilitarian standpoint. Cognitive standards were better than desiderative standards, but standards of objective reasonableness were better still. Thus for Holmes, the irrelevance of motive was not a description of prevailing doctrine, but a normative claim about the true function of criminal liability. When proclaimed by Holmes, the irrelevance of motive was the slogan for a sweeping program of doctrinal reform.

By the early twentieth century, the distinction between motive and intent was familiar and the irrelevance of the former to criminal liability had become an accepted maxim of the criminal law. The following statement from Clark and Marshall's turn of the century treatise is typical:

It is a clear principle of law that motive does not enter into any crime as an essential ingredient. Neither failure to prove any motive nor proof of a good motive will prevent conviction. . . . [I]f it otherwise appear to [the jury's] satisfaction that [the accused] did do the act, and that he did it willfully and without justification or excuse, the fact that no motive is shown is altogether immaterial. . . . A willful act prohibited and made punishable by the common law or by statute is none the less a crime because the accused was actuated by a good motive. . . . For example, on a prosecution for depositing in the mails or publishing an obscene article or book it is no defense for the accused to show that his object was to correct evils and abuses in intercourse between the sexes, and thus do a public good. And on a prosecution for a nuisance in erecting a wharf on public property it is no defense to show that it has been in fact beneficial to the public. Since a good motive is no excuse, . . . a man cannot set up his religious belief to escape

139. *Id.*

liability for violation of a statute punishing . . . polygamy, or punishing labor on Sunday, or the disinterring of a dead body, or the beating of a drum in the streets of a town.¹⁴⁰

At mid-century, Jerome Hall reiterated the irrelevance of motive maxim and insisted on the centrality of the distinction between motive and intent. As far as Hall was concerned, mens rea had a clear meaning: it was the intent to harm, or the reckless disregard of a risk of harming another person. Hall regarded mens rea in this sense as a moral prerequisite to criminal liability, so that strict liability and negligence liability were both illegitimate in criminal law. According to Hall, the intent or recklessness on which mens rea depended were clearly distinguishable from motive. An actor's motive was her reason for intentionally imposing harm or risk. According to Hall, moral blameworthiness depended on both an actor's intent to impose harm or risk, and the moral worth of her motives for doing so.¹⁴¹ But even though moral blameworthiness depended in part on motive, Hall insisted that motive was irrelevant to criminal liability. Motives were too various to be codified: their moral worth had to be assessed on a case by case basis at sentencing.¹⁴² The legality values that had inspired lawyers to define the mental elements of offenses could not be realized by defining bad motives.

Jurists propounding the irrelevance of motive drew the distinction between motive and intent in at least three different ways: motive referred to the actor's purposes, or her ultimate purposes, or her purposes beyond those required for criminal liability. Intent usually referred to those consequences of action that the actor expected or, perhaps, desired. Yet it might refer only to relatively immediate expectations or desires, or only to inculpatory expectations or desires. The irrelevance of motive maxim was associated with the proposition that assessment of an actor's culpability should focus on the mental element of a

140. Clark & Marshall, *supra* note 3, at 149-51.

141. Hall, *supra* note 1, at 149, 157, 161.

142. *Id.* at 162-63.

particular offense. Usually this mental element would involve acting with awareness of the danger of causing, or the desire to cause some proscribed harm. The irrelevance of motive maxim also was understood to imply that good motives or religious motives should not excuse or justify offenses, despite the fact that many recognized defenses did absolve offenders because of their motives.

The irrelevance of motive maxim was associated with a number of reform projects: defining the elements of offenses precisely, establishing a legislative monopoly on criminalization by eliminating common law crimes, and organizing the criminal law around the utilitarian aim of deterring dangerous conduct. Yet these different projects had different, and ultimately incompatible, premises and vocabularies. The legal scientific project of offense definition used a conception of intent as a legally proscribed expectation or desire to impose harm. The utilitarian project of deterrence used a conception of motive as desire rather than expectation. Thus the legal scientific conception of intent and the utilitarian conception of motive were not mutually exclusive terms. The opposition of these intersecting terms left the irrelevance of motive doctrine vulnerable to the charge that it was indeterminate.

V. CRITICISMS OF THE IRRELEVANCE OF MOTIVE MAXIM

In the twentieth century, critics mounted three types of arguments against the irrelevance of motive maxim: (1) logical critiques of the irrelevance of motive maxim as premised on a false dichotomy between motive and intent; (2) empirical claims that the irrelevance of motive was false as a description of established criminal law; and (3) normative arguments that criminal liability should be conditioned on motive because it is relevant to moral blame. Often, arguments of the first two types would be intertwined, as critics would argue that no distinction could be drawn between motive and intent that would make the irrelevance of motive claim descriptively true, as opposed to true only by definition.

A. Descriptive and Logical Objections

John Salmond was the first scholar to raise questions about the motive/intent distinction, in his 1902 treatise, *Jurisprudence*. Walter Wheeler Cook and Walter Hitchler extended his arguments. More recently, Douglas Husak has amplified them further. Salmond, Cook, and Hitchler argued that a purely cognitive conception of intent, of the kind endorsed by the utilitarians Bentham, Austin, and Holmes, accorded with neither ordinary nor legal usage. If intent was confined to cognitive states, the proposition that criminal liability turned only on intent, and not motive, was descriptively false. Therefore, intended consequences had to include desired consequences as well as expected consequences. Salmond, Cook, and Hitchler also rejected the utilitarians' inclusion of consequences recognized as merely probable among those intended. There was a moral, and often a legal difference between knowingly endangering and knowingly harming. Thus intended consequences were those desired or seen as necessarily following from an act. In the language of the Model Penal Code, intent included purpose and knowledge.

Working with a partly desiderative conception of intent, Salmond had to acknowledge that motive was not distinguishable from intent. Instead, a motive was really a kind of intent, one that was distant or ulterior relative to some more immediate intent. Thus almost any intent might be considered a motive when considered in relation to some more immediate intent: the intent to kill might be the motive for stabbing a victim, the intent to stab the motive for thrusting a knife, the intent to thrust the knife the motive for thrusting the hand.

In law, the intent commanding attention would be whatever intent sufficed to inculcate the actor, usually the intent to commit some proscribed harm. Following the utilitarians, Salmond reasoned that the intent to harm was never an offender's ultimate purpose: people harmed others only to benefit or gratify themselves in some way. This

intention to gratify the self was the motive for intentionally harming another.¹⁴³

This conception of motive as a desire to benefit or gratify one's self, fit with the traditional utilitarian argument that conditioning punishment on motive was normatively wrong. For utilitarians, the end of self-gratification was healthy and efficacious, when considered apart from harmful means for pursuing it. It was both impossible and undesirable to use legal sanctions to suppress the desire to gratify the self. But since this hedonistic motive for wrongdoing was, by definition, not part of the intent that made the act wrong, it was, also by definition, irrelevant to criminal liability. Accordingly, Salmond's definition of motive also fit with the descriptive claim that motive was irrelevant to criminal liability.

Unfortunately, Salmond's definition seemed to reconcile the irrelevance of motive claim with existing criminal law at the price of reducing that claim to a tautology. It excluded motives from the criteria of criminal liability by defining motive in terms of irrelevance to criminal liability. As Husak comments, "criminal theorists attempting to make sense of a principle, frequently 'defend' it by construing it as true by definition. What is initially put forward as an important substantive claim is interpreted as an uninformative tautology."¹⁴⁴

Avoiding tautology, Cook and Hitchler defined motive more broadly, as any relatively remote intent. For Cook, a motive was any end desired and intended to be brought about by means of some other desired and intended consequence of action. This definition implied that, for any criminal act, after one had enumerated all the requisite intentions for criminal liability, one could specify further intentions or "motives" that would not be relevant to criminal liability. But it also implied that any incriminating intent for which one could identify a more immediate intent, would be a "motive," and would

143. John Salmond, *Jurisprudence: Or, the Theory of Law* 417-419 (1902).

144. Douglas N. Husak, *Philosophy of Criminal Law* 144 (1987).

nevertheless be relevant to criminal liability.¹⁴⁵ Husak points out

The difficulty with this account is that it relativizes the distinction between intention and motive to moments of time. An intention ceases to remain a motive as soon as it becomes immediate. When actions are examined retrospectively, as in criminal trials, there may be no intentions that are not also motives.¹⁴⁶

Cook and Hitchler were content to collapse the motive/intent distinction in this way because they rejected the irrelevance of motive maxim. Each proceeded to list examples of what they called "motives" that were relevant to criminal liability. These included exculpatory motives for the otherwise criminal use of force, such as the purposes of defending one's self or preventing a felony.¹⁴⁷ These motives support affirmative defenses of justification. They might have added motives supporting other affirmative defenses. Thus, the motive of averting greater harm supports the defense of lesser evils; the motive of avoiding being subjected to unlawful force supports the excuse of duress; the motive of averting imminent harm supports the excuse of necessity; and the motive of retaliation for the unlawful use of force supports the excuse of provocation. Considering these examples, we might conclude that while defendants may justify or excuse criminal offenses on the basis of good motives, prosecutors should never be required to prove a bad motive as an offense element.

Yet, in addition to the exculpatory use of motives in defining defenses, Hitchler drew attention to the inculpatory use of motives in defining offenses. Hitchler pointed to wholly inchoate offenses such as attempt and conspiracy, in which an act becomes criminal only if committed with the unachieved purpose of causing some

145. Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 *Yale L.J.* 645, 660-61 (1917).

146. Husak, *supra* note 144, at 145.

147. Cook, *supra* note 145, at 661-62; Walter H. Hitchler, *Motive as an Essential Element of Crime*, 35 *Dick. L. Rev.* 105, 113-14 (1931).

harm. He also noted partially inchoate offenses like burglary and robbery, in which a relatively minor criminal act such as trespass or assault is aggravated into a more serious offense by an unachieved purpose to commit an additional crime such as theft.¹⁴⁸ Hitchler could have included felony murder, which in most instances aggravates negligent homicide to murder based on the purpose of committing a serious felony. Finally, Hitchler mentions crimes defined by reference to culpability terms like “fraudulently” or “corruptly,” that imply a purpose to acquire some undeserved benefit.

The criticisms of the motive/intent distinction developed by Salmond, Cook, and Hitchler have persuaded leading authorities on criminal law, without quite killing off the irrelevance of motive maxim. Consider the following discussion by Glanville Williams, in which he concedes that the irrelevance of motive claim is indeterminate, tautologous, or descriptively false, and yet opts to preserve it as an empty tautology for unexplained reasons of “convenience:”

[M]otive is ulterior intention—the intention with which an intentional act is done. Intention, when distinguished from motive, relates to the means, motive to the end; yet the end may be the means to another end, and the word “intention” is appropriate to such medial end. Much of what men do involves a chain of intention. . . and each intention is a motive for that preceding it. In criminal law, it is generally convenient to use the term “intention” with reference to intention as to the constituents of the *actus reus*, and the term “motive” with reference to the intention with which these constituents were brought about.

The definition of some crimes involves an intention to commit another crime. . . . It is commonly called by lawyers a “specific intent.” The same usage is adopted where the intent required for the crime is to bring about some result that in itself is not necessarily criminal. Forgery, for example, requires an intent to defraud or deceive. . . . The

148. Hitchler, *supra* note 147, at 111, 113-14.

intent is referred to by lawyers as a “specific intent” rather than as a motive. . . .

If the forgoing definition of motive is accepted, it becomes tautologous to say that motive is irrelevant to legal responsibility.¹⁴⁹

Williams goes on to concede that several offenses are defined by reference to motives. He does not object to the mental elements of these offenses, but recommends that they be referred to as “ulterior intentions” rather than “motives,” for the sake of “convenience.”¹⁵⁰ Wayne LaFave also wonders “if the notion that motives are irrelevant in the substantive law requires that the word ‘motive’ be defined as those purposes and objectives which are deemed irrelevant. . . .”¹⁵¹ He suggests that it “would be better to abandon the difficult task of trying to distinguish intent from motive and merely acknowledge that the substantive criminal law takes account of some desired ends but not others.”¹⁵² Yet in the end, he adheres to the maxim by arbitrarily designating any inculpatory or exculpatory purpose an intent rather than a motive.¹⁵³ Thus, he replaces the descriptive claim that motive is irrelevant with a definitional claim. Joshua Dressler, by contrast, simply rejects the maxim as descriptively false.¹⁵⁴

B. Normative Objections

More recent critics have added normative criticisms to these logical and empirical criticisms of the irrelevance of motive maxim. Husak argues that we take actors’ motives into account in making everyday moral judgments¹⁵⁵ and complains that the irrelevance of motive doctrine “has had a pernicious impact upon the disposition of a number of

149. Glanville Williams, *Criminal Law: The General Part* 48-49 (2d ed. 1961).

150. *Id.* at 50.

151. Wayne R. LaFave, *Criminal Law* 244 (3d ed. 2000).

152. *Id.*

153. *Id.* at 245.

154. Joshua Dressler, *Understanding Criminal Law* 121 (3d ed. 2001).

155. Husak, *supra* note 144, at 144.

cases, most notably those involving benevolent euthanasia. It is monstrous that a defendant should be convicted of the most serious offense known to the criminal law when he lovingly and regretfully complies with a request to kill his suffering and incurable spouse."¹⁵⁶

Hyman Gross offered a more fundamental objection to the irrelevance of motive principle. Gross rejected the purely cognitive model of responsibility advanced by the utilitarians. On his view, culpability has four "dimensions." The culpability attending an action depends on the (1) probability and (2) gravity of harm resulting from that action, (3) the extent of the actor's intentionality with respect to that danger, and (4) the legitimacy of the purpose for which the act is committed. For example, suppose an actor throws a rock at a group of boys taunting him, in order to frighten them away. The rock strikes one of them, causing his death. Although the actor did not wish to hit any of the children, he recognized that this was highly probable. If the charge is homicide, the actor's culpability is a function of the actor's recklessness with respect to the relatively low danger of the very grave harm of death, when measured against the at best slight legitimacy of his reasons for acting (frightening children to protest their taunting him). Now this last dimension of culpability, the legitimacy of the actor's purposes, is a question of how good or evil the actor's motives were. According to Gross, this inquiry into the moral worth of the actor's purposes is always relevant to culpability and should be part of the criteria for measuring the criminal liability of every offender.¹⁵⁷

Yet Gross argued that for offenses involving actual harm or even danger, no special inculpatory motive need be proven ordinarily. The obligation to allege an exculpatory motive lies with the offender. On the other hand, an illegitimate motive must be proven where it aggravates liability for imposing harm or danger. An example might

156. *Id.* at 148.

157. Hyman Gross, *A Theory of Criminal Justice* 77-88, 103-06 (1979).

be an assault with intent to intimidate a witness. Similarly, a "malicious" motive like spite might aggravate liability for intentionally destroying another's property.¹⁵⁸ In addition, where the dangerous or harmful conduct consists of some socially or even constitutionally valued activity like speech, a legitimate motive may be presumed. So an obscenity offense may require proof that a redeeming expressive purpose was absent; a criminal libel may require proof of a malicious purpose to injure.¹⁵⁹ Official corruption offenses may involve harmless conduct, inculpated only by an illegitimate motive which must therefore, be proven.¹⁶⁰ So legitimacy of motive is always a dimension of culpability, but need only be pled in exceptional cases.

Some of the scholars collected in this symposium have developed Gross's idea that legitimacy of motive is an independent dimension of culpability. Ken Simons, Kyron Huigens, and Sam Pillsbury have analyzed depraved indifference to human life, recklessness, and negligence as compound forms of culpability, involving both cognitive and desiderative components. On this view, ascribing culpability involves evaluating an offender's practical reasoning, examining not only her willingness to impose risk, but also the purposes for which she imposes those risks.¹⁶¹ Consider some hypothetical killers who act without intent to kill:

- (1) A surgeon routinely defrauds his patients by failing to use an anesthesiologist for procedures requiring one. Some of them die.

158. *Id.* at 106.

159. *Id.*

160. *Id.*

161. Kenneth W. Simons, *Rethinking Mental States*, 72 *B.U. L. Rev.* 463 (1992); Kyron Huigens, *Virtue and Inculpation*, 108 *Harv. L. Rev.* 1423 (1995); Samuel H. Pillsbury, *Crimes of Indifference*, 49 *Rutgers L. Rev.* 105 (1996). For trenchant criticism of the desiderative dimension of this two dimensional model of culpability, see Kimberly Ferzan's contribution to this symposium.

- (2) To save money, a commuter delays fixing his brakes but continues to drive his car. His brakes fail at an intersection and cause a fatal collision.
- (3) A parolee, pulled over by a police officer has a gun in the car in violation of his parole. He speeds way to avoid arrest, loses control of his vehicle, and collides with another vehicle, killing the driver.
- (4) The same, except it is the officer giving chase who collides.
- (5) A hunter fires a gun at some rustling bushes and kills another hunter.
- (6) In a popular state park, a hiker fires a gun over the heads of a picnicking family, in order to frighten them, and kills another hiker in the bushes.

In both of the first two examples, offenders impose risk on others to save themselves money. But the surgeon does so in order to steal from his patients. This antisocial purpose aggravates his reckless imposition of risk to depraved indifference to human life, and so aggravates his liability from manslaughter to murder. The commuter is negligent or reckless only. The parolee has a socially harmful reason for speeding, whereas the officer has a socially beneficial one. The officer may be justified, or only negligent. The parolee may be reckless or depraved. The hunter and the hiker arguably impose similar risks, in that both fire guns in the woods under circumstances where other persons may be present. But the hiker's antisocial purpose makes him more likely to be judged reckless or depraved. In all these cases, the purpose for which the offender imposes risk seems relevant to culpability because it expresses the value he or she places on human life.

Alan Michaels has argued that even seemingly cognitive criteria of culpability, like knowledge of harm or risk have implicit desiderative dimensions. Why, Michaels

asks, do we punish those who cause harm knowingly, but not purposely? Imagine two witnesses to an accident, who are helpless to prevent it. One hopes the accident will occur and the other hopes it won't. The mental state of the first witness seems reprehensible, while the mental state of the second seems blameless. Michaels argues that mere knowledge of harm by itself is not culpable. When an offender causes harm knowingly, however, she has accepted that harm will occur as a consequence of her act. Even if she regrets the harm, she desires some other consequence of her action enough to outweigh this regret. If the social value of this consequence in fact outweighs the harm, she may well be justified. But if not, her acceptance of the harm expresses bad values. The fault even in knowing harm, then, is in the desires moving the actor rather than in the knowledge itself.¹⁶²

If these scholars are right, "motive" is part of the calculus of culpability for crimes imposing risk and harm, not only for inchoate crimes and those conditioned on unusual culpability terms like "maliciously," "fraudulently," or "corruptly." On this reasoning, motive is, whether or not explicitly, part of the mental element of every offense.

Other scholars have defended the desiderative aspect of defenses. Dan Kahan (along with his coauthor Martha Nussbaum), Victoria Nourse, and Sam Pillsbury have all argued that the partial defense of provocation appropriately mitigates murder liability on the basis—but *only* on the basis—of sympathetic reasons for killing.¹⁶³ These scholars reject the prevailing understanding of provocation as a partial interference with the offender's volition. They reason that an account of excusing

162. Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. Cal. L. Rev. 953 (1998).

163. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269 (1996); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L.J. 1331 (1997), *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 Stan. L. Rev. 1435 (1998) (book review); Samuel H. Pillsbury, *Judging Evil: Rethinking the Law of Murder and Manslaughter* 125-60 (1998).

conditions as impediments to volition is vulnerable to the determinist argument that all acts are caused. Rather than viewing provocation as an impairment of volition, they regard the provoked killer as an autonomous decision maker, who kills for reasons that may be more or less justifiable.

The pattern of provocation analysis these scholars recommend can be illustrated by comparing some hypothetical cases. Consider four killers:

- (1) Bob, a man of limited education and means, feels little control over his own fate. He is accordingly very emotionally invested in controlling his wife. When she attempts to leave him, he kills her.
- (2) Sue learns that a neighbor has molested her five-year-old daughter. Her daughter is traumatized, and will likely find it difficult to testify. Sue kills the neighbor.
- (3) Wade, deeply ashamed of his own homoerotic impulses, kills a pair of homosexuals kissing on a park bench.
- (4) Bill, a drug addict, kills and robs an elderly priest to support his drug habit. Physically ravaged by his addiction, Bill targets the priest because he knows he is an easy victim: frail, trusting, and living alone.

All four killings were partially "caused" by circumstances. In the first three cases, these causes involved strong emotions. Yet whether we mitigate murder liability will depend more on the worth of those emotions than on their strength. Bob and Wade kill on the basis of anger that is unjustifiable. Their crimes therefore express atrocious values, and should not be mitigated. Sue makes an unjustifiable decision, in killing, but she makes that decision on the basis of a justifiable anger. Thus the values expressed by Sue's decision to kill are also defective, but

much less so. It follows that mitigation is appropriate. Bill's killing is as much caused by circumstances as Sue's. Yet most readers will feel that Bill is responsible for choosing to kill the priest, and that this choice also expresses very reprehensible values. According to Kahan, Nourse, and Pillsbury, the defense of provocation appropriately invites the jury to evaluate the killer's reasons for killing—her motives, as it were.

Claire Finkelstein has proposed a similar analysis of the defense of duress, as an evaluation of the defendant's reasons for committing crime. Rather than simply asking how afraid the offender was, the duress defense asks how reasonably or justifiably afraid she was. The justifiability of fear depends on the gravity and probability of harm apparent to the actor, but also on the actor's responsibility for placing herself in danger of harm, and of being pressured into crime. Did she join a gang? Did she go into debt to a violent drug dealer? The duress defense also evaluates the offender's decision-making in light of her fear. Did she appropriately weigh the interests of others before succumbing to her fear? Or did she kill in order to avoid a black eye? Thus understood, the duress defense is concerned not with the extent to which the offender's crime was determined, but with an assessment of the values expressed by the crime.¹⁶⁴ Finkelstein has also explained self-defense claims as assertions of the worth of an offender's reasons for using force. In so doing, she rejects alternative accounts of self-defense as involuntary action and as socially beneficial action.¹⁶⁵

C. The Expressive Argument for Punishing Motives

Underlying these arguments is a distinctive conception of criminal liability that stands at odds with the utilitarian theory of punishment underwriting the irrelevance of

164. Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 *Ariz. L. Rev.* 251 (1995).

165. Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 *U. Pitt. L. Rev.* 621 (1996).

motive maxim. According to the moral philosopher Jean Hampton, crime and punishment are both expressions of value. To harm or endanger another person is to assert the superiority of one's own purposes over the purposes of other people. In some cases this is legitimate, as where one's purpose is to prevent the other person from wronging someone else. But where one's purposes are not morally superior, to inflict harm or danger on others in pursuing them is to claim a superior status over others. Punishment appropriately condemns the values asserted by the offender in committing her crime, and vindicates the law's commitment to the equal worth of every person.

On Hampton's view, punishment necessarily expresses a moral judgment of the actor's reasons for acting.¹⁶⁶ Otherwise, it is just a price, a means of optimizing certain consequences. But if punishment is nothing more than a price, expressing no moral judgment of the offender's values, it becomes hard to justify its infliction of suffering. Hampton's expressive account of punishment rejects the utilitarian premise that all desires are equally good. It accords with Martha Nussbaum's position that we can subject the passions to moral judgment, affirming some desires as worthy and condemning others.¹⁶⁷

In its intellectual origins, the irrelevance of motive maxim is closely connected with a dubious premise of classical liberalism, the assumption that people are by and large able to pursue their ends without affecting, and so without harming others.¹⁶⁸ The legal realists criticized this premise as underestimating the interdependence of market

166. Jean Hampton, *Punishment as Defeat*, in *Forgiveness and Mercy* 124 (Jeffrie G. Murphy & Jean Hampton eds., 1988), *The Moral Education Theory of Punishment*, 13 *Phil. & Pub. Aff.* 208 (1984); see also Guyora Binder, *Meaning and Motive in the Law of Homicide*, 3 *Buff. Crim. L. Rev.* 755 (2000) (review essay); Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate* in 20 *Law & Phil.* 175 (2001).

167. Kahan & Nussbaum, *supra* note 163; Martha C. Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (1990).

168. On this principle see generally, Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *Wis. L. Rev.* 975; Kahan, *supra* note 166.

actors in a modern economy.¹⁶⁹ Modern social actors are constantly trying to use resources in incompatible ways. There are no spheres within which they can act without affecting the interests of others.

But there is another and deeper basis for criticizing this scenario of social actors each pursuing their ends within their autonomous spheres of action. The problem is not just that people want to use the same resources in inconsistent ways. Their desires do not only concern the allocation of resources: they also concern the distribution of happiness itself. Thus, many preferences are not independent of the welfare of others, but instead are "relative" preferences, preferences about the welfare of others.¹⁷⁰ Sadistic and altruistic desires are straightforward examples of such relative preferences. The existence of such relative preferences casts doubt on the utilitarian premise that motives, as opposed to actions, are morally neutral. If the good consists in maximizing preference satisfaction, a sadistic desire is perverse. Far more utility can be achieved in a world populated by altruists than in a world populated by sadists. Hence, altruistic preferences would seem to be better, from a utilitarian standpoint, than sadistic preferences. When motives concern the welfare of others, then, they matter morally, even on utilitarian premises.

Moreover, there are grounds for viewing most preferences as relative preferences about the welfare of others. Relative preferences include the desire to occupy a particular social status relative to others, whether of superiority or equality. Yet preferences regarding the allocation of resources are never neatly separable from preferences about social status. Because, as the legal realists argued, resources always lie at the nexus of competing uses, control over resources is a social relation.

169. Singer, *supra* note 168; Barbara Fried, *The Progressive Assault on Laissez-Faire: Robert Hale and the First Law and Economics Movement* (1998); Guyora Binder, *Twentieth-Century Legal Metaphors for Self and Society, in Looking Back at Law's Century* 151 (Austin Sarat et al. eds., 2002).

170. Richard H. McAdam, *Relative Preferences*, 102 *Yale L.J.* 1 (1992).

As Michael Walzer has argued, resources matter to people when they are socially recognized as “goods,” when they acquire some significance within social and cultural practices as sources of value.¹⁷¹ What most people care most about are the forms and indices of social status peculiar to their own societies. In valuing and distributing goods, we determine who deserves to be rewarded and recognized according to a variety of scales of value.

Thus, many of our desires are laden with moral content. They express judgments of value, and imply judgments about the status and worth of other persons. And so when an offender acts on a wrongful desire, she also expresses a view about the relative worth of other persons. Typically, offenders show selfish indifference to the welfare of others in wronging them to achieve some benefit for themselves. But sometimes they act out of anger or hatred or envy, for the very purpose of decreasing the welfare of others. The desire to reduce the welfare of others is not always evil. Our criminal law is premised on the notion that wrongdoers deserve to suffer. The defense of provocation reflects the view that the desire to impose deserved suffering is less culpable than the desire to impose undeserved suffering.

To sum up the implications of Hampton’s expressive view of punishment, when we punish an actor, we do not just disapprove and discourage the consequences of her action. We determine that she caused or risked harm to others by acting on desires that express a reprehensible moral attitude toward the worth and welfare of other people. This means that both criminal acts and criminal punishment necessarily make statements about the social status and moral worth of persons. If so, bad “motive” is indeed an essential part of criminal liability. Moreover, what makes a motive bad is the basis on which it honors or degrades persons.

171. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 3-31 (1983).

D. An Application to Hate Crimes

This expressive account of crime and punishment has important implications for one of the most controversial contemporary issues in criminal justice, the legitimacy of hate crime liability. If Hampton is right, the criminal law typically inflicts punishment because an offender has severely and undeservedly degraded another person by harming them. We cannot practice punishment on this basis without making moral judgments about the bases on which people deserve social status. This means that condemning those who persecute others to degrade their status unjustly comes close to the core purpose of the criminal law. That is why many people regard genocide as the ultimate crime, the essence of evil. Persecuting an individual because of her membership in a racial or religious group expresses contempt for, and claims superiority over all members of the group. It wrests resources and liberties away from members of that group by force and the threat of force.

It has become common to argue that hate crime liability violates the value of free speech because it adds punishment for expressing bad values to the punishment otherwise deserved for imposing harm or risk.¹⁷² On this view, attitudes about the worth of other human beings are merely political opinions, harmless unless acted upon, and even beneficial because they contribute to the marketplace of ideas. Hate crime liability seems to simply punish two offenses, a crime of violence against the person, and an opinion offense. But because political speech is valued in a liberal democracy, political opinions cannot be punished separately, and a crime of violence that expresses a political opinion is no worse—indeed, is arguably better—than a crime of violence with no ideological content. This argument against hate crimes suggests there may be

172. See, e.g., Anthony Dillof, *Punishing Bias: An Inquiry into the Theoretical Foundations of Bias-Crime Statutes*, 91 *Nw. U. L. Rev.* 1015 (1997); James B. Jacobs and Kimberley Potter, *Hate Crimes, Criminal Law, and Identity Politics* 126-127 (1998).

something fundamentally illiberal about the expressive theory of punishment and about the moral assessment of offender's motives.

Expressive theorists have two possible lines of response. One response concedes the expressive theory of punishment is incompatible with a value-neutral liberalism and concludes, "so much the worse for value neutral liberalism." This is the response offered by Dan Kahan.¹⁷³ Kahan invokes Hampton's expressive theory in arguing that criminal law pervasively and appropriately judges the values motivating acts of violence.¹⁷⁴ Such a moral assessment of an actor's reasons for acting is essential to the judgment of blameworthy wrongdoing that alone justifies retribution. A prisoner would be entitled to complain if he was subjected to punishment *without* a judgment blaming him for choosing to act on the wrong values. So a value-neutral liberalism is arguably incompatible with retributive punishment which necessarily compares the values on the basis of which defendant acted to a societal moral standard. According to Kahan, a criminal law premised on moral desert cannot be indifferent to the worth of people's "beliefs, values, and preferences."¹⁷⁵ Kahan reasons that

Hate crime laws assess the values expressed by an offender's actions in exactly the same way as the rest of criminal law. In our society, individuals tend to construct their identities around their ethnic and religious affiliations, their genders, and their sexual orientations. An individual who assaults or kills another on account of one of these characteristics, then, shows us that he enjoys not only the suffering of another human being, but also the experience of domination and mastery associated with denigrating something that the victim and others regard as essential to their selves.¹⁷⁶

173. Kahan, *supra* note 166, at 175.

174. *Id.* at 180.

175. *Id.*

176. *Id.* at 182.

A second possible response reconciles hate crimes liability with liberal notions of free speech by pointing to the necessary limits of liberalism's value-neutrality. Thus, it asserts that the evaluation of motives generally, and hate crime liability in particular, are compatible with liberalism because (1) liberalism, although neutral towards some values in some contexts, is nevertheless a value theory with implications for the moral worth of at least some motives, and (2) using violence to express bigotry is a particularly egregious violation of liberalism's inherent moral values.

Consider Bruce Ackerman's theory that justice in a liberal state is the outcome of a rational and neutral discursive process. Ackerman defines rationality and neutrality as follows:

Rationality. Whenever anybody questions the legitimacy of another's power, the power holder must respond not by suppressing the questioner but by giving a reason that explains why he is more entitled to the resource than the questioner is.¹⁷⁷

Neutrality. No reason is a good reason if it requires the power holder to assert:

- (a) that his conception of the good is better than that asserted by any of his fellow citizens, or
- (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.¹⁷⁸

Ackerman's neutrality principle suggests that neither expressions of bigotry, nor expressions of conceptions of the good make any contribution to a legitimate political process. Yet his rationality principle militates against punishing such expressions. They may be ignored, but not suppressed. Ackerman's conception of liberalism therefore militates against punishing hate-*speech*. But, surprisingly, it has the opposite implication for hate-*crimes*, that is,

177. Bruce Ackerman, *Social Justice in the Liberal State* 4 (1980).

178. *Id.* at 11.

penalty enhancements for crimes of violence that express bigotry. Ackerman's rationality principle draws a fundamental distinction between two different modes of advancing political views: persuasion and coercion. Hate crimes express political views by means of coercive force rather than rational persuasion. Ackerman's liberalism does not protect violent political expression, and it does not value bigotry.

The apparent conflict between hate crimes liability and the liberal free speech principle dissolves once we realize that liberalism does not ascribe value to ideas and opinions as such. Liberalism maintains a studious indifference to the content of ideas, substituting a procedure for a criterion of value. What the liberal free speech principle favors is only a certain means of advancing ideas and opinions: through discursive action. The very concept of freedom of expression is premised on a distinction between coerced expression and uncoerced expression. In a hate crime, the offender attempts to exclude members of a certain group from some aspect of public life not by rational persuasion, but by force and fear. Punishing hate *speech* may restrict speech, but punishing hate *crimes* does not.

Not only are hate crime penalty enhancements compatible with the free speech principle, they honor it. While a liberal theory like Ackerman's may maintain a neutral posture towards certain kinds of values (conceptions of the good) it nevertheless embraces other values (like rationality). The more one values the principle that ideas should be promoted by persuasion rather than coercion, the more one should condemn the use of force to promote an idea. On this reasoning, it is worse to assault person to advance a political opinion, than simply to assault a person. The latter offense expresses contempt for the safety and well-being of another person; the former expresses that and also expresses contempt for the value of free speech as a process for settling differences within a liberal polity. That is why many people think that terrorist motives should aggravate liability for murder. Hate crimes

are a form of terrorism, and enhancing punishment for terrorist motives seems perfectly compatible with content-neutral liberalism.

The argument that penalty enhancements for ideologically motivated crime violates the principle of free speech mistakenly disaggregates the hate crime into two components—a crime of violence, and an opinion—as if they were two completely unrelated phenomena. This effaces the relationship between a value and the means by which it is pursued. There is a world of difference between offering reasons for others to vote for you and keeping them away from the polls at gun point. The free speech principle values political discourse but condemns political intimidation.

Political intimidation is a compound wrong, violating the person and the political autonomy of a victim. The criminal law punishes many such compound wrongs. Thus, robbery is an offense against person and property; extortion is an offense against personal security or privacy and against personal autonomy; rape is an offense against both the personal security and the sexual autonomy of a victim. All of these offenses are viewed as more than the sum of their parts. When an offender uses force not just to hurt a victim, but for the further purpose of dominating the victim's will, the offender demeans the victim in a more profound way. This expresses a process value that offends even a liberalism like Ackerman's, that while neutral as to substantive values, is firmly committed to certain process values. Such a liberalism may refuse to discriminate between different political motives for violent crime, but it may well enhance punishment for any politically motivated violent crime. In short, there can be a liberal version of the expressive theory of punishment, and that liberal version could also enhance penalties for violent crimes motivated by group hatred.

The expressive theory of punishment insists that all punishments condemn the values that criminals express when they wrongly impose harm or risk on others. Aggravating liability for particularly bad values simply discriminates among degrees of badness. In this way, it

accords with Hyman Gross's overall theory of culpability, which holds that legitimacy of motive is always a dimension of culpability.

VI. CONTEMPORARY APPLICATIONS OF THE IRRELEVANCE OF MOTIVE MAXIM

We have seen that over the course of the twentieth century, critics of the irrelevance of motive maxim have raised logical, descriptive, and normative objections. They have argued that as a descriptive matter, the "intentions" punished by the criminal law include desiderative as well as cognitive states. They have also argued that as a normative matter, desiderative states *should* be evaluated and punished. They have argued further that if desiderative states are included within intention, motive and intent cannot be distinguished from one another as mental states. As a result, motive cannot be shown to be irrelevant to criminal liability, except by defining motives as intentions irrelevant to criminal liability. This last strategy reduces the irrelevance of motive maxim to an empty tautology.

Despite these arguments, the irrelevance of motive maxim survives and continues to be invoked in practical and theoretical arguments about criminal law. This section will examine some contemporary legal arguments invoking the irrelevance of motive maxim and show that they fail in the ways predicted by the descriptive, logical, and normative objections.

A. *Constructing the Mental Elements of Offenses*

Courts are most likely to invoke the maxim in constructing the mental element of offenses. The typical scenario involves a partially inchoate offense. Thus, a legislature imposes a regulation requiring that some procedure be followed so as to prevent a particular kind of harm or to achieve a certain benefit. The legislature also criminalizes violation of the regulation, without clearly

indicating whether the offense requires any culpability with respect to the harm feared or the benefit sought. Defendant requests an instruction that the offense requires intent to cause the harm or prevent the benefit. The prosecution responds that so instructing the jury would require the prosecution to prove "bad motive," or enable the defense to contest the charge by offering evidence of "good motive." But, the prosecution continues, motive is irrelevant to criminal liability. Therefore, the prosecution concludes, the mental element of the offense is only the "intent" to evade the regulation, not the "motive" of causing the harm feared or preventing the benefit sought. This argument appears to persuade some courts. Yet it is an empty argument, that offers only a conclusion in place of any real reason to exclude culpability with respect to the threatened harm from the mental element of the offense.

Consider five cases illustrating this pattern of argument:

- (1) A soldier refused to be deployed abroad in a war she considers illegal and immoral. Charged with "desertion with intent to shirk hazardous duty," she sought to prove that she sought only to avoid violating her conscience and international law and not to avoid duty or danger. The trial court refused this proffer of evidence on the ground that it concerned her *motive* and so was *irrelevant* to the required intent to avoid service that was in fact hazardous and obligatory. An appellate court overturned this decision on the ground that the offense required proof that defendant believed she had a duty to fight and that her purpose in refusing to do so was to protect herself from danger.¹⁷⁹
- (2) A bank officer circumvented bank procedures to loan money to a friend who was a poor credit risk. Charged with "willful misapplication of funds," he

179. *United States v. Huet-Vaughn*, 39 M.J. 545 (A.C.M.R. 1994).

requested an instruction requiring proof that he intended to permanently deprive the bank of money. The court refused this instruction, concluding that the offense required proof only of intent to use the funds without the bank's consent. The court reasoned that a purpose to permanently deprive the bank of the money would be a *motive* rather than an intent, and motive is *irrelevant* to criminal liability.¹⁸⁰

- (3) At the behest of a bank officer, a borrower lied on a loan application. Charged with "making a false statement to a federal savings and loan with intent to influence its actions," the borrower offered evidence that the persons making the decision on the bank's behalf were the ones urging him to make false statements, and that they seemed determined to loan him the money. He requested an instruction requiring proof that he believed the bank would not have loaned him the money unless he lied. The court refused, reasoning that the prosecution had no obligation to prove that he made the false statement with a deceptive *motive*, since motive is *irrelevant* to criminal liability.¹⁸¹
- (4) A father stopped paying court-ordered child support to his ex-wife when the child was placed in foster care. Charged with "intentional failure to provide proper child support, which one reasonably should know is legally due," the father requested an instruction requiring proof that he expected his payments would actually be applied to his child's support. This was refused on the ground that the desire to deprive his child of support was a *motive* and therefore *irrelevant* to liability. Knowledge that

180. United States v. Hansen, 701 F.2d 1215 (7th Cir. 1983).

181. United States v. Wilcox, 919 F.2d 109 (9th Cir. 1990).

the support payments were court-ordered was all the "intent" required.¹⁸²

- (5) A farmer, angered to find a game inspector driving a truck over his crops, blocked his exit from the field and called the police. Charged with "obstructing governmental administration," the defendant argued that the prosecution had to prove the farmer believed the game officer had entered the fields pursuant to his official duties. The court reasoned that the farmer's purpose of preserving evidence of what he believed to be the game inspector's unlawful trespass until the police arrived was merely a "*motive*," and therefore *irrelevant* to liability. The only "intent" required was to interfere with a public official while he was in fact working.¹⁸³

Now in any of these cases, a court might reasonably grant the defendant's requested instruction or admit the defendant's proffered evidence, as the appellate court did in the desertion case above. If a court grants the requested instruction, it views the hope or expectation of causing the proscribed harm as part of the mental element or "intent" required for the offense. But a court might just as reasonably deny the requested instruction or evidence, as occurred at trial in desertion case, and in the other four cases. In so doing, a court simply decides that the hope or expectation of causing the proscribed harm is not part of the mental element of the offense.

Courts might base a definition of the mental element on the text of the statutory provision defining the offense, or on its legislative history, or on a culpability default rule,¹⁸⁴ or on considerations of morality and prudence. The

182. *State v. Meyer*, 460 N.W.2d 656 (Neb. 1990).

183. *State v. Briggs*, 790 A.2d 792 (N.H. 2002).

184. Model Penal Code §§ 2.02(1), 2.02(3), and 2.02(4) (Proposed Official Draft 1962) (culpability default rules). See Guyora Binder, *Felony Murder and Mens Rea Default Rules*, 4 *Buff. Crim. L. Rev.* 399, 408-412 (describing Model Penal Code default rules), 416-430 (describing default rules in 25 state codes).

New York case of *People v. Coe*¹⁸⁵ illustrates several of these approaches. Coe was charged with the misdemeanor of “willful” violation of a regulation proscribing the physical abuse or mistreatment of a nursing home resident. The New York Court of Appeals was offered three different constructions of the mental element of this statute. The prosecution contended that defendant was guilty as long as he intentionally struck, shoved or inappropriately restrained the victim. The Appellate Division contended that the prosecution must also prove defendant’s knowledge that such treatment was illegal. Finally, the defense contended that the prosecution must prove, in addition to these other mental states, defendant’s “evil motive or intent to injure.”¹⁸⁶ The Court of Appeals rejected the prosecution’s construction of the offense definition as inconsistent with New York’s culpability default rules, the text of related statutory provisions, and considerations of desert. It rejected the defense construction, not on the ground that motive is always irrelevant to criminal liability, but on the ground that proof of intent to injure commonly triggers felony liability. Such grave culpability deserved more punishment than this statute imposed.

By contrast, in the five cases summarized above, courts eschewed all of these familiar strategies of statutory construction. Instead, each court simply decided that the hope or expectation of causing the proscribed harm is not a required culpability element, arguing that such a hope or expectation is a “motive” rather than an “intent” and is, for that reason alone, irrelevant to criminal liability.

But is the irrelevance of motive maxim doing any persuasive work in these decisions? Suppose the court instead decides that some form of culpability with respect to the feared harm is required. Perhaps the statute says so explicitly, or the legislative history suggests the legislature intended such a mental element, or the level of punishment prescribed would otherwise be disproportionate to the

185. 71 N.Y.2d 852 (1988).

186. *Id.*

required culpability. For whatever reason, the court requires culpability with respect to the harm. Is the court likely to add that while an expectation of harm is really only a motive, motive is always relevant to the criminal law? Not likely. The court will simply say that intent or recklessness or negligence with respect to the harm is part of the mental element of the offense. Only if a court finds a particular mental state irrelevant will it trouble to characterize that mental state as a motive. But there is nothing about any of the mental states in these five cases that identify them as motives rather than intentions, other than their purported irrelevance to liability. The distinction between motive and intent does no work in these cases. The irrelevance of motive maxim never tells any court whether a proposed mental element is a relevant intent or an irrelevant motive. It merely affords courts the illusion of having an articulated reason for a decision made on some unstated ground, or on no ground at all.

Courts' contemporary misuse of the irrelevance of motive maxim in constructing the mental element of offenses shows the force of the logical critique. Unless the concepts of motive and intent can be distinguished from one another as signifying different mental states, the irrelevance of motive maxim can not offer a determinate rule of decision. If there is no psychological difference between motives and intentions, the irrelevance of motive maxim cannot be empirically true. It can only have the logical truth of the empty tautology.

B. Hate Crimes in the Courts

Courts have also misused the irrelevance of motive maxim in the area of hate crimes. Since the late 1980's several states have passed hate crime legislation.¹⁸⁷ In the

187. See Cal. Penal Code § 422.7 (West 1988 and Supp.1993); Colo. Rev. Stat. § 18-9-121(2) (Supp. 1995); Fla. Stat. § 775.085 (1991); Idaho Code § 18-7902 (Michie 1987); 720 Ill. Comp. Stat. 5/12-7.1 (West Supp. 1996); Iowa Code Ann. § 729A.2 (West 1993); Md. Code Ann. Crim. Law § 470A (Supp. 1993); Mich. Comp. Laws Ann. § 750.147b (West 1991); Minn. Stat. Ann. § 609.2231(4) (West Supp.

early 1990's, a number of state supreme courts considered challenges to the constitutionality of new statutes enhancing penalties for various crimes if committed because of ethnic hatred.¹⁸⁸ These challenges rested primarily on federal and state free speech clauses, although in some states they also included arguments that the new statutes were void for vagueness (a federal due process claim)¹⁸⁹ or violated equal protection.¹⁹⁰ The Wisconsin Supreme Court and Ohio Supreme Court both struck down their states' penalty enhancement laws as violations of free speech, with the Ohio Supreme Court avoiding decision on due process and equal protection claims. Ultimately, the United States Supreme Court reversed both decisions, deciding that the First Amendment did not preclude enhancing the penalty for a crime of violence based on a bigoted motive.¹⁹¹ Yet both the Wisconsin and Ohio decisions were notable for their reliance on the irrelevance of motive maxim to bolster an argument that penalty enhancements for discriminatory motive amount to unconstitutional punishment of political opinion.

Both courts accepted the argument that hate crime liability impermissibly punishes thought alone, in violation

1996); Mo. Rev. Stat. § 574.090(1) (Supp. 1993); Mont. Code Ann. § 45-5-221(1) (1993); Nev. Rev. Stat. § 207.185 (Supp. 1995); N.J. Stat. Ann. § 2C:44-3(e) (West 1995); N.Y. Penal Law § 240.31 (McKinney 1989); N.C. Gen. Stat. § 14- 401.14(a) (1993); N.C. Gen. Stat. § 14- 3(c) (1993); N.D. Cent. Code § 12.1-14-04(1-2) (1985); Ohio Rev. Code Ann. § 2927.12 (Baldwin 1993); Okla. Stat. tit. 21, § 850 (1991); Or. Rev. Stat. § 166.155 (1995); S.D. Codified Laws § 22-19B-1 (Michie Supp. 1996); Vt. Stat. Ann. tit. 13, § 1455 (Supp. 1992); Va. Code Ann. § 8.01-42.1 (Michie 1992); Wash. Rev. Code § 9A.36.080 (1996); W. Va. Code § 61-6-21 (1992); Wis. Stat. Ann. § 939.645 (West 1996).

188. In re M.S., 42 Cal. Rptr. 2d 355 (Cal. 1995); State v. Stalder, 630 So.2d 1072 (Fla. 1994); State v. McKnight, 511 N.W.2d 389 (Iowa 1994); Ayers v. State, 645 A.2d 22 (Md. 1994); State v. Vanatter, 869 S.W.2d 754 (Mo. 1994); State v. Wyant, 597 N.E.2d 450 (Ohio 1992); State v. Plowman, 838 P.2d 558 (Or. 1992); State v. Ladue, 631 A.2d 236 (Vt. 1993); State v. Talley, 858 P.2d 217 (Wash. 1993); State v. Mitchell, 485 N.W.2d 807 (Wis. 1992).

189. Plowman, 838 P.2d 558; Wyant, 597 N.E.2d 450; Talley, 858 P.2d 217; In re M.S., 42 Cal. Rptr. 2d 355.

190. Wyant, 597 N.E.2d 450; LaDue, 631 A.2d 236.

191. Wisconsin v. Mitchell 508 U.S. 476 (1993); Ohio v. Wyant, 508 U.S. 969 (1993).

of the First Amendment. Such an argument confronts two difficulties. First, the crimes in question were crimes of violence (assault in Wisconsin, menacing in Ohio, involving a death threat). Thus, they didn't punish thought alone, but a combination of action and thought. Second, all offenses conditioned on culpability criminalize otherwise innocent action on the basis of mental states. Moreover, many offenses, like homicide, are graded on the basis of different culpable states attending the same conduct. Sentencing laws also often condition the degree of punishment on mental states. Thus, if conditioning the level of punishment on thought is unconstitutional, it would seem that much of the criminal law must be.

The United States Supreme Court ultimately overturned both decisions on precisely these grounds. The Court held that the statutes in question criminalized clearly punishable conduct rather than speech.¹⁹² The statutes graded that punishable conduct on the basis of the same kind of discriminatory motive that triggers civil liability for civil rights violations.¹⁹³ The court noted that sentences are often enhanced on the basis of disfavored motives.¹⁹⁴ The Court conceded that enhancing a sentence because of defendant's political beliefs would violate the First Amendment if those beliefs were unrelated to the crime. But it concluded that the First Amendment permits enhancing a sentence because of defendant's political motives for committing a crime.¹⁹⁵ Indeed, as the Court noted, the Constitution defines political motive as an element of the crime of treason.¹⁹⁶

Both the Ohio and Wisconsin Supreme Courts anticipated, and attempted to refute, this argument. Strangely, both courts tried to contest this argument on the ground of substantive criminal law rather than free speech law. Surely, the straightforward response to this argument

192. *Wisconsin v. Mitchell* 508 U.S. 476, 484 (1993).

193. 508 U.S. 476, 487.

194. *Id.* at 485.

195. *Id.* at 485-486.

196. *Id.* at 489.

is to concede that the criminal law can grade penalties on the basis of mental states, including motives, but to argue that the First Amendment precludes punishing one particular kind of motivation, the purpose of expressing a political ideology. According to this interpretation of the free speech principle, government is free to punish acts of violence that express political beliefs, so long as it does not condition the amount of punishment on the expression of political beliefs as such.

Yet both courts eschewed this narrow critique of hate-based penalty enhancements. Instead, both courts responded with the sweeping claim that the criminal law does not, and can not condition punishment on motive at all. This argument was developed by defense attorney Susan Gellman, who presented it to the Ohio Supreme Court and explained it in an article that influenced the Wisconsin court.¹⁹⁷ The gist of this argument is that all culpable mental states actually used as criteria of liability or sentencing enhancements are intentions rather than motives, so that hate crime statutes uniquely punish offenders for their motives. Unfortunately, none of the proponents of this argument explain the supposed link between the irrelevance of motive maxim and the Constitution. Is the irrelevance of motive required by due process? If so, why do the Ohio and Wisconsin courts rely on it in ruling that hate crime statutes violate the First Amendment? Is it, then, that the First Amendment forbids the punishment of any motive, even a nonpolitical one? Gellman apparently thinks that "the First Amendment does not . . . permit criminalization of pure motive."¹⁹⁸ Is it that the First Amendment permits punishing violence committed with the "intention," but not the "motive," of expressing a political view? But why? And how can we tell

197. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional Policy Dilemmas of Ethnic Intimidation Laws*, 39 *UCLA L. Rev.* 333 (1991).

198. *Id.* at 368 (Gellman considers whether bigotry might be excepted from this general rule under the "fighting words" doctrine.).

that the purpose of expressing group hate is a “motive” rather than an “intent”?

In any case, the argument that hate crimes uniquely punish motive rather than intent depends on the irrelevance of motive maxim being a descriptively true empirical claim. If it is tautologically true that motive is irrelevant to criminal liability, then hate crime statutes cannot criminalize motive by definition. Yet, citing LaFave and Scott, and Gellman, the Ohio and Wisconsin Supreme Courts offered the self-defeating argument that motive was irrelevant to criminal liability by definition.

According to the Ohio Supreme Court,

Motive, in criminal law, is not an element of the crime. In their textbook, 1 Substantive Criminal Law (1986) 318, Section 3.6, LaFave and Scott argue that if defined narrowly enough, motive is not relevant to substantive criminal law Other thought-related concepts such as intent and purpose are used in the criminal law as elements of crimes or penalty-enhancing criteria, but motive itself is not punished. . . . ‘While motive may be relevant as a mitigating factor in the penalty phase, it is irrelevant to the guilt-phase determination . . .’; Gellman, . . . 39 UCLA L. Rev. 333.

There is a significant difference between why a person commits a crime and whether a person has intentionally done the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any number of different motives. Enhancing a penalty because of motive therefore punishes the person’s thought, rather than the person’s act or criminal intent.¹⁹⁹

The Wisconsin Court reasoned similarly, quoting Gellman’s analysis of a burglary hypothetical discussed by LaFave and Scott:

Because all of the crimes under chs. 939 to 948, Stats., are already punishable, all that remains is an additional punishment for the defendant’s motive in selecting the

199. *State v. Wyant*, 597 N.E.2d at 453-54 (citations omitted).

victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights.

. . . Merely because the statute refers in a literal sense to the intentional 'conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law—punishment of offensive motive or thought. . . .

In this case the crime was aggravated battery, and the necessary intent under sec. 940.19(1m), Stats. is an 'intent to cause great bodily harm.' Quite clearly, Mitchell's intent to cause great bodily harm to Reddick is distinct from his motive or reason for doing so. Criminal law is not concerned with a person's reasons for committing crimes, but rather with the actor's intent or purpose in doing so.

As explained by Professor Gellman:

Unlike purpose or intent, motive cannot be a criminal offense or an element of an offense. . . .

The distinction becomes more clear upon consideration of the effect of altering the intent or purpose on the legal characterization of the same conduct, as compared to the effect . . . of altering the motive. Continuing with the example of burglary, changing the *purpose* of the break-in changes the very nature of the act: If A broke into B's house for the purpose of getting A's own property. . . the act of breaking in is . . . not burglary, even if A's motive was identical (the desire to pay his debts). By contrast, changing A's *motives*, even to more sympathetic ones (say, the desire to buy a house for the homeless), while his *purpose* was that of committing the crime of theft in B's house, does *not* change the nature of the act: it is still burglary.²⁰⁰

A check of LaFave and Scott's text shows that Gellman's gloss is unreliable and that both courts have misapplied LaFave and Scott's statements to hate crime statutes. According to Gellman, "Professor LaFave points out that, unlike intent, 'motive is not relevant on the substantive side of the criminal law.'"²⁰¹ But LaFave and

200. State v. Mitchell, 485 N.W.2d at 812-13 & 813 n.11 (citing Gellman, *supra* note 197, at 364-65).

201. Gellman, *supra* note 197, at 364 (quoting LaFave & Scott, *supra* note 32, §

Scott's actual statement is that "[m]otive, *if narrowly defined to exclude recognized defenses and the 'specific intent' requirements of some crimes, is not relevant.*"²⁰² Thus Gellman suppresses the fact LaFave simply stipulated that motive means whatever purposes are not elements of offenses or defenses, while acknowledging that these elements include mental states that would otherwise be called motives.

LaFave and Scott illustrated their distinction with an offender breaking into a home to steal money to pay his debts. They urged that the purpose to get money should be characterized as an intent because it is an offense element, while the purpose to repay a debt should be characterized as a motive because it is not an offense element. Based on LaFave and Scott's example, Gellman defines intent as "the actor's mental state as it determines culpability based on volition," purpose as "what the actor plans as a result of the conduct," and motive as "the actor's underlying, propelling reasons for acting."²⁰³ As the Wisconsin court notes, Gellman argues that changing the actor's "motive" for the break-in does not change its character as burglary, whereas changing the actor's purpose does. But both the desire for money and the desire to repay debts are purposes in Gellman's terms, and the first is an intention in LaFave and Scott's terms only because it is defined as an element of liability. According to LaFave and Scott's terminology, if group hate is defined as an offense element, it becomes an intention. Indeed, in the most recent edition of the treatise, LaFave draws a direct parallel between the intent to steal in burglary, and group animus in hate crimes. He treats them both as specific intent requirements, and concludes "it is preferable to view such crimes as *not* being based on proof of a bad motive."²⁰⁴

By adopting LaFave's definition of motive—any purpose that does not change an act's character as an

3.6 at 227).

202. LaFave & Scott, *supra* note 32, § 3.6 at 227 (emphasis added).

203. Gellman, *supra* note 197, at 364

204. LaFave, *supra* note 151, at 242.

offense—the Ohio and Wisconsin Supreme Courts made the irrelevance of motive maxim always true by definition. Nevertheless, the Ohio court also tried to show that the irrelevance of motive maxim was an empirically true description of criminal law, by denying that any purpose bearing on liability was properly called a motive. For example, the court denied that the purpose to commit a theft required for one form of burglary was a motive, saying that “[w]hat is being punished is . . . the additional act of theft, or the intent to commit theft. . . . The object of the purpose is itself a crime. Thus the penalty is not enhanced solely to punish the thought or motive.”²⁰⁵ The Court distinguishes here between a purpose to commit some additional offense and a purpose which, if achieved, would not be an additional offense. It implies that only the purpose to commit some additional criminal offense can aggravate liability constitutionally.

But the Constitution cannot possibly restrict aggravating purposes to results which would constitute additional crimes. Consider the following hypothetical statutory scheme:

Section 146.01 Criminal Misappropriation in the Second Degree. A person is guilty of criminal misappropriation in the second degree if he knowingly takes property without the owner’s consent. Criminal Misappropriation in the Second Degree is a class C misdemeanor.

Section 146.02 Criminal Misappropriation in the First Degree. A person is guilty of criminal misappropriation in the first degree if he knowingly takes property without the owner’s consent for the purpose of causing the owner inconvenience. Criminal Misappropriation in the First Degree is a class B misdemeanor.

Section 146.03 Theft. A person is guilty of theft if he knowingly takes property without the owner’s consent

205. State v. Wyant, 597 N.E.2d at 455.

for the purpose of keeping it or otherwise permanently depriving the owner of it. Theft is a class A misdemeanor.

This statutory scheme aggravates the offense of knowingly taking the property of another based on the purposes of inconveniencing or permanently expropriating the owner. Yet this scheme includes no additional offenses that require actually inconveniencing or expropriating the owner. Thus it is not true of this example that "the object of the [aggravating] purpose is itself a crime." According to the Ohio Supreme Court's terminology, then, these aggravating purposes are motives. Can the court seriously contend that the above scheme violates some constitutional standard? Of what? Free speech? Due Process? The Court's argument has the dubious implication that a jurisdiction is constitutionally required to punish a result every time it enhances punishment because of a purpose to cause that result.

The Court makes a similarly fallacious argument concerning aggravating conditions for murder. The Court argues that murder for hire "is not properly seen as enhancing the penalty for a mercenary motive. . . . The greater punishment is for the additional act of hiring or being hired to kill."²⁰⁶ That may be true as a matter of Ohio law, but it is hard to see why Ohio should be constitutionally precluded from aggravating greed-motivated killings. Would this infringe freedom of thought? Arguing in the same spirit, Gellman implies that legislatures could not constitutionally aggravate murders committed for the purpose of killing a police officer or for the purpose of furthering another felony. She argues that such penalty enhancements can only be for the circumstances that a victim is an officer,²⁰⁷ or that a

206. *Id.*

207. Gellman, *supra* note 197, at 365. Note that in New York, this aggravator is conditioned on reason to know that the victim is a police officer. N.Y. Penal Law § 125.27(1)(a)(i) (McKinney 2002).

murder coincides with a felony.²⁰⁸ But of course legislators can and do grade offenses involving similar conduct and consequences on the basis of “thoughts alone.” It is possible to stipulate that all inculpatory thoughts and purposes are intentions rather than motives, but this strategy will automatically reclassify group hate as an intent as soon as its gratification or expression becomes an aggravating purpose. It appears difficult to both assert the irrelevance of motive maxim as a statement of positive law, and also use it as a critical principle, as the Ohio and Wisconsin courts sought to do. Any effort to apply the irrelevance of motive maxim to the hate-crimes controversy stumbles over the logical and descriptive objections explored above.

C. Confining Motive to Defenses or Sentencing

Let us now consider some efforts to define and apply a more limited irrelevance of motive maxim. Several scholars have argued that while motive has a proper place in the definition of defenses, and at the sentencing stage, it should be excluded from the definition of offenses. Having conceded the normative relevance of desiderative states to blame and punishment, these authors now face a dilemma. They must either explain why desiderative states although relevant to desert, should be excluded from offense definitions; or they must distinguish “motives” from other desiderative states, without merely excluding them from offense definitions, by definition.

Jerome Hall was an early and influential exponent of the view that motive should be confined to sentencing. Recall that Hall defined mens rea as the intentional or reckless creation of harm or risk, and defined motive as one’s reasons for doing so. Hall recognized motive as a component of blameworthiness, but insisted that consideration of motive should be limited to sentencing, so

208. Gellman, *supra* note 197, at 365. New York conditions this aggravator on the killing being in furtherance of the felony. N.Y. Penal Law § 125.27(1)(a)(vii) (McKinney 2002).

as to advance the value of legality. In accepting the moral relevance of motive, Hall anticipated and acquiesced in the normative objection to the exclusion of motive from offense definition. Hall was also aware of the logical and descriptive objections offered by Salmond, Hitchler, and Cook.²⁰⁹ Nevertheless, Hall replied that these critics were beset with conceptual confusions and he insisted that motive should remain irrelevant to criminal liability.

Unfortunately, Hall's emphatic restatement of the irrelevance of motive maxim left unanswered a number of important questions posed by the descriptive, logical, and normative objections. One was the nature of intent. Did Hall consider criminal intent a purely cognitive state of expecting harm? Or did he include within criminal intent a desiderative aspect, a desire for or willingness to inflict harm? Was there a difference between knowingly imposing risk and purposely imposing risk? If intent had a desiderative dimension, the concepts of intent and motive might overlap after all.

This possibility raises a question about the scope of motive. What if an actor's reason for intentionally inflicting harm was the desire to inflict harm? Could a criminal intent also be a motive, or would Hall have defined the category of motive to exclude the mental element of offenses automatically? Unless Hall was willing to exclude desire from intention or exclude inculpatory desire from motive, the two concepts would indeed overlap, and some motives would be pertinent to criminal liability.

If criminal intent does include any desire to harm, we face a third question: what if an actor's reason for inflicting a harm or imposing a risk was the desire to inflict some other harm? Could the motive for one offense be the intent to commit another? Could that secondary intention aggravate the defendant's culpability? If so, this would provide a second way that criminal liability would depend on motive.

209. Hall, *supra* note 1, at 150-51.

Finally, Hall's argument that motives should be considered at sentencing rather than trial raises some questions. First, why did Hall assume that bad motives would be any harder to define and grade than bad intentions? Presumably intentions can be graded on the basis of their anticipated harms: a certainty of death is worse than a probability of injury. But cannot some motives be graded in the same way? A desire to kill is worse than a desire to injure. A desire to inflict great pain is worse than a desire to annoy. A desire for undeserved riches is worse than a desire to fulfill an obligation to provide necessities to a child.

Even presuming Hall was right that motives cannot be categorized and graded, but must be evaluated on a case-by-case basis, why must that case-by-case evaluation occur at sentencing rather than trial? We usually think of the trial as the forum in which to assess the unjustified harm or risk the defendant created, and the culpability with which he did so. These are features of the defendant's conduct, not his character. They determine the wrongfulness of his conduct as defined by conduct norms prescribed and publicized in advance. The trial is also the place to consider at least those exculpatory circumstances or incapacitating conditions that completely eliminate blameworthiness, because no blameless person should be pronounced guilty. On this view, a sentencing hearing is an appropriate place to consider any features of the defendant's character relevant to the amount or form of punishment he merits, from the standpoint of desert or utility, that do not exculpate him completely. In other words, *sentencing is not case-by-case decision-making* because it is not about "the case." Legality requires that the extent of defendant's culpable wrongdoing be determined at trial, not at sentencing. *Sentencing is person-by-person decision-making*. It is a choice among the range of punishments appropriate to the wrongfulness of defendant's conduct, based on any individual characteristics. So if, as Hall seemed to think, motives are determinants of the wrongfulness of defendant's conduct,

rather than permanent features of his character, they should be judged at trial according to norms of conduct promulgated and publicized in advance.

If those norms cannot be defined very precisely, their application will require discretion. But Hall did not identify any reason why that discretion is better exercised by a judge at a sentencing hearing than by a jury at a trial. The law often requires criminal juries to apply very flexible standards. According to the Model Penal Code, judgments of recklessness depend on an assessment as to whether a consciously disregarded risk is "substantial and unjustifiable" and on whether "its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation" in light of "the nature and purpose of the actor's conduct."²¹⁰ When a duress defense is offered, juries may have to decide whether the threat is one a "person of reasonable firmness" would have been able to resist.²¹¹ Criminal statutes frame many issues by reference to such vague "reasonableness" standards.²¹² Of course one implication of these examples is that juries routinely *do* evaluate defendant's motives in resolving both offense and defense issues. But another implication is that we currently expect juries to exercise discretion and moral judgment in determining guilt.

Martin Gardner has offered a detailed argument for a position similar to Hall's.²¹³ Gardner sees motive as relevant to defenses and sentencing, but not to offense definition. Gardner reasons that considerations of legality caused the criminal law to abandon the archaic "evil motive" conception of culpability in favor of specific states of mind peculiar to different offenses. But as long as vestiges of the "evil motive" approach remain within offense definitions, they undermine the determinacy and

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

211. *Id.* at § 2.09(1).

212. Oren Zeve, *Justification of Belief Beyond a Reasonable Doubt* 147-91 (1998) (unpublished Ph.D. dissertation, S.U.N.Y. at Buffalo) (on file with the author).

213. Gardner, *supra* note 5, at 685-86, 694.

predictability of the criminal law, and expose defendants to the risk of being punished prejudicially for their opinions and general character, rather than their acts. Individualized consideration of defendants' blameworthiness is appropriate in deciding whether to justify, excuse, or mitigate their offenses, but offenses must be defined in general descriptive terminology.

Unfortunately, the indeterminacy of the distinction between motive and intent, and the futility of any aspiration to eliminate moral criteria from offense definitions undermine Gardner's argument. While Gardner objects to a number of doctrines as vestiges of the supposedly ancient "evil motive" approach, he cannot distinguish them on any principled basis from the doctrines he approves. Gardner objects to five doctrines: the conditioning of some sex and family offenses (notably bigamy, adultery, and statutory rape) on partial strict liability; the felony murder and misdemeanor manslaughter doctrines; the "transfer" of culpability from intended to similar unintended results; the conditioning of property damage offenses on spite or hostility; and hate crime liability. Gardner considers each of these an instance of punishing a defendant for desiring a bad consequence other than the one she is charged with causing. But Gardner fails to acknowledge how pervasive and necessary this form of culpability is in the criminal law.

Critics have long objected to punishing adultery and bigamy without proof of at least negligence with respect to the risk that one of the partners remains legally married to another living partner. They have also objected to punishing sex acts with minors without proof of at least negligence with respect to the victim's age. According to Gardner, both of these types of offenses are based on the archaic theory that anyone engaged in sex acts risks liability for trafficking with an illegal partner. This theory illegitimately substitutes the supposed immorality of sex

(or divorce, in some bigamy and adultery cases) for the actual intent to do harm.²¹⁴

But is Gardner objecting to the general principle of punishing badly motivated harmful conduct, or is he just objecting that the motives being punished here, sex and divorce, are not really bad? If the latter, the imposition of strict liability for adultery and bigamy are misapplications of an otherwise valid principle of punishing bad motive. Does Gardner object to punishing child-molesters who reasonably believe their nine-year-old victims are ten, as severely as those who know who their victims are nine?²¹⁵ If not, he accepts the principle of punishing on the basis of motive rather than expectation.

Notice too, how malleable the motive is irrelevant argument can be. The argument that bigamists and adulterers should not be punished unless they desire or expect the harm they are charged with causing is the same one offered above by defendants accused of desertion, bank fraud, neglect of child support, and obstruction of governmental administration. In the statutory construction cases considered above, prosecutors argued that accepting this argument would require them to prove bad motive rather than merely illegal intent. That the immoral motive/illegal intent distinction can be marshalled on both sides of these arguments is not surprising. After all, motives are desires, indistinguishable from intentions except by reference to whether they are relevant to liability, and the immorality of a desire is one reason for making it relevant to liability.

Gardner reasons that it made sense to transfer culpability from a felony to an unintended resulting death, when all felonies were punished with equal severity. But he argues that now that felonies are punished less than murder, the felony murder rule results in excessive punishment, "perhaps death"²¹⁶ for unintended, unforeseen,

214. *Id.* at 698-704.

215. See, e.g. Model Penal Code § 213.6(1) (Proposed Official Draft 1962).

216. *Id.* at 707.

and even nonnegligent killings.²¹⁷ Gardner's argument depends upon a distortion of the original implications of the felony murder rule. When early forms of the felony murder rule were proposed in the seventeenth and eighteenth centuries, felonies other than murder were eligible for benefit of clergy (which exposed literate offenders to only minor penalties) and attempted felonies were usually not punishable at all. Thus, absent a special rule for illegal act homicide, one who caused death in attempting a violent and dangerous offense might receive no punishment at all. The felony murder rule was an early form of attempt liability, punishing at least those attempts resulting in the most serious harm. This connection between the felony murder rule and attempt liability reminds us that attempts also exemplify the principle Gardner attacks: punishment for an unfulfilled wish to cause a particular harm. Yet Gardner raises no objection to attempt liability.

More troubling is the fact that Gardner's argument against the felony murder rule relies on a distorted picture of its contemporary application. The death penalty can only be applied to felony murders that are either intentional or that express depraved indifference to human life.²¹⁸ In some jurisdictions, felony murder is predicated on recklessness or negligence.²¹⁹ In most jurisdictions, felony murder is predicated on a small number of enumerated, inherently dangerous felonies. Arguably, any person committing such a felony should be aware of a substantial risk of death. Some jurisdictions limit felony murders to those caused proximately (that is, foreseeably) or in furtherance of the felony, and some provide an affirmative defense for unarmed, unwitting accomplices to a felony murder. The effect of these various limits on the felony murder rule is to restrict it, in most jurisdictions, to negligent killings in the pursuit of very serious crimes.

Gardner's exaggeration of the risk that felony murderers will be punished excessively again raises a

217. *Id.* at 706.

218. *Tison v. Arizona*, 481 U.S. 137 (1987).

219. See *Binder*, *supra* note 184, at 430-37.

question about the true target of his argument. Is he objecting to the principle that liability for harm should be enhanced on the basis of an offender's desire to commit a serious crime? Or is he merely objecting to its intemperate application? Should we abolish the felony murder rule altogether, or merely keep it within its traditional limits? Gardner does not seem to mind other applications of the principle that a criminal purpose should aggravate liability. Thus, he raises no objection to aggravating intentional killings to capital murder when committed in furtherance of a felony, or aggravating reckless manslaughter to extreme indifference murder, when risk is recklessly imposed for a base, antisocial purpose.²²⁰

Gardner's critique of transferred intent is similarly inconsistent. He explains that this doctrine seemed necessary when there was no attempt liability,²²¹ but now one who kills "B" unintentionally in a failed attempt to murder "A" can be prosecuted for the attempt on "A" and for killing "B" recklessly. But both of the doctrines that Gardner would substitute for transferred intent would seem to punish motive as well. We have already observed that attempt liability punishes on the basis of harm defendant wishes to cause, not harm she causes. As for recklessness, recklessness involves imposing a significant and *unjustifiable* risk of death.²²² Thus, it is impossible to identify recklessness without a moral evaluation of the purposes for which defendant imposed a risk of death. Gardner admits the dependence of recklessness on the relative immorality of the actor's purposes,²²³ but he does not see how this admission undercuts his claim that the availability of liability for recklessness obviates the need to transfer intent. He is not substituting intent for motive, or descriptive terminology for normative terminology. He is

220. See, e.g., *People v. Protopappas*, 246 Cal. Rptr. 915 (1988); Pillsbury, *supra* note 163, at 172-84.

221. Gardner, *supra* note 5, at 709-10.

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

223. Gardner, *supra* note 5, at 725-27.

substituting one moral evaluation of defendant's purposes for another.

Despite Gardner's objections to transferred culpability, it cannot be avoided. It is impossible to ascribe an event to a culpable choice without abstracting away some of the particularities of the event and treating it as a token of a type.

Consider the following examples of accidental byproducts of intentional wrongdoing: An assassin aims at his victim's head but inadvertently hits his victim's heart. Or misses the victim's body but hits her car's tire, causing a fatal collision. A terrorist unsuccessfully attempts to destroy a building with the force of a collision and unexpectedly destroys a different building by fire. In attempting to force her child's head under water, an abusive parent breaks the child's neck. A driver forces another driver's car off the road, unexpectedly (but unsurprisingly) causing it to hit a pedestrian. In all these cases, it seems plausible to hold the perpetrator as responsible for the result she actually caused as for the result she "had in mind."

Alternatively, for each of these cases, we can imagine a different offender with a less precise, but equally malevolent intent. The assassin aims a shotgun at his victim, or blows up his victim's car, and so is uncertain exactly what fatal injuries she will inflict. The terrorist sets off an explosion, hoping to destroy buildings. The driver deliberately drives into a crowd, not knowing whom he might injure. The abusive parent intends to endanger the child's life. In all these cases, the offender does not even have a specific event in mind. Yet it would be odd to punish these offenders more than their counterparts because their intention to harm was less precisely formulated or vividly imagined. These examples suggest that we are interested in the intent to cause or risk a certain class of harms rather than a specific event.

This is easiest to see with negligence and recklessness. We usually consider an act reckless if the actor is aware (and criminally negligent if she should be aware) that all

the expected costs of her conduct to others greatly outweigh all the expected benefits.²²⁴ Thus, a judgment of negligence or recklessness requires that we calculate and aggregate the probabilities of a host of different harms and benefits. When a defendant deliberately fires one shot into a dense crowd of a thousand, the chances of any particular person in the crowd being killed are quite small, but the overall risk of death is substantial and unjustifiable. A drug wholesaler dilutes a prescribed cancer drug with a powder that can cause potentially fatal allergic reactions in some patients. The risk to any one patient may be small: few patients are allergic, many would have died of cancer anyway, others will get better on their own. But the recklessness of the act depends on aggregating the risk of preventable deaths from cancer and the risk of fatal allergic reaction over a population of many patients. Because judgments of recklessness and negligence require assessments of risk, the Model Penal Code determines whether an actor has recklessly or negligently caused harm by asking whether that harm was within the scope of the risk recklessly or negligently inflicted.²²⁵ Ascribing a harmful result to an actor's recklessness or negligence therefore involves determining whether it is part of a set of morally equivalent hypothetical consequences.

But as illustrated by the example of the assassin who aims at one vital organ and hits another, even intentions can be fulfilled by more than one scenario. Accordingly, the Model Penal Code assesses intentional causation by reference to classes of morally equivalent events. It asks whether a harm was within the scope of the actor's intent, or was similar except for the identity of the person or property harmed, or the gravity of the harm, or was similar and "not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability"²²⁶

The drafters of the Model Penal Code understood that the attribution of culpability, whether for imposing risk or

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

225. *Id.* at § 2.03(3).

226. *Id.* at § 2.03(2) (bracketing of "just" in original).

for inflicting harm, involves imagining a class of hypothetical harms for which the actor would be responsible. When we consider an actor's culpability for causing a result, the question is never "Did the actor precisely predict the consequences of his action?" The question is "Can we fairly ascribe the *injustice* of those consequences to his choice?" Strictly speaking, an actor never causes harm, but merely supplies one among an infinity of causal conditions.²²⁷ Causal responsibility depends on a judgment that an actor *deserves* to be treated *as if* his decisions caused the specific result because his act showed some degree of willingness to *wrong* another person. Causation and culpability are metaphors. Gardner's objection to transferred intent reflects a quixotic aspiration to base criminal liability on a completely precise and value neutral description of states of affairs. He ascribes such an aspiration to the drafters of the Model Penal Code, but their embrace of transferred intent shows the futility of that aspiration.

Gardner's objections to conditioning liability on personal hostility²²⁸ and group hate²²⁹ are much of a piece. In his eyes, both of these mental elements are too hard for prosecutors to prove and place too much discretion in the hands of fact-finders, who may use it to punish unpopular opinions or life-styles. Yet, these objections seem speculative and contradictory. Why is it any harder to prove motives of personal or group hate than to prove the intentions to annoy or frighten commonly found in definitions of assault and harassment? Part of the harm of hate crimes consists in the message of intimidation and degradation they publicly communicate to a class of victims. Where that message is clearly legible, the intent behind it will be easy to prove. Where that message is not clearly legible, group animus will be difficult to prove, but there will be little purpose served in charging a hate crime.

227. Richard Taylor, Causation, in 2 Encyclopedia of Philosophy 56, 63 (Paul Edwards ed., 1967).

228. Gardner, *supra* note 5, at 713-17.

229. *Id.* at 717-24.

In any case, it is hard to see why the difficulty of proving group animus gives jurors discretion to punish on some other, less legitimate basis.

Of course, hate crime statutes can be drafted badly so as not to clearly require group animus. Statutes that enhance penalties for “selecting” a victim because of group membership are inadvisable because in a diverse society in which group membership correlates with other demographic variables, an offender might screen victims on the basis of group membership without expressing any group animus. Thus, a mugger working a black neighborhood might select white victims believing they are more likely to carry a lot of money, less likely to resist effectively, less likely to elicit sympathy from passers by, less likely to recognize or identify their assailant, and less likely to avenge the attack. Hate crime statutes should not be used simply to punish opportunistic cross-racial crimes, because that would offend the principle of equal protection of laws.²³⁰ Hate crime statutes should therefore require group animus, or perhaps intent to degrade or intimidate because of group membership. The drawbacks of a vaguely drafted hate crime statute are drawbacks of vagueness, not of hate crime liability.

Gardner never argues that those who commit crimes in order to express bigotry do not deserve more punishment.²³¹ Instead, he offers two alternatives to conditioning aggravated liability on bigoted motive. Yet his two alternatives seem far worse from the standpoint of legality. One is a proposal to enhance liability for committing crimes against certain demographic groups, an explicit rejection of the principle of equal protection of the laws.²³² As a variant of this proposal, Gardner suggests permitting an

230. See Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 *Buff. Crim. L. Rev.* 389, 422-23 (2002) (distinguishing between biased and merely opportunistic selection on the basis of group membership).

231. *Id.* at 748.

232. For the reasons expressed in the text, I object to penalty enhancements for offenses against police officers, but not to penalty enhancements for the motive of obstructing law enforcement.

affirmative defense, shifting the burden of proof onto the defendant to disprove racial animus.²³³ Why he thinks burden shifting would enhance legality or decrease the risk to unpopular defendants is a mystery. His other proposal is to move the assessment of motive to sentencing, so that it need not be announced to the public as an offense element, charged in an indictment, supported with evidence at a pretrial hearing, or proven beyond a reasonable doubt at a jury trial.²³⁴ Gardner concedes the principle that some motives are indeed relevant to blameworthiness and should increase punishment.²³⁵ If so, the best way to reconcile this principle with Gardner's stated concern for legality is to define, charge, and prove such motives as offense elements.

Jeremy Horder has taken a similar position: aggravating motives should be considered at sentencing, not in identifying offenses.²³⁶ But his adherence to this position seems undermotivated, as if the irrelevance of motive maxim were maintaining its inertia after it had ceased to exert any persuasive force. For Horder, grading offenses on the basis of aggravating motives is "needless over-elaboration in a criminal statute, questions of heinousness being better left to sentencing."²³⁷ Like Gardner, Horder is not objecting to the principle that the culpability of an act depends on the moral worth of the reasons for doing it. Quite the contrary.²³⁸ Horder explains his position as follows:

The existence of a crime, justifiably created, reflects a reason not to do the thing prohibited. An 'aggravating' motive for committing a crime is regarded as aggravating because it provided yet another reason not to do the thing prohibited, a reason on which the defendant culpably acted,

233. *Id.* at 722-24.

234. *Id.* at 748.

235. *Id.*

236. Jeremy Horder, *On the Irrelevance of Motive in Criminal Law*, in *Oxford Essays in Jurisprudence* 173, 176-77 (Jeremy Horder ed., 2000).

237. *Id.* at 176.

238. *Id.* at 173.

to be added to the reasons on which the law is based. . . . But if the reason not to [commit the crime] . . . on which the law is based is, *ex hypothesi*, sufficient to justify criminalization, there may be scant justification for giving a legal basis to yet further reasons to act in this way.²³⁹

“Scant justification”? The justification is that (1) the act is more punishable if committed with greater culpability, and (2) fairness, deterrence, and democracy require that circumstances warranting greater punishment be specified publicly, prospectively, and legislatively, and (3) the presumption of innocence requires that such circumstances be proven beyond a reasonable doubt. Horder offers nothing to counter these conventional reasons for defining inculpatory circumstances as offense elements. In accepting the normative objection that motive is relevant to blameworthiness, Gardner and Horder cut the legs from under their own versions of the motive is irrelevant maxim.

Perhaps the most attenuated version of the motive is irrelevant maxim is offered by Antony Duff.²⁴⁰ Duff acknowledges the force of the descriptive objection:

[O]n any plausible interpretation of the concept of ‘motive,’ motives *are* . . . relevant to criminal liability. Thus, to offer just three examples, if my motive for picking up a dropped wallet is to return it to its owner, my action is not a theft; if it is to keep the wallet, my action is theft. If my motive for damaging another’s property is to protect my own property, I might avoid a conviction for criminal damage. . . . If my motive for carrying what counts in law as an offensive weapon is to defend myself against a threatened, imminent attack, I might avoid conviction for carrying an offensive weapon; but if my motive for carrying an otherwise innocent article is to use it to commit an assault, I am guilty of that offence.²⁴¹

239. *Id.* at 174.

240. Antony Duff, *Principle and Contradictions in the Criminal Law: Motives and Criminal Liability*, in *Philosophy and the Criminal Law: Principle and Critique* 156 (Antony Duff ed., 1998).

241. *Id.* at 173.

Duff considers defining motive as only those “motivating factors” that are “irrelevant to criminal liability,”²⁴² but acknowledges the logical objection that such a definition reduces the motive is irrelevant maxim to an empty tautology.²⁴³ Nevertheless, in the face of these descriptive and logical objections, Duff attempts to rescue the motive is irrelevant maxim by making it “a definitional truth *about the task of adjudication*.”²⁴⁴ Thus, “[t]o avoid the appearance of triviality, we might better express the doctrine as holding not that ‘motive’ is irrelevant to criminal liability, but that ‘further motive’ is irrelevant to liability; and as a doctrine that applies to courts, not legislatures.”²⁴⁵ Duff agrees that *legislatures* can and should “so define particular crimes that the agent’s motives are relevant to whether or for what he is to be criminally liable.”²⁴⁶ In so doing, like Hall, Gardner and Horder, Duff seems to accept the normative relevance of motive to criminal liability. Duff sees no problem with a *legislature* mitigating homicide on the basis of the humanitarian motive of ending the suffering of a consenting terminally ill patient, or aggravating it on the basis of group hate. But

Once the legislature has defined crimes, it is for the courts to apply those definitions . . .; and in so doing they should attend only to the issue of whether the defendant’s actions matched the law’s definition of a crime. They will thus often have to attend to questions of what motivated the defendant because such motivational questions will often be relevant to her liability: but they must not attend to motivational factors that are not declared relevant by the law.²⁴⁷

This division of labor is sensible enough, but has nothing to do with motives as such: courts will also attend only to

242. *Id.*

243. *Id.* at 174.

244. *Id.*

245. *Id.* at 177.

246. *Id.* at 177.

247. *Id.* at 174.

those *intentions* legislatively defined as offense or defense elements. Duff has replaced the maxim that motive is irrelevant to liability with the quite different maxim that legislatures alone should define offense elements and defenses. Having accepted the descriptive, logical, and normative objections to the irrelevance of motive maxim, he has essentially abandoned it.

But in so doing, he has maintained faith with one of the original purposes of the motive is irrelevant maxim. In its day, the maxim crudely and confusingly expressed the idea that liability for every crime should require proof of some specific mental state, defined in advance, probably by a legislature. That idea has triumphed, but implies nothing about whether those mental states should be cognitive or desiderative, or whether they should be represented in neutral and descriptive or in normative terminology. Although the irrelevance of motive maxim was historically associated with the emergent idea of legality in criminal law, the association was arbitrary. The idea of legality really has nothing to do with any defensible conception of motive.

CONCLUSION

The distinction between motive and intent in criminal law emerged in the nineteenth century as a result of two related responses to a great expansion of legislative activity. This growth of legislative activity forced an intellectual revolution within criminal law. The exclusive function of maintaining public peace, which had theretofore confined the criminal law within narrow limits, was expanded to embrace service to any public interest. Lawyers and reformers sought for new limitations to discipline legislatures and courts and to prevent arbitrary and unnecessary punishment.

Within criminal law doctrine, this effort expressed itself in the project of analyzing liability into act and mental elements and using these as the building blocks of offense definition. This project yielded a newly technical

terminology of intention. Thus, the idea that criminal liability always depended on intent was a premise of this project of offense definition. In legal and political theory, the effort to discipline legislatures and courts took the form of a utilitarian science of legislation. Exponents of this science sought to define the public interest, to allocate exclusive responsibility for its definition and pursuit to the legislature, and to determine the most effective legislative means for its pursuit. Utilitarianism sought to found policy on a mechanics of human desire. Accordingly, utilitarianism sharply distinguished motivations, which were inherently fixed, from behavior, which legislators could manipulate by means of legal sanctions. The idea that motives should not be penalized was a premise of utilitarianism.

Thus the terms "intention" and "motivation" emerged out of two distinct discourses and collided. These two discourses had compatible aims, but quite disparate premises. To legal scientists, "intention" meant the authoritatively defined mental element of an offense. When contrasted with intention in this sense, motivation could only mean mental states that were not inculpatory. To utilitarians, "motivation" meant desiderative mental states. When contrasted with motivation in this sense, intention could only mean cognitive mental states. Thus both groups could agree that motive was irrelevant to criminal liability, but meant completely different things by this claim.

Since "motive," as defined by utilitarians, and "intent," as used in doctrinal analysis, were not mutually exclusive terms, the intent-not-motive formula was beset with logical difficulties. It proved impossible to distinguish motive from intent in a way that made the motive is irrelevant thesis both true and non-trivial. Many legal decision makers thought that purposes and desires were morally significant and so conditioned liability on these desiderative states. As a result, the utilitarian version of the motive is irrelevant claim has never been descriptively true. On the other hand, because the mental elements of criminal offenses have no common essence, doctrinal analysts have not been

able to give any discernible content to the contrasting concept of motive. Thus their version of the motive is irrelevant claim is true only tautologically, not descriptively.

The motive is irrelevant maxim has somehow survived a century of logical, descriptive and normative criticism. Yet contemporary exponents of the maxim rarely specify whether they mean the descriptively false utilitarian version or the trivially true doctrinal version. The utilitarian version is a critical principle, with law reform implications over a wide range of issues. But these implications flow from the counterintuitive principle that an actor's purposes and values are irrelevant to her moral responsibility for wrongdoing. On the other hand, because the doctrinal version is always true by definition, regardless of the criminal law's actual criteria of liability, it can never have any doctrinal or policy implications. Its role in legal argument is purely ornamental. Yet the doctrinal version acquires an aura of substantiality from its historic association with the utilitarian version, just as the utilitarian version borrows some of the doctrinal version's authority. Unsited to survive on their own, the two versions of the motive is irrelevant maxim sustain one another, each disguising the other's failings.