PUBLIC

ANNEX I

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D. N. Husak, 'Motive and Criminal Liability' (1989) 8(1) *Criminal Justice Ethics* 3–14

CITATIONS:

Bluebook 21st ed.
Douglas N. Husak, Motive and Criminal Liability, 8 CRIM. JUST. ETHICS 3 (Winter/Spring 1989).

ALWD 7th ed.
Douglas N. Husak, Motive and Criminal Liability, 8 Crim. Just. Ethics 3 (1989).

APA 7th ed.
Husak, D. N. (1989). Motive and criminal liability. Criminal Justice Ethics, 8(1), 3-13.

Chicago 17th ed.
Douglas N. Husak, "Motive and Criminal Liability," Criminal Justice Ethics 8, no. 1 (Winter/Spring 1989): 3-13

McGill Guide 10th ed.
Douglas N. Husak, "Motive and Criminal Liability" (1989) 8:1 Crim Just Ethics 3.

AGLC 4th ed.
Douglas N. Husak, 'Motive and Criminal Liability' (1989) 8(1) Criminal Justice Ethics 3

MLA 9th ed.
Husak, Douglas N. "Motive and Criminal Liability." Criminal Justice Ethics, vol. 8, no. 1, Winter/Spring 1989, pp. 3-13. HeinOnline.

OSCOLA 4th ed.
Douglas N. Husak, 'Motive and Criminal Liability' (1989) 8 Crim Just Ethics 3

AI SUMMARY:

Motive and Criminal Liability

Criminal Justice Ethics, Vol. 8, Issue 1 (Winter/Spring 1989), pp. 3-13
Husak, Douglas N. (Cited 342 times)
8 Crim. Just. Ethics 3 (1989)

Central Thesis:
The article challenges the traditional view that motives are irrelevant to criminal liability, arguing that motives should play a role in determining liability rather than being confined to sentencing considerations. The author contends that the current approach lacks a principled basis for distinguishing between factors relevant to liability and those relevant to sentencing, and that incorporating motives into liability assessments could enhance the fairness and clarity of criminal law.

Legal/Academic Issues Addressed:
- The relevance of motives to criminal liability versus sentencing.
- The distinction between intention and motive in criminal law.
- The lack of principled basis for assigning factors to liability or sentencing stages.
- The role of motives in justifications, excuses, and the distinction between acts and omissions.

Methodologies/Data Sources:
- Conceptual analysis of the distinction between motive and intention.
- Examination of specific legal cases and doctrines, such as euthanasia and theft.
- Critique of existing theories from criminal law scholars, including Jerome Hall, Glanville Williams, and Hyman Gross.
- Analysis of legal codes and sentencing reform trends.

Findings/Analysis:
- Motives are already implicitly considered in some criminal offenses and legal doctrines.
- Motives influence determinations of justification, excuse, and the distinction between acts and omissions.
- The current system often relies on unprincipled distinctions and ad hoc reasoning to assign factors to liability or sentencing stages.
- The exclusion of motives from liability assessments can lead to unjust outcomes and legal fictions.

Recommendations/Implications:
- Motives should be explicitly incorporated into criminal liability assessments to address moral and legal ambiguities.
- Criminal codes should be redrafted to account for motives in defining offenses and determining liability.
- Legal theorists and reformers should develop a more principled framework for assigning factors to liability or sentencing stages.
- Greater attention should be paid to the role of motives in justifications, excuses, and the distinction between acts and omissions.

ARTICLES

Motive and Criminal Liability

DOUGLAS N. HUSAK

According to Jerome Hall, "Hardly any part of penal law is more definitely settled than that motive is irrelevant."[1] This thesis is endorsed, sometimes with minor qualifications, by almost all leading criminal theorists. Hall and these commentators must be understood to mean that motive is and ought to be immaterial to *liability*. Roughly, criminal justice is dispensed in two stages: first it is decided whether the defendant is liable; if so, it is next determined to what extent he is to be punished. It is beyond dispute that motive is relevant to the latter inquiry. Thus a bad motive might aggravate, or a good motive might mitigate, the severity of the defendant's punishment -- but the goodness or badness of his motive does not bear on the prior issue of his liability.

Commentators should have been more critical of the thesis that motives are and ought to be material to sentencing, but not to liability. A defense of this thesis requires a theory about why a given factor that reflects on a defendant's blameworthiness should be assessed at the sentencing rather than at the liability stage of the criminal justice system. It is true that Anglo-American criminal theory has been relatively clear about whether to assign a particular issue to one stage or the other. Modern penal codes typically identify only four culpable states (purpose, knowledge, recklessness, and negligence) that are relevant to the defendant's liability. All other "mentalistic" factors that bear on his blameworthiness are consigned to the sentencing stage. Foremost (but not alone) among these is his motive. But there is no good reason why the *mens rea* component of liability should be construed so narrowly as to include only these four "mental states." No satisfactory explanation supports the decision to relegate a factor to one stage or the other. Why are such issues as whether the defendant succeeds in killing his victim, as opposed to failing in his attempt, material to his liability but not to his punishment? Why are such issues as his stress, economic background, ignorance of law, inherited character, education, amount of temptation, or degree of complicity in the offense, material to his punishment but not to his liability? The writings of orthodox criminal theorists provide no principled answers to these questions.[2]

In the absence of a theory to identify why a factor is properly assigned to the first or the second stage of the criminal justice system, one would expect disputes about where a given issue should be assessed. These disagreements are surprisingly rare, although they surface occasionally. Commentators have recently debated whether a "cultural defense" should be permitted to defeat liability, as opposed to merely mitigate punishment, for an alien whose otherwise illegal act would have been acceptable in his native land.[3] Provocation and intoxication provide additional instances in which the law is ambivalent about the stage at which a factor should enter into the judicial process. Typically, provocation is pertinent to liability in the law of homicide, but is material only to sentencing for all other offenses. In most jurisdictions, gross intoxication precludes liability for crimes of "specific intent," but is relevant only to sentencing for crimes of general intent. The principles on which these doctrines rest remain obscure.

Commentators should have been more critical of the thesis that motives are and ought to be material to sentencing, but not to liability.

Lately, however, this traditional (but largely unprincipled) consensus to relegate a consideration of motives

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to the sentencing stage of the criminal justice system has been eroding. Impetus for change has come not from theoreticians of liability, but from advocates of sentencing reform. The traditional treatment of motives is at odds with recent (and welcome) trends in sentencing theory. Perhaps the most noteworthy aspect of the revival of retributivism (or "just deserts") is the reduction of discretion among sentencing authorities. If the severity of the defendant's punishment is to be proportionate to his desert and not responsive to the need to deter or to rehabilitate him, there is almost no reason to allow sentencing authorities the wide discretion they have generally exercised in the last several decades. But any effective strategy to lessen discretion in sentencing will prove draconian in implementation without revising the substantive criminal law.[4] Penal codes typically create broad offenses, encompassing a diverse spectrum of conduct that merits a wide range of punishment. A single offense of robbery or rape, for example, includes behavior of varying degrees of blameworthiness. It is morally obtuse to suppose that each instance of robbery or rape warrants an equivalent punishment. Particular characteristics of offenders or offenses that justify especially severe or lenient penalties must be taken into account *somewhere* in the criminal justice system. If the discretion to take account of these characteristics is withdrawn from sentencing authorities, a viable solution is to make them relevant to liability. This proposal, however, requires a redrafting of criminal codes.

Consider an extreme example in which the incorporation of motives into the substantive criminal law would be sensible. Suppose Smith deliberately kills in order to relieve the suffering of his incurable wife, while Jones is hired to kill a stranger for money. The range of available punishments for a purposeful killing would have to be incredibly vast if guidelines allowed both Smith and Jones to be punished in proportion to their desert. Here the difficulty does not arise because the latitude available to sentencing authorities to tailor the severity of the punishment to the gravity of the offense is too narrow. The source of the problem is that Smith and Jones are guilty *of the same offense.* No sentencing guidelines can realistically hope to correct the injustice that results from convicting Smith and Jones of the same crime. And the most obvious means to differentiate between the conduct of Smith and Jones is to incorporate reference to motives into their respective offenses.

Several advantages would follow if motives were sometimes considered to be relevant to liability.[5] The incorporation of motives into the substantive criminal law would publicize whatever significance motives are thought to have. For example, if an assault motivated by racial hatred is believed to be more reprehensible than an assault motivated by sexual jealousy, this judgment should be explicitly included in a criminal code.[6] A properly drafted criminal code should provide effective notice. Statutes not only should identify objectionable conduct, but also should draw whatever distinctions are necessary to indicate the extent to which conduct is blameworthy. The public is less likely to be informed of the relevance of such judgments as long as the evaluation of motives is reserved to the less visible decision of sentencing authorities.

The incorporation of motives into the substantive criminal law would publicize whatever significance motives are thought to have.

On the other hand, there are obvious limits to the number of variables that a criminal code can effectively include. Offenses would become horribly complex if all (or even most) factors relevant to blameworthiness were incorporated into statutes. It is unclear exactly when this limit is exceeded. Perhaps draftsmen of criminal codes should proceed cautiously by explicitly identifying only a few especially benevolent or malevolent motives, leaving finer distinctions to sentencing authorities.

Even this modest experiment, however, runs afoul of Hall's thesis. We cannot begin to undertake the more ambitious project of identifying the precise conditions under which motives should be relevant to criminal liability without first addressing the more general reservations about whether motives should *ever* be relevant. In short, if Hall's thesis is sound, criminal justice reformers must resist any inclination to incorporate a consideration of motives into the substantive criminal law. In this paper I will argue that Hall's thesis is neither descriptively nor prescriptively accurate. His contention that motives are *in fact* immaterial to liability cannot withstand critical scrutiny. Nor are there compelling reasons to believe that motives *should* be treated as irrelevant. But I am not merely interested in refuting Hall's thesis. I am equally concerned to indicate the several respects in which the pretense that motives are and ought to be immaterial to liability has had a pernicious impact on Anglo-American criminal theory.

The Concept of Motive

It is tempting to believe that these conclusions about the significance of motive cannot be defended without first engaging in conceptual analysis. To what extent does uncertainty about the relevance of motive to criminal liability derive from disagreement about the concept of motive itself? The answer, I believe, is hardly at all. This answer should be surprising. The concept of motive, I concede, *is* unclear and imprecise. Insofar as commentators have sought to analyze the concept of motive, they have defended radically different conceptions. One might expect this difference of opinion to be reflected in debates about the importance of motive to criminal liability, just as, for example, unclarity and imprecision about the concept of free will are reflected in disputes about whether persons are responsible for their behavior. But I believe that the same is not true of debates about the concept of motive. I will argue that motive is relevant to criminal liability according to virtually *any* conception of motive that satisfies the most minimal criteria of adequacy.

One of the most minimal constraints on an adequate analysis of motives is that the account not be circular. Yet this obvious constraint disqualifies a number of attempts to defend Hall's thesis. Many commentators have explicated the concept of motive in order to preserve, rather than to test, the inviolability of Hall's thesis. The most effective (but least satisfactory) means to guarantee the accuracy of this thesis is to construe it as a necessary truth. Conceptions have been rejected for no better reason than that they are incompatible with the claim that motives are irrelevant to liability.[7] But Hall's thesis is substantive, and is trivialized when construed as a tautology. Nothing in the *concept* of motive (or of criminal liability) requires its irrelevance. It should be *possible* to construct a theory of criminal liability that renders motives important. Hall's thesis should be understood not to deny the coherence of such an alternative, but rather to affirm that the Anglo-American tradition does not (and ought not to) conform to this possibility.

> *I will argue that motive is relevant to criminal liability according to virtually* any *conception of motive that satisfies the most minimal criteria of adequacy.*

It is disappointing that criminal theorists have embraced Hall's thesis while expending so little effort to understand the nature of motives. Some commentators simply offer examples of motives; others seem content with metaphors. Perhaps the most colorful illustration is provided by Hyman Gross: "If a rich man has an ugly daughter, he is concerned about her suitor's motives. But a poor man with a beautiful daughter is concerned about her suitor's intentions."[8]

As Gross's example suggests, most of the (few) attempts by criminal theorists to analyze the concept of motive begin (but too frequently end) by emphasizing the similarities and differences between motive and intention. It is not surprising that accounts of motive focus on intention. The exceptional significance Anglo-American criminal law attaches to intention stands in stark contrast to its (alleged) complete disregard of motive. This disparate treatment demands attention. Perhaps an explanation is to be found in whatever distinguishes intention from motive. Alleged differences and similarities between these concepts provide a useful means to introduce the two most familiar attempts of criminal theorists to analyze motives. According to the first school of thought, motives are one species of the genus intention. According to the second, motives and intentions are logically separate types.

Neither account is altogether satisfactory. The correct view, I believe, is that some but not all motives are intentions; motives and intentions are not separate types, but not all motives can be subsumed under the broader category of intentions.[9] But I am less interested to defend the philosophically correct account of motives than to argue that motives are relevant to criminal liability according to *any* plausible conception. Nonetheless, it will prove instructive to provide a brief critical evaluation of these competing accounts.

Glanville Williams defends a version of the first kind of definition, according to which motives are a species of the genus intention. He writes: "Motive 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."[10] Of course, the end of one action may be the means toward another. Williams continues: "Much of what men do involves a chain of intention (D pulls the trigger of his revolver in order to make the bullet enter P's body in order to kill P in order to get him out of the way, etc.), and each intention is a motive for that preceding it."[11] This account relativizes the distinction between intention and motive to moments of time. Since "each intention is a motive for that preceding it," the only intention that is *not* (also) a motive is that currently entertained by the defendant. An intention ceases to remain a motive only when it becomes immediate. Williams concludes: "It is only the immediate physical act that can never be called a motive."[12]

Although Williams's view has been extensively criticized, it is seldom noticed that it does not readily lend itself to support for Hall's thesis. For if Williams is correct, Hall's thesis is false, or at least extraordinarily misleading. Since a determination of liability always includes an examination of conduct that has already taken place, such inquiries must be interested in those intentions that are also motives. In other words, insofar as the criminal law is concerned with past intentions, it *must* also be concerned with motives, since each past intention *is* a motive. If Hall's thesis is to be salvaged, it must be reinterpreted to mean that although the criminal law *is* concerned with motives, it is only concerned with them *qua* intentions, and not *qua* motives. I am puzzled to understand what could be meant by claiming that, although the criminal law *is* concerned with motives, it is not concerned with them *qua* motives. Even if sense can be made of this reinterpretation, Hall's thesis is rendered much less interesting, to say the least.[13]

Insofar as the criminal law is concerned with past intentions, it must *also be concerned with motives since each past intention* is *a motive.*

Moreover, any number of offenses include an "ulterior intention" as an element. Common law burglary, to cite one of several examples, includes within its definition a breaking and entering "with the intent to commit a felony." If "ulterior intentions" *are* motives, as Williams claims, how can the existence of these offenses be reconciled with Hall's thesis? The sensible approach is simply to renounce the thesis and affirm the importance of motives to criminal liability.[14] Curiously, however, Williams is unwilling to take this step. His "solution" is simply to redescribe any "ulterior intention" that comprises an element of an offense not as a motive but as a "specific intent." He writes: "In short, whenever an intention to commit another crime is involved in the definition of a crime, it is generally referred to as an intention and not as motive."[15] In other words, if what (otherwise) satisfies the definition of motive is relevant to criminal liability, it cannot (for this reason alone) be deemed a motive.[16]

It is lamentable that scholars willfully embrace such a strategy. Perhaps the major obstacle to the development of Anglo-American criminal theory is the tendency among commentators to advance principles that are initially defended as important substantive insights, but become embellished as vacuous tautologies.[17] The fundamental principles of criminal theory should be falsifiable. Hall's thesis hardly qualifies as an important claim if no conceivable instance of liability could possibly contravene it.

Those who embrace versions of the second account of motives, and construe them as conceptually distinct from intentions, typically regard motives as "springs" or "originators" of actions. Differences between theorists of this school derive largely from disagreements about the nature of practical reasoning. Some accept the Humean account according to which reason is inert in producing action, and thereby liken motives to urges or desires. Others reject the Humean account, and allow that motives *can* function as *reasons* for action. But whatever the nature of reason in influencing behavior, the contrast between motive and intention is expressed by the principle that motives *explain why* a person acted, while intentions *describe what* action was performed. The principle that motives explain while intentions describe is affirmed by all theorists who regard motives and intentions as logically distinct.[18] Gross writes: "A motive can be distinguished from an intention as an explanation of an act and not a description of it."[19] This view is appealing because it lends itself to a theory about why intention but not motive is material to liability. According to this theory, criminal statutes simply describe unlawful conduct. A complete description of conduct includes not only the defendant's *actus reus*, but also his *mens rea* or intention. Trying to kill is a different action than merely pointing a gun in a victim's direction and shooting, even though the physical, behavioral, external components of these actions may be identical. By contrast, this theory continues, motives are *not* included in complete descriptions of conduct. Two actions might be tokens of the same type although explained by different motives. Trying to kill for money is not a different action than trying to kill for spite. Therefore intention, but not motive, is material to criminal liability.

This theory could be challenged at its foundation. Why should the criminal law merely describe illegal conduct? It must be conceded that many factors that are relevant to a defendant's blameworthiness are excluded from a description of his conduct (when the scope of a description is confined to his *actus reus* and his intention). Why should these factors be pertinent only to sentencing, and not to liability? A deeper justification is required to support treating variables that *describe* conduct as relevant only to liability, while treating variables that *explain* conduct as material only to punishment. Surely it is insufficient to simply reply without supporting argument that liability is "action-directed," while punishment is "person-directed." Theories of liability and theories of sentencing each seem to contain assessments of actions as well as of persons,[20] insofar as evaluations of actions and of persons can be clearly distinguished in the first place. Until this "deeper justification" is produced in detail, judgment about this sketch of a theory should be withheld.

Moreover, the claim that intentions describe while motives explain cannot be assessed without sophisticated theories of descriptions and explanations, and no criminal theorist has yet produced them. In the absence of a theory, there is no obvious fact of the matter that settles whether a proposition qualifies as a description or as an explanation of conduct. Depending upon our purposes in raising the inquiry, a proposition might count as either descriptive or explanatory. The end that a person believes will be achieved by his action might either describe or explain it. In this light, reconsider Gross's example about the rich/poor man who is concerned about the motives/intentions of his ugly/beautiful daughter's suitor. If the father is concerned about the suitor's interest in his daughter, either her physical attraction or her wealth seems to qualify as an explanation. But her beauty or money might just as well describe the nature of the suitor's interest. Why is Gross so confident that the plan of the suitor to marry the ugly but rich daughter explains his interest, while the plan of the suitor to seduce the poor but beautiful daughter describes his interest? Gross may be correct in his supposition, but his view cannot be evaluated in the absence of a theory of descriptions and explanations.

Hall's thesis hardly qualifies as an important claim if no conceivable instance of liability could possibly contravene it.

Consider the example of *State v. Warshow*,[21] in which the defendant was convicted of trespassing. Each of the following propositions about his conduct is true. The defendant was:

(a) sitting;
(b) demonstrating;
(c) protesting the opening of a nuclear power plant; and
(d) calling attention to the hazards of nuclear energy.

The orthodox theory of criminal liability would probably label (a) as descriptive, and (b), (c), and (d) as explanatory. The information in addition to (a) that is supplied by (b), (c), and (d) pertains neither to the defendant's *actus reus* nor to his *mens rea* or intention, and thus explains but does not describe his conduct. But these labels seem arbitrary and unfounded. Surely the defendant himself would stress that (a) is inadequate to describe *what* he was doing. He would insist that he was performing a *different action* from that of a defendant who was sitting for altogether different reasons, for example, because he was tired, or paid by a rival power company to cause disruption. There is no obvious reason to insist that the defendant must be incorrect in his insistence.

If the distinction between description and explanation is relative to a purpose, what purpose is operative in the criminal law? Typically, the objective in collecting information about the defendant's conduct is to decide whether he is liable, that is, whether he has committed an offense without justification or excuse. Thus the question of whether motive is relevant or irrelevant to the criminal law depends upon whether the elements of any offenses contain motives, or whether the availability of any justifications or excuses depends upon motives. There is no shortcut to answering this question without examining particular offenses, and attending to theories of justifications and excuses.[22] But what *is* the truth about motives? I believe that the correct account is a hybrid of the two kinds of theories sketched above, and represents something of a compromise between them. This view denies that motives are always a kind of intention, or that they never are. According to this account, some motives are intentions while others are not. Some actions are initiated by further intentions, while others are initiated by reasons, or other mental states. Motives might thus be understood as a "polymorphous collection of action initiators."[23] A somewhat more detailed analysis that might be acceptable to both those who emphasize the similarities and those who emphasize the differences between motives and intentions has been defended by Paul Grice. According to Grice, to have a motive for an action is to believe that some end will be furthered by performing it, and to want or desire to further that end.[24]

Whatever the differences between intentions and motives, there is an important connection between them. If Grice's account is accurate, an action that lacks a motive would be performed without the belief that some desired end would be furthered by performing it. These actions would be purposeless, and it is doubtful that *any* intentional action is purposeless in this sense. Thus it might be said that a person P intentionally performs action x only if P acts on a motive for x-ing. A motive for x-ing must provide some rationale, perhaps very weak, for x-ing. If there were no motive for P's x-ing, x would not be intentional. If these claims are correct,[25] Hall's thesis must again be reinterpreted. *Whether* the defendant has a motive *must* be relevant to liability if the criminal law is to remain interested in intention. The conclusion that a defendant lacked a motive altogether entails that he acted unintentionally, and surely *this* finding is material to liability. Hall must be understood to assert that what is irrelevant to liability is not *whether* the defendant has a motive, but *what* his motive is.

The Relevance of Motive

I do not pretend to have resolved the question of what motives are, or precisely how they might be differentiated from intentions. Nonetheless, I believe Hall's thesis can be shown to be false according to any of the above accounts of motives. Any uncertainty about the relevance of motives does not derive from philosophical confusion about the concept of motive, but rather from substantive moral ambivalence. In this section I will defend this claim by indicating four respects in which it is likely that motives are relevant to criminal liability.

The first of four ways in which motives are material has been described above. Motives (or so-called "specific intentions") are incorporated as elements into the descriptions of a number of existing offenses. Textbooks contain several illustrations of these offenses.[26] They are defined in terms of some end that a defendant wants to further, and believes will be promoted by his action. Whether the "further end" included in these offenses is an explanation or description of the defendant's conduct is immaterial; on any (noncircular) account of motives, the existence of these offenses provides good reason to reject Hall's thesis. Since commentators have long noted the difficulty of reconciling these offenses with Hall's thesis, I will not dwell upon them here. Instead, I will describe three additional (and less obvious) respects in which motives are relevant.

As indicated above, if motives can be shown to be material to whether a defendant has (a) committed a criminal offense (b) without justification or (c) without excuse, their relevance to liability will have been demonstrated. In fact, I believe that motives are sometimes material to *each* of these three determinations. First, I will indicate how a consideration of motives helps to identify whether conduct should be construed as an *act* that transgresses a criminal statute, rather than as an *omission* that does not. Second, I will argue that a defendant may be justified in committing an offense only if he acts with the proper motive. Finally, I will discuss how an evaluation of motives limits the availability of a number of excusing conditions. Despite the apparent significance of motives in each of these three additional respects, criminal theory continues to suffer from the pretense that motives are unimportant.

Acts versus Omissions

Criminal liability does not arise unless the defendant violates a legal duty. Consider the application of this requirement to liability for homicide. In cases in which the defendant's conduct causes death by a positive action, the requirement of a duty owed by the defendant to his victim is always satisfied. Each person owes a duty to all other persons not to cause death by a positive action. But when the defendant's conduct consists in an omission, the existence of a duty becomes problematic. The criminal law has delineated carefully defined circumstances in which persons owe duties to others not to cause death by omission.[27] Thus a defendant who causes death is much more likely to escape liability if he can succeed in convincing the court that his conduct should be characterized as an omission rather than as a positive action.

Unfortunately, the distinction between positive actions and omissions is anything but clear. Perhaps cases of beneficent euthanasia provide the best examples of uncertainty. Is the discontinuance of aid to a terminal patient a positive action or an omission? Reasonable arguments can be made on both sides. The conscientious attempts of commentators to apply an analytical distinction between positive actions and omissions to cases of beneficent euthanasia sometimes yield bizarre results. Depending upon the details of how aid is discontinued, liability is made to depend on subtle distinctions that have no clear significance. Is the withdrawal of the tube of a drip feed that keeps a person alive a positive action? Is the failure to replace an emptied bag an omission?[28] It seems preposterous that liability for homicide would turn on such questions.[29]

As a result of this predicament, the distinction between positive actions and omissions is frequently gerrymandered to achieve desired outcomes.[30] It is doubtful that existing law could ever allow the cessation of aid if all cases of euthanasia consisted of positive actions. Thus those commentators who would permit some instances of euthanasia have been well advised to describe such conduct as an omission. They do not reason that "liability should not arise because this conduct is an omission," but rather "this conduct is an omission because liability should not arise." The contrast between positive actions and omissions is not invoked to *support* the judgment that liability is unjust; it is applied *after* this judgment is reached on independent, unarticulated grounds.

This strategy is objectionable. The integrity of legal reasoning suffers from "arguing backwards." It is disingenuous to invoke a distinction in support of a decision if that decision is reached on grounds having nothing whatever to do with the distinction. The distinction between positive actions and omissions contributes nothing to the analysis in many of these cases. The factor that *really* explains these decisions is hidden from critical scrutiny.

Clearly, motive is one of the most significant factors in explaining why commentators are willing to categorize many cases of euthanasia as omissions rather than as positive actions. Typically, the motive of the physician and the patient's family is to relieve suffering. But if the physician had a bad motive for discontinuing aid to a terminal patient, for example, if he were paid to allow the patient's relatives to collect an early inheritance, there would be no hesitation to describe his conduct as a positive action. The doctor would be a murderer, even though the *effect* of his decision upon the patient -- relief from suffering -- would be identical to that achieved by a good motive.

Expressed in terms of Grice's analysis, the practitioner of beneficent euthanasia is motivated to prevent suffering, inasmuch as he wants or desires to prevent suffering, and believes that euthanasia will further that end. But Grice's account need not be invoked to support the claim that motives are used to draw the distinction between positive actions and omissions. The relevance of motive does not depend upon whether one accepts Williams's account, according to which all motives are ulterior intentions, or Gross's account, according to which no motive is an intention, or some hybrid of the two. If Williams is correct, the physician is motivated to prevent suffering, although this motive is now described as an ulterior intention. And if Gross is correct, the physician still is motivated to prevent suffering, although this motive does not describe his action, but rather explains it. The important point is that motive is material notwithstanding these philosophical differences. Any reluctance to acknowledge the significance of motives does not stem from unclarity about the concept of motive, but rather from substantive moral qualms about the permissibility of euthanasia.

> *The distinction between positive actions and omissions is frequently gerrymandered to achieve desired outcomes.*

If the criminal law is to avoid injustice, health care professionals who practice beneficent euthanasia will evade liability *somehow*. At present, courts are usually spared the charade of manipulating the distinction between positive actions and omissions because prosecutors exercise their discretion not to bring charges. This "solution," of course, is unprincipled. Doctors should not be forced to entrust their fate to acts of prosecutorial grace. Clearly, a better approach is available. Our moral judgments about whether and to what extent euthanasia is impermissible attach extraordinary significance to the physician's motive, and there is good reason for the criminal law to do likewise. There is nothing improper about allowing liability in such cases to depend largely upon motive. The unwillingness of theorists to identify motive as the crucial variable in order to help distinguish permissible from impermissible euthanasia can be explained only by the powerful grip Hall's thesis holds upon them. I hope to help loosen this grip. A theory of criminal liability would have less need to embrace fictions, engage in backwards reasoning, rely upon prosecutorial discretion, and risk injustice if the real basis for allowing beneficent euthanasia were openly acknowledged.

Justifications and Proper Motives

Under what conditions is a defendant justified in apparently committing a criminal offense?[31] Answers to this question require a theory of justification as a criminal law defense category. A comprehensive theory should provide a plausible view about the relevance of *mistakes* to the availability of a justification. Mistakes typically exculpate, but the apparent significance of motives arises from those relatively rare cases in which mistakes might be said to have an *inculpatory* effect. Can a defendant invoke a justification for his apparent criminal conduct if he was unaware at the time of his conduct of the circumstances that gave rise to the justification? Suppose, for example, that Smith assaults Jones without being aware of any justificatory circumstances. He is ignorant that Jones is about to destroy his most cherished possession, a bust of his aunt, and can be prevented only by the use of force. Had Smith been aware of Jones's effort, there would be no question that his assault would be justifiable under the law that allows the use of (non-deadly) force in the protection of property. May he invoke this justification as a defense if he becomes aware of Jones's plan subsequent to his assault?

The guilt or innocence of a defendant can depend upon how this hypothetical is resolved. But deeper theoretical questions are at stake as well, for the ultimate issue is how the structure of criminal offenses is to be conceptualized. It is important to determine whether the elements that comprise the definitions of distinct offenses must be differentiated from the absence of justifications for committing those offenses. It is clear that a defendant is not liable if he is mistaken in his belief about the presence of an element in the definition of a given offense. Suppose, for example, that a defendant believes he is stealing the property of another. If in fact the property belongs to him, he cannot be liable for theft, regardless of his belief. This result follows from an application of the principle of legality, *nulla poena sine lege*. Simply expressed, the defendant is not violating a criminal law, whatever his intentions. The difficult issue is whether the same analysis applies to mistakes about justifications. Should the absence of justification (for example, that an assault is not in self-defense) be understood as an element (perhaps an "implicit element") in the definition of a given offense? If so, a defendant may invoke a justification even if he was unaware of its existence at the time of his conduct: if a justificatory condition exists in fact, the defendant is not violating a criminal law. But if the absence of justification should not be understood as an element in the definition of a given offense, so that the word "lege" in the principle of legality does not encompass the absence of justifications, it is arguable that the defendant may not invoke a justification he discovers subsequent to his conduct.

A defendant is not liable if he is mistaken in his belief about the presence of an element in the definition of a given offense.

George Fletcher maintains that defendants can invoke a justification only if they act with "justificatory intent."[32] What does this mean? Surprisingly, Fletcher does not provide a detailed elaboration. This much is clear: the absence of belief in a fact that would otherwise serve as a justification implies the absence of a justificatory intent. When so expressed, Fletcher's claim is that a defendant cannot be justified in apparently committing an offense unless he is aware of those facts in which the justification consists. This conclusion can be challenged, but seems to yield a plausible solution in the Jones/Smith hypothetical.[33]

If Fletcher's position is accepted thus far, the next difficult issue is whether mere belief in the existence of a justification is *sufficient* to comprise a "justificatory intent." If belief alone sufficed, Fletcher would probably speak of a "justificatory belief" rather than a "justificatory intent." The question of whether an additional condition is necessary becomes crucial if the above hypothetical is altered so that Smith's ignorance of those facts in which the justification consists plays no role in his conduct. Suppose that Smith planned to assault Jones all along. Suppose further that the following counterfactual is true. Had Smith been aware of

Jones's plan to destroy his bust, he would have reasoned, "How fortunate! Now I can escape liability for assaulting Jones, and, if I am really lucky, get rid of that awful reminder of my aunt at the same time!" This revised hypothetical does not involve a case in which Smith, were he cognizant of the facts, would have *two* sufficient reasons for assaulting Jones.[34] In my example, Smith does not care about his bust at all, and has only one reason to assault Jones upon discovering that his property is about to be destroyed. Should the defense of use of force in the protection of property be available to Smith under these circumstances?[35]

It is hard to understand why mere belief should have a bearing on liability unless it influences conduct.[36] Why should a mistake about a justification make a difference to the defendant's liability if he would have acted exactly as he did whether or not he had made that mistake? Perhaps Fletcher's position should be reinterpreted as follows: A defendant cannot be justified in committing an offense unless he (a) believes those facts in which the justification consists, and (b) acts because of those beliefs.

It seems clear that condition (b) refers to the defendant's motive.[37] Expressed in terms of Grice's analysis, the defense is unavailable to Smith unless he wants or desires to protect his property, and believes that assaulting Jones will further that end. Once again, however, the relevance of motive is established by any competing account of motives as well. The philosophical questions of whether the reference to motive in condition (b) is to an ulterior intention or a desire, or whether motives describe or explain, are immaterial to the argument that confirms their relevance to liability. The defendant cannot be justified if he lacks the proper motive for apparently committing a criminal offense, whatever the deep truth about the nature of motives. Any reluctance to accept this conclusion is based upon substantive disagreements about whether the defendant should be held liable or acquitted in these kinds of cases, and not upon conceptual doubts about the correct analysis of motives.

It is hard to understand why mere belief should have a bearing on liability unless it influences conduct.

If the argument has been accepted to this point, the relevance of motive to a theory of justification and thus to criminal liability has been established. But it is interesting to pursue the analysis one step further, and inquire whether condition (a) is necessary. Alter the hypothetical once again so that Smith is *not* mistaken at the time he assaults Jones; he knows Jones is about to destroy his property, but he would have assaulted Jones even if he had not known this. Is there good reason why the claim "actors may avail themselves of justifications only if they act with justificatory intent" should apply only when a mistake is made? Presumably defendants may lack a "justificatory intent" even when they are *not* mistaken. If so, this position does not appear to be about the relevance of *mistake* to liability at all. The important question is not whether the defendant holds any false beliefs. More simply, Smith cannot plead the defense of use of force in the protection of property unless he had the proper motive for assaulting Jones. If other justifications in the criminal law conform to a similar pattern of analysis, the relevance of motive to criminal liability is clear.

The Availability of Excusing Conditions

Most (recognized as well as controversial) excusing conditions -- intoxication, immaturity, insanity, hypnotism, brainwashing, chromosomal abnormality, and the like -- are named after the disabilities that cause illegal but excused conduct. *Why* should these conditions excuse? Answers to this question require a theory of excuse as a criminal law defense category.

Many of these disabilities give rise to an excuse because they result in nonvoluntary behavior.[38] When is conduct sufficiently nonvoluntary for it to be excused? There is no simple, single answer to this question. Conduct need not be *totally* nonvoluntary, as in a spasm or reflex reaction, before an excuse should be recognized. Conduct that is completely nonvoluntary may not require an excuse; arguably, it does not involve an *actus reus*. The test to determine whether conduct should be exempt from criminal liability on grounds of nonvoluntariness is normative: in light of the circumstances, *should* the defendant have been expected to conform his conduct to law?[39]

It is clear that one factor weighs heavily against, and perhaps defeats altogether, the defendant's allegation that his illegal act should be excused because of nonvoluntariness. This factor is *deliberation*. Suppose a court is initially inclined to excuse a kleptomaniac who provides evidence that he was unable to effectively resist his urge to steal. The court should be prepared to reconsider its judgment upon discovering that the defendant yielded to his inclination only after learning that kleptomaniacs are frequently excused.[40] Illegal conduct that would not have been performed but for the expectation of acquittal seems calculating and controlled. The defendant's reliance on the availability of an excuse is at odds with his claim that his conduct was nonvoluntary.[41]

The same analysis applies to each of the many defenses that depend upon nonvoluntariness. Consider the defense of provocation, which typically reduces the grade of homicide from murder to manslaughter. The most obvious requirement of this defense is that the defendant himself must have been provoked; a defendant is not eligible for this defense simply because the external circumstances were sufficient to provoke a reasonable person. In many jurisdictions, the defendant must actually "lose control," a condition that is reinforced by the requirement that a "cooling-off" period cannot have elapsed between the provocative event and the killing. What factors determine whether a defendant was genuinely provoked? Again, a complete answer to this question is complex and controversial. But it should be clear that an admission by the defendant that his killing was preceded by deliberation, performed in expectation of acquittal (from a charge of murder) undermines his allegation that he lost control. The defense cannot be used as a strategic instrument to allow defendants to accomplish results that are the products of calculation.

The motive *of the defendant is crucial to the availability of those excusing conditions that are based upon nonvoluntariness.*

These examples illustrate that the *motive* of the defendant is crucial to the availability of those excusing conditions that are based upon nonvoluntariness. Those excusing conditions should be extended only to defendants whose motive for acting is (roughly) the immediate gratification that is experienced by succumbing to inclination. In other words, a defendant must *not* have acted from given motives if a nonvoluntariness defense is to be clearly acceptable. If the alleged kleptomaniac or provoked killer relied upon his belief that he would escape liability for his crimes, and would not have acted but for this belief, it is doubtful that he can be said to have lost control or to have acted nonvoluntarily.

It may be important to distinguish an extreme from a moderate version of the claim that deliberation is at odds with nonvoluntariness. According to the extreme version, deliberation defeats an allegation of nonvoluntariness altogether. Expressed in terms of Grice's analysis -- or, alternatively, in a vocabulary more amenable to Williams or Gross -- a defendant should be convicted if he believed he could escape liability for his offense, wanted or desired to do so, and would not have acted but for this combination of beliefs, wants, and desires. According to the moderate version, deliberation does not conclusively defeat an allegation of nonvoluntariness. The fact that the defendant would not have committed the offense but for this combination of beliefs, wants, and desires does not (as with the extreme version) conclusively preclude the availability of a defense that depends upon nonvoluntariness, but merely provides good reason not to allow that defense. Fortunately, it is not necessary for present purposes to decide whether the extreme or moderate version should be preferred, for either confirms the importance of motives to a theory of excuses and thus to criminal liability.

Conclusion

If my position on the significance of motives to criminal liability is accepted, there is much important work that remains to be done. I hope it will not be objected that I have not undertaken that difficult work here. I have not been so ambitious as to attempt to identify the best or the worst motives, or to describe the several conditions under which motives *should* be relevant to criminal liability. In the context of euthanasia, for example, it must be decided what requirements the physician must satisfy in addition to good motive before he should have a defense to homicide. Must there be uncontroverted medical evidence that no cure is forthcoming? Must the patient consent? How severely must the patient be suffering before beneficent euthanasia may be practiced without liability? I have not sought to answer these questions, but theorists of the substantive criminal law rarely *ask* them. (They are, of course, frequently debated by moral philosophers as well as by sentencing authorities.) There is an understandable reluctance to open Pandora's Box by acknowledging the relevance of motives, but criminal theory pays an even higher price by neglecting them. Finally, I hope to have shown that theorists need not be entirely confident about their analysis of the nature of motives before they can begin to address these difficult issues.

NOTES

I would like to thank Brian McLaughlin, Harold Rubinstein, and the referees of *Criminal Justice Ethics* for their helpful contributions.

1 J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 88 (2d ed. 1960). I offer no hypothesis about why Hall's thesis is so widely accepted among criminal theorists.

2 "The basis for . . . assuming a clear distinction between excusing conditions, which operate to relieve a criminal defendant from liability entirely, and mitigating excuses, which are taken into account by way of sentencing discretion . . . is rarely articulated, and when it is, seems unconvincing." Wasik, *Partial Excuses in the Criminal Law*, 45 MOD. L. REV. 516 (1982).

3 *See* Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).

4 *See* Tonry, *Criminal Law: The Missing Element in Sentencing Reform*, 35 VAND. L. REV. 607 (1982).

5 *See* the discussion in A. ASHWORTH, SENTENCING AND PENAL POLICY 81-91 (1983).

6 Federal criminal civil rights statutes -- 18 U.S.A. Sec. 241 and 242 -- are typically used to prosecute criminal conduct motivated by racial prejudice. The reference to racial motive, however, is included to establish federal jurisdiction, and thus may not reflect a judgment that racially motivated crimes are more culpable than non-racially motivated crimes.

7 *See* Hall's ground for rejecting Salmond's definition: "[T]he criticism of Salmond's usage is based upon . . . countless decisions holding that motive is not a material element of a crime." *Supra* note 1, at 85, n. 67.

8 H. GROSS, A THEORY OF CRIMINAL JUSTICE 111 (1979). Gross attributes this example to "a philosopher," but neglects to identify him.

9 *See* Sistare, *Agent Motives and the Criminal Law*, 13 SOC. THEORY & PRAC. 303 (1987).

10 G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 48 (2d ed. 1961). *See also* J. SALMOND, JURISPRUDENCE 397 (7th ed. 1924).

11 G. WILLIAMS, *id.*

12 G. WILLIAMS, *supra* note 10, n. 2.

13 Yet Williams insists that the distinction is significant. *See* text accompanying *infra* note 15.

14 *See* Hitchler, *Motive as an Essential Element of Crime*, 35 DICK L. REV. 105 (1930-1931).

15 *Supra* note 10, at 49.

16 *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 206 (1972). .

17 *See* D. HUSAK, PHILOSOPHY OF CRIMINAL LAW (1987), for a discussion of how the *actus reus*, *mens rea*, causation, and harm requirements have been "defended" by being interpreted as tautologies.

18 Notice that according to Williams's kind of account, according to which motives are a kind of intention, it is difficult (or impossible) to defend the view that intentions are descriptions while motives are explanations. If intentions describe, and motives are a kind of intention, then presumably motives describe as well.

19 *Supra* note 8, at 111.

20 *See* Von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 U. MINN. L. REV. 591 (1981).

21 410 A.2d 1000 (1979).

22 *See* Part III.

23 *See* Sistare, *supra* note 9, at 306. The chief difficulty with this view is to identify those "action-initiators" that are not motives.

24 *See* P. Grice, *Motive and Reason*, in PRACTICAL REASONING 168 (J. Raz ed. 1978).

25 I believe these claims are widely accepted among philosophers. Disagreement surrounds the nature of practical reasoning and whether the notion of "acting on" a motive must be understood causally.

26 In light of these offenses, Sistare remarks, "If there is a real ground for dispute here, it seems to be a question of how many exceptions remake the rule." *Supra* note 9, at 316.

27 *See Jones v. U.S.*, 308 F.2d 307 (1962).

28 *See* Beynon, *Doctors as Murderers*, CRIM. L. REV.. (1982).

29 *See* J.C. SMITH & B. HOGAN, CRIMINAL LAW 44 (5th ed. 1983).

30 *See* the analysis in Fletcher, *Prolonging Life: Some Legal Considerations*, 42 WASH. L. REV. 999 (1967). The influence of this analysis in case law is illustrated by *Barber v. Superior Court of Los Angeles County*, 195 Cal. Rptr. 484 (1983).

31 It is unclear whether a defendant whose conduct is justified actually commits a criminal offense. *See* D. HUSAK,, *supra* note 17, at 190-92.

32 G. FLETCHER, RETHINKING CRIMINAL LAW 557 (1978).

33 But *see* Robinson, *A Theory of Justification: Societal Harm as*