
MOTIVE'S ROLE IN CRIMINAL PUNISHMENT

CARISSA BYRNE HESSICK*

ABSTRACT

Motive plays an important role in criminal law. It is necessary to prove liability for some offenses; it is a key component of several defenses; and it has been a traditional consideration at sentencing. Motive's role in criminal punishment has grown through the adoption of hate crime sentencing enhancements and the rise of substantive sentencing law. And motive has an important role in punishment theory, as it reinforces the centrality of shared moral judgments, which are indispensable to any system of criminal law. Yet despite motive's increasing importance in criminal law, its treatment is inconsistent and incomplete. This Article proposes an expanded role for motive in criminal punishment, in which a defendant's motive for committing any crime may result in a sentencing increase or decrease. The proposed sentencing system not only will result in a greater correlation between a defendant's punishment and her individual blameworthiness, but also will increase sentencing uniformity, because it clarifies the aggravating and mitigating nature of various motives ex ante.

I. INTRODUCTION

Everyone who watches *Law & Order* knows (or thinks they know) that motive is very important in criminal justice. However, as any first year law student will tell you, motive is irrelevant in determining criminal

* Climenko Fellow and Lecturer on Law, Harvard Law School; B.A. 1999, Columbia University; J.D. 2002, Yale Law School. I thank Steve Duke, Jack Goldsmith, Andy Hessick, Andrew Kent, Adriaan Lanni, Dan Meltzer, Dena Sacco, Dan Schwarcz, Carol Steiker, and Bill Stuntz for their helpful comments on earlier drafts. Thanks also to the participants in the Climenko Fellowship scholarship workshop and to Sara Turken for her research assistance.

liability. Unlike in the television show, which places great emphasis on a defendant's reasons for committing a crime, in the perceived real world of criminal liability, motive is just a bit player, appearing only in limited circumstances, usually as a consideration in certain defenses. Ordinarily, the only real questions at trial are (1) did the defendant commit the illegal act and (2) did she have the necessary mental state. The defendant's mental state is relevant only to determine if she acted with *mens rea*—did she act purposefully, knowingly, recklessly, et cetera. Evidence of a defendant's motive may be introduced at trial to convince a jury that she is guilty, but motive is not perceived as a legal component of guilt.

But this familiar law school picture of motive as essentially irrelevant is increasingly wrong descriptively and is also wrong normatively. Historically, motive has played a role not only in criminal defenses, but also as an element of some criminal offenses, and it has traditionally been regarded as an appropriate factor to consider at sentencing as well.¹ More recently, motive has played an increasingly visible role in criminal justice decisions, as legislatures have begun to enact so-called "hate crime" legislation. The rise of "the substantive law of sentencing"² has also resulted in the identification and classification of various aggravating and mitigating motives.

In response to the growing role of motive in criminal punishment, a wave of legal criticism, mainly focused on hate crime sentencing enhancements, has emerged.³ These critiques contain two main objections to the consideration of motives in determining punishment. The first is a volitional objection. It rests on the premise that an actor cannot control her motives. It is unjust to punish an individual for something she cannot change, and, therefore, the argument goes, punishment based on motives is unjust.

1. See *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (noting that a "defendant's motive for committing the offense is one important factor" that sentencing judges have traditionally considered "in determining what sentence to impose on a convicted defendant") (citing 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.6(b), at 324 (1st ed. 1986)).

2. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792–804 (2006) (noting that, as Supreme Court decisions have made criminal procedure issues more costly to legislate, substitution effects have made changes in substantive criminal law and "the substantive law of sentencing" cheaper).

3. See, e.g., Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015 (1997); Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991); Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004).

The second objection is based on a broader notion of government neutrality. This neutrality objection operates on the premise that because ours is a society of different political opinions and moral viewpoints, governmental preference for one opinion or viewpoint over another should be minimized. Allowing motives to play a role in criminal punishment is necessarily predicated on assessing the moral worth of an actor's decision to engage in criminal conduct based on a particular motive. For this reason, those who advocate for a government that eschews moral judgments and governs according to morally neutral principles oppose any significant role for motive in punishment.

This Article describes the theoretical justifications for motive's role in punishment, addresses the main objections to motive's role, and seeks to put motive on a more secure theoretical footing. The Article also proposes that motive play a more consistent and considered role in criminal punishment. Specifically, the Article proposes that motive play an expanded and clearly delineated role during sentencing. To that end, the Article proposes not only a new system for motive classifications, but also a specific procedure under which to account for motive.

Part II describes the role that motive has come to play in criminal law. It identifies some of the offenses and defenses for which motive makes a difference in liability. It also describes the aggravating and mitigating motives that appear in capital and noncapital sentencing schemes.

Part III sets out the normative arguments that support a larger role for motive in punishment. It maps motive onto the various extant theories of criminal punishment, showing the sometimes surprising degree to which the different theories support a role for motive in punishment. Part III then addresses the criticisms that have been leveled at motive. It demonstrates that the underlying premise of the volitional objection—that an actor cannot control her motives—is flawed: An individual may choose to commit a crime for one motive and abstain from criminal activity for another. Allowing motive to play a role in punishment merely reflects that these choices have moral content. Part III also identifies the weaknesses of the neutrality objection. Building on the limitations of the harm principle that other legal commentators have identified,⁴ the Article explains that our system of punishment does not operate according to neutral principles. This is demonstrated not only by the existing role of motive in criminal law, but also by the most fundamental decisions in criminal punishment. Our

4. See, e.g., Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423 (1995); Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate*, 20 L. & PHIL. 175 (2001).

criminal laws do not adhere to the neutral principle of harm—that government should coerce (that is, punish) an individual only to prevent harm to others. Much conduct that results in harm is not criminalized, and many criminal statutes prohibit behavior that does not result in harm to others. And determining the amount of punishment to impose for engaging in criminal conduct also requires the exercise of moral judgment, as the amount of punishment is determined by how “bad” a crime is. Here, the harm principle is again not sufficient, as crimes are not always punished according to the amount of measurable harm they cause.⁵

Part IV proposes a new system that allows criminal punishment to account for motives. Despite motive’s repeated appearance in criminal punishment decisions, and despite the strong normative arguments in favor of that role, our legal system accounts for motive only sporadically. Part IV suggests that motive’s starring role in criminal punishment should occur at the sentencing phase rather than at liability. Criminal liability is essentially a binary inquiry: is the defendant guilty or not guilty? Finer distinctions about a defendant’s culpability—not issues of guilt, but issues of relative blame—are usually made only at sentencing. *Regina v. Dudley & Stephens*,⁶ one of the first cases many law students read in their criminal law class, illustrates this contrast. In that case, several sailors found themselves shipwrecked and marooned on a life raft with no food or water.⁷ Eventually the sailors decided to kill and eat one of their own.⁸ When the sailors were later rescued and prosecuted for the killing, they argued that they should not be punished because the killing was necessary for them to survive.⁹ The case introduces students to basic concepts of criminal law and criminal defenses, and it may be a particularly useful teaching tool because the court did not accept the sailors’ sympathetic defense—that they were starving—and found them guilty of murder. The very interesting epilogue of the case tells students that the sailors’ sentences were commuted from a sentence of death to six months’ imprisonment.¹⁰ While the binary system of criminal liability could not

5. See, e.g., Kahan, *supra* note 4, at 181 (“The reason we distinguish rape from assault and condemn it more severely isn’t that rape invariably inflicts greater physical injury. What makes rape distinctive, and distinctively worse, is the greater contempt it evinces for its victim’s agency.”).

6. *Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273, reprinted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 135–39 (7th ed. 2001).

7. KADISH & SCHULHOFER, *supra* note 6, at 135.

8. *Id.*

9. *Id.* at 137.

10. *Id.* at 139 & n.2.

account for the unique blameworthiness of the sailors, a sentencing determination could.

After explaining why motive is best accounted for at criminal sentencing, Part IV sketches a proposal for implementing an expanded role for motive in punishment. It presents a new classification system that allows for finer distinctions between various motives. This classification system is designed to modify the sentences of defendants based on their individual motives while at the same time preserving sentencing uniformity—the practice of sentencing similar defendants similarly.¹¹ In addition to identifying various motives as aggravating and mitigating, the proposed system distinguishes between those motives that are highly aggravating and those that are partially aggravating, as well as distinguishing between those motives that are highly mitigating and those that are partially mitigating. Present sentencing systems do not account for the relative aggravating or mitigating nature of different motives.

The proposed system also envisions a new procedural process for adjusting defendants' sentences. The system identifies the motive or motives that ordinarily prompt defendants to commit particular crimes. By adjusting a defendant's sentence only when the aggravating or mitigating nature of her actual motive differs materially from the motive that ordinarily prompts the crime, the proposed system minimizes the practical difficulties associated with determinate sentencing generally and with determining an individual's motives more specifically. Although the proposed system does not account for every practical hurdle associated with determinate sentencing and determining motives, the Article concludes that an expanded role for motive in punishment is warranted because it allows the isolated and incomplete doctrines of motive to be brought together and synthesized into a coherent and cohesive whole, and therefore is likely to generate fairer results.

II. THE CURRENT ROLE OF MOTIVE IN CRIMINAL LAW

The classic inquiries at a criminal trial are whether the defendant committed the forbidden act and whether she had the necessary state of mind. For example, to convict a defendant for stealing a bicycle, the prosecutor must prove both that the defendant intended to steal the bicycle, and that she actually stole it. If the defendant took someone else's bicycle believing that it was her own, then she did not have the necessary mental

11. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 13 (1988).

state and is therefore not guilty of theft. And if the defendant wanted to steal someone else's bicycle, but mistakenly took her own bicycle, then she is not guilty of theft because she did not commit the illegal act.¹²

Although motive may be explored at trial, the reason for doing so is usually only to convince the jury that the defendant actually committed the act and that she meant to commit it.¹³ To return to the example of the bicycle, the prosecutor may introduce a prior statement by the defendant that people who fail to lock their bicycles are "stupid" and "it would serve them right if they were ripped off." This statement suggests that the defendant was motivated to take the bicycle in order to teach careless bicycle owners a lesson. As a legal matter, a prosecutor need not provide a jury with a motive, but a juror who knows that the defendant previously expressed this view is probably less likely to believe that the defendant inadvertently took another's bicycle.¹⁴

Recognizing this limited evidentiary role, the conventional criminal law wisdom states that "motive is irrelevant." Criminal liability is concerned only with a defendant's intentions, not with her motives.¹⁵ A bad motive does not establish liability, and a good motive, standing alone, is not a defense to most crimes.¹⁶ But the line between intent and motive is not always clear; indeed, those who have argued for motive's irrelevance have often been required to shift the line between intent and motive in order to make the conventional wisdom regarding motive's irrelevance descriptively true.¹⁷ In its most basic legal form, an intention is an actor's

12. She may, however, be guilty of attempted theft.

13. HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 103 (1979) ("[I]n general, motives may play a role in deciding whether a particular person committed a crime but not in deciding whether a particular crime was committed.").

14. As one early commentator explained:

As an *evidential* fact motive is always relevant, but never essential. When a motive of the accused for the commission of a crime is discovered, it is easier to believe that he committed it than when no motive is apparent. For this reason it is always relevant to prove the existence of a motive. But though the discovery of a motive helps to prove the guilt of the accused, there may be ample proof, independent of motive, of his guilt. It is not necessary therefore for the state to prove the motive as an evidential fact.

Walter Harrison Hitchler, *Motive as an Essential Element of Crime*, 35 DICK. L. REV. 105, 112 (1931).

15. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 153 (1947).

16. "It is difficult to conceive a criminal act that may not involve some desire beyond the act itself—avarice, revenge, pleasure, et cetera. The law prohibits acts, not bad motives; and good motives do not exonerate crime." *State v. Logan*, 126 S.W.2d 256, 261 (Mo. 1939).

17. See Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 5 (2002) ("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.").

state of mind toward her illegal action: whether she performed the act purposefully, knowingly, or recklessly. These states of mind are commonly referred to as *mens rea*. By contrast, a defendant's motives are her *reasons* for acting.¹⁸ As discussed in more detail below, a defendant's reasons for acting can be described in a number of ways. But in identifying the aspects of criminal law where motive is not irrelevant, it is enough to say that if the law takes account of an individual's reasons for performing an action, beyond her mere desire to take that action, then the individual's motives are not irrelevant.

Working within those definitions, it is clear that several areas of criminal law, some of which are deeply rooted in our common law tradition, involve a qualitative evaluation of a defendant's reasons for acting.¹⁹ Several commentators have identified some of these areas, noting that the maxim regarding motive's irrelevance is descriptively untrue.²⁰ Those areas include elements of substantive offenses, requirements for defenses, and aggravating and mitigating sentencing factors. Several discretionary stages of criminal law, such as the charging process, may also be affected by considerations of motive. Motive is never the *only* inquiry (nor should it be); it is one of several factors considered. Although the consideration of motive is sometimes not explicit, as the ensuing discussion demonstrates, motive is most certainly not irrelevant in criminal law.

A defendant's motive may be relevant to her criminal liability in a number of different ways: Motive may be fully inculpatory or exculpatory, or it may be only partially inculpatory or exculpatory. Motive may also be

18. "Motive is a desire prompting conduct." Hitchler, *supra* note 14, at 105. I realize that these definitions may not be uncontroversial, as a surprising amount of ink has been devoted to defining motive and intent. See, e.g., Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 664–66 (2005) (collecting sources); Douglas N. Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3, 5–8 (1989) (same); Whitley R.P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 CRIM. JUST. REV. 317, 321–23 (2003) (same). Some commentators have even counseled that the distinctions between motive and intent may not be worth pursuing. See 1 LAFAVE & SCOTT, *supra* note 1, § 3.6(a), at 322 (suggesting that the difficult task of trying to distinguish between motive and intent be abandoned and that it should be acknowledged that "the substantive criminal law takes account of some desired ends but not others").

Even if readers do not agree with the specific definitions I provide, the examples provided in the remainder of this Part indisputably demonstrate that motive plays some role in criminal punishment.

19. See Carol S. Steiker, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857, 1863 (1999) ("[H]ate crime laws are essentially continuous with the basic structure of Anglo-American criminal law, and . . . a constitutional challenge to the one necessarily calls the other into question. . . . [N]umerous criminal law doctrines . . . treat a defendant's reasons for acting as partially or wholly exculpatory.")

20. See *id.* at 1863–70. See also Chiu, *supra* note 18, at 666–69.

relevant as a method to distinguish between the relative blameworthiness of individuals at sentencing.

A. MOTIVE'S FULLY INCULPATORY OR EXCULPATORY ROLE

Motive is fully inculpatory when otherwise lawful behavior is illegal only if performed with a particular motive. Motive is fully exculpatory when otherwise illegal activity does not subject a defendant to any criminal liability if that activity is committed with a particular motive. Examples of motive's fully inculpatory or exculpatory role appear in several areas of criminal law.

When motive plays a fully inculpatory role, it may be an explicit element of an offense. Consider statutes that impose criminal liability for the possession of certain items with an unlawful purpose.²¹ In California, it is unlawful to possess burglary tools with the intention to break into any dwelling or vehicle;²² and in New Jersey, it is unlawful to possess a weapon "with a purpose to use it unlawfully against the person or property of another."²³ Motive serves a fully inculpatory role in these "unlawful purpose" statutes,²⁴ because the possession of burglary tools, weapons, et cetera may be otherwise lawful.

There are also several federal white-collar crimes that require an illegal purpose. For example, federal law contains a series of provisions that criminalize the obstruction of justice.²⁵ Presumably because some of these provisions contain broad descriptions of conduct that may obstruct

21. *E.g.*, 18 PA. CONS. STAT. ANN. § 907(a) (West 1998 & Supp. 2006) ("A person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally."). *See generally* Joshua S. Geller, Comment, *A Dangerous Mix: Mandatory Sentence Enhancements and the Use of Motive*, 32 FORDHAM URB. L.J. 623, 647–51 (2005) (discussing the importance of motive in these "unlawful purpose" statutes).

22. CAL. PENAL CODE § 466 (West 1999). Similarly, in Massachusetts, it is unlawful to possess burglary tools with the intent to break into another's dwelling:

Whoever makes or mends, or . . . knowingly has in his possession, an [instrument] adapted and designed for cutting through, forcing or breaking open a building, room, vault, safe or other depository, in order to steal therefrom money or other property, or to commit any other crime, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ or allow the same to be used or employed for such purpose, . . . shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.

MASS. GEN. LAWS. ANN. ch. 266 § 49 (West 2000).

23. N.J. STAT. ANN. § 2C:39-4(a) to (d) (West 2005). *See also* 18 PA. CONS. STAT. ANN. § 907(b) (West 1998 & Supp. 2006) ("A person commits a misdemeanor of the first degree if he possesses a firearm or other weapon concealed upon his person with intent to employ it criminally.").

24. *See* Geller, *supra* note 21, at 647–51.

25. *See* 18 U.S.C. §§ 1501–20 (2000 & Supp. III 2003).

justice,²⁶ they also require that an offender perform the prohibited act “corruptly,”²⁷ which is defined as “with an improper purpose.”²⁸ A federal conviction for bribery will similarly turn on an offender’s motives. It is ordinarily lawful for an individual to give money to a public official, such as for a campaign contribution. But if the individual’s reason for giving the money is to influence or reward an official act, then she is guilty of giving an illegal gratuity.²⁹

Motive may also play a fully inculpatory role even when it is not explicitly listed as an element of an offense. Consider treason. The United States Constitution defines treason in such a way that a conviction for treason “may depend very much on proof of motive.”³⁰ It provides: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”³¹ In *Haupt v. United States*,³² the Supreme Court upheld the conviction of Hans Max Haupt for treason.³³ Haupt’s offense consisted of helping his son (a saboteur employed by the German government who was convicted by a military tribunal)³⁴ obtain employment in a factory that manufactured bomb sights, purchasing an automobile for his son, and generally “harboring and sheltering” his son.³⁵ To prove treason, the prosecution had to prove not only that the charged actions actually aided and comforted the enemy, but also that “the acts were done because of adherence to the enemy, for acts helpful to the enemy may nevertheless be innocent of treasonable character.”³⁶ Thus, it was necessary for the prosecution to prove Haupt’s motives in committing the charged acts. An inquiry that focused only on *mens rea*—for example, whether Haupt purposefully purchased the automobile for his son—would not have

26. Drafting statutes to include motive as an explicit element gives legislators the freedom to enact broadly worded provisions. Because motive plays a wholly inculpatory role, legislators need not rely solely on prosecutorial discretion to ensure that only “bad” people are prosecuted.

27. 18 U.S.C. §§ 1503, 1505, 1512, 1517 (2000).

28. *Id.* § 1515(b).

29. See 18 U.S.C. § 201(c)(1)(A), which “prohibits giving ‘anything of value’ to a present, past, or future public official ‘for or because of any official act performed or to be performed by such public official.’” See also *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 400 (1999).

30. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

31. U.S. CONST. art. III, § 3, cl. 1.

32. *Haupt v. United States*, 330 U.S. 631 (1947).

33. *Id.* at 644.

34. *Id.* at 632–33.

35. *Id.* at 634.

36. *Id.* at 634–35.

revealed whether Haupt performed these actions in order to give America's "[e]nemies" "[a]id and [c]omfort."³⁷

Motive's fully exculpatory role is perhaps best illustrated by justification defenses. In order to be entitled to a justification defense, a defendant must have acted with the "purpose" of avoiding a greater harm. Justification defenses take several different forms, including necessity, the "lesser evils" defense,³⁸ self-defense,³⁹ and the public authority defense.⁴⁰ The necessity of an appropriate motive in order to invoke a justification defense is often described as the "purpose requirement": to be entitled to a justification defense, the actor must have performed the illegal act with the purpose of "avoiding a threatened harm to the societal interest."⁴¹ For example, if an individual sets fire to a field in order to stop the progress of a forest fire and save a town, she is entitled to the lesser evils defense. But if that individual had set fire to the field out of a desire for revenge on the owner of the field, rather than to save the town, she is not entitled to the justification defense even if her actions ultimately resulted in the town's salvation.⁴²

B. MOTIVE'S PARTIALLY INCULPATORY OR EXCULPATORY ROLE

37. U.S. CONST. art. III, § 3, cl. 1.

38. Also called the "choice of evils" defense, this defense is not recognized in all American jurisdictions. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 24(a), at 83 (1984). The Model Penal Code defines the defense as follows:

Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

MODEL PENAL CODE § 3.02(1) (Official Draft and Explanatory Notes 1962).

39. Justifications include other defensive force defenses, such as defense of others, defense of property, and defense of habitation or premises. 1 ROBINSON, *supra* note 38, § 24(a), at 84-85.

40. This defense—a version of which appears in every American jurisdiction—provides a defense for individuals who engage in prohibited conduct that is necessary to maintain order or safety, provided that the individuals are authorized to maintain order and safety. *See* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 143(a), at 146-49 (1984).

41. 2 ROBINSON, *supra* note 40, § 122(b)(2).

42. *Id.* § 122(b), at 13-18. Identifying the actor's "purpose," as relevant to a justification defense, may turn on the level of generality at which motive is defined. The practical issue of defining the various "levels" of a defendant's motives is addressed in Part IV.C.2(b), *infra*. Paul Robinson gives the example of the actor who sets fire to the field in order to save the town from the forest fire "because his agents are at that moment engaged in a million dollar heroin transaction in the town." *Id.* § 122(b)(2), at 13-18.

Motive plays a partially inculpatory or exculpatory role when it informs the gradation or type of offense for which the defendant is liable. In this role motive does not determine whether the defendant is guilty or not guilty of *any* crime. The defendant is indisputably subject to some level of criminal liability; motive merely informs the ultimate offense for which she may be found liable.

Perhaps the most visible partially inculpatory role that motive plays is in the crime of burglary. An individual is guilty of burglary when she unlawfully enters a dwelling with the purpose of committing a further crime once inside.⁴³ Unlawfully entering a dwelling is already prohibited, and by performing that act, the defendant is already subject to criminal liability. But in unlawfully entering the dwelling with the motive of committing another crime, the defendant has become liable for the more serious offense of burglary. Some hate crime statutes function in a similar fashion. While some of this legislation provides only for sentencing enhancements,⁴⁴ other legislation redefines existing criminal conduct “as a new crime or as an aggravated form of an existing crime” based on the actor’s motive.⁴⁵

Motive plays a similar role in the substantive law of homicide in those jurisdictions that define varying degrees of homicide based, at least in part, on a defendant’s motives.⁴⁶ For example, New York State defines first degree murder as intentionally causing the death of another person under specific circumstances, including, *inter alia*, when “the death was caused for the purpose of preventing the intended victim’s testimony in any criminal action” or “for the purpose of exacting retribution for such prior testimony.”⁴⁷ The legislative history of this provision is explicit that the first degree murder provision regarding witness elimination requires the

43. See generally BLACK’S LAW DICTIONARY 211 (8th ed. 2004) (defining burglary as “breaking and entering another’s dwelling at night with the intent to commit a felony”).

44. That type of hate crime legislation authorizes or requires “the enhancement of criminal penalties when already criminally prohibited actions are performed as a result of offenders’ hatred or bias against their victims because of their victims’ race, ethnicity, religion, gender, disability, or sexual preference.” Hurd & Moore, *supra* note 3, at 1082. Therefore, it is best identified as an example of motive in sentencing law rather than as an element of an offense. See *infra* Part I.C.

45. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 33 (1998) (“Some hate crime statutes define new substantive offenses. They redefine conduct that is already criminal as a new crime or as an aggravated form of an existing crime.”). See also *Virginia v. Black*, 538 U.S. 343, 363 (2003) (“A ban on cross burning carried out with the intent to intimidate . . . is fully proscribable under the First Amendment.”).

46. Cf. Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, 1992/1993 ANN. SURV. AM. L. 605, 605 (1994) (“[M]otive ought to be and commonly is, notwithstanding the claims to the contrary, an element in determining liability or grade of offense.”).

47. N.Y. PENAL LAW § 125.27(1)(a)(v) (McKinney 2004).

prosecution to prove “that the defendant’s *motivation* for committing a killing was to prevent or influence the actual testimony of a victim in a criminal proceeding.”⁴⁸ In purposefully ending the victim’s life, the defendant is already subject to criminal liability. The motive of preventing or retaliating for witness testimony serves the partially inculpatory function of making the defendant liable for the most serious degree of murder.

Motive plays a partially exculpatory role when it provides an incomplete defense to a crime. For example, a particular motive is a necessary (though not sufficient) requirement for the defense of provocation.⁴⁹ A successful provocation defense⁵⁰ reduces a charge of murder to a charge of manslaughter “when the victim of the homicide has provoked the defendant to act.”⁵¹ Early common law authorities specifically enumerated a limited number of circumstances in which adequate provocation could, as a matter of law, reduce liability for an intentional killing to voluntary manslaughter.⁵² Determining whether a defendant satisfies the adequate provocation requirement entails an evaluation of the defendant’s motives because the defense is available only

48. *People v. Cahill*, 809 N.E.2d 561, 583 (N.Y. 2003) (emphasis added) (quoting Mem. of Codes Comm., at 2, Bill Jacket, L. 1995, ch. 1).

49. See generally Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 305–08 (1996). Some jurisdictions have replaced the common law provocation defense with the Model Penal Code’s “extreme emotional disturbance” defense, which reduces murder liability to manslaughter when the offender commits a murder “under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” MODEL PENAL CODE § 210.3(1)(b) (Official Draft and Explanatory Notes 1962). See also 1 ROBINSON, *supra*, note 38, § 102(a)(2), at 481–83.

50. The common law provocation defense has three requirements: “(1) [t]he provocation to which the actor respond[ed] must have been adequate; (2) [t]he killing must have occurred while the actor was in the ‘heat of passion;’” and (3) the defendant’s actions must have resulted from a reasonable loss of self-control. Stephen P. Garvey, *Passion’s Puzzle*, 90 IOWA L. REV. 1677, 1687 (2005).

51. 1 ROBINSON, *supra* note 38, § 102(a)(1), at 480.

52. The circumstances constituting “adequate provocation” were usually limited to “adultery, mutual combat, false arrest, and a violent assault.” Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1341 (1997) (citing SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 413 (6th ed. 1995)).

to those who act out of a desire to retaliate against the victim when the victim severely wronged the defendant.⁵³

C. MOTIVE'S ROLE AT SENTENCING

When motive plays a fully inculpatory or exculpatory role, its presence is reflected in a defendant's criminal liability, rendering her either guilty, or not guilty. When motive plays a partially inculpatory or exculpatory role it determines the offense for which she is guilty. Motive's role at sentencing is neither inculpatory nor exculpatory; rather, its role is to distinguish between the relative blameworthiness of individuals who are liable for the same criminal offense.⁵⁴ An evaluation of an individual's blameworthiness is necessary to determine what sentence to impose on her within the available range of sentences.

In *Wisconsin v. Mitchell*, the Supreme Court confirmed that a "defendant's motive for committing [an] offense is one important factor" that a trial judge may consider in deciding what sentence to impose.⁵⁵ It is generally understood that a sentencing judge may impose a shorter sentence on a defendant "because he was acting with good motives, or a

53. Whether the victim's wrong was sufficiently severe (and thus the defendant's desire to retaliate was sufficiently justified) is determined according to some identifiable set of norms—whether strictly enumerated or determined on more of an ad hoc basis. "The [early common law] distinctions between provocations that were adequate and those that were not were often quite fine. For example, a blow to the face was adequate, a boxing of the ears not; the infidelity of a man's wife was adequate, the infidelity of a man's fiancée or girlfriend not." Kahan & Nussbaum, *supra* note 49, at 308 (internal footnotes omitted). Modern authorities applying the common law formulation of the defense "have tended to abandon categorical definitions of adequate provocation," but "while many courts no longer purport to specify all the provocations that are adequate as a matter of law, they still occasionally identify particular ones that are not." *Id.* at 309–10.

54. As Carol Steiker explains:

Just as the existence or degree of criminal liability can often turn on a normative evaluation of the defendant's reasons for acting, so too the degree of punishment imposed after a finding of criminal liability often turns on such an evaluation. The clearest examples of this tendency are in the capital sentencing context, because constitutional constraints on the imposition of the death penalty have led legislatures to specify those circumstances that "aggravate" a murder so as to make the defendant eligible for this punishment. As the Supreme Court recognized in *Mitchell*, the death penalty is "surely the most severe 'enhancement' of all." Death penalty statutes routinely designate as aggravating circumstances motives for killing that are considered worse than the usual motives a defendant might have for committing a crime of violence.

Steiker, *supra* note 19, at 1866 (internal footnotes omitted) (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993)).

55. *Mitchell*, 508 U.S. at 485.

rather high sentence because of his bad motives.”⁵⁶ Published reports of the practice date back at least to the beginning of the twentieth century.⁵⁷

Some commentators who have argued against the consideration of motive for liability determinations have opined that motive should play a role in determining a defendant’s sentence, as a defendant’s motive is a reflection of her “character,” “which could only be evaluated by discretionary moral judgment,”⁵⁸ such as occurs in the sentencing process. As Martin Gardner sees it:

[I]nquiry into motive . . . invites open-ended speculation into the general moral worth of the accused. Courts and juries, however, are ill-equipped to make finely tuned character evaluations, at least within systems that value timely determinations of guilt. . . .

. . . .

. . . On the other hand, evaluations of the motivations, background, and character of the offender are necessary within any system claiming to make punishment proportional to blameworthiness. If judges are even roughly competent to discover and make comparisons between the motives, temptations, opportunities, and thus the moral culpability of different individuals, inquiry into such matters is justified at the sentencing stage.⁵⁹

56. 1 LAFAYE & SCOTT, *supra* note 1, § 3.6(b), at 324. *See also* Kaufman, *supra* note 18, at 319 (“[M]otive has long been taken into account for purposes of sentencing, lessening the sentence where there is a good motive, lengthening where there is a bad one.”).

57. *See, e.g.,* Rex v. Bright, (1916) 12 Crim. App. 69, 71 (U.K.) (“Before passing sentence the judge considered the appellant’s motives; the Court is of opinion that he had a perfect right to consider motives, whether they were good or bad.”).

58. Binder, *supra* note 17, at 3 (collecting sources). *See also* HALL, *supra* note 15, at 162–63 (proposing that “the determination and evaluation of the motives of criminal behavior are allocated to administration; in the first instance, to judicial discretion in the selection of a proper sentence” and noting that a sentencing judge’s discretion “is very great”); 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, 747–49.

59. Gardner, *supra* note 58, at 747–49 (internal footnotes omitted) (advocating a sentencing scheme that provides for “slight deviations from a presumptive sentence if assessments of the offender’s character suggest an aggravated or mitigated disposition”).

Because motive's role in sentencing has been underexplored, a brief account of aggravating and mitigating motives that appear in various sentencing systems follows.⁶⁰

1. Aggravating Motives

There are several aggravating motives that repeatedly appear in the Federal Sentencing Guidelines, capital sentencing statutes, and judicial opinions stating the reasons for the imposition of a particular sentence. Those motives include a desire for pecuniary (financial) gain, a desire to inflict pain or harm, a desire to avoid detection or escape punishment, group hatred or bias, and a desire to promote terrorism.

Pecuniary gain may be the most prevalent aggravating motive.⁶¹ Many state capital sentencing schemes classify pecuniary gain as an aggravating sentencing factor.⁶² The Federal Sentencing Guidelines provide for sentencing enhancements when defendants who commit certain nonfinancial crimes, such as aggravated assault⁶³ or trafficking in material involving the sexual exploitation of a minor,⁶⁴ are motivated by pecuniary gain. The Federal Guidelines also provide sentencing reductions where a crime that would ordinarily be committed for pecuniary gain, such as criminal infringement of copyright or trademark, is committed for a nonfinancial motive.⁶⁵

60. In addition to the Federal Sentencing Guidelines, which contain detailed and explicit rules for every sentencing adjustment, the most detailed accounts of sentencing factors can be found in capital sentencing statutes. *See* Steiker, *supra* note 19, at 1866. Those statutes specifically identify aggravating factors, including aggravating motives, because the Supreme Court has indicated that, while wholly discretionary capital sentencing schemes are unconstitutional, schemes that guide "sentencer discretion through the use of aggravating and mitigating circumstances" will be upheld. *Id.* at 1866 n.32 (citing *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976)).

61. *See* Elizabeth Rapaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501, 526 (1990) (noting that "pecuniary gain" is one of "five aggravating factors which are among the most frequently included in modern death penalty statutes").

62. *See, e.g.*, KAN. STAT. ANN. § 21-4625(3) (1995) (listing crimes committed "for the purpose of receiving money or any other thing of monetary value" as an aggravating circumstance for capital sentencing purposes); MISS. CODE ANN. § 99-19-101(5)(f) (2000) (same). *See also* MODEL PENAL CODE § 210.6(3)(g) (Official Draft and Explanatory Notes 1962).

63. U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(b)(4) (2004) ("If the assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels.").

64. *Id.* § 2G2.2(b)(3), 2G2.2(b)(3)(A) ("If the offense involved: [d]istribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.").

65. *Id.* § 2B5.3(b)(3) ("If the offense was not committed for commercial advantage or private financial gain, decrease by 2 levels . . .").

Many capital sentencing statutes include a provision that identifies a murder that “was especially heinous, atrocious or cruel, manifesting exceptional depravity” as an aggravating factor.⁶⁶ Several judicial decisions⁶⁷ (and at least one statute)⁶⁸ have indicated that this aggravating factor assesses the defendant’s motive at the time of the killing, focusing on whether the defendant “intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim’s death.”⁶⁹

Many jurisdictions provide for a sentencing enhancement when an offender commits an illegal act in order to avoid detection or escape punishment. This enhancement appears in several different forms. Some jurisdictions provide for increased punishment when a crime is committed in order to intimidate or retaliate against a witness, or otherwise prevent a witness from testifying.⁷⁰ Other jurisdictions provide for additional

66. MODEL PENAL CODE § 210.6(3)(h). See also James R. Acker & C.S. Lanier, “*Parsing this Lexicon of Death*”: *Aggravating Factors in Capital Sentencing Statutes*, 30 CRIM. L. BULL. 107, 125 (1994) [hereinafter Acker & Lanier, *Aggravating Factors*] (“Statutes in seventeen of the thirty-seven death penalty jurisdictions use some version of [this sentencing factor], and related provisions appear in twelve other capital sentencing statutes.”); Steiker, *supra* note 19, at 1867 (noting that this aggravating factor is “common” in “state death penalty schemes”).

67. See Steiker, *supra* note 19, at 1867 (collecting cases for the proposition that the “aggravating factor of this general type is frankly evaluative of the defendant’s reasons for committing the underlying killing and of the defendant’s attitude toward his victim and his act”); *Id.* (noting that the depravity factor is one of the “best examples in capital punishment law of aggravating factors that designate certain motivations as worse than others”).

68. When the Arkansas Supreme Court held that a broadly worded depravity factor—a murder committed in an “especially heinous, atrocious or cruel manner”—was unconstitutionally vague, *Wilson v. State*, 751 S.W.2d 734, 735 (Ark. 1988), *modified*, 752 S.W.2d 762 (Ark. 1988), the legislature responded by clarifying that “a capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim’s death, mental anguish, serious physical abuse, or torture is inflicted.” ARK. CODE ANN. § 5-4-604(8)(B)(i) (2006).

69. ARK. CODE ANN. § 5-4-604(8)(B)(i). Samuel Pillsbury refers to this motive as a desire “to assert cruel power over another.” SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 116 (1998). He explains that this motive should be treated as aggravating because crimes committed with this motive, though often labeled “senseless,” illustrate a particular “aspect of evildoing”—the defendant commits the crime (which is often violent and cruel) in order to “express personal dominance.” *Id.* Pillsbury acknowledges that all intentional criminal homicides arguably involve the “assertion of ultimate power over another human being,” but distinguishes those crimes where “the killer seeks total, brutal domination of his victim as a motivation for the killing” and seeks “satisfaction in pain.” *Id.* at 116–17.

70. *E.g.*, OHIO REV. CODE ANN. § 2929.04(A)(8) (LexisNexis 2006). The Code identifies as an aggravating capital sentencing factor whether the victim

was a witness to an offense who was purposely killed to prevent the victim’s testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim’s testimony in any criminal proceeding.

punishment when a crime is committed “for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.”⁷¹ Some jurisdictions also provide for additional punishment when a crime is committed for the purpose of concealing a crime.⁷² These aggravating motives, though factually distinct, are conceptually similar: each defendant who commits a crime with one of these motives seeks to avoid punishment for committing a crime.

Some jurisdictions also provide for a sentence enhancement if an offense was committed with the motive of promoting terrorism. For example, the Federal Sentencing Guidelines provide for a significant sentencing enhancement of any felony that “involved, or was intended to promote, a federal crime of terrorism.”⁷³

Perhaps the most well known of all sentencing enhancements are those imposed on defendants who commit crimes because of hatred or bias toward a group.⁷⁴ Hate crime enhancements have been at the center of a firestorm of legal debate.⁷⁵ Those who oppose them argue that hate crime

Id.

71. MODEL PENAL CODE § 210.6(3)(f) (adopted in part by many jurisdictions). See Acker & Lanier, *Aggravating Factors*, *supra* note 66, at 139 n.175 (identifying jurisdictions that have identified some form of this aggravating circumstance in their capital sentencing statutes).

72. *E.g.*, NEB. REV. STAT. § 29-2523(1)(b) (1995) (identifying as an aggravating capital sentencing factor whether “murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime”). See also Acker & Lanier, *Aggravating Factors*, *supra* note 66, at 140 n.183 (collecting sources).

73. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2004). See also GA. CODE ANN. § 16-4-10 (2003) (providing that any person who commits a crime “for the purpose of domestic terrorism shall . . . be sentenced to the maximum term of imprisonment” for noncapital crimes; providing that “the purpose of domestic terrorism” shall be admissible at the sentencing stage of capital trials as “a statutory aggravating factor”); 720 ILL. COMP. STAT. 5/9-1(b)(21) (West Supp. 2006).

74. The hate crime enhancements in force in different jurisdictions take many different forms: they differ with respect to the groups protected, the predicate offenses to which they apply, and the severity of the enhancement. See JACOBS & POTTER, *supra* note 45, at 29–31, 43.

75. For examples of criminal law literature discussing this legislation, see *id.* (opposing hate crime legislation); Gellman, *supra* note 3 (same); Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507 (1999) (supporting hate crime legislation); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-motivated Crimes*, 93 MICH. L. REV. 320 (1994) (same); Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314 (1993) (same).

enhancements unconstitutionally punish political beliefs, represent a departure from previous criminal law practice, and will result in even more tension between estranged groups. Some opponents have signaled that they are not opposed to considering other nonbias motives at sentencing,⁷⁶ which suggests that at least participants in the hate crime debate view the enhancements as an issue of “identity politics,” rather than as an issue of criminal law.⁷⁷

2. Mitigating Motives

The number of regularly identified mitigating motives is smaller than the number of identified aggravating motives. This may be explained by the fact that much of the existing law on aggravating motives comes from capital sentencing statutes, and while states are constitutionally required to enumerate aggravating factors that may result in the imposition of the death penalty, there is no similar requirement for mitigating capital factors. Thus, state capital sentencing statutes will enumerate a limited number of mitigating factors, as well as “a ‘catchall’ phrase or its functional equivalent permitting the sentencer to consider all other mitigating factors.”⁷⁸

Another possible explanation for the small number of mitigating motives that appear in positive sentencing law may be found by examining

For examples of nonlegal commentary, see Steve Chapman, *Hate-crime Laws, for No Good Reason*, CHI. TRIB., June 20, 2004, at C9 (opposing hate-crime legislation, arguing that it “indulges a chronic impulse to turn more and more power over to federal law enforcement” for crimes already punishable under existing criminal law); Fred Dickey, *The Perversion of Hate: Laws Against Hate Crimes Are an Idea Gone Sour. Prosecutors Apply Them Unfairly and the List of ‘Special Victims’ Keeps Growing*, L.A. TIMES, Oct. 22, 2000, (Magazine), at 10 (opposing hate crime legislation, arguing that these crimes are punishable under existing law, and that higher penalties for crimes against specific groups violates principles of equality); Rudolph W. Giuliani, *How Europe Can Stop the Hate*, N.Y. TIMES, June 18, 2003, at A25 (applauding New York’s hate crime legislation and arguing for implementation of similar laws in Europe); Dana Parsons, *Orange County; Don’t Tolerate Intolerance, but It’s OK to Hate the Hate Laws*, L.A. TIMES (Orange County Ed.), Aug. 17, 2001, § 2, at 3 (opposing hate crime legislation, arguing that “‘hate’ is a state of mind” and “people [should not] be punished for their thoughts”).

76. See *infra* note 213.

77. See JACOBS & POTTER, *supra* note 45, at 65–78 (“[T]he passage of hate crime laws enacted in the 1980s and 1990s is best explained by the growing influence of identity politics.”). See also Steiker, *supra* note 19, at 1873 (“[T]he debate about hate crime laws should take its place next to debates about affirmative action, single-sex education, and other debates about group consciousness as a strategy for achieving group equality in our society.”).

78. Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 848 (1992). See also James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. LAW BULL. 299, 339–41 (1994) [hereinafter Acker & Lanier, *Mitigating Factors*].

the nonmotive factors that are generally considered mitigating. Most mitigating capital sentencing factors “appear to be based on a theory of imperfect excuse and diminished culpability.”⁷⁹ Similarly, many of the factors enumerated in the Federal Sentencing Guidelines that will allow a court to reduce a defendant’s sentence below the set range are essentially imperfect defenses to liability: provocation, justification (that is, committing a crime in order to avoid a greater harm), coercion and duress, and “significantly reduced mental capacity.”⁸⁰ These standards are consistent with data collected from capital jurors, which suggest that jurors will consider mitigating evidence in their sentencing decision only if that evidence “excuses” the defendant’s behavior.⁸¹ Although an individual’s motive may affect the perception of her blameworthiness,⁸² a motive does not provide a legal excuse—nor partial excuse—for offending behavior.

Even though few mitigating motives appear in positive sources of law, it does not mean that motives play no role in mitigating crimes. Several capital sentencing statutes include a “catch-all” provision, instructing jurors to consider all potentially mitigating evidence.⁸³ Judges may also reduce sentences on a case-by-case basis to account for an individual defendant’s mitigating motives. However, because of the nature of sentencing decisions in American jurisdictions, the motives that are treated as mitigating may be

79. Stephen P. Garvey, “*As the Gentle Rain from Heaven*”: *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1024 n.137 (1996) (citing Steiker & Steiker, *supra* note 78, at 848–49).

80. See U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.10–5K2.13 (2004).

81. See Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1043–53 (2001). The authors of this article argue that, in holding defendants to a standard of excuse, capital jurors are misunderstanding the meaning and the role of mitigating evidence. *Id.* at 1044–53. As a legal matter, the concept of mitigating evidence extends beyond evidence that “would tend to support a legal excuse from criminal liability.” *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982). Yet capital sentencing decisionmakers appear uncomfortable reducing criminal sentences for reasons that do not approximate a legal excuse. See Steiker & Steiker, *supra* note 78, at 848–51 (“A vast majority of the enumerated mitigating circumstances are primarily, often exclusively, relevant to a defendant’s culpability. . . . The only arguably nonculpability oriented circumstances that appear with any frequency concern the defendant’s lack of a prior record and, much less often, whether the defendant constitutes a continuing threat to society.”).

A possible explanation is that while legislatures want to treat certain motives as mitigating, they consciously avoid identifying mitigating motives *ex ante* out of fear that this will somehow encourage lawless behavior. See, e.g., Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 632–33 (1984). This argument is addressed in Part IV, *infra*.

82. See *infra* text accompanying notes 99–101.

83. See Acker & Lanier, *Mitigating Factors*, *supra* note 78, at 337–39.

difficult to identify: Jury sentencing decisions (capital or noncapital)⁸⁴ are rendered as general rather than specific verdicts, making it difficult to discern the sentencing rationale. Judicial sentencing decisions are difficult to locate because they are often unpublished and may be constrained; even published decisions may not explain the reasoning behind a particular sentence because the decision may have been dictated by legislative policy decisions, as is sometimes the case in federal sentencing decisions. Motives that have been identified in sentencing statutes or decisions as mitigating include: (1) a belief that the defendant was acting with a moral justification, (2) helping a family member, and (3) motives that are less culpable than the motive with which the offense is ordinarily committed.

The only mitigating motive included in the Model Penal Code's provision on capital punishment—versions of which have been adopted in many American jurisdictions⁸⁵—is that the murder was “committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.”⁸⁶ Few jurisdictions have included this motive in their capital sentencing legislation,⁸⁷ but at least one state

84. Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 197 (2004) (“[J]urors who select sentences in non-capital cases are simply asked to pick a sentence somewhere within the statutory sentencing range.”).

85. Acker & Lanier, *Aggravating Factors*, *supra* note 66, at 112 (noting that the Model Penal Code's death penalty provisions “have greatly influenced modern capital punishment legislation”).

86. MODEL PENAL CODE § 210.6(4)(d) (Official Draft and Explanatory Notes 1962) (listing death penalty factors). This motive has been characterized as the “least widely adopted of the MPC mitigating circumstances,” Acker & Lanier, *Mitigating Factors*, *supra* note 78, at 321, and then-Justice Rehnquist strongly criticized this motive as a mitigating factor, stating:

I cannot believe that the States are constitutionally required to allow a defense, even at the sentencing stage, which depends on nothing more than the convict's moral belief that he was entitled to kill a peace officer in cold blood. John Wilkes Booth may well have thought he was morally justified in murdering Abraham Lincoln

Roberts v. Louisiana, 431 U.S. 633, 649 (1977) (Rehnquist, J. dissenting).

87. Kentucky appears to be the only jurisdiction that has adopted this provision verbatim. *See* KY. REV. STAT. ANN. § 532.025(2)(b)(4) (LexisNexis 1999 & Supp. 2005). A few additional states adopted the provision with the limitation that the defendant's belief be reasonable or that the defendant acted in good faith. *See* Acker & Lanier, *Mitigating Factors*, *supra* note 78, at 321–23 & nn.115–16. *See also* Steiker & Steiker, *supra* note 78, at 850 n.72 (collecting sources).

appears to have adopted this factor judicially.⁸⁸ Other jurisdictions either include this motive as a jury instruction or otherwise consider it.⁸⁹

In some contexts, a desire to help one's family may be considered a mitigating motive. For example, the Federal Sentencing Guidelines provide a sentencing reduction for some immigration offenses⁹⁰ if "the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child)."⁹¹ At least one court has stated that, when considering a defendant's motives, a defendant who commits a financial crime "in order to support his family is less culpable and thus more deserving of leniency than one who steals from the vulnerable to finance a lavish lifestyle."⁹²

88. See *Harris v. State*, 352 So. 2d 479, 494, 495 n.12 (Ala. 1977) (indicating that, at a capital trial, a defendant "may show any one or more of the following mitigating circumstances: . . . The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct" and indicating that this mitigating factor was "taken substantially from the Model Penal Code").

89. One jurisdiction that appears to include this factor as a jury instruction is Oklahoma. See *Snow v. State*, 876 P.2d 291, 299 (Okla. Crim. App. 1994). The Florida Supreme Court has upheld a capital verdict where the "murders were not committed under circumstances which defendant believed to provide a moral justification or extenuation for his conduct." *Alvord v. State*, 322 So. 2d 533, 540 (Fla. 1975), *abrogated on other grounds by* *Caso v. State*, 524 So. 2d 422 (Fla. 1988). The United States Supreme Court quoted all mitigating factors proposed by the Model Penal Code, including this one, in its decision in *Gregg v. Georgia*, 428 U.S. 153, 193 n.43 (1976).

Although worded broadly enough to encompass a large number of situations, the belief of a moral justification provision was drafted "'chiefly to call for mitigation of sentence where the actor kills from an arguably humane motive,' such as in cases of euthanasia." Acker & Lanier, *Mitigating Factors*, *supra* note 78, at 321 (quoting AM. L. INST., MODEL PENAL CODE AND COMMENTARIES 141 (Official Draft & Revised Comments 1980)). However, a separate mitigating factor enumerated in the Model Penal Code, which is phrased in terms of whether the victim participated in or consented to the homicidal act (rather than in terms of the defendant's motives), also includes mercy killings and has been more widely adopted. MODEL PENAL CODE § 210.6(4)(c). At least twenty states appear to have adopted this provision. See Acker & Lanier, *Mitigating Factors*, *supra* note 78, at 320–21.

90. U.S. SENTENCING GUIDELINES MANUAL § 2L1.1 (2004) (Smuggling, Transporting, or Harboring an Unlawful Alien); *Id.* § 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a U.S. Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law).

91. *Id.* §§ 2L1.1–2L2.1. Although these provisions are not phrased in terms of a defendant's motive to help her family members, but rather in terms of whether the offending conduct was so limited, the wording suggests that the defendant's motives are paramount. The first portion of the sentencing reduction provision indicates that immigration offenses committed for motives other than financial gain are "better" than ordinary motives. Because the provision is written in the disjunctive, an attempt to aid the illegal residence of one's family members—even if also motivated by financial gain—can be read as considered "better" than an immigration offense committed with other motives.

92. *United States v. Milne*, 384 F. Supp. 2d 1309, 1313 n.4 (E.D. Wis. 2005). That court also noted that "after *Booker*, courts are required to consider any § 3553(a) factor put forward by the defense that might make the guideline sentence inappropriate" and that "[i]n many cases, this requirement will necessitate consideration of the defendant's motive for committing the offense rather than merely the amount involved." *Id.* at 1312–13 n.4.

In addition to these specific mitigating motives, a defendant who commits an act with an unusual and less culpable motive may receive a sentence reduction. The Federal Guidelines provide for sentencing reductions where a crime that would ordinarily be committed because of an aggravating motive is committed because of a less culpable motive. For example, a defendant can receive a sentencing reduction for certain immigration offenses if “the offense was committed other than for profit.”⁹³ Similarly, the Guidelines provide sentencing reductions for other offenses, which one would expect are ordinarily committed for financial gain, such as criminal infringement of copyright or trademark, if those offenses are committed for a nonfinancial motive.⁹⁴

D. NONINSTITUTIONALIZED ROLES FOR MOTIVE

The discussion about the role of motives in criminal law focuses on judicial decisions and the wording of statutes. But there are several other components of the criminal justice system where motive also appears to play a role. For example, although assisted suicide is prohibited in almost every American jurisdiction,⁹⁵ those who are accused of the offense—so-called “mercy killers”—may escape punishment because of jury nullification,⁹⁶ executive clemency,⁹⁷ or a prosecutor’s decision not to

93. U.S. SENTENCING GUIDELINES MANUAL §§ 2L1.1–2L2.1.

94. *Id.* § 2B5.3.

95. The exception to this rule is Oregon, which exempts from criminal liability physicians who, in compliance with the specific safeguards in the Oregon Death With Dignity Act, OR. REV. STAT. §§ 127.800–.897 (2005), dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient. *See* *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

96. Dr. Jack Kevorkian, who admitted to assisting numerous patients commit suicide, was famously acquitted in several trials for assisted suicide before he was ultimately convicted. *See* Raphael Cohen-Almagor, *Euthanasia and Physician-assisted Suicide in the Democratic World: A Legal Overview*, 16 N.Y. INT’L L. REV. 1, 19–20 & nn.143–44, 148 (2003) (collecting sources). Non-physician mercy killers have similarly been acquitted. Cecil Angel, *Jury: Aiding Wife’s Suicide Wasn’t Murder Cancer Victim Died in Family’s Presence*, MIAMI HERALD, May 11, 1991, at A1 (noting that a Detroit, Michigan jury acquitted a man accused of assisting the suicide of his wife).

97. *See, e.g., Man Who Shot Wife as a Mercy Killing Is Granted Clemency*, N.Y. TIMES, Aug. 2, 1990, at A11 (reporting that an eighty-one-year-old man, who had been sentenced to twenty-five years to life after being convicted of first-degree murder in the 1985 shooting death of his wife was granted clemency).

pursue criminal charges.⁹⁸ This is unsurprising given that public opinion favors lenient treatment of such actors.⁹⁹

It is difficult to quantify the effect that motive has in these situations. These decisions are discretionary, meaning that there are no identifiable governing standards that could be analyzed in a medium such as this Article. Also, charging decisions and, to a lesser extent, jury nullification are performed behind proverbial (and sometimes literal) closed doors, making it very difficult to determine when they occur.

III. THE NORMATIVE CASE FOR MOTIVE IN CRIMINAL LAW

As mentioned above, an illegal act and the appropriate *mens rea* are the two elements necessary for every criminal prosecution. Under many circumstances, these two elements unsurprisingly provide the most important information about a defendant's culpability. The type of crime an individual commits says a lot about how much punishment she should receive—for example, the rapist deserves more punishment than the petty thief. *Mens rea* also speaks to culpability, and punishment is often adjusted on that basis. For example, the reckless killing of another (manslaughter) receives less punishment than the same act committed purposefully or knowingly (murder).

But an actor's *actus reus* and *mens rea* are not always the best indicators of her culpability. Sometimes her motive may provide information that many would believe is more important to determining the appropriate amount of punishment. The classic example of this phenomenon is the mercy killer who ends a loved one's life in order to end her suffering. Even motive's critics appear to acknowledge that this individual is not as blameworthy as—and thus does not deserve the same punishment as—those individuals who purposefully kill out of malice.¹⁰⁰

98. "There must also be a large number of cases where district or State's attorneys, regardless of what substantive law was involved, deliberately forego prosecution because the harms committed were actually minor ones and the motives were very laudable." HALL, *supra* note 15, at 163.

99. William Claiborne, *Doctor-aided Suicide Is Backed in Poll*, WASH. POST, July 30, 1998, at A3 (referencing a public opinion poll on physician assisted suicide that indicated 69% of respondents "backed the right of terminally ill patients to receive help from physicians to end life"). See also Sergio Herzog, *The Effect of Motive on Public Perceptions of the Seriousness of Murder in Israel*, 44 BRIT. J. CRIMINOLOGY 771, 776 (2004) (reporting that a study conducted in Israel indicated that "first-degree murder scenarios representing euthanasia . . . were perceived as the least serious scenarios, receiving significantly lower seriousness scores than justified (non-criminal) homicides committed by police officers during the course of their legal duties").

100. See Hurd & Moore, *supra* note 3, at 1131 ("[T]he mercy killer appears as nonculpable as the contract killer appears culpable.").

But the example proves even more. The mercy killer appears to deserve less punishment not only than purposeful killers with other motives, but she also appears less blameworthy than the actor whose reckless decision to drive at an excessive speed results in the death of a pedestrian.¹⁰¹ The mercy killer's motives also appear to provide more information about her blameworthiness than her illegal act. If asked to assign punishment to different actors, it is doubtful that many individuals would impose as much punishment on the mercy killer as they would impose on a kidnapper or a drug dealer, even though murder is usually perceived as the crime deserving the most punishment.¹⁰² These examples demonstrate that motive plays an important role in establishing blame, and that the role is not limited to distinguishing between offenders who commit the same crime; rather, motive can also, in some circumstances, provide more important information about an individual's blameworthiness than her *actus reus* and her *mens rea*—the two traditional elements that define a crime.

Of course, a few examples are not sufficient to prove the validity of a thesis. Even if reasonable minds agree that motive *seems* relevant to the appropriate amount of punishment, it is important to establish *why*. Much has been written on the important question of why a society should punish. This question has practical implications because once we understand why we punish—or why we should punish—we may be better able to determine when and how we should punish. This Article does not attempt to answer these very difficult questions. It aims only to demonstrate that motive should play a role in determining the amount of punishment. To that end, it examines each of the main extant theories justifying punishment, concluding that each theory supports a role for motive in punishment, albeit to varying degrees. Motive's role in punishment is strongly supported by both the retributive and expressivist theories of punishment, and there is a sound argument that an expanded role for motive in punishment will enhance the deterrent effects of punishment.

After setting out the positive case for motive's role in punishment, this Part examines the two major theoretical criticisms that have been leveled against motive in punishment.¹⁰³ The first objection, which I term the volitional objection, opposes motive on the premise that an actor cannot

101. See Herzog, *supra* note 99, at 775 tbl.2, 776.

102. See MARVIN E. WOLFGANG ET AL., THE NATIONAL SURVEY OF CRIME SEVERITY 44 (U.S. Dep't of Justice Bureau of Justice Statistics 1985) (surveying the seriousness of various crimes).

103. In addition to these theoretical objections, commentators have also raised practical concerns about motive's role in punishment. Those practical concerns are addressed in Part IV.C.

control her motives. The second objection, which I label the neutrality objection, opposes the role of motive in punishment because it will require the criminal law to assess the moral worth of various motives. I conclude that the volitional objection is factually unsound and that the neutrality objection is inconsistent with the very foundations of criminal law. Criminal punishment is necessarily a value-laden endeavor, and expanding motive's role in punishment allows the criminal law to more faithfully reflect shared notions of moral blame.

A. THEORIES OF PUNISHMENT

One of the largest questions confronting criminal law scholars and other theorists who write about criminal law is *why* we punish wrongdoers. There are multiple theories to justify punishment: retribution (and its subsidiary, expressivism), deterrence, rehabilitation, and incapacitation. Although some commentators remain relative purists, others have determined—rightly, I believe—that punishment may be justified only by some combination of these theories.¹⁰⁴ Because many, if not all, of these theories are important and because some of these theories are more supportive of the role of motive in criminal law than others, this Article examines each in turn.

1. Retribution and Expressivism

Under the theory of retribution (also sometimes called the theory of “just deserts”), a defendant is punished because she deserves it.¹⁰⁵ Put another way, “[a] retributivist believes that the imposition of deserved punishment is an intrinsic good.”¹⁰⁶ Under retribution, the amount of punishment for a particular offense or sentencing factor is based on considerations of proportionality. The amount of punishment must be proportional to the punishment assigned to other similar (and dissimilar) offenses, and the amount of punishment must also be in proportion to the gravity of the offense itself.¹⁰⁷ Gravity is measured in two separate ways:

104. See, e.g., Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1987). See also Norval Morris, *Desert as a Limiting Principle*, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 180 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998).

105. Michael S. Moore, *The Moral Worth of Retribution*, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 104, at 150.

106. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 15 (2003).

107. Proportionality is a main concern of desert theory, which is a “modern form of retributive philosophy.” ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 72–73 (3d ed. 2000).

(1) the blameworthiness of individual defendant and (2) the loss or harm caused by the offense.¹⁰⁸

Retribution is a very broad theory. Aside from these general notions, those who call themselves retributivists need not agree on who deserves punishment or why,¹⁰⁹ and they often do not.¹¹⁰ One version of retributive theory called expressivism believes that an individual deserves punishment when she commits an illegal act, because in committing that act, the individual has demonstrated that she does not respect an important value, such as a victim's moral worth.¹¹¹ In punishing the wrongdoer, society expresses its view that the offender's values are wrong.¹¹² And the amount of punishment that society inflicts reflects the "judgment of 'how bad' the offence [sic] was . . . by translating that judgment into the particular [amount of punishment]"¹¹³

Expressivism is the theory that best supports an expanded role for motive in punishment. Dan Kahan gives the example of the white supremacist who kills out of racial hatred and the mother who kills a man who has sexually abused her child. "Both acts are wrong, and their consequences are in some sense equivalent—there is one dead person in each case. Nevertheless, the racist's killing is more worthy of condemnation precisely because his hatred expresses a more reprehensible valuation than does the mother's anger."¹¹⁴ Because the white supremacist's motives are more blameworthy than the grieving mother's, society must punish the supremacist more harshly in order to reflect its greater condemnation.¹¹⁵

108. See Andrew Ashworth, *Desert*, in PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra* note 104, at 141, 143.

109. See Alschuler, *supra* note 106, at 15.

110. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 602 (1996) ("[O]ne might say, for example, that an individual deserves punishment when 'he renounces a burden which others have voluntarily assumed and thus gains an advantage which others . . . do not possess,' or when human beings naturally intuit that the individual has engaged in 'a wrong action [that] . . . calls for the infliction of suffering or deprivation on the agent.'" (internal footnote omitted) (quoting Herbert Morris, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 40, 42 (Jeffrie G. Murphy ed., 1973); J.L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in PHILOSOPHY OF LAW 677, 682 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991))).

111. Some commentators might dispute that expressivism is merely a form of retributivism. The resolution of that issue is not necessary to demonstrate how expressivism supports a role for motive in criminal punishment.

112. See Kahan, *supra* note 110, at 597–98.

113. ASHWORTH, *supra* note 107, at 61.

114. Kahan, *supra* note 110, at 598.

115. *Id.* ("[U]nduly lenient punishment reveals that the victim is worthless in the eyes of the law.").

The paradigmatic example of the mercy killer is also explained by expressivism. The individual who performs a mercy killing has committed the same crime as a contract killer: Both have purposefully killed another human being, evincing some amount of disrespect for the value of human life. But while the mercy killer was willing to disrespect human life only to end another's suffering, the contract killer was willing to demonstrate the same amount of disrespect for profit. In criminalizing both mercy killing and contract killing, the criminal law has determined that the value of human life is more important than either ending suffering or personal profit. And even though ending human suffering is not considered an important enough interest to outweigh the value of a human life,¹¹⁶ it is more important than the interest in personal profit. Thus, the mercy killer is less blameworthy than the contract killer.¹¹⁷

Several judicial opinions explaining decisions to punish defendants more harshly based on their motivation appear to be based on some form of retributive theory. The authors of these opinions indicate that the defendant who acts out of an aggravating motive is more blameworthy than the defendant who acts for another motive.¹¹⁸ For example, the importance of the relative blameworthiness of pecuniary gain appeared in the case of

116. There is substantial disagreement over the validity of this statement. Indeed public support seems to favor assisted suicide and mercy killings, yet the only American jurisdiction to have decriminalized the practice is Oregon. *See supra* note 95. In those jurisdictions where mercy killing remains illegal, the criminalization decision is explainable under the retributive theory as a determination that the value of human life outweighs the interest in ending the victim's suffering.

117. *Cf.* Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 433 n.256 (2002) (“[C]onsider the difference between a mercy killing and a contract killing. Both of these killings are murder, by virtue of the positive fault consideration of purpose or premeditation regarding death. But the two murders differ in fault because of the vastly different circumstances surrounding the two killings: acceding to the request of a loved one who is in intolerable pain versus making a profit from the coldhearted killing of a stranger.”); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 817 n.277 (2002) (“Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted.”).

118. When imposing a criminal sentence one judge remarked that the defendant's actions “were not driven by any even perceived necessity,” but rather that the defendant had been “[m]otivated purely by greed.” *United States v. Duff*, 371 F. Supp. 2d 959, 964–65 (N.D. Ill. 2005). Another court, in justifying its decision to impose a sentence of 120 months imprisonment, rather than the fifteen months recommended under the Federal Sentencing Guidelines, contrasted the short sentence recommended for the defendant and her “greed” with the lengthy Guidelines sentences imposed on drug couriers who “are motivated by a desire to feed and provide health care for their families.” *United States v. Andrews*, 301 F. Supp. 2d 607, 610–12 (W.D. Tex. 2004), *vacated by* 390 F.3d 840, 849 (5th Cir. 2004). These courts, in contrasting the defendants who act for financial profit with defendants who act out of need, are making a retributivist judgment that pecuniary gain is a more blameworthy motive than need.

famed spy Jonathan Pollard. While Pollard argued to the district court at sentencing that he had passed confidential information to Israel because he believed that his aid to Israel would also benefit United States security interests,¹¹⁹ the government “consistently suggested . . . that Pollard’s spying had been motivated by greed rather than ideology.”¹²⁰ On appeal, Pollard argued, unsuccessfully, that by portraying his motive as financial rather than ideological, the government violated his plea agreement, which resulted in the imposition of a longer sentence.¹²¹

2. Deterrence

Deterrence is the notion that the threat or fear of punishment will result in law abiding behavior. Deterrence is generally considered to have two forms: individual or special deterrence, which is concerned with deterring a specific individual from reoffending; and general deterrence, which aims to deter other individuals from committing the same type of offense.¹²² The theory of deterrence, like the theories of rehabilitation and incapacitation, is consequentialist—that is to say, the theory’s overarching goal is the prevention of crime.¹²³

The conventional perspective of deterrence theory—that a specific unit of punishment corresponds to a specific number of potential offenders who are dissuaded from committing a particular number of offenses¹²⁴—supports a system that adjusts a defendant’s punishment based on her motives only insofar as the defendant’s motives correlate to deterrability. Thus, for example, if an individual who wishes to commit a murder because she takes pleasure from the pain and suffering of others is more difficult to deter than the individual who wishes to commit a murder in order to rob the victim, then it makes sense to increase the punishment for the actor with the sadistic motives. But some of the motives that we would instinctively want to punish less may be more difficult to deter.¹²⁵

119. United States v. Pollard, 959 F.2d 1011, 1017 (D.C. Cir. 1992).

120. *Id.* at 1027.

121. *Id.* at 1026–27.

122. See ASHWORTH, *supra* note 107, at 64.

123. *Id.*

124. The conventional perspective frames “the deterrence inquiry as simply whether a penalty for crime X will reduce X.” Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1175 (2004).

125. Judge Posner provides a good illustration: “Suppose I lose my way in the woods and, as an alternative to starving, enter an unoccupied cabin and ‘steal’ some food. Should the punishment be death, on the theory that the crime saved my life, and therefore no lesser penalty would deter? Of course not.” Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205–06 (1985).

One of the most difficult tasks in applying this conventional perspective of deterrence theory to a specific practice, such as motive's role in punishment, is that "factual data on which a deterrent system must be founded do not exist. Reliable findings about the marginal deterrent effects of various types and levels of penalty for various crimes are hard to find."¹²⁶ Although some research suggests that punishment lengths may have some effect on the premeditating wrongdoer,¹²⁷ research also suggests that many crimes are crimes of opportunity or impulse,¹²⁸ indicating that deterrence—especially the marginal deterrence of gradual increases in punishment—is unlikely to prevent many crimes. To the extent that the data suggest increased penalties may help to deter those individuals who plan their criminal behavior in advance, deterrence theory would support increasing penalties for criminal activity that involved more than minimal criminal planning.¹²⁹ This view of deterrence theory does not provide much support for the role of motive in punishment, as motives do not necessarily correlate with amount of planning.¹³⁰

But that is not to say that extending motive's role in punishment will not deter more crime. Motive is widely perceived as a relevant component of an actor's blameworthiness. Thus, a punishment system that takes account of motive has the advantage of conforming to widely shared moral

126. ASHWORTH, *supra* note 107, at 64. Ashworth further explains:

A necessary element in research is a proper definition of deterrence, to establish that fear of the legal penalty was the factor which led to avoidance of the proscribed conduct. Also essential to the understanding and identification of deterrent effects are information about the potential offender's knowledge of the penalty and of the risk of detection Few studies satisfy these criteria, and they provide no basis for broad [public] policies.

Id. at 65. See also Meares et al., *supra* note 124, at 1186 ("[M]odern deterrence research has failed to find consistent evidence of the deterrent effects of punishment. Empirical evidence on the deterrent effects of punishment remains speculative and inconclusive, and the ability of formal punishment *alone* to deter crime appears to be quite limited.").

127. A study by Richard Harding suggests that robbers tended to avoid arming themselves with firearms if there was a substantial extra penalty for carrying a firearm. Richard W. Harding, *Rational-choice Gun Use in Armed Robbery: The Likely Deterrent Effect on Gun Use of Mandatory Additional Imprisonment*, 1 CRIM. L.F. 427, 450 (1990), cited in ASHWORTH, *supra* note 107, at 65 n.4.

128. See ASHWORTH, *supra* note 107, at 65.

129. The Federal Sentencing Guidelines include precisely such provisions. *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(b)(1) (2004) (Aggravated Assault) ("If the assault involved more than minimal planning, increase by 2 levels.").

130. Even crimes motivated by profit, which are often viewed as calculated, can be entirely impulsive. For example, the defendant in *United States v. Russell*, 870 F.2d 18 (1st Cir. 1989), was the driver of a Wells Fargo armored truck, and a bank had mistakenly handed to his partner an extra money bag containing \$80,000. *Id.* at 19. After keeping the money for a week, Russell returned all of the money and cooperated fully in the investigation of the crime. *Id.* Although his actions were motivated by financial gain, "Russell's actions were unplanned and spontaneous; he was apparently overcome by the sudden intoxication of unexpected and immediate wealth." *United States v. Carey*, 895 F.2d 318, 325 (7th Cir. 1990) (describing the *Russell* case as an "act of aberrant behavior").

views. It is important that criminal justice practices conform to shared notions of justice because, as numerous studies have revealed, without the support of public opinion, the criminal law is less effective at deterring crime.¹³¹ These studies are consistent with evidence that suggests informal social controls, such as the loss of social relationships or employment, are far more effective than formal penal sanctions in deterring crime.¹³² Those informal social controls function most effectively when members of communities believe that committing a crime is morally wrong. This will occur only so long as criminal laws approximate moral wrongs. Thus, while the conventional view of deterrence theory may not provide much support for an expanded role for motive in punishment,¹³³ a broader view of deterrence, which recognizes that the perceived legitimacy of criminal law and informal controls play determinative roles in the promotion of lawful behavior, strongly supports a larger role for motive.

3. Incapacitation

Incapacitation, as a punishment principle, aims to deal with “dangerous” offenders or repeat offenders by making them incapable of

131. See Meares et al., *supra* note 124, at 1193–97; Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just?: Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1861–65 (2000) (collecting sources). See also Kahan, *supra* note 110, at 604 (“Individuals are more disposed to obey particular laws . . . when criminal punishment confirms, rather than disappoints, shared expectations about what behavior is worthy of moral condemnation.”).

132. See Meares et al., *supra* note 124, at 1187–90.

133. The mere fact that deterrence theory does not adequately explain the existing categories of aggravating and mitigating motives does not suggest that a defendant’s punishment should not be adjusted based on her motives. Even deterrence supporters have acknowledged that deterrence cannot be the only theory for punishment allocation; punishment must also account for an offender’s culpability. For example, in a recent article advancing a life-life trade off rationale in support of the death penalty, Cass Sunstein and Adrian Vermeule balk at the notion of imposing the death sentence for drunk driving, even though drunk driving could also yield a life-life trade off. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 748 (2005) (“[N]othing we say here entails a view, one way or another, on the question (for example) whether drunk drivers who kill recklessly or negligently should be subject to capital punishment.”). As Carol Steiker notes in her response article:

The only good reason that the culpability of the individual agent of harm ought to matter in a “life-life tradeoff” is a retributive one, as Sunstein and Vermeule seem to concede by recognizing that capital punishment for homicides caused by drunk driving “might stand on a different moral footing” from capital punishment for intentional murders because of “constraints of proportionality.” But bringing in the “constraints of proportionality” to distinguish executions for drunk driving from executions for murder gives up the whole game; it eliminates the special moral force of the “life-life tradeoffs” argument that Sunstein and Vermeule wish to assert.

Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 781–82 (2005) (internal footnote omitted) (quoting Sunstein & Vermeule, *supra*, at 748).

offending again for long periods of time.¹³⁴ A defendant's motive for committing a crime may provide information about both her dangerousness and her likelihood to reoffend. For example, the defendant who kills for her own pleasure is probably a very dangerous individual, who is likely to reoffend in order to gratify that desire. Similarly, although a motive of personal financial profit may not make an offender appear more dangerous (that is, it does not make them more violent than other offenders who commit similar offenses), it may arguably indicate that the defendant is more likely to reoffend because money is a constant motive.

Some mitigating motives also make a defendant seem less threatening than the average lawbreaker and less likely to reoffend. For example, we are unlikely to worry that the husband who falsifies a passport to help bring his wife to the United States will engage in the same behavior in the future; because his wife is now in the country, the unique motive for his behavior has disappeared. But the correlation between sympathetic motives and lack of need to incapacitate will not always exist. For example, the offender who steals because of his own need may engage in the same behavior in the future if he does not otherwise change his personal circumstances. Although the theory of incapacitation seems to support some specific examples of adjusting punishment based on motives, incapacitation does not provide a consistent justification for adjusting punishment based on motives.

4. Rehabilitation

Rehabilitation theory justifies punishment as a method of modifying an offender's behavior and attitude, thus decreasing her likelihood of reoffending. Rehabilitative punishment requires an individualized assessment of each offender in order to determine how punishment may be used to alter the offender's propensity to commit crime. In addition to focusing on the modification of an offender's attitude and behavior, rehabilitation may include "provid[ing] education or skills, in the belief that these might enable offenders to find occupations other than crime."¹³⁵

Rehabilitative punishment was often practiced in the United States in conjunction with parole: a judge sentences a defendant to an indeterminate period of incarceration, and the "experts" on the parole board examine the incarcerated inmate on a regular basis, releasing her once they determine

134. See ASHWORTH, *supra* note 107, at 68.

135. *Id.* at 70.

she has been reformed.¹³⁶ Rehabilitation fell out of favor with policymakers in the 1970s and 1980s, leading many jurisdictions to abandon parole.¹³⁷

Motive's role in punishment is, under some circumstances, compatible with rehabilitative theory. That is because an offender's motive may provide information regarding the likelihood that she will reoffend, and it may suggest whether she will benefit from treatment. Consider, for example, three defendants convicted of shoplifting. The first defendant's shoplifting was motivated by need. The second shoplifter, a kleptomaniac, was motivated by her insatiable desire to steal. The third shoplifter was motivated to steal for personal profit; she desired the item and simply did not wish to pay for it. These defendants' motives suggest different rehabilitative treatment. The first defendant would likely benefit from an opportunity to acquire skills that will enable her to satisfy her needs without resorting to crime; the second defendant would likely benefit from psychological treatment that would help her to overcome her disorder; and the third defendant might benefit from a program aimed at modifying her behavior and attitudes so that she is less likely to value her own personal gain so highly as to infringe the rights of others by stealing.

But while motive may provide some useful information under rehabilitative theory, and thus should play some role, its utility has an important limitation: motive does not provide the most important information that is required for a rehabilitative punishment system—how long a defendant should be incarcerated so that she may be rehabilitated.

B. THE VOLITIONAL OBJECTION

Having made the positive case for motive's role in punishment, it is necessary to address the major theoretical objections to motive's role. The first of those objections, the volitional objection, may be summarized as follows: While an actor can ordinarily control whether she commits a crime, she is unable to control the reasons for which she commits a crime. It is unjust to punish an individual for something she cannot control, and, therefore, adjusting her punishment because of her motives is unjust.

The volitional objection appears in multiple forms. Susan Gellman frames her concerns using the term volition, stating "belief and motive are not . . . clearly volitional. They may change, but not by their holder's will

136. See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 19–22 (1998).

137. For an account of "the collapse of the rehabilitative ideal," see *id.* at 29–35.

on the spot.”¹³⁸ Others raise the same objection, but in a less direct fashion. Consider the following criticism raised by Hurd and Moore in the context of hate crime sentencing enhancements: “in punishing a defendant for hating or being prejudiced against his victim because of his victim’s membership in a particular group, hate/bias crimes . . . necessarily punish a defendant for having bad character. In fact, they punish a defendant *solely* for bad character.”¹³⁹ Hurd and Moore characterize hate crime sentencing enhancements as punishment of character, then argue that an actor who is biased toward a certain group is unable to change her character “by an act of will alone,” and thus it is inappropriate to punish her for it.¹⁴⁰

In framing their objection to motive’s role in punishment as an objection to punishment based on character, Hurd and Moore invoke the debate between choice theorists and character theorists. The choice versus character debate is ordinarily one about criminal liability: whether it is a defendant’s choices or her character that appropriately subject her to punishment. Choice theorists claim that it is inappropriate to punish a person unless that person had “the capacity and a fair opportunity . . . to [conform] his behaviour to the law”;¹⁴¹ in other words, only an individual’s choices are properly subject to punishment. Character theorists, in contrast, argue that punishment should be limited to those actors who possess

138. Gellman, *supra* note 3, at 356. See also Garvey, *supra* note 50, at 1711 (“[I]f one’s beliefs are constituent elements of one’s character over which one has no direct or immediate control, then the additional punishment imposed on the inadequately provoked actor . . . is punishment imposed for the content of his character . . .” (internal footnote omitted)).

139. Hurd & Moore, *supra* note 3, at 1128 (internal footnote omitted). “The emotions and beliefs with which hate/bias crimes are concerned are not occurrent states of mind; they are, rather, character traits possessed by defendants over time.” *Id.* at 1127.

140. *Id.* at 1129. Although Hurd and Moore argue that punishment of the motive of hate or prejudice necessarily punishes based on character, they appear to concede that other motives do not necessarily reflect an offender’s character: “one may form the intention, say, to kill without being disposed toward violence, and one may set one’s sights on another’s wealth without being a greedy person.” *Id.* at 1128. Elsewhere, Hurd and Moore indicate that “motivationally oriented legislation[,] in general, ultimately punishes persons for standing traits of character.” *Id.* at 1135.

The leading case on hate crime enhancements, *Wisconsin v. Mitchell*, does not appear to involve an inveterate racist. There, the defendant, a young African American man, discussed the film *Mississippi Burning* with some friends prior to committing his crime. *Wisconsin v. Mitchell*, 508 U.S. 476, 479–80 (1993). The defendant was upset about a scene in the movie that showed a white man beating a young black boy who was praying; he, along with a group of other boys, then decided to “move on some white people” and, after seeing a white boy walking down the street, beat the boy severely and stole his tennis shoes. *Id.* The fact pattern suggests that the assault was motivated by the defendant’s reaction to the film; there is no reason to believe that he ordinarily holds racist views or wishes to harm whites.

141. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 181–82, 201 (1968). See also Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL’Y 29 (1990).

undesirable character traits that are “likely to produce criminal harm.”¹⁴² It is unnecessary to rehash the choice/character controversy in order to demonstrate why the volitional objection should not minimize motive’s role. It is sufficient to take note of the debate so that those commentators who criticize motive’s role in punishment as punishing people for who they are rather than for what they do¹⁴³ are recognized as raising the volitional objection.

There are several reasons to discount the volitional objection. The first is that, even assuming an offender cannot control her motives, she can certainly control how she responds to those motives—that is, whether she commits the crime.¹⁴⁴ Criminal liability often turns on a factor over which the offender has no control. For example, it is illegal to purchase alcohol in most states if you are under the age of twenty-one. An individual has no control over her age, yet the law conditions liability on that fact. Similarly, an alien who enters the United States without appropriate authorization is subject to criminal liability, yet an individual has no real control over her alienage. This response is not entirely satisfying, however, because the defendant’s decision to engage in criminal activity is already accounted for in the punishment she will receive. Unlike the examples above, additional punishment for a defendant’s motives is, according to those who subscribe to the volitional objection, being imposed specifically for something that she cannot control.¹⁴⁵

But the volitional objection could easily apply to the knowledge requirement that informs several mental states. Just as an actor cannot change her motive “by an act of will alone,”¹⁴⁶ she cannot always change the mental states that inform our present system of intent—mental states

142. Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 L. & PHIL. 5, 13 (1982).

143. Hurd & Moore, *supra* note 3, at 1127–29; Gardner, *supra* note 58, at 686 (characterizing “responsibility for one’s motive[]” as a “character attribute[]” which may be “seen as the product of certain factors, such as environment and heredity, which are beyond the control of the actor”). *See also* Garvey, *supra* note 50, at 1716–17.

144. *Cf.* Kent Greenawalt, *Reflections on Justifications for Defining Crimes by the Category of Victim*, 1992/1993 ANN. SURV. AM. L. 617, 625 (1994) (“Actors who have the wrong kinds of feelings are not being asked to eliminate the feelings. They are asked not to commit criminal acts on the basis of their feelings.”).

145. *See* Hurd & Moore, *supra* note 3, at 1127–28.

146. *Id.* at 1129.

that choice theorists support.¹⁴⁷ Consider the individual who is confronted with a boisterous drunk in a bar; the drunk says something offensive to the individual, who then wishes to punch the drunk because she is angered and offended by the comment. Motive's critics believe that the individual can choose only whether to punch the drunk or to resist the temptation; she cannot choose to throw the punch for another reason. One could tell an equally compelling story about intent. Imagine an individual who is driving her car at an excessive rate of speed. Her conduct is creating a real risk of danger to the passengers in her car, other drivers, and pedestrians. If the defendant is aware of the risk her conduct poses, and yet she chooses to disregard that risk, then she is guilty of reckless driving. But if she is not aware of the risk, then she is guilty only of negligent driving.¹⁴⁸ In either situation, the defendant cannot "choose" whether she is aware of the risk, yet we increase her punishment based on that awareness. Another, perhaps more intuitive, example concerns the crime of receiving stolen goods. If a prospective seller tells an individual that the Rolex watch he is trying to sell her is stolen, the individual is guilty of a crime if she buys the watch. The individual had no control over whether she acquired that knowledge—that is, whether the prospective seller told her—yet she is criminally liable if she elects to purchase the watch with that knowledge, despite the fact that she had no control over the necessary mental state.

A third, and perhaps the best, response to the volitional critique is simply that motive is not, as its critics claim, beyond an actor's control. Consider the individual who sees the unattended, open cash register (the proverbial "open till"¹⁴⁹); she wants to steal money from the register because she desires personal financial gain. At this point, according to motive's critics, the individual can choose only whether to take the money or to resist the temptation; she cannot choose to take the money for another

147. See Dillof, *supra* note 3, at 1017; Gardner, *supra* note 58, at 688 ("Many of these problems are avoided if inquiries into motives are abandoned and *mens rea* offense elements are defined in terms of specific states of mind, as in the *Model Penal Code* scheme."). See also Dillof, *supra* note 3, at 1036 (stating that the traditional model of criminal offenses assumes that "intentions determine the scope of the wrongdoing for which the actor is culpable"). But see Hurd & Moore, *supra* note 3, at 1130–31 ("[W]e are sympathetic to the view that *moral* culpability is largely a function of the reasons for which persons act Contrary to the traditional assumptions of the criminal law, it seems to us that surprisingly little is learned about a defendant's moral culpability by discovering that the defendant intended a legally prohibited harm or knew that he would cause it.").

148. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 466 (1992) (noting that the "Model Penal Code differentiates criminal recklessness from negligence in only one respect: recklessness requires conscious awareness of a substantial and unjustifiable risk, while negligence requires that the actor *should* have been aware of such a risk").

149. HART, *supra* note 141, at 33 ("[M]en are capable of self-control when confronted with an open till but not when confronted with a wife in adultery.").

reason. But that is not accurate. The actor may choose to resist the temptation for personal profit, and subsequently realize that she can help support her ailing and elderly mother only if she steals the money. Now that the individual's motives have changed from personal profit to helping a family member, her decision to act may change as well.¹⁵⁰

C. THE NEUTRALITY OBJECTION

The second theoretical objection to motive's role in punishment is the neutrality objection. Neutralists (also sometimes referred to simply as liberals¹⁵¹) advocate a system in which punishment requires no moral judgments; rather than requiring a moral evaluation of the offender or her actions, punishment under the neutralist ideal requires nothing more than a finding that the defendant harmed her victim with the requisite mental state.¹⁵² According to the neutralists, the only appropriate mental inquiry is whether the defendant performed the harmful act with the requisite *mens rea*. They oppose motive's role in punishment because it requires a

150. This may seem like an exaggeratedly deliberate account of choosing to act based on motives, but I imagine that it is no more exaggerated than the commonly held beliefs about offenders "choosing" to perform an illegal act with a culpable level of intent. Most offenders likely do not spend much time reflecting or deliberating before acting—indeed, a common critique of deterrence theory is that it is "unrealistic" to construct a system of punishment "on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not." ASHWORTH, *supra* note 107, at 65 (quoting Home Office White Paper, Crime, Justice, and Protecting the Public (Feb. 1990)).

151. See, e.g., F.H. Buckley, *Perfectionism*, 13 SUP. CT. ECON. REV. 133, 150 (2005). I use the terms "neutralist," "neutralism," and "neutrality" in this Article because the term "liberal" has acquired an accepted meaning that encompasses more than the principles of neutralism. This new, and more dominant meaning refers to specific political views, some of which—such as support for hate crime legislation—are inconsistent with neutralism.

152. This theory is often phrased in terms of preferring a system that values "the [R]ight over the [G]ood." MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 1 (2d ed. 1998). In classic liberalism terms, because the members of society will be unable to agree on a vision of the Good, it is important that society not try to impose one view at the expense of another. See *id.*

qualitative evaluation of different motives.¹⁵³ But the view of criminal punishment as morally neutral is inconsistent and incompatible with important aspects of criminal law.

The neutral world view is grounded in social contract theory. “The social contract structures the relationships of discrete individuals: it specifies those fairly modest constraints on conduct whose observance will enable the citizens to live their own lives, pursuing their own [moral ends].”¹⁵⁴ The neutralist believes that, because citizens are unable to agree on a specific view of what is “the Good”—that is, appropriate moral ends—the state cannot impose its own view and must be neutral toward various conceptions of the Good. Motive’s role in punishment is fundamentally incompatible with neutralism because, before adjusting an offender’s punishment either up or down based on her motives, we must first determine which motives are “good” and which are “bad.”

But the neutralists’ view of criminal punishment as a morally neutral undertaking ignores the multitude of moral judgments that presently exist in our criminal law. Ultimately, neutralism must be rejected as a governing principle for criminal law because criminal punishment is an undertaking that cannot operate in the absence of moral judgment. Moral judgments are necessary predicates to the most fundamental aspects of criminal law: the criminalization of conduct¹⁵⁵ and the assessment of punishment.

153. Hurd and Moore couch their neutralist critique of motive-based punishment in the third person—saying that those who justify hate crime sentencing enhancements with character theory “cannot enjoy support from those who conceive of themselves as working within the philosophical tradition of political liberalism” and that character theorists “must admit, then, that they are not liberals.” Hurd & Moore, *supra* note 3, at 1135, 1137. They never explicitly adopt the neutral critique of motive-based sentencing enhancements except to say that “[n]ot only must those who are willing to criminalize hate and bias meet the challenges of contemporary liberalism generally, but they must be confident that in enacting such legislation they are not inhibiting a liberty to be bad that is necessary to the cultivation of good.” *Id.* at 1138. See also Gardner, *supra* note 58, at 686 (“Even when known, motives are difficult to evaluate. Consensus on moral issues is often impossible in modern, pluralistic societies.”); Garvey, *supra* note 50, at 1716 (“A liberal state can punish its citizens for the crimes they chose to commit, but it cannot punish them more for the lack of virtue they happen to betray in committing them, even when the virtues at stake are liberal ones. If it does so punish its citizens, it betrays its own true—and illiberal—character.”) (citing Hurd & Moore, *supra* note 3, at 1137).

154. R.A. Duff, *Choice, Character, and Criminal Liability*, 12 L. & PHIL. 345, 381 (1993).

155. Kyron Huigens alludes to this problem:

Deontological political theory, whatever its merits in explaining distributive justice, is inadequate to explaining criminal justice. We need an alternative theory to cope with the fact that the criminal law condemns the decisions and actions of individuals in their pursuit of the good as they conceive it. The aspiration to neutrality with regard to individual conceptions of the good—which, however it is formulated, is the principal feature of deontological theories of distributive justice—renders deontology useless in explaining and understanding inculcation *as it now occurs*.

Huigens, *supra* note 4, at 1457–58 (internal footnote omitted).

Neutralists may try to justify decisions regarding criminalization and punishment under the harm principle, the tenet of liberalism that states a government may coerce an individual only to prevent harm to others.¹⁵⁶ But harm is both too broad and too narrow to describe the wrongs that result in criminal punishment. A person can be guilty of a legal wrong without causing any harm: “for example, an attempt at murder that fails and does no harm to the intended victim is still a (highly) wrongful act.”¹⁵⁷ And a person can harm another individual and yet not deserve or receive criminal punishment. There are numerous examples of conduct that result in harm to another, but are actionable only as a tort—if at all¹⁵⁸—and do not subject the actor to criminal penalties.¹⁵⁹

Harm also fails to provide a sufficient explanation of how we assign various lengths of punishment to different crimes. Harm may explain some punishment decisions, such as the decision to punish murder more than theft: a victim suffers substantially more harm if an offender deprives her of her life, than if the offender deprives her of her property. But, harm cannot explain all punishment decisions.¹⁶⁰ Robbery is consistently treated as a more serious offense than theft, even though theft may result in a

156. See John Stuart Mill, *On Liberty*, in 18 COLLECTED WORKS OF JOHN STUART MILL: ESSAYS ON POLITICS AND SOCIETY 213, 223–24 (J.M. Robson ed., 1977). For example, Anthony Dillof argues that a defendant’s motive of racial animus does not affect the “gravity” of her wrongdoing, reasoning that:

Based on their intentions, the bias criminal will be culpable exactly for inflicting wrongdoing W on a Black, and the nonbias criminal will be culpable exactly for inflicting wrongdoing W on an indefinite person. Inflicting wrongdoing W on a Black and on an indefinite person, however, are types of wrongdoing of equal gravity: the gravity associated with wrongdoing W. Thus, although the perpetrator of a bias crime, by virtue of his intention, is highly culpable for an act such as “inflicting wrongdoing W on a Black” and the perpetrator of a nonbias crime does not have that level of culpability for such an act, these differing culpabilities do not justify different degrees of punishment.

Dillof, *supra* note 3, at 1034 (internal footnote omitted).

157. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1661 (1992). Motive’s critics do not argue that attempt should not be punishable as a criminal offense. To the contrary, Michael Moore has argued that

[c]ulpability is necessary to desert, but wrongdoing is not. Someone who shoots at another with the intent of killing him, but misses, or someone who passes on a blind curve but meets no on-coming traffic, deserves some punishment even though there is no wrongdoing. Culpability, in other words, is sufficient, meaning that wrongdoing is not necessary.

Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 238 (1994) (internal footnote omitted).

158. See generally GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978).

159. The specific example Jean Hampton gives is the shipowner who ties his ship to a dock to avoid the virtual certainty of shipwreck by an approaching storm, despite the fact that the dockowner refuses permission for him to do so. If, during the storm, the ship causes damage to the dock and the dockowner sues, the shipowner will be liable for damages, but he will not be held criminally liable for having tied his ship to the dock given the circumstances. Hampton, *supra* note 157, at 1664–65 (describing *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910)).

160. See Kahan, *supra* note 4, at 181.

larger loss to the victim.¹⁶¹ This punishment decision requires the exercise of moral judgment, as the amount of punishment is determined by how “bad” the crime is.¹⁶²

Several commentators have explored the inadequacies of neutralism.¹⁶³ Kyron Huigens has demonstrated neutralism’s inability to account for justification defenses:

[T]he theory of justification as a balancing of interests requires a supporting theory of the good. It requires a theory of the final ends of political association in which those ends are taken to be something apart from the particular ends of society’s members. Without some such conception of the greater good of society, the balance-of-interests theory of justification is incoherent. Without some comprehensive background of value, common to both interests and within which each can be given its full due, the choice between interests might be nothing more than an arbitrary preference for one of two incommensurable concerns.¹⁶⁴

Dan Kahan has noted that neutralists are unable to account for the evaluations of motives that occur, *inter alia*, in the context of the doctrine of duress.

The doctrine of duress evaluates motive when it determines whether the defendant submitted to a threat that a “reasonable” person would have resisted. The woman who assists in the assault of a stranger in order to avoid being beaten herself will likely have a defense, whereas the woman who acquiesces in the assault of her own child in order to avoid being beaten won’t. . . .

. . . .

These distinctions don’t turn on the injury that the offenders impose on their victims . . . the injuries are, roughly speaking, the same. Rather

161. A public opinion survey revealed that a robbery with no weapon involving only \$10 is viewed as deserving of more punishment than a theft of \$100. WOLFGANG ET AL., *supra* note 102, at 44.

162. Cf. HART, *supra* note 141, at 162 (“[I]t is not clear what, as between the objective harm caused by a crime and the subjective evil intention inspiring it, is to be the measure of ‘seriousness’ [of a crime when attempting to correlate severity of punishment with seriousness of a crime]. Is negligently causing the destruction of a city worse than the intentional wounding of a single policeman? . . . [I]f the subjective wickedness of the criminal act is relevant, can human judges discover and make comparisons between the motives, temptations, opportunities and wickedness of different individuals?”).

163. Michael Sandel’s account of the theory’s shortcomings may be the best known. See SANDEL, *supra* note 152.

164. Huigens, *supra* note 4, at 1430.

they turn on the law's assessment of the offender's reasons for bringing those harmful consequences about.¹⁶⁵

Even the use of intent as a condition for punishment, which neutralists applaud as appropriate,¹⁶⁶ is not without moral content. Punishing the purposeful actor who ends the life of her suffering partner more harshly than the actor whose reckless decision to drive drunk results in the death of a pedestrian communicates the message that the first killing, and consequently the first actor, is worse than the second.¹⁶⁷ Where, as in this example, the amount of punishment does not correlate to our shared notions of right and wrong, neutrality's preoccupation with avoiding any specific view of the good results in an outcome that most (if not all) members of a diverse society would agree is bad.¹⁶⁸

Any theory purporting to require a particular outcome in criminal law and criminal punishment must be able to account for at least the fundamental decisions underlying criminal punishment: the criminalization of particular actions and the assessment of criminal punishment. Neutralism is neither able to provide such an account, nor able to account for the other moral judgments implicit in our criminal law. Unless motive's critics can provide an alternative account of these existing moral judgments, or provide a rationale for permitting moral judgments for those aspects of criminal law but not for motive, the neutrality objection should not be credited as an argument against the role of motive in criminal punishment.

IV. CREATING A COHERENT LAW OF MOTIVE

Now that it has been demonstrated that motive plays both an important descriptive role and a valuable normative role in criminal law, the next

165. Kahan, *supra* note 4, at 177–78 (internal footnote omitted). *See also id.* at 179 (“Inconveniently for the Millian critics of hate crime penalties, the criminal law comprises a comprehensive series of bad-value added taxes.”).

166. *See, e.g.,* Gardner, *supra* note 58, at 688.

167. “The neutralist might reject legal moralism but he cannot ban expressive effects. Whether he likes it or not, laws necessarily express approval or disapproval.” Buckley, *supra* note 151, at 136.

168. *See supra* note 99. Hurd and Moore consider those who commit mercy killings “to be highly moral people.” Hurd & Moore, *supra* note 3, at 1131. They acknowledge that if “we can distinguish the mercy killer from the contract killer only by reference to their relative motivations,” then “our theory of moral culpability clearly departs from our doctrines of legal culpability” because “the mercy killer appears as nonculpable as the contract killer appears culpable.” *Id.* They also say that they are “sympathetic to the view that *moral* culpability is largely a function of the reasons for which persons act and the emotions that attend their actions,” and that it seems to them “that surprisingly little is learned about a defendant’s moral culpability by discovering that the defendant intended a legally prohibited harm or knew that he would cause it.” *Id.* at 1130–31.

question is how motive should be treated in practice. This Article proposes that motive's role in criminal punishment be expanded beyond its present boundaries and that the extended role be played largely at sentencing. The Article also proposes a sentencing system in which motive plays this expanded role.

The law of motive, as it presently exists, is disjointed and sometimes contradictory. Although certain substantive offenses and defenses require a determination or an evaluation of motive, only sometimes do they provide a framework for identifying the relative worth of different motives. Sentencing statutes and opinions provide more information about the relative value of different motives by identifying particular motives as aggravating or mitigating, but few sentencing systems distinguish (even implicitly) between varying degrees of aggravation or mitigation,¹⁶⁹ and some sentencing systems' treatment of motives appears incomplete or inconsistent.¹⁷⁰

I propose that, except where motive plays a fully inculpatory or exculpatory role, an explicit evaluation of a defendant's motives should occur at sentencing in accordance with a predetermined classification system of motives. The existing partial system of sentence adjustments

169. This is likely a function of the fact that, aside from the Federal Sentencing Guidelines, the most comprehensive sentencing systems are capital sentencing regimes, which require only a binary determination.

170. For example, the statute for the District of Columbia that specifies aggravating sentencing factors includes whether the offender's conduct "involved a drive-by or random shooting," but makes no mention of whether the crime was motivated by terrorism. D.C. CODE § 24-403.01(b-2)(2)(E) (Supp. 2006). The D.C. statute specifying aggravating factors for first degree murder also does not mention terrorism. D.C. CODE § 22-2104.01 (2001 & Supp. 2006).

The Model Penal Code lists "avoiding or preventing a lawful arrest or effecting an escape from lawful custody," "pecuniary gain," and "exceptional depravity" as aggravating motives for the purpose of the imposition of the death penalty. MODEL PENAL CODE § 210.6(3)(f)-(h) (Official Draft and Explanatory Notes 1962) (listing several death penalty factors). But those motives are not listed in the noncapital section of the Code that identifies the factors permitting a court to sentence a defendant "to an extended term of imprisonment." *Id.* § 7.03 ("The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section."). This omission is especially odd in light of the Code's consistent treatment of its one mitigating motive: a defendant commits a murder "under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct." *Id.* § 210.6(4)(d). The Model Penal Code denotes that the defendant's motive is a "[m]itigating [c]ircumstance[]" for capital sentencing purposes. *Id.* § 210.6(4). Similarly, the Code provides that for noncapital offenses, if "there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense," the court should "accord[] weight" to this factor in determining whether to impose a noncustodial sentence. *Id.* §§ 7.01(2)(d), 7.01(2).

Also, the Federal Sentencing Guidelines provide sentencing adjustments based on particular motives for some offenses but not for other offenses. For example, the motive of helping one's spouse or child is treated as a mitigating factor only for immigration offenses. *See supra* note 90.

based on motive should be expanded into a system that anticipates the evaluation of each defendant's motives and increases or decreases the amount of punishment when that motive materially differs from the motive for which the offense ordinarily would have been committed.

Some might object to an expanded role for motive if that role results in less punishment. If the law explicitly states that it will punish individuals who commit crimes with certain motives less severely, and if the law identifies those motives *ex ante*, then individuals are more likely to commit a crime in the presence of that motivation.¹⁷¹ A system that decreases punishment based on motives, the argument goes, not only may detract from the normative message of illegality,¹⁷² but also reduces the penalties for lawbreaking in precisely those circumstances “when temptation to crime is strongest.”¹⁷³ This objection is not limited to motive. Rather, it can be made in any context where the law faces a “trade-off between the competing values of deterrence and compassion (or fairness).”¹⁷⁴

There are three reasons why the proposed system for motive withstands this objection. First, the objection rests only on the narrow, conventional perspective of deterrence.¹⁷⁵ As explained above, an individual's motive is, at times, so central to perceptions of blameworthiness that a system that fails to take account of differing motives would, in some cases, fail to conform to perceived notions of fairness.¹⁷⁶ If the law differs substantially from perceived notions of fairness, then it is less likely to deter.¹⁷⁷ Second, even assuming that reducing punishment for specified motives will decrease deterrence, the effect will be less pronounced if motive is treated as a sentencing issue, rather than as an issue of liability. That is because deterrence results

171. See, e.g., Dan-Cohen, *supra* note 81, at 632 (“[B]ecause individuals are familiar with the decision rules, they may well consider those rules in shaping their own conduct.”).

172. See *id.*

173. *Id.* at 633. As Meir Dan-Cohen explains the argument, even when external pressures impel an individual toward crime, the law should by no means relax its demand that the individual make the socially correct choice. If anything, the opposite is the case: “[I]t is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary.”

Id. (quoting 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 107 (1883)).

174. *Id.* For example, it previously has been explored in the context of the defense of duress. See *id.*

175. See *supra* notes 122–24 and accompanying text.

176. See *supra* text accompanying notes 100–02.

177. See *supra* notes 131–33 and accompanying text.

principally from the threat of being subject to conviction and punishment.¹⁷⁸

Third, *ex ante* identification of aggravating and mitigating motives is necessary to ensure consistent application of sentencing principles across defendants. Without consistent treatment of motives, we cannot ensure that similarly situated offenders receive similar punishments. Moreover, specifying how motives will be treated at sentencing *ex ante* will not only promote more uniform treatment of defendants, but will also help to guarantee that motive's role in criminal punishment is transparent. Transparent treatment of motives is necessary to ensure that punishment accurately reflects moral values (rather than entrenched hierarchies).¹⁷⁹

A. WHY SENTENCING?

Sentencing is the poor relation in criminal law. While criminal liability has a long pedigree, with several important liability doctrines tracing their roots to the early common law, sentencing's development began later and has been comparatively erratic. Criminal sentencing has only recently acquired a role as an institutional player in criminal law, and the boundaries of its potential influence are in flux, making it an area of law that is particularly amenable to proposed changes, such as an expanded role for motive.

178. See *infra* text accompanying notes 189–90 (explaining that sentencing allows for finer distinctions of culpability than determinations of liability).

179. Without a comprehensive and transparent system of motive, undesirable prejudices can slip in through the back door. For example, as Victoria Nourse explains in her article about the provocation defense, in those jurisdictions where the evaluation of a defendant's motives is largely hidden from view—that is, those jurisdictions that have adopted the modern “extreme emotional disturbance” version of the provocation defense—courts have allowed the defense for defendants who killed their lovers when the latter tried to leave the relationship. Nourse, *supra* note 52, at 1348, 1356. In contrast, those jurisdictions that follow the common law approach, and thus are more explicit in their evaluation of the adequacy of defendants' reasons for provocation, do not allow the defense in those situations. *Id.* at 1356. This suggests that unless the evaluation of a defendant's motives is transparent, the outcome of that evaluation may not conform to our shared moral judgments. As Kahan notes, if the “morally judgmental character of criminal law” is obscured, it “stack[s] the rhetorical deck of the law in favor of traditionally hierarchical social norms and against progressive egalitarian ones.” Kahan, *supra* note 4, at 190. See also Nourse, *supra* note 52, at 1379.

When reformers rid the law of the nineteenth-century categories, they believed they were ridding us of a long-outdated code of honor. When they declined to judge the adequacy of provocation, they rejected an approach that bestowed privileges on certain relationships. But getting rid of the categories, and forcing normative judgments on juries, did not prevent courts from deciding normative questions. It simply disguised these judgments by changing the ways we argued about them. It transformed them into questions that did not seem normative at all, into questions about situations or emotions or the defendant's characteristics.

Id.

“[T]he English trial judge of the later eighteenth century had very little explicit discretion in sentencing.”¹⁸⁰ A particular crime was subject to a particular penalty—often death¹⁸¹—and the only issue resolved at trial was that of guilt.¹⁸² Discretionary sentencing became the American norm no later than the nineteenth century.¹⁸³ In discretionary sentencing systems, legislatures set the statutory maximum sentences (and, on some occasions, statutory minimum sentences) for different offenses, and the sentencing judge has the discretion to impose any sentence on a particular defendant within the wide statutory range.¹⁸⁴ The sentencing judge’s determination is

180. *Apprendi v. New Jersey*, 530 U.S. 466, 479 (2000) (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900*, at 36–37 (A. Schioppa ed., 1987)).

181. See Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 696 (2005) (“The English practice in colonial times for felony offenses consisted of a set or determined sentence for every offense, primarily the death penalty or a fine which varied according to the value of the property stolen.”); Note, *The Admissibility of Character Evidence in Determining Sentencing*, 9 U. CHI. L. REV. 715, 715 n.1 (1942) (“In the seventeenth century practically all felonies called for the death sentence. In Blackstone’s day Parliament had provided that the death sentence should be imposed in not less than 160 different crimes.” (internal citation omitted)). See also THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800*, at 274 (1985) (“[E]ighteenth-century legislation greatly increased the scope of offenses for which death was at least a potential sanction . . .”).

182. To compensate for the harshness of required punishments, English juries often acquitted defendants, despite proof of guilt, or convicted defendants only of a lesser offense, for which the proscribed sentence was noncapital. See GREEN, *supra* note 181, at 277, 286 (“Many capital defendants [in the mid-eighteenth century] were saved by an undervaluation or a ‘finding’ of simple larceny instead of burglary . . . and thus were convicted of an offense for which transportation or whipping were the prescribed sanctions. . . . [M]ost defendants were either acquitted or awarded a partial verdict.”).

183. The early history of discretionary sentencing—especially the date of its adoption in the United States—is a matter of some dispute. Compare STITH & CABRANES, *supra* note 136, at 9 (“From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.”), and *Williams v. New York*, 337 U.S. 241, 246 (1949) (“[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.”), with Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892–93 (1990) (“[U]p through 1870, legislators retained most of the discretionary power over criminal sentencing . . . the period of incarceration was generally prescribed with specificity by the legislature.”), and Note, *supra* note 181, at 715–16 (“During the nineteenth and twentieth centuries American criminal legislation has shifted from the fixed sentence type of criminal statute to the discretionary sentence type of statute.” (internal footnote omitted)). But everyone seems to agree that discretionary sentencing was the norm by the late nineteenth century.

184. While sentencing decisions are usually made by judges, several jurisdictions in early America allowed for sentencing by juries. See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 316–23 (2003); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790–93 (1999). With few exceptions, jury sentencing occurs now only in capital cases. See Iontcheva, *supra*, at 314 (“Only six states currently employ jury sentencing in non-capital cases, down from thirteen in 1960.”).

not ordinarily subject to appellate review.¹⁸⁵ In the late 1970s and early 1980s, there was a movement to create determinate sentencing systems and to limit the discretion of sentencing judges. The determinate sentencing movement was motivated in large part by a desire to ensure that defendants who committed similar crimes received similar sentences.¹⁸⁶ Different jurisdictions approached the desired goal of uniformity in different ways. Some states provided judges with advisory guidelines about sentence lengths.¹⁸⁷ The United States Congress created a determinate sentencing system that provided mandatory “guidelines.”¹⁸⁸ The Federal Sentencing Guidelines severely limit judicial sentencing discretion by specifying narrow ranges of punishment for different offenses and providing for upward or downward adjustments of that punishment range if different specified “factors” are present.¹⁸⁹ The Guidelines allow a judge to depart from the specified range only under very limited circumstances.

As a general matter, accounting for motive at sentencing is sensible and efficient because the sentencing process allows for finer distinctions of culpability than determinations of liability. Criminal liability is essentially binary: a defendant is either guilty or not guilty of an offense.¹⁹⁰ By contrast, because criminal sentences are measured chronologically, a court can adjust a defendant’s sentence by a percentage of the overall sentence or by different set amounts of time.¹⁹¹ This flexibility is especially useful in making fine distinctions between the relative blameworthiness of various offenders. While a role for motive at sentencing will result in finer distinctions among offenders’ blameworthiness, sentencing is not, however, the appropriate forum to evaluate motives that are fully

185. See *Dorszynski v. United States*, 418 U.S. 424, 431–32 (1974) (citing several cases for “the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end”).

186. For a historical account of this movement and the major players, see STITH & CABRANES, *supra* note 136, at 29–48.

187. These states, which include Minnesota, Washington, Florida, Pennsylvania, Oregon, Tennessee, Louisiana, and Kansas, promulgated “presumptive sentencing guidelines,” which specify a narrow presumptive sentence for the “ordinary case” of a given offense, depending on an offender’s prior record of convictions. Judges retain power to depart up or down from the presumptive sentence in an unusual case, but must give reasons for doing so, and such departures become subject to appellate review.

Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law*, 64 U. COLO. L. REV. 645, 647 & n.10 (1993).

188. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984).

189. See STITH & CABRANES, *supra* note 136, at 192–93 (app. D) (illustrating how sentencing decisions are made under the federal guidelines).

190. Of course, if a defendant has a partial defense, such as provocation, then she is guilty but her liability is limited to a lesser charge.

191. If the punishment takes the form of a fine, it can also be adjusted by a percentage of the overall fine or by different set amounts of money.

inculpatory or exculpatory.¹⁹² Such motives are dispositive on the issue of criminal liability. Even though the sentencing process could result in a decision not to subject a defendant to punishment in the form of imprisonment or a fine, a criminal conviction carries other collateral consequences (such as disenfranchisement and the acquisition of a “criminal record”) that should not be imposed on defendants whose motives fully exculpate them. Also, in situations where a defendant’s motive is dispositive of guilt, it is important that the defendant receive all of the procedural protections afforded at the criminal liability stage.¹⁹³

While fully inculpatory and exculpatory motives are most sensibly accounted for at the liability phase of a criminal prosecution, partially inculpatory or exculpatory motives present a closer question.¹⁹⁴ Several recent Supreme Court cases—*Apprendi v. New Jersey*,¹⁹⁵ *Blakely v. Washington*,¹⁹⁶ and *United States v. Booker*¹⁹⁷—illustrate the tensions in this area. In *Apprendi*, the Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁹⁸ Thus, if legislators conclude that a particular motive sufficiently alters a defendant’s blameworthiness such that the maximum punishment available to sentencing judges should be different,¹⁹⁹ then under the reasoning of *Apprendi*, the motive must be

192. Cf. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1494–95 (2001) (distinguishing between a fact that “separates the guilty from the innocent” and “a fact that separates the more guilty from the less guilty”). For a more complete account of fully inculpatory and exculpatory motives, see Part II.A, *supra*.

193. Criminal sentencing does not afford the same procedural protections. See STITH & CABRANES, *supra* note 136, at 28 (“[T]he Court’s seminal case of *Williams v. New York*,” 337 U.S. 241 (1949), “explicitly embraced the traditional separation of adjudicatory procedures from sentencing procedures, and declined to place significant due process restraints on the latter”; the *Williams* Court indicated “that the ‘salutary and time-tested protections’ of due process are simply inapplicable to sentencing.”). See also Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 663–69 (2005) (describing “a series of decisions” in which the Supreme Court “consistently . . . repudiated defendants’ arguments for expanding the procedural rights available during sentencing”).

194. For a fuller account of partially inculpatory and exculpatory motives, see Part II.B, *supra*.

195. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

196. *Blakely v. Washington*, 542 U.S. 296 (2004).

197. *United States v. Booker*, 543 U.S. 220 (2005).

198. *Apprendi*, 530 U.S. at 490.

199. For example, several jurisdictions have concluded that a defendant who commits a crime with a motive of bias or hate should be subject to significantly higher penalties.

In Vermont, a hate crime is subject to *double* the maximum prison term. Under Florida’s enhancement provision, the maximum possible sentence is tripled. The hate crime statute challenged before the Supreme Court in *Wisconsin v. Mitchell* provided for a two-year maximum prison term for aggravated battery, but if the perpetrator was motivated by bias, the maximum punishment jumped to seven years.

charged and proved to a jury beyond a reasonable doubt. *Blakely* extended the reasoning of *Apprendi*, holding that mandatory determinate sentencing systems may violate the Sixth Amendment if they increase a defendant's potential maximum sentence based on a fact not proven to a jury.²⁰⁰ *Booker* applied the ruling in *Blakely* to the Federal Guidelines, holding that the Guidelines could serve only as nonmandatory rules, and that sentencing judges were free to sentence offenders outside of the Guideline ranges.²⁰¹

There are many possible benefits and drawbacks to various sentencing systems—discretionary, determinate, and the jury-based system contemplated in *Blakely*²⁰²—and it would require a separate article to explore the relative merits of each system.²⁰³ This Article does not attempt such an exploration. It proposes only that motive play an expanded role at sentencing. And while it frames the proposal in a determinate sentencing system, the decision to use the framework of a determinate sentencing system should not be viewed as a deliberate endorsement of such a system; rather a determinate system is used only because it can most easily account for the aggravating and mitigating nature of motives and because the most visible sentencing system, the federal system, presently employs a (mostly) determinate sentencing system.

Accounting for motive at sentencing is consistent with historical practice. Sentencing has long been viewed as the relevant forum for individual assessment regarding an offender's blameworthiness and the harm she caused.²⁰⁴ More specifically, as previously mentioned, motive has a history as an appropriate sentencing factor.²⁰⁵ A system that identifies motives and evaluates their relative worth *ex ante* simply standardizes what occurs on an *ad hoc*, case-by-case basis in discretionary sentencing

JACOBS & POTTER, *supra* note 45, at 30 (internal footnote omitted).

200. *Blakely*, 542 U.S. at 313–14.

201. *Booker*, 543 U.S. at 245–46.

202. For an account of the “continuum of possibilities for the design of sentencing systems” see Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 156–60 (2005).

203. Indeed, several commentators have explored the relative merits of different sentencing systems. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 905–08, 918–25, 939–49 (1991); David Yellen, *Saving Federal Sentencing Reform After Apprendi, Blakely and Booker*, 50 VILL. L. REV. 163, 173–87 (2005). See also Berman, *supra* note 193, at 683–85 (describing the present rift on the Supreme Court between the Justices who seek to “provide greater procedural protections to individual defendants in the application of modern statutory and guidelines sentencing systems” and those Justices who embrace “whatever sentencing procedures are needed to foster the modern sentencing reform goal of achieving greater sentencing uniformity”).

204. In contrast, the liability phase is concerned with factual guilt—that is, did the defendant commit the offense and, if so, did she have a defense.

205. See *supra* Part II.C.

systems. This standardization has the additional benefits of ensuring (1) sentencing uniformity among similarly motivated defendants and (2) that the assessment of motives' blameworthiness occurs in a more public setting and is thus subject to scrutiny.²⁰⁶

Adopting a system that accounts for motive at sentencing at this time, would cause little disruption because sentencing law is presently in flux. The recent decisions in *Blakely*²⁰⁷ and *Booker*²⁰⁸ altered the landscape of determinate sentencing. Rather than return to a system of discretionary sentencing, some institutional players (notably the Department of Justice) have indicated that they may seek a legislative solution to ensure continued legislative control of sentencing,²⁰⁹ and since the decision in *Booker*, debates on several substantive sentencing issues that were perceived as settled have recently been reopened.²¹⁰ The present state of flux in sentencing law will limit any disruptive effects associated with instituting a new system with an expanded role for motive. Even in the absence of such flux, it would likely be easier to accommodate a changed role for motive in sentencing than at liability because substantive sentencing law has no real common law tradition,²¹¹ and because aggravating and mitigating factors are always subject to legislative or agency change.

206. See *supra* note 177.

207. *Blakely v. Washington*, 542 U.S. 296 (2004).

208. *United States v. Booker*, 543 U.S. 220 (2005).

209. See, e.g., *Federal Sentencing After United States v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of United States Attorney William W. Mercer), available at <http://judiciary.house.gov/media/pdfs/mercer031606.pdf>; Alberto Gonzales, Attorney General of the United States, Address at the National Center for Victims of Crime (June 21, 2005), reprinted in 17 FED. SENT'G REP. 324 (2005).

210. For example, in the wake of *Booker*, several district courts refused to impose the lengthy sentences for crack-cocaine, reviving the controversy regarding the 100 to 1 disparity between the treatment of crack-cocaine and powder cocaine required under the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002(2), 100 Stat. 3207, 3207-2 to -3 (1986) (codified as amended at 21 U.S.C. § 841(b)(1) (2000)). E.g., Pamela A. MacLean, *Cracking the Code: After 'Booker,' Judges Reduce Crack Cocaine Sentences*, NAT'L L.J., Oct. 3, 2005, at 1. To date, appellate courts have not responded favorably to the idea that district courts may depart from the now-advisory Guidelines solely on a policy-based objection to the sentencing differential for offenses involving crack-cocaine and offenses involving powdered cocaine. See, e.g., *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006); *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006); *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006).

211. Because sentencing was not subject to appellate review prior to the enactment of the Sentencing Reform Act of 1984, no common law of sentencing ever developed. See STITH & CABRANES, *supra* note 136, at 9 ("For over two hundred years, there was virtually no appellate review of the federal trial judge's exercise of sentencing discretion."). Cf. James G. Carr, *Some Thoughts on Sentencing Post-Booker*, 17 FED. SENT'G REP. 295, 296 (2005) (noting that, after the Supreme Court's ruling in *Booker*, rulings by appellate courts on sentencing matters "will serve the function they have always served: namely, to develop on a case-by-case basis a coherent body of law which, as to many issues, is likely to be uniform across the Circuits").

B. THE PROPOSED SYSTEM

I propose that the expanded role for motive at sentencing occur within a determinate sentencing system that provides for sentencing adjustments if a defendant's motive is "better" or "worse" than the motive that is ordinarily associated with the defendant's particular offense. This system has two significant benefits. First, it strikes a balance between the twin goals of sentencing: doing individual justice and promoting sentencing uniformity among similar offenders. Second, it ameliorates several practical concerns that have been raised about the ability to identify a defendant's motive.

The proposed system will specify, *ex ante*, a list of recurring motives—such as financial gain, infliction of emotional harm, et cetera—and classify those motives along a continuum from highly mitigating to highly aggravating. The system will also assign an "ordinary motive" for every offense; for example, economic crimes are ordinarily committed for pecuniary gain. When a defendant is convicted of a particular crime, it will be assumed that she committed the crime for the ordinary motive. Her sentence will be adjusted for motive only if one party elects to introduce evidence suggesting that the defendant acted for a different motive. The defendant will be free to introduce evidence that she acted for a mitigating motive (a motive that is classified as better than the ordinary motive), just as the prosecution will be free to introduce evidence that the defendant acted for an aggravating motive (a motive classified as worse than the ordinary motive). The party introducing evidence will bear the relevant burden of proof,²¹² and if the party meets that burden, then the sentencing court will adjust the defendant's sentence based on her motive.

The classification system that I propose consists of five motive categories: highly mitigating, partially mitigating, neutral, partially aggravating, and highly aggravating.²¹³ Within the highly mitigating category are those offenders whose motives are especially sympathetic (for example, the mercy killer). The partially mitigating category includes the

212. The appropriate burden will depend upon the sentencing system; as the Supreme Court clarified in *Booker*, the burden of proof for sentencing facts will depend upon whether the sentencing system's articulated sentences are mandatory or advisory. See *United States v. Booker*, 543 U.S. 220, 231–33 (2005).

213. Several of motive's critics—specifically those whose objections are aimed at hate crime enhancements—have argued that if sentences are to be adjusted based on an offender's motive, then sentencing law must account for more than simply bias or prejudice as a motive. See JACOBS & POTTER, *supra* note 45, at 80; Hurd & Moore, *supra* note 3, at 1131. I agree and believe these categories will help achieve that goal.

person who acts to benefit someone else in need (for example, the mother who steals to feed her hungry children). The people who break the laws to fulfill their own needs fall in the neutral category (for example, the person who breaks the law to satisfy her drug addiction). Pecuniary gain is an example of a partially aggravating motive; and promoting terrorism and desiring to inflict emotional trauma are examples of highly aggravating motives. The sentencing adjustment that a defendant receives under this proposed system will correspond to the classification of her motive: A defendant acting with a highly mitigating motive will receive a greater reduction than a defendant acting with a partially mitigating motive. A defendant acting with a highly aggravating motive will receive a larger sentencing enhancement than a defendant who acts with a partially aggravating motive. The sentencing adjustment will also depend upon the ordinary motive for the defendant's offense. A defendant's sentence will be increased only if the prosecutor proves that her actual motive was more aggravating than the ordinary motive for the crime. Her sentence will be decreased only if the defendant proves that her actual motive was more mitigating than the ordinary motive. Here is an illustration:

A defendant commits an economic crime, which has an ordinary motive of personal financial profit, a partially aggravating motive. The defendant may argue that she should receive a reduced sentence because she acted with a more mitigating motive, such as personal need (a neutral motive), or to help a family member (a partially mitigating motive). The prosecutor may argue for an increased sentence only if the defendant acted for a highly aggravating motive, for example if she committed the economic crime in order to funnel the illegally obtained funds to a terrorist organization.

This proposed system strikes a balance between the two competing goals of sentencing: individualized proportional punishment and uniformity.²¹⁴ It allows for an adjustment in the amount of punishment if an individual offender's motive materially alters her blameworthiness. Determinate sentencing has been criticized as valuing similar treatment of offenders at the expense of individualized determinations of justice.²¹⁵ The

214. See Breyer, *supra* note 11, at 13. See also Antony Duff, *Principle and Contradiction in the Criminal Law: Motives and Criminal Liability*, in *PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE* 156, 176 (Antony Duff ed., 1998) (identifying "tension between two conceptions of 'doing justice' in sentencing": determining "the sentence appropriate to the individual offender and her particular offence [sic]" and treating like cases alike).

215. E.g., Alschuler, *supra* note 203, at 908–15 (noting that determinate sentencing systems focus mainly on the harm of a defendant's conduct and that "offenders who have produced comparable harms differ greatly in culpability").

proposed system seeks not only to account for varying levels of culpability among offenders, but also to maintain sentencing uniformity among similarly culpable defendants by identifying relevant motives and specifying the amount of the sentence adjustment. Of course, individual circumstances may arise for which the proposed system may not prove adequate—for example, some offenses may involve motives sufficiently unique that their classification into one of the five categories may pose difficulties. In those circumstances, sentencing judges should use their discretion, as informed by the classification system and subject to some form of appellate review, to make an appropriate adjustment.

Before specific practical objections to the proposed system are addressed, it is necessary to anticipate the more general criticism that the administrative costs associated with designing and implementing the proposed system may outweigh its potential benefits. Such a criticism is not unique to the proposed system: every additional adjustment in a determinate sentencing system imposes additional administrative costs,²¹⁶ meaning that a system cannot fully account for all possible factors that may bear on a defendant's blameworthiness. But, at the same time, administrative ease cannot be the sole governing principle for criminal sentencing. While a system that accounts for every variation in defendants' blameworthiness may impose too high an administrative burden, a system that does not account for *any* variation in blameworthiness imposes too high a cost on the individual defendants for whom the sentencing process is supposed to achieve justice.²¹⁷ Striking a balance between administrative

216. See Breyer, *supra* note 11, at 13 ("The more the system recognizes the tendency to treat different cases differently, however, the less manageable the sentencing system becomes. The punishment system becomes much harder to apply as more and more factors are considered" (internal footnote omitted)).

217. Then-Judge Stephen Breyer identified this problem when he discussed the "competing rationales behind a 'real offense' sentencing system and a 'charge offense' system." Breyer, *supra* note 11, at 8–9. In a "charge offense" system, punishments correlate directly with the offense for which the defendant was convicted: "One would simply look to the criminal statute, for example, bank robbery, and read off the punishment provided in the sentencing guidelines." *Id.* at 9. "The principal difficulty with a presumptive sentencing system is that it tends to overlook the fact that particular crimes may be committed in different ways, which in the past have made, and still should make, an important difference in terms of the punishment imposed." *Id.* In a "real offense" system, the amount of punishment is determined by the specific circumstances of the case, and "each added harm that the offender brought about would lead to an increase in the sentence." *Id.* at 10. Judge Breyer noted that the "real offense" system required the development of procedures for fact finding above and beyond a finding of guilt and "[m]aking such post-trial procedures administratively manageable is difficult":

[T]he more facts the court must find in this informal way, the more unwieldy the process becomes, and the less fair that process appears to be. At the same time, however, the requirement of full blown trial-type post-trial procedures, which include jury determinations of fact, would threaten the manageability that the procedures of the criminal justice system were designed to safeguard.

ease and doing justice in individual cases requires a system to identify those circumstances that are central enough to an individual defendant's blameworthiness to justify the added administrative burdens.

In the case of motive, the appropriate balance is not an all-or-nothing decision. Some motives may provide significant information about a defendant's blameworthiness, while other motives may provide little information. Consider two defendants who steal money from an unattended cash register. One defendant is motivated to take the money so that she may obtain expensive medical help for her seriously ill spouse. The second defendant is motivated by a desire to impress her friends. Although both defendants committed the offense of theft with a motive that differs from the ordinary motive for theft (personal financial gain), only the first defendant's motive materially affects her blameworthiness. Helping someone else in need is significantly less blameworthy than acting for personal financial gain, and thus the added administrative costs are warranted in order to ensure that the first defendant receives a sentence reduction. In contrast, committing a crime to impress others is not so different from acting for financial gain to justify the administrative costs associated with adjusting a sentence.

The five motive categories and the "ordinary motive" presumption serve as sorting mechanisms to ensure that administrative costs are imposed only when they are outweighed by a material difference in blameworthiness. The examples of the two defendants who steal from the cash register illustrate the sorting mechanism. The proposed system classifies financial gain (the ordinary motive for theft) as a partially aggravating motive. Helping someone else in need is classified as a partially mitigating motive, and thus will result in a sentence reduction for the first defendant. But committing a crime to impress others is not different in kind than acting for financial gain, and is thus also likely to be categorized as a partially aggravating motive. Because the second defendant's motive falls within the same category as the ordinary motive, she is not entitled to a sentence reduction, and she therefore has no incentive to raise her motive as an issue at sentencing. Indeed, under the proposed system, parties have an incentive to make motive an issue at sentencing (and thus impose additional administrative costs) only when they can show that a defendant's actual motive falls in a different category than the ordinary motive. Because the proposed system includes five motive categories, it is capable of distinguishing between the relative

Id. at 10–11. See also Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617, 623–24 (1992).

blameworthiness of many motives, while at the same time ensuring that the administrative costs associated with determining a defendant's actual motive and adjusting her sentence are imposed only when her blameworthiness differs significantly from the ordinary motive.

C. DEFENDING THE PROPOSED SYSTEM

Some commentators have raised practical objections to motive's role in punishment.²¹⁸ Those practical objections include challenges to the ability to rank different motives and the ability to identify a defendant's true motives. The classification and determination of the relative culpability of motives may prove challenging, as there is no easy theory to explain why some motives are perceived as more blameworthy than others. Concerns about the ability to identify offenders' motives are less difficult to address. As demonstrated below, the proposed system's use of presumed motives and assignment of burdens of proof should significantly alleviate these concerns.

1. Ranking Motives

Alon Harel and Gideon Parchomovsky contend that "motives cannot be readily ranked by their degree of culpability."²¹⁹ They contrast motives with intentions, stating:

While no one disputes that a defendant who intentionally killed a person is more blameworthy than a defendant who negligently brought about the same result, and should therefore be punished more severely, many would question the proposition that an offender motivated by prejudice is more culpable than one motivated by greed, spite, or pure sadism.²²⁰

There are several responses to this criticism. First, as discussed above, intentions are not always the best measure of culpability; the intentional mercy killer is less culpable than the reckless driver.²²¹ Second, even if Harel and Parchomovsky are correct regarding the motives that they have listed—prejudice, greed, spite, and sadism may be equally culpable motives—we can identify other motives whose differing levels of

218. Possible substantive objections are discussed in Parts III.B and III.C, *supra*.

219. Harel & Parchomovsky, *supra* note 75, at 513.

220. *Id.*

221. *See supra* text accompanying notes 100–02.

culpability “no one disputes,”²²² such as financial need versus the desire for financial profit²²³ or relieving suffering versus enjoying the infliction of pain. Third, there is a strong argument that the motives Harel and Parchomovsky identify *can* be ranked according to culpability. For example, the Federal Sentencing Guidelines appear to treat sadism—“an aggravating, nonmonetary objective”—as a motive that is more culpable than financial profit.²²⁴

The more difficult issue that Harel and Parchomovsky have identified is the challenge of *how* to rank various motives by their degree of culpability. The neutralist wants to avoid such a ranking because it will require a moral assessment (and thus a particular version of the Good).²²⁵ But such assessments are unavoidable in criminal law and criminal sentencing. Each time that a particular sentence or sentencing range is prescribed for an offense, the length of the sentence indicates a ranking of the offense in relation to other offenses.²²⁶ That sentence may be determined legislatively²²⁷ or by a body of experts, such as a sentencing commission. Regardless of its source, such a moral assessment is a necessary predicate for punishment.²²⁸

This Article does not attempt to identify or classify all motives that may be relevant for sentencing.²²⁹ Such an undertaking cannot be condensed into the space of one Article, as it would require the

222. Harel and Parchomovsky made this statement in an article discussing the justifications for hate crime legislation. See Harel & Parchomovsky, *supra* note 75. Their point may simply be the same as Hurd, Moore, Jacobs, and Potter—that if sentences are to be adjusted based on an offender’s motive, then sentencing law must account for more than simply bias or prejudice as a motive. See *supra* note 213 and accompanying text.

223. See *supra* notes 118–19.

224. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2004) (Larceny, Embezzlement, and Other Forms of Theft) (Application Note 19) (stating that if a “primary objective of the offense was an aggravating, non-monetary objective,” such as “to inflict emotional harm” an upward departure may be warranted). Whether greed (that is, financial gain) is worse than spite may be more difficult to decide. While both motives seem relatively culpable, I have found no sentencing system that identifies spite as an aggravating motive. In contrast, many sentencing systems treat financial gain as an aggravating motive. See *supra* notes 62–65 and accompanying text.

225. See *supra* Part III.C.

226. Cf. ASHWORTH, *supra* note 107, at 72 (stating that the touchstone of desert theory is “proportionality”; “[o]rdinal proportionality concerns the relative seriousness of offences [sic] among themselves”).

227. See Kaufman, *supra* note 18, at 320 (“[T]he bewildering variety of motives—political, moral, religious, economic, and so forth—calls for decisions that require the sort of complex weighing and balancing that is more appropriate to the legislative than to the judicial process.”).

228. See *supra* notes 155–68 and accompanying text.

229. Nor does it give a full account of the moral assessments underlying the examples given for the five categories of motives.

identification and assessment of many individual motives. More importantly, there does not appear to be any convenient theory that could be applied to different motives in the abstract to avoid an individualized assessment and classification of different motives. Punishment theories provide explanations of why society punishes, but those explanations do not include information regarding how to make specific criminal punishment decisions, such as what actions to criminalize or the precise amount of punishment to impose. Neutralism is, as described above, not capable of providing this information either.²³⁰ The two theories generally characterized as competing with neutralism—communitarianism and perfectionism—are also incapable of providing substantive guidance. The communitarian believes that “principles of justice derive their moral force from values commonly espoused or widely shared in a particular community or tradition.”²³¹ Like the communitarian, the perfectionist believes that the state need not be completely neutral with respect to a conception of the Good. But where the communitarian’s conception of the Good is grounded in shared values, perfectionists believe that correct moral values are inherently right. While both of these theories provide a philosophical alternative to neutralism, neither provides the moral content needed to classify various motives, and both present risks of erroneous classifications.

Every instance of moral judgment—in criminal punishment and elsewhere—may produce undesirable results.²³² But the possibility of erroneous moral assessments should not lead us to eschew the moral component of sentencing if, for no other reason, punishment is *perceived* as having a moral component.²³³ Likewise, the challenge of classifying motives should not prevent motive from playing a larger role in criminal punishment. An offender’s motive contains valuable information about her blameworthiness, and, to the extent the criminal law does not incorporate

230. See *supra* Part III.C.

231. SANDEL, *supra* note 152, at x.

232. For example, as I have argued elsewhere, see Carissa Byrne Hessick, *Prioritizing Policy Before Practice after Booker*, 18 FED. SENT’G REP. 167, 167–68 (2006), the federal sentencing system is seriously flawed in its harsh treatment of crack-cocaine offenders. The Guideline’s treatment of crack-cocaine reflects neither the views of sentencing experts, that is, the Sentencing Commission, see U.S. Sentencing Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, reprinted in 10 FED. SENT’G REP. 184 (1998), nor the views of the public, PETER H. ROSSI & RICHARD A. BERK, NATIONAL SAMPLE SURVEY: PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 80 (1995), available at http://www.ussc.gov/nss/jp_exsum.htm (noting that there is “little support in public opinion for especially severe sentences for drug trafficking and little support for singling out crack cocaine for special attention”).

233. Cf. Buckley, *supra* note 151, at 136 (“[L]aws necessarily express approval or disapproval.”).

this information in its determination of punishment, the system is less than just.

No doubt, if multiple jurisdictions decide to adopt this proposed system, their identifications and classifications of motive will differ, just as their present systems of punishment lengths for specific offenses vary. But even if different jurisdictions reach different results, the process through which those results are adopted should involve legislators and legal commentators. That will ensure that the motive classifications reflect both shared moral values and considered moral judgment.

2. Identifying an Offender's Motives

The literature discussing motives in criminal punishment has identified three practical concerns with identifying a defendant's motives: first, that the evidence necessary to prove motive may be difficult to locate; second, that a defendant may have many different "levels" of motive; and third, that a defendant may act with "mixed motives." Although each of these concerns merits a response, the proposed sentencing system minimizes the bases for these concerns.

a. Evidence of Motives

The evidentiary concern is essentially as follows: because motive is a subjective, internal issue, it will be difficult to determine; and although intent is also subjective, it is easier to determine than motive because the evidence of an offender's *mens rea* will often be the same evidence that is used to establish the *actus reus*.²³⁴ For example, when trying to prove that a defendant is guilty of murder, the same evidence that establishes whether the defendant shot the victim, such as an eyewitness account of the shooting, will often be the same evidence that demonstrates the defendant's state of mind: if the witness testifies that the defendant pointed a gun at the victim's head and then pulled the trigger, that is evidence both that the defendant physically shot the victim, as well as that she shot the victim purposefully. In contrast, motive's critics argue, a defendant may act for

234. See Gardner, *supra* note 58, at 686–89 (“Actual motives are often hidden Serious attention to motivational analysis would require trial courts to consider detailed case histories of each defendant. . . . Many of these problems are avoided if inquiries into motives are abandoned and *mens rea* offense elements are defined in terms of specific states of mind, as in the Model Penal Code scheme.”). See also Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2087 (1994) (“We are . . . inexorably led to the notion that whatever can be said about mental states must be inferred from behavior.”).

any number of motives, and the evidence needed to prove a motive may be either difficult to locate or unreliable.²³⁵

But *mens rea* seems relatively straightforward and simple to prove in part because we make certain assumptions about a defendant's mental state based on her actions. (The popular formulation of this assumption is that an actor is presumed to have intended the consequences of her actions.)²³⁶

So, to return to the previous example, we assume that the defendant who points a gun at the victim and pulls the trigger does so because her purposeful intent is to shoot and kill the victim. We do not presume that the defendant was simply pointing the gun at the victim in order to scare him, and that she pulled the trigger accidentally. Nor do we presume that the defendant intended to shoot the bullet just past the victim's head rather than kill him. These are both plausible explanations of what the defendant's *mens rea* may have been at the time of the shooting, but we infer that the defendant intended to do exactly what she did, unless the defendant introduces evidence to the contrary.²³⁷

Motive-based sentencing can operate in the same way. Many crimes have an obvious purpose: Rape is usually committed for sexual domination and gratification. White-collar crime, burglary, and other thefts are usually done for pecuniary gain. Some other crimes are also often financially motivated, such as drug crime and kidnapping, though there may be other motivations. The drug offender may have acted to feed her personal addiction rather than for money, and the kidnapper may have acted to satisfy a baser desire, such as to exert control over her victim. But the information necessary to distinguish between motives for these crimes may

235. See Gardner, *supra* note 58, at 686–89.

236. See, e.g., *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 570 n.22 (1973) (Marshall, J., concurring in the result) (“Indeed, perhaps the oldest rule of evidence—that a man is presumed to intend the natural and probable consequences of his acts—is based on the common law’s preference for objectively measurable data over subjective statements of opinion and intent.”).

Some commentators have noted that “to know the motives of a defendant would, arguably, require a vastly greater inquiry into the specifics of his or her character and his or her goals than an inquiry into the intention involved in the specific act.” Kaufman, *supra* note 18, at 320. The proposed system places the burden of such an inquiry on the party seeking a sentence adjustment based on motive.

237. While a criminal court may not instruct jurors that they *must* presume the criminal defendant intended the consequences of her actions, *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (finding such an instruction violated due process because a juror might conclude that such an instruction was either “a burden-shifting presumption . . . or a conclusive presumption”), courts may instruct a jury “that it could *infer*” the necessary *mens rea* from the defendant’s conduct, *Rose v. Clark*, 478 U.S. 570, 581 (1986). “Indeed, in the many cases where there is no direct evidence of intent, that is exactly how intent is established.” *Id.*

be relatively easy to obtain: Does the defendant have a history of substance abuse? Did the kidnapper make a ransom demand? The sentencing fact finder can infer that the defendant acted for the presumed motive, just as the liability fact finder can infer that the defendant intended the consequences of her actions.²³⁸ And if the defendant wishes to prove that she acted for a less culpable motive, or if the prosecutor wishes to prove that the defendant acted for a more culpable motive, the party who wants a sentence adjustment can simply introduce the relevant evidence and the fact finder can decide whether the moving party meets the relevant burden of proof.

b. Levels of Motives

Once a defendant's reasons for acting have been identified, a question may arise about the relevant level of generality for identifying her motive. Returning to the example of the individual who sets fire to her neighbor's field in order to stop a forest fire from burning down a town, we can see the various "levels" of the defendant's motives: the actor set the fire because she wanted to save the town; the actor wanted to save the town because she wanted to protect her neighbors' homes; the actor wanted to protect her neighbors' homes because she knew that her neighbors would be grateful; the actor wanted her neighbors to feel grateful because it would make her feel good about herself.²³⁹ Having asked "why" a sufficient number of times, the individual whose motives seemed entirely good and humanitarian is revealed as acting for selfish reasons. The same thing occurs (though much earlier in the process) with a second hypothetical, proposed by Paul Robinson, of an individual who sets fire to the field: he sets the fire to save the town, but he wants to save the town only because his agents are conducting a large drug transaction at that location.²⁴⁰

These examples illustrate the question: at what level of an actor's desires do we identify her motives?

Often the answer is simply that the relevant "level" of motive is the first level that meaningfully distinguishes a particular defendant's motives

238. See Hitchler, *supra* note 14, at 118 ("In reference to proof of the formation of the requisite motive where the capacity to form it is not denied or successfully disputed, the ordinary rules of evidence prevail; and the existence or non-existence must be inferred from the circumstances.")

239. As Robinson explains:

There are, in the forest fire hypothetical, any number of levels of "purpose": to set fire to the field, to save the town, to serve humanitarian ends, and to make oneself feel like a good person. In each case the *motive* of the actor at one level of inquiry becomes the *purpose* or *real purpose* or *greater purpose* at the next level of inquiry.

2 ROBINSON, *supra* note 40, § 122(b)(3), at 18.

240. See *id.* § 122(b)(2), at 17.

from the presumed motive. For example, if an individual steals a sum of money, she is presumed to have acted for pecuniary gain. But if a defendant can demonstrate that she stole the money, not simply to profit personally, but to help care for a severely disabled family member, she has probably distinguished herself sufficiently from the ordinary defendant who acts for a financial motive, and she is thus entitled to a sentence reduction. Further inquiry into *why* she wants to help the family member will not ordinarily reveal additional relevant information. Once a mitigating “level” of motive has been identified, the prosecution is unlikely to identify evidence that will undermine the mitigating nature of the defendant’s motive. Evidence that the defendant wanted to help another because it would ultimately make her feel good about herself does not diminish the mitigating nature of her motive.

The drug dealer example of Robinson’s forest fire hypothetical is one situation where one might say that the next “level” of the defendant’s motive tends to negate the mitigating nature of his original motive (saving the town). But there is something troubling about this example. The second “level” of motive is a desire to engage in criminal activity. The defendant will presumably be punished for that pernicious motive when he is prosecuted for the underlying drug offense. Because that level of motive can be fully accounted for in a separate criminal proceeding, it does not appear necessary to adjust his punishment for setting fire to the field (or, in this case, deny him the justification defense) to account for the second “level” of motive.

c. Mixed Motives

The issue of “mixed motives” is perhaps the most pressing issue to resolve in identification of motives. Because people often act with more than one motive,²⁴¹ any substantial role for motive in punishment must be able to contend with multiple motives. For example, in a white-collar fraud case a defendant may argue at sentencing that she acted in order to benefit her corporate employer rather than for personal profit. But a successful company may generate more compensation and rewards for its employees,

241. As Hurd and Moore explain, “the determination of someone’s motives for action requires one to determine the nature and the relative weight of an inevitably complex set of motivational desires, emotions, and dispositional beliefs and to assess the overall merit of their combination.” Hurd & Moore, *supra* note 3, at 1132. *See also* Hitchler, *supra* note 14, at 115–16 (discussing “complex motives”—that is, mixed motives). *Cf.* 2 ROBINSON, *supra* note 40, § 122(b)(2), at 17 (“Must the justificatory purpose be the actor’s only purpose? A primary purpose? A necessary purpose, in the sense that the actor would not have engaged in the conduct *but for* the justifying interests? Can the justificatory purpose be entirely secondary and tangential, although real?”).

through bonuses and the ability to exercise stock options. Assuming the defendant knew about this additional compensation, how much of her offending conduct can be attributed to a personal desire for profit? Another example: the girlfriend who assists her drug dealer boyfriend's business by taking his phone messages may help her boyfriend because she loves him—a motive that seems neutral if not mitigating.²⁴² But to the extent that the girlfriend also receives significant material benefits (such as a free place to live, fancy clothes, or spending money) from her boyfriend's illegal business,²⁴³ a court must also question whether she acted for pecuniary gain.

It is important to clarify how to treat mixed motives under any motive-based punishment scheme. Without a legal standard—such as predominant reason, substantial reason, significant reason, or contributing reason²⁴⁴—different judges will undoubtedly classify these mixed motives differently, which will result in similarly motivated defendants receiving disparate sentences.

Many courts that have confronted the issue of mixed criminal motives have adopted the substantial motivating factor test.²⁴⁵ For example, the New York Court of Appeals adopted this standard when addressing the issue of mixed motives in a first-degree murder case involving witness elimination. The defendant argued that he could not be found liable for first degree murder on the grounds of witness elimination unless the state could prove that he had killed “the victim for the *sole* purpose of preventing the victim's testimony”—he claimed, in other words, that proof of “any motive for the murder other than his desire to prevent . . . [the victim's] testimony” would exonerate him.²⁴⁶ The court rejected this argument, as well as an argument by the State that would have permitted “a conviction when a defendant's motivation to eliminate a witness is insubstantial or

242. See generally Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-based Anomalies in the Gender-free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 977–80 (1993) (“[U]nless a female leaves her mate who is dealing drugs, it may be difficult for her to totally disassociate herself from the conspiracy. In other words, she is likely to be aware of his criminal endeavors and familial actions on her part often promote his criminal activities.”).

243. See, e.g., ADRIAN NICOLE LEBLANC, RANDOM FAMILY: LOVE, DRUGS, TROUBLE, AND COMING OF AGE IN THE BRONX 48 (2003) (describing a female drug conspiracy participant's decision to help work in her boyfriend's drug business; the decision may have been prompted by her desperation for money, “but love was what she wanted”).

244. See Gellman, *supra* note 3, at 357.

245. See JACOBS & POTTER, *supra* note 45, at 32 (stating that in hate crime prosecutions “the majority of courts hold that prejudice must be a *substantial* motivating factor”).

246. *People v. Cahill*, 809 N.E.2d 561, 583 (2003).

incidental.”²⁴⁷ Instead, the court adopted a rule that would permit a first degree murder conviction when a defendant possessed “mixed motives” so long as the defendant’s motivation to eliminate the victim as a witness “was a substantial factor in murdering her.”²⁴⁸

The substantial factor test is consistent with other legal doctrines. Like the requirement of causation in tort law, the test does not require proof that the defendant would not have committed the crime but for a particular motive, but it does ensure that truly secondary reasons for an offender’s behavior do not eclipse the true cause of her actions.²⁴⁹ Such a standard also appears consistent with employment discrimination law—an area of the law in which an actor’s motives are paramount in determining liability.²⁵⁰ Under federal antidiscrimination law, an employment discrimination plaintiff can prevail if she demonstrates that an impermissible consideration, such as race, “was a motivating factor for any employment practice, even though other factors also motivated the practice.”²⁵¹ Previous Supreme Court cases had held that an employer acting with a “mixed motive” could successfully defend against a discrimination charge so long as it could show that “its legitimate [that is, nondiscriminatory] reason, standing alone, would have induced it to make the same decision.”²⁵² The Civil Rights Act of 1991 subsequently overruled this holding, and now, even if the defendant-employer can

247. *Id.*

248. *Id.*

249. In tort law, a court will hold an actor responsible for the consequences of her conduct only when her conduct is the “proximate cause” of an injury.

In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would “set society on edge and fill the courts with endless litigation.” As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984) (internal footnote omitted) (quoting Mitchell, J., in *North v. Johnson*, 59 N.W. 1012 (Minn. 1894)).

250. In cases assessing potentially discriminatory peremptory challenges to jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986), overruled in part by *Powers v. Ohio*, 499 U.S. 400 (1991), another situation where motive is determinative, “[s]ome courts have upheld peremptory challenges despite the striking attorney admitting on the record that race or gender was a factor in the decision, provided that the striking attorney can also demonstrate that she would have struck the venire person for a neutral reason anyway,” while “[o]ther courts have found that any subjective discriminatory motivation, even when there are legitimate neutral motivations, is sufficient to uphold a *Batson* challenge,” Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 173–74 (2005) (collecting sources).

251. 42 U.S.C. § 2000e-2(m) (2000).

252. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion).

demonstrate that it would have taken the “same action in the absence of the impermissible motivating factor,” the employer is still liable.²⁵³

V. CONCLUSION

Motive plays an important role in criminal law. But its present role does not reflect its centrality to the relative culpability of different defendants. Because our system of criminal punishment is predicated on the moral assessment of a defendant and her actions, motive should play an expanded role in criminal punishment. The most efficient and effective method to accomplish this integration is to identify and classify various motives *ex ante* and then incorporate an individual defendant’s reasons for committing a crime into the amount of her punishment. Accounting for motives at sentencing will help ensure that a defendant receives the punishment she deserves and that criminal punishment accurately expresses the appropriate amount of moral condemnation for the defendant’s actions. Because a punishment system that reflects shared values is more effective at deterring crime, and because motives are perceived as relevant to a defendant’s blameworthiness, a punishment system that accounts for motives may also result in less crime.

253. But, in that situation, the plaintiff’s remedies are limited. 42 U.S.C. § 2000e-5(g)(2)(B).

