Criminal Justice Review
Volume 28, Number 2, Autumn 2003

MOTIVE, INTENTION, AND MORALITY IN THE CRIMINAL LAW

Whitley R. P. Kaufman

A remarkably persistent dispute in the criminal law concerns the relevance of a defendant's motive to his or her criminal liability. Specifically, the issue is whether a good or permissible motive should exculpate someone who has committed a criminal act. According to the orthodox rule, the defendant's motive is strictly irrelevant to liability. Recently, though, there has been a barrage of criticism aimed at this doctrine. Critics charge that the doctrine is not only false—judges do regularly consider motive—but also morally inexcusable, because a permissible motive ought to lessen the blameworthiness of the defendant. The present article defends the orthodox doctrine. It is argued both that it is factually accurate as a description of how judges behave but also, more importantly, that there is a sound moral basis for the doctrine that motives are irrelevant with respect to criminal liability. Critics have mischaracterized the role that motive plays in moral theory and practice, and careful attention to the significance of motive demonstrates that the orthodox criminal law doctrine is quite in line with our moral practices.

A persistent and important controversy in the criminal law involves the relevance of a defendant's motive to his or her criminal liability. If a person has committed a criminal act, should the fact that the person had a good motive be an exonerating factor? The traditional position in criminal law is clearly negative: "Hardly any part of penal law is more definitely settled than that motive is irrelevant," says Hall (1960, p. 88). Norrie (1993, p. 37) agrees that the irrelevance of motive to liability is "as firmly established . . . as any rule can be." This orthodox view holds that, although the good or bad motive of the agent may be relevant for judging a person's moral culpability, it is irrelevant for criminal liability.

The countermovement challenging the traditional position is led by Husak (1987, 1989), who argues that this orthodox view is deeply mistaken factually and normatively. Despite their rhetoric, he argues, courts in fact always have considered motive, and indeed they ought to. Husak declares (1989, pp. 4, 8) that "the pretense that motives are and ought to be immaterial to liability has had a pernicious impact on Anglo-American criminal theory," which, he claims, "continues to suffer from the pretense that motives are unimportant." He calls for a complete abandonment of the doctrine, which he sees as a "source of injustice" in the criminal law (1987, p. 147). Sistare (1987, p. 324) similarly argues that the orthodox rule simply masks the fact that motives are considered relevant in the law and that the law needs to be reformed in the direction of both "openly acknowledging the present place of agent motives in legal judgments" and also "extending that role."

Norrie (1993, 1998) has argued that the distinction between motive and intention reflects a fundamental contradiction in the law. LaFave and Scott (1986, Sec. 3.6), citing the intractability of this disagreement, suggest that the difficult task of trying to distinguish motive from intention should be abandoned and that it should just be acknowledged that the criminal law "takes account of some desired ends but not others." Such a counsel of defeat, however, should be taken only as a last resort. The present article analyzes this controversy and provides a defense of the orthodox doctrine of the irrelevance of motive to criminal liability.

THE ORTHODOX DOCTRINE OF MOTIVE AND INTENTION

It is typically said that, according to the traditional doctrine in the criminal law, motive is irrelevant to criminal liability. But this statement is not quite precise as it stands. The orthodox doctrine holds that motive is irrelevant to criminal liability unless it is specifically made relevant as part of the definition of a crime (for example in hate crimes) or unless there is an established criminal defense that requires the establishment of a motive (e.g., duress). Duff (1998, p. 170) expresses this distinction by stating that intention "is normally a sufficient condition of criminal liability."

This qualification is significant, because some critics apparently take such examples as hate crimes as evidence against the orthodox view (e.g., Husak, 1989, p. 8). In fact hate crimes (and other motive crimes) are not counterexamples to the rule that motive is irrelevant to liability. Quite the contrary; as will be discussed below, one of the rationales for the orthodox rule is precisely that it is up to the legislature, not the courts, to decide whether to make motive relevant to a given crime. In defining hate crimes, the legislature has explicitly directed the courts to take motive as a relevant factor in assessing criminal culpability. Numerous other kinds of criminal statutes also make motive an element of the crime (Horder, 1996). Nothing in the orthodox doctrine makes any claim about the wisdom of such legislative decisions, nor does the orthodox doctrine in any way suggest that a judge should override this legislative choice and ignore motive in such circumstances. The orthodox doctrine holds only that a court should not take a defendant's motive into account where the legislature (or common law) has not directed it to do so. Hence, the rest of this article will concern itself only with such cases, and not with the broader question of the appropriateness of hate crimes or other crimes that specifically include motive as an element.

It is also important to head off another possible misunderstanding here. The orthodox doctrine holds that motives are irrelevant specifically to criminal liability. Traditionally, both prosecutors and judges regularly take motive into account for purposes such as mitigating sentences. A prosecutor will sometimes decide not to prosecute a crime where the person acted with good motive (this issue often arises with regard to beneficent euthanasia) or, alternatively, to prosecute a crime more vigorously when it was motivated by a particularly distasteful motive such as racial

hatred. For the judge or jury, motive 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. Again, the orthodox doctrine does not question or criticize this use of motive (though of course it ought to be criticized, like any practice, when it is abused or used inappropriately). However, critics such as Husak invoke the use of motive at the sentencing stage as evidence of the hypocrisy or incoherence of the orthodox doctrine, claiming that it makes no sense to hold motive irrelevant for one purpose but not for another. Thus, a convincing justification for the orthodox rule will have to explain this apparent inconsistency, that motive is irrelevant to liability but relevant for other purposes in the criminal law.

This article defends the orthodox position both descriptively and normatively. It argues that courts in fact do regularly refuse to consider motives in assessing criminal liability. The article does not claim that they always do so, or that they are fully consistent in doing so, but only that the doctrine plays an essential role in jurisprudence. More importantly, however, the article argues for a normative foundation for the doctrine that motives should be irrelevant to criminal liability. In particular, the article challenges the apparent consensus of the critics (a consensus that appears among both "liberal" commentators like Husak and "critical" theorists like Norrie) that the doctrine is morally unacceptable. It is argued here that the doctrine that motive is irrelevant to criminal liability not only does not contradict our moral beliefs but indeed is quite congruent with them. For these reasons, the orthodox doctrine ought to be preserved.

RATIONALE FOR THE ORTHODOX DOCTRINE

Critics of the orthodox doctrine have performed an important service in drawing attention to the need to articulate a justification for holding motives irrelevant to criminal liability. It is remarkable how little attention was paid to the underlying rationale of the orthodox doctrine before the critics began challenging it. The avoidance of this issue has made the orthodox doctrine particularly vulnerable to critical attack, even to such cynical charges as Norrie's (1998, p. 120) that the doctrine was designed merely to protect private property owners from the poor and oppressed. Thus it is particularly important to address the question of just why the tradition has excluded motive from consideration for purposes of criminal liability.

One argument that is often made is that the law must exclude motives for the sake of an effective and practicable system of criminal justice. Given the difficulty of identifying a person's subjective motive for an action, it would complicate adjudication tremendously to have to ask not only whether the person violated a criminal statute but also whether his or her motive for doing so was a good one. The law, this argument goes, must be constructed of simple and clear directives in order to serve as a useful guidance to human behavior. Whereas ethicists can afford

to engage in prolonged discussions of the moral character of an action, the law is not suited to such a task as a practical matter. As Husak (1989, p. 4) states the problem, "offenses would become horribly complex if all (or even most) factors relevant to blameworthiness were incorporated into statutes."

Of course, while it is true that an inquiry into motive requires a problematic examination of the subjective state of mind of the defendant, the same is arguably true for assessing the defendant's intentionality, yet an inquiry into intention is required in virtually every criminal case. It is also "subjective" to determine whether (say) a fatal shooting was accidental or intentional. Nevertheless, a determination of subjective intention will no doubt be easier than a determination of motive, given that the former is "proximate" and the latter is "ultimate" or "ulterior" and therefore more difficult to infer from surrounding circumstances. Thus, 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. Such a psychological inquiry into the complexities of the question of character is to be avoided where possible.

For Duff (1998, p. 175), the doctrine that motive is irrelevant to liability is grounded in the matter of institutional competence; it is based on a "division of labour between legislatures and courts." Duff concedes, however, that we still need a justificatory account of this division, arguing that legislatures are better suited to "attend to motives" (p. 177). A legislature can decide what difference a given motive "makes to the moral character of the action, or to its agent's culpability" (p. 178). It can also decide on the "practicability" and "likely effects" of trying to give these sorts of moral consideration recognition in the law. How effective, in other words, would this legislation be in practice? Will it be difficult to apply, will it lead to unjust convictions, will it fail to influence peoples' behavior, will its enforcement be too intrusive into individual privacy? All of these issues, Duff thinks, are best left to the legislature to determine.[1]

Along the same lines, one might add that the 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. To allow such consideration into judicial decisions would open a Pandora's box and create the possibility of jury or judicial "nullification" of the criminal law, not to mention the enormous increase in unpredictability that such practices would no doubt create.[2] In contrast, in the case of hate crimes for example, the legislature has clearly indicated just which sorts of motives are relevant to liability. This concern, of course, cuts both ways. As Fletcher (1978, p. 790) warns, "The criteria of punishable conduct are so multi-

[1]Horder (2000, p. 175) argues a related view, that motives are irrelevant because, in general, "collective deliberation" is a better way to make difficult decisions on such matters than leaving it to the individual to make judgments.

[2]This point is credited to an anonymous referee for the *Criminal Justice Review*.

farious that a certain amount of discretion should be exercised by trial and appellate judges in filling out the details of the legislative prohibition. The legislature cannot envision the full range of cases in which someone might be motivated to commit larceny, destroy property," and so forth.

Each of these defenses has some plausibility. However, there are two problems with each of them. First, neither responds to Husak's charge of the incoherence of the orthodox doctrine. If motive is relevant for purposes of sentencing and prosecutorial discretion, why should it not be relevant for liability purposes? That is, the arguments given above would seem to apply equally to the mitigating function of motive as to the exculpatory function. The legislative competence argument would imply that it is equally inappropriate and impermissible for judges, juries, and prosecutors to take motive into account for these other purposes. Inasmuch as prosecutors, judges, and juries are already conducting inquiries into motives for these other purposes, it hardly seems plausible to say that the difficulty of the subjective inquiry into motive is the basis for holding motive irrelevant to liability.

Second, none of these defenses address the principal charge of critics such as Husak and Norrie. The critics' main concern goes to substantive morality rather than procedural or institutional constraints. It is, they claim, simply unjust to hold a person liable for a criminal act when he or she lacked a wrongful motive or indeed had a beneficent or morally praiseworthy motive.[3] The very reason for which it is appropriate to use prosecutorial or sentencing discretion, they argue, is the same reason that should permit motive to be exculpatory in certain cases. Even if there are some good reasons for the orthodox doctrine, it remains open to the critics to insist that they must be overridden by the greater concern that the law be brought into harmony with fundamental moral principles. In morality, they claim, an agent's motive is crucial, and the law must not stray from moral principles without an especially strong reason. Thus, there is need of a more thorough investigation of the grounds for the orthodox doctrine of the irrelevance of motive.

DISTINGUISHING MOTIVE FROM INTENTION

It is often claimed that the reason for the confusion in this debate is the lack of any clear definition of the concept of "motive." Many commentators claim that one cannot decide the question of whether motive is relevant to criminal liability until one has arrived at an agreed upon definition of "motive" and a means of distinguishing it from intention (which is clearly relevant to criminal liability). In particular, the debate has long been on the question of whether motive is merely one type of intention or whether it belongs to a different category altogether. Thus,

[3]It is unclear whether Husak and other critics believe that a good motive should be counted as an excusing condition or as a justification. It appears that they leave this as an open question.

some commentators argue that a motive is essentially distinct from an intention, in that a motive is a sort of causal power, a moving force, that which impels the agent toward his or her action; it is often called the "springs" of action. (See, e.g., the discussion in Sistare, 1987, pp. 303–307.) Thus a motive is essentially affective, rather than intentional.

If we could uncover an essential distinction between motive and intention, that would be an important first step toward supporting the orthodox doctrine, which does purport to draw a line between motive and intention. Of course, even if it were true that motives are essentially causal and noncognitive, while intentions are essentially consciously chosen and purposeful, we would still have to explain why a causal impulse is not relevant to an assessment of the action for purposes of the criminal law. Unfortunately, this distinction does not stand up. First, common, everyday usage does not make such a clear-cut distinction between motives and intentions. As Sidgwick (1981, p. 202) points out, "the distinction between 'motive' and 'intention' in ordinary language is not very precise." Second, and more importantly, it is doubtful that a motive can be seen as purely "causal." In most cases the motive for an action, whether it be to gain money or to save a life, clearly is intentional in any meaningful sense: conscious, purposeful, and intelligent, and surely not a merely causal force or power. It is difficult to think of a genuine example of a motive that would count as purely causal in this sense.

In any case, at least some motives are difficult to distinguish from intentions, and for these the orthodox doctrine becomes particularly troublesome. If, as the doctrine claims, there is a radical distinction to be made and motives are wholly irrelevant while intentions are wholly relevant, then it is an embarrassment to orthodox theory that commentators, judges, and juries have so much difficulty telling the two apart. A typical strategy for the defender of orthodox doctrine is to avoid these problems by asserting that it is not necessary to strictly define "motive." (See, e.g., Duff, 1998, p. 171.) Commentators on this question often rely on illustration rather than analysis. One example in particular haunts the discussion: "If a rich man has an ugly daughter, he is concerned about her suitor's motives. But a poor man with a beautiful daughter is concerned about her suitor's intentions" (Gross, 1979, p. 111). Intuitively, the rich man's concern is the ultimate or underlying goal for which the suitor is courting his daughter (the money). The poor man's concern is rather that the more immediate goal of the suitor might be seduction under the pretense of seeking marriage. However, this approach does not get us very far. How exactly are we to distinguish between the more "immediate" and the more "ultimate" aspects of a person's intentional state? And why is this distinction important to the criminal law, especially as this particular example would only seem to show just how important a person's motive really is in assessing his or her behavior?

The most common way of distinguishing them is to hold that a motive, even if it is a sort of intention, is distinguished from other intentions in that it is "ulterior" or

"ultimate," that it is somehow so far removed from the action that it does not change our judgment of the agent's culpability. Thus, for Williams (1961, p. 48), "motive is ulterior intention—the intention with which an intention is done." Perkins and Boyce (1982, p. 927) concur, holding that only the most immediate intention is called the intention in the criminal law, and any "ulterior" intent is called the motive. The difficulty, of course, is to explain in just what sense motive is "ulterior" or to say just why an ulterior motive should not count toward liability. (Even more confusing is the common phrase "ulterior motive," as if motives themselves can have degrees of immediacy or ultimacy.) As Husak (1989, p. 6) argues, this definition "relativizes the distinction between motive and intention to moments of time" and makes all but the most immediate intention also motives. It remains puzzling why the law should be concerned with intentions but not motives, because on this view almost all intentions are also characterizable as motives. (It is also puzzling just why the law should not be concerned with ultimate ends.)

Commentators have tried various means to distinguish motive from intention. One view holds that the difference is one of description versus explanation: Motive provides the explanation of an action, whereas intention provides merely a description (Gross, 1979, p. 111; cf. Husak, 1987, p. 145). Another school of thought suggests that the distinction between intention and motive corresponds to the difference between the action that an agent undertakes and his or her character (Husak, 1987, pp. 145, 147). In another account, the intention is the *means* by which an action is carried out, whereas the motive is the *end* being aimed at (LaFave & Scott, 1986, Sec. 3.6). Another view holds that "the intention but not the motive has a beginning and an end" (Gross, 1979, p. 111).

Despite the intuitive force in each of these definitions, they have been widely criticized as inadequate. Notice that none of these accounts makes sense of the example of the two suitors. The poor man worries that his daughter's suitor has as his intention seduction rather than marriage, while the rich man worries that his daughter's suitor has a motive of securing the inheritance. But each suitor equally has an ulterior goal (in one case seduction, in the other money). So it is not clear why one of these goals should be construed as motive and the other as intention. Nor does the explanation/description account help; we seek an explanation of the suitor's actions in each case, not merely a description. And certainly both the poor man and the rich man are concerned at bottom with the character of the suitor, not merely with the single action? Finally, and most importantly, it is simply obscure why the criminal law should only be concerned with one of these sorts of cases and not the other. One would rather say that each of these suitors appears to have wrongful intentions, and there is no apparent reason why only one sort of wrongful intention should matter to the criminal law. We seem, then, to be at an impasse.

TWO EXAMPLES OF THE MOTIVE/INTENTION DISTINCTION IN ACTION

Let us try to make this discussion more concrete by examining a pair of criminal law cases that center on the problem of a perpetrator's benign motive for an illegal action. In *United States v. Harmon* (1891), the defendant Harmon was convicted of the crime of sending pornographic materials through the mail system. He did not contest this charge but rather argued on appeal that he was a "public benefactor, rather than a malefactor." Harmon claimed to have mailed these materials as a "necessary vehicle to convey to the popular mind the aggravation of the abuses in sexual commerce," with a purpose of thereby "alleviat[ing] the human condition." That is to say, he admitted committing the crime but claimed that his beneficent motive should exculpate him (p. 422). The court rejected this argument on grounds that the defendant was admittedly guilty of intentionally sending pornographic materials through the mail, which was all that the statute required.

However, the interesting twist in this case is the fact, pointed out by the defendant, that the trial judge himself had apparently also violated the very same statute, because the judge used the mail system to send the pornographic materials in evidence to the clerk of the court in preparation for trial: "The argument is that if the offense in question is completed by the mere overt act of knowingly placing in the post-office an obscene print, publication, etc., it would subject to indictment and punishment the judge of this circuit for sending the indictment herein containing the forbidden publication, sent him through the mail by mistake, back to the clerk of the court through the mail" (p. 419). Thus the same reasoning by which Harmon was convicted apparently should have applied to the trial judge as well. If the benévolent motive of improving humanity could not excuse a criminally prohibited act, why should the benevolent motive of conducting a trial excuse the very same act?

The court in *Harmon* rejected this argument, on the grounds that, although the trial judge's action did technically violate the statute, the legislature must have intended an implied exception for judicial or prosecutorial action.[4] However, this rationale is simply question-begging; one could just as easily ask whether the legislature might have implied an exception for crusading antipornographic public

[4]The court held, "The public officer, like a judge, who commits to the mail an indictment containing the vicious publication in question in the performance of an official duty connected therewith, and in the administration of public justice, is employing the mail within the purview of the object of the constitution. Such a user must, *ex necessitate rei*, be held by the courts to be the exception to the letter of the statute arising from necessary implication, as much so as in the case of the Bolognian law, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity.' It was held not to apply to the surgeon who opened a vein of a person in order to save his life when he had fallen in the street in a fit. And again, it is obvious from the whole context of the act of congress in question, as well as the popular history attending its enactment, that it was leveled at the circulation and disposition of the forbidden matter as such in its relation to society. It is to prevent the supposed hurtful effect of the receiving and reading of such indecent literature published as such by declaring it non-mailable, and the statute should be so construed by the courts as to effectuate the legislative intent" (p. 420).

benefactors. The question is, On what (if any) principled basis did the court find it obvious that one is an exception and the other is not, so that the judge but not others ought to be exempted from the strict standard of the law? All the decision seems to tell us is that *some* motives are irrelevant for the criminal law but that certain other motives are quite relevant—a far cry from the position that motives per se are irrelevant. Intuitively, the *Harmon* decision was correct, but it is hard to delineate the principle on which it was decided or to decide whether the doctrine that motive is irrelevant is of any use here.

Contrast the *Harmon* case with an intriguingly similar one, *United States v. Badolato* (1983). In *Badolato*, one of the defendants (Quarnstrom) charged with involvement in a drug conspiracy defended himself on the grounds that his sole purpose for entering into the conspiracy was to gather information so that he could write a movie script. Quarnstrom argued that he lacked the requisite criminal intention to "advance an illegal purpose" as required for a conspiracy conviction. The court rejected this reasoning by reference to the orthodox doctrine that motive is irrelevant in the criminal law. It said that this argument "confuses the intent to enter into an agreement to violate federal drug laws with the purpose or goal which motivates one to enter into such an agreement." The "usual goal in a drug conspiracy," the court argued, "is financial gain. Yet a person would be just as guilty if the motive were revenge or even to obtain money for a worthy cause" (p. 921). Thus the court invoked the venerable principle that a good or permissible motive does not justify an otherwise wrongful action.

However, as in the *Harmon* case, there is another twist. Also involved in this abortive drug conspiracy and unbeknownst to Quarnstrom at the time were several undercover DEA agents. In fact, the respective roles of Quarnstrom and the undercover agents were quite parallel: While Quarnstrom attended a meeting of the drug dealers and declared himself to have access to trucks and buyers, the DEA agents attended the same meeting and claimed to have access to landing and storage facilities. Of course, both of these representations were fabrications, and in neither case was there any attempt to actually carry out the shipments. It is hard to resist the conclusion that, if Quarnstrom was guilty of a conspiracy, so were the DEA agents. Quarnstrom made this argument, and the court found the analogy ingenious but not ultimately persuasive. As in the *Harmon* case, the court in a footnote suggested rather lamely that the federal agents were "effectively given immunity" for acting upon the instructions of the Attorney General (*United States v. Badolato*, 1983, p. 921, n. 4). This explanation once again simply pushes the question back: Why is the Attorney General excused? It is furthermore important to note that the mere fact of pursuing law enforcement duties does not constitute a general permission for wrongful behavior. A police officer who commits perjury in order to convict a known criminal (or tortures a suspect in order to solve a crime) may have a good motive, but that does not excuse the officer's wrongful intention. Thus the court's reasoning again simply begs the question.

It goes without saying that a person should always use alternative, legal means to achieve his or her goals, and among these alternatives is always the possibility of using the democratic process to get the law changed. Harmon, for example, should have tried other means of pursuing his agenda. However, this will not do as an explanation of the motive/intention distinction. First, even if Harmon and Quarnstrom had had alternative means available, so did the judge and the DEA agents. (The judge certainly did not need to use the mail system in this case; he could have sent a courier.) Second, it is not clear that either Harmon or Quarnstrom did reasonably have alternative means. Harmon explicitly asserted that his method was "necessary" to attempt to achieve a goal that was in his view not reasonably attainable by other means. And it is hard to see what reasonable alternatives Quarnstrom had; it is not plausible that he could have had a law enacted that allowed screenplay writers to enter into drug conspiracies.

It thus seems that the orthodox position, that motive is irrelevant to criminal liability, is in trouble. The tautologous explanations that the *Harmon* and *Badolato* courts gave for the distinctions that they drew only seem to mask, as Husak charged, a surreptitious acknowledgment that *certain* motives are relevant. Apparently, the trial judge's motive for mailing the pornographic materials and the DEA agents' motives for entering the conspiracy are just the sort of motives that will exonerate them from liability, even if they are not explicitly specified in the statute. Notice also that the purported ground for the irrelevance of motive—that the law can only ask whether the statute was violated—would also not suffice to explain the decisions in *Harmon* and *Badolato*, for the trial judge in *Harmon* (and perhaps even the DEA agents in *Badolato*) did clearly violate the letter of the statute. The critics appear to be correct. The courts pay lip service to the orthodox doctrine but in reality allow certain sorts of motives as quite relevant.

THE ORTHODOX DOCTRINE DEFENDED

The orthodox doctrine, suitably defended, can indeed make sense of the *Harmon* and *Badolato* cases. The underlying intuition behind the distinction between motive and intention is the ethical distinction between *intending* wrong as a means and *foreseeing* wrong as a side effect of one's action. This distinction is most famously developed in the ethical principle known as the doctrine of double effect, a doctrine that has been increasingly influential among ethical theorists in general. The distinction between intending wrong as a means and foreseeing wrong as an unintended side effect can help make sense of the motive/intention distinction.[5]

[5]See, e.g., Nagel (1986, p. 179): "The traditional principle of double effect, despite problems of application, provides a rough guide to the extension and character of deontological constraints, and . . . remains the right point of convergence for efforts to capture our intuitions." For a discussion of these problems of application regarding the viability of the means/side effect distinction, see, e.g., Bennett (1998) and Davis (1984). The distinction is a sound one and indeed a crucial one for ethical theory, though there is not space here to enter into this debate.

The idea is that there is a central moral difference between a wrongful act that is used as a means to achieve a good end and a permissible act that includes bad side effects. Killing an innocent person as a means to save others is not permissible, whereas prescribing a smallpox vaccination with the known side effect of killing some number of people is permissible. The very same result will be impermissible or permissible, depending on whether it is used as a means or is merely an indirect effect. To put it in more commonsense terms, a good end does not justify wrongful means. As Grisez (1970, p. 90) explains, where the wrong is used as a means to the good (as opposed to being a mere side effect of the good), then there is no longer a "unitary act" with a permissible intention. This can be applied to the motive/intention distinction as follows: When there is a "unitary act," there is no need to make a motive/intention distinction; there is a single dominant intention, be it lawful or unlawful. However, in some cases the action is not unitary but consists of distinct good and bad intentions. In such a case, the motive/intention distinction separates the distinct elements of the action: the proximate and the ulterior. Then it can be said that, even if the ultimate goal (the motive) is permissible, it does not render the impermissible intention (the means) lawful.

This idea can also be applied to the *Harmon* and *Badolato* cases. In *Harmon,* most would agree that the defendant should be held guilty and that his good motive should not exonerate him (though it should perhaps mitigate his punishment). Most people would also agree that it would be absurd to hold the judge guilty of the same offense. However, this intuition does not rest on the idea that the judge had a permissible motive for breaking the law and Harmon had an impermissible one. It is not that the judge broke the law but should be excused by his good motive; rather, the proper description is that the judge did not have an improper intention or motive at all, that he never did anything wrong. The proper account of the case is that Harmon's mental state can be analyzed into an intention to commit an unlawful act and a distinct (good) motive for doing so. The mental state of the judge, in contrast, cannot be so analyzed; his single unified intention was to mail the trial materials to the clerk, whatever happened to be in them. It is psychologically implausible to hold that he formed an intention to distribute pornography because of his distinct motive of administering the trial. Even if he considered that pornography was going through the mail, that was never part of his specific intention. If this is right, then the orthodox doctrine explains the result. For Harmon, a good motive does not excuse a bad intention; for the judge, there never was an unlawful intention, and the question of a distinct motive does not come up.

The *Badolato* case, however, might seem to refute such an analysis, for there the defendant Quarnstrom seems more in the situation of the judge than of the defendant in *Harmon.* Quarnstrom never intended to break the law or to use wrongful means to pursue his purposes. His intention and his motive were the same (unitary): to investigate the drug dealing culture firsthand, rather than to enter into a drug conspiracy for the further purpose of gaining information in order to write

a movie screenplay. Had Quarnstrom actually sold or bought drugs in order to do so, the case would have been quite different. Quarnstrom appears to be in exactly the same position as the DEA agents; if he had an unlawful intention, they did as well. But then, if good motive does not exonerate Quarnstrom, it ought not exonerate the DEA agents either.

One might of course argue that this is a situation where the legislature specifically exempted the DEA agents from liability given their permissible motive, law enforcement. But, as mentioned earlier, there is no general permission to engage in unlawful actions on the grounds that one is engaged in law enforcement, lest the police be justified in committing perjury in order to gain a conviction (or using other unlawful tactics that are not permitted to undercover drug enforcement agents). Hence one cannot avoid the question of whether the police activity was unlawful. In any case, intuitively the agents in this case were in a position more like the trial judge in *Harmon*; it would be odd to say that they intended to deal drugs but for a good motive. Rather, they intended to infiltrate a drug gang but never intended to actually carry out any deals. It will be objected of course that this same account describes Quarnstrom as well and that he should escape liability. The reply must be that such a view is exactly right; this case was wrongly decided.[6] Quarnstrom did not form an intention to engage in criminal activity; his only intention was to observe it close up. Had he become more involved in the conspiracy, e.g., actually delivering drugs, then the conclusion might be different, but, as it is, Quarnstrom should be exculpated, not because a permissible motive excuses a wrongful action but because the man never formed an intention to engage in a drug trafficking conspiracy in the first place.

Thus, in Harmon's case, mailing the pornography was a consciously adopted unlawful means by which he sought a permissible ultimate goal, but the judge in mailing the materials to the clerk did not form a distinct, separate intention to mail pornography as a means to accomplish his ultimate goal. For Quarnstrom, the analysis suggests that he did not have two distinct intentions (one to enter into a drug conspiracy, the other to research it for his upcoming movie). He did not seem to have any intention to enter into the conspiracy at all. His activity was guided solely by his goal of observing drug dealers in order to gather information. Like the DEA agents, he never seemed to have had any unlawful intention at all. Thus, for Quarnstrom and the DEA agents, it would be a mistake to try to separate their mental states regarding these actions into a distinct motive and intention. Their acts were unitary, aimed at infiltrating and finding out about the drug dealers.

---

[6]Despite the holding of the case, there are indications that the court in fact recognized the force of this intuition. It held that "sufficient evidence supports the jury's verdict that Quarnstrom intended to enter into the conspiracy. . . . We do not intend to hold that motivation or purpose plays no role in these proceedings." Moreover, the court reaffirmed the traditional view that a reduction of sentence might be appropriate, given the defendant's motive (n. 6), appearing to sympathize with the view argued here.

This idea can be applied to the rich man/poor man illustration. The concern about the rich man's daughter is that the suitor has two separate intentions and that his intention to marry the daughter is merely a means to his ultimate intention (i.e., motive) of gaining the money. In the case of the suitor of the poor man's daughter, the question is not about whether the suitor has a further intention, a motive for which he is pursuing the marriage, but rather what his single intention is, to marry or simply to seduce. In the rich man's case, there is no question about the intention to marry; the issue is whether there is a further (and illicit) motive for this intentional action. In the poor man's case, the question is rather whether the suitor has the intention to marry at all, or whether his intention stops short of marriage and merely aims at seduction.

It will be objected of course that this sort of analysis relies heavily on intuitive judgments about the "unitary" status of an action and does not provide any rigorous test by which to determine the status of a person's intentions. This objection raises fundamental questions about the possibility of a "mechanical jurisprudence," a topic that is far too large to be discussed here. But the position being argued here is that we should not reasonably expect any such precise test. As Sistare (1987, p. 319) says, we may not have a "handy maxim" for identifying motives, but this simply reflects the "complexity of legal affairs." There is ultimately no substitute for good judgment and common sense, if the law is to seek justice with respect to particular cases.

NORMATIVE FOUNDATION OF THE MOTIVE/INTENTION DISTINCTION

The central contention of the critics is that the orthodox doctrine of motive, whatever its merits, is fundamentally in conflict with common morality and therefore with justice. Both Husak and Norrie are explicit on this issue. For Husak (1987, p. 144), the criminal law and morality are directly at odds on this issue; the "doctrine that motive is irrelevant has contributed to a number of unjust decisions that should be denounced in the strongest possible language." Norrie suggests that any moral system beyond that of a child will recognize the significance of motive to culpability and that by ignoring motives the legal doctrine ignores morality as well: "People act from motives and intentions, and it is indeed 'childish' to imagine that culpability can be properly evaluated with reference to intention alone. Motive is crucial, in terms of our evaluation of the goodness or badness of an action, but motive must be irrelevant to the law's evaluation, for once motive rears its head, substantive issues of right and wrong enter the courtroom" (1993, p. 45). For Norrie, not only is the doctrine in conflict with morality; it is deliberately so. Indeed, even some defenders of the doctrine appear to concede that the doctrine is not consonant with moral principles. Gross (1979, p. 77) defends the doctrine on the surprising ground that "the blameworthiness of a person falls outside the concern of the criminal law."

The critics are correct in asserting that the criminal law must in general reflect widely accepted moral principles if it is to retain its authority and legitimacy. A defense of the orthodox doctrine is not likely to be convincing if it must resort to Gross' dubious suggestion that the criminal law can dispense with concerns about blameworthiness. A more fruitful line of defense is to challenge the widespread assumption that the doctrine of the irrelevance of motive to liability is indeed contrary to morality or that it must be defended on uniquely "legal" or political or institutional grounds. In fact, this assumption is false. A close analysis reveals that criminal law and morality actually share a common foundation on this question.

First, it should again be emphasized that the criminal law does not depart from morality so as to ignore motive altogether. Motive is relevant at the prosecutorial and sentencing stages. This point is all too easily overlooked or dismissed in the debate. Norrie (1993, p. 47), while acknowledging the use of motive in mitigating sentences, cynically interprets this practice as a deliberate strategy to keep the subversive motive doctrine "politically safe with the judges, far away from the noise and conflict of the world outside." Husak more plausibly acknowledges that the law does recognize, through prosecutorial and sentencing discretion, the moral significance of motive. Yet even Husak (1987, p. 144) is prone to such overstatements as his assertion that the criminal law displays an "almost complete disregard of motive." In fact, one should not discount the important function of prosecutorial and sentencing discretion in keeping the criminal law in line with our moral intuitions. Husak (1989, p. 9) himself concedes that prosecutorial discretion "usually" prevents the courts from having to convict physicians of beneficent euthanasia.

Nevertheless, the assertion of the critics that the criminal law runs afoul of moral principles by excluding motive from the question of liability has so far gone unchallenged, and it does raise serious questions about the orthodox doctrine if it is true. In fact the critics are presenting a misleading picture of moral theory, and in fact the criminal law is quite in line with fundamental moral principles in its doctrine of the irrelevance of motive. Moral theory and practice come down on the same side as the orthodox doctrine: A good motive does not justify a wrongful action, though it does (as in law) mitigate the wrongdoing of the offense.

The critics' portrayal of morality implies that, in morality, a good motive does in general exonerate a person from culpability for wrongdoing. In fact, however, it is far from clear that this is the case. Take even the relatively trivial case of telling a lie for a good purpose. Immanuel Kant, arguably the greatest of ethical theorists, in fact held that it was never morally permissible to do so. For Kant (1963, p. 229), lying remains an evil whatever the motive: "A lie is a lie, and it is in itself intrinsically base whether it be told with good or bad intent." Kant notoriously held that one may not lie even to save an innocent life. Yet Kant's theory is a paradigm of what Norrie considers the most sophisticated level of morality, in which the intention (what Kant calls the "good will") is the sole basis for moral judgment.

Nevertheless, it simply does not follow that for Kant, as Norrie seems to think, a good motive justifies a wrongful action. Kant's doctrine holds that it is one's intention (as determined by the "maxim" of one's action) that determines an action's moral status, rather than one's motive.[7]

Most people would no doubt reject Kant's extreme view, especially given that a lie is a relatively minor wrong. But the more serious the wrong the less a good motive will likely be seen as excusing the wrongdoer—especially where the wrong is quite serious, such as causing physical harm or even killing. Consider the following much-discussed ethical dilemma: May one save five peoples' lives by sacrificing one, e.g., by taking the vital organs of a healthy person to save five others? Even though the motive for such an action is perfectly good (saving innocent lives), there is overwhelming agreement that it would not be morally permissible. "Nobody, to my knowledge" in such a situation, says Rakowski (1993, p. 1064), "would condone trading one life for five." Killing for a good motive, although no doubt less wicked than killing for a bad motive, is still wrong.

Indeed, in an age of terrorism, the issue of the status of motives is no trivial matter, for terrorists typically carry out their murderous actions with what they see as quite noble motives: They are "freedom fighters" for their cause and their country, and they may well believe themselves to be acting under divine mandate. How else to explain why the suicide bomber is condemned as immoral, despite the bomber's no doubt sincere belief that he or she is acting for a good cause, except to say that a good motive does not in general excuse a wrongful action? In 1999, the United Nations Security Council condemned "all acts of terrorism, irrespective of motive" (United Nations Security Council Resolution 1269). Notably, Gross (1979, p. 105) illustrates the concept of motive with the example of bombing a government building in protest of governmental policies—recalling to mind the Oklahoma City bombing by Timothy McVeigh, an act that hardly supports the claim that a permissible motive is morally exculpatory.

Both Husak and Norrie raise the issue of beneficent euthanasia, where the orthodox doctrine is said to be radically at odds with everyday morality. For Husak (1989, p. 9), "health care professionals who practice beneficent euthanasia" must be protected from liability "somehow," if the criminal law "is to avoid injustice." For Norrie (1998, p. 45), it "makes no moral sense" that "the wicked murderer and the mercy killer may be equally guilty of the crime of murder." Husak similarly argues that the orthodox doctrine forecloses the obvious means by which such physicians can be protected: allowing that their good motive should justify their actions. The criminal law is then forced to resort to what Husak calls "unprincipled" means of evading liability, by relying on prosecutorial discretion or on such judicial "charades" as manipulating the distinction between action and

[7]The example of Kant is sufficient to refute Husak's claim that "nothing written by moral philosophers suggests the unimportance of motive" (Husak, 1987, p. 144). See also Sidgwick's *The Methods of Ethics* (1981, p. 204): "Our judgments of right and wrong strictly speaking relate to intentions, as distinct from motives."

omission in order to reach the desired result. Far more honest and simple, Husak argues, is for law here to emulate morality, for our "moral judgments about whether and to what extent euthanasia is impermissible attach extraordinary significance to the physician's motive." The "unwillingness of theorists to identify motive as the crucial variable in order to help distinguish permissible from impermissible euthanasia can be explained only by the powerful grip" that the orthodox thesis has on them (Husak, 1989, pp. 9–10).

However, Husak and Norrie present an overly one-sided account of the moral status of euthanasia. It is far from clear that a good motive should be determinative of the moral permissibility of euthanasia. Consider for example the following discussion of the problem by a leading ethicist: "Mercy killing has been defined as killing with a certain kind of motive, as killing motivated by pity or compassion. If what we are interested in is mitigation or excuse, then this kind of definition is the most appropriate. But since in the nature of the case a good motive cannot make an otherwise wrong act right, this definition is not useful" (Devine, 1978, p. 168). The influential moral theorist Rachels (2003, p. 94) argues similarly with respect to beneficent euthanasia: "We are reluctant to excuse" the practitioner of euthanasia, "even though he may have acted from noble motives. He intentionally killed an innocent person; therefore, according to our moral tradition, what he did was wrong." Khatchadourian (1974, p. 45) agrees that "the noblest sentiments alone do not justify a physician's mercy killing of a cancer patient he regards as terminal."

Thus a central strand of ethics today holds that active euthanasia (i.e., a physician deliberately intervening to kill a patient) remains a moral wrong despite the good motive (though of course, as in the law, the motive can serve as a mitigating factor). Such a view is held by such diverse institutions as the American Medical Association and the Catholic Church. It is argued elsewhere that the traditional moral doctrine of double effect prohibits euthanasia on the grounds that it is wrong to intentionally kill, even if one does so with good motives (Kaufman, 2001; Steinbock & Norcross, 1994). It is arguable that public opinion is shifting on this issue toward the permissibility of active euthanasia. However, the assertion of Husak and Norrie that the law is far out of line with morality on this issue is simply false. Indeed, the law's position is strikingly similar to the traditional moral view. A good motive certainly mitigates our condemnation of the practitioner of euthanasia (such a person would certainly not be treated the same as a brutal murderer), yet the intentional killing of a human being remains a wrong whatever the motive. A fanatic who shoots a doctor who performs abortions in order to save the lives of fetuses is not justified, either in morality or in law.[8] In any case, the

[8]Norrie thinks it is patently outrageous to lump together the practitioner of euthanasia with other kinds of killers. But consider the following pronouncement from the Vatican: "Whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia, or willful self-destruction, . . . all these things and others like them are infamies indeed." The Pope goes on to acknowledge that some of these wrongs are "more serious" than others but

controversial status of this moral question supports the orthodox view that the legality of such acts should be determined in advance by the legislative process, rather than by crusading moralists.

Hence it seems to me quite reasonable to hold that the orthodox rule provides a sensible balance between our competing moral and legal concerns. Neither in morality nor in law should a good motive by itself be grounds for fully exonerating someone of an otherwise wrongful action. Nor should it in general be left to individuals to judge when it is appropriate to violate moral or legal standards for what they perceive as good cause. And yet only the most hard-hearted would refuse to recognize the presence of a beneficent motive as at least a mitigating factor in our judgment, even if not fully exonerative. The orthodox doctrine allows for this mitigating function at the level of discretion in sentencing and also, at the extreme, in decisions not to prosecute at all in unusual cases where substantial injustice would result from a literal application of the law. Such discretion is far from a judicial declaration of innocence, or from official endorsement of the wrongful act. The rule provides for a middle ground, by reinforcing the wrongness of the action and yet treating individual cases with good sense and with compassion in order to prevent excessive harshness.

CONCLUSION

The central argument against the orthodox doctrine is that it purportedly contravenes our society's basic moral standards. It is the contention of this article that this argument is flawed, that there is nothing morally "primitive" about the law's doctrine that motive is irrelevant to criminal liability.[9] To the contrary, the law is quite in line with traditional moral practice. In fact, the application of the doctrine of double effect to the motive/intention distinction (discussed above) demonstrates how closely traditional morality matches the legal doctrine of the irrelevance of motive. The social importance of respect for the law is such that even a good motive does not exonerate one from culpability, lest this be taken as a societal endorsement of the violation of law. (In contrast, mitigating sentences or declining to prosecute does not send the same social message of approval of violations of the law.)[10] In general, deliberate violation of the law is not encouraged, even for a good purpose.[11]

---

asserts that all are wrong nonetheless (Pope John Paul II, 1995). Is this not parallel to the law, where euthanasia remains a wrongful act, though it may be treated as less serious given the motive?

[9]The argument has been made that the motive/intention distinction has a firm normative foundation in the moral tradition of deontology. No such claim is made here, for those who favor consequentialism as a moral theory. However, it may be noted that even the great utilitarian thinker Sidgwick (1981, p. 204) accepted the moral relevance of the distinction: "Our judgments of right and wrong strictly speaking relate to intentions, as distinguished from motives."

[10]See Fletcher (1998, p. 90) for a discussion of the influence on public understanding of exoneration from wrongdoing.

[11]Such actions are strictly limited to cases of "necessity" or "lesser evil," where a person had no real choice but

This is not to say, of course, that morality and law treat motive and intention in identical fashion. A notable difference is that for traditional moral theory, although a good motive does not excuse a bad intention, a bad ulterior motive does render an otherwise good action impermissible. In contrast, the orthodox legal doctrine holds that motives in general are irrelevant, be they good or bad. (Thus an executioner does not do wrong in executing a man for motives of personal vengeance). To this extent it may be said that the law has somewhat different interests from morality and that it chooses to limit its inquiry to the question of whether a defendant intentionally violated the law. Still, though morality may be stricter, its influence on the doctrine that a good motive does not excuse a bad action cannot be ignored. The claim that the orthodox doctrine is unjust, as the critics charge, must be answered with a moral justification, lest the criminal law fail its central purpose of dispensing justice.

Moreover, to the extent that a moral issue is one of great and ongoing moral controversy (as in the case of euthanasia), there is good reason to let the issue be decided in the legislatures by the democratic process. The legislature may well want to provide that certain motives justify or excuse intentional killings, but it would be a mistake to argue, as Husak does, that eliminating the orthodox doctrine and allowing judges to consider motives would result in a "principled" solution to these difficult cases. For in morality there is by no means agreement on just what sort of good motives justify what sort of wrongdoing. The orthodox doctrine is a quite sensible way to pursue the goals of preserving social order, providing clear definitions of criminality, yet allowing prosecutorial or judicial discretion to prevent serious injustices.

The doctrine is far from mechanically self-applying, and it requires good judgment on the part of the judge (judgment that failed in the *Badolato* case). The lack of attention to the underlying rationale for the orthodox doctrine arguably reflects a lingering formalist element in the law, the idea that the law consists of simple, self-applying rules from which decisions can be automatically deduced. Critics such as Husak have rightly drawn critical attention to this formalist tendency. There is a good (and morally sound) rationale for the doctrine, and the doctrine cannot be successfully applied without attention to this rationale. (This was the mistake in *Badolato*.) Deciding difficult cases demands an exercise of judgment and an awareness of the purpose (and the moral basis) of the doctrine. In the end, though, the doctrine that motive is irrelevant to criminal liability is not only a sensible and practical doctrine but one that is grounded in the fundamental moral principle that the end does not justify the means, that a wrongful act is not automatically made permissible simply because the actor has a good motive. Neither in law nor in morality does a good end justify a wrongful means. The *Harmon* court has the last word, hyperbolic though it may be: "If the end sought

---

to violate the law in order to prevent an even greater harm. See, e.g., Fletcher's discussion (1998, chap. 8).

justifies the means, and there were no arbiter but the individual conscience of the actor to determine the fact whether the means are justifiable, homicide, infanticide, pillage and incontinence might run riot" (*United States v. Harmon*, 1891, p. 422).

REFERENCES

Bennett, J. (1998). *The act itself.* Oxford, UK: Clarendon Press.

Davis, N. (1984). The doctrine of double effect: Problems of interpretation. *Pacific Philosophical Quarterly, 65*, 107–123.

Devine, P. (1978). *The ethics of homicide.* Ithaca, NY: Cornell University Press.

Duff, A. (1998). Principle and contradiction in the criminal law: Motives and criminal liability. In A. Duff (Ed.), *Philosophy and the criminal law* (pp. 156–204). New York: Cambridge University Press.

Fletcher, G. (1978). *Rethinking criminal law.* Boston: Little, Brown & Co.

Fletcher, G. (1998). *Basic concepts of criminal law.* New York: Oxford University Press.

Grisez, G. (1970). Toward a consistent natural law ethics of killing. *American Journal of Jurisprudence, 15*, 64–96.

Gross, H. (1979). *A theory of criminal justice.* New York: Oxford University Press.

Hall, J. (1960). *General principles of criminal law* (2nd ed.). Indianapolis: Bobbs-Merrill.

Horder, J. (1996). Crimes of ulterior intent. In A. P. Simester & T. H. Smith (Eds.), *Harm and culpability* (pp. 153–172). Oxford, UK: Clarendon Press.

Horder, J. (2000). On the irrelevance of motive in criminal law. In J. Horder (Ed.), *Oxford essays in jurisprudence* (pp. 173–191). New York: Oxford University Press.

Husak, D. (1987). *Philosophy of criminal law.* Totowa, NJ: Rowman & Littlefield.

Husak, D. (1989). Motive and criminal liability. *Criminal Justice Ethics, 8*, 3–14.

Kant, I. (1963). *Lectures on ethics* (L. Infield, Trans.). New York: Harper & Row.

Kaufman, W. (2001). The doctrine of double effect and the problem of euthanasia. In R. Baergen (Ed.), *Ethics at the end of life* (pp. 197–205). Belmont, CA: Wadsworth.

Khatchadourian, H. (1974). Is political assassination ever morally justified? In H. Zellner (Ed.), *Assassination* (pp. 41–55). Cambridge, MA: Schenkman.

LaFave, W., & Scott, A. (1986). *Substantive criminal law.* St. Paul, MN: West Publishing.

Nagel, T. (1986). *The view from nowhere.* New York: Oxford University Press.

Norrie, A. (1993). *Crime, reason, and history.* London, UK: Weidenfeld & Nicolson.

Norrie, A. (1998). Simulacra of morality? Beyond the ideal/actual antinomies of criminal justice. In A. Duff (Ed.), *Philosophy and the criminal law* (pp. 101–155). Cambridge, UK: Cambridge University Press.

Perkins, R. M., & Boyce, R. N. (1982). *Criminal law* (3rd ed.). Mineola, NY: Foundation Press.

Pope John Paul II. (1995, March 25). *Encyclical evangelium vitae* [The gospel of life]. Retrieved July 4, 2003, from http://www.vatican.va/edocs/ENG0141/_INDEX.HTM.

Rachels, J. (2003). *The elements of moral philosophy* (4th ed.). New York: McGraw Hill.

Rakowski, E. (1993). Taking and saving lives. *Columbia Law Review, 93*, 1063–1156.

Sidgwick, H. (1981). *The methods of ethics* (7th ed.). Indianapolis: Hackett Publishing Company.

Sistare, C. (1987). Agent motives and the criminal law. *Social Theory and Practice, 13*(30), 303–326.

Steinbock, B., & Norcross, A. (Eds.). (1994). *Killing and letting die* (2nd ed.). New York: Fordham University Press.

United Nations Security Council Resolution 1269. (1999, October 18). New York: United Nations.

United States v. Badolato, 701 F.2d 915 (11th Cir. 1983).

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

Williams, G. (1961). *Criminal law: The general part* (2nd ed.). London, UK: Stevens & Sons.