THE IRRELEVANCE OF MOTIVE AND THE RULE OF LAW

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One of the maxims of criminal law orthodoxy states that a defendant's motive for offending, be it good or bad, should have no weight in assessing his or her criminal liability—although it may rightfully bear on the punishment imposed. Known as the "irrelevance of motive principle," this idea owes much of its popular stature in legal thinking to arguments that draw on the notion of the rule of law. It is said that allowing defendants' motives to generate or negate their criminal liability would undermine the state's authority in defining the contours of crime.

The article identifies and critically examines three streams of such arguments, and these in turn lead to three findings. First, each manifestation of the rule of law argument defends a somewhat different conception of the irrelevance principle; this means that despite the common allusion to the *irrelevance principle, there is no singular principle, but instead several variants of the norm are at play. Secondly, rule of law arguments fail to sustain any meaningful notion of the irrelevance principle. Finally, there exists a sphere of instances*

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where the careful application of motives to criminal directives may advance the rule of law by infusing legislation with added clarity and richness.

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INTRODUCTION

It is a maxim of criminal law orthodoxy that defendants' motives for offending—that is, the reasons or emotions that propel them to violate legal norms—should have no bearing on the assessment of their liability; hereinafter, the irrelevance principle. The courts, as well as numerous leading commentators, often view this idea as incontrovertible, "for hardly any part of penal law is more definitely settled than that motive is irrelevant."[1] Despite its contentious nature, proponents of the irrelevance principle do not dispute that motives often hold evidentiary significance, e.g., in ascertaining the identity of the perpetrator. Furthermore, they concede that motives can be important to the administration of criminal justice through prosecutors' discretion, sentencing decisions, and parole board rulings. Nonetheless, these commentators have persistently argued that motives ought not to be given weight in determining a defendant's liability.

This article critically examines what is perhaps the most tenacious justification for the irrelevance principle: the enduring claim that allowing defendants' motives to generate or negate their criminal liability would

1. Jerome Hall, General Principles of Criminal Law 88 (2nd ed., 1960). Other accounts of the irrelevance principle's longevity within the criminal law include Guyora Binder, *The Rhetoric of Motive and Intent*, 6 Buff. Crim. L. Rev. 1, 2 (2002) ("Courts and commentators incant the irrelevance of motive maxim in arguing against hate-crimes liability, for mercy-killing liability, against 'transferring' intent from one victim or offense to another, against some versions of the defenses of necessity and provocation, and against criminal negligence"); A.P. Simester, J.R. Spencer, G.R. Sullivan, & G.J. Virgo, Simester and Sullivan's Criminal Law—Theory and Doctrine 130 (5th ed., 2013) ("[I]t does not matter in principle what that background motive is"); Richard Card, Card, Cross & Jones Criminal Law 103 (21st ed., 2014) ("The general rule is that the defendant's motives, good or bad, are irrelevant to his criminal liability, although they may affect the punishment imposed"); Alan Norrie, Crime, Reason and History 42 (3rd ed., 2014) ("It is as firmly established in legal doctrine as any rule can be that motive is irrelevant to responsibility"); Jonathan Herring, Criminal Law—Text, Cases, and Materials 200 (6th ed., 2014) ("it is often said that motive is irrelevant in the criminal law").

undermine the rule of law, and in particular the authority of the state to define the contours of criminal prohibitions. This line of argument is centuries old and has been put forward by leading criminal law scholars dating back to Cesare Beccaria's warning in the mid-eighteenth century that giving weight to the reasons that propel defendants to act would necessitate a separate code for each individual and for each act.[2] Clearly, such a code would undermine the rule of law.

In what follows, three streams of the rule of law argument are identified and discussed. These in turn lead us to three findings. First, each manifestation of the rule of law argument defends a somewhat different conception of the irrelevance principle; this means that despite the common allusion to "the" irrelevance principle, there is no singular principle, but instead several variants of the norm are at play (section I). Secondly, rule of law arguments fail to sustain any meaningful notion of the irrelevance principle (sections II through VI). Finally, there exists a sphere of instances where the careful application of motives to criminal directives may actually advance the rule of law by infusing legislation with added clarity and richness (section VII).

I. VARIATIONS ON THE IRRELEVANCE PRINCIPLE

Although it is not the only reasoning set forth in support of the irrelevance principle,[3] the rule of law argument deserves separate attention. Justifications for the specific treatment of the rule of law argument include its prevalence in the literature and its endorsement by thinkers such as

2. Cesare Beccaria, On Crime and Punishment and other Writings 22 (1995 [1764]). The rule of law argument has given support to the irrelevance principle in case law at least since Lord Coleridge's decision to deny an excuse from the shipwrecked sailors who killed and cannibalized a young cabin boy in order to save themselves from death by starvation in the classic case of *R v Dudley and Stephens* [1884] 14 QBD 273. And see John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 Houston L. Rev. 397, 405 (1999) (commenting that rule of law considerations entrenched within Victorian culture lead to Lord Coleridge's opinion in this case).

3. Alternative rationales for the irrelevance of motive principle include, *inter alia*, the unfairness and disutility in punishing emotions or stimuli that are beyond the agent's control; the need to maintain liberal neutrality in law; and the epistemic difficulty in establishing the internal thoughts and feelings of others (the "other minds" problem, including the conundrum of unconscious motives).

Jerome Hall, Antony Duff, Jeremy Horder, and William Wilson. Just as importantly, and as we shall show, the rule of law argument is often summoned to vindicate a moderated account of the irrelevance principle, and should therefore be particularly convincing to those who might oppose the complete disregard of the defendant's motive in determining his or her criminal liability.

There are three lines of argument that purport to explain why an application of motives to criminal liability would subvert the rule of law, each of them defending a slightly different conception of irrelevance. The limits of the irrelevance principle (i.e., the limits of motives' relevance to criminal liability) differ depending on the justification given, diverging mainly according to the institutions that hold the discretion to decide which motives may bear on liability: the individual agent, the courts, or the legislature. Interestingly, this means that there is not one principle involved, but instead several possible norms are at play: the commentators who favor irrelevance do not have a singular concept in mind, which means that despite the common allusion to "the" irrelevance principle, this maxim is sustained only by the aggregate of diverging opinions.

We refer here to this plurality of norms in terms of the different variants of the irrelevance principle (stemming from different manifestations of the rule of law argument), and we discuss these variants in the following order: first, in section III we explore the argument that introducing individual motives into the assessment of liability deprives the legal directive of its objectivity. This line of argument endorses what we term a "subjective" variant of the irrelevance principle. Its supporters are concerned with a legal scheme that weighs each defendant's motives for offending *de novo* according to the defendant's own terms, expressing the fear that such a system would lose its ability to consistently coordinate social activity. In section IV we examine the "division of labor" variant of the irrelevance principle, where focus shifts from the individual defendant to the nexus of judicial decision making. Proponents of this permutation argue that the rule of law is undermined if, in order to assess liability, the court is allowed to introduce motives that are not pre-ordained by the legislature. Finally, after a short interlude to discuss Jeremy Horder's mixed variant within section V, we turn in section VI to the "strict variant." For the advocates of this variant, even where it is the legislature who introduces motives into an assessment of criminal culpability, values that are closely associated with the rule of law, such as clarity and the even application of the law, are

compromised. By subverting these fundamental values, it is argued, the introduction of motives undermines the rule of law.

II. POSITIVE LAW AND PRESCRIPTIVE NORM

The allure of the rule of law argument, encompassing all three variants, has been strong enough to safeguard the irrelevance principle's normative stature in legal discourse despite much evidence to the contrary in positive law. Descriptively, motives, on any plausible conception of this term, are relevant to liability, and do indeed figure in the definition of both offenses and defenses. The stock meaning of "motive" is the actor's "reason for action": A motivated act is one in which the actor, desiring the realization of a certain state of affairs *a* and believing that action *b* could reasonably bring about *a*, performed *b* in order to bring about *a*.[4] *On this conception*, the term "motive" at least partly overlaps with that of "intention,"[5] because an actor's intent may be coined in terms of his aim to satisfy his motive.[6] This idea was illustrated by Glanville Williams. In the crime of burglary, Williams states, "[t]here is an intentional entry, with the ulterior intent of committing a crime in the house; this ulterior intent is the motive of the entry, and is sometimes referred to as such, yet here it forms part of the legal definition."[7] The conflation of intention and motive was elegantly summarized by Victor Tadros as follows: "In standard cases, if a person intends to *v* in order to *w* and she wants to *w* for its own sake, she intends both *v* and *w*. She is also motivated by both *v* and *w*. She is motivated to *v*

4. Antony Duff, Intention, Agency and Criminal Liability—Philosophy of Action and the Criminal Law 38–73 (1990).

5. Intention and motive are not completely overlapping, however. First, as we shall see later in text of this passage, not all motives are re-describable as intentions; some motives, such as fear, anger, or hate, are better described as emotions and not intentions. Secondly, intention may refer to the actor's desire to act, as opposed to his desire to bring about the consequence, and this form of intention may not be comfortably interchangeable with motive; for this point, see Simester et al., *supra* note 1, at 128–29.

6. *See, e.g.*, Viscount Radcliffe in *Chandler v. DPP* [1964] A.C. 763, 794–95: "All controversies about motives or intentions or purposes are apt to become involved through confusion of the meaning of the different terms, and it is perhaps not difficult to show by analysis that the ideas conveyed by these respective words merge into each other without a clear line of differentiation."

7. See Glanville Williams, Textbook of Criminal Law 75 (2nd ed., 1983).

for the instrumental value she believed it to have and she is motivated to *w* for the intrinsic value she believes it to have."[8] Strikingly, there is no dispute among criminal law theorists that intentions are relevant, and indeed central, to criminal liability. Consequently, motives in the sense of reason for action find a place in criminal doctrine. Liability for conspiracy and attempt, for example, often requires the court to determine whether the defendant was motivated by a wish to consummate the offense.[9] Criminal law defenses may be founded on such motives as frustrating an attack, averting a greater evil, or avoiding a threat, in self-defense, necessity (where applicable) and duress, respectively.[10] The defendant's reason for action may be crucial to assessing the wrongfulness of his conduct as a matter of policy. The publication of what would otherwise count as obscenity may be permitted if it is accompanied by educational or artistic motives. In contrast, otherwise protected speech may become criminal libel if performed out of a motive to defame.[11]

Furthermore, some criminal directives recognize motives that are not synonymous with intentional states of mind, but consist of the *emotions* that have propelled the actor to perform the conduct in question. Motive in the sense of emotion functions on liability as a mitigating as well as an aggravating factor. Homicidal behavior that is predicated on the motives of fear or anger may receive the partial defense of provocation, or its modern incarnation "loss of self-control,"[12] and violence or harassment that is motivated by hostility may form the basis for a racially or religiously aggravated crime.[13] Crimes involving open-textured normative elements such as "dishonestly" may also

8. Victor Tadros, *Wrongdoing and Motivation*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 206 (R.A. Duff & S.P. Green eds., 2011). For a discussion of a different position, which states that motives differ from intentions in that the former constitute those reasons for action that are external to the definition of the offense, see text at note 18 *infra*.

9. In conspiracy liability: Criminal Law Act 1977, § 1(1); but see the House of Lords decision in *R. v. Anderson* [1986] A.C. 27. In attempt liability: Criminal Attempts Act 1981, § 1(1).

10. *See e.g.*, Douglas N. Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3, 10–11 (1989). However, the requirement that justificatory defenses actually depend on the agent's motive is disputed by many contemporary commentators; see most recently DAVID ORMEROD & KARL LAIRD, SMITH & HOGAN'S CRIMINAL LAW 127–28 (14th ed., 2015).

11. For such examples, see HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 106 (1979).

12. Whereas when the defendant acted in a considered desire for revenge the defense does not apply; *see* Coroners and Justice Act 2009, § 54(4), § 55(3)–(4).

13. *See* Crime and Disorder Act 1998, §§ 28–33.

fit in this category.[14] Drawing the precise ambit of motive within the criminal law and its relation to emotion and intent demands more attention than we can provide here.[15] However, for the purposes of the inquiry whether arguments based on the rule of law could support a convincing notion of the irrelevance principle, we may set aside the challenge of providing a precise definition of motives, and devote our analysis to constructing arguments that are relevant to both reasons for action and emotions.[16]

It is not new to point out that there are myriad examples of where motivations seem relevant to liability in positive law, and supporters of the irrelevance of motive as a normative principle generally do not dispute this phenomenon (though they may tend to undervalue its breadth). In light of that, one would expect those commentators who laud the normative benefits of the irrelevance of motive either to provide a radical conception of motive that is somehow independent of reasons for action and emotional states of mind, or else to offer a staunch critique of the doctrines and offenses that make reference to motive as it is commonly understood. This, however, is not what one finds in the relevant literature. Rather, proponents of the irrelevance principle tend to resort to a host of formulations and tactics designed to deal with the prevalence of motive in criminal law directives. The majority of writers simply ignore the problem by turning a blind eye to the motivational aspects of liability. Other writers venture to reconcile the obvious relevance of motives in positive law with the idea of an irrelevance principle by offering semantic solutions, such as naming all motivational elements in criminal law in terms of their specific content (e.g., "duress," "fear," or "hostility")[17] or generally relabeling motives as "intentions" through a tautological conjuring feat by which "whenever an intention to commit another crime is involved in the definition of a crime, it is generally referred to as intention and not as motive."[18] This statement renders

14. Martin Wasik, Mens Rea, *Motive, and the Problem of "Dishonesty" in the Law of Theft*, [1979] Crim. L. Rev. 543, 543; William Wilson, Central Issues in Criminal Theory 129 (2002).

15. The complexity of the issue may be exemplified by the fact that whereas some commentators base their theory of criminal law defenses on reasons for action (see note 10 *supra*), others devise an emotion-based theory instead. *See notably* Eilean Spain, The Role of Emotions in Criminal Law Defenses (2011).

16. Support for the sensibility of appraising the irrelevance of motive principle without committing to any specific meaning of motive is found in Husak, *supra* note 10, at 5.

17. See text at note 10 *supra*.

18. Glanville Williams, Criminal Law—The General Part 49 (2nd ed., 1961).

the irrelevance principle descriptive rather than prescriptive: it is not concerned with whether motives should comprise elements of crime, but simply makes it so that they can never do.[19] A third group of writers resolves the issue by holding the irrelevance principle, while restricting its extent—either functionally, by rendering the principle inapplicable to either the legislature or the courts, or substantively, by attempting to discern the criteria for exceptions that render some motives relevant to liability. These are serious constructions that do not simply bypass the problem, and we shall encounter and discuss their like in sections III through VI below.

We see then that although the various doctrines and discrete offenses within the criminal law render the irrelevance principle descriptively false, it is nevertheless still believed by many to hold prescriptive merit, partly due to the perceived support offered by arguments founded on the rule of law. In what follows, we attempt to show that however influential the rule of law argument may be in supporting different notions of the irrelevance principle, on close scrutiny, none of the lines of argument that it has spawned convincingly demonstrate that the rule of law is particularly subverted by ascribing weight to motive. As a result, an irrelevance principle cannot be supported by such an argument.

III. THE SUBJECTIVE VARIANT OF THE IRRELEVANCE PRINCIPLE

A. Jerome Hall and Offenders' Discretion

The foremost spokesman for the rule of law argument in support of the irrelevance of motive principle in the twentieth century was Jerome Hall.

19. Williams, it seems, appreciated this shortfall of his explanation and conceded the interchangeability of much of what we refer to as motive and intention (see *id.*, also WILLIAMS, *supra* note 7, at 75), and the tautological nature of this definition of the irrelevance principle has also undergone forceful criticism by Husak, *supra* note 10, at 6; Binder, *supra* note 1, at 5; and others. Yet, the tautological definition of the irrelevance principle is still held in mainstream criminal law literature. In *Smith & Hogan's Criminal Law*, it is straightforwardly contended that where a motivational element figures in the definition of an offense, "we should speak of intent or purpose rather than motive"; ORMEROD & LAIRD, *supra* note 10, at 128. Like Williams before them, Ormerod and Laird appreciate that such a formula renders motive irrelevant to liability by definition. They advocate it, however, as a means to uproot the ambiguities that result from the conflation the terms "motive" and "intent."

Hall contended that "the preservation of the objective meaning of the principle of *mens rea* and of legality requires that motive be excluded from the definition of criminal conduct."[20] Hall's concern was that granting relevance to motives in the assessment of criminal liability would mean allowing the agent's own estimate of the merits of his motives to determine the legal judgement of his liability. Not surprisingly then, he found the inclusion of motive to be objectionable, "unless one is prepared to hold that every fanatic has *carte blanche* to wreak whatever harm he wishes to inflict."[21]

Hall's argument fails to establish a meaningful foundation for the irrelevance principle. The line of reasoning that it draws is unsuccessful because it relies too heavily on a wholly subjective understanding of the irrelevance principle, that is, the irrelevance resulting from an agent's own assessment of his motives. This account of the irrelevance principle is misplaced, because it is directed at a concept of fault that no one would seriously advocate except at the fringes of criminal law, where arguments are made in support of a rare recognition of a cultural defense (where criminal responsibility is negated or mitigated because the acts were committed "under a reasonable, good-faith belief in their propriety based upon the actor's heritage or tradition"[22]) or for a restricted accommodation of subjectively unavoidable mistakes of law. Otherwise, neither motive nor any other element in the definition of either offenses or defenses functions as a wholly subjective fixture.

The relevant acts, circumstances, consequences, and mental requirements of legal directives are normatively determined by society. Where the definition of an offense or of an incriminating doctrine (such as attempt

20. HALL, *supra* note 1, at 102. This is because "neither the offender's conscience nor the personal code of ethics of the judge or the jury can be substituted for the ethics of the penal law" (104). We address the concern with judicial discretion in section IV below, in our discussion of Antony Duff.

21. HALL, *id*. at 99. Martin Wasik concurred with Hall that revoking the irrelevance principle would result in individuals being tried entirely upon their own terms, thereby undermining the rule of criminal law. *See* Wasik, *supra* note 14, at 548–49. Wasik, however, is more tolerant than Hall to the inclusion of motive to the assessment of liability, and views it as part of law's respect to the idea of subjective fault (549).

22. JILL NORGREN & SERENA NANDA, AMERICAN CULTURAL PLURALISM AND LAW 175 (3rd ed., 2006). Notably, even staunch supporters of cultural defense impose strict restrictions on its applicability, and do not propose that privately held beliefs and customs should generally trump the law.

liability) is not predicated upon a certain conduct, circumstance, or consequence, or a particular state of mind, it will not serve the defendant to plead the lack of these constituents in the case to be tried. Such a plea would only exonerate where these elements are pre-set as requirements of the criminal charge. Similarly, where a particular element does not form part of any recognized defense, the defendant will not be absolved by asserting that his conduct included that element. Naturally, the same logic applies to inculpating and exculpating motives; an agent's motive will bear on his liability only if it is a particular motive that is sanctioned by law. This is implied by the concept of authority, which in Razian terms means that the rule maker, as the commanding power, "is replacing his authority for the addressee's judgment on the balance."[23]

B. Motive as a Policy Issue

Contrary to Hall, allowing motives to factor into criminal responsibility does not result in a judicial system whereby each defendant's subjective assessment of his guiding motives is determinative. Ultimately, it is the law that sets the legitimate inculpating as well as exculpating motives by embedding them in doctrines such as attempt liability, crimes of ulterior intent, and motivational defenses.[24] In cases that evoke these doctrines, it is society and not the individual agent that is charged with making the relevant policy choices and deciding which motives absolve and which motives create or augment liability. (Indeed, even at sentencing, where motives may play a pivotal role in the judgment, the normative value of the defendant's motives is established by the court.)

To illustrate, even where motives are sanctioned, society will not be forced to absolve a violent attack performed out of bias or racial hatred simply because the attacker happened to believe that racism is a commendable and justifying motive for violent action. Indeed, the attacker's professed racial motive may subject him to harsher treatment if it is the law's assessment that racially motivated violence should be covered by an aggravated category of hate crime. Notably, a criminal law that dogmatically adheres to the irrelevance principle precludes any discussion concerning the

23. For Raz, this implies that "it is never a justification that the agent had a desire, however strong, for something inconsistent with his following the order." Joseph Raz, The Authority of Law—Essays on Law and Morality 24 (1979).

24. See above, section II.

merit of giving due effect to the difference between mere violence and hate crimes.[25] This limitation may, in itself, be detrimental to the rule of law's aspiration for fair treatment, which necessitates proportionality between transgressions and the severity of punishment imposed.[26]

Therefore, valid as the warnings against a wholly subjective criminal law may be, they are inapt in supporting any substantive meaning of the irrelevance principle, one that is concerned not with the value of motives as it is perceived by the individual, but as it is assessed by society and set by its laws.

IV. THE ''DIVISION OF LABOR'' VARIANT OF THE IRRELEVANCE PRINCIPLE

A. Antony Duff and the Distinct Tasks of Legislation and Adjudication

In the preceding section, we argued that the subjective variant of the argument for the irrelevance principle misdirects its attack by focusing on an idea of motive relevance for which no one seriously advocates. A more satisfactory measure for grounding the irrelevance principle was sought in a rule of law argument that stresses the potential harm to the validity of the criminal law that may ensue even where decisions as to relevant motives are not based on the defendant's point of view, but are left to the discretion of the courts. This variant of the rule of law argument is most closely associated with Antony Duff.[27]

Duff sets out to "provide a coherent account of why motives should be irrelevant to liability."[28] He finds his answer in the embodiment of a "substantive doctrine about the 'rule of law' and the distinction between the tasks of legislation and adjudication."[29] Duff's argument shifts the scope from the distinction between general law and individual morality to the division of labor between parliament and the courts. The variant of

25. Except in sentencing. On the harm to the rule of law entailed by delegating motive considerations to the sentencing stage, see below, section IV.

26. We return to this point in section VII below.

27. R.A. Duff, *Principle and Contradiction in the Criminal Law: Motives and Criminal Liability*, in PHILOSOPHY AND THE CRIMINAL LAW 156 (R.A. Duff ed., 1998).

28. *Id.* at 170.

29. *Id.* at 174.

the irrelevance principle that he advances is not directed exclusively toward individuals, who should not be allowed to use motives to override the standards decreed by society, but also, and more importantly, toward the courts, which are not authorized to construct inculpating or exculpation motives outside of what is otherwise provided for by legislation. The myriad ways in which defendants' motives may bear on liability are accounted for by the legislature's authority to define offenses and defenses that are predicated on such motives.[30] In Duff's own words:

> By portraying the orthodox doctrine [of the irrelevance of motive] as a definitional truth *about* the task of *adjudication*, we can see it as embodying a substantive doctrine about the "rule of law", and the distinction between the tasks of legislation and of adjudication. . . . The legislature defines crimes, by defining kinds of action that must count as criminal. Those definitions might include motivational factors, as identifying features of the relevant kind of action. . . . Once the legislature has defined crimes, it is for the courts to apply those definitions to determine defendants' criminal liability; and in doing so, they should attend only to the issue of whether the defendant's actions matched the law's definition of a crime.[31]

Notably however, the idea that it is generally the legislature's function to set the rules and the judiciary's to apply them is not particular to motives, and therefore does not substantiate the creation of a particular principle for the irrelevance of motives.[32] It may just as validly be said that courts should not base verdicts on intention or recklessness where these states of mind are not required within the definition of the offense (i.e., in crimes of negligence), but the truth of this statement need not entail (and has not entailed) a principle of the "irrelevance of intention to verdicts" or of the "insignificance of the state of recklessness to guilt." The mores of legality dictate an attitude that is in general favorable to the

30. *Id.*

31. *Id.* (emphasis in the original).

32. This criticism of Duff is found in Binder, *supra* note 1, at 93–94. It could, however, be that Duff was simply using the irrelevance of motive principle as an illustration of the more general idea he advances in this article, i.e., rebutting the charge made by critical theorists that the criminal law is unprincipled or contradictory. Otherwise, a specific warning to judges and juries to attend only to legislated motives when reaching verdicts may be warranted if it can be shown that courts infringe the rule of law by attending to extra-legislation motives more often than they do with regard to other extra-legislation factors.

idea that the legislature is the most suitable forum for defining the elements of crime, inclusive, but not exhaustive, of motives. It follows that the division of labor variant does not provide meaningful support for the notion that it is specifically motives that ought to be irrelevant to liability. Rather, it is a manifestation of the principle of parliamentary supremacy that has nothing in particular to say about the psychological phenomenon that we call motives.

Duff prefers the division of labor account of the irrelevance principle over the position that motives are relevant to criminal liability, explaining that the latter is open to criticism based on its failure to provide a principled distinction between motives that bear relevance to criminal liability and those that do not.[33] This criticism, however, unduly conflates two separate issues: the question, "May motives be used as building blocks in the construction of criminal liability?" and the query, "If so, which motives should be taken into account and which should not?" These are fundamentally distinct issues, the former dealing with the structure of liability and the latter concerned with its substance. Answering the latter query by demarcating relevant motives from irrelevant ones is a specific case of deciding which conduct to criminalize. To illustrate, deciding whether to view certain forms of speech as criminal when generated by feelings of hatred or by a motive to defame is a normative and cultural choice regarding the perimeters of the substance of criminal law—much like, say, deciding whether attempted suicide or homosexual conduct should be criminalized. And, although it is true that a mere rejection of the irrelevance principle does not, in itself, set out a rationale for accepting or rejecting specific motives as elements of offenses and defenses, the division of labor variant is also inapt.

The division of labor argument, if persuasive, would allow legislators to infuse motives into the definitions of inculpating and exculpating directives. However, it too does not indicate which motives may be legitimately employed. Tellingly, although Duff advances a very persuasive argument for legislative supremacy in selecting which motives criminal law ought to recognize, he does not provide the legislature with the criteria for making such a selection (which, presumably, will rely on the democratic rule-making process).

33. Duff, *supra* note 27, at 173.

B. Motive at the Sentencing Stage

A further weakness of the division of labor variant, one which Duff expressly recognizes but perhaps undervalues, is its failure to explain why it is inapplicable at the sentencing stage, where courts are allowed to give great relevance in their judgment to defendants' motives, including motives not addressed by legislation. Arguing from the position of legality only emphasizes this anomaly. If the rationale for the lack of discretion at the stage of assessing liability is rooted in an apprehension that allowing the courts such discretion may detract from the clarity of the law and the certainty of its application, then this also applies, *a fortiori*, to the sentencing stage, where the questions of the type and the severity of punishment are decided.[34] Indeed, consigning motives to sentencing allows the law to maintain the appearance of strictly adhering to the rule of law, while the actual impairment of liberty is discretely left to the discretion of judges.[35] Such a practice undermines the rule of law by obscuring the actual consequences of one's conduct.[36] This problem is amplified in jurisdictions that erode the standard of proof at the sentencing stage (i.e., where the obligation to accept reasonable doubt in favor of the defendant is replaced at sentencing by a benchmark focusing on the preponderance of evidence), detracting further from the ideal of certain application by relegating motives to a stage of the trial where judges hold more, rather than less, evidentiary discretion.[37]

Duff alleviates some of the tension created by the different treatment of motives in the two stages of judgment—as well as the tension between the rule of law and the relevance of motives for sentencing—by pointing to the legislature's inability to sufficiently capture the shades of moral judgment, and the entailed necessity of formulating broad categories of crime. The limits of legislation specificity dictate that each offense encompass a diversity of conduct tokens of varying severity, and this variety is accounted for

34. To this we may add that some motives constitute rules of conduct, designed to guide citizens—in contrast to decision rules, which are intended to direct adjudication—and these motives should therefore form part of the offense definition. On this issue see text to note 72 below.

35. Norrie likens this practice to having one's cake and eating it too. NORRIE, *supra* note 1, at 56.

36. George P. Fletcher, *Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1307 (1974).

37. Binder, *supra* note 1, at 92.

within sentencing discretion. The sentencing stage centers on the individual defendant. It is therefore more suited than generally applied legislation to provide an individually tailored judgment and may thus be less restricted than otherwise by the constraints of legality.[38] This elucidation goes a long way toward consolidating the rule of law with sentencing discretion, but it does not salvage the irrelevance principle. The problem is that this point does not explain why motives *specifically* may only be legitimately introduced by courts at the sentencing stage.[39] More generally, since the defendant may adduce evidence of his good motive in order to reduce his punishment "perhaps to vanishing-point,"[40] the strict separation between the two layers of judgment places too much importance on the division of the trial into stages.

C. Motive and Judicial Interpretation

Possibly, the division of labor variant may be salvaged by reconstructing it as a principle of interpretation, stating that where legislation leaves space for judicial interpretation, courts are barred from resorting to motives as distinguishing criteria between cases. To make sense, this formula must specify the unique characteristics of motives that render them unsuitable as interpretive tools. Duff himself does not aspire to such a project. Indeed, such a venture would be foreign to his cause, considering that he does not reject the relevance of motives to assessing liability (he accepts that legislators may resort to motives in defining wrongdoing), nor does he maintain that courts are ill-equipped to decide questions of motive (he allows for such decisions in the sentencing stage).

Duff's stated objective in his article is to argue against critical theorists who find that criminal law can never be principled because it is founded on an irreconcilable contradiction between law's aspiration for liberal individualism and the state's need for social control.[41] The professed catalyst to

38. Duff, *supra* note 27, at 175–77.

39. It may further be argued that the binomial nature of the liability verdict, as opposed to the scalar nature of the sentence, justifies some differences in the factors considered. This again only shows that the sentencing stage is the more flexible of the trial stages, but does not offer an explanation that says anything specific about motives.

40. WILLIAMS, *supra* note 7, at 75. And see, to the same effect, HALL, *supra* note 1, at 102.

41. Duff, *supra* note 27, at 156–57.

Duff's argument is Alan Norrie,[42] who maintained that the criminal law is found to be in contradiction to its avowed commitment to liberal individualism when it disregards, for example, political motive as a defense against the offense of disturbing the peace, and deprivation as a defense to property offenses. In a forceful defense against critical contentions, Duff reconciles this seeming contradiction by stressing the fact that the legal system includes forums where citizens can effectively express their political views, and receive some measure of social security that may aid the financially distressed. Duff allows that we may sometimes feel uncomfortable because of the conviction of deprived or conscientious defendants. Nonetheless, he argues that the discomfort caused by such convictions should not be attributed to any inherent contradiction within the criminal law, but rather to the malfunction of the social institutions on which the moral foundation for the law's claim on such defendants is conditioned.[43]

Yet, the fact that jurists have associated the idea of irrelevance specifically with the element of motive in spite of all the evidence regarding motive's relevance within positive law, may indicate that law is particularly ambivalent in its regard to this element of responsibility. This instinct to conceal law's reliance on motive in assessing liability plays into the hands of critics such as Norrie, who rightfully question the resilience of the irrelevance principle.

V. A COMBINED VARIANT: MOTIVE IRRELEVANCE AND EMERGENCY CASES

A. Jeremy Horder on the Irrelevance Principle

Before we move on to discuss a third, "strict" variant of the irrelevance principle, let us pause to assess Jeremy Horder's version of the rule of law argument, which entwines the two themes discussed in the preceding segments of this article: Hall's value subjectivism and the idea of division of labor. Importantly, Horder's account of the rule of law argument purports not only to explain why motive ought to be irrelevant to criminal liability and excluded from the evaluation of liability as a rule, but also to

42. NORRIE, *supra* note 1, at 41–57.
43. Duff, *supra* note 27, at 179–89.

account for the exceptional cases where motives do figure into an evaluation of responsibility.[44]

Without discussing Hall, Horder nevertheless seems to share Hall's premise that the irrelevance principle is needed to safeguard the legal order from having to concede that each defendant's normative model of motivations overrides the generally formulated decrees of society. Thus, he presents the irrelevance principle as a necessary fortification against a norm that would allow each actor to "substitute his or her own conception of a just resolution of a problem for that of the polity,"[45] and act according to his or her "own assessment of the morally relevant reasons."[46]

As we have seen in appraising Hall's argument,[47] this conception of the irrelevance principle is problematic because it focuses on a kind of value subjectivism for which no one seriously argues, irrespective of the relevance of motive. The actor's normative valuation of the reasons or emotions that have led him to act would not guide the legal response to his actions, whether motives are deemed relevant to liability or whether the irrelevance principle is intact. Horder's analysis, according to its own language, provides a rationale for a variant of the irrelevance principle that stipulates that an agent's subjective assessment of his motives for action is irrelevant with respect to the law's appraisal of his criminal liability. This position is misdirected because the agent's subjective assessment of any of the elements of the offense—mental as well as physical—is in general not relevant to his responsibility. All elements of the offense, not only motives, are determined by law or, in Horder's terms, the collective, which can assess the long-term effects of inculpating behavior.

B. The Case of Motivational Defenses

Horder advances his theory by pointing to a division of labor that exists in the normative valuation of motives between the individual actor and the law. According to Horder, in the majority of cases, the individual is less able than the collective to successfully appraise the long-term ramifications of his decision to allow a particular motive to override a criminal directive.

44. Jeremy Horder, *On the Irrelevance of Motive in Criminal Law*, *in* OXFORD ESSAYS IN JURISPRUDENCE—FOURTH SERIES 173 (J. Horder ed., 2000).

45. *Id.* at 183.

46. *Id.* at 187.

47. Above, section III.

Consequently, his subjective appraisal of his motive is denied, and he is expected to submit to the collective dictum reflected in the pronouncements of the law. Horder contrasts this usual scenario with those that give rise to pleas of self-defense, necessity, and duress. According to Horder, the success of such pleas often hinges on whether the agent's action was motivated by the exculpating conditions of the defense. What allows the law to concede the relevance of the agent's motive in such defenses is the fact that they invariably arise in rare situations, "one-off emergencies" in Horder's terms, where an acquittal based on the agent's motivation and choice will not serve much of a precedent or bear any far reaching socio-ethical implications. In these instances, the law can afford to delegate the act of appraising of the values involved to the individual facing the emergency, and allow him to act at will without consulting the collectively designed rules of conduct. As Horder illustrates, necessity may be afforded to a mountaineer who finds himself in an unexpected, life-threatening situation in which his only options are either to freeze or to break into a cabin and seize some supplies. In such a case, he is acting in a one-off emergency.[48]

C. Setting the Limits of the Defense

Horder's over-reliance on a subjective version of the irrelevance principle undermines his analysis of the division of labor between the individual and society, which he uses to explain the exceptions to the principle. By pointing toward those occurrences that are rare enough to lessen the need for a full collective process of reasoning (or render such a process too costly to be efficient), Horder wishes to discern the sphere in which the law allows an agent to apply his own reasoning regarding his motive. However, this is not how these exceptions operate. Just as it is the collective that defines the elements of offenses, it is also the collective that decides the elements of defenses. Even in cases of rare emergency, it is not the agent's choice of motives that is decisive but the law's:[49] the

48. Horder, *supra* note 44, at 177. A line may be drawn between Norrie's critical claim in his *Crime, Reason and History* (*supra* note 1) regarding society's tendency to treat motive as irrelevant where it threatens the social order that the law aims to preserve, and Horder's thesis about the relevance of motive in one-off emergencies, where the sporadic introduction of motive presumably would not put the social order under threat.

49. We assume here, with Horder, the position that predicates self-defense, necessity, and duress on motive. See discussion above, section II.

agent is not free to act out of any motive of his choosing, but is restricted to those privileges pre-ordained by law. This is precisely why the instances that Horder refers to are covered by self-defense, necessity, and duress. The agent is only left with the choice of whether to act out of one of these recognized motives; his discretion does not extend to choosing which motives are relevant. The internal limits of each motive are also set by law and not by the agent. In necessity, for instance, weighing the relative values of the harm inflicted by the action and the harm evaded by it is not in the hands of the agent, but in the hands of the law, which ultimately rules on the question of the lesser evil. Moreover, most jurisdictions restrict the availability of the defense of duress for certain serious offenses, notably murder and treason.[50]

Horder views such restrictions on the availability of defenses to be part of the system of the division of labor, as a way for society to set limits on the sphere where individuals are given discretion in determining the value of their motives for offending.[51] But they are in fact more than that: through such restrictions on the availability of a defense the law does not simply indicate the sphere where individuals are given freedom to assess their motives, it actually dictates which motives will be recognized and in what circumstances. Even in rare emergencies, the actor is not given the authority to determine the value of his motives, but only a freedom to act from those motives that were already sanctioned by law. To use John Gardner's terminology in his theory of justifications, a prohibited act may only be

50. In addition to being pre-ordained by law, defenses are generally circumscribed by objective qualifiers based on such standards as reasonableness, adequacy, and proportionality. The objective standard serves to curtail the defense, making it unavailable to agents who hold subjective views that divert from those generally accepted. Thus, for example, the motives of fear and anger are not enough to provide the defendant with the partial defense of provocation, as the requirement of adequate provocation sets a standard by which only those who have enough regard for the law to brace themselves generally are afforded the defense, and not those who do not possess enough respect for other people's rights of self-expression and act murderously in face of behavior or speech that is not to their liking. See Andrew J. Ashworth, *The Doctrine of Provocation*, 35 CAM. L.J. 292, 311 (1976), and Fletcher, *supra* note 36, at 1306. Indeed, it is Horder himself who elsewhere advocates integrating objective factors into the analysis of excuses, stating that "objective standards, in one form or another, are best understood as part of the necessary conditions, rather than as part of the sufficient conditions, for excuse." JEREMY HORDER, EXCUSING CRIME 28–29 (2004).

51. Horder, *supra* note 44, at 180.

justified if the actor's "explanatory reasons" for performing it correspond with the "guiding reasons" set by society.[52]

What we have in Horder's emergency cases are instances where the law must pronounce its decrees by using general standards rather than through narrow rules. Similarly to instances where the law uses general standards in offense definitions, the legality of the agent's conduct under standard-based defenses is appraised, but also determined by the court after the deed. The latitude afforded to the agent in these cases is misleading because it is limited in advance by the legislature and is subject ex-post to the discretion of adjudicators. Thus, although Horder is successful in pointing out a common characteristic of the justifying motives recognized by law[53]—that is, their applicability to rare emergencies—the theory that he introduces does not support a meaningful conception of the irrelevance principle. Ultimately, individuals can hold a valid motive only if that motive, like any other element of liability, is authorized by the established legal order (which, as Duff showed us,[54] is better represented here by the legislature than by the courts). With this in mind, we turn to examine a formulation of the rule of law argument that purports to address the irrelevance principle with regards to the legislature.

VI. THE ''STRICT'' VARIANT OF THE IRRELEVANCE PRINCIPLE

A. Equal Application and the Clarity of Legislation

Can an irrelevance principle *stricto sensu*, one that would apply to all functions of government irrespective of the particular divisions among them, be grounded in the rule of law? Obviously, it cannot be explained simply by the authoritarian notion of "rule of law, not of men"—as under this conception of the principle it is the law itself, through a restriction that

52. John Gardner, *Justifications and Reasons*, *in* HARM AND CULPABILITY 103 (A.P. Simester & A.T.H. Smith eds., 1996).

53. Note, however, that the notion of rare emergencies is incapable of explaining inculpating motives; on the contrary: there is little utility in enacting crimes of ulterior intent to account for rarely formed motives for action, and some inculpating motives, notably in hate crime legislation, are not temporary and passing but may sometimes constitute permanent dispositions.

54. Above, section IV.

is imposed even on the legislature, that is somehow prohibited from making reference to motive. Thus, the argument for the strict variant departs from the general meaning of the rule of law and shifts its focus to its particular formal conditions.

Attempts to ground motive restrictions that apply to legislation center on two requirements that stem from the rule of law, being: (1) equal application of the law, and (2) clarity of legislation. Thus, the question may be rephrased, and focus shifted to an examination of whether there is something about motives as such that is eminently harmful to one of these formal conditions. Equal application encompasses the requirement that similar cases be treated alike, meaning that law should be equally dispensed to any two individuals who act similarly. Where two defendants performed the same physical act, can legislation fairly distinguish between them based solely on the fact that different motives guided their respective actions? Stating the argument in this way helps us to see how it begs the question on the relevance of motive. We cannot hope to determine whether two similar physical acts based on different motives are different or alike before we decide if motives form relevant criteria for criminal responsibility.[55] Because the answer to the question of whether two otherwise similar acts become different due to distinct motivations is dependent upon the relevance of motive to criminal liability, it cannot inform us on this point (or serve a basis for the irrelevance of motive principle). We shall revisit the theme of equality in section VI below, where we find that disregarding motives in the attribution of liability may advance formal equality while, at the same time, hindering substantive equality among defendants.

B. Vague or Contestable Legal Norms

Is the pursuit of statutory clarity particularly thwarted by the introduction of motives into criminal legislation? Arguably, with moral sentiment being varied and often polarized, certain motives do not lend themselves to the neatness and clarity mandated by the rule of law. The assessment of a motive's relevance to culpability is infamously messy. It is said that when motive rears its head in the courtroom,[56] it opens up Pandora's Box[57] and

55. On this question, see Douglas Husak, *The Cost to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility*, 3 CRIM. L. & PHIL. 51 (2009).

56. To use Norrie's polemical language. NORRIE, *supra* note 1, at 53.

57. Reference made by Husak, *supra* note 10, at 12.

risks turning the courtroom into an arena for political, theological, and ideological debate.[58] It should however be remembered that the exclusion of motive from the assessment of culpability also signifies, in itself, an ideological stance implying a decision to disregard such common motives for offending as poverty and conscientious conviction. Moreover, clarity considerations do not preclude resorting to some motives where value and commensurability are generally agreed upon.

Thus, the consideration of clarity cannot afford adequate support for an all-encompassing version of the irrelevance principle. It could, however, suggest that motives should, as much as possible, be narrowly defined to minimize subjective value judgments factoring into judicial decisions. If, in the case of some motives, this is impossible to achieve justly (in terms of equality, for instance), that may suggest the irrelevance of *such* motives. What the argument ultimately comes down to is that legislated motives should not be exceedingly open-textured and leave too much room for subjective moral discretion. The matter is one of specificity, which calls to mind the division of labor between the legislature and the judiciary on which Duff builds his argument for the irrelevance principle:[59] when a motive is too vaguely defined, there is a danger that judges and juries may let their extra-legal attitudes affect their decisions, and substitute their own subjective morality or their assessment of a party's character for fact finding.[60]

Another constraint on the clarity of motive elements may result not from their contestable character or their political charge, but from their abstract nature. Consider, for example, the well-known case of *Chandler v. DPP*.[61] Here, the court dismissed the appellants' claim that they acted in accordance with a commendable and legally sanctioned motive when entering a prohibited militarized zone, seeking to further the aims of nuclear disarmament through non-violent demonstrations of civil disobedience.

58. See for example Wasik, *supra* note 14, at 548.

59. Above, section IV.

60. But compare Kent Greenawalt, *The Rule of Law and the Exemption Strategy*, 30 CARDOZO L. REV. 1525 (2009), who finds that standards may be necessary, sometimes beneficial, and at any rate prevalent in legal doctrine, and therefore should not be deemed an obvious violation of the rule of law—even when applied to considering motive in assessing criminal liability: "with legal references to mental states, including motives, we must be cautious about condemning open-ended standards as violations of the rule of law."

61. See note 6, *supra*.

The difficulty in this case may not have necessarily arisen from the possibility of giving relevance to motive as such, but from the particular framing of the motive found in § 1 of the Official Secrets Act, 1911, as "for a purpose prejudicial to the safety or interest of the state." This may well be too open-textured to easily exclude the defendants' seemingly honest claim that their concern was for the safety of the state and its interests as the defendants saw them.[62] From this perspective, the intent or motive requirement in the offense may benefit from a more specific definition, such as "obstructing the policy chosen by the state." This way, the question of policy is neither in the hands of the defendant nor in the hands of particular adjudicators.[63]

Where motives are not framed in terms of reasons for action but consist instead of emotions, the problem is exacerbated. How can the legislature confine or define in more concrete terms its framing of feelings such as fear, anger, or racial hatred? Yet, even here it may be argued that the drawbacks of a vaguely drafted motive parallel the drawbacks of vagueness in general and not those of motive-based liability.[64] After all, many legal factors are inescapably abstract, such as causation, omission, and reasonableness.

C. William Wilson and the Offense-Defense Distinction

The quest for legislative clarity leads William Wilson to argue for the middle ground between relevance and the strict irrelevance of motives to criminal liability. According to Wilson, a favorable balance is struck when motives are excluded from the definition of offenses and relegated to the realm of defenses. Freeing the criteria of criminal liability from the complexities of motive sustains the clarity of the moral principles they express.[65] Wilson argues that his solution is particularly helpful where the prohibited conduct embodies a moral proscription, such as in crimes of

62. Although, even given the statute's wording, it is reasonable to assert that the interests of the state are to be determined by the state.

63. Of course, a legislator may be liberal enough to allow good-willed demonstrations against state policy, which highlights the dilemma of balancing the level of specificity in which to frame motives within criminal legislation.

64. Binder, *supra* note 1, at 90.

65. WILSON, *supra* note 14, at 131. Notice how Wilson's view offers yet another conception of the irrelevance of motive principle, which may be termed "the irrelevance of motive to offense definition" variant. However, as we shall soon see in the text, Wilson qualifies this principle by accepting that for some offenses, motive is indispensable.

physical violence, in which case "lending an actor's reasons for [action] a defining role in the offense would be self-defeating."[66] Excluding motive from the definition of such offenses helps to achieve a "clarity of purpose, which allow us to know what is the 'right' thing to do without our having to engage in complex moral inquiry."

This line of argument is open to two kinds of criticism. First, Wilson fails to provide a convincing criterion by which to discern those offenses that he himself agrees should include in their definition the agent's reasons for action—for example, in crimes of ulterior intent such as theft and blackmail. These, Wilson claims,[67] should be reserved for cases where the act specified by the offense is only wrong if done for the wrong reasons, in which case "one makes naturally the excusability or justifiability of D's conduct a prominent role in the definition of the offense."[68] But, it is very hard to make the distinction, even with regard to those offenses which Wilson uses to illustrate his point. It is not readily shown why acts of appropriation of another's property (in theft) or of making a demand or a threat on another whereby infringing his autonomy (in blackmail) are categorically different from acts of physical assault, so that in the former it is natural to include the motive in the definition of the offense, whereas in the later it is self-defeating. It would seem that in all three cases, the act in question could have been instigated by good (justifying) motives or by bad (inculpating) ones, and it is not at all obvious in which of these offenses the motive should be considered wrong-constituting and therefore part of the offense definition.

Relating to the desirability of constructing the offense of assault with intent to rape[69] as a fitting (fairly labeling) category between attempted

66. *Id.*

67. *Following* Jeremy Horder, *Crimes of Ulterior Intent*, *in* HARM AND CULPABILITY 153 (A.P. Simester & A.T.H. Smith eds., 1996).

68. WILSON, *supra* note 14, at 131.

69. This offense illustrates the conflation of motive and intent, discussed in the text at notes 7–8 above. The actor performs an assault wishing to rape, perhaps in view of gaining sexual gratification. He intends both to rape and to gain sexual gratification. At the same time he is motivated to rape for the instrumental value he believes it to have, and he is motivated to gain sexual gratification for the intrinsic value he believes it to have. Some would label the wish to rape as an irrelevant *motive* for the offense of assault and as a relevant *intent* for the offense of assault with intent to rape (and indeed label the wish to gain sexual gratification as an irrelevant motive for the offense of assault with intent to rape, but as a relevant intent in relation to several offenses in the Sexual Offenses Act 2003, which are

rape (reserved for conduct more advanced toward completion of the act required in that offense) and simple assault (which undervalues the sexual nature of the assault), Wilson writes that "[w]ithout forms of criminal wrongdoing which take full account of the practical significance of intentions accompanying actions, the temptation is to force such examples of moral wrongdoing into legal pigeonholes they were not made for."[70] But can this not be also said about classifying murder for financial gain and euthanasia under a single offense, which Wilson seems to favor in order to promote legislative clarity?[71] In both instances, different motives for action, carrying different moral significance, may be noticed or ignored by the law. Arguably, the difference between paid assassination and mercy killing is much more significant than that between assault and assault with intent to rape—yet Wilson champions only a distinction of the latter (though he advocates mitigation in the sentence of the mercy killer).

Second, and what is more fundamental from the standpoint of legality and clarity, some motives are often regarded to be rules of conduct, which means that they should publicly communicate as clear a message as possible as to the acceptable parameters of pubic demeanor. These may include the desire to consummate an offense in attempt liability, as well as the justifying (if not also the excusing) motivational defenses. Considering the established role of justifications as rules of conduct[72] (and assuming that the availability of such defenses is indeed predicated on motive),[73] then they should clearly instruct any person facing an attack on his body about the limits of self-defense and let anybody faced with necessity know that it is permissible to commit the lesser evil in the situation. Arguably, this means that these justifying motives should be accentuated in the legal directives, rather than hidden in the realm of defenses. It may be retorted

predicated on a which to achieve sexual gratification). This distinction between motive and intention is circular and not helpful, as shown in note 19 above.

70. WILSON, *supra* note 14, at 143, agreeing with Horder, *supra* note 67.

71. WILSON, *id.* at 131.

72. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 810–13 (1978); John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 597 (1998). On the distinction between rules of conduct and rules of adjudication in general, see: Meir Dan-Cohen, *Decision Rules and Conduct Rules: on Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990); Peter Alldridge, *Rules for Courts and Rules for Citizens*, 10 OXFORD J. LEGAL STUD. 487 (1990).

73. See discussion in note 10 above.

that the actor is expected to consult the words of defenses as well as those of offenses before proceeding to act, but if that is the case, then the complexity associated with motive will be retained wherever considerations of motive are placed. Either way, the distinction between elements of the offense and elements of the defense is not as natural as Wilson would have us believe. It follows that the question of clarity hinges on whether relevant motives may be confined and clearly stated, rather than on whether motivational elements are positioned in offenses or in defenses.[74]

A balance needs to be struck between clarity and substantive justice. For example, the interest of equal application of the law and the concern with clarity of legislation may sometimes conflict: if motives are defined too widely, for example, "exemption for religious motives," then clarity will be subverted (in the extreme, each individual will be judged according to his beliefs and preferred methods of worship—or, alternatively, in accordance with the beliefs of individual adjudicators).[75] If, however, motives are defined too narrowly, for example, by accommodating the practices of some religions and not those of others, inequality might ensue. Surely, absolute rules are clear, and clarity will be kept by a rule of "thou shall not kill under any circumstances or out of any motives however noble," but this cannot be said to make for fair law. Inevitably, some motives will have to be recognized and other discarded.

74. This is not to say that the practice of relegating certain motives to defenses is misguided, only that it is not necessarily guided by clarity. Factors such as efficiency may be decisive in this matter, for example, where a justifying motive is relevant to a large group of offenses, and it may prove more practical to account for it in a general defense than to have it countlessly reiterated. Furthermore, Wilson, relying in part on Richard H. S. Tur, *Subjectivism and Objectivism: Towards Synthesis*, *in* ACTION AND VALUE IN CRIMINAL LAW 213 (S. Shute, J. Gardner, & J. Horder eds., 1993), writes that the division of elements between offense and defense allows for non-fundamental changes in a community's core values to be filtered more flexibly via changes in defense definitions rather than through changes in the reflected prohibition. In other words, we can add or subtract defenses according to current mores without compromising our fundamental values. *See* WILSON, *supra* note 14, at 270–71. This concern may also be relevant to some motivational elements.

75. We assume that "religious motives" are construed widely enough to include all convictions, otherwise inequality may ensue from the demarcation of acknowledged religions.

VII. HOW MIGHT MOTIVE PROMOTE THE RULE OF LAW?

Showing the failure of a central set of arguments in support of the irrelevance principle does not dictate that motive is forever relevant to liability. Leaving aside the possibility that other arguments in support of the irrelevance principle, besides those that rest on the rule of law, may be sound, there may still be good reasons to disregard motives in many particular instances. As we have seen, such reasons are sometimes rooted in the rule of law, for example, regarding those motives that cannot be stated except in a way that would harm clarity or neutrality.[76] The point is that law does not face an all-or-nothing choice between a complete disregard of motives and an obligation to nuance each verdict with motivational considerations. One should indeed be suspicious of the prospect that there should be a monolithic notion of "motive" to support any comprehensive claim about the interrelation between motives and criminal liability.

If we concede the varied nature of culpability, then we may also allow that, at times, the very factors that are said to count against the inclusion of motive in liability will point in the opposite direction. Thus, as a closing remark, we wish to briefly point to places where the rule of law may, in fact, be advanced by the introduction of motive to the assessment of liability.[77] This link works on several levels.

First, by abandoning the dogma of the irrelevance principle we can begin to openly discuss important topics such as the measure of favorability of different motives, a debate that is often prematurely silenced by the hegemonic position of the irrelevance principle. Since, as we have seen,[78] the irrelevance principle is descriptively false, and motivational elements are present in doctrines of liability as well as in concrete offenses and defenses, acknowledging this fact is an important first step for any illuminating discussion of those legal rules that may include motivational elements. By acknowledging motive's relevance to liability, specific motivational elements will not be criticized simply as a violation of the

76. Above, section VI.

77. This claim is distinct from the historical observation that the irrelevance of motive principle was initially designed with the aim of promoting fidelity to the rule of law. For the historical perspective, see Binder, *supra* note 1, at 3.

78. Above, section II.

irrelevance principle, but rather assessed according to their specific merits and demerits as elements of crime.

Second, in certain instances the rule of law may be advanced by the introduction of new motivational elements into criminal directives. One way of stating the case is by holding that where a strong sense exists within a community that a certain motive ought to matter in determining guilt, then this motive should be part of the criminal law in order to ensure greater adherence to the rule of law.[79] Another possibility is to hold that allowing a place for individual motives in the criminal law advances the rule of law in the sense of our ability to keep a satisfactory legal and political system in operation over time, by helping it to maintain the legitimacy of these rules.[80] This idea holds true not only with respect to the introduction of motive in general, but also to concrete motives. Where the policy behind the statute has more to do with an agents' motive than with physical acts or the resulting harm, the rule of law requires reference to motive. In these cases, adhering to the irrelevance principle means either defeating the policy or formulating the law through proxies for the existence of the pertinent motive, which, if the proxy cannot completely overlap with the existence of the motive, will result in unfairness and substantive inequality.[81] For example, the offense of theft is grounded on the thief's motivation (in the sense of "reason for action") to deprive the appropriated goods from their rightful owner. Barred from resorting to this motive, the offense of theft would have to be either discarded for being overly inclusive (incriminating otherwise innocent acts as well as wrongful acts of appropriation) or restricted by means of proxies that would limit its scope. If we believe that the wrongfulness of theft is dependent on the actor's wish to deprive the owner of the stolen goods, what elements could adequately substitute for this motive, in a way that would give the offense the form that we desire? The same may be said of emotional motives, such as hate: without resort to this emotion in the prohibitory norm, what are known as "hate crimes" or racially aggravated crimes would have to be either discarded or formulated through substitutes

79. Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 673 (2005).

80. Parry, *supra* note 2, at 456.

81. Jeremy Waldron, *One Law for All? The Logic or Cultural Accommodation*, 59 WASH. & LEE L. REV. 3, 6–7 (2002).

that would not capture the true essence or the right limits of the conduct intended for criminalization.

Which leads us to a further, third link between motives and the rule of law, centering on equal application of the law. As we have already observed,[82] the question of equal application depends on whether the acts that are similarly treated are indeed similar, or whether diverging motivations render them different. Determining a set of criteria for assessing what constitutes the same act is illusive. Quite often different mental states render two seemingly similar acts different.[83] Take, for example, the extreme cases of mercy killing and mercenary killing: although both involve similar physical conduct and share some common mental criteria (notably, the willing of another human's death), differing motivations may render them two very different acts. One may rightly criticize law for neglecting to afford this difference its due significance. Even in the more mundane context of religious exemptions, the normative evaluation of conduct may vary according to motive, sharply separating circumcision from criminal mutilation, worship under the influence from drug use, and sacramental wine consumption by kids from underage drinking.[84] Thus, a blanket prohibition on underage wine consumption may advance formal equality, while substantively discriminating against those minors who consume wine for communion or *kidush*.

For Kent Greenawalt, the issue of upholding the rule of law in such instances hinges on the legislature's motives in formulating an offense or defense in terms of motive:

> If the crucial considerations come down to effective deterrence and competing views about "just" punishment, we should not understand a well considered decision to [introduce a certain motive into criminal legislation] as an offense to the rule of law (whether or not we actually agree with that decision). . . . If, however, legislators act thoughtlessly or in response to pressure *and* they categorize exemptions in terms they cannot reasonably defend, *then* we may say that they have failed to act in accord with the rule of law value that similar acts should be treated similarly.[85]

This is surely right, although it is not unique to motives or indeed confined to mental states. It would appear that all the elements of criminal

82. We touched on the theme of equal application in section VI, above.

83. Greenawalt, *supra* note 60, at 1521.

84. *Id.*; Waldron, *supra* note 81.

85. Greenawalt, *supra* note 60, at 1529.

law directives should be subject to the conditions of thoughtful legislation and defensible terminology (think once again of the criminalization of attempted suicide and homosexual conduct). But, the important point to take is that motives, like other elements of crime, do not inherently harm the rule of law and, at instances, can advance it. Sometimes *actus reus* and the non-motivational elements of *mens rea* cannot sufficiently capture the complexities of criminal liability. As we have illustrated above, the basic constituents of crime may not be reliable criteria under which to differentiate religious practices from delinquency. If this distinction is important to society, another dimension is needed to adequately construct criminal prohibitions. Otherwise, we risk the possibility of laws being arbitrarily narrow or broad. With its added precision, clarity, and descriptive power, motive may bolster equal application of the law while enabling people to better organize their affairs. As a result, the introduction of at least some motives may have the potential to significantly advance the rule of law.

CONCLUSION

We have identified and examined three manifestations of the rule of law argument, which gave rise to three variations on the irrelevance of motive principle in criminal law. These are: (1) the *subjective variant*, whereby it is claimed that the revocation of the irrelevance principle would mean that each defendant would be judged according to his own perception of the permissibility of his conduct based on his subjective assessment of the reasons that lead him to act; (2) the *division of labor variant*, holding that the irrelevance principle is directed at adjudicators, who, when reaching a verdict as to the guilt or innocence of a defendant, ought to be barred from making reference to any motive that is not preordained in legislation; and (3) the *strict variant*, which argues that even the legislature should not be allowed to infuse motives into the directives of the criminal law, lest the values of equal application and clarity of legislation be undermined.

We found all three variants to be unconvincing. Proponents of the subjective variant are right to claim that allowing each agent to assert his assessment of the normative value of his motives for wrongdoing would be detrimental to the rule of law. But as society cannot afford to bow to each agent's subjective assessment of the merit of any of the elements of offending, this argument has nothing in particular to say about the phenomenon

of motive, and its attack is misdirected at a radical value subjectivism that no mainstream commentator of criminal law has ever seriously advanced. Ultimately, individuals may claim a valid motive only if it is endorsed by the legal decrees of the collective, but this is also true of the other components of the mental element—and, indeed, of the constituents of the physical element as well. The second variant, which emphasizes the division of labor between the legislature and the courts, advances parliamentary supremacy in the formulation of criminal directives. This principle too is not specific to the topic of motive. It is a facet of the wider principle, which states that in determining liability in general, the courts should closely trace those (and only those) elements of offenses and defenses that were set in legislation. Furthermore, the literature that introduced the division of labor variant has not produced a unique characteristic of motives that would render them unsuitable as interpretive tools, and has failed to adequately reconcile the fact that on any recognized account of the irrelevance principle, courts are free to consider motives at the sentencing stage. The third variant, which endeavors to base the irrelevance principle on the rule of law requirements of equal application and clarity of legislation, is also unsuccessful. Arguing equal application for similar conduct where two similar acts were accommodated by different motives begs the question of whether motive indeed has a relevant effect on the moral and legal value of conduct. Arguing from clarity can only justify a tendency to dismiss those particular motives that do not lend themselves to clear formulation.

We can conclude that rule of law considerations cannot serve to support the irrelevance principle. In their most far-reaching form, rule of law arguments may vindicate a much more modest claim than the irrelevance of motive: they serve as a useful reminder that when applying motives to criminal directives, one ought to be sensitive to questions concerning the clarity of norms, the precise scope of application, and the idea of equal application under the law. But, it is hard to show how even this modest claim is particular to motives and why it should therefore apply in this context more strongly than with regard to the other constituents of the offense, particularly in respect to other vague and abstract elements such as causation, omission and reasonableness.

Furthermore, in some instances the rule of law will be advanced by the introduction of motive to the assessment of liability. If motives are carefully analyzed and their scope of application plainly defined, motives may be used to provide both clarity and substantial equality where other elements

of crime prove inadequate. When neither *actus reus* nor the non-motivational elements of *mens rea* are suited to distinguish between what society has sanctioned and prohibited, progress could be achieved by the application of motive.