

THE CONTINUED RELEVANCE OF THE IRRELEVANCE-OF-MOTIVE MAXIM

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ABSTRACT

The irrelevance-of-motive maxim—the longstanding principle that a defendant’s motives are irrelevant to criminal liability—has come under attack. Critics of this maxim claim that “motives,” under any plausible conception of the term, are in fact relevant in the criminal law. According to these critics, the only way to defend the truth of the irrelevance-of-motive maxim is to render it true by definition, by defining motive as the subcategory of intentions that are irrelevant to criminal liability. This Note defends the irrelevance-of-motive maxim by applying a plausible conception of “motive” that conforms to the historical meaning of the term. With the proper definition in place, the irrelevance-of-motive maxim can be understood as stating a valid principle of criminal law, defied only by the advent of a certain kind of bias crime legislation.

INTRODUCTION

“[A]lthough a good motive might mitigate punishment (or [discourage] prosecution), and a bad motive might aggravate punishment (or [encourage] prosecution), it is a truism within orthodoxy that motive has no bearing on liability itself.”¹ According to Professor Jerome Hall, “hardly any part of penal law is more

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1. DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 144 (1987) (altered to correct the source’s transposition of the words “encourage” and “discourage”).

definitely settled than that *motive is irrelevant*.² The “irrelevance-of-motive maxim”³—the claim that one’s motives are irrelevant to criminal liability—has received increasing attention in light of the modern debate over hate crime, or bias crime,⁴ legislation. For example, the Wisconsin and Ohio Supreme Courts both cited the irrelevance-of-motive maxim to support their decisions, later reversed by the United States Supreme Court, to strike down bias crime statutes as unconstitutional.⁵ Yet despite judicial reliance on this maxim, and despite Professor Hall’s characterization of it as an unquestioned principle of law, the irrelevance-of-motive maxim has come under attack⁶ from normative, empirical, and logical criticisms.⁷

The normative criticisms ask why motive *should* be irrelevant to criminal liability, in light of motive’s relevance to questions of moral culpability.⁸ The empirical criticisms assert that motive *is* relevant to criminal liability,⁹ and even when irrelevant to liability itself, that motive nevertheless exerts a more subtle influence, affecting how prosecutors,¹⁰ judges,¹¹ and juries¹² apply the law. The logical criticisms

2. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 88 (2d ed. 1960) (emphasis added) (citing *State v. Logan*, 126 S.W.2d 256 (Mo. 1939) (per curiam)).

3. Although the phrase “irrelevance-of-motive maxim” is used consistently throughout this Note, there is no generally agreed upon description of this principle. This phrase, sans hyphens, was used by Professor Guyora Binder in his article *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1 *passim* (2002).

4. The term “bias crime” is used throughout this Note instead of “hate crime” because those who commit bias crimes do not necessarily hate their victims. See FREDERICK M. LAWRENCE, PUNISHING HATE 9 (1999) (defending the term “bias crime” for this reason). For a discussion on the distinction between statutes that require a racial animus and those that merely require differential selection of victims of a particular group, see *infra* Part III.B.3.

5. See *State v. Wyant*, 597 N.E.2d 450, 452–56 (Ohio 1992) (invalidating a bias crime statute because it wrongly punished motive), *vacated*, 508 U.S. 969 (1993) (mem.); *State v. Mitchell*, 485 N.W.2d 807, 813 & n.11–12 (Wis. 1992) (discussing the distinction between motive and intention to show that the statute improperly concerns motive), *rev’d*, 508 U.S. 476 (1993).

6. See, e.g., Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 90 (2006) (“[T]his familiar law school picture of motive as essentially irrelevant is increasingly wrong descriptively and is also wrong normatively.”).

7. Binder, *supra* note 3, at 45.

8. See HUSAK, *supra* note 1, at 144 (“Nothing written by moral philosophers supports the unimportance of motive.”).

9. See, e.g., *id.* at 146 (“The reason *why* the defendant breaks and enters is crucial in characterizing his conduct as a burglary. Forgery, kidnapping, criminal libel, and conspiracy provide other examples, and the list could be expanded at great length.”).

10. See WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW 231 (2d ed. 1986) (asserting that motive is relevant to the procedural aspects of criminal law).

11. See Antony Duff, *Principle and Contradiction in the Criminal Law: Motives and Criminal Liability*, in PHILOSOPHY AND THE CRIMINAL LAW 156, 171 (Antony Duff ed., 1998)

of the maxim question the coherence of proposed distinctions between motives and intentions, and seek to prevent defenders of the maxim from rendering it true by definition.¹³

Taken together, the logical and empirical criticisms contend that “no distinction could be drawn between motive and intent that would make the irrelevance of motive claim descriptively true, as opposed to true only by definition.”¹⁴ In other words, the maxim is either false or vacuous. Professor Douglas Husak contends that “according to *any* plausible conception” of what motive means, motive can be shown to be relevant to criminal liability.¹⁵ Husak thus calls for an abandonment of the irrelevance-of-motive maxim,¹⁶ which he claims has had a “pernicious impact” on the law.¹⁷

This Note accepts Professor Husak’s challenge. It defends the truth of the irrelevance-of-motive maxim by applying a conception of motive that is not only “plausible,” but that conforms to the historical meaning of the term. Part I explains the conceptions of motive espoused by two of the most influential commentators on the topic, Sir James Fitzjames Stephen and Professor Jerome Hall, and defends the success of their explanations in coherently distinguishing between motives and intentions. Part II demonstrates the inadequacy of the predominant view of motive, which defines motive as a species of intention. Applying Hall’s conception of motive, Part III argues that the irrelevance-of-motive maxim is alive and well. Motive is indeed irrelevant to criminal liability, with one exception: certain bias crime statutes *do* make motive relevant to criminal liability. In light of the maxim’s continued validity, participants in the debate over bias

(“Courts can acquit defendants with whose motives they sympathise, by redescribing their intentions in terms of their motives to make it appear that they did not act with the appropriate criminal intention.”).

12. See LAFAVE & SCOTT, *supra* note 10, at 231 (“The jury, if the defendant’s good motive comes to its attention, might exercise its uncontrolled discretion to acquit.” (footnote omitted)).

13. See, e.g., Douglas N. Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3, 5 (1989) (“The most effective (but least satisfactory) means to guarantee the accuracy of [the irrelevance-of-motive maxim] is to construe it as a necessary truth. . . . But [this] thesis is substantive, and is trivialized when construed as a tautology.”).

14. Binder, *supra* note 3, at 45.

15. Husak, *supra* note 13, at 5.

16. HUSAK, *supra* note 1, at 148.

17. See *id.* (remarking, in reference to benevolent euthanasia cases in which the defendant’s good motives were ignored, that “[i]t is monstrous that a defendant should be convicted of the most serious offense known to the criminal law when he loving and regretfully complies with a request to kill his suffering and incurable spouse”).

crimes should recognize just how exceptional these new crimes are in the criminal law.

I. MOTIVE AS WHOLLY DISTINCT FROM INTENTION

The distinction between intention and motive is far from settled. “It might be thought that a clear distinction between intention and motive can be drawn, given the radical difference in treatment that follows from categorizing a mental state as one or the other. In fact, however, the distinction has long bedeviled law students and criminal theorists alike.”¹⁸ Nevertheless, despite such confusion, a clear distinction between motive and intention does exist. The view of motive defended here—that motive refers not to intended consequences, but to the reason those consequences are desirable to the actor—is best understood through the writings of two influential proponents of the irrelevance-of-motive maxim: Sir James Fitzjames Stephen and Professor Jerome Hall. Although the two theorists held slightly different conceptions of motive, they both viewed motive as a concept wholly distinct from intention—meaning that a motive could never be an intention, or vice versa. This Part explains Stephen’s and Hall’s distinctions between motive and intention, and then embraces Hall’s distinction,¹⁹ defending its logical coherence.

A. *Sir James Fitzjames Stephen’s View*

Sir James Fitzjames Stephen is regarded as one of the “most influential exponents of the irrelevance of motive maxim.”²⁰ Although his explanation has been misread,²¹ Stephen was clear that intentions are neither “synonymous with motives” nor a broader category that includes motives and nonmotives.²²

18. *Id.* at 144.

19. This Note specifically defends Hall’s view because it is both more sensible and better explained than Stephen’s view and because the irrelevance-of-motive maxim is often viewed as “Hall’s thesis.” See, e.g., Husak, *supra* note 13, at 4 (referring to the maxim as “Hall’s thesis”).

20. Binder, *supra* note 3, at 37 (referring to Victorian-era British judge and historian Sir James Fitzjames Stephen and Supreme Court Justice Oliver Wendell Holmes as the two most influential exponents of the maxim).

21. See *infra* notes 33–34 and accompanying text for an explanation of how Stephen’s distinction between motive and intentions has been misread.

22. 2 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 110–12 (1883).

1. *The Two Fallacies of Which Stephen Warns.* In his 1883 work *History of the Criminal Law of England*, Sir James Fitzjames Stephen warns “against two common fallacies, namely, the confusion between motive and intention, and [second,] the tendency to deny an immediate intention because of the existence, real or supposed, of some ulterior intention.”²³ Understanding what Stephen means by these “fallacies” illustrates two fundamental principles about intentions in the criminal law. The first principle is that motive is irrelevant in the criminal law—the irrelevance-of-motive maxim. The other principle asserts the irrelevance of a more “ulterior intention.”²⁴ According to this second principle, just as one’s *most* ultimate intention is irrelevant to criminal liability, so too are any intentions *more* ultimate than those included in a crime’s mens rea requirement. That is, even if one’s most ultimate goal is to save the world, this does not save one’s actions from criminality. The confusion surrounding the irrelevance-of-motive maxim can ultimately be explained as resulting from the conflation of these two distinct principles.²⁵ Following a cursory discussion of the fallacies Stephen addresses, Part I.A.2 elaborates on the distinction between the two.

The first fallacy Stephen warns of is the subject of this Note: the confusion between motives and intentions. Stephen identifies an actor’s motive as “the prevailing feeling in his mind at the time when he acted rather than the desire to produce the particular result which his conduct was intended to produce.”²⁶ To explain this distinction, Stephen presents the following illustration:

A puts a loaded pistol to B’s temple and shoots B through the head deliberately, and knowing that the pistol is loaded and that the wound must certainly be mortal. It is obvious that in every such case the intention of A must be to kill B. On the other hand, the act in itself throws no light whatever on A’s motives for killing B. . . . They may have been mixed in all imaginable degrees. The motive may have been a desire for revenge, or a desire for plunder, or a wish on A’s part to defend himself against an attack by B, or a desire to kill an enemy in battle, or to put a man already mortally wounded out of

23. *Id.* at 111.

24. This second principle is discussed further in Part I.A.2.

25. See *infra* Part I.A.2 for an explanation of how Stephen’s distinction between motive and intention has been misread as a distinction between proximate and ultimate intentions.

26. STEPHEN, *supra* note 22, at 110.

his agony. In all these cases the intention is the same, but the motives are different²⁷

It would be easy to interpret Stephen's first fallacy as saying motive means a more ulterior intention, and because more ulterior intentions are irrelevant, motives are irrelevant. Under a correct reading of Stephen, however, motive should be understood as *distinct* from intentions altogether. To see this, consider the second fallacy Stephen describes.

The second potential fallacy is that of excusing a prohibited intention based on the existence of some ulterior intention. To illustrate this point, Stephen discusses the case of *Rex v. Woodburne and Coke*,²⁸ an English case in which the defendants were charged with wounding another "with intent to maim and disfigure."²⁹ One defendant claimed to be innocent of this crime because he did not intend to *disfigure* the victim, but rather to kill him.³⁰ Stephen explained, however, that the legal concept of "intention" does not refer only to the most ultimate intended consequence of an action, but to all consequences sought as a means to achieving the ultimate end.³¹ Thus, Stephen asserted that the jury was properly instructed to determine whether disfiguring the victim was a consequence that the defendant had desired as a means of achieving his ultimate goal of murder.³²

2. *Distinguishing between the Two Fallacies.* Sir James Fitzjames Stephen's discussion of these two fallacies—confusing motive with intention and mistakenly believing that ulterior intentions are relevant—points to a third potential pitfall:

27. *Id.* at 110–11.

28. THE TRIAL OF JOHN WOODBURN AND ARUNDEL COKE, ESQ. AT SUFFOLK ASSIZES, FOR FELONY, IN WILLFULLY SLITTING THE NOSE OF EDWARD CRISPE, GENT. (* 8 GEORGE I. A.D. 1722), reprinted in 16 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM EARLIEST PERIOD TO THE YEAR 1783 WITH NOTES AND ILLUSTRATIONS, at 53 (William S. Hein & Co., Inc., 2000) (T.B. Howell comp., T.C. Hansard 1812).

29. STEPHEN, *supra* note 22, at 112.

30. *Id.*

31. *See id.* at 110–11 (rejecting the view that only the ultimate intentions are relevant and suggesting that one's intentions can be inferred from the natural consequences of one's actions).

32. *Id.* at 112 (instructing the jury to "consider whether the means made use of to effect and accomplish that murder and the consequence of those means were not in the intention and design of the party; whether every blow and cut and the consequences thereof were not intended, as well as the end for which it is alleged the blows and cuts were given").

misconstruing the two fallacies as one and the same. The mistake results from interpreting Stephen's examples of motives—"a wish on A's part to defend himself against an attack by B, or a desire to kill an enemy in battle," and so forth—as examples of intended consequences.³³ Professor Guyora Binder falls prey to this pitfall, claiming that Stephen views motives as "desired ends."³⁴ That this interpretation is a misreading can best be illustrated through a concrete example.

In a hypothetical based on the *Woodburne* case described in Part I.A.1,³⁵ Donny Defendant strikes Victor Victim seven times on his face and head with a knife. Further, suppose that Donny's intended consequences for this action can be listed, in order from most temporally proximate to temporally ultimate, as follows: (1) Victor's face and head suffer cuts and other injuries, (2) Victor is severely injured, and (3) Victor dies.

Assuming that this is a complete list of the consequences Donny intended, what was his motive for the assault? According to Stephen's view, the reader should have no idea. For Stephen, motive is not an intended consequence of the action. Motive is "the prevailing feeling in [the defendant's] mind at the time when he acted rather than the desire to produce the particular result which his conduct was intended to produce."³⁶ Although the list of Donny's intended consequences rules out certain possible motives, many others remain.³⁷ For example, Donny may have attacked Victor out of bloodlust, a desire for revenge, or to minimize Victor's suffering.

These descriptions of potential motives form the potential source of confusion. One might think that what Stephen calls "motives" can be redescribed in terms of intended consequences—interpreting "having a desire for revenge" as meaning "having the intended

33. *Id.* at 111.

34. Binder, *supra* note 3, at 38–40 ("For Stephen, intentions are compound mental states, combining volitions and expectations. They are consequences not merely desired, but chosen or accepted, as the likely consequences of acts that are chosen. Thus, there are intentions (expected consequences of acts) that are not motives, because not desired. And there are motives (desired ends) that are not intentions, because not acted upon.")

35. In the *Woodburne* case, "Woodburne, at Coke's instigation, struck Crispe about the head and face with a billhook seven distinct blows." STEPHEN, *supra* note 22, at 112 (discussing THE TRIAL OF JOHN WOODBURNE AND ARUNDEL COKE, ESQ. AT SUFFOLK ASSIZES, FOR FELONY, IN WILLFULLY SLITTING THE NOSE OF EDWARD CRISPE, GENT., *supra* note 28). The defense of intending murder rather than disfigurement was offered by Coke. *Id.*

36. *Id.* at 110.

37. See *infra* Part III.A for a defense of this claim.

consequence of achieving revenge.” In the Donny hypothetical, however, achieving revenge is not a separate consequence following from Victor’s death; it is simply a different characterization of the same event. This is the distinction between motive and intention.³⁸ Intention refers to the events the defendant sought to bring about whereas motive refers to a subjective reason the defendant desired to bring about those events.

With this distinction in mind, notice that Stephen’s two fallacies identify two distinct categories of irrelevant information. The first fallacy points to the irrelevance of *motive*. As applied to the Donny example, it is irrelevant whether Donny assaulted Victor out of bloodlust or to minimize Victor’s suffering. As far as the criminal law is concerned, Donny intended and attempted to kill a human being; his motive for doing so is simply not relevant. The second fallacy asserts the irrelevance of *a more ulterior intention*. Assuming Victor survived the attack, it is irrelevant whether or not maiming him was Donny’s ultimate goal. So long as Donny intended to maim Victor in the process of seeking his ultimate goal,³⁹ Donny “intended” to maim him. Stephen’s two fallacies illustrate two separate principles of criminal law.

3. *Why Stephen Says Motive Should Be Irrelevant.* Sir James Fitzjames Stephen offers three “conclusive” reasons why motive should not be relevant to criminal liability.⁴⁰ First, defendants’ motives do not affect the harm that their actions have on society.⁴¹

38. This conclusion is consistent with Stephen’s discussion, STEPHEN, *supra* note 22, at 110–12, 119–21; however, the distinction between separate events and separate characterizations of the same event was added to make sense of Stephen’s conclusion, and is further discussed *infra* in Section I.C. Even with this addition, Stephen did not view motive as an ulterior intention; otherwise, his two fallacies would be one and the same. See *id.* at 111 (labelling the confusion between motive and intention a separate fallacy from the mistake of ignoring an immediate intention because of the existence of a more ultimate one).

39. This determination would depend upon whether it qualifies as “maiming” to disfigure someone for the short interval between an assault and death.

40. STEPHEN, *supra* note 22, at 121.

41. *Id.* Contemporary commentators debate whether a motive of racial prejudice can exacerbate the harm of a defendant’s crime. Compare *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993) (“[A]ccording to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”), and LAWRENCE, *supra* note 4, at 39–44 (arguing that bias crimes, compared to their unbiased counterparts, are “far more likely to be violent,” cause greater “psychophysiological symptoms,” ignite “inter-community tensions,” and cause stigmatization, which brings about “humiliation, isolation, and self-hatred”), with Heidi M. Hurd & Michael S.

[O]ne great object of criminal law is to prevent certain acts which are injurious to society. But the mischief of an act depends upon the intention, not upon the motives of the agent. If a man intentionally burns down a house, or intentionally wounds the owner, the injury . . . is equally great, whether the offender's motive was or was not one in which the public in general would be inclined to sympathise.⁴²

Second, Stephen says “it is impossible to determine with any approach to precision . . . a man's motive for any given act. They are always mixed, and they generally vary.”⁴³ Third, Stephen claims that because of the first two reasons, even if motive *is* made doctrinally relevant, it will not become relevant in fact. He defends this conclusion by reference to “malice.”

Although the word “malice” means “wickedness,” and therefore *does* invoke the concept of motive, “the word seldom if ever bears its natural sense.”⁴⁴ Stephen explains how, to avoid the problems of punishing motives, the term “malice” is defined through legal fictions that avoid reference to motives.

Malice is divided into ‘express’ malice and ‘constructive’ or ‘implied’ malice, or, as it is sometimes called, ‘malice in law’ and ‘malice in fact.’ The effect of this fiction is that bad motives are by a rule of law imputed where intentional misconduct not prompted by bad motives is proved.⁴⁵

In other words, although the term “malice” invokes a defendant's motives, the criminal law operationally defines “malice” through other legal constructs that do not involve motive.⁴⁶ The word malice

Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1085–93 (2004) (“It is not hatred and bias, as such, that hurt; rather it is the *perception* of hatred and bias that hurts. . . . So if the psychic trauma to victims of hate/bias crimes is thought to be the gravamen [*sic*] of the offense, then the law should not be concerned with the motive of the offender, but rather, with the perception of the defendant's motive by the victim.”).

42. STEPHEN, *supra* note 22, at 121. The reasons for punishing intentional harms differently from harms produced accidentally fall outside the scope of this note.

43. *Id.*

44. *See id.* at 119–20 (explaining that the reason “malice” is never applied in accord with its natural meaning is because the term invokes the concept of motive).

45. *Id.* at 121.

46. This pattern has been repeated with regard to bias crimes statutes. See *infra* notes 173–76 and accompanying text for a discussion of the way statutory bias crime language that references a defendant's motives can be operationally defined through legal concepts that inquire only into a defendant's intentions.

therefore fails to retain its natural meaning in the law, and Stephen suggests that “if the law were codified it might with great advantage be altogether omitted from the criminal law.”⁴⁷

To Stephen, motive should thus be irrelevant because: (1) it is unrelated to the degree an actor has harmed society; (2) it is almost impossible to determine; and (3) even if a legal concept were to invoke a defendant’s motives, such as the concept of malice, the first two considerations would persuade judges to adopt a motive-free interpretation of that concept.

B. Professor Jerome Hall’s View

In 1947, Professor Jerome Hall reiterated the validity of the irrelevance-of-motive maxim.⁴⁸ Although the maxim’s truth had been challenged by that time, Hall explained that this critique resulted from an unfortunate conflation of motive and intention.⁴⁹ Hall blamed Sir John William Salmond for the mistaken view that motive is a species of intention.⁵⁰ Without explanation or citation, Salmond had defined “motive” as an “ulterior intent,” and thus had concluded that there are many exceptions to the general principle that motive is irrelevant.⁵¹ Take the example of burglary, which Salmond defined as “breaking and entering a dwelling-house by night with intent to commit a felony therein.”⁵² Under Salmond’s view, a motive is any ulterior intention, and thus an intent to commit a felony once inside the dwelling constitutes a “motive” for breaking and entering.⁵³ Salmond concluded that motive is indeed relevant for burglary, as well as for criminal attempts, forgery, defamation, malicious prosecution, and the defense of necessity.⁵⁴

Hall explains that these categories would never have been construed as exceptions to the irrelevance-of-motive maxim had Salmond applied the “usual distinction between intention and motive.”⁵⁵ In reference to the burglary example:

47. STEPHEN, *supra* note 22, at 120.

48. HALL, *supra* note 2, at 83–93 (arguing that motive is irrelevant to criminal liability).

49. *Id.* at 85.

50. *Id.* at 85–87 (“Salmond’s views have had considerable influence in this country . . .”).

51. JOHN W. SALMOND, JURISPRUDENCE 343–48 (4th ed. 1913).

52. *Id.* at 346.

53. *Id.*

54. *Id.* at 343–48.

55. HALL, *supra* note 2, at 86.

The breaking may have been in order to enter, the entry in order to steal, the stealing in order to get money to buy things, the buying of things to effect other objectives. But it does not aid analysis to designate the various subsequent intentions or the final “ulterior” one a “motive.”

That an intention is beyond or “ulterior” to the scope of legal relevance does not transform it into a motive in the generally accepted legal sense of the term.⁵⁶

For Hall, in contrast, “intention . . . refers to the objective effect which the law-breaker contrives to produce on others by his act or omission, and . . . motive refers to the subjective effect and its accompanying emotion which he desires to produce on himself.”⁵⁷ Motive is “a ground or reason for action.”⁵⁸ Hall’s use of the word “reason” is instructive. A “motive” is not a driving force that *compels* a person’s actions.⁵⁹ Hall says “[i]t is doubtful whether one is responsible for his motives; but the crucial point for legal purposes is that action involves a choice.”⁶⁰ Thus, Hall distinguishes the legal use of “motive” from psychiatrists’ understanding of “motive” as a scientific cause.⁶¹

Hall insightfully explains the source of Salmond’s confusion. Although Salmond and his followers were right to identify “motive” with the question of *why* a person acted as he or she did, they confused different types of answers to “why” questions because of the ambiguity of the word.⁶² For Hall, “motive answers the question why, neither in terms of causation nor in those of a further ulterior

56. *Id.* at 87.

57. *Id.* at 90 n.79 (quoting W. Norwood East, *Murder, from the Point of View of the Psychiatrist*, 3 MED.-LEGAL & CRIM. REV. 69–70 (1935)) (internal quotations omitted).

58. *Id.* at 92.

59. *See id.* at 89 n.77 (“In the legal view, there is no compulsion or necessity in the action of normal persons.”).

60. *Id.* at 90.

61. *Id.* at 89.

62. *See id.* (“In a formal way [Salmond and his followers] recognized the difference between asking *what* a person did, *i.e.* to ascertain whether he acted, and *why* he acted that way. But they did not adhere to the ordinary and legal difference between these ideas. For when they asked ‘why did a person do a particular act?’ they proceeded to answer it in terms of an objective which he sought, an intention oriented towards the future, a purpose, which they called ‘motive.’ The ambiguity of ‘why’ implemented their predilection.”). These different types of “why” are discussed *infra* in Part I.C.

objective, but in terms that give a reason which is the subject of an ethical appraisal.”⁶³

As discussed in Part III, the choice between Salmond’s and Hall’s definitions is crucial to whether the irrelevance-of-motive maxim is rendered descriptively true or false. If the “motive” for an action is any ulterior intention of that act, then burglary indeed makes use of “motive.” If Hall’s and Stephen’s conceptions are correct, however, the offense of burglary does not implicate motive, given that a burglar burglarizes whether driven by hunger or a thirst for adventure.

In addition to defending motive’s empirical irrelevance to criminal law, Hall defends the view that motive *should* be irrelevant to criminal liability. Hall does not defend this view by claiming that motive is irrelevant to moral culpability.⁶⁴ On the contrary, he says moral culpability cannot be determined unless both intention and motive are considered:

For example, D kills T; all agree that what he did is morally wrong. But the appraisal of D’s moral culpability must also take account of his motive: was D acting from cupidity, knowing he was named the chief beneficiary of T’s will? Or was the motive his love for his sick wife who needed an operation? . . . [W]e cannot pass an adequate moral judgment if we know only what harm has been committed but not the motive for committing it⁶⁵

Hall recognizes that excluding motives when determining criminal liability sometimes results in outcomes that are out of balance with morality.⁶⁶ But he says these outcomes must be tolerated because the alternative would be to make the substantive rules vague.⁶⁷ “[T]he preservation of the objective meaning of . . . *mens rea* as well as of the attendant principle of legality has its price. For it is impossible to forbid any class of harms without including rare marginal instances where . . . the value protected by the rule was not impaired in that instance.”⁶⁸ Hall insists that the moral judgment imposed by the penal law must be absolute, so as to encourage

63. HALL, *supra* note 2, at 93.

64. *Id.* at 93–94.

65. *Id.* at 93.

66. *See id.* at 95–96 (recognizing the problems that arise in “marginal cases” and suggesting that these inequitable outcomes be mitigated).

67. *Id.* at 95.

68. *Id.* at 94.

conformity to the law.⁶⁹ If a particular outcome seems inequitable, Hall says lawmakers can redefine criminal laws to account for this exceptional situation without making reference to motive.⁷⁰

Hall also stresses that making motive relevant to criminal liability would require the finder of fact to make difficult determinations about a defendant's motive.⁷¹ Even when not impossible, the task of determining a person's motive can be arduous, sometimes requiring a "detailed case-history of the defendant's past life."⁷² Even if one's motive could be established, judges and juries would then have to pass judgment on whether the motive was good or bad,⁷³ thus stripping objectivity from the principle of *mens rea*.⁷⁴

Despite this firm stance on motive's irrelevance to criminal liability, Hall lets motive in the back door. When confronted with a Jean Valjean,⁷⁵ Hall recommends the use of official discretion, such as foregoing prosecution or suspending a sentence, to provide a "safety valve" to rectify the injustice created by unsympathetic substantive rules.⁷⁶ Achieving this result informally "preserves the principles of *mens rea* and legality in the vast majority of cases."⁷⁷ To Hall, allocating questions of motive to the administration of justice is greatly preferable to making motive doctrinally relevant, which would depreciate "both penal law and its ethical significance by making the relevant rules vague."⁷⁸

69. *Id.* at 94–95.

70. *Id.*

71. *Id.* at 99.

72. *Id.*

73. *Id.*

74. *Id.* at 104.

75. Jean Valjean is a character in *Les Misérables* who went to prison for breaking a window pane and stealing a loaf of bread to feed his family. VICTOR HUGO, *LES MISÉRABLES* 95 (Norman Denny trans., Penguin Books 1982) (1862).

76. HALL, *supra* note 2, at 104; accord Hessick, *supra* note 6, at 92 & nn.6–10 (discussing the famous case of *Regina v. Dudley & Stephens*, *R v. Dudley & Stephens*, (1884) 14 Q.B.D. 273, in which the defendant sailors, having cannibalized one of their own to survive at sea, only served six months in prison despite receiving death sentences, *id.*).

77. HALL, *supra* note 2, at 95. On the relevance of motive, it appears that "[t]he Law In Action is as malleable as The Law On The Books is uncompromising." HUSAK, *supra* note 1, at 148 (quoting Yale Kamisar, *Some Nonreligious Views Against Proposed "Mercy Killing" Legislation: A Rejoinder*, 42 MINN. L. REV. 969, 971 (1958)).

78. *Id.*

C. Motive and Intention Are Conceptually Distinct under This View

Both Sir James Fitzjames Stephen and Professor Jerome Hall agree that motive is an entirely distinct concept from intention.⁷⁹ Although their views are similar, they are not identical. Stephen identifies motive as the prevailing feeling in the actor's mind,⁸⁰ whereas Hall identifies it as the subjective effect that actor seeks to produce upon himself by acting.⁸¹ This Note specifically defends Hall's view because it is both more sensible and better explained, and because the irrelevance-of-motive maxim is often viewed as "Hall's thesis."⁸²

According to Professor Douglas Husak, "the claim that intentions describe while motives explain cannot be assessed without sophisticated theories of descriptions and explanations, and no criminal theorist has yet produced them."⁸³ Although this Note does not connect the distinction between motive and intentions to a grand epistemological scheme, this Section explains and defends Hall's distinction as logically coherent by expounding on the difference between the two concepts. The further question of whether this definition saves the irrelevance-of-motive maxim is discussed in Part III.

As Hall indicates, questions asking "why" something happened the way it did are susceptible to several types of answers.⁸⁴ One type of explanation would be a scientific one. To explain why a billiard ball fell into the corner pocket, one could combine information about natural laws with information about the states (masses, velocities, locations, etc.) of the balls at a given time to explain *why* the ball acted the way it did. Regardless of whether human behaviors are theoretically susceptible to this type of deterministic explanation, the criminal law presumes otherwise—assuming that every lawbreaker possessed the power to choose to obey the law.⁸⁵

79. See *supra* Part I.A–B.

80. See *supra* note 26 and accompanying text.

81. See *supra* note 57 and accompanying text.

82. See, e.g., Husak, *supra* note 13, at 4–6 (labeling the assertion that motive is irrelevant in the criminal law "Hall's thesis").

83. *Id.* at 7.

84. See *supra* notes 62–63 and accompanying text for a discussion of Hall's view on the ambiguity of "why."

85. HALL, *supra* note 2, at 89 n.77 ("In the legal view, there is no compulsion or necessity in the action of normal persons.").

A different sort of explanation is required whenever examining “why” a defendant took a particular course of action in the context of the criminal law. To understand why a defendant took the action he did, the explanation proceeds in terms of intended consequences, with each intention explaining the preceding intention. Donny’s act of striking Victor’s face is explained by the fact that Donny intended to seriously injure his victim. His intention to seriously injure Victor is explained by his further intention to kill Victor. But what explains *that* intention? Given that, based on the facts of the hypothetical, Donny intends no consequences beyond Victor’s death,⁸⁶ this intended consequence cannot be explained by reference to a more ultimate one. Each step in this explanation merely pushes the question back a level.

The ultimate intended consequence can only be explained by reference to the actor’s motive—for example, a desire for revenge. This last piece of information does not resolve every possible question about Donny’s actions. One could still wonder why Donny believed cuts to the face would be deadly or why Donny thought revenge could be achieved through Victor’s death. Nevertheless, as Hall stresses, the motive helps explain the “reason” for Donny’s actions.⁸⁷

One possible objection to this distinction between motives and intentions is that “achieving revenge” is not conceptually different from “severely injuring Victor” or any of Donny’s other intended consequences. According to this argument, the Donny/Victor hypothetical begs the question because it *defines* Donny’s motive of “achieving revenge” as something other than an intention by excluding it from the so-called complete list of intended consequences. The question raised by this criticism is whether “achieving revenge” is indeed a different sort of thing from Donny’s intended consequences. It is. Notice that each of the intended consequences, or “intentions,” is an event. Each one temporally follows the preceding one.⁸⁸ As such, the method of explaining one

86. See *supra* Part I.A.2 for a complete list of intended consequences and a description of Victor’s death as the most ulterior intention.

87. See *supra* notes 57–61 and accompanying text.

88. It is not true that all intended consequences must occur at different times. With a more complicated (and thus more realistic) example, the set of intended consequences would not proceed as a single chain of events, each having but one effect. Rather, any ordinary action would have many effects, and each of these effects would have many consequences of its own. It

intention by reference to another is to explain how Donny expected the earlier event to bring about the later event. This pattern would be broken if “achieving revenge” were added to the chain of intended consequences. “Achieving revenge” was not an event Donny expected to follow Victor’s death, but rather a *characterization* of Victor’s death that had special meaning to Donny. As Hall says, “[t]he *reference* of ‘motive’ . . . is to the actor, whereas intention is directed outside him.”⁸⁹ The concepts of motive and intention are thus conceptually distinct. The word “intention . . . refers to the objective effect which the law-breaker contrives to produce on others by his act or omission, and . . . motive refers to the subjective effect and its accompanying emotion which he desires to produce on himself.”⁹⁰

The view of motive discussed in this Part is not only historically supported by Stephen’s and Hall’s discussions, but also creates a conceptually coherent distinction between motive and intent. Before examining the truth of the irrelevance-of-motive maxim in light of this distinction,⁹¹ Part II shows that other proposed definitions of motive either fail to identify a conceptually distinct concept, or bear little relation to the original legal term.

II. THE INADEQUACY OF OTHER DEFINITIONS OF MOTIVE

In contrast to the view presented in Part I, which defines motive as a conceptually distinct category from intention,⁹² other views define motives and intentions in such a way that the categories overlap.⁹³

is certainly possible for two such consequences to occur at the same time. The important point is that they would be separate events, not differing characterizations of the same event.

89. HALL, *supra* note 2, at 90 (emphasis added).

90. *Id.* at 90 n.79 (quoting W. Norwood East, *Murder, from the Point of View of the Psychiatrist*, 3 MED.-LEGAL & CRIM. REV. 69–70 (1935)).

91. *See infra* Part III.

92. Hyman Gross’s definition of motive appears to also fall into the category of those that classify motives as conceptually distinct from intentions. *See* HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 111 (1979) (distinguishing motives from intentions in that motives do not have a beginning and an end and that motive is an explanation of an action, not a description of it). Gross uses this illustration: “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.” *Id.* However, the specifics of Gross’s conception of motive are not clear from this illustration or from his description of motive. *See* HUSAK, *supra* note 1, at 145–46 (“[T]his account . . . does not make sense of Gross’s own example.”); Whitley R. P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 CRIM. JUST. REV. 317, 322 (2003) (claiming Gross’s illustration “haunts” the discussion of motive).

93. *See, e.g.*, Kaufman, *supra* note 92, at 322–23 (describing the approach of defining motive as an ulterior intention).

These definitions trivialize the irrelevance-of-motive maxim. Although a successful distinction between motive and intention need not render the maxim true, it should at least make sense of why the maxim has been so adamantly defended.⁹⁴ These definitions, by overlapping the concepts of motives and intentions, render the irrelevance-of-motive maxim either (1) incoherent, (2) so trivially false that it never should have been uttered, or (3) a mere renaming of some different principle of law altogether.

A. *The Problems with Conflating Motive and Intention*

Contemporary views that conflate motive with intention fall into two categories.⁹⁵ Under the first approach, motive is defined as a special type of intention. “The most common way of distinguishing [motive from intention] 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[]’”⁹⁶ Under this view, motive is the “the intention with which an intentional act is done. Intention, when distinguished from motive, relates to the means, motive to the end.”⁹⁷ Under the second approach, motive is identified as a broader category that includes some intentions, but that also includes elements other than intentions—anything that can provide a reason for the defendant’s actions.⁹⁸ Professor Douglas Husak, for example, describes motive as a “polymorphous collection of action initiators,” which includes both intentions and non-intentions.⁹⁹ Under either of these approaches, the concepts of motive and intention overlap such that at least some

94. Recall Hall’s claim that “hardly any part of penal law is more definitely settled than that motive is irrelevant.” HALL, *supra* note 2, at 88 (citing *State v. Logan*, 126 S.W.2d 256 (Mo. 1939) (per curiam)). In light of the treatment of the irrelevance-of-motive maxim as having content—demonstrated by the many decisions which claim to rest on this principle—defining motive so as to trivialize the maxim is an unacceptable outcome, unless there is no other choice. See, e.g., *United States v. Harmon*, 45 F. 414, 419–24 (D. Kan. 1891) (rejecting the defendant’s argument that committing a prohibited act is lawful if done with a beneficent purpose).

95. This categorization is consistent with that of Elaine Chiu. See Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 664–66 (categorizing views of motive as (1) completely different from intent; (2) a sub-category of intent; or (3) a functional polymorphous category of action initiators, including both intentions and non-intentions).

96. Kaufman, *supra* note 92, at 322–23; see LAFAVE & SCOTT, *supra* note 10, at 227 (describing this view).

97. GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 48 (1961).

98. See Hessick, *supra* note 6, at 94–95 (defining motives as a defendant’s “reasons for acting,” and explaining that intentions can also be motives).

99. Husak, *supra* note 13, at 7–8 (quoting Christine Sistare, *Agent Motives and the Criminal Law*, 13 SOC. THEORY & PRAC. 303, 306 (1987)).

motives are also ulterior intended consequences. This shared characteristic ultimately requires the rejection of both types of definitions.

1. *These Definitions Render the Maxim Incoherent.* The maxim is incoherent under definitions that conflate motive and intention because they create a relative conception of motive such that motives and intentions do not differ in any context-independent way;¹⁰⁰ one cannot identify any particular motive without specifying what behavior it is a motive for.¹⁰¹ The distinction between motive and intent is thus a relative one under this conception, a characterization Professor Glanville Williams accepts and defends:

Much of what men do involves a chain of intention (D pulls the trigger of his revolver in order to make the bullet enter P's body in order to kill P in order to get him out of the way etc.), and each intention is a motive for that preceding it.¹⁰²

Given that every intention is a motive for something else, Professor Husak concludes that the only intention that is not also a motive is the one “currently entertained by the defendant.”¹⁰³ Husak criticizes this definition because the identity of something as a “motive” changes with time.¹⁰⁴

Husak's argument can be taken even further to show that a relative conception of motive renders the irrelevance-of-motive maxim incoherent. Consider a statute that defines murder as purposely causing the death of another human being.¹⁰⁵ Unlike the burglary example, which inquires into the ulterior purpose for which

100. See HUSAK, *supra* note 1, at 144–45 (criticizing the relative nature of the motive/intention distinction).

101. Contrast this with the absolute conception of motive presented in Part I. If “stealing diamonds” is the intention with which a thief reached into the jewelry case, it does not transform into a motive when one seeks to explain why the thief broke into the house. Because motives and intentions are different sorts of things, the question of whether something is a motive or an intention has a single answer that does not vary with context.

102. See WILLIAMS, *supra* note 97, at 48 & n.2 and accompanying text (explaining that intention relates to the means of an action, whereas motive relates to the ends).

103. HUSAK, *supra* note 1, at 145.

104. *Id.*

105. The Model Penal Code suggests this approach. MODEL PENAL CODE §§ 210.1(1), 210.2(1) (1962).

an action was done,¹⁰⁶ this definition of murder inquires into whether the prohibited act—causing a person’s death—was purposeful. Thus, under the conception of motive as a more ulterior intention, motive is not relevant with regard to this statute.¹⁰⁷ Now consider another hypothetical statute that defines murder as “performing any bodily act with the intention of causing the death of another human being, where the bodily act causes the death of that other human being.” This statute is functionally identical to the first murder statute, yet the second version references an ulterior intention in the same way a burglary statute does. Like burglary, the second statute inquires into the defendant’s ulterior intention for committing the prohibited act. Under this type of definition—that defines motive as a type of more ultimate intention—the question of whether motive is relevant to the offense of murder yields different answers depending on functionally irrelevant changes to a statute’s wording.

Due to the relative nature of this view of motive as an ulterior intention, whether or not a statute involves motive becomes purely semantic. This renders the irrelevance-of-motive maxim incoherent.¹⁰⁸ Because there can be no answer to the question of whether crimes, such as murder, relate to motive, the irrelevance-of-motive maxim is neither true nor false. Its assertion simply does not make sense. In light of the longstanding history of the irrelevance-of-motive maxim, any definition that renders the maxim incoherent should be rejected if an alternate view that does not trivialize the maxim exists.

2. *These Definitions Render the Maxim Trivially False.* Even if the incoherency problem could somehow be solved, thus allowing the

106. See LAFAVE & SCOTT, *supra* note 10, at 228 (describing the view that crimes such as burglary—which require a mental state “beyond the defendant’s intent to do those acts or cause those consequences” defined in the statute—make relevant the defendant’s motive for doing those acts).

107. Some have claimed, however, that all specific intent crimes involve motives. See *infra* note 140.

108. Professor Frederick Lawrence makes a similar argument, stating two functionally identical descriptions of a bias crime, one that inquires beyond the defendant’s intention, and one that does not. LAWRENCE, *supra* note 4, at 108–09. The analogous argument, however, leads Lawrence to the opposite conclusion from the one defended in this Note. Because Lawrence considers only a single definition of motive—“the cause that drives the actor to commit the offense”—he concludes that the “distinction between intent and motive does not hold the weight that the *Mitchell* and *Wyant* state courts placed upon it” *Id.* at 108. When Hall’s definition is added to the list, however, Lawrence’s argument merely adds a reason to reject the nonsensical definition in favor of Hall’s. For a discussion of *Mitchell* and *Wyant*, see *supra* note 5 and accompanying text.

maxim to at least make an empirical assertion, that assertion would be trivially false under these definitions of motive. The scheme of defining motive as a concept that overlaps that of intention must be rejected because it trivializes the irrelevance-of-motive maxim as incoherent or—if this incoherency problem could somehow be overcome—patently false, thus failing to make sense of the maxim’s long history of endorsement.¹⁰⁹

The view that motive is a type of ulterior intention renders the maxim false, as the maxim’s critics have proclaimed.¹¹⁰ If motive is a type of ulterior intention, then burglary statutes, as well as many other categories of crimes,¹¹¹ demonstrate that motive is indeed relevant to criminal liability, in contravention to the maxim.¹¹² Had the definition of motive been well settled, the fact that this type of definition renders the irrelevance-of-motive maxim false would be the end of the issue; critics of the maxim could simply express bewilderment as to why smart people reach such obviously wrong conclusions,¹¹³ and move on. When confronted with an alternative conception of motive that does not trivialize longstanding principles, however, the bewildering definition should be rejected.

B. Embracing the Definitional Truth: Duff’s View

Although Professor Antony Duff also defines motive as a concept that overlaps with intention, his novel defense of this type of definition deserves separate consideration. Although Duff is successful in defending the maxim’s truth, he does so only by so altering the maxim’s meaning that it refers to a separate principle

109. A successful distinction between motive and intention should at least make sense of why the maxim was so adamantly defended by criminal law theorists such as Professor Hall. See *supra* Part I.B.

110. See SALMOND, *supra* note 51, at 341–46 (writing in 1913 and identifying the simple truth that ulterior intentions are relevant to criminal liability).

111. See *infra* Part III.B.1–2 for an explanation of how inchoate crimes, and perhaps specific intent crimes, make reference to one’s ulterior intentions.

112. See SALMOND, *supra* note 51, at 346 (asserting that in crimes like burglary and forgery, “the ulterior intent is the source, in whole or in part, of the mischievous tendency of the act, and is therefore material in law”).

113. See HUSAK, *supra* note 1, at 147–48 (citing the lack of “outcry” from orthodox theorists in response to the inclusion of offenses such as burglary and kidnapping, and defenses such as duress and necessity, to conclude that the irrelevance-of-motive maxim is not persuasive to orthodox theorists); Husak, *supra* note 13, at 13 n.1 (appending his citation to Hall’s book by saying, “I offer no hypothesis about why Hall’s thesis is so widely accepted among criminal theorists”).

altogether. Unlike the typical definitions of motive that conflate motive and intention, Duff defends a definition that renders the maxim true by definition.¹¹⁴ As many commentators have pointed out, one way to make the irrelevance-of-motive maxim true is by making it a definitional truth—defining “motive” as the subset of intentions that are irrelevant to criminal liability.¹¹⁵ For most theorists, this option does not represent a legitimate possibility.¹¹⁶ Duff, however, has attempted to defend the maxim along these lines.

Of course, Duff has not found a way around the hard fact that a tautology has no empirical content. Rather, he construes the irrelevance-of-motive maxim as having multiple dimensions of content, such that it can make a substantive claim about one issue while being true by definition along another dimension.¹¹⁷ Duff begins by defining motive in such a way as to make it “a definitional truth that anything which counts as a ‘motive’ is irrelevant to criminal liability, thus making the orthodox doctrine true by definition.”¹¹⁸ Duff says it would be too hasty to dismiss this move as merely trivializing a substantive claim by rendering it true by definition.¹¹⁹ Rather, “by portraying the orthodox doctrine 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.”¹²⁰

To protect the maxim from tautological status, Duff restates the irrelevance-of-motive maxim as holding “not that ‘motive’ is irrelevant to criminal liability, but that ‘*further* motive’ is irrelevant to liability.”¹²¹ He also clarifies that the maxim applies only to courts, and not to legislatures.¹²² Combining these steps, the statement “motive is irrelevant to criminal liability” is transformed into the

114. See Duff, *supra* note 11, at 174 (“[B]y portraying the orthodox doctrine 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.”).

115. HUSAK, *supra* note 1, at 146–47; LAFAVE & SCOTT, *supra* note 10, at 229; Binder, *supra* note 3, at 45.

116. See, e.g., HUSAK, *supra* note 1, at 146–47 (describing such characterizations as “question-begging and unhelpful”); LAFAVE & SCOTT, *supra* note 10, at 229 (calling this reasoning circular).

117. Duff, *supra* note 11, at 174.

118. *Id.* at 173.

119. *Id.* at 174.

120. *Id.*

121. *Id.*

122. *Id.*

statement that motive [*beyond* those motives made relevant to criminal liability by the legislature] is irrelevant to criminal liability [in a judicial context].

From this foundation, Duff describes the content that the maxim retains, even though motive is defined by reference to criminal liability:

The legislature defines crimes, by defining kinds of action that must count as criminal. Those definitions might include motivational factors [I]n deciding how particular crimes should be defined, legislatures will be asking what kinds of motive should make what kind of difference to criminal liability.

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.¹²³

Under Duff's interpretation, the claim of the irrelevance-of-motive maxim is not about the types of mental states that are relevant for criminal liability. That claim is rendered true by definition. Rather, the maxim is about the rule of law and the distribution of power between legislatures and the courts.

Although Duff's conception of motive appeals to common sense and does not render the irrelevance-of-motive maxim false, it changes the meaning of the irrelevance-of-motive maxim in such a fundamental way that it refers to a separate principle of law altogether. In the abstract, there is nothing wrong with defining "motive" by reference to criminally irrelevant intentions, but doing so entails discussing a different concept than the one at issue in the debate over the irrelevance-of-motive maxim.¹²⁴ One simply cannot resolve a debate by drastically redefining all the terms to remove the controversy.

The relevant question in evaluating Duff's view is whether his interpretations of "motive" and the irrelevance-of-motive maxim are consistent with the way these concepts have historically been discussed. If not, then Duff's point about the respective roles of

123. *Id.*

124. See *supra* Part I.A–B for an explanation of the meaning of the maxim to Stephen and Hall.

courts and legislatures¹²⁵ should be understood as an interesting proposition, though an entirely distinct one from the irrelevance-of-motive maxim. In defending his novel interpretation of the maxim, Duff does not seek historical support for it; rather, he offers a “justificatory” account for why the proposition is and should be true.¹²⁶ Even if Duff succeeds in showing that he has translated a criticized maxim of orthodox criminal law into a descriptively true and normatively defensible principle, he has so altered the original maxim that he is discussing a new principle altogether.¹²⁷ Despite Duff’s creative approach, in the end his view so alters the meaning of the irrelevance-of-motive maxim as to make it something entirely different.

In light of the inadequacy of these alternative definitions of motive, the term should properly be understood through Hall’s conception of motive as the reason one’s intended consequences are desirable. With this definition in mind, the truth of the maxim can be evaluated.

III. THE CONTINUED RELEVANCE OF THE IRRELEVANCE-OF-MOTIVE MAXIM

Evaluating the irrelevance-of-motive maxim’s truth requires first pinning down its assertion. Thus clarified, the maxim’s narrow claim—that motive is never directly doctrinally relevant to criminal liability—is still valid.

A. *Clarifying the Maxim’s Claim*

Following Professor Jerome Hall’s explanation, the statement that motive is irrelevant to criminal liability has a limited scope. Hall’s maxim does not claim motive is irrelevant to moral culpability; just

125. See *supra* notes 118–23 and accompanying text for an explanation of Duff’s interpretation of the irrelevance-of-motive maxim as a statement about the proper roles of judges and legislators.

126. Duff, *supra* note 11, at 175–89 (emphasis removed).

127. Professor Binder reaches a similar conclusion: “Duff has replaced the maxim that motive is irrelevant to liability with the quite different maxim that legislatures alone should define offense elements and defenses. Having accepted the descriptive, logical, and normative objections to the irrelevance of motive maxim, he has essentially abandoned it.” Binder, *supra* note 3, at 94.

the opposite is true.¹²⁸ Furthermore, the maxim does not claim motive is irrelevant in the entire justice system; in fact, Hall recommends administrative consideration of motive.¹²⁹ Lastly, the maxim does not claim that evidence of motive is never relevant to determining criminal liability, just that it is never *directly* relevant. This last claim is essential for a defense of the maxim, and can be demonstrated by the following observations about the information conveyed by evidence of a defendant's motives and by evidence of a defendant's intentions.

First, though a complete list of one's intentions can rule out certain possible motives, many possibilities remain. For example, it is clear that Donny Defendant did not attempt to kill Victor Victim out of lust.¹³⁰ Although it is possible to attempt a murder out of lust—such as when one believes a murder will impress a potential romantic interest—in such cases, one of the perpetrator's intended consequences will relate to the motive of lust. According to the postulated facts of the Donny/Victor hypothetical, Donny's only intended consequences were Victor's injury and eventual death. His crime thus cannot possibly have satisfied a drive for lust. Donny's motive for the attempted murder must have been one that could be satiated by the death of another, without reference to any further consequences. As explained in Part I.A.2, several possible motives fit this description. Thus, evidence demonstrating a defendant's intentions can rule out some possible motives, but can leave many remaining options. This observation demonstrates the broader conclusion that information about one's intentions can convey information about one's motives.¹³¹

Second, the converse is also true. Information about one's motives conveys information about one's intentions. If *A* kills *B* for the motive of "lust" one can infer that *B*'s death was not *A*'s ultimate

128. Hall argues that motive should be irrelevant to criminal liability even though he stresses that an evaluation of motive is essential to judgments of moral culpability. *See supra* notes 64–65 and accompanying text.

129. *See supra* notes 76–77 and accompanying text (explaining that Hall prefers questions of motive to be examined on an administrative—not a doctrinal—level).

130. The Donny/Victor hypothetical is introduced in Part I.A.2.

131. This conclusion is implied by Gross's point that the legislature can use intentions as a proxy for distinguishing between acts done from a particular motive. GROSS, *supra* note 92, at 112 ("If murder for money or for vengeance is to be singled out, the proscribed act may be 'causing death of a person with intent to profit financially thereby' or 'with intent to avenge the death of another.'").

intended consequence. Similarly, if a person commits a mugging with the motive of “greed,” it would be reasonable to infer that the mugger did not *intend* to choose a penniless victim.

Third, because information about motive can convey information about intentions and vice versa, in certain circumstances, relevant legal questions can be answered by reference to either motive or to intent. Take the example of Paul, a police officer who lectures students on gun safety in his spare time. While demonstrating the use of a safety catch in a school auditorium, Paul pulls the trigger of his gun, shooting and killing a teacher whom he knew personally. Did Paul intend to kill the teacher? This question could be resolved by proof (assuming such proof is possible) that Paul’s only intentions in pulling the trigger were to depress the trigger, convey knowledge that a safety catch prevents a gun from firing, and decrease the rate of accidental firearm deaths in the community. If these were Paul’s only intended consequences, the shooting could not have been intentional. The same conclusion could also be reached, however, if it were proven that Paul’s motive in pulling the trigger was to “be a role model.” If, however, evidence showed that Paul did have a substantial motive to kill the teacher, if he stood to profit from her death or if she had broken his heart, it would add to the investigation and lend credibility to the argument that Paul intended to kill her while creating the appearance of an accident. Both information about Paul’s motives and information about Paul’s intentions could be sufficient to demonstrate that Paul did not intend to kill the teacher.

Fourth, the fact that evidence of motive can provide information relevant to determining criminal liability does not make motive directly relevant to criminal liability.¹³² In the Paul hypothetical, notice that Paul’s motive is only indirectly relevant to liability. The reason Paul’s motive could be relevant in his murder trial is because his motive can shed light on his intentions. In this hypothetical, motive is thus relevant in the same unofficial way as it is in many

132. Cf. *State v. Culmo*, 642 A.2d 90, 104 (Conn. 1993) (“Words can be used to prove an intention to violate virtually any penal statute, however, and their use as evidence of crime does not transform a statute criminalizing conduct into a statute implicating protected communication. As the supreme court of Oregon pointed out in the context of that state’s ‘hate crimes’ statute, there is a distinction between ‘making speech the crime itself, or an element of the crime, and using speech to prove the crime.’” (quoting *State v. Plowman*, 838 P.2d 558 (Or. 1992))).

criminal trials.¹³³ If a defense attorney stresses to the jury that the prosecution has no evidence of motive, it is not because motive is an element of the crime, but to imply that the defendant had no reason to commit the crime, and therefore never did. This argument would fail in a case in which the prosecution presented indisputable evidence that the defendant committed the crime, even if the defendant's reasons for doing so remained a mystery.¹³⁴ In other words, evidence of motive might help the jury to speculate as to whether the defendant did the act, but motive is not directly relevant.¹³⁵ The same is true in the example about Paul's motive in pulling the trigger.

Observations three and four are vital to the question of whether the irrelevance-of-motive maxim is true. Though motives can be indirectly relevant to certain issues in criminal trials, the question posed by the irrelevance-of-motive maxim is whether motive *qua* motive is ever relevant to criminal liability.¹³⁶ Stated more precisely, can different motives affect criminal liability when coupled with identical intentions?¹³⁷

133. Hessick, *supra* note 6, at 89–90 (“Everyone who watches *Law & Order* knows (or thinks they know) that motive is very important in criminal justice. . . . Unlike in the television show, which places great emphasis on a defendant's reasons for committing a crime, in the perceived real world of criminal liability, motive is just a bit player. . . . Evidence of a defendant's motive may be introduced at trial to convince a jury that she is guilty, but motive is not perceived as a legal component of guilt.”).

134. See *People v. Edwards*, 819 P.2d 436, 452 (Cal. 1991) (“Motive here is, indeed, elusive. This was apparently a random killing for a reason known only to defendant. . . . [but we] have never required the prosecution to prove a specific motive. . . . A senseless, random, but premeditated, killing supports a verdict of first degree murder.”).

135. See GROSS, *supra* note 92, at 103 (discussing the way that motives are presented as part of the prosecutor's case even though motive is hardly ever a requirement for criminal liability).

136. See Husak, *supra* note 13, at 6 (“I am puzzled to understand what could be meant by claiming that, although the criminal law *is* concerned with motives, it is not concerned with them *qua* motives. Even if sense can be made of this reinterpretation, Hall's thesis is rendered much less interesting, to say the least.”).

137. See HALL, *supra* note 2, at 88 (“[I]f the above writer meant to assert that all the above situations are alike except as regards the motives, in the usual sense, it can readily be shown that he was mistaken. . . . If the deceased was advancing on the defendant with drawn knife, saying, ‘I'm going to kill you,’ and safe escape was impossible, it makes not the slightest difference whether the defendant hated his assailant or whether the assailant was his son whom he loved beyond measure.”).

B. Evaluating the Truth of the Maxim's Claim

Despite the array of crimes and defenses cited as examples of motive's relevance,¹³⁸ most of these examples relate to intentions, not motives. Although empirical criticisms of the maxim assert that motive is relevant to both criminal offenses and defenses, one approach to defending the maxim is to acknowledge motive's relevance to *defenses* while explaining why the maxim's claim only applies to criminal *offenses*.¹³⁹ Although certain defenses intuitively seem to challenge the maxim, a careful application of the proper definition of motive reveals the maxim's continued validity to all crimes save a certain category of bias crimes, which are discussed in Part III.B.3.

1. *Criminal Offenses.* In addition to mentioning criminal defenses, critics have claimed that motives are relevant to certain criminal offenses, such as specific intent crimes¹⁴⁰ and inchoate crimes,¹⁴¹ because these crimes turn on the reason for the defendant's action.¹⁴² This claim only follows, however, from an identification of motive with ulterior intentions. Once motive is understood as something altogether distinct from intentions, it is clear that motive is irrelevant to specific intent crimes and inchoate crimes such as criminal attempt. "In criminal attempts, the purpose to effect a

138. See *infra* Part III.B.1–2 for a discussion of specific intent crimes, inchoate crimes, self-defense, necessity, and duress.

139. See Binder, *supra* note 3, at 48 (suggesting this approach). Used here, the term "criminal defenses" refers to those affirmative defenses that negate criminal liability even when the prosecutor establishes the elements of a criminal offense. Compare MODEL PENAL CODE art. 2 (1962) (discussing principles of liability), with *id.* at art. 3 (discussing principles of justification).

140. See LAFAVE & SCOTT, *supra* note 10, at 228 (describing the view that crimes such as burglary—which require a mental state "beyond the defendant's intent to do those acts or cause those consequences" defined in the statute—make relevant the defendant's motive for doing those acts); Husak, *supra* note 13, at 8 (defining motive as "specific intentions").

141. See Binder, *supra* note 3, at 48–49 (recounting, with approval, Walter Hitchler's argument that inchoate crimes, such as attempt and conspiracy, and partially inchoate crimes, such as burglary and robbery, use the actor's purpose in committing the act to transform a legal act into a criminal one in the case of inchoate crimes, or a minor criminal offense into a serious one in the case of partially inchoate crimes, and thus concluding that these crimes make motive relevant).

142. See HUSAK, *supra* note 1, at 146 ("The reason *why* the defendant breaks and enters is crucial in characterizing his conduct as a burglary. Forgery, kidnapping, criminal libel, and conspiracy provide other examples, and the list could be expanded at great length."); see also *supra* notes 140–41.

particular harm is not a motive; it is part of the plan, it implies intention.”¹⁴³ As long as the person intended to commit the crime, it simply does not matter whether that person planned to do so for love or for money.

The offense element of premeditation and deliberation provides a more interesting example, because it does not turn on a specific intention like criminal attempt does. As Professors Heidi M. Hurd and Michael S. Moore adeptly explain, however, premeditation does not turn on motive either:

To determine that a defendant premeditated and deliberated about a killing simply requires a fact finder to find that the defendant formed the purpose to kill and contemplated the means by which to kill temporally in advance of the killing. In making this determination, it may be evidentially valuable to discover that the defendant hated the victim or had a motive to kill the victim, since if he did, he may well have thought about killing the victim. But as a matter of law, to find that a defendant premeditated and deliberated about a killing does not require the fact finder to discover the reasons for which the defendant intended to kill and deliberated about its means¹⁴⁴

At least excluding bias crimes,¹⁴⁵ the irrelevance-of-motive maxim thus appears to be true with regard to criminal *offenses*. That is, bad motives are irrelevant. Professors Hurd and Moore reach this conclusion, but admit that “there are clearly defense doctrines that require courts to consider good, or at least exculpatory, motivations as bases for reducing or altogether suspending penalties for prima facie wrongdoing,” listing necessity, third-party self-defense, and the provocation/passion doctrine.¹⁴⁶ The same type of reasoning Hurd and Moore invoke to dismiss the issue of premeditation, however, can demonstrate the irrelevance of motive in these criminal *defenses* as well.

2. *Criminal Defenses*. Some critics of the maxim argue that although inculpatory motives may not be relevant to criminal

143. HALL, *supra* note 2, at 86.

144. Hurd & Moore, *supra* note 41, at 1120–21.

145. See *infra* Part III.B.3.

146. Hurd & Moore, *supra* note 41, at 1119–20.

offenses, exculpatory motive are relevant to criminal defenses.¹⁴⁷ In response to these arguments, defenders of the maxim could attempt to explain why only *offenses* should exclude motive. They could claim, for example, that offenses establish objective standards void of moral and political issues,¹⁴⁸ “leaving a ‘technical’ core to the law.”¹⁴⁹ Peripheral doctrines of an entirely different nature could then resolve the inadequacies of this technical core, taking subjective differences, morality, and political issues into account. Regardless of whether such a distinction is defensible, it is unnecessary because motives are irrelevant to criminal defenses as well.

Professor Jerome Hall explains motive’s irrelevance to the self-defense doctrine: “If the deceased was advancing on the defendant with drawn knife, saying, ‘I’m going to kill you,’ and safe escape was impossible, it makes not the slightest difference whether the defendant hated his assailant or whether the assailant was his son whom he loved beyond measure.”¹⁵⁰ As one court graphically put it:

One may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart’s blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account.¹⁵¹

Recall that the irrelevance-of-motive maxim merely asserts that motives are not *directly* relevant.¹⁵² Even though “the solution of the question—was it self-defense or an unnecessary killing?—is sometimes aided by considering the motives of the accused,” this does not imply that motives like “hatred or revenge supersede[] the apparent necessity of the measures taken in self-defense.”¹⁵³

Just like the offense of burglary, the defenses of necessity and duress relate to intention, not motive.¹⁵⁴ These defenses only apply if

147. *See id.* at 1119 (objecting to bias crimes as breaking “new ground in the development of criminal law doctrine” by making inculpatory motives relevant, even though exculpatory motives are already relevant).

148. *See generally* ALAN NORRIE, PUNISHMENT, RESPONSIBILITY, AND JUSTICE: A RELATIONAL CRITIQUE 142–93 (2000) (explaining, but ultimately rejecting, this view).

149. *Id.* at 192.

150. HALL, *supra* note 2, at 88.

151. *Golden v. State*, 25 Ga. 527, 532 (1858).

152. *See supra* notes 132–37 and accompanying text.

153. HALL, *supra* note 2, at 88.

154. *See supra* notes 141–43 and accompanying text.

the prohibited act was committed “*in order to* avoid an unlawful threat of harm from another person,”¹⁵⁵ or, in the case of necessity, avoid a greater harm.¹⁵⁶ The doctrine of necessity protects inmates who escaped from prison under the mistaken belief that their lives were in danger,¹⁵⁷ but it is of no assistance to prisoners who escaped in ignorance of a real, life-threatening fire.¹⁵⁸ This relevance of the actor’s purposes raises an issue of ulterior intentions, not motives. As long as the prisoner’s escape served the intention of “avoiding the fire,” it matters not whether this intention was valuable for self-preservation or for gluttony—if, for example, a death row inmate cared about survival only as a means to allow the inmate to enjoy the last meal.

None of these supposed examples of motive’s relevance pose a problem for the irrelevance-of-motive maxim, properly construed. This result is a predictable one. Because the proponents of the view that motive is relevant define “motive” as some form of ulterior intention, their examples relate to instances in which *ulterior intentions* are relevant to criminal liability. Given that motive has been shown to be altogether distinct from intention, however, these examples say nothing of the relevance of motive.

One might criticize the foregoing method of analysis for dismissing any offense or defense that can be described using intention terms rather than motive terms. This approach, however, is exactly what Professor Hall’s thesis calls for. “[T]he technique of restating such cases in conformity with the principle of *mens rea* [rather than motive] is to articulate the relevant criminal intention and state the decision in terms of that. This, unfortunately, has not always been done by the courts.”¹⁵⁹ At least excluding bias crimes, motivations are never directly relevant to criminal liability.

3. *Bias Crimes*. Although this Note takes no position as to the ultimate issues in the bias crime debate, it seeks to reframe that discussion by revealing the unique nature of bias crimes. Bias crime

155. HUSAK, *supra* note 1, at 146.

156. LAFAYE & SCOTT, *supra* note 10, at 229.

157. *Id.* at 229 & n.19; *see id.* at 446 (“[I]f *A* kills *B* reasonably believing it to be necessary to save *C* and *D*, he is not guilty of murder even though, unknown to *A*, *C* and *D* could have been rescued without the necessity of killing *B*.”).

158. *See id.* at 446 (“If *A* kills his enemy *B* for revenge, and he later learns to his happy surprise that by killing *B* he saved the lives of *C* and *D*, *A* has no defense to murder.”).

159. HALL, *supra* note 2, at 91–92.

statutes are not, as some commentators have suggested, simply one additional instance in which the criminal law considers motive.¹⁶⁰ For better or for worse, certain bias crimes represent a drastic doctrinal departure from a longstanding maxim of criminal law.¹⁶¹ This Section first identifies the subcategory of bias crimes that inculcate motives and then discusses the empirical relevance of this subcategory.

Professor Frederick Lawrence has identified two “analytically distinct” categories of bias crime statutes: the discriminatory selection model and the racial animus model.¹⁶² “The discriminatory selection model of bias crimes defines these crimes in terms of the perpetrator’s discriminatory selection of his victim. Under this model, it is irrelevant *why* an offender selected his victim on the bases of race or group; it is sufficient that the offender did so.”¹⁶³ Whether the offender chose the victim on the basis of race is a question of intentions.¹⁶⁴ If the offender assaulted a black victim, the question is whether the offender had the intention of assaulting “a black person” or whether the offender merely intended to assault “a person.” Motive is thus irrelevant to the discriminatory selection model of bias crimes.

The racial animus model, however, “defines crimes on the basis of the perpetrator’s animus for the racial or ethnic group of the victim and the centrality of this animus in the perpetrator’s motivation for committing the crime.”¹⁶⁵ A statute would fall into the racial animus model if it requires ill will, hatred, bias, or “some measure of hostility toward the victim’s racial group and/or toward the victim because he is part of that group.”¹⁶⁶ Unlike every other crime considered thus far, this type of bias crime statute does make motive *qua* motive relevant. A hypothetical scenario shows that this model will distinguish, on the basis of motive, between two defendants with identical intentions.

160. See Janine Young Kim, *Hate Crime Law and the Limits of Inculcation*, 84 NEB. L. REV. 846, 852–55 (2006) (citing examples of motive’s relevance).

161. See Hurd & Moore, *supra* note 41, at 1119 (2004) (objecting to hate crimes as breaking “new ground in the development of criminal law doctrine”).

162. LAWRENCE, *supra* note 4, at 29–30 (1999). Regardless of whether the bias crime provision constitutes a separate offense or merely creates a sentencing enhancement criterion, it nevertheless becomes an “essential element of the offense.” *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000).

163. LAWRENCE, *supra* note 4, at 30.

164. See Hurd & Moore, *supra* note 41, at 1124 (explaining how statutes that avoid reference to hate or bias altogether are analogous to traditional specific intent crimes).

165. LAWRENCE, *supra* note 4, at 30.

166. *Id.* at 34–35.

Imagine a person, Alan, with an unusual resistance to change—whenever he chooses between alternatives that are otherwise equally desirable, Alan likes to choose whichever option is more familiar. Now meet Bob, an individual with a strong dislike for black people. One day, both Alan and Bob participate in an identical sequence of events. They both feel hungry and decide to seek out some money for food. Having none, Bob and Alan both resolve to mug a stranger. They each walk to a quiet street that has periodic passersby of both white and black races. They both make a conscious choice to mug a black victim, though for different reasons. Because Alan had only committed one mugging before this time, and because his previous victim happened to be black, Alan decides to choose another black victim simply for the sake of consistency. Bob, however, chooses a black victim because of his prejudice.

The two offenders committed the respective muggings with identical intended consequences. They both intended to mug a black person, obtain money from the victim, buy food, and eat food. What differentiates the two is the reason why their intended consequence of mugging a black person was valuable to them. Because both offenders had the specific intention of mugging a person of a particular race, the discriminatory selection model of bias crime laws would treat both of these individuals as bias crime offenders. Under the racial animus model, however, only Bob committed a bias crime.

This example demonstrates how under the racial animus model, motive is directly relevant to bias crimes. This apparent contravention of the irrelevance-of-motive maxim raises the question of how common the racial animus model is. Although the racial animus model has been identified as “the one that bias crime scholars and law enforcement agencies most typically adopt,”¹⁶⁷ it is hardly ever enacted. For example, Professor Lawrence claims that Massachusetts follows the racial animus model based on a statutory definition that “[h]ate [c]rime[s]” are “any criminal act coupled with overt actions motivated by bigotry and bias.”¹⁶⁸ This statutory definition, however, applies only to the collection and dissemination of hate crime data.¹⁶⁹

167. *Id.* at 34 (footnote omitted).

168. MASS. GEN. LAWS ch. 22c, § 32 (1997) reprinted in FREDERICK M. LAWRENCE, PUNISHING HATE app. C, at 191 (1999) (internal quotations omitted).

169. See MASS. GEN. LAWS ch. 22c, § 32–35 (2007) (applying the definitions in section 32 only to sections 33 through 35, which concern hate crime data).

The state's criminal law contains no such requirement.¹⁷⁰ Racial animus model statutes have been repealed in New Jersey¹⁷¹ and Maryland¹⁷² in favor of discriminatory selection model versions.

Even when statutes do appear to enact the racial animus model, judges can interpret them in a way that takes the bias out of "bias crimes" by transforming them into discriminatory selection model statutes. In *State v. Stalder*,¹⁷³ the Supreme Court of Florida sought to construe a bias crime statute narrowly, so that it only covered crimes "committed because of prejudice."¹⁷⁴ By referencing prejudice in this way, the court thus described a crime that invokes a defendant's motives.¹⁷⁵ The court then defined a "bias-motivated crime" as "any crime wherein the perpetrator intentionally selects the victim *because of* the victim's race, color, ethnicity, religion, or national origin."¹⁷⁶ In so doing, the court stripped the motive element from the statute by determining the existence of prejudice by reference to the defendant's intended consequences.

This type of judicial interpretation was foreseen by Sir James Fitzjames Stephen, who explained how motive-laden terminology "is

170. See MASS. GEN. LAWS ch. 265, § 39 (2007) (requiring an "intent to intimidate [the victim] because of such person's race, color, religion, national origin, sexual orientation").

171. Compare N.J. STAT. ANN. § 2C:44-3(e) (1994) (enhancing a sentence if "[t]he defendant in committing the crime acted, at least in part, with *ill will, hatred or bias* toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity" (emphasis added)) with N.J. STAT. ANN. § 2C:44-3(e) (1999) ("The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."), and Act of Jan. 11, 2002, ch. 443, 2001 N.J. ALS 443 (codified as N.J. STAT. ANN. § 2C:16-1 (2002)) (repealing § 2C:44-3(e) and creating a separate offense that prohibits the commission of certain other crimes "with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation, or ethnicity").

172. Compare MD. ANN. CODE art. 27, § 470A(b)(4)(ii)(2) (1996) (repealed 2002) (requiring, in some cases, "evidence that exhibits *animosity* on the part of the person committing the act against a person or group because of that person's or group's race, color, religious beliefs, or national origin" (emphasis added)), with MD. CODE ANN., CRIM. LAW § 10-304 (2007) (requiring only that property be destroyed because of another's "race, color, religious beliefs, or national origin").

173. *State v. Stalder*, 630 So. 2d 1072 (Fla. 1994).

174. *Id.* at 1076.

175. A bias crime statute that requires prejudice does invoke defendants' motives, whereas a statute would not invoke defendants' motives if it merely required that the victim's race, ethnicity, etc. play a factor in the perpetrator's selection of the victim. See *supra* notes 160-66 and accompanying text.

176. *Stalder*, 630 So. 2d at 1077 (emphasis added) (quoting FLA. STAT. § 775.085 (1989)).

always evaded by legal fictions.”¹⁷⁷ Although bias crimes following the racial animus model are still on the books,¹⁷⁸ the relevant question is whether such laws will take defendants’ motives into account, or whether, as Stephen predicted, they will ultimately be understood in terms of intentions.

CONCLUSION

Assuming that bias crimes do continue to involve motives *qua* motives, the foregoing examination of the irrelevance-of-motive maxim shows just how unique such crimes would be. Consider Professors Hurd and Moore’s claim in their 2004 article that bias crimes are breaking “new ground in the development of criminal law doctrine.”¹⁷⁹ Because they did not defend the irrelevance of motive more generally,¹⁸⁰ however, their important conclusion has already been trivialized. Professor Janine Young Kim construes Hurd and Moore’s argument as merely showing that bias crimes involve motives in a slightly different way than the way in which other crimes involve motives.¹⁸¹ This Note has reached the same conclusion regarding bias crimes as Hurd and Moore did, but has presented it in a broader context—demonstrating that racial animus model bias crimes are not simply a new application of motive, but the single exception to a longstanding maxim of criminal law. Although arguments can be made that regardless of whether it is typical to take motives into account, bias crimes should do so, the foregoing discussion demonstrates the need for scholars to make such arguments if they are to defend bias crime statutes. Bias crime statutes are not just another variety of crime; they differ in a fundamental way from the balance of the criminal law.

This conclusion about the uniqueness of bias crimes only follows once the term “motive” is understood to refer to something distinct from “intention.” Although critics of the irrelevance-of-motive

177. STEPHEN, *supra* note 22, at 121. Stephen’s claim is discussed in more detail *supra* in the text accompanying notes 44–45.

178. See N.H. REV. STAT. ANN. § 651:6(I)(f) (2007) (providing a sentence enhancement for defendants who were “substantially motivated to commit the crime because of hostility towards the victim’s religion, race, creed, sexual orientation, . . . national origin or sex”).

179. Hurd & Moore, *supra* note 41, at 1119.

180. See *id.* at 1120 (discussing examples in which exculpatory, but not inculpatory, motives are relevant rather than defending the irrelevance-of-motive maxim in its entirety).

181. See Kim, *supra* note 160, at 852–55.

maxim are correct that no context-independent, logical distinction can be drawn between criminal intentions and more ultimate intentions, this does not disprove the maxim. Rather, it demonstrates the need to reject this conception of motive altogether in favor of any plausible alternative. The alternative defended here is not only plausible, it is in line with the view articulated by Sir James Fitzjames Stephen in the nineteenth century, and is the very conception defended by Professor Jerome Hall, the theorist to whom the irrelevance-of-motive maxim is often attributed.¹⁸² Once what Hall calls the “usual distinction between intention and motive”¹⁸³ is accepted, it appears that motives—with the possible exception of motives in racial animus model bias crimes—are indeed irrelevant to criminal liability.

182. See, e.g., Husak, *supra* note 13, at 4–6 (labeling the assertion that motive is irrelevant in the criminal law “Hall’s thesis”).

183. HALL, *supra* note 2, at 86 (referring to the view he defends).