

Evil and the Law of Murder

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It should be the first task of philosophy, theology, psychology — indeed, of all disciplines concerned with the study of man — to find out why there are men who desire to kill and are capable of killing. We should not hesitate to search for the primal cause of evil. Once we see it clearly, we may be less evil than we are now¹

When our age is remembered, surely one of the things we will be remembered for is our killers. The dark side of America in the late twentieth century includes an extraordinary tendency to homicidal violence.² The darkest aspect of the phenomenon must be the acts of a small but significant number of killers who seem to act out of pure evil, who kill for visceral or other material satisfaction.

We recognize the general dimensions of the problem; we discuss it at length. Our fear of such killers has boosted political careers and helped revive the death penalty. Yet in one important respect we have avoided the issue. In the intellectual dis-

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¹ Kerényi, *The Problem of Evil in Mythology*, in *EVIL* 17 (Curatorium of C.G. Jung Institute ed. 1967) (emphasis in original omitted).

² The Senate Judiciary Committee in the summer of 1990 reported a homicide rate for the United States of 10.5 per 100,000, making the nation “the most murderous industrialized nation” in the world. *L.A. Daily Journal*, Aug. 1, 1990, at 9, col. 1. Comparable rates for Great Britain were 0.8; Japan, 1.0; and Germany, 1.2. *Id.* The previous historic peak in the nation’s homicide rate as reported by the Department of Justice had been 10.2 per 100,000 in 1980. 1988 DEP’T OF JUSTICE, *UNIFORM CRIME REPORTS* 47 (1989). Figures for the last two decades represent an enormous increase from the rates recorded at the beginning of the century. In 1903, for example, the homicide rate for the United States was 1.1 per 100,000. 1988 DEP’T OF JUSTICE, *REPORT TO THE NATION ON CRIME AND JUSTICE* 15 [hereafter DEP’T OF JUSTICE, *REPORT TO THE NATION*].

course about the worst killers we speak of dangerousness and rationality; we speak of individual responsibility and the products of society. We rarely speak of good and evil. We have trouble with the idea that some persons rationally desire to cause others suffering. Although we recognize that some persons do evil to others, we shun the idea of evil as a human motivation. This Article seeks to understand and confront the evil involved in the worst kind of murders, what I will term aggravated murders. As a paper about criminal law, the Article examines current murder doctrines, analyzes their strengths and weaknesses, and proposes an alternative. The Article also reveals a larger issue: the modern reluctance to confront human evil. I argue that, although we tacitly agree on the most important qualities of bad human behavior, we have failed to accurately express those qualities in our legal definitions. I argue that in order to better conduct the never-ending battle between good and evil which comprises so much of human life, we must become more candid about human temptations to evil and more perceptive about their nature.

The first portion of the Article lays the theoretical base for the moral and legal discussion which follows. I posit that the primary function of punishing murder is to defend fundamental human value. In punishing criminal homicides we use legal doctrines to determine the extent to which the killer disregarded the value of others and so deserves punishment. In a variation on an expressive theory of punishment, I argue that punishment of serious crimes plays a critical role in a public dialogue about morality. By committing offenses such as murder, offenders challenge public order in not only a physical but also a principled sense. Thus criminal culpability depends largely upon the moral attitude manifested by the wrongdoer's offense. The worst killers display total disregard for a central precept of morality — the value of human life. Their actions present a direct challenge to our basic morality and only a proportionate, punitive response adequately demonstrates the moral significance of their crimes.

The second portion of the Article explores the dimensions of murder as both a social and a legal phenomenon. I begin by examining the criminologic distinction between stranger and acquaintance killings. I then note the way in which this distinction, as informed by ordinary language descriptions of homicides, reveals the twin bases for moral distinction: analysis of rationality and motive. We intuitively distinguish killings depending upon the extent to which the killer utilized his or her highest rational

capacities and upon our moral view of the reason for the killing. These elements provide a key to understanding the various efforts of Anglo-American law to categorize purposeful homicides according to severity. From the earliest attempts to segregate "secret" killings from all others, through the premeditation formula and modern capital murder schemes, Anglo-American law has sought to use certain easily observed criteria to categorize homicide offenses. These criteria demonstrate the relevance of rationality and motive, but do not capture their full significance. The modern doctrine of premeditated murder overemphasizes rationality at the expense of motive while felony-murder celebrates motive and virtually ignores rationality. Earlier, more metaphysical approaches to offense categorization which relied upon terms that directly evoke intuitive notions of evil permitted both kinds of analysis but at the cost of analytic vagueness. Finally, the approach of most capital murder schemes, which provide a laundry list of factors, proves unsatisfactory because of its failure to provide a coherent means for weighing of factors.

The third part of the Article introduces and develops a concept of evil as a means of articulating and justifying shared intuitions about murder. I use evil in a secular sense to refer to disregard for others. I employ the classical terminology of good and evil to dramatize the moral stakes and to illuminate the motives which moral concepts inspire. Using three archetypal figures of evil — the traditional figure of Satan, the literary figure of the vampire, and the modern incarnation of evil, the serial killer — I suggest the basic characteristics of evil on which we already agree. These examples of evil demonstrate that while the rationality analysis emphasized by premeditation is important, motivational differences are critical as well. I develop a distinction between persons who deliberately reject the basic morality of society and kill for nonmoral or immoral reasons and those who act in a less-considered way for reasons that have at least an echo of moral justification. In general, we seek to punish most severely those persons who have not only disobeyed the most basic rule of civilized society, but who have consciously rejected its moral force.

The last portion of the Article lays out the specific language of a new doctrine of aggravated murder which centers on the rationality and motivation analysis developed earlier. This part also addresses pragmatic objections which may be raised to the reliance upon motivation analysis. I conclude that the sort of motivation analysis proposed presents no more evidentiary problems or

obstacles to review than present doctrine and will represent a significant advancement in the law because it will more closely track shared intuitions on evil in the taking of life. Finally, I illustrate the application of the new doctrine by applying it in two hypothetical but illustrative situations.

I. PUNISHMENT AS DEFENSE OF MORAL REGARD

In order to say anything meaningful about murder we must first reach an understanding about the institution of punishment. Since punishment has been, and remains, a rich source of moral and legal controversy, we should not expect agreement on a full theory of punishment. Instead, I outline an expressive approach to punishment which draws from retributive and, to a lesser extent, utilitarian theories and which captures the basic moral structure of much of current homicide doctrine. The theory presented is in several important respects incomplete. I do not give a full account of what is necessary for moral responsibility. Nor do I provide a full theory of human value. Although these matters are important to understanding criminal liability, I have skirted them in an effort to keep the discussion focused on moral distinctions between murder offenses.³

I argue that punishment is fundamentally a way of making public morality real. If we care about the way in which persons treat each other and believe that human interaction has a moral dimension, then we must have a concrete means of expressing those convictions. Punishment provides a way of tangibly defending moral principle.⁴ Our first step in criminal analysis, therefore, is to define the moral principles at stake.

³ I should also make clear that while I present a particular theoretical justification for my doctrinal proposal, it may find support from other punishment theories. Although I do not explore them here I can imagine justifications of my approach under either a purely retributive or a deterrent theory. I use the expressive approach because I find it the most persuasive in both prescriptive and descriptive senses. My main purpose, however, is to present an alternative perspective to the crime of murder, not to defend a particular punishment theory.

⁴ See Andenaes, *General Prevention — Illusion or Reality?*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 176, 179-80 (1952). In this sense the theory looks to consequences and is teleological. As set out below, I am less convinced of the sharp distinctions between teleological and deontological approaches than are most contemporary commentators.

A. Moral Regard

We begin with a notion of core value in persons. The Kantian view emphasizes the human abilities to choose and obey rules.⁵ From these capacities we can draw the principle of respect for persons.⁶ Every person, as an individual capable of reasoned choice, has a basic autonomy value which must be respected by every other person. This rationalistic and individual approach to morality provides basic insight into how humans should interact. I take a somewhat broader view of essential human value and the moral interaction of persons, however, and argue that the worth of humans includes their capacity for rational emotional life. It is through our emotions as much as our conscious reason that we find meaning in life's experience. Emotions are one of the prime means by which we understand the value of moral action. Therefore, both sides of the moral equation should take account of emotion. We should not merely respect others; we should care for them. We should care not only for their autonomy, but also for the way in which they experience their autonomy. For example, under a purely rationalistic view we would describe rape as a crime against physical, sexual, and mental autonomy. Yet surely rape is also an act of hatred and cruelty because of the terrible psychic pain it inflicts upon the victim. Our first principle, therefore, should be that of moral regard — a caring for the moral capacities of others.⁷ From the same approach we may also derive a principle of self-regard: we may protect our own autonomy and worth from others' acts of disregard.

Moral regard presupposes a responsible moral actor. For an act to have a moral dimension under this approach, the actor must display the basic capacities of rationality and rule-obedience. The actor must work toward a set of goals which make

⁵ See I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* (T. Abbott trans. 1949); I. KANT, *THE DOCTRINE OF VIRTUE, PART II OF THE METAPHYSIC OF MORALS* (M. Gregory trans. 1964); I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd trans. 1965).

⁶ R. DOWNIE & E. TELFER, *RESPECT FOR PERSONS* 20 (1969); MacLagan, *Respect For Persons As a Moral Principle — I*, 35 *PHIL.* 193, 198-99 (1960). For applications of this approach to punishment see note 21 *infra*.

⁷ On the move from respect to caring see A. DONAGAN, *THE THEORY OF MORALITY* 9-31 (1977); Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *CORNELL L. REV.* 655, 685-89 (1989).

sense.⁸ Further, the actor must work towards his goals in a way that makes sense in terms of our collective perception of reality. In other words, the actor's chosen means to achieve his ends must have some chance of success. Finally, the actor must have a sufficiently integrated self so that we may infer that his conscious rationality directs his actions. Without at least these capacities,⁹ we will not view a harmful act as a demonstration of disregard.¹⁰

Moral responsibility requires the ability to make rational moral decisions. We have doubts about children's culpability because their immaturity, mental and otherwise, makes us wonder whether they can make the rational connections necessary to moral choice. Likewise some crazy persons may pose significant threats to public safety, but their lack of cognitive or volitional control precludes any interpretation of immoral attitude. We can not say they have rationally chosen to contravene fundamental moral principles.¹¹

B. Punishing Disregard

The principle of moral regard informs punishment in two related respects. Punishment, as a basic means of defending regard, represents a public expression of condemnation of acts of disregard. To be effective as condemnation, though, punishment must be deserved according to the regard principle.

1. Punishment as Public Condemnation

Inherent in the concept of moral regard as a rule for human conduct is the idea that there must be negative consequences for

⁸ This will prove the most complex aspect of rationality analysis for purposes of murder. See Section III(E)(3) *infra*.

⁹ The example of the psychopath raises the potential for further responsibility requirements relating to the connection between rationality and emotion. See J. MURPHY, *Moral Death: A Kantian Essay on Psychopathy*, in RETRIBUTION, JUSTICE, AND THERAPY 128, 132 (1979); Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POLICY 59, 63-65 (1990); see also M. BAVIDGE, *MAD OR BAD?* 58-60 (1989). Unfortunately, to explore this idea fully would take us far beyond the bounds of this Article.

¹⁰ See generally section III(E)(2)-(3) *infra*.

¹¹ This review of responsibility necessarily aims more toward describing present responsibility practices than justifying them. In a later work I hope to provide a set of arguments justifying our practice of linking rationality and individual responsibility.

its violation.¹² Those persons who rationally resolve, and act, to hurt others in certain fundamental respects should be punished so that they, and others, can appreciate the moral significance of their actions. In this respect we use punishment as a means of publicly condemning the wrong committed.¹³ We can see punishment, in part, as a dialogue of action about morality. In committing a crime the offender inevitably makes a moral statement.¹⁴ By breaking into a home and stealing personal items from it, for example, the burglar indicates that she cares nothing for the principle of personal autonomy as it is expressed in the idea of private space and private property. She may not consciously wish to make a public statement about private property (in fact she probably wishes her deed to go undiscovered) but her deliberate act nevertheless presents a challenge to principle. We punish, in part, to defend the challenged principle.¹⁵

Much of this works on an emotional level. The burglar's disregard makes us mad; it challenges our fundamental beliefs about justice in the world and this anger seeks relief in punishment.¹⁶

¹² See Charvet, *Criticism and Punishment*, 75 MIND 573, 576 (1966). For a critical view along similar lines see Fingarette, *Law and Punishment*, in CRIME IN THE STREETS AND CRIME IN THE SUITES 306-19 (D. Timmer & D. Eitzen eds. 1989).

¹³ See, e.g., E. DURKHEIM, MORAL EDUCATION 176 (E. Wilson & H. Schnurer trans. 1961) stating:

To punish is not to make others suffer in body or soul; it is to affirm, in the face of an offense, the rule that the offense would deny. . . . [P]unishment is only the palpable symbol through which an inner state is represented; it is a notation, a language through which . . . [is] expressed the feeling inspired by the disapproved behavior.

See also J. FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING 95, 101-05 (1970); H.L.A. Hart, LAW, LIBERTY AND MORALITY 60-69 (1963); H.M. Hart, *Criminal Punishment as Public Condemnation*, in CONTEMPORARY PUNISHMENT 12, 12-15 (R. Gerber & P. McAnany eds. 1972). For critiques of this approach see Skillen, *How to Say Things With Walls*, 55 PHIL. 509, 516-20 (1980); Walker, *Punishing, Denouncing or Reducing Crime?*, in RESHAPING THE CRIMINAL LAW 381-403 (P. Glazebrook ed. 1978).

¹⁴ See N. LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 77 (1988); Oldenquist, *An Explanation of Retribution* 85 J. PHIL. 464, 467-68 (1988).

¹⁵ See H.M. Hart, *supra* note 13, at 12-15; W. MOBERLY, THE ETHICS OF PUNISHMENT 219 (1968); Charvet, *supra* note 12, at 578-79.

¹⁶ Pillsbury, *supra* note 7, at 689; see also T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 147-51 (1969); J. MURPHY & J. HAMPTON, FORGIVENESS AND MERCY 118-19 (1988).

To the extent that this anger is morally based, it provides a legitimate motivation to punishment. Leaving offenders unpunished undermines our commitment to regard principles.¹⁷ It denies expression to our well-founded anger and suggests that the regard principle does not really matter.

This view of punishment allows us to see it as a forward-looking institution working for the community's future, a present institution engaged in the work of denunciation, and, as discussed below, a backward-looking institution concerned with desert for past acts.¹⁸ It supplies a coherent explanation for both the general practice of punishment and its particular distribution in sentencing decisions¹⁹ and provides a basic means of limiting the government's use of penal force.²⁰

2. Rationality, Motive, and Commitment to Disregard

Punishment as condemnation has moral force only if it is deserved according to the principle whose violation is being condemned. Thus, punishment in defense of moral regard requires that punishment be merited by a violation of the regard principle.²¹ Punishment should be apportioned according to the sever-

¹⁷ As Nigel Walker noted: "There is nothing like conforming with a rule for inducing a feeling of propriety or even righteousness. An unpunished infraction means two infractions." Walker, *supra* note 13, at 400. See also N. LACEY, *supra* note 14, at 176-77; Oldenquist, *supra* note 14, at 467-68.

¹⁸ See also N. LACEY, *supra* note 14, at 68-71; Charvet, *supra* note 12, at 578.

¹⁹ See N. LACEY, *supra* note 14, at 68-71; *c.f.* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1-27 (1968) (presenting a theory sharply distinguishing between general justification for punishment and the distribution of punishment).

²⁰ See N. LACEY, *supra* note 14, at 160-68, 176-86; see also Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. CRIM. L. & CRIMINOLOGY 726, 770-72 (1989).

²¹ The most telling criticism of the expressive theory of punishment has been its necessary but uncertain relationship to the desert principle of retribution. See Skillen, *supra* note 13, and Walker, *supra* note 13. Clearly the notion of punishment as condemnation requires desert to be meaningful. See W. MOBERLY, *supra* note 15, at 219; Charvet, *supra* note 12 at 578-79. To that extent the approach urged brings all the problems of retributive theory. For basic explications and defenses of desert see *supra* note 5; J. KLEINIG, PUNISHMENT AND DESERT (1973); M. MOORE, LAW AND PSYCHIATRY 233-43 (1984); H. MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE 31 (1976); J. MURPHY, JUSTICE, RETRIBUTION AND THERAPY (1979); A. VON HIRSCH, DOING JUSTICE (1976).

ity of the wrongdoer's act of disregard. The worse the physical harm, the more we can say the wrongdoer displayed an attitude of disregard for the worth of others. The more awareness of harm infliction the offender displays, the more we can charge him with disregard for others. These distinctions explain generally the criminal law's hierarchy of offenses and mental states.²²

The determination of culpability involves an interpretation of the actor's moral attitude. We look at the harmful event and ask why the individual acted as she did. While we cannot ascertain the exact thoughts and impressions which went through the actor's consciousness, we can use our own knowledge of human experience to infer reasons from external circumstances. We look for reasons which might explain the action. In this sense the moral inquiry remains objective. We care about how the actor's view demonstrates regard or disregard; we do not excuse if the actor chooses a moral code which conflicts with the regard principle. In essence, we ask to what extent the offender, in killing, made a commitment to disregard. As a rational individual capable of planning her action,²³ how much thought and consideration did she put into the decision to kill, and what was the real goal of the killing? We can divide this inquiry into two subparts: (1) a rationality inquiry which looks at the quality of the offender's planning activity, and (2) a motive inquiry which looks at the ultimate goal of the offender's action.

As part of our rationality analysis we can make a general distinction between an immoral act and a morally reckless one.²⁴ Under this analysis, the worst wrong is that committed by the wrongdoer who acts with a clear understanding of the harm he will cause and who seeks that harm for nonmoral or immoral reasons. This person has fully utilized his moral capacities in resolving to harm another. This person has deliberately rejected the

²² For example, see the hierarchy of mental states in the Model Penal Code: purpose, knowledge, reckless, negligent. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

²³ For an interesting account of human action which emphasizes the planning capacity as key to human rationality, see M. BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON* (1987).

²⁴ This distinction bears a structural resemblance to the one Aristotle makes between the bad man and the morally weak one, although Aristotle's conception requires careful use to make sense within the context of purposeful murder. See NICOMACHEAN ETHICS, bk. 7, at 249 (J. Thomson trans. 1953) [hereafter NICOMACHEAN ETHICS].

regard principle.²⁵

A morally reckless act involves a culpable failure to appreciate fully the moral consequences of action. We commonly employ this approach in assessing unintended harms, but it applies, in different fashion, to intended harms as well. Where, for example, an individual attacks another in a fit of anger, we may morally distinguish that act from a premeditated attack. Even though the conduct is purposeful, we may decide that the impassioned actor did not consider the justification for and consequences of the act as fully as if he had acted in a dispassionate state.²⁶ This provides only slight mitigation, however. Although the wrongdoer retained her rational and volitional capacities, she failed to use them to their fullest. She did not exercise the self-control and sensitivity needed for moral conduct.

In the moral evaluation of purposeful wrongs we care not only about how carefully the actor planned the crime, but also about the purpose behind the plan. Our moral view of a carefully considered murder depends in large part upon our view of its motive. If the killer kills for pleasure, we see the murder as a demonstration of total disregard for the value of other persons. The same killing motivated by righteous revenge — the modern Hollywood hero who executes those responsible for depredations upon his family, for example — does not show the same level of disregard. Similar analysis holds for acts which involve a degree of moral recklessness. We judge more harshly the passionate killing motivated by bigotry than the passionate killing inspired by defense of honor.²⁷

Scholars and courts have often argued that motive is legally

²⁵ Again we must take care not to confuse the wrongdoer's moral view with our own. That the wrongdoer believes his action moral does not necessarily provide any mitigation. If he subscribes to a "morality" which celebrates harm to others, we should not be impressed. What we care about is that the wrongdoer clearly see the harm he causes and that his reasons for action have no moral content according to the regard principle.

²⁶ We must be careful here not to confuse two levels of moral analysis. The difference between immoral and morally reckless conduct both explains basic distinctions between mental states — between purposeful and reckless conduct, for example — and differentiates offenses within the category of purposeful crimes. So, for example, we generally consider a purposeful offense committed with some degree of moral recklessness as more culpable than an offense committed with the mental state of recklessness.

²⁷ This accords with the argument of some scholars that criminal law evaluates individual character. See N. LACEY, *supra* note 14, at 65-68;

irrelevant, that punishment concerns bad acts and not bad people.²⁸ Yet Anglo-American criminal law, with its emphasis upon mental states, clearly concerns itself with the “why” of criminal acts and so makes a basic inquiry into moral disposition. We resolve how bad an act is by what it reflects about the wrongdoer’s attitude toward others. We consider a purposeful act worse than a negligent one not simply from a calculus of dangerousness, but because of the differential moral attitudes indicated by the different mental states.²⁹ As we will see, the traditional distaste for motive analysis represents an attempt to limit the culpability inquiry in a theoretically unjustified fashion.

Motive analysis will present one significant difficulty. It will bring to the fore basic questions about human value which otherwise might be only indirectly considered. In some instances it will open the legal arena to morally controversial questions. Yet where culpability distinctions are of great importance, as in murder, motivation analysis provides a critical means of judging culpability. There is no substitute.

II. MURDER IN AMERICA — SOCIAL AND LEGAL VIEWS

Having established a theoretical structure for punishing murder, we turn now to the particular problem of building a hierarchy of offenses. How should we rank murder offenses according to the regard principle? I begin by examining common views of homicide in both legal and nonlegal contexts. In both instances distinctions we normally make between different kinds of killings provide important insights into moral difference. In most views of homicide we can find two basic assessments: (1) an assessment of the quality of rationality involved in the choice to kill, and (2) an assessment of motive — a moral judgment of the offender’s reasons for killing. From a critical review of current legal doctrine, we will see that present law has often confused these two assessments and has particularly neglected the motivational inquiry.

Arenella, *supra* note 9. For a view critical of this approach see Moore, *Choice, Character and Excuse*, 7 SOC. PHIL. & POL’Y 29 (1990).

²⁸ See Hitchler, *Motive As An Essential Element of Crime*, 35 DICKINSON L. REV. 105 (1931) (reviewing and critiquing arguments against motive analysis).

²⁹ See generally H.L.A. HART, *supra* note 19, at 136-57 (explaining various degrees of negligence and the corresponding degrees of criminal responsibility).

A. The Social View

Murder, like all crimes, is a legal construct.³⁰ Yet as a violation of society's most basic moral rule — that persons not kill one another — we have shared moral ideas about the offense which go beyond legal definitions. If we look at some of the ways that we distinguish killings in nonlegal context — in ordinary speech and in social science, for example — we may find moral insights not captured by legal doctrine.

Criminologists have noted the significance of the relationship between victim and killer in the social impact of criminal homicide. Although we recognize that we are at greatest risk of homicide from people we know,³¹ we fear most being killed by a stranger.³² Criminologists find this distinction important and attempt to separate those offenses which involve a clear “duet of crime,”³³ a close interaction between victim and offender, from those where the violent intersection of lives seems almost random because the parties remain essentially strangers to each other.³⁴

There are nonmoral explanations for the stranger-acquaintance distinction. We most fear and hate those who are most different from us. Yet the distinction between stranger and acquaintance killings also points to moral distinctions — differences which relate to rationality and motive.³⁵ Common terms used to describe different kinds of killing make these distinctions clearer. We often call the worst killings “cold-blooded.”³⁶ The phrase suggests a lack of basic caring for fellow humans which we presume in stranger killings. The phrase contrasts with the frequent

³⁰ In other words, it is a product of social consensus of some form. See G. VOLD & T. BERNARD, *THEORETICAL CRIMINOLOGY* 248-68 (3d ed. 1986).

³¹ 1988 DEPT. OF JUSTICE UNIFORM CRIME REPORTS 13 (1989); M. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 204-09 (1958).

³² DEPT. OF JUSTICE, *REPORT TO THE NATION*, *supra* note 2, at 24, 32.

³³ H. VON HENTIG, *THE CRIMINAL AND HIS VICTIM* 383-85 (1948).

³⁴ See, e.g., J. KATZ, *SEDUCTIONS OF CRIME; MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 180-81 (1988); M. WOLFGANG, *supra* note 31.

³⁵ Thus I am not concerned here with whether Americans are generally more persuaded by nonmoral “otherness” concerns or by the regard-based concerns of rationality and motive. My concern is to explore the moral possibilities in order to construct a moral scheme.

³⁶ See, e.g., J. KATZ, *supra* note 34, at 274-76. See also *Austin v. United States*, 382 F.2d 129, 137 (D.C. Cir. 1967) (stating: “In homespun terminology, intentional murder is in the first degree if committed in cold blood and is murder in the second degree if committed on impulse or in sudden heat of passion”).

description of acquaintance killings as “crimes of passion.” Here we presume that violence comes out of extreme emotion that may limit rational appreciation of a situation. We have a sense that an emotion-driven choice is a less responsible one because the chooser’s conscious mental processes were impaired. A dispassionate and reflective decision presents no such mitigation. We presume that the offender, acting on cool and carefully considered choice, took a more serious moral position.

The same ordinary language distinctions point to distinctions in motive. The worst killings are often called “senseless.”³⁷ They do not appear to serve anyone’s material interest. Yet what we mean by “senseless” seems to be that they have no *moral* sense, that they can be explained only by an immoral drive. When we hear of a “senseless” crime, a torture-murder of a small child by a stranger for example, we ask, why would anyone want to do such a thing? We are surprised by a motivation that seems foreign to our own lives. Yet our declaration of senselessness may also stem from a reluctance to acknowledge evil in motivation. As will be discussed below, such killings have their own considerable logic: the killer finds pleasure in the most terrible form of disregard. Our placement of such killings at the top of our hierarchy may indicate that we intuitively recognize the immorality of the motivation.

By contrast, most acquaintance killings involve a personal dispute of some kind. The homicide results from an argument over right conduct — usually an argument about a harm for which the killer holds the victim responsible.³⁸ Similarly, the designation of an offense as a “crime of passion” may indicate more than strong emotion; it may imply a morally credible reason for hostility. As a result of these motive distinctions, we may interpret the offense as involving more of a mistake in moral calculation or control than a direct challenge to public morality.

B. The Law of Murder — The Traditional Approach

Even within the overall category of purposeful, unjustified and unexcused killings, virtually all Western jurisdictions make definitional distinctions between homicide offenses. The distinctions are significant; the categorization of offense can mean the differ-

³⁷ See J. KATZ, *supra* note 34, at 274-76.

³⁸ See *id.* at 18-36; J. TOTMAN, *THE MURDERESS: A PSYCHOSOCIAL STUDY OF CRIMINAL HOMICIDE* 48-56 (1978).

ence between life and death, or between life in prison and a modest prison term. As in the social view of murder, the traditional legal distinctions between offenses depend upon evaluations of rationality and motivation. Doctrines such as provocation clearly implicate both concerns. With the exception of provocation, however, current murder doctrines emphasize rationality nearly to the exclusion of motive.

1. Secrecy

The earliest English law on homicide concentrated exclusively upon the secrecy of the act. In pre-Norman times “murth” or “murdrum” meant a secret killing.³⁹ Secrecy implied (although it did not require) most of the other factors generally recognized in the worst homicides. Secret killings suggest planning; planning suggests both reflection and a cool emotional state at the time of killing. Secrecy in killing implies a lack of immediate victim provocation, although it is consistent with revenge for a prior provocation.⁴⁰ English common law later developed a standard of malice aforethought which emphasized a similar notion: lying in wait. Perhaps taken from a Biblical admonition concerning such killings,⁴¹ it appealed to the special horror of secret ambushes.⁴²

Secrecy cannot be the sole criterion for aggravation of murder, however. The worst killings may involve “open” slaughter which mocks any idea of mutual combat lurking in the secrecy concept. Secret killings may not involve the highest level of rationality;

³⁹ ROYAL COMMISSION ON CAPITAL PUNISHMENT REPORT, 1953 CMND. NO. 8932, app. 7, at 381 [hereafter ROYAL COMMISSION].

⁴⁰ It also suggests lack of opportunity for self-defense which may be offensive in a culture that honors the use of violence in mutual combat. For example, early Russian law categorized the worst homicide as that where the victim was killed without drawing his sword; in Sweden the worst killings were of defenseless individuals. G. TARDE, PENAL PHILOSOPHY § 84(I), at 462 (R. Howell trans. 1912).

⁴¹ *Exodus* 21:14 (stating “if a man shall kill his neighbor deliberately and by lying in wait, thou shalt take him from mine altar that he may die”).

⁴² See T. GREEN, *Judge, Jury, and the Evolution of the Criminal Law in Medieval England*, in VERDICT ACCORDING TO CONSCIENCE 74-75 (1985) [hereafter T. GREEN, VERDICT]; Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 414 (1976) [hereafter Green, *The Jury*] (tracing the way in which early English approaches to homicide were influenced by the Anglo-Saxon tradition of distinguishing secret from open killings). Many contemporary European murder statutes contain similar notions. See G. FLETCHER, RETHINKING CRIMINAL LAW § 4.5.3, at 329 (1978).

even with an opportunity to consider consequences, emotional stress or mental disturbance may influence the quality of the actor's practical reasoning and present grounds for mitigation. Most importantly, one who kills in secret may have good cause for grievance against the victim.⁴³ While this will neither excuse nor justify the crime, it does morally distinguish the offense from one where the killer acts for nonmoral or immoral reasons.

2. Provocation and Victim Precipitation

From early on, English law recognized a distinction between purposeful killings immediately provoked by victim wrongdoing and all other purposeful killings. The law declared voluntary manslaughter a less serious offense than murder because, although purposeful, it was committed upon "chance-medley," that is, in the heat of a physical altercation,⁴⁴ or upon stark and immediate provocation, such as a husband's discovery of his wife in the act of adultery.⁴⁵ Mitigation was found, however, not just in the victim's provoking act, but in the "heat of passion" which the act reasonably aroused in the offender. The doctrine of provocation recognizes mitigation in both motive and rationality. The killer must have a justification for extreme passion, usually anger, (motive) and suffer some diminution in moral perspective and control as a result (rationality).⁴⁶ Provocation thus demonstrates

⁴³ Thus a child who kills her abusive father or a battered spouse who kills her abusive husband lack any legal excuse or justification but have a reason for hostility which morally distinguishes their actions from identical acts of a child or spouse who kill to collect on an insurance policy. See, e.g., *Jahnke v. State*, 682 P.2d 991 (Wyo. 1984).

⁴⁴ See 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *191-92; Green *supra* note 42, at 467 & n.200.

⁴⁵ 4 W. BLACKSTONE, *supra* note 44, at *191-92. Here we see an example of the moral controversies that motive analysis raises. Earlier Anglo-American law assumed that traditional notions of male honor informed self-regard. In other words, the insult to male honor of a wife's sexual infidelity was an extreme violation of personal integrity which justified extreme anger, if not violence, toward the wife and love rival. Today many reject the idea that a wife's consensual sexual conduct could constitute such a severe injury to the husband because this assumes an oppressive kind of sexual ownership of the wife by the husband. Thus, the husband's anger, especially toward his love rival, would not have as strong a moral justification.

⁴⁶ See VON HIRSCH & JAREBORG, *Provocation and Culpability*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS, 241 (F. Schoeman ed. 1987); see also Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 427-29 (1982). In recent years

the moral relevance of victim precipitation, but limits it to situations where it presents the strongest mitigation. The doctrine leaves most killings, including most acquaintance killings, in the category of murder.⁴⁷

3. Dispassion and Reflection — Premeditation in America

Provocation suggests a paradigm instance of killing in sudden, righteous wrath. Its opposite number would seem to be a dispassionate, reflective killing committed for a particularly immoral reason. Premeditated murder has, to a limited extent, represented such a doctrine. Premeditation first gained acceptance in America during a period of criminal justice reform following the American Revolution.⁴⁸ The earliest reforms took place in Pennsylvania, where a combination of evangelical humanitarianism and Enlightenment thought inspired a new approach to the crime problem.⁴⁹ In 1794 the Pennsylvania legislature enacted a reform scheme which drastically reduced the number of capital offenses and separated murder into two degrees. Declaring that “the several offenses, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment,”⁵⁰ the Pennsylvania legislature limited capital punishment to certain felony murders and “all murder which shall be perpetrated by poison, or by lying in wait, or by any kind of wilful,

courts and commentators have moved toward a more subjective approach to provocation that emphasizes rationality at the expense of motive analysis. See Singer, *The Resurgence of Mens Rea: I — Provocation, Emotional Disturbance and the Model Penal Code*, 27 B.C.L. REV. 243, 291-322 (1986). A similar emphasis upon rationality inspired the move to a diminished capacity defense to murder based on mental disease or defect. This development proved more controversial, however. See, e.g., Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984); see also Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977) (criticizing the diminished responsibility model).

⁴⁷ For a general discussion of victim precipitation see G. FLETCHER, *supra* note 42, at 351-53.

⁴⁸ See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 280-99 (2d ed. 1985); Pillsbury, *supra* note 20, at 729-38.

⁴⁹ Pillsbury, *supra* note 20, at 731-33.

⁵⁰ Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 772-73 (1949) (quoting 4 JOURNAL OF THE SENATE 242 (Pa. 1974) codified at PA. STAT. ANN. tit. 18, § 4701 (Purdon, 1945)).

deliberate and premeditated killing.”⁵¹ All other murders were designated murders of the second degree to be punished by imprisonment at hard labor. This offense ranking proved popular in the new republic. By the early twentieth century most states had adopted similar schemes.⁵²

Although widely used in Western law,⁵³ premeditation was a new concept to the English common law,⁵⁴ and it received a generally hostile response from American judges trained in the English tradition. Instead of using the concept of premeditation to generate new legal distinctions, American courts generally forced the new doctrine into the shape of the old. Since the old common law disregarded premeditation, so would the new. By the mid-nineteenth century the Pennsylvania Supreme Court held that “no time is too short for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it.”⁵⁵ On

⁵¹ *Id.* The statutory language was taken from the colony’s original penal code drafted by founder William Penn in the seventeenth century. *Id.* at 760-61.

⁵² See Wechsler & Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 704-05 (1937).

⁵³ See ROYAL COMMISSION, *supra* note 39, at 180; CODE PÉNAL art. 296-298 (Fr.) translated in THE FRENCH PENAL CODE 104 (J. Moreau & G. Mueller trans. 1960); CODICE PENALE, art. 576 (It.) translated in THE ITALIAN PENAL CODE 192 (E. Wise & A. Maitlin trans. 1978).

⁵⁴ At least it appeared to be a new concept in the late eighteenth and nineteenth centuries. The early doctrine of malice aforethought probably involved a notion of prior reflection. See ROYAL COMMISSION, *supra* note 39, at 175; R. MORELAND, THE LAW OF HOMICIDE 10-11 (1952); see also Green, *The Jury*, *supra* note 42, at 461. As late as the early eighteenth century Blackstone wrote that malice is “evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.” 4 W. BLACKSTONE, *supra* note 44, at *199. The phrase also had a broader meaning, however, describing a killing without provocation, a felony-murder or the killing of a magistrate or officer of the law in the line of duty. 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 52-60 (1883) (commenting on Coke’s *Third Institute*). Despite a number of reform proposals English law has never distinguished between different kinds of murder and has never adopted a premeditation formula. See generally ROYAL COMMISSION, *supra* note 39, at 57-59; Ashworth, *Reforming the Law of Murder* 1990 CRIM. L. REV. 75 (reviewing report of recent English legislative commission on murder reform).

⁵⁵ Commonwealth v. Drum, 58 Pa. 9, 16 (1868) (quoting from Commonwealth v. Richard Smith). I do not mean to suggest this statement is wrong insofar as it deals with the general question of offense severity. In fact, it expresses a basic point about evil and bad motivation which we

another occasion the same court observed that even with time for reflection "causes may affect [the offender's] intellect, preventing reflection, and hurrying onward his unhinged mind to rash and inconsiderate resolutions, incompatible with the deliberation and premeditation defining murder in the first degree."⁵⁶ By the early twentieth century one astute observer described premeditation as a legal excuse for the discretionary exercise of mercy by the jury.⁵⁷ This tendency has continued into the modern era, with state courts viewing premeditation as nothing more than a "conscious purpose to bring about death."⁵⁸

In many jurisdictions the judicial deconstruction of premeditation has made the first-degree murder category over-inclusive. Offenses which do not involve the highest degree of rational choice-making are treated the same as those that do.⁵⁹ More seriously, offenses where the motive for the killing might provide grounds for mitigation are treated the same as those where the motive argues for greatest culpability.⁶⁰ This latter point provides an important insight into premeditation's checkered history. We might see what courts have done with premeditation not so much as a subversion of rationality analysis, but as a covert move to find room for motivation analysis. The need for such analysis becomes clearer when we examine the consequences of a strict reading of premeditation.

The California Supreme Court has experimented with taking premeditation seriously by interpreting it strictly. In *People v. Anderson*,⁶¹ the court provided a rule structure for premeditation

intuitively accept. See Section II(C) *infra*. It does undermine the concept of premeditation as significant prior reflection, however.

⁵⁶ Jones v. Commonwealth, 75 Pa. 403, 406 (1874).

⁵⁷ B. CARDOZO, *What Medicine Can Do For Law*, reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 371, 384 (1947).

⁵⁸ Commonwealth v. O'Searo, 466 Pa. 224, 239-40, 352 A.2d 30, 37-38 (1976); see also Commonwealth v. Carroll, 412 Pa. 525, 194 A.2d 911 (1963).

⁵⁹ See, e.g., *People v. Jackson* 49 Cal. 3d 1170, 783 P.2d 211, 264 Cal. Rptr. 852 (1989) (first degree murder despite indication of extreme PCP intoxication); *People v. Odle*, 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137, cert. denied, 488 U.S. 917 (1988) (first degree murder despite evidence of basic personality change following major brain surgery).

⁶⁰ The clearest example of this sort of offense is mercy killing. See *State v. Forrest*, 321 N.C. 186, 362 S.E.2d 252 (1987); *State v. Ehlers*, 98 N.J.L. 236, 119 A. 15 (1922) (declaring the irrelevance of motive to any determination of degree of murder).

⁶¹ 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968); see also R. MORELAND, *supra* note 54, at 211-12.

which could significantly restrict its application. The *Anderson* court found that the prosecution had failed to prove premeditation in a man's ferocious and fatal attack upon a ten-year-old girl, where the defendant had been drinking heavily, there was little evidence of planning, the manner of killing was frenzied, and the relationship between victim and the defendant did not suggest a reflective killing.⁶² In other words, the court took seriously the notion that premeditation requires cool calculation and a carefully reflected-upon decision to kill.⁶³

The *Anderson* decision was, and remains, controversial because although proof of premeditation was lacking, proof of aggravating circumstances was considerable. The case involved the slaughter of a child by an adult under circumstances which strongly suggested a sexual motivation, a crime that ranks high on an intuitive scale of homicide offenses. As commentators have noted, an impulsive killing, depending on motivation, may present a more culpable offense than a reflective killing by a brooding, self-doubting offender.⁶⁴ We have to judge the motive for the

⁶² *Anderson*, 70 Cal. 2d at 26-27, 33-34, 73 P.2d at 948-49, 953, 73 Cal. Rptr. 556-57, 561.

⁶³ In this way the *Anderson* decision reflects the importance in rationality analysis of what philosopher Michael Bratman terms reconsideration. Bratman argues that rationality involves not only the process of making decisions and plans but the process of deciding when and how to reconsider those decisions and plans. See M. BRATMAN, *supra* note 23, at 60-75.

Other courts concerned with giving meaning to premeditation have concentrated on the timing aspect of killing. See, e.g., *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967); *State v. Bingham*, 40 Wash. App. 553, 699 P.2d 262 (1985), *aff'd*, 105 Wash. 2d 820, 719 P.2d 109 (1986).

The recent California Supreme Court has not demonstrated the same interest in premeditation as reflection as its predecessors. See, e.g., *People v. Jackson*, 49 Cal. 3d 1170, 783 P.2d 211, 264 Cal. Rptr. 852 (1989).

⁶⁴ "The suddenness of the killing may simply reveal callousness so complete and depravity so extreme that no hesitation is required" while prior reflection may represent "the uncertainties of a tortured conscience rather than exceptional depravity." MODEL PENAL CODE, *supra* note 22, § 210.6, 127-28 (Commentary). In criticizing the French doctrine of premeditation, Sir James Fitzjames Stephen cited the following examples: "A., passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat." 3 J. STEPHEN *supra* note 54, at 94. Stephen's examples strike us as particularly heinous because the killers acted for sadistic or sexually predatory reasons.

The example of an impulsive killer may also provide insight into the

killing as well as the quality of rationality in choice to kill.⁶⁵

4. The Relevance of Motive — Felony-Murder

The *Anderson* decision reveals an equally significant deficiency in a separate doctrine of first-degree murder: the felony-murder rule. The only reason the premeditation discussion was necessary in *Anderson* was because the court found the proof of an independent felony insufficient in the case. Had such a felony been proven, first-degree murder status would have been secure, regardless of the offender's mental state toward the resulting death. This illustrates the way in which American law has used felony-murder to backstop premeditation doctrine and so sweep into the highest offense category many heinous crimes that might otherwise be classified at a lesser level. The felony-murder doctrine allows us to treat killings motivated by an immoral reason — the successful commission of crime — as extremely serious, without regard to the degree of rational consideration involved. Unfortunately, as courts and commentators have noted for more than a century, the doctrine does not comport with basic culpability principles underlying much of the rest of criminal law and generally operates in an arbitrary and overinclusive fashion.⁶⁶ The doctrine excludes all but the crudest sort of rationality analysis. The prosecution need show only the defendant acted voluntarily and with the mental state needed for the underlying felony. The killer need not have any culpable mental state toward the death of

nature of rationality analysis. The examples may illustrate that timing is not a universal proxy for rationality. As courts have frequently noted, a fully culpable decision may be reached quickly, although we generally presume a lack of deliberation from its haste. *See supra* text accompanying notes 59-63. In some instances we may decide that an impulsive killing demonstrates a conscious refusal to deliberate before causing harm that is as culpable as a well-considered harmful act.

⁶⁵ Tacitly many courts may do this in their premeditation analysis. *See, e.g.,* *People v. Waters*, 118 Mich. App. 176, 324 N.W.2d 564 (1982) (premeditation may be found in fatal shooting of woman by defendant at drive-in after victim's husband refused to give defendant's companion a light).

⁶⁶ *See* T. MACAULAY, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS, 110-13(1838); Fletcher, *Reflections on Felony-Murder*, 12 SW. U.L. REV. 413 (1981); Roth & Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985); Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974). *But see* Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL. 359 (1985).

the victim. Thus, although the doctrine includes killings with immoral motives, it also includes accidental killings. The absurdities of felony-murder doctrine argue strongly for the development of a unified approach to the categorization of the worst murder offenses.

C. *Alternative Approaches — Mythic Evil*

The allusive approach of the early common law suggests an alternative way of approaching murder definition, one attractive in its openness to motivation analysis. Unfortunately, the vagueness of terminology which characterizes this method means that it provides at best a starting point for reform efforts.

The general trend of modern American criminal law has been toward a close examination of the immediate criminal decision. Influenced by the Model Penal Code, which is based upon a hierarchy of four carefully defined mental states,⁶⁷ courts and legislatures have become more precise in their evaluation of offender intentionality. This analytic method contrasts with that of the classical common law which used allusive, mythic methods to define crimes. The common law used a mythic approach in that it relied upon a central narrative to encapsulate a concept rather than to define it by constituent elements.⁶⁸

The early common law distinguished a criminal deed from a noncriminal one by means of *mens rea*, literally, evil mind.⁶⁹ Murder was distinguished from manslaughter by the presence (or absence) of malice aforethought. Although these terms rapidly developed technical meanings in some instances far-removed from a lay understanding of the terms, their rhetoric remains meaningful as a clue to the moral assumptions underlying the law. The law's direct reference to evil belied a faith that man acts according to evil reasons as well as good and that these may be readily discerned. Coming out of a theological tradition in which the opposition of God and Satan was critical to man's situation in the world and to his salvation,⁷⁰ the law reflected a belief in the

⁶⁷ See MODEL PENAL CODE, *supra* note 22, § 2.02.

⁶⁸ See N. FRYE, *THE GREAT CODE: THE BIBLE AND LITERATURE* 33 (1982) (defining one sense of myth as a special, sacred story used to convey essential truths for a culture).

⁶⁹ See Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 983 (1932).

⁷⁰ For an overview of the Christian tradition of thought concerning Satan, see J. RUSSELL, *LUCIFER: THE DEVIL IN THE MIDDLE AGES* (1984) [hereafter J. RUSSELL, *LUCIFER*]; J. RUSSELL, *SATAN: THE EARLY CHRISTIAN*

existence and concreteness of evil motivations for human acts.

The traditional language of Anglo-American criminal law describes archetypal characters who personify each of the criminal categories. The secret killer and the later premeditated killer present similar images. They are cold-blooded assassins, dark schemers who act only after long and careful planning. The premeditated killer lies in secret ambush and kills by cowardly subterfuge, such as poison. He does not act on sudden impulse; his homicide is the culmination of a personal campaign of cruelty. He represents the most dangerous enemy of peaceful human society because his crime smacks of treachery; he is the mole in the moral community. By contrast, the provoked killer openly confronts his victim. He does the deed not with cool precision, but wildly, inflamed by passion — and not just any passion but with the anger of the righteous. If he does not have the right to kill, he surely has the right to anger.⁷¹

Again we see the complexity of our sense of heinousness. It depends not upon the manner of homicide, but upon what that manner reveals about the moral attitudes of the killer. We infer from the manner of the worst killer the darkest of human motives and the most deliberate rejection of moral principle. The provoked killer seems less culpable on both scores.

Mythic terminology survives in the modern law of homicide, but precariously. In their capital murder schemes many states refer to special wickedness in killing, often using or borrowing from the “especially heinous, atrocious and cruel” language of the Model Penal Code.⁷² Where such terms remain part of the legal fabric in America, modern courts view them with distrust, fearing their vagueness. Suggestive words and images may help us recognize classic instances of homicide categories but provide

TRADITION (1981) [hereafter J. RUSSELL, SATAN]; J. RUSSELL, THE DEVIL: PERCEPTIONS OF EVIL FROM ANTIQUITY TO PRIMITIVE CHRISTIANITY (1977) [hereafter J. RUSSELL, DEVIL].

⁷¹ See von HIRSCH & JAREBORG, *supra* note 46, at 249-50.

⁷² See, e.g., FLA. STAT. ANN. § 921.141(4)(h) (West 1985); see also MODEL PENAL CODE, *supra* note 22, § 210.6(3)(h). Continental murder schemes make similar references. The Swiss Code distinguishes killings which indicate that the offender is “particularly depraved” (*pervers*). ROYAL COMMISSION, *supra* note 39, at 181. In Sweden the worst murders are those where the offender showed “particular cunning, brutality or malice.” *Id.*; see also G. FLETCHER, *supra* note 42, § 4.5.3, at 328-29.

little guidance in resolving the hard cases.⁷³ Worst of all, they increase the risk of nonmoral decision-making.⁷⁴ Thus, to regulate decision-making in capital cases, courts have sought to make offense definitions more determinate.⁷⁵

What the mythic approach supplies that the analytic does not is a reference to motivation. The rich language of malevolence in traditional criminal law speaks to important differences in why the offender acted as he did. If we were to speak only in terms of "malice," for example, we would see a distinction between the killer-rapist and the mercy-killer which traditional mental state analysis ignores. Unfortunately, the mythic approach remains largely suggestive. The main work of articulating and defending motivational distinctions remains.

D. Capital Murder

A survey of contemporary approaches to categorizing murder would be incomplete without a look at the many capital sentencing schemes used in this country. Yet the discussion may be brief because these schemes largely employ methods already discussed and their shortcomings as "law" have been widely noted.⁷⁶

All states which have constitutionally valid death penalty schemes leave the difficult distinctions between capital and non-capital offenses to the sentencing phase of a case.⁷⁷ Most states give juries a laundry list of factors to consider which fall under

⁷³ See, e.g., *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

⁷⁴ See, e.g., *Mayard and Godfrey*, *supra* note 73; see also *Pillsbury*, *supra* note 7, at 687-89.

⁷⁵ See *Maynard*, 486 U.S. at 364-65. In recent decisions, the Court has displayed less interest in narrowing the definitions of these terms. *C.f.* *Walton v. Arizona*, 110 S. Ct. 3047, 3056-58 (1990) (approving state court's narrowing of statutory definition of heinousness); *Clemons v. Mississippi*, 110 S. Ct. 1441, 1448 (1990) (appellate court may review merits of death sentence rendered by jury given improper instruction on "especially heinous, atrocious and cruel" aggravating factor).

⁷⁶ See *Burt*, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); *Gillers*, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037 (1985); *Weisberg*, *Deregulating Death*, 1983 SUP. CT. REV. 305; *Pillsbury*, *supra* note 7, at 666-70.

⁷⁷ This is because the United States Supreme Court has struck down all mandatory death penalty schemes where the fact-finder would, by determining liability, also determine penalty. See, e.g., *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); see

three main headings: harm, motive-intentionality, and responsibility. Harm factors include the number of victims, identity of victims, prior criminal record, predictions of dangerousness, extent of risk created by the offender, and the extent of victim suffering.⁷⁸ Motive-intentionality factors include pecuniary gain, sexual motivation, racial motivation, enjoyment of the victim's suffering, and the extent of victim precipitation.⁷⁹ Responsibility factors include age, mental and emotional disturbance, duress, and moral confusion.⁸⁰

While these sentencing schemes identify considerations relevant to any murder hierarchy, they all fail in one critical respect: the schemes do not give decisionmakers any guidance in evaluating competing factors. The schemes supply no overarching principle or weighing method by which conflicts between relevant factors can be resolved. Thus the categorization decision remains essentially discretionary; it is a "legal" one, that is, bound by rules capable of rigorous review in name only.⁸¹

E. *The Move to Motivation Analysis*

The central shortcoming of traditional approaches to murder categorization is their failure to include motive in offense definition. In order to discern which murderers represent the most serious threat to moral regard we need to know not only whether they desired the victim's death, not only if they utilized their highest rational capacities, but also why they sought this result. Motive analysis provides an important element in assessing the level of disregard in murder.

Although the standard view of criminal law holds that motive is legally irrelevant,⁸² motivation analysis fits easily within orthodox

also *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986).

⁷⁸ CAL. PENAL CODE § 190.2(a)(3),(4),(6)-(13),(17)-(18) (Deering Supp. 1990); MODEL PENAL CODE, *supra* note 22, § 210.6(3) (a)-(f).

⁷⁹ See, e.g., CAL. PEN. CODE § 190.2(a)(1),(14)-(19) (Deering Supp. 1990); MODEL PENAL CODE, *supra* note 22, § 210.6(3)(e)-(h).

⁸⁰ CAL. PENAL CODE § 190.3(d)-(j) (Deering 1985), MODEL PENAL CODE, *supra* note 22, § 210.6(4).

⁸¹ See sources cited *supra* note 76.

⁸² See, e.g., G. FLETCHER, *supra* note 42, § 6.5.5, at 452-63; J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 88-93 (2d ed. 1960) (distinguishing motive from *mens rea*); G. WILLIAMS, CRIMINAL LAW § 19 (1953). All of these authors recognize, however, that the traditional distinction between motive and intent is definitional. Determining motivation is widely recognized as

Anglo-American criminal law. At most it takes a well-recognized mental state inquiry one step farther. We may see criminal culpability as depending largely on answers to two "why" questions. The first involves mental state — the intentionality of the offender in committing the offense. Why did the defendant pull the trigger, strike the blow? Did she desire the victim's death or did she have some lesser mental state toward the result? This question is carefully limited in chronologic and moral scope but provides essential information about the wrongdoer's attitude toward others.⁸³ The second "why" question takes the inquiry a step further. If she wanted to kill, why did she want to kill? This is the question of motive. Many important doctrines depend upon motivation analysis. Self-defense, for example, involves justification by righteous motive. If the would-be offender desired the death of the victim only because she reasonably believed the victim was trying to kill her, then her reason for desiring another's death absolves her of liability.⁸⁴ The doctrine of insanity holds that if the reason the offender desired the victim's death is crazy, then we may determine the killer lacked the rationality necessary for basic responsibility.⁸⁵ Provocation,⁸⁶ duress, and necessity⁸⁷ are a few of the other doctrines which involve motivation

an important aspect of police work and sentencing. See H. GROSS, A THEORY OF CRIMINAL JUSTICE 103-04 (1979).

The classical position against the kind of culpability analysis suggested here was presented by Oliver Wendell Holmes, who rejected moral fault in favor of dangerousness as the key to culpability. See O. HOLMES, THE COMMON LAW 39-76 (1881); see also *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N.E. 770, 770 (1897) (stating "the aim of the law is not to punish sins but to prevent certain external results"). Holmes acknowledged the influence on criminal law of what he called vengeance, but viewed this as the result of an emotional urge; he did not view it as a proper basis for legal distinction. Holmes, *supra*, at 39-76; see also Hitchler, *supra* note 28.

When courts speak of the irrelevance of motive they usually refer to the irrelevance of good motive as an excuse. See, e.g., *United States v. Cullen*, 454 F.2d 386, 390-92 (7th Cir. 1971); *Regina v. Hicklin*, 3 L.R. - Q.B. 19 (1868).

⁸³ See generally H.L.A. HART, *supra* note 19.

⁸⁴ J. DRESSLER, UNDERSTANDING CRIMINAL LAW 191-92 (1987); W. LAFAVE & A. SCOTT, CRIMINAL LAW 454-59 (2d ed. 1986).

⁸⁵ See G. MOORE, *supra* note 21, at 197. See generally Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3 (1989) (arguing that motive is crucial to the rationality inquiry).

⁸⁶ See sources cited *supra* note 46.

⁸⁷ J. DRESSLER *supra* note 84, at 259-74; W. LAFAVE & A. SCOTT, *supra* note 84, at 432-50.

analysis.⁸⁸

Motivation distinctions also play an important role at time of sentencing.⁸⁹ At least at time of sentencing it matters if the premeditated killing was motivated by a desire to collect on an insurance policy or to protect siblings from a father's abuse. In many instances this analysis remains discretionary, however. Except in certain determinate and capital sentencing schemes, it is not subject to appellate review. The law presumes that the sentencer will intuitively recognize the critical motivation distinctions without legal assistance.⁹⁰ Only a few commentators have suggested that motivation analysis should provide the basis for legal distinctions between murder offenses.⁹¹

There appear to be at least two basic reasons for the reluctance to formalize motivation analysis. The first is pragmatic — a concern that motivation distinctions cannot be rigorously categorized in legal rules.⁹² The second is substantive — a distrust of motiva-

⁸⁸ A number of offenses usually termed "special intent" crimes also require an answer to a second why question and thus a kind of motive analysis. Burglary, for example, requires a knowing and unlawful entry into a structure with the further purpose of committing a crime therein. See Husak, *supra* note 85, at 6.

⁸⁹ See J. HALL, *supra* note 82, at 100-02.

⁹⁰ See, e.g., MODEL PENAL CODE, *supra* note 22, §§ 210.6, art. 6-7; ROYAL COMMISSION, *supra* note 39, at 173-77; McGautha v. California, 402 U.S. 183 (1971), *vacated*, 408 U.S. 941 (1972); see also note 64 *supra*.

⁹¹ See R. GAROFALO, CRIMINOLOGY 373-82 (R. Miller trans. 1914) (arguing for distinction between purely egoistic murders and those of misconceived honor or passion); G. TARDE, *supra* note 40, at 464-65 (arguing that only economically motivated murders should be first degree); see also F. JESSE, MURDER AND ITS MOTIVES 14-67 (1954); Husak, *supra* note 85, at 7-8. Several European murder schemes, most prominently the German, utilize motivation analysis. In German law aggravated homicide is based upon a killing for pleasure (*Mordlust*), for pecuniary reasons (*Habgier*) or for sexual satisfaction. G. FLETCHER, *supra* note 42, § 4.5.3, at 326-27; Bundesgesetzblatt [BGB1] I S.1 § 211(2) (W. Ger.) translated in THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY 176 (J. Darby trans. 1987). The statute provides that a murderer is "anyone who kills a human being . . . from a lust to kill, to satisfy his sex drive, from covetousness or other base motives; treacherously or cruelly or by means endangering the community or for the purpose of making possible or concealing the commission of another crime." *Id.*

⁹² See, e.g., 3 J. STEPHEN, *supra* note 54, at 84. Stephen states: "The motive prompting the act ought not, I think, to be embodied in the definition, because the attempt to do so must infallibly lead to inextricable confusion, and probably to legal fictions like those from which our own law has not yet worked itself clear . . ." *Id.* In the same sentence, however,

tion inquiry because of the hard questions it raises concerning responsibility and the nature of human evil. These latter concerns are the most basic, and so must be addressed first.

III. UNDERSTANDING EVIL

So far I have sought to establish the importance of rationality and motivation analysis in understanding murder. We now must determine what that analysis involves. Using the regard principle as our guide, how should we identify and rank the seemingly infinite variety of inspirations and decisions to kill? In answering this question I move away from the traditional terms of moral discourse. Instead of speaking of right and wrong, regard and disregard, I wish to speak of good and evil. As we will see, the choice of terms does not dictate content, but will influence understanding. An insistence upon evil will dramatize and illuminate punishment's moral function in a democratic society.

Initially I provide a definition of evil for criminal law purposes. Then I look to three symbols of evil in our culture to draw an outline of shared ideas about good and evil. These symbols provide the framework for an analysis of rationality and motivation in murder. Finally I consider some of the basic objections to a legal structure based on evil as defined here.

A. Definition

Evil is a word with many potential meanings. It can refer to suffering caused by natural forces or by man. It commonly has religious significance: in Christianity evil is associated with sin.⁹³ For purposes of our criminal law, however, evil must have a more limited meaning, one referring to moral concepts on which even a pluralist society can agree. My particular conception of evil refers only to man's "inhumanity" to man. It does not implicate the relationship of an individual to herself or to any supernatural being.

Good and evil as used here take their meaning from moral regard. Good, for our purposes, means action taken with regard

Stephen recognized that motive "must always affect the moral guilt of the offence itself." *Id.* He recommended that these distinctions be left to the discretion of the sentencer. *Id.* at 85.

⁹³ See, e.g., P. GLENN, *A TOUR OF THE SUMMA* 42 (1978) (commenting on Aquinas, *SUMMA THEOLOGICA* Question 48, (3)(4)); see also ST. AUGUSTINE, *THE CITY OF GOD* bks. XI-XII (M. Dods trans. 1950).

for self and others; evil is action taken in disregard of others.⁹⁴ Evil involves cruelty, the infliction of suffering upon another for nonmoral or immoral reasons. The evil-doer may be sadistic and take pleasure from the infliction of pain or may remain essentially indifferent to it, willing to inflict pain in order to attain a variety of nonmoral or immoral ends.

Given this limited definition and our particular concern with criminal punishment, many of the traditional philosophic problems of evil need not concern us. We need not decide, for example, whether persons who act for evil reasons act in their own best interests.⁹⁵ The essential point, elaborated below, is that some people find satisfaction and significance in it. They find more fulfillment in harming others than they do in any other activities. From their perspective, doing harm to others makes sense.⁹⁶ Nor do we need to decide whether evil is an independent force in the universe or simply a negation of good.⁹⁷ For purposes of this Article we need only recognize the attractions of those kinds of wrongdoing which we call evil.

B. *The Move to Evil*

But why should we call this evil? The word has religious connotations which pose difficulties in a pluralist, secular society and contemporary legal and moral scholars seem generally content

⁹⁴ Again, I am not concerned here with moral duties to self.

⁹⁵ See, e.g., PLATO, THE LAWS 731; PLATO, PROTAGORAS 352a-358d; A. ROSENTHAL, A GOOD LOOK AT EVIL 3 (1987) (defining evil as that aspect of action that "intentionally obscures, disrupts, or deflects the ideal thread of plot in human lives"); see also Kekes, *Understanding Evil*, 25 AM. PHIL. Q. 13 (1988) (critiquing traditional views of human evil).

⁹⁶ In other words, even if we believe that an individual does ultimate harm to him or herself by doing evil, that individual may have rational reasons for doing it. Evil describes a mode of action that can provide pleasure and pleasure is a powerful, rational motivation to action. See D. McNAUGHTON, MORAL VISION 140-44 (1988).

⁹⁷ Many early religions posit the dualist view of a universe divided between warring, independent forces of good and evil. See P. CARUS, THE HISTORY OF THE DEVIL AND THE IDEA OF EVIL (1974). St. Augustine presented the classical Christian view, consistent with most modern ethical accounts, that evil has no separate essence from good but simply represents a turning away from good. ST. AUGUSTINE, *supra* note 93, at bk. XII; see generally G. EVANS, AUGUSTINE ON EVIL (1982). Here we need only acknowledge that some persons consciously and rationally choose to harm others for nonmoral or immoral reasons.

with less charged ethical terms such as regard or respect.⁹⁸ The significance of the move to evil lies in the word's allusive power, its connotations of central moral concepts which we experience in many different ways in everyday life. Reference to good and evil opens up criminal law to popular moral thought and so provides a firmer political base for punishment.

Most theoretical discussions of punishment neglect its political aspect. By politics here I refer not to the struggle for power between classes or other groups, but the need to maintain a broad consensus in support of penal practices. Punishment must remain an exceptional event. In a democratic system no aspect of criminal law will be effective which requires punishment of a majority, or even a significant minority, of the population. Law obedience, at least as we understand it in a democratic society, depends upon a general moral consensus which is reinforced through punishing those exceptional individuals who choose to offend. Punishment provides the concrete means for a community's declaration of justice in community life. Thus, even though we choose our moral principles without regard to popularity, the political aspect of punishment in a democratic society requires a means of expression that is accessible to popular understanding. Law divorced from popular understanding is law divorced from reality.⁹⁹

Yet the move away from academic to popular terminology is not simply a matter of accessibility, it has moral content as well. The virtue of academic moral discourse is intellectual rigor, but its vice is narrowness, a separation from the richness of moral experience. A careful move to expand the bounds of the academic debate, therefore, can bring substantial rewards in the

⁹⁸ The move away from discussions of evil in criminal law is relatively recent. Nineteenth century texts commonly spoke of evil in terms of mental state analysis. *See, e.g.*, J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 372 (3d ed. 1865) ("no man deems, in his heart, another man guilty, or deserving of punishment, unless the other has intended evil"). *But c.f.* O. HOLMES, *supra* note 82, at 72-76 (stating that "actual wickedness" of a party is wholly unnecessary). Even in the early part of this century the term was widely used in academic discussions. *See generally* Sayre, *supra* note 69. Even those modern theorists who urge a return to retributive analysis, however, do not use this terminology. *See* sources cited *supra* note 21.

⁹⁹ By which I do not mean that popular understanding determines law (although it can) or that law should depend upon popular opinion (although it may). Rather, law must speak in terms that are meaningful to a broad range of the people it serves and governs.

form of new insights. For example, the terms right and wrong suggest a dispassionate and intellectualized view of morality. If we speak in terms of good and evil we reveal the emotional depth of moral questions both in terms of the actor and the observer. Similarly, good and evil more strongly suggest the motivations to act morally or immorally. To declare an action good implies a reason to do it.¹⁰⁰ And the same holds true for evil. Evil has its own thrill, its own seductive attraction.¹⁰¹ Finally, good and evil connote importance in human terms. A good action is one that gives meaning, in the most positive sense, to the actor's life; an evil action is likewise significant. It indicates a willingness to find individual meaning, to find at least part of the soul's satisfaction, in hurting others.

C. *Symbols of Evil*

The words good and evil may not trip lightly off the tongues of most legal academics, but they are central to contemporary moral culture. Figures who personify evil take leading roles in contemporary religion, literature, and film. They star in the daily crime dramas reported in newspapers and on television. In all of these contexts there is little doubt that we consider the figures portrayed evil; in fact their evil explains the fascination which they hold for us. Three figures may serve to represent our shared view of evil: from Christian theology the person of Satan, from popular culture the vampire, and from the annals of modern crime, the serial killer Ted Bundy. If we can understand why we consider these figures evil, we will learn much about our own, often unarticulated view of it.

All three share certain basic characteristics. All represent rational, clear-thinking individuals who choose a particular course of action with full awareness of its moral consequences. All find self-fulfillment in the destruction of innocents, persons with whom they have no particular quarrel.¹⁰² All demonstrate a fun-

¹⁰⁰ Thus Jeremy Bentham described good will as one of the basic motivations of human action. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPALS OF MORALS AND LEGISLATION 112-114 (1948).

¹⁰¹ See *id.* at 114-15. Evil's attraction includes the lure of power and the excitement of wrongdoing, that is, the thrill of breaking all the rules.

¹⁰² In other words, the evil-doer has no grievance against the victim based on any deed by the victim; the evil-doer selects the victim based on type. The killing may represent a symbolic resolution of a larger dispute, such as that between God and Satan or man and woman, but for purposes of

damental disregard for others.

Satan represents the central figure of evil in Judeo-Christian theology and Western culture and so serves as a traditional focus for discussions of evil. As classically portrayed in John Milton's *Paradise Lost*, Satan was an angel of exceptional qualities, even among the heavenly host.¹⁰³ He fell from grace, from heaven to hell, as the result of his rebellion against God. God,

Had cast him out from Heav'n, with all his Host
Of Rebel Angels, by whose aid aspiring
To set himself in Glory above his Peers,
He trusted to have equal'd the most High. . . .¹⁰⁴

Satan was willing to sacrifice for power. "Better to reign in Hell, then serve in Heav'n,"¹⁰⁵ he declared. In hell Satan rededicated himself to the struggle with God. He saw the choice clearly:

So farwel Hope, and with Hope farwel Fear,
Farwel Remorse: all Good to me is lost;
Evil, be thou my Good: by thee at least
Divided Empire with Heav'ns King I hold. . . .¹⁰⁶

Satan more than acknowledged his own immorality; he embraced it. Immorality provided him a meaningful means to a meaningful end — the attainment of power. Satan's chosen victim was mortal man. He flew out of hell to corrupt God's creatures not because they had done anything to offend him, but because they represented an opportunity to battle God.¹⁰⁷ From the secular perspective (and we must work from the secular to use Satan in criminal analysis), we can see Satan as a rebel against morality. He has deliberately rejected basic moral obligations in order to pursue personal ambition.

The vampire, as classically depicted in Bram Stoker's

moral analysis this is quite different than a personal dispute between parties based upon mutual interaction.

¹⁰³ This romantic portrayal has been criticized and may make Milton's Satan less exemplary than other Christian visions of the devil. For example, Dante's version of Satan is far less attractive and, for that reason, may be more consistent with the theological view of the Evil One. See DANTE ALIGHIERI, *THE INFERNO* (A. Mandelbaum trans. 1980); J. RUSSELL, *LUCIFER*, *supra* note 70, at 217-25. Nevertheless, Milton's verse dramatically illustrates the essential qualities of devilry in Satan.

¹⁰⁴ MILTON, *PARADISE LOST* bk. I, lines 37-40.

¹⁰⁵ *Id.* at line 262.

¹⁰⁶ *Id.*, bk. IV, lines 98-101.

¹⁰⁷ See *id.*, bks. II, III.

Dracula,¹⁰⁸ is a creature once human, now supernatural, a combination of bat and man that can live forever.¹⁰⁹ The vampire requires blood to survive, particularly human blood. He sleeps during the day and arises at night to prey upon mere mortals. As with Satan, the vampire's choice to prey upon humans is a rational one, although there is nothing "personal" in the decision. Victims are not usually chosen for moral reasons but because they provide life's sustenance.¹¹⁰ Yet the attack upon humans goes beyond mere supernatural survival. The vampire experiences a sensual thrill at the taking of life. The modern master of the vampire genre, Anne Rice, describes the vampire's urge to kill this way through one of her protagonists:

[I]t was never merely the need for blood anyway, though the blood is all things sensual that a creature could desire; it's the intimacy of that moment — drinking, killing — the great heart-to-heart dance that takes place as the victim weakens and I feel myself expanding, swallowing the death which, for a split second, blazes as large as the life.¹¹¹

For the vampire, killing is a means to a *meaningful* existence.¹¹²

In today's secular and technologic age, figures such as Satan and the vampire may be dismissed as fiction despite the power of their stories. Yet we need not look far in our contemporary situation for our own contributions to evil. Consider the serial killer, as personified by Ted Bundy. A handsome, intelligent young man, Bundy spent his adulthood as a rapist and multiple killer. He kidnapped, sexually assaulted, and then murdered a number of young women in college towns across the country. At the time of his last arrest he told police, "I'm the most cold-blooded son of

¹⁰⁸ B. STOKER, *DRACULA* (1897).

¹⁰⁹ See R. CAVENDISH, *THE POWERS OF EVIL* 55-59 (1975).

¹¹⁰ As a creature who must kill to survive, the vampire seems to have a moral motivation for homicide. Yet the vampire is a human creation, and from the human perspective we cannot morally credit a motive which requires the never-ending destruction of innocent humans. The only way to justify the vampire's conduct is by means of a theory of species' self-defense which goes beyond the bounds of this Article. From the human perspective, a rational creature devoted to human destruction is evil.

¹¹¹ A. RICE, *THE QUEEN OF THE DAMNED* I (1988).

¹¹² For echoes in reality, note the comments of French killer Gilles de Rais who said he killed " 'solely for the pleasure and delectation of lust; in fact I found incomparable pleasure in it'" J. MACDONALD, *THE MURDERER AND HIS VICTIM* 180-81 (1961). Charles Starkweather said: "Shooting people was a kind of thrill, it brought out somethin'." *Id.* at 191 (quoting J. REINHARDT, *THE MURDEROUS TRAIL OF CHARLES STARKWEATHER*).

a bitch that you'll ever meet."¹¹³ He was eventually convicted of several murders, including the rape and murder of a 12-year-old girl, and executed.¹¹⁴

In jailhouse conversations with several journalists Bundy revealed in hypothetical fashion¹¹⁵ the inner life of a serial killer. He described an individual drawn to sexual violence, who experienced remorse after each criminal episode, but who quickly rationalized it.¹¹⁶ He understood the moral situation. "[H]e'd (the killer) know — we *all* know — not only is the act of murder — of the kind we're talking about — senseless, inhumane, and cruel, it's *also* illegal!"¹¹⁷ Yet Bundy worked against remorse, he rejected guilt.

I don't think I need to feel guilty anymore, because I try to do what's right, right *now*!

I feel sorry for people who feel guilt. . . . I feel sorry for people who are drug addicts or who are *criminals*. . . . I feel sorry for a lot of people who have to do things that hurt them.

But I don't feel sorry for anyone who doesn't feel guilty because the guilt doesn't solve anything, really. It hurts you. You don't need guilt to do the right thing.¹¹⁸

He told himself after his crimes that his own survival was more important than remorse. About his victims he rationalized:

¹¹³ S. MICHAUD & H. AYNESWORTH, *TED BUNDY: CONVERSATIONS WITH A KILLER 3* (1989) [hereafter MICHAUD & AYNESWORTH, *CONVERSATIONS*].

¹¹⁴ *See id.*; E. KENDALL, *THE PHANTOM PRINCE—MY LIFE WITH TED BUNDY* (1981); R. LARSEN, *BUNDY: THE DELIBERATE STRANGER* (1980); S. MICHAUD & H. AYNESWORTH, *THE ONLY LIVING WITNESS* (1983) [hereafter MICHAUD & AYNESWORTH, *WITNESS*]; A. RULE, *THE STRANGER BESIDE ME* (1980); S. WINN & D. MERRILL, *TED BUNDY: THE KILLER NEXT DOOR* (1980).

¹¹⁵ For most of his time in captivity Bundy was unwilling to admit guilt, so journalists Michaud and Aynesworth hit upon the technique of a hypothetical questioning method — where Bundy would give his insights into how a serial killer would think or operate — without ever explaining how he would know. MICHAUD & AYNESWORTH, *WITNESS*, *supra* note 114. MICHAUD & AYNESWORTH, *CONVERSATIONS*, *supra* note 113, provides the basic text of these interviews.

¹¹⁶ After an initial attack on a woman Bundy said of the hypothetical killer: "What he had done terrified him. . . . And he was full of remorse and remonstrating with himself about the suicidal, uh, nature of the activity . . . the ugliness of it all." MICHAUD & AYNESWORTH, *CONVERSATIONS*, *supra* note 113, at 74. Later he said "the individual . . . began to condition mentally, condition out guilt; using a variety of mechanisms. Saying it was justifiable, it was, uh, acceptable, it was necessary, and on and on." *Id.* at 79.

¹¹⁷ *Id.* at 172.

¹¹⁸ *Id.* at 288.

“Well, there’s so many people, they won’t be missed.”¹¹⁹

Bundy’s crimes were carefully planned, his victims selected according to personal criteria of attractiveness and vulnerability.¹²⁰ They provided him a means of avenging himself for a sense of personal failure.¹²¹ His criminal enterprise was a kind of hunt in which he experienced “a high degree of anticipation, of excitement, of arousal. It was an *adventuristic* kind of thing.”¹²² Also a thief, Bundy found basic satisfaction in stealing and illicit possession.¹²³ In his attacks on women he sought human possession. First, he took his victims’ sexuality, then he took their lives.¹²⁴ He found pleasure in a personal triumph over death. “I want to master life and death,” he said.¹²⁵

Like Satan and the vampire, Bundy saw the moral issues clearly. He understood the suffering he caused and its wrongness in the eyes of mankind. He killed because murder provided self-fulfillment. Bundy acted in order to achieve what Ernest Becker has called “significant immortality.”¹²⁶ Like most serial killers he was a failure in most aspects of his life, but he found significance in killing. He triumphed over other mortals; he became, for a few moments, God.¹²⁷

D. Evil in Murder

The essential qualities of evil revealed in figures such as Satan, the vampire, and Ted Bundy permit new insights into the ration-

¹¹⁹ *Id.* at 188.

¹²⁰ Bundy described the victims of serial killers as representative of a class of women “that has almost been created through the mythology of women and how they are used as objects.” *Id.* at 80. See D. CAMERON & E. FRAZIER, *LUST TO KILL* 164-77 (1987); J. CAPUTI, *THE AGE OF SEX CRIME* 173-88 (1987).

¹²¹ See E. LEYTON, *COMPULSIVE KILLERS: THE STORY OF MODERN MULTIPLE MURDER* 107-11 (1986).

¹²² *Id.* at 95 (emphasis added).

¹²³ See MICHAUD & AYNESWORTH, *CONVERSATIONS*, *supra* note 113. See also E. LEYTON, *supra* note 121, at 31, 110.

¹²⁴ Bundy observed, “perhaps it came to be seen that the *ultimate* possession was, in fact, the taking of the life.” MICHAUD & AYNESWORTH, *CONVERSATIONS*, *supra* note 113, at 123.

¹²⁵ E. KENDALL, *supra* note 114; E. LEYTON, *supra* note 121, at 108.

¹²⁶ E. BECKER, *ESCAPE FROM EVIL* 24-26(1975).

¹²⁷ See W. BROMBERG, *THE MOLD OF MURDER* 50-56 (1961) (terming this the “despoiler reaction”); D. CAMERON & E. FRAZER, *supra* note 120, at 60 (describing murderers’ escape from themselves into some “Other”); P. LINDSAY, *THE MAINSPRING OF MURDER* 33-49 (1958).

ality and motivation distinctions so far developed. The well-considered killing of another for the nonmoral or immoral satisfaction of the killer represents the essence of cruelty and of evil. Whether such a killer takes pleasure in the victim's suffering or remains indifferent to it, he definitively rejects the norm that we must care for all individuals. The attacker may have reasons for believing his act justified, but these are incapable of the universalization necessary to constitute moral principle. The worst killers thus act according to their own self-defined "will to power," as Nietzsche described it.¹²⁸ Their need to make a difference, to exert power upon the human world, tempts them to kill.¹²⁹ The innocence of the victims of such killers shows the extent of the killers' selfish, nonmoral motivation.

A person who kills for fun obviously falls into this moral category. So does the contract killer and others who murder for pecuniary gain. They consciously seek another's destruction in order to promote their own nonmoral self-interest. The rapist or robber who kills in order to eliminate a witness demonstrates the same attitude toward the regard principle.¹³⁰ Here the killer's self-interest is thoroughly immoral. The killer uses murder to obtain immunity from criminal responsibility. We view in the same light a killer who acts according to an immoral principle. The individual motivated by bigotry who attacks members of certain racial groups demonstrates profound disregard. In all of

¹²⁸ F. NIETZSCHE, *BEYOND GOOD AND EVIL* 21 (trans. W. Kaufmann 1966); see also E. BECKER, *supra* note 126, at 37 (describing man's need to be a "cosmic hero"); J. CAPUTI, *supra* note 120, at 10 (surveying the desire for power as exhibited by several murderers).

¹²⁹ See W. BROMBERG, *supra* note 127, at 8-9 (noting the creative satisfactions of murder); D. CAMERON & E. FRAZER, *supra* note 120, at 64.

¹³⁰ We should note here that many such killings may be understood better as murder for the satisfaction of killing. A widely quoted passage of verse by Nietzsche makes this point:

Thus speaks the red judge, "Why did this criminal murder? He wanted to rob." But I say unto you: his soul wanted blood, not robbery; he thirsted after the bliss of the knife. His poor reason, however, did not comprehend this madness and persuaded him: "What matters blood?" it asked; "don't you want at least to commit a robbery with it?" . . . And he listened to his poor reason: its speech lay upon him like lead; so he robbed when he murdered. He did not want to be ashamed of his madness.

F. NIETZSCHE, *Thus Spoke Zarathustra: First Part*, in *THE PORTABLE NIETZSCHE* 150-51 (W. Kaufmann ed. 1968). See also J. KATZ, *supra* note 34, at 274-309.

these instances the killers have consciously rejected their obligation to others in favor of nonmoral or immoral satisfactions.

In terms of moral regard, such killers represent the ultimate threat. In the most calculated and most radical fashion they have rejected the basic norm of the human community. Such a person, whom I will refer to as an aggravated murderer, is Aristotle's bad man — the individual who chooses immorality as his law.¹³¹ He acts on the presupposition that human existence has no moral dimension, that life is simply the war of all against all.¹³² The reservation of our most severe punishment for aggravated murderers, therefore, is both a concrete and symbolic defense of moral regard. It is our way of stating, in the most costly (to society and the offender) and forthright fashion, that human beings have inherent worth and that the principle of caring for that worth is meaningful and important. The punishment of aggravated murderers represents an opportunity to reinforce the community's commitment to moral regard.

The majority of purposive murders present a different profile of inspiration and deed. Most who murder do so in an essentially spontaneous response to a dispute with the victim. The murderer kills the victim in retaliation for a perceived injury inflicted by the victim. The average murderer acts while impassioned; the state of heightened anger (sometimes fear) is necessary to overcome the principle of regard for others.¹³³ Because we presume from these circumstances that the killer did not employ his rational capacities to their fullest¹³⁴ and had some glimmer of morality in his motivation, his crime does not represent as powerful a statement about morality (or immorality) as does the aggravated mur-

¹³¹ NICHOMACHEAN ETHICS, *supra* note 24; *see also* Kekes, *supra* note 95, at 20-21.

¹³² This helps explain the fear and anger which such killers generate. Figures such as Ted Bundy terrify us because we have no moral hold on them. They will do whatever they wish — until someone forcibly stops them. We fear them in part because they are unpredictable. They do not kill in response to serious insults or long-standing antagonisms; they kill by virtue of personal whim. To the extent our anger at such killers may be separated from our fear, it may have a moral dimension. Such persons enrage us because they do more than threaten our physical safety. They seek to destroy meaning in community life. They personify the total breakdown of community and foreshadow a world of chaos.

¹³³ *See generally* J. KATZ, *supra* note 34; M. WOLFGANG, *supra* note 31.

¹³⁴ This presumption is usually based on observations of timing and emotional state.

derer's. We presume that the hasty, raging killer makes a less whole-hearted commitment to evil.¹³⁵

As the legal system has implicitly recognized, motive distinctions are not easily categorized. They depend upon factual context and are intertwined with rationality considerations. Motive analysis requires us to ask a hard question: to what extent did the killer have a good (i.e. moral) reason for hostility to the victim? Usually this means asking how much we think the killer acted out of nonmoral self-interest, and how much from self-regard. We judge whether the individual has made a basic moral mistake and assessed blame where there should be none. The gambler may accuse another of cheating when it is clear his luck has simply gone bad. We may decide that the reason for anger is not only mistaken in context, but represents a basic immorality. The racially-motivated killer who takes his bigotry to a homicidal extreme may feel morally justified in action, but assuming a responsible actor, we should judge this motive harshly. We also look to questions of degree. The man who kills another in a dispute over a minor traffic accident may have cause for anger, but not for the sort of rage we normally would expect to inspire violence. The less we can morally credit the motivation, the more we condemn the homicide.

As should be apparent, the distinction between aggravated and ordinary murder is inevitably one of degree. For all their differences, aggravated and ordinary murders share many similarities. All murders involve a conscious decision to place self over others by means of ultimate violence; all involve nonmoral satisfactions for the killer. We should view all killings as ranging along a moral continuum, from the most aggravated, which involve the purest expression of disregard, to ordinary murders, which involve some degree of norm-rejection, but of a more moral and less-considered variety, to voluntary manslaughter where the degree of rational consideration is least and degree of regard motivation is greatest. At the end of the continuum are justified homicides

¹³⁵ This presumption may not always be justified. We may decide that certain persons have such a settled disposition to anger — that they become enraged so often and with so little cause — that their failure to control their rage in the particular instance makes them as culpable as if they acted without emotion. I am grateful to Peter Arenella for pointing this out to me. I suspect that we generally avoid making such distinctions in criminal law because of the practical difficulties of making culpability distinctions dependent upon life history rather than the circumstances of the offense.

where self-regard and the exigencies of the situation provide a full justification or excuse.

E. Objections to Evil and Motivation Analysis

Before moving to the final step of providing a new definition of murder based on evil, we must confront several theoretical objections to this approach. Most importantly, we must at least begin the effort to understand the modern reluctance to speak of legal and moral issues in terms of evil.

1. Evil and Human Worth

One source of modern discomfort with evil stems from a confusion between declaring a person evil and declaring his deeds and motivations evil. Much modern religious and ethical thought holds that all persons are worthy, that by virtue of their status as rational creatures, they must be respected.¹³⁶ Thus, most modern ethicists and moral thinkers have rejected earlier moral accounts which not only permitted but encouraged the condemnation of certain human beings.

Judging actions and motivations to action as evil does not, however, violate the principle that all persons have worth. As persons capable of good and bad, some people do, and wish to do, the horrific. In an ultimate sense, that does not make them unworthy; a life is more than a single deed or set of deeds. Yet neither does their ultimate worthiness change the evil nature of their motivation to cause others suffering.¹³⁷ Similarly, we need to recall the

¹³⁶ See R. DOWNIE & E. TELFER, *supra* note 6; J. FLETCHER, *SITUATION ETHICS* (1966); R. NIEBUHR, *LOVE AND JUSTICE* (D. Robertson ed. 1957); G. OUTKA, *AGAPE* (1972); MacLagan, *supra* note 6.

¹³⁷ St. Augustine declared that the moral person "ought to cherish toward evil men a perfect hatred, so that he shall neither hate the man because of his vice, nor love the vice because of the man, but hate the vice and love the man." ST. AUGUSTINE, *THE CITY OF GOD*, *supra* note 93, at bk. XIV, pt. 6.

Related difficulties arise from the so-called problem of evil, a problem in both theology and philosophy. The theological problem is how to explain the presence and power of evil in a world governed by an all-powerful, benevolent God. This paradox need not detain us long here. A meaningful hierarchy of murder offenses does not require proving (or disproving) the existence of an all-powerful and benevolent God. In our secular state we need a secular morality to support the offense hierarchy. Theodicy may provide some insights; it is not required. The philosophical problem of evil involves the metaphysical nature of good and evil. See M. MIDGLEY,

difference between the moral judgments necessary for criminal law and those of ultimate moral worth.¹³⁸

2. Responsibility for Character

The traditional argument against motivation analysis in criminal law is that motive is irrelevant to culpability.¹³⁹ After examining murder doctrine in detail, this objection no longer seems to have much substance.¹⁴⁰ But behind the irrelevance claim lies a subtler and more significant philosophical objection. Motive analysis seems to raise uncomfortable questions about basic principles of individual responsibility which undergird criminal law.

In general, motivation analysis seems soft and unscientific. Especially when put in terms of evil it suggests a return to religious and superstitious views of human nature which modern society has rejected.¹⁴¹ Worst of all, motive analysis threatens to

WICKEDNESS: A PHILOSOPHICAL ESSAY 12-20 (1984). As discussed at the beginning of this part, for criminal law purposes we need only recognize the reality of bad motivation to understand evil in murder.

¹³⁸ I should also acknowledge an objection to evil that comes from the opposite direction — that human worth is purely individual, and individually defined; it has nothing to do with cooperative coexistence. Under this view what has been proposed as evil might be considered the liberation of man. Nietzsche argued along these lines — that the greatest human achievement was to break free from traditional morality. See, e.g., F. NIETZSCHE, *BEYOND GOOD AND EVIL*, *supra* note 128. Modern writers working in the existentialist tradition have offered similar arguments. See, e.g., N. Mailer, *Introduction* to J. ABBOTT, *IN THE BELLY OF THE BEAST* (1981); N. MAILER, *The White Negro*, in *ADVERTISEMENTS FOR MYSELF* 337-58 (1959). See D. CAMERON & E. FRAZER, *supra* note 119, at 59-66. Such authors reject the central premise of this Article, the primacy of moral regard, and so tempt us beyond its bounds. We should recognize that such an extreme celebration of individual freedom fundamentally contradicts the idea of criminal law as we know it.

¹³⁹ See *supra* note 82.

¹⁴⁰ See Sections I and II *supra*.

¹⁴¹ Anthropologists and historians report that evil plays a more prominent role in primitive cultures than it does in the industrialized world. The forces of nature, dangerous and uncontrollable, give rise to visions of the supernatural. See K. THOMAS, *RELIGION AND THE DECLINE OF MAGIC* 641-68 (1971); Macfarlane, *The Root of All Evil*, in *THE ANTHROPOLOGY OF EVIL* 57 (D. Parkin ed. 1985). Evil in these cultures is a nonhuman and otherworldly force largely beyond human comprehension. Thus, the explanation of evil is religious, a matter for prayer and belief. The process of modernization, with its move away from the agrarian life and its reliance upon science resulted in what Max Weber termed the “disenchantment of the world.” *Id.* at 60. Supernatural explanations were replaced by human explanations. The God of man replaced the gods of Good and Evil. First the rational

plunge us into the causal abyss opened by the behavioral sciences. If we look beyond the question of why a shooter pulled the trigger to why he wanted to shoot, we will have to consider the source of that motive. We may find that at least part of the motive comes from an unchosen incident in the shooter's past, and if that is true it suggests the shooter is not fully responsible for his decision to shoot. In other words, motivation analysis seems to raise the fundamental problem of demonstrating responsibility for character.

Several legal scholars and philosophers have recently noted the difficulties that responsibility for character poses for desert theorists.¹⁴² Desert theory holds that persons deserve punishment for freely choosing to commit bad acts. Yet the idea of free choice seems suspect when we consider the extent to which a person's character — his settled disposition to act in certain ways — is formed by unchosen influences. While a discussion of the merits of the question necessarily lies beyond the bounds of this paper,¹⁴³ I can for our purposes offer a limited response. The motivation analysis proposed here presents no more of a problem with responsibility for character than do traditional criminal doctrines.

As noted previously, current law views motivation as relevant to culpability in a number of contexts, contexts which cannot be distinguished from murder, at least with regard to responsibility for character. Provocation doctrine holds that individuals are generally responsible for their reactions to aggravating situations. A person with an unusual sensitivity to certain insults or aggravations — regardless of how he came by it — is not excused for his extreme reaction to them.¹⁴⁴ Thus provocation doctrine is explicitly built upon responsibility for character.

To the extent that mental state analysis involves blame based on free choice, it raises similar issues. A father who abuses his

explanations of Enlightenment philosophers and later the scientific explanations of the behavioral and other sciences provided radically different ways of understanding human interaction.

¹⁴² For an excellent introduction to these difficulties, see Watson, *Responsibility and the Limits of Evil*, in CHARACTER, RESPONSIBILITY AND THE EMOTIONS, *supra* note 46, at 256-86. See also Arenella, *supra* note 9.

¹⁴³ I plan however to address them in my next work.

¹⁴⁴ See, e.g., *People v. Morse*, 70 Cal. 2d 711, 732-36, 452 P.2d 607, 619-23, 76 Cal. Rptr. 391, 403-06 (1969), *cert. denied*, 397 U.S. 944 (1970); *People v. Washington*, 58 Cal. App. 3d 620, 625-26, 130 Cal. Rptr. 96, 98-99 (1976); *Mancini v. Director of Pub. Prosecutions* (1941) 3 L.R. App. Cas. 272, 277.

children is not excused even if we know that his tendency toward abuse is largely the result of his own victimization as a child. By looking only at his demonstrated attitude toward the specific harm caused, we may temporarily sidestep the question of the source of that attitude, but basic fairness requires an answer just as it does in the case of motivation analysis.¹⁴⁵ Thus motivation analysis does not change the nature of the moral inquiry; it only deepens the inquiry. To put it in a more basic way, it is hard to imagine a view of responsibility which could distinguish between a purposive and knowing killing, that could not also distinguish between a mercy killing and a killing for fun.

3. Craziness and Moral Depravity

The most basic objection to evil comes from the lurking suspicion that persons who desire to hurt others act from sickness rather than evil. Surely anyone who would kill for the visceral pleasure of human destruction must be "sick." There must be something so fundamentally wrong with her that we cannot consider this person by ordinary standards of human responsibility. This looks like a crazy person.¹⁴⁶ While a full consideration of craziness would go far beyond the present endeavor,¹⁴⁷ I will suggest a basic distinction between the traditional view of craziness and moral depravity.

Craziness, as exemplified in modern insanity tests, involves fundamental irrationality.¹⁴⁸ The actor works for ends which are nonsensical according to our view of the world or the means chosen to attain meaningful ends appear nonsensical.¹⁴⁹ Alternatively, the actor may have a fundamentally fractured self so that his rational consciousness does not control his actions.¹⁵⁰ None

¹⁴⁵ See Arenella, *supra* note 9.

¹⁴⁶ On the use of "crazy" to indicate the insane, see Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 780 n.4 (1985).

¹⁴⁷ Perhaps the most difficult responsibility problem for a desert-based theory of punishment is presented by the psychopath. Is the classic psychopath, an individual who does not appear capable of feeling for others, capable of moral conduct? If not, the psychopath should not be punished, although society may protect itself from her depredations. If responsible, the condition of psychopathy may simply describe in behavioral terms an extreme commitment to immorality.

¹⁴⁸ See M. MOORE, *supra* note 21, at 196-98.

¹⁴⁹ *Id.*

¹⁵⁰ See MODEL PENAL CODE, *supra* note 22, § 4.01 (referring to actor's lack

of these conditions are presented by the worst killers. Certainly the means they choose to vent their hostility seem rational. More debatable is whether their ends, their reasons for killing, are rational. For crimes that are widely described as "senseless," how can we say that they actually make sense?

I argue that although the ends the worst killers choose are unusual and ugly, they are ends with which all of us can identify. Even if we agree that their approach to life is self-destructive in the long run, in the short run it provides significant rewards.¹⁵¹ In a symbolic way the killings provide the deep satisfaction of revenge. Many serial killers, for example, hate women and find pleasure in their destruction in a way that reflects destructive sexual attitudes prevalent in society generally.¹⁵² One serial killer stated: "'I was death on women. . . . I didn't feel they need to exist. I hated them and I wanted to destroy every one I could find.'" ¹⁵³ As feminist scholars have pointed out, the misogyny of many male murderers reflects the society of which they are part.¹⁵⁴ Hatred between the sexes is an all-too-common phenomenon, although fortunately it rarely finds murderous expression.

Murder involves the ultimate power over another individual, and power is one of the fundamental motivators of humans.¹⁵⁵ More than simply human power, murder involves a taste of a power beyond life, of immortality. One killer stated: "What I wanted to see was the *death*, and I wanted to see the *triumph*, the exultation over death In other words, winning over death. They were dead and I was alive. That was a victory in my

of substantial capacity "to conform his conduct to the requirements of law"); see also M. MOORE, *supra* note 21, at 219-20.

¹⁵¹ Criminal responsibility cannot depend on the ability to work for long-term as opposed to short-term ends. The ability to conduct a life for long-term good is one which many people seem to lack, including many we consider fully responsible. Indeed, there are few criminal offenders who could pass a test of living for long-term good if that were a responsibility prerequisite.

¹⁵² See D. CAMERON & E. FRAZER, *supra* note 120, at 17-18; J. CAPUTI, *supra* note 120, at 114..

¹⁵³ E. LEYTON, *supra* note 121, at 17 (1986) (quoting from a television interview with serial murderer Henry Lee Lucas).

¹⁵⁴ See D. CAMERON & E. FRAZER, *supra* note 120, at 164-66; J. CAPUTI, *supra* note 120, at 116.

¹⁵⁵ See G. NETTLER, *KILLING ONE ANOTHER* 199-201 (1982).

case.”¹⁵⁶ This lust for power may be intertwined with the satisfaction that some killers find in the sexual and ultimate possession of another.¹⁵⁷ For these reasons killing can provide a basic, sensual pleasure. “It felt so good the first time I stabbed her, and when she screamed at me it did something to me, sent a rush through me, and I stabbed her again” Susan Atkins said, describing her killing of Sharon Tate.¹⁵⁸ Atkins described the pleasure of killing as “like a sexual release. . . . It’s better than a climax.”¹⁵⁹

In other words, the worst killers embrace evil for the rewards it brings — rewards the rest of us might acknowledge and to a lesser extent seek in our own lives. These killers embrace the thrill of wrongdoing, of power, of revenge against enemies and self-promotion. Their acts speak powerfully in the moral (or immoral) sense because they satisfy urges that are broadly shared. We can imagine persons taking satisfaction from such actions, however depraved we may view that satisfaction. By contrast, craziness involves fundamental irrationality which blocks our understanding of the deed. We cannot understand how another person can gain satisfaction from such bizarre activity. It does not seem to connect to the common kinds of rewards which we associate with an even marginally meaningful life.

This distinction between depravity and madness emerges in our moral view of crazy conduct. The truly crazy have a perception of life and the world that is so skewed from ours that we cannot say they understand the principle of moral regard as it applies in our world. To kill on orders from a CIA computer or to prevent radio beams from being transmitted into one’s head says almost nothing about moral questions as the rest of us understand them. In the never-ending battle between good and evil, the crazy appear fundamentally confused.

IV. A REVISED LAW OF MURDER

We now begin the final job of drafting laws to reflect the theoretical insights obtained into murder. In the drafting of offense definitions we must consider the pragmatic needs of the legal sys-

¹⁵⁶ E. LEYTON, *supra* note 121, at 52 (quoting serial killer Edmund Emil Kemper).

¹⁵⁷ *Id.* at 82-108 (on serial killer Ted Bundy).

¹⁵⁸ V. BUGLIOSI & C. GENTRY, *HELTER SKELTER* 95 (1974) (as reported by a cell-mate of Atkins).

¹⁵⁹ *Id.*

tem. Like all provisions of law, and especially those of criminal law which depend upon jury interpretation, these must be susceptible to consistent application. The philosophical goal of motivation analysis must be explained in terms accessible to the public, and the new rules should be determinate enough to permit meaningful appellate review.

A. Offense Definitions — Aggravated Murder and Murder

The most serious form of murder¹⁶⁰ should be defined as follows:

Aggravated murder is the deliberate and purposeful killing of another for evil reasons; that is, for power, profit, pleasure, out of hatred based on sex, race or ethnicity, or for any other reason which demonstrates a conscious rejection of basic morality.

Juries should be instructed on aggravated murder as follows:

Aggravated murder represents the most heinous form of homicide and is reserved for those exceptional instances when we can say the killer consciously rejected moral principle and embraced evil. The mental state required for aggravated murder has three elements. The state must prove that the defendant acted: (1) deliberately, (2) with purpose to kill,¹⁶¹ and (3) for an evil reason.

The requirement of deliberation means that the offender fully understood the reasons for and consequences of his or her act. You may infer deliberation from factors such as the time lapse between the criminal decision and the criminal act or by the emotional state of the defendant at the time of killing. You should not consider these factors absolute guides to your decision, however.

The deliberation requirement means you should distinguish

¹⁶⁰ This defines an offense, not a punishment. Some may wish to use aggravated murder as a basis for distinguishing capital from noncapital murder. On the level of distinguishing a greater from a lesser penalty, this might be appropriate. The death penalty, however, represents not just a different amount of punishment, but a radically different kind of punishment which raises questions well beyond the scope of this Article. For example, in judging whether an offender deserves to die, and so condemning a life, the sentencer arguably should judge an offender's entire life and find it unworthy, a determination not part of the aggravated murder formula.

¹⁶¹ There may be some instances in which extreme indifference to the possibility of death should also suffice but because attitudes of indifference raise different concerns than those of purposeful conduct, which has been the prime focus of this Article, I have limited the present definition to purposeful conduct.

the aggravated murderer from the killer whose moral view was in some respect clouded by mental disease or defect, even if that mental disease or defect does not constitute a full legal excuse.¹⁶²

Aggravated murder also requires an evil motive — a nonmoral or immoral reason for killing. By motive I mean the primary inspiration for the defendant's criminal act. An evil motive usually involves the promotion of selfish concerns. Examples of such motives include killing another person for money, killing another to ensure freedom from prosecution for a crime, or a killing in which the murderer takes pleasure in the victim's suffering and death. A killing motivated by racial, ethnic, or other group-based hatred also satisfies the evil motive requirement. In all of these instances the murderer has no good reason to fear or hate the victim and has resolved to kill because of a nonmoral or immoral motivation.

The rejection of basic morality means a refusal to acknowledge the fundamental moral obligations of human beings to each other in a civilized society. It means killing in order to promote personal, nonmoral or immoral goals.

Among the circumstances relevant to motive are the use of particular cruelty against the victim and the lack of a prior personal relationship between victim and killer. Neither of these circumstances are required, however.

Murder should be defined, in part,¹⁶³ as follows:

Murder is the purposeful, unprovoked, and unjustified killing of another person.

The basic argument for these offense definitions has been laid out in the previous parts of this Article; a few words about terminology may be warranted, however. I use the word "deliberate" to indicate the quality of rationality required. Despite the problems this has posed for courts under the "deliberate and premeditated" formula, the term expresses the basic idea of awareness of moral issues and consequences that is critical to distinguishing offenses. I have excised premeditation from the

¹⁶² Where intoxication is an issue in the case, the following instruction should be inserted at this point:

Also relevant is the effect of intoxication, if any, on the defendant. You must determine whether the defendant's ingestion of intoxicants was part of his or her criminal decision and so presents no ground for mitigation, or whether it affected the criminal decision by interfering with the defendant's appreciation of the consequences of his action.

¹⁶³ This definition covers only purposeful murder. I do not mean by this that other forms, such as depraved heart murder, should be excluded.

definition because its current legal usage presents too many difficulties. The doctrinal history of premeditation is so barnacled with competing interpretations that future use would require an enormous effort at linguistic reform.¹⁶⁴ Moreover, the term seems to overemphasize the timing aspect and de-emphasize the future-looking aspect of rationality analysis.

On one reading, the use of "evil" in the offense definition is superfluous. The "for power, profit, pleasure. . ." phrase which follows provides a technically complete explication of the motive requirement. Yet, as argued previously,¹⁶⁵ the word evil has important connotations that open up the law to general moral understanding in an important way. The more substantial criticism which may be raised along these lines is that terms such as "evil" and "rejection of basic morality" invite a variety of moral arguments that we do not wish to countenance within our legal system. Some will bring religious or other private moral views into an arena where only arguments based on a shared morality should be made.¹⁶⁶ How can we limit the moral debate to applications of the regard principle? Here we confront a basic value question concerning legal draftsmanship. Do we prefer hard line, relatively closed rules which generally express our underlying values and limit decisionmaker manipulation but lead to a substantial number of value-mistaken but legally-correct decisions? Or do we prefer fuzzier, more open-ended rules which are more sensitive to underlying values but also more vulnerable to improper manipulation by decisionmakers? At least in the context of murder definition, I argue for the latter approach. The distinction between offenses involves a moral controversy too difficult to confine to objective (that is, nonmoralistic) criteria. Nor should we underestimate the power of unvoiced moral beliefs. The history of murder doctrine reveals over and again the way in which popular moral views of homicide work can subvert formal rule

¹⁶⁴ By which I mean sincere efforts by courts and lawyers to replace old understandings of the term with a new and more precise meaning. While the process of redefinition is familiar to common law adjudication, it remains a haphazard affair, as the last 200 years of premeditation doctrine indicates.

¹⁶⁵ See *supra* text accompanying notes 4-11.

¹⁶⁶ Another way of putting this is that only public reasons should count in this moral debate. See K. GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 56-67 (1988); Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259, 277-86 (1989); Solum, *Faith and Justice*, 39 DE PAUL L. REV. 1083, 1089-92 (1990).

structures.¹⁶⁷ A rule which makes a frank appeal to basic moral ideas presents a better opportunity for regulating the moral debate than one which drives those ideas underground.

We should understand, however, that the proposed rule permits, and even requires, jury determination of hard moral questions about motive. The broad moral statements included in the rule and instructions do not resolve questions such as whether traditional notions of male sexual honor should constitute a good reason for hostility. The rule and instructions do not resolve cultural conflicts about morality. What I have proposed is a basic way of approaching such problems. The details of how they are resolved must be left for the further efforts of commentators, courts, lawyers, and juries.

B. Evidentiary Objections

Some may object that motivation analysis of the kind proposed will present significant proof problems.¹⁶⁸ Because the proposed definition will require a deeper understanding of the offender's mental processes, confessions might become more important and the constitutional law of criminal procedure teaches us the hazards of an over-reliance upon self-incrimination.¹⁶⁹ In addition, prosecutors might have to rely upon psychological experts to supply motives for apparently "senseless" crimes. This could lead to a war of the experts that would be difficult to resolve, especially given the basic conflict between the causal ideology of behavioral science and the moral ideology of criminal law.¹⁷⁰

Yet motivation analysis will make no extraordinary demands on criminal fact-finding. Compare the aggravated murder proposal, for example, with the inquiry required for premeditation. In both instances the circumstances of an offense usually provide a rich source of information about why the offender acted as she did. Motivation analysis requires more information (at least for conviction) than does ordinary mental state inquiry — but so does

¹⁶⁷ See, e.g., Green, *The Jury*, *supra* note 42.

¹⁶⁸ See Hitchler, *supra* note 28, at 109-11 (collecting arguments).

¹⁶⁹ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); L. LEVY, *THE ORIGINS OF THE FIFTH AMENDMENT* (1968); E. PETERS, *TORTURE* 40-73 (1985).

¹⁷⁰ See Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985); see also Morse, *Psychology, Determinism and Legal Responsibility*, 33 NEB. SYMP. ON MOTIVATION 35 (1986).

premeditation.¹⁷¹ As noted previously, the reasons for most killings are fairly obvious. To the extent that the motivation for a particular crime remains obscure, that constitutes a strong argument for conviction of a lesser homicide offense. As is true now, I suspect that confessions will prove important to guilt, but will provide more assistance on the question of the killer's identity than on the degree of culpability.¹⁷²

Nor do we necessarily need expert guidance. Prosecutors will have to develop a deeper understanding of the crimes which they prosecute and will have to communicate that understanding to juries. But the motives for murder tend to be fairly simple. A robber kills for fun, to eliminate witnesses, for immediate self-protection, or by accident. None of these situations require expert elucidation. As noted before, even "senseless" crimes have their own logic once we acknowledge the attractions of cruelty, power, and hatred. Motivation analysis is a staple of our moral life. In both public and private life we constantly work to determine others' motives and base significant actions upon our conclusions. Neither here, nor in the areas of criminal law where it is now used, do evidentiary problems appear insurmountable.

C. *The Doctrine Applied*

The real test of a doctrine must come in a series of live controversies resolved by the judicial system. The best we can do prior to implementation is to imagine how we would apply the doctrine in hypothetical situations. Because of their accessibility and the richness of their moral detail I suggest application to two situations from recent movies — the Joker's depredations in "Batman" and Judah Rosenthal's murder in "Crimes and Misdemeanors." Like law, art raises fundamental moral questions and so law may borrow from art, just as art borrows from law. As hypotheticals, these cases present the luxury of dramatically revealed moral dispositions so that we may debate the moral issues in greater depth.¹⁷³ In terms of aggravated murder doc-

¹⁷¹ In many jurisdictions, such as California, motive can be an important part of premeditation analysis. *People v. Anderson* 70 Cal. 2d 15, 26-27, 447 P.2d 942, 949, 73 Cal. Rptr. 550, 557 (1968).

¹⁷² While confessions are by definition devastating on the issue of the identity of the criminal actor, they are often self-serving on the question of extent of culpability.

¹⁷³ In this sense they obviously do not address the evidentiary objections raised above. Another objection may be aesthetic — that artistic examples

trine, the issues these cases raise are neither especially easy nor difficult. They are, rather, illustrative.

1. Madness v. Depravity, or Is the Joker Crazy?

Jack Nicholson's portrayal of the Joker in the recent Batman movie¹⁷⁴ illustrates some of the distinctions between the sort of irrationality which precludes aggravated murder status (at least) and moral depravity, which supports it. The Joker seems to have all the attributes of great evil. From our first view of him we see a cruel man, devoted to crime and corruption, loyal to none. After an encounter with Batman leaves him disfigured, his face contorted into a permanently crazed grin, his last tie to ordinary humanity is severed and he begins a celebration of evil. His execution of the crime boss who betrayed him is joyful. Shortly thereafter the Joker electrocutes a criminal rival and then conducts a conversation with the corpse that reveals his delight in human destruction. At the conclusion of their one-sided colloquy the Joker says, "I'm glad you're dead" and roars with laughter. He launches a campaign of destruction and desecration, defacing human art and beauty wherever he can. "I am the world's first fully functioning homicidal artist," he explains. He seeks significance. He says he wants his name on the dollar bill. He wants to disfigure all around him so that everyone's face will bear his grotesque and permanent grin. The movie climaxes with his scheme for metropolitan genocide. In all these ambitious works the Joker finds gleeful satisfaction.

We might say the Joker is crazy. What brings him pleasure seems bizarre. There is something child-like about his manner which suggests a radical immaturity akin to insanity. We must resolve, however, whether he suffers from any real defect in rationality. We must decide whether there is any reason to believe that he is fundamentally confused about moral issues. The answer appears to be no. The Joker suffers no perceptual problems. He knows that he causes suffering — he enjoys it. He

are useful only to the extent that they reveal truths about human life. I believe at least the Woody Allen film meets this criteria. Yet aside from aesthetics, the popularity of these works makes them worthy subjects of discussion. As previously noted the political requirements of punishment are substantial in a democratic society. By testing the proposed doctrine on popular culture we may see to what extent the view of morality espoused here is accessible to and accords with popular views.

¹⁷⁴ *Batman* (Warner Bros. 1989).

knows what suffering is and where it comes from — Batman has made him suffer terribly. His own pain may provide the goad to cruelty, but that represents an explanation, not an excuse. He hurts others for the same reason that most people do — it makes him feel better. His cruelty and enjoyment of it is exaggerated but its fundamental nature is familiar to us all. The Joker knows that society deems harming others wrong but for the Joker that's part of the fun. He has no delusions about what he does or why. He does not act on God's command or in hopes of creating a utopia. What is skewed in the Joker is his values not his reason. He is a caricature, (he is after all a comic book character), but he is a caricature of evil, not craziness.

2. The Rationality of Evil — “Crimes and Misdemeanors”

In his movie “Crimes and Misdemeanors”¹⁷⁵ Woody Allen teaches that evil can be subtle. It can arise from disputes between closely related persons; it can involve the prosperous and the sensitive as well as the brutal and downtrodden.

Judah Rosenthal is a successful ophthalmologist with just about everything the modern man desires. He has money, respect, a successful career, a comfortable home, a loving wife and family, and a devoted mistress. The last of these presents a problem, however. Judah wants to end his extramarital relationship with Dolores Paley but the more he tries to break away the tighter she clings. Dolores says he promised her a permanent relationship, a claim he half-heartedly denies. She threatens to expose their affair to his wife and to expose his financial wrongdoings to his colleagues. He now faces a choice. He knows he must break off the relationship but if he simply says goodbye, she will bring his life down around him. His brother, who knows about such things, suggests murder. After much agonizing, Judah agrees. A hired killer murders Dolores, making it look like the work of a surprised burglar. Judah, after a period of guilt, returns to his old life.

The traditional doctrine of premeditation solves this case neatly. Judah carefully reflects upon and coolly orders his mistress' execution and so should be convicted of the highest murder offense. The proposed aggravated murder formula produces the same result, but requires a more complex analysis.¹⁷⁶ Judah has

¹⁷⁵ *Crimes and Misdemeanors* (Orion Pictures 1989).

¹⁷⁶ In this sense premeditation solves this case better than does aggravated murder. That there are some cases that premeditation solves

some reason for hostility to Dolores. She acts in a possessive and destructive way toward him. While their affair is illicit, she shares in the blame for that. His wrong of promising too much does not excuse hers of seeking to possess him totally. The "rightness" of Judah's hostility should not be exaggerated, but if Judah killed Dolores in the heat of an argument over their relationship we would probably view this as an ordinary murder. We might decide that a passionate dispute leading to violence would not evidence a clear appreciation of consequences or an embrace of evil. Judah does have *some* reason to be angry with Dolores.¹⁷⁷

But in Woody Allen's filmic reality Judah does not act spontaneously, on the spur of an emotional moment. He waits, considers, agonizes, and finally acts with full awareness of the immorality of his deed. He knows he acts for personal gain, that he shares fault in engaging in the relationship and in his financial dealings so that he has no right to take drastic action against her. He is fully aware that he compounds all his previous wrongs with the worst wrong of all — murder. Here we see the way in which the rationality and motive inquiries interrelate. Because his awareness of the moral situation is so clear, we can see his embrace of evil. In killing his mistress Judah consciously and deliberately rejects the principle of moral regard. It is not a rejection of moral regard for all time or all purposes, but that is not a concern of the criminal law. In his decision to murder Dolores Paley, Judah Rosenthal makes a commitment to evil.

CONCLUSION

Human beings love to fictionalize evil — to terrorize each other with stories of defilement, horror, excruciating pain, and divine retribution. Beneath the surface of bewitchment and half-sick amusement, however, lies the realization that evil is real and that people must find a way to face and overcome it.¹⁷⁸

There are many ways of denying evil. The most popular intellectual approach is to deny it through explanation, addressing only the mechanistic causes and effects of harmful behavior.¹⁷⁹

more neatly than the proposed definition does not mean that it is superior overall, however. An offense definition must cover all possibilities and so its worth must be evaluated over the whole range of relevant human conduct.

¹⁷⁷ Again, this should not be exaggerated. It probably would not rise to the level of provocation.

¹⁷⁸ N. NODDINGS, *WOMEN AND EVIL* 1 (1989).

¹⁷⁹ See M. MOORE, *supra* note 21, at 226.

While criminal law has largely avoided this error, the reluctance to employ motivation analysis suggests its influence. Another popular form of denial involves the exaggeration of evil. If we can declare persons fundamentally "other" by declaring them evil, then we can deny them worth and reject any claim they might make upon our moral consideration.¹⁸⁰ Some will no doubt take the argument for evil presented here as an argument that certain fearful criminals are so different from the rest of us that their fate does not implicate ours, except in the crude sense of a threat to be eliminated. To make such an argument, though, is to fundamentally misconceive the nature and power of evil. It is to misapprehend the small and narrowly defined role of criminal law in the larger battle between good and evil.

The criminal law argument may be simply put. Today, when the use of ultimate violence to further a variety of personal ends seems more common than ever in our country, we should recognize a moral challenge that requires official, communal response. To define aggravated murder as I have suggested is to say to such killers: we see you for what you are and what you would do; we will defend ourselves against you. By defining murder in this fashion we bolster our commitment to moral regard. We fight back.

The doers of evil present us with a larger moral challenge as well, however, one hard to address and easy to ignore. It is the challenge to see the victims of evil in those that do it, to see the good in those that do wrong. It is the challenge to see that we punish to further a collective effort at morality, not to establish our own moral superiority. A hard look at evil should humble us because what makes evil so frightening is not its strangeness, but its familiarity.

¹⁸⁰ See Pillsbury, *supra* note 7, at 692-93.