The Depths of Malice
Vera Bergelson*

Introduction

The Model Penal Code ("MPC") revision of the traditional mens rea provisions has been almost uniformly recognized as an immense success. The MPC has clarified and simplified mens rea categories by replacing numerous amorphous terms with just four rigorously defined mental states and provided default rules for the interpretation of those mental states as applied to each material element of an offense. The MPC framework has been extremely influential: it has been adopted explicitly in more than a half of American jurisdictions, and it often guides judicial interpretation of mens rea in the remaining jurisdictions as well. However, the MPC may have lost some important insights in departing from the traditional mens rea criteria. In this paper, I suggest that, in its strive for simplification, rationality, and utility, the MPC has sacrificed some of the moral complexity of the traditional, common-law mens rea categories. Specifically, I argue that the common-law category of malice is doctrinally important and its abandonment affects the fairness and coherence of the entire body of criminal law.

1. The Historic Meaning of Malice

The meaning of the term "malice" has changed dramatically since its early use in medieval England. While there is no agreement among scholars as to its exact original meaning, most concur that, in general terms, malitia (medieval malice) signified "wickedness," or some generally immoral, inexcusable act. Francis Bowes Sayre wrote that, at the beginning and at least until the early seventeenth century, malice "was construed in its popular sense as meaning general malevolence or cold-blooded desire to injure, and referred to the underlying motive rather than to the immediate intent of the actor."

Similarly, in the 18th century, Blackstone associated the term malice with "an open-ended inquiry into the moral quality of defendant's motivation." Thus malicious mischief for him required "a

---

* Distinguished Professor of Law, Robert E. Knowlton Scholar, Rutgers Law School. I am grateful to my research assistants Krista Hartrum for her excellent work in researching this project and Andrew Kristofick for his editorial help.
2 MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments) (1980).
4 Simons, supra note 1, at 179.
6 Conversely, there seems to be an agreement that there is a lack of evidence to answer that question definitively. PENNY CROFTS, WICKEDNESS AND CRIME: LAWS OF HOMICIDE AND MALICE 29 (2013).
7 Id. at 29 (citing J.M. Kaye, The Early History of Murder and Manslaughter: Part I’ 83 LAW QUARTERLY REVIEW 365, 372 (1967).
8 Francis Bowes Sayre, Mens Rea, 45 Harv. L. Rev. 974, 997 (1932).
spirit of wanton cruelty or black diabolical revenge.”

And, speaking of murder, Blackstone explained that malice meant “not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart.” This wanton cruelty, diabolic revenge, or evil design, however, did not mean “some additional quality of depravity;” instead, for Blackstone, it underscored the actor’s unimpaired volition.

The broad inquiry into the actor’s motives was gradually replaced in the next century with a more technical meaning focused on one’s intentionality rather than the reasons behind it. A major figure behind this rethinking of the concept of malice was James Fitzjames Stephen. In his attempt to simplify and rationalize criminal law, Stephen “constructed a negative model of malice to which he attributed all that was undesirable or irrational in law. He relied upon malice to express the differences between his cognitive order and the old moral order of criminal law.”

In his famous work, *A Digest of the Criminal Law*, Stephen referred to the conceptual distinction between murder and manslaughter based on the presence or absence of malice as “one of the most difficult problems presented by the criminal law” and he attributed that difficulty to the “intricacy, confusion, and uncertainty of this branch of the law.” The revised criminal law envisioned by Stephen required a different approach to culpability. Penny Crofts describes it as follows:

Culpability was to be a question of fact – objective and rational, not dependent on moral terms. Stephen’s ambition to separate the analytic and factual from evaluative questions was thus consistent with the views of legal positivists Bentham and John Austin. On this model, judgment should be based on empirical facts rather than uncertain and inconsistent moral evaluations.

The positivist model of criminal law promulgated by Stephen has gradually prevailed. *Mens rea* has come to mean various cognitive states. Malice has been reinterpreted as actual intent or recklessness. An influential early 20th century treatise explained:

In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).

---

2. Id. at 19.
3. Id. at 18 (quoting 4 Blackstone, at 243, 198, 198-199).
5. Id. at 19.
7. Crofts, supra note 6, at 120.
In his 1932 seminal article, Francis Bowes Sayre illustrated that change:

For instance . . . the *malitia* required for arson in the early days referred dearly to the malevolence of the motive; today the mental requirement has narrowed down to the intent to burn another's house unlawfully, irrespective of the motive. Similarly, the underlying evil design which first set off non-clergyable killings from clergyable ones, known as "malice," originally meant little more than general malevolence. But the meaning attached to "malice aforesaid" today is no longer an underlying evil motive, but the specific immediate intent, it may be to kill, or it may be not to kill or even to injure, but to do some act with cause to know that it unwarrantably endangers human life, or to commit some felony of a kind which is customarily dangerous, or to resist lawful arrest. 19

Such was the state of the law of malice by the time the MPC drafters started their work on the model code. As we will see shortly, there was no room for the concept of malice in that code. Nevertheless, despite the enormous influence of the MPC, particularly in the area of culpability, many jurisdictions have retained the concept of malice (often, alongside with the MPC *mens rea* concepts),20 either in the meaning of intentionality or an evil motive.21

Generally (though not invariably), courts interpret malice as intent or recklessness, or the foresight of the prohibited consequence.22 However, there is no one settled understanding of the term. For instance, in *United States v. Gray*,23 the defendant was prosecuted under a federal statute24 that made it a crime to give "maliciously" false information about a bomb threat on an

---

20 See, e.g., S.D. CODIFIED LAWS § 22-1-2(1)(f) (including malice as the highest level of *mens rea*, above knowledge and intent). The section reads:

If the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, intent, or malice also constitutes sufficient culpability for such element. If recklessness suffices to establish an element of the offense, then knowledge, intent or malice also constitutes sufficient culpability for such element. If knowledge suffices to establish an element of an offense, then intent or malice also constitutes sufficient culpability for such element. If intent suffices to establish an element of an offense, then malice also constitutes sufficient culpability for such element. Id.

21 See, e.g., GA. CODE ANN. § 16-12-4(a)(2) (defining malice as “[a]n actual intent, which may be shown by the circumstances connected to the act, to cause the particular harm produced without justification or excuse” or “[t]he wanton and willful doing of an act with an awareness of a plain and strong likelihood that a particular harm may result”). CAL. PEN. CODE § 188 (malice in homicide is “express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature;” and “implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart”); OKLA. STAT. 21 § 701.7 (defining malice in connection with first-degree murder as “deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof”). *But see* V.I. CODE ANN. 14 § 111(6) (“Malicious” means conduct characterized by or involving malice cruelty, hostility or revenge.”); NEV. REV. STAT. ANN. § 193.0175 (“Malice” and “maliciously” import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.”).

22 KADISH, *supra* note 3, at 264 (“Absent clear indications to the contrary, courts will interpret ‘malice’ . . . to require that the defendant was aware his actions posed a substantial risk of causing the prohibited harm.”).
23 780 F.3d 458 (1st Cir. 2015).
airplane. The government argued that, “where a statute does not define a common-law term like malice, courts presume that Congress adopted the common-law definition,” and urged the court to interpret the term as recklessness (“willful disregard of the likelihood that damage or injury would result”). The defendant, in contrast, argued that to act “maliciously” meant “to do something with an evil purpose or motive.” The trial court issued a jury instruction that combined the two standards and later the First Circuit reversed the defendant’s conviction and affirmed her interpretation of malice on the basis of the statutory scheme and legislative history. The court also commented on the lack of uniformity in the meaning of malice, saying:

> We recognize that there are multiple common law definitions of malice. The dissent favors a common law definition that is frequently used to distinguish manslaughter from murder. The Seventh Circuit, on the other hand, [in United States v. Grady][28] recently upheld another common law definition of “maliciously” as “[acting] intentionally or with deliberate disregard of the likelihood that damage or injury will result.” The Grady court stated that this definition is “indeed a common definition of the word,” is found in the Fourth, Eighth and Eleventh Circuit model jury instructions, and “is how the common law traditionally defined the term.” Furthermore, the Grady court explicitly rejected the dissent’s position that “malice” must include the phrase “without just cause or reason.” It is clear there is no “one size fits all” common law definition of malice.29

United States v. Gray is a good illustration of the three major competing contemporary interpretations of malice—one associating malice with evil purpose or motive; another simply equating malice with intent or recklessness; and finally, the third, represented by the Gray dissenters and numerous legal authorities starting with Blackstone,30 signifying the absence of a legal defense or mitigation. “Malice is not satisfied simply by killing with an intentional or reckless mental state; instead, malice specifically requires committing the wrongful act without justification, excuse, or mitigation,” said the court in the United States v. Serawop.31 The court further explained:

> Thus, when we say that a murder must be committed "with malice," we mean not just that it requires a particular murderous intent but, more to the point, that it must also be “without legal justification, excuse, or mitigation.” This is why, in [United States v. Lofton][32] we held that to establish malice the prosecution must prove beyond a reasonable doubt the absence of heat of passion when it is an issue in the

---

25Gray, 780 F.3d at 463-464.
26Id. at 463.
27Id.
28United States v. Grady, 746 F.3d 846 (7th Cir. 2014).
29Gray, 780 F.3d at 467 (citing Grady, 746 F.3d at 848).
30See supra note 13 and accompanying text.
31410 F.3d 656, 664 (10th Cir. 2005) (citing numerous authorities including the following). See 50 Am.Jur.2d Homicide § 37 (1999) ("[Malice] is said to include all those states and conditions of mind which accompany a homicide committed without legal excuse or extenuation."); BLACK’S LAW DICTIONARY 976 (8th ed. 2004) (defining "malice" as "intent, without justification or excuse, to commit a wrongful act"); 40 C.J.S. Homicide § 33 (1991) ("Malice has been defined as consisting of the intentional doing of a wrongful act toward another without legal justification, excuse, or mitigation."). Patterson v. New York, 432 U.S. 197 (U.S. 1977) (defining malice as "lack of provocation").
32957 F.2d 476 (7th Cir. 1992).
case. Heat of passion is one legal excuse pursuant to which what would otherwise constitute murder is mitigated to a less culpable offense of manslaughter—because with heat of passion, “malice” in the sense of “lack of provocation” no longer exists.33

This brief review reveals several important themes. The concept of malice has undergone a major transformation from its early use in medieval England to nowadays. The dominant trend in this transformation was consistent with the general transformation of the meaning of culpability in criminal law. An inquiry into one’s evil disposition, plan, or motive was gradually replaced with an inquiry into one’s mental commitment to the completion of the harmful act (purpose, awareness, carelessness). The main focus of criminal law has shifted from punishment of evil to prevention of harm while the interests protected by criminal law have expanded beyond the traditional king’s peace to include setbacks to other public as well as private interests.34 The concept of malice has survived various reinterpretations and legal reforms, including the MPC, yet its meaning has become quite murky and uncertain.35 To the extent this meaning is still associated with a moral inquiry into the actor’s ultimate purpose or motive, the meaning of malice has lost its conceptual uniformity and has often become offense-specific.36 And yet, the relevance of malice as a legal concept is evidenced by its resilience both in penal codes and torts statutes.37 Many jurisdictions include malice in sentencing statutes.38

In what follows, I consider whether the MPC could have and should have retained the concept of malice and whether that concept adds anything important to the criminal law doctrine.

2. The MPC Abandonment of Malice

The MPC has abandoned the concept of malice. There were several reasons for that. Firstly, the MPC saw one of its main goals in rationalizing and simplifying the concept of mens rea by

---

33 *Serawop*, 410 F.3d at 664 (citations omitted).
34 Binder, *supra* note 9, at 20.
36 *See, e.g.*, GA. CODE ANN. § 16-12-4(a)(2) (defining malice in the context of cruelty to animals); CAL. PEN. CODE §§ 136-39 (Deering 2020) (employing malice in the context of the crime of intimidating or threatening witnesses); DEL. CODE ANN. Tit. 11 §§ 3531-33 (2020) (limiting the use of malice to the crime of witness and victim intimidation); FLA. STAT. § 874.03 (2020) (employing malice to identify a gang or “hate group”); LA. STAT. ANN. §§ 14:204-205 (2020) (using malice in reference to the mens rea necessary for conviction of fire-raising); MICH. COMP. LAWS §§ 750.233-235, 750.329 (2020) (employing malice in crimes involving firearms); MO. REV. STAT. §§ 571.117, 571.225 (2020) (requiring malice only in regard to sheriff liability); OR. REV. STAT. §§ 133.315, 166.190, 166.412, 166.436, 166.421 (2020) (limiting malice to define liability of a peace officer and in firearm offenses).
37 Forty-eight states and the District of Columbia incorporate a finding of malice or malicious behavior on the part of the defendant as grounds for awarding punitive damages. 2 Punitive Damages D.C CODE § 20.1 (2020). The only two states that do not incorporate the malice language (Nebraska and Washington) do not allow for punitive damages in their legal systems. *Id.*
38 *ARIZ. REV. STAT. ANN.* § 13-701 (2020) (increasing the sentence for offenders who committed a crime out of malice); *COLO. REV. STAT.* § 18-1.4-102 (2019) (“The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more persons during the commission of the same criminal episode . . .”).
limiting the number of culpable mental states. 39 As the MPC commentary observed, according to a federal study, there were seventy-six different methods of stating the requisite mental element in the federal criminal statutes of the time. 40 The sheer number and variety of statutory mental states created confusion and uncertainty for the juries and courts alike. Malice was seen as one of the culprits responsible for “the obscurity with which the culpability requirement is often treated.”41

In addition, malice simply did not fit into the doctrinal picture of mens rea envisioned by the MPC drafters. In its “intentionality” meaning, the term “malice” was redundant; the quadripartite mens rea provision already covered the mental states associated with malice (intent and recklessness). And the malice’s meaning of moral evilness was foreign to the MPC. The mental element of a crime has been conceptualized by the MPC as a purely cognitive matter devoid of the emotional or moral component. Under the MPC, the only mens rea inquiry is to one’s cognitive relationship to the criminal conduct, result, and attending circumstances. If this relationship is characterized by purpose, knowledge, recklessness, or negligence, no furtherer inquiry into one’s motives is necessary and the person is prima facie culpable.

Even more fundamentally, the MPC was conceived as, first and foremost, a utilitarian document whose main objective was “to deter criminal conduct and, in the event this failed, to diagnose the correctional and incapacitative needs of each offender.”42 Under the MPC, a person is prima facie criminally liable if he acts with a certain mental state toward an unlawful end. The motivation for the unlawful conduct is usually immaterial. It is equally immaterial whether or not the unlawful end has been achieved or is even achievable because in either case the offender “has displayed the same symptom of dangerousness.”43 To give just a few examples—

- An attempt, including an impossible attempt is punishable under the MPC as severely as a completed offense.44
- The same is true for the crimes of solicitation and conspiracy. The solicitation may be fruitless; it may have a zero chance of succeeding (e.g., when the actor addresses the target of solicitation in a language which the latter does not speak).45

39 MODEL PENAL CODE § 2.02 cmt 1 at 230 (quoting Justice Jackson that “the variety, disparity and confusion” of judicial definitions of ‘the requisite but elusive mental element’ in crime should, insofar as possible, be rationalized by a criminal code).
40 Id. at 230, n.3.
41 Id. cmt 1 at 230.
43 Id.
44 MODEL PENAL CODE §§ 5.05(1) and 5.05 (2) (except for felonies of the 1st degree and except for those acts that court in its discretion mitigates to a lower grade or degree). See also Robinson & Dubber, supra note 42, at 329 (observing that “few states have followed the code's abandonment of the common law distinction between the punishment for attempted and consummated offenses”).
45 MODEL PENAL CODE § 5.02(2) (covering uncommunicated solicitation).
Similarly, the conspiracy may be impossible due to a substantive misunderstanding between the coconspirators or due to the lack of a coconspirator (e.g., when the “coconspirator” is an undercover police agent).

Finally, the theory of complicity follows the same unilateral logic of responsibility: a person is guilty of a crime if he, “with the purpose of promoting or facilitating the commission of the offense,” “aids or agrees or attempts to aid” others to commit the offense. Moreover, in the draconian combination of the unilateral complicity and impossible attempt, a person who “aided or agreed or attempted to aid” another to commit an offense is guilty of an attempt to commit that offense even though the offense has never been committed or attempted by the other person.

The consistently utilitarian logic of the MPC puts the emphasis on identifying and isolating potentially dangerous offenders. It is the logic of prevention, not desert. Not surprisingly, the concept of malice with its focus on blameworthiness was hostile to the ideology of the MPC.

Finally, to the extent the MPC is concerned with the harmful results, it tends to measure the permissibility of one’s conduct by numerical considerations rather than a deontological principle. Under section 3.02, which provides a defense to an actor who has broken the law in order to avoid a greater harm or evil, no conduct is beyond justification. Rape, torture, or murder of an innocent is not only permissible but is deemed not wrongful, provided such actions have averted a similar harm to more people. A commentary to the MPC explains: “The life of every individual must be taken in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act.” The evil component of the MPC “choice of evils” defense is understood pragmatically in contrast with the moral evil of malice.

3. The Missed Opportunities

Has the MPC lost something important by eliminating the concept of malice? To answer this question, we first need to try to extricate the basic qualities of malice by looking at various contexts in which this term retains an independent morally significant substantive meaning. That meaning is usually expressed in

---

40 Id.
47 MODEL PENAL CODE § 2.06.3(a)(ii).
48 MODEL PENAL CODE § 5.01(3).
49 MODEL PENAL CODE § 3.02(1)(a).
50 MODEL PENAL CODE § 3.02, cmt 3 at 15.
negative terms as the lack of malice, so, to determine what malice means, let’s first see what qualities go into the “lack of malice.”

Heat of Passion; Provocation; EMED. An area of law particularly helpful in this inquiry is homicide. At least one meaning of malice may be simplistically expressed by a formula: malice equals murder minus voluntary manslaughter. In other words, take the crime of murder, put aside all the elements it shares with the crime of voluntary manslaughter; the remaining elements would constitute malice. In common law terms, that difference would mean cold blood (the opposite of the “heat of passion”) or the lack of significant provocation. Under the MPC, that difference would be the lack of “extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” Both the common law and the MPC underscore the qualities opposite to malice: the reactive character of violence; the lack of a rational plan; the limited volitional control not due to the actor’s fault; the limited causative responsibility (the actor would not have committed that crime but for the assault on his rights or the extreme mental or emotional disturbance). Malice, thus, requires independent, rational, and cold-blooded reasoning.

Accidents. Malice is absent when the criminal wrongdoing is accidental. Even when the harm is serious and the actor is objectively at fault, like in the case of negligent homicide, the law does not find malice in the defendant’s actions. Malice requires subjective culpability.

Justifications. Malice is absent when there is no wrongdoing (no violation of rights protected by criminal law), such as when the actor uses force in legitimate self-defense, defense of others, protection of property or habitation etc. Arguably, even though the law does not always grant the actor a defense for policy reasons (primarily, in cases of homicide or serious bodily harm), there is no malice when the actor causes consensual harm or causes harm pursuant to necessity. Malice, accordingly, signifies harmfulness without a “good” reason.

Excuses. Malice is absent in cases of significant cognitive or volitional impairment, such as in the circumstances of mistake, insanity, intoxication, very young age, or duress. For example,
central to a claim of duress is that the actor intended but did not want to break the law;\textsuperscript{57} he has only broken the law because of a volitional impairment, namely his will was subdued by a serious threat to his or others’ vital interests.\textsuperscript{58} Similarly, imperfect self-defense due to a cognitive impairment, such as an honest but unreasonable mistake, does not involve malice. Malice, thus, requires the actor to be rational and choose voluntarily.

To summarize, in very general terms, malice means a free, independent and voluntary choice of a rational agent to act in a certain harmful or extremely risky way without an honest and benevolent reason for such conduct, that is, from the moral perspective, the two most important features of malice are:

- that the actor is the true “author” of his actions with which he may be fairly said to have identified; and
- the lack of any honest and benevolent reason for the actor’s actions, or the actor’s evil design.

Does malice so understood add anything important to the theory of criminal culpability? I believe it does.

(b) The Value of Malice

1. Malice as a Gatekeeper

Some legal concepts are dramatic game-changers. One well recognized example is consent.\textsuperscript{59} Malice may be another. In fact, in many ways, malice is akin to consent, only with the opposite sign. Like consent, malice is (i) attitudinal;\textsuperscript{60} (ii) requires capacity; (iii) and has normative force in that the presence of malice, just like the presence of non-consent, may vitiate otherwise permissible conduct or exacerbate the wrongfulness of impermissible conduct.

Consider a claim of defense for the conduct that, from the objective perspective, is justified, but subjectively, from the perspective of the actor’s action-guiding reasons,\textsuperscript{61} is driven by malice. Here is a scenario: suppose $A$ hates $B$ and wants him dead. Knowing that $B$ frequents a certain

---

\textsuperscript{57} Penny Crofts makes a similar observation in CROFTS, supra note 6, at 260.
\textsuperscript{58} See, e.g., MODEL PENAL CODE § 2.09(1).
\textsuperscript{59} See, e.g., Heidi M. Hurd, Blaming the Victim: A Response to the Proposal that Criminal Law Recognize a General Defense of Contributory Responsibility, (2005) 8 BUFF. CRIM. L. REV. 503, 504 (remarking that consent “turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party”). See generally WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923).
bar, $A$ spends night after night outside the bar waiting for an occasion. While he is waiting, he witnesses numerous fights, sexual assaults, even murders; however, he never interferes, until finally one day he sees $B$ attacking another patron $C$ with deadly force. Knowing the law of defense of another, $A$ intervenes and kills $B$. At his trial, $A$ honestly tells his story of patience and determination. Should he be rewarded for these qualities and completely exonerated, even though we know that he would not have defended $C$ but for his desire to kill $B$?\(^{62}\)

I think most of us would view such acquittal as a mockery of justice. Defenses are not intended to provide people with convenient opportunities to commit crimes. And yet, without the concept of malice, it would be hard to deny $A$ full exoneration: all the requirements of the defense are satisfied. Malice here serves as a gatekeeper for manipulations of the legal system.

2. Normativity and Individual Justice

The concept of malice brings normativity and individual justice into the theory of punishment, the two qualities which the largely utilitarian MPC has subordinated to its cost-benefit calculus. Individual justice requires proof of the actor’s blameworthiness, not merely dangerousness, and this determination includes moral judgment which the MPC with its mostly cognitive understanding of culpability could not supply. That led the MPC to miss on many important distinctions.

Consider a classic example discussed in an MPC commentary—only slightly modified: a surgeon who undertakes an extremely risky surgery which he knows is practically certain to result in the death of his patient.\(^{63}\) If the patient indeed dies, under the MPC, the surgeon would be guilty of murder because homicide committed “knowingly” is murder,\(^ {64}\) and to act “knowingly” with respect to a result (death of the patient) means to be aware that it is practically certain that the actor’s conduct will cause such a result.\(^ {65}\) Murder under the MPC is a felony of the first degree punishable by up to life imprisonment.

Bearing in mind the seriousness of the crime and the potential severity of the punishment, wouldn’t it to be appropriate for the court to inquire about the moral reasons behind the surgeon’s decision to go ahead with the surgery? It could be that the surgeon was driven by the sheer desire to harm his patients like the surgeon in *Duntsch v. State*\(^ {66}\) who maimed and killed his patients by intentionally performing surgeries incorrectly. In contrast, it could be that the surgeon took the only chance he had to save his patient’s life by performing the risky surgery. Under the MPC, both surgeons would be equally guilty.

Could the “good” surgeon perhaps benefit from the “choice of evils” provision under Section 3.02? Not really because the harm he sought to avoid (the death of his patient) is not greater than the harm his actions have brought about (the death of his patient). In fact, the latter harm may be

\(^{62}\) I have used this example before in Vera Bergelson, *The Right To Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 230 (2007).

\(^{63}\) MODEL PENAL CODE § 2.02, cmt 3 at 237 (the MPC commentary discusses this as an example of conduct that is not reckless because the risk is justified).

\(^{64}\) MODEL PENAL CODE § 210.2 (1)(a).

\(^{65}\) MODEL PENAL CODE § 2.02(2)(b).

even seen as greater—in the sense that the death happened a few hours or days sooner than it would have without the surgery.

Had the MPC incorporated the concept of malice, the “good” and “evil” surgeons would be easily differentiated. Using the summary of the constitutive elements of malice above, it may be said that each surgeon’s actions involved a free, independent and voluntary choice of a rational agent to act in a certain extremely risky way; however, only the “evil” surgeon had no honest and benevolent reason for such conduct.

Compare two more cases, this time involving the mens rea of purpose, specifically, homicide committed purposely. One is a killing committed out of sheer hatred and sadism; the other is a mercy killing like in State v. Forrest,67 in which the defendant, sobbing with emotion, shot to death his terminally ill father to spare him further hopeless suffering. Under the MPC, both killers are murderers: killing another purposely constitutes murder,68 and a person acts purposely with respect to a result (death of another) if it is his conscious object to cause such a result.69 In both cases, the actors’ conscious object was to cause the death of another. What differed of course was the moral reason for the killing; however, the MPC does not take it into account.

Just like in the example with the “good” surgeon above, the mercy killer would not be able to benefit from the 3.02 choice-of-evils defense. In this case, the defense would be foreclosed because of the primacy of the legislative decision: the legislature has considered the issue of mercy killings and has banned those.70 The mercy killer might try to mitigate the charge of murder to manslaughter due to the “extreme mental or emotional disturbance for which there is reasonable explanation or excuse” (“EMED”)71 but it is uncertain whether this defense would succeed.72 On its face, both the evil killer and the mercy killer would be guilty of the same offense, murder, and subject to the same punishment. Had the MPC contained the concept of malice, the two killings would be treated differently. As a court said: “While intent and malice are both descriptions of the mind, malice denotes a wicked purpose.”73 Under this approach the evil killing would be murder while the mercy killing could be mitigated to manslaughter due to the lack of malice. The doctrine of malice thus brings normativity and individual justice into criminal law which the MPC sometimes fails to do.

3. Coherence

(a) Traces of Malice in the MPC.

68 MODEL PENAL CODE § 210.2 (1)(a).
69 Id. at § 2.02(2)(a).
70 Id. at § 3.02(1)(c) (the defense may be allowed only if a “legislative purpose to exclude the justification claimed does not otherwise plainly appear”).
71 Id. at § 210(3)(1)(b).
72 In State v. Forrest, the court refused mitigation from murder to manslaughter. Forrest, 362 S.E.2d at 255.
Defenses. As the discussion above showed, the only hope for a mercy killer to receive mitigation from murder to manslaughter under the MPC is due to EMED. The EMED provision is an offense-specific mitigator, the MPC version of the traditional “heat of passion” defense. Under the common law, however, the mitigation pursuant to the “heat of passion” was just one embodiment of a much broader concept, the lack of malice. Malice was the overarching doctrine which unified various complete and partial defenses, or put differently, distinguished between the worst evils, lesser evils, and permissible conduct. Without the doctrine of malice, under the MPC, those distinctions stopped being elements of one unifying theory of wrongdoing and instead became independent, detached, and often poorly theorized concepts.

Recklessness v. Knowledge. Take the MPC definitions of mens rea. The definition of recklessness clearly shows traces of the concept of malice: “A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.” The italicized word ensures that the “good” surgeon not be convicted of manslaughter (reckless homicide) for the serious risk he has undertaken by performing an almost hopeless surgery in the hope of saving his patient. Although the surgeon may not be convicted of manslaughter under the MPC, he can be convicted of a more serious crime, namely murder, because the MPC does not have a similar saving provision for a person who acts justifiably but against all odds (i.e. is “practically certain” of the tragic outcome of his efforts).

Recklessness v. Recklessness Manifesting Extreme Indifference to The Value of Human Life. Outside the MPC, the doctrine of malice plays a clarifying role differentiating between plain recklessness qualifying for manslaughter and gross recklessness (or, using the MPC language, recklessness manifesting “extreme indifference to the value of human life”) required for murder. Under the MPC, the two kinds of recklessness are barely distinguishable; yet the difference between the two may cost a defendant significant stigma and many years in prison. Unlike the MPC, state statutes and courts have tried to keep that difference straight by applying the concept of malice. One court explained:

When an individual commits an act of gross recklessness for which he must reasonably anticipate that death to another is likely to result, he exhibits that “wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty” which proved that there was at that time in him “the state or frame of mind termed malice.”

---

74 MODEL PENAL CODE § 210(3)(1)(b).
75 Serawop, 410 F.3d at 664 n. 5. (“Other legally recognized justifications, mitigating factors, or excuses may also preclude a finding of malice but would have different consequences. For example, if a defendant killed in self defense, that killing would also be without malice, but that conclusion would lead to different results.”). See also CROFTS, supra note 6 at 163-210 (discussing historic role of malice in compulsion defenses). “Malice was integral to attributions of blameworthiness, and these same historic structures continue to frame contemporary defences.” Id. at 163.
76 MODEL PENAL CODE § 2.02(2)(c).
77 See KADISH, supra note 3, at 511 (“Common-law formulations of the circumstances under which an unintentional killing constituted murder rather than manslaughter have been incorporated into many American statutes either directly or by reference to such common-law terms as ‘malice.’”).
78 Commonwealth v. Malone, 47 A.2d 445 (Pa. 1946). See also People v. Dellinger, 783 P.2d 200, 201 (Cal. 1989) (applying malice to distinguish between the two kinds of recklessness and finding malice “when the killing results
Applying this principle to cases of deadly drunk driving, the court in United States v. Fleming\(^79\) said:

In the average drunk driving homicide, there is no proof that the driver has acted while intoxicated with the purpose of wantonly and intentionally putting the lives of others in danger. Rather, his driving abilities were so impaired that he recklessly put others in danger simply by being on the road and attempting to do the things that any driver would do. In the present case, however, . . . defendant drove in a manner that could be taken to indicate depraved disregard of human life, particularly in light of the fact that because he was drunk his reckless behavior was all the more dangerous.

Unlike the MPC, both state courts quoted above used the moral inquiry to distinguish between the conduct that was merely irresponsible and the conduct that was intentionally irresponsible and demonstrated the actor’s personal evil design to play with others’ lives. The concept of malice, consistently applied, allows to distinguish both between murder and voluntary manslaughter and murder and involuntary manslaughter.

\(b\) Inconsistency

Consider another issue: why, under the MPC, EMED is not a general principle but merely an offense-specific mitigation? Why does not EMED apply to, say, assault or destruction of property? True, the “heat of passion” or provocation, in most states, is also available only in the context of homicide. Merely a couple of states allow for a lesser form of assault to be charged when the victim provoked the attack or the defendant acted in the heat of passion.\(^80\) However, the drafters of the MPC were not shy to rewrite other mens rea related provisions. Why did they not include EMED in the General Part and put an end to the absurdity of granting a partial defense to a killer but denying it to an actor who, in the identical circumstances, instead of shooting the provoker, slapped him on the face (assault) or threw a valuable vase on the floor (destruction of property)? How can it be reasonably explained that one who has caused a graver injury is entitled to a partial defense, whereas one who has caused a lesser injury is not? As a matter of both logic and public policy, this is an unsatisfactory outcome.

The answer to these questions most likely lies in the approach taken by the drafters of the MPC and articulated by Herbert Packer as “principled pragmatism.”\(^81\) Packer observed that the MPC “provisions reflect an awareness that the discernment of right principles is only the beginning of

---

\(^79\) United States v. Fleming, 739 F.2d 945, 948 (4th Cir. 1984).

\(^80\) See OHIO REV. CODE ANN. §2903.12 (West 2001) (reducing a charge from felonious assault to aggravated assault in case of serious provocation by the victim); KY. REV. STAT. ANN. § 508.040 (LexisNexis 1999) (allowing a reduction in charge when an assault is committed under extreme emotional disturbance); MO. REV. STAT. §565.060 (1999) (allowing a charge of second degree assault instead of first degree assault if the defendant acted under “sudden passion arising out of adequate cause”); COLO. REV. STAT. § 18-3-202(2)(a) (West 1999) (reducing first degree assault from a class three to a class five felony if committed in the heat of passion); \textit{Id.} at §18-3-203(2)(a) (West 1999) (reducing second degree assault from a class four to a class six felony if committed in the heat of passion).

rational lawmaking and that the besetting sin of rationality is the temptation to press a principle to the outer limits of its logic.”82 Concerned about succeeding in reforming American criminal law, the MPC “drafters took care to ground the code firmly in existing law”83 and “frequently sacrificed theoretical consistency for pragmatic expediency.”84

In contrast with the MPC, some courts have applied the defense of provocation across the board and allowed it in contexts not limited to homicide. One relatively common application of provocation has been in connection with intentional destruction of another person’s property, an offense recognized under different names by all American states and the MPC.85 In those decisions, courts applied the doctrine of malice and concluded that provocation defeats malice, thereby constituting a defense against malicious mischief or malicious destruction of property.86 Consider Brown v. United States, in which the District of Columbia appellate court reversed a conviction that stemmed from an incident in which the defendant smashed the front windows and door of her mother’s house in an effort to get inside and take custody of her runaway son.87 The appellate court concluded that the trial court erred in not allowing the defendant to introduce evidence of provocation:

We cannot say that an ordinary, reasonable person, after searching for her son for ten days only to learn that he was staying with her own mother and that her own mother had not only failed to inform her of her son’s whereabouts but also refused to return the boy to the custody of his own parent, could not have been so impassioned by these circumstances as to lose her self-control and, acting without reflection, destroy windows and a door in an attempt to get into her mother’s house and retrieve her lost son.88

According to the court, since malice was an element of the offense and provocation negates malice,
provocation was a proper defense. Moreover, the court said in dicta that provocation should be available whenever an offense involves malice, e.g., in cases of malicious disfigurement and malicious interference with a contract. The MPC has missed on the opportunity to capitalize on the doctrine of malice and build EMED into the structure of the MPC as a general mitigation.

4. Law and Morality

It is important for the law to develop in dialogue with public perceptions of justice and morality. Such dialogue is essential for establishing the moral authority of the law and for using that authority to create moral norms and ensure compliance with them. Historically, law and morality spoke in one voice and crimes were defined in strong evaluative terms, including those constitutive of malice (e.g., “abandoned and malignant heart,” “wanton cruelty,” etc.). The MPC has replaced those normative terms with the descriptive ones and has subordinated the retributive moral values to the utilitarian. Kent Greenawalt has opined that Herbert Wechsler, the main figure behind the MPC, despite his own utilitarianism, was mindful that “no criminal code should drift too radically from the public’s sense of wrongful behavior and of degrees of wrongdoing.” And yet, I wonder whether Wechsler has succeeded in this objective: after all, according to public polls, the community principles of just punishment have been consistently expressed as retributive.

By abandoning malice, the MPC has significantly weakened its link with public morality. Without the concept of malice, it was difficult sometimes to provide satisfactory reasoning for distinguishing between degrees of wrongdoing. Numerous academic debates about the rationales for the defense of provocation or EMED and the reasons for and against abandoning it are just one example of the unclear message the law sends to the community when the law is not grounded in morality. Indeed, if the gradation of the offenses under the MPC reflects the dangerousness or deterrability of potential offenders, it is far from obvious why a person who loses control to the point of killing is less dangerous or more deterrable than the one who acts upon cold reflection.

In contrast, malice understood in moral terms, as one’s “authorship” of an evil design, can help in separating different wrongful actions consistently with “the public’s sense of wrongful

89 Id. at 539.
93 See, e.g., JOHN M. DARLEY et al., INCAPACITATION AND JUST DESERTS AS MOTIVES FOR PUNISHMENT, 24 Law & Hum. Behav. 659 (2000); See also Mark Warr & Mark Stafford, Public Goals of Punishment and Support for the Death Penalty, 21 J. RES. CRIME & DELINQ. 95, 99-101 (1984) (noting that people explicitly name retributivism as the philosophy that should govern punishment in our society).
behavior and of degrees of wrongdoing.” Compare a few examples: in each of them the actor intentionally (purposely) kills an innocent bystander.

1. The actor kills a terminally ill, gravely suffering person out of compassion but without that person’s consent (*State v. Forrest* scenario).
3. The actor kills under duress out of fear to be severely beaten.
4. The actor kills his old enemy out of hatred.
5. The actor kills a successful rival out of jealousy.
6. The actor kills as the only way to inherit the victim’s fortune.
7. The actor kills simply because he enjoys killing.

All these killings are wrongful and impermissible but only in the last four the actors can be said to be the “authors” of evil who have identified with evil and aimed at evil. In the first three examples, either the killing is not aimed at evil (example one) or the killers are not the “authors” (examples two and three). It would be fair to say that, unlike the last four, these first three killings have been committed without malice. That does not mean of course that they do not deserve punishment; that only means that they are not as wrongful as the other killings. Moreover, we can have different opinions about the gradation of evilness in these seven examples but surely the last one is the worst.

This exercise demonstrates at least three important things: one, we can morally distinguish degrees of wrongdoing on the basis of presence or absence of malice; two, malice is not a monolithic concept—malicious acts can be more or less malicious; and three, these moral distinctions are important for our sense of justice. Recall *State v. Forrest*. At the trial, the defendant presented evidence that “upon seeing his father at the hospital, he was overwhelmed by the futile, horrible suffering before him and that, in a highly emotional state, he killed to bring relief to the man he deeply loved.” Nevertheless, he was convicted of first-degree murder and sentenced to life in prison. Both the conviction and the sentence have been upheld on appeal.

Many would probably agree that Forrest did not deserve such a harsh punishment and that justice was not served by it. In contrast, it is very unlikely that an actor who has killed for the sheer joy of killing would be seen as deserving any mitigation. Yet, under the MPC, these two actors have committed the same crime. One could argue that, at the sentencing stage, this injustice can be mitigated and the motives of the two defendants can be taken into account. This is certainly true; however, it is also true that the injustice cannot be eliminated by merely sentencing the mercy killer to a lesser term than the vicious killer. The undeserved conviction of murder and the accompanying it stigma of a murderer are punishment in itself. The very fact that the mercy

---

96 *But see Forrest*, 362 S.E.2d at 256 (“We are unwilling to hold that, as in the case at bar, where defendant kills a loved one in order to end the deceased's suffering, adequate provocation to negate malice is necessarily present.”).
97 *See, e.g.*, *Moore, supra* note 61, at 408 (opining that “[k]illing or torturing, or disfiguring for the sheer joy of it seems rather paradigmatic of true evil”).
98 *Forrest*, 362 S.E.2d at 255.
killer has been convicted of the same crime as the worst possible vicious killer is already injustice, the injustice that could be avoided had the MPC retained the concept of malice.

4. How Could the MPC Incorporate Malice?

How could the MPC incorporate malice? On the one hand, this is a silly question: the MPC, as designed, could not do that. On the other hand, perhaps there was a way to incorporate malice and, as a result, end up with a different (and in my view, enriched) MPC. In the latter case, malice should have been included in the General Provisions, article 2, which covers the fundamental principles of criminal liability. It is not my goal here to suggest a specific definition of malice; however, such definition, as discussed above, should reflect the qualities of the actor’s free choice, “authorship,” and the lack of an honest and benevolent reason for the actor’s actions. If the need be, malice may be defined in negative terms, similarly to how a “voluntary act” is defined in section 2.01(2).99

Two more points are worth mentioning: (i) malice is not just a motive; and inclusion of malice in a penal code does not require including other motives; and (ii) malice is not reducible to “unlawfulness.” Many scholars have argued that criminal law should be more sensitive to motives,100 and perhaps it should, but this is not what I am arguing here. Even though the MPC has rejected motives as elements of mental states, it still could have included malice as a very special kind of moral reasoning directly linked to the essence of the crime. Malice is what exacerbates an offense; and conversely, its absence mitigates an offense. Malice is also something that destroys defenses (all justifications and all partial defenses with at least some elements of justification).101 Whereas motives may provide certain, often remote and self-contradictory, guidance as to one’s action-guiding states (as in the seven examples of purposeful killing above), malice is directly linked with wrongfulness and culpability.

As for the concept of unlawfulness widely employed by the MPC, it cannot replace malice or solve the problems discussed in this paper. First, as the definition of “unlawful force” shows, this concept under the MPC only means violation of one’s personal autonomy and other rights protected by law.102 It does not deal with moral reasons for the actor’s actions. And secondly, “unlawfulness” does not distinguish between more and less serious wrongs—both kinds are unlawful. The actions of the mercy killer and the vicious killer are equally unlawful but clearly the vicious killing is much more wrongful—it involves not only a violation of the victim’s rights but also the specific desire to set back the victim’s interests.

Conclusion

99 MODEL PENAL CODE § 2.01(2) (listing movements that are not “voluntary acts” within the meaning of that section).
100 See, e.g., Binder, supra note 9; Carissa Byrne Hessick, Motive’s Role in Criminal Punishment, 80 S. CAL. L. REV. 89 (2006).
101 See supra note 55 regarding proper characterization of duress.
102 MODEL PENAL CODE § 3.11 (“unlawful force” means force, including confinement, that is employed without the consent of the person against whom its directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense . . . not amounting to a privilege to use the force”).
The MPC reform, particularly its revision of the culpable mental states, was an enormous accomplishment; however, together with the arcane, flowery common-law terms, the drafters may have thrown out some important concepts. In this paper, I have suggested that malice is one such concept. Encompassing the free, unobstructed choice of the actor to do evil, the concept of malice brings normativity, individual justice, and coherence to the criminal law doctrine. The resilience of the concept of malice in the substantive criminal law, sentencing, and torts law suggests that the moral inquiry presented by that concept is important to the community sense of justice. The MPC would have gained in its moral depth and nuance had it incorporated the concept of malice; and the concept of malice would have gained in clarity and precision had the MPC drafters chosen to capture its unique moral meaning and define it as one of the general principles of criminal liability.