

# The Depths of Malice

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## INTRODUCTION

The Model Penal Code (“MPC”) revision of the traditional mens rea provisions has been almost uniformly recognized as an immense success.<sup>1</sup> 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.<sup>2</sup> The MPC framework has been extremely influential: it “has been adopted explicitly in more than half of American jurisdictions, and it often [guides] judicial interpretation [of mens rea] in the remaining jurisdictions as well.”<sup>3</sup> However, the MPC may have lost some important insights in departing from the traditional mens rea criteria.<sup>4</sup>

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.

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1. See, e.g., Joshua Dressler, *The Model Penal Code: Is It Like a Classic Movie in Need of a Remake?*, 1 OHIO ST. J. CRIM. L. 157, 157 (2003) (characterizing “the MPC drafters’ work on mental state categories [as] their greatest gift to the American criminal law”); Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 179 (2003).

2. MODEL PENAL CODE § 2.02 (AM. L. INST., Official Draft and Revised Comments 1985).

3. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 272 (10th ed. 2016).

4. Simons, *supra* note 1, at 179.

## I. THE HISTORIC MEANING OF MALICE

The meaning of the term “malice” has changed dramatically since its early use in medieval England.<sup>5</sup> While there is no agreement among scholars as to its exact original meaning,<sup>6</sup> most concur that, in general terms, *malitia* (medieval malice) signified “wickedness,” or some generally immoral, inexcusable act.<sup>7</sup> 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.”<sup>8</sup>

Similarly, in the eighteenth century, Blackstone associated the term malice with “an open-ended inquiry into the moral quality of defendant’s motivation.”<sup>9</sup> Thus malicious mischief for him required “a spirit of wanton cruelty or black diabolical revenge.”<sup>10</sup> 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.”<sup>11</sup> This wanton cruelty, diabolic revenge, or evil design, however, did not mean “some additional quality of depravity;”<sup>12</sup> instead, for Blackstone, it underscored the actor’s unimpaired volition.<sup>13</sup>

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.<sup>14</sup> 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

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5. Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 457 (1976) (tracing the term back to the Statute of 1390).

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 (2015).

7. *Id.* (citing J.M. Kaye, *The Early History of Murder and Manslaughter: Part I*, 83 LAW Q. REV. 365, 372 (1967)).

8. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 997 (1932).

9. Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 18 (2002).

10. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*198–99, \*244).

11. *Id.*

12. *Id.* at 19.

13. *Id.*

14. CROFTS, *supra* note 6, at 118 (“With regard to malice, Stephen is regarded as a primary authority on its history and substance, and it is his negative and derogatory construction of malice that tends to be cited.”).

the old moral order of criminal law.”<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup>

The positivist model of criminal law promulgated by Stephen has gradually prevailed. *Mens rea* has come to mean various cognitive states.<sup>18</sup> Malice has been reinterpreted as actual intent or recklessness.<sup>19</sup> An influential early twentieth 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).<sup>20</sup>

In his 1932 seminal article, Francis Bowes Sayre illustrated that change:

For instance . . . the *malitia* required for arson in the early days referred clearly 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 aforethought” today is no longer an underlying evil motive,

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15. *Id.* at 125. Crofts also observes that Stephen “aimed to apply the principles of science to law, to impose order, reason and objectivity.” *Id.* at 119.

16. SIR JAMES FITZJAMES STEPHEN, *A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENTS)* 383–84 (Fred B. Rothman & Co. 1991) (1878).

17. CROFTS, *supra* note 6, at 120.

18. *See* 21 AM. JUR. 2D *Criminal Law* § 112, Westlaw (database updated Feb. 2021).

19. *See Malice*, BLACK’S LAW DICTIONARY (11th ed. 2019).

20. *R v. Cunningham* [1957] 2 QB 396 at 399 (Eng.) (quoting C.S. KENNY, *OUTLINES OF CRIMINAL LAW* 186 (J.W. Cecil Turner ed., 16th ed. 1952) (1902)).

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.<sup>21</sup>

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 the MPC mens rea concepts),<sup>22</sup> in the meaning of either intentionality or an evil motive.<sup>23</sup>

Generally (though not invariably), courts interpret malice as intent or recklessness, or the foresight of the prohibited consequence.<sup>24</sup> However, there is no one settled understanding of the term. For instance, in *United States v.*

21. Sayre, *supra* note 8, at 1019 n.184.

22. See, e.g., S.D. CODIFIED LAWS § 22-1-2(1)(f) (2021) (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.*

23. See, e.g., GA. CODE ANN. § 16-12-4(a)(2) (2021) (“‘Malice’ means: (A) An actual intent, which may be shown by the circumstances connected to the act, to cause the particular harm produced without justification or excuse; or (B) The 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 (West 2021) (“(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature. (2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”); OKLA. STAT. tit. 21, § 701.7(A) (2021) (“Malice is that 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. tit. 14, § 111(6) (2021) (“‘Malicious’ means conduct characterized by or involving malice cruelty, hostility or revenge.”); NEV. REV. STAT. § 193.0175 (2021) (“‘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.”).

24. KADISH ET AL., *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.”).

*Gray*,<sup>25</sup> the defendant was prosecuted under a federal statute that made it a crime to give “maliciously” false information<sup>26</sup> about a bomb threat on an 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”).<sup>27</sup> The defendant, in contrast, argued that to act “maliciously” meant “to do something with an evil purpose or motive.”<sup>28</sup> 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.<sup>29</sup> 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*] 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.<sup>30</sup>

*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;<sup>31</sup> another simply equating malice with intent or recklessness;<sup>32</sup> and finally, the third, represented by the *Gray* dissenters and numerous legal authorities starting with Blackstone,<sup>33</sup> signifying the absence of a legal defense or mitigation. “Malice is not satisfied simply by killing

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25. 780 F.3d 458 (1st Cir. 2015).

26. 49 U.S.C. § 46507(1).

27. *Gray*, 780 F.3d at 464–65.

28. *Id.* at 463.

29. *Id.* at 463, 470.

30. *Id.* at 467 (footnote omitted) (citations omitted) (citing *United States v. Grady*, 746 F.3d 846, 848–50 (7th Cir. 2014)).

31. See *supra* note 23 and accompanying text.

32. See KADISH ET AL., *supra* note 3, at 264.

33. See Binder, *supra* note 9, at 18–20.

with an intentional or reckless mental state; instead, malice specifically requires committing the wrongful act without justification, excuse, or mitigation[,]” said the court in *United States v. Serawop*.<sup>34</sup> 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*], 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 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.<sup>35</sup>

This brief review reveals several important themes. The concept of malice has undergone a major transformation from its early use in medieval England<sup>36</sup> to nowadays.<sup>37</sup> The dominant trend in this transformation has been consistent with the general transformation of the meaning of culpability in criminal law.<sup>38</sup> 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).<sup>39</sup> 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.<sup>40</sup> The concept of malice has survived various reinterpretations and legal reforms, including the MPC, yet its meaning has become quite murky

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34. *United States v. Serawop*, 410 F.3d 656, 664 (10th Cir. 2005) (citing numerous authorities, including 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.”); *Malice*, BLACK’S LAW DICTIONARY (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, 216 (1977) (defining malice as a “lack of provocation”)).

35. *Serawop*, 410 F.3d at 664 (citation omitted) (citing *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985)).

36. Robert John Araujo, *Statutory Making and Interpretation: The Lessons of 1533–35 for the Present Age*, 83 MISS. L.J. 543, 585–86 (2014).

37. *Serawop*, 410 F.3d at 664.

38. See Binder, *supra* note 9, at 10–11.

39. See *id.*

40. *Id.* at 20.

and uncertain.<sup>41</sup> 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.<sup>42</sup> And yet, the relevance of malice as a legal concept is evidenced by its resilience both in penal codes<sup>43</sup> and torts statutes.<sup>44</sup> Many jurisdictions include malice in sentencing statutes.<sup>45</sup>

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.

## II. 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

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41. See, e.g., Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 34 (2001); see also *Serawop*, 410 F.3d at 662 (“Today, malice still distinguishes federal murder from federal manslaughter.”); *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985) (articulating malice as element of both first and second degree murder); 18 U.S.C. § 1112 (defining both voluntary and involuntary manslaughter as “without malice”).

42. See, e.g., GA. CODE ANN. § 16-12-4(a)(2) (2021) (defining malice in the context of cruelty to animals); CAL. PENAL CODE §§ 136–139 (West 2021) (employing malice in the context of the crime of intimidating or threatening witnesses); DEL. CODE ANN. tit. 11, §§ 3531–3533 (2021) (limiting the use of malice to the crime of witness and victim intimidation); FLA. STAT. § 874.03 (2021) (employing malice to identify a gang or “hate group”); LA. STAT. ANN. §§ 14:204–205 (2021) (using malice in reference to the mens rea necessary for conviction of fire-raising); MICH. COMP. LAWS §§ 750.233–235, 750.329 (2021) (employing malice in crimes involving firearms); MO. REV. STAT. §§ 571.117, 571.225 (2021) (requiring malice only in regard to sheriff liability); OR. REV. STAT. §§ 133.315, 166.190, 166.412, 166.421, 166.436 (2021) (limiting malice to define liability of a peace officer and in firearm offenses).

43. See, e.g., CAL. PENAL CODE § 188 (West 2021) (stating that express malice is manifested by “a deliberate intention to unlawfully take away the life of a fellow creature” and implied malice is present “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart”); WYO. STAT. ANN. § 6-2-105 (2021) (“A person is guilty of manslaughter if he unlawfully kills any human being without malice, expressed or implied.”); S.C. CODE ANN. § 16-3-50 (2021) (defining manslaughter through lack of malice); NEB. REV. STAT. § 28-305 (2021) (same); D.C. CODE § 22-2101 (2021) (including malice in the definition of murder in the first degree); COLO. REV. STAT. § 18-3-102 (2021) (same).

44. 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 § 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.*

45. ARIZ. REV. STAT. ANN. § 13-701 (2021) (increasing the sentence for offenders who committed a crime out of malice); COLO. REV. STAT. § 18-1.4-102 (2021) (“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 . . .”).

and simplifying the concept of mens rea by *limiting the number* of culpable mental states.<sup>46</sup> 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.<sup>47</sup> The sheer number and variety of statutory mental states created confusion and uncertainty for juries and courts alike. Malice was seen as one of the culprits responsible for “the obscurity with which the culpability requirement was often treated.”<sup>48</sup>

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 primarily as a *cognitive* matter devoid of the emotional or moral component.<sup>49</sup> Under the MPC, the focus of mens rea inquiry is on one’s cognitive relationship to the criminal conduct, result, and attending circumstances.<sup>50</sup> If this relationship is characterized by purpose, knowledge, recklessness, or negligence, no 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.”<sup>51</sup> Under the MPC, a person is *prima facie* criminally liable if he acts with a certain mental state toward an unlawful end.<sup>52</sup> 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 “ha[s] displayed the same symptom of dangerousness.”<sup>53</sup> To give just a few examples—

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46. MODEL PENAL CODE § 2.02 cmt. 1, at 230 (AM. L. INST. 1985) (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”).

47. *Id.* at 230, n.3.

48. *Id.* at cmt. 1.

49. To be clear, the MPC provisions covering defenses and mitigations allow for an inquiry into the moral and emotional reasons of one’s actions, but the four levels of mens rea are almost entirely cognitive.

50. *See* MODEL PENAL CODE § 2.02.

51. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 325 (2007).

52. *See* MODEL PENAL CODE § 2.02.

53. Robinson & Dubber, *supra* note 51.



- An attempt, including an impossible attempt, is punishable under the MPC as severely as a completed offense.<sup>54</sup>
- 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).<sup>55</sup> 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).<sup>56</sup>
- Finally, the theory of complicity follows the same unilateral logic of responsibility: a person is guilty of a crime if, “with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid” others to commit the offense.<sup>57</sup> 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.<sup>58</sup>

The consistently utilitarian logic of the MPC puts the emphasis on identifying and isolating potentially dangerous offenders; the actual amount of harm plays a very minor role in the MPC world. It is the logic of prevention, not desert.<sup>59</sup> Not surprisingly, the concept of malice with its focus

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54. MODEL PENAL CODE §§ 5.05(1), 5.05(2) (except for felonies of the first degree and except for those acts that the court in its discretion mitigates to a lower grade or degree); *see also* Robinson & Dubber, *supra* note 51, 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”).

The code’s policy makes good sense if one’s focus is on rehabilitation and incapacitation of the dangerous—an offender may be equally dangerous whether or not his conduct in fact causes the harm intended or risked. On the other hand, if the criminal law is to capture the community’s sense of justice, then the community’s shared intuition that resulting harm does matter cannot be ignored.

*Id.*

55. MODEL PENAL CODE § 5.02(2) (covering uncommunicated solicitation).

56. *See id.* § 5.03(1) (requiring a person to come to an agreement with another person).

57. *Id.* § 2.06(3)(a)(ii).

58. *Id.* § 5.01(3).

59. Admittedly, this conclusion is affected by my belief that one’s desert depends not only on one’s culpability but also on the amount of harm resulting from one’s actions. This

on blameworthiness—and thus desert—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,<sup>60</sup> no conduct is beyond justification. Rape, torture, or murder of an innocent person 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."<sup>61</sup> The evil component of the MPC "choice of evils" defense is understood pragmatically in contrast with the moral evil of malice.

### III. 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 meaning not reducible to other legal terms. We then need to evaluate the importance of so understood malice in the structure of criminal law. And finally, assuming there is a value lost, we need to consider what might be the proper place for malice in the organization of the MPC.

#### A. *The Meaning of Malice*

Let's consider a few contexts in which malice has historically played and has still retained an independent, morally significant substantive meaning. That meaning is usually expressed in 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."

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understanding of desert is shared by many but not all. The alternative view is that culpability alone determines one's desert. *See, e.g.*, LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, WITH STEPHEN MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* (2009). For detailed analysis of the two competing views, see, for example, MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 191–247 (1997). Note, however, that the adherents of this competing view of desert would also have powerful reasons to endorse the concept of malice, which specifically focuses on one's culpability.

60. MODEL PENAL CODE § 3.02(1)(a).

61. *Id.* cmt. 3, at 15.

*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 and 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.<sup>62</sup> Under the MPC, that difference would be the lack of “extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”<sup>63</sup> 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; and 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.<sup>64</sup>

*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.<sup>65</sup>

*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

62. See, e.g., KADISH ET AL., *supra* note 3, at 468.

63. MODEL PENAL CODE § 210.3(1)(b) (defining manslaughter as “a homicide which would otherwise be murder . . . committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse”).

64. See, e.g., *State v. Ryan*, 543 N.W.2d 128 (Neb. 1996), *overruled on other grounds by State v. Burlison*, 583 N.W.2d 31 (Neb. 1998); *Branch v. Commonwealth*, 419 S.E.2d 422 (Va. Ct. App. 1992). Both cases hold that malice may be shown by (i) acting deliberately with a calm mind or with a plan, or (ii) committing a purposeful and cruel act without any or without great provocation.

65. See, e.g., CAL. PENAL CODE § 188, cmt. 5, at 13 (West 2021) (pointing out that gross negligence and implied malice, “although bearing a general similarity, are not identical”). Moreover, under some statutes and court opinions, malice requires more than ordinary recklessness. See *infra* notes 93–96 and the accompanying text.

Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence. . . . A finding of gross negligence is made by applying an objective test . . . [while] a finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved . . .

*People v. Watson*, 637 P.2d 279, 283 (Cal. 1981) (citations omitted) (same). In addition, see notes 98–105 and accompanying text for the position taken by some legislatures and courts that, at least with respect to homicide offenses, malice requires a higher degree of subjective culpability than ordinary recklessness.

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.<sup>66</sup> Malice, accordingly, signifies harmfulness without a “good” reason.

*Excuses.*<sup>67</sup> 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.<sup>68</sup> For example, central to a claim of duress is that the actor intended but did not *want* to break the law;<sup>69</sup> 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.<sup>70</sup> 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.

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66. See generally CAL. PENAL CODE § 188 (West 2021).

67. I list duress under “excuses,” which is the traditional view; however, as I have argued elsewhere, properly characterized, duress should be treated as a mitigation of partial justification and partial excuse. See Vera Bergelson, *Duress Is No Excuse*, 15 OHIO ST. J. CRIM. L. 395 (2018).

68. See, e.g., 18 PA. CONS. STAT. § 2503(b) (2021) (reducing murder to voluntary manslaughter for an honest but unreasonable mistake in self-defense); *State v. Faulkner*, 483 A.2d 759, 761 (Md. 1984) (holding that the honest but unreasonable belief, although not a complete defense, “mitigates murder to voluntary manslaughter”); Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57, 82 (2010) (“Because the defender is partially justified in his commission of reactive violence, and because he is mistaken as to the degree of force warranted by the threat, he should not be convicted of the charge of murder, but rather the lesser charge of voluntary manslaughter.”).

69. Penny Crofts makes a similar observation in CROFTS, *supra* note 6, at 260.

70. See, e.g., MODEL PENAL CODE § 2.09(1) (AM. L. INST. 1985).

## B. The Value of Malice

### 1. Malice as a Gatekeeper

Some legal concepts are dramatic game-changers. One well recognized example is consent.<sup>71</sup> Malice may be another. In fact, in many ways, malice is akin to consent, only with the opposite sign. Like consent,<sup>72</sup> malice (i) is attitudinal; (ii) requires capacity; and (iii) 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.<sup>73</sup>

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,<sup>74</sup> is driven by malice. Here is a scenario: suppose *A* hates *B* and wants him dead. Knowing that *B* frequents a certain 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*?<sup>75</sup>

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

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71. See, e.g., Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal that Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503, 504 (2005) (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 AS APPLIED IN JUDICIAL REASONING* 39 (1964).

72. See Vera Bergelson, *The Meaning of Consent*, 12 OHIO ST. J. CRIM. L. 171, 172–73 (2014); Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 124 (1996); Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 166 (1996). But see Nathan Brett, *Sexual Offenses and Consent*, 11 CANADIAN J.L. & JURIS. 69, 69 (1998); ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 144–62 (2003) (arguing that consent is performative, not attitudinal).

73. See Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289, 355 (2006).

74. MOORE, *supra* note 59, at 407 (naming three kinds of action-guiding states defining moral culpability: desire, belief, and intention).

75. 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).

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 that 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 that the MPC with its mostly cognitive understanding of culpability could not supply. That has 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 that he *knows* is practically certain to result in the death of his patient.<sup>76</sup> If the patient indeed dies, under the MPC, the surgeon would be guilty of murder because homicide committed “knowingly” is murder,<sup>77</sup> 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.<sup>78</sup> Murder under the MPC is a felony of the first degree punishable by up to life imprisonment.<sup>79</sup>

Bearing in mind the seriousness of the crime and the potential severity of the punishment, would it not 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 people, like the surgeon in *Duntsch v. State* who maimed and killed his patients by intentionally performing surgeries incorrectly.<sup>80</sup> 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 even be seen as

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76. MODEL PENAL CODE § 2.02, cmt. 3, at 237 (AM. L. INST. 1985) (discussing this scenario as an example of conduct that is not reckless because the risk is justified).

77. *Id.* § 210.2(1)(a).

78. *Id.* § 2.02(2)(b).

79. *Id.* §§ 210.2(2), 6.06(1).

80. *Duntsch v. State*, 568 S.W.3d 193, 198–200 (Tex. Ct. App. 2018).

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 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*, in which the defendant, sobbing with emotion, shot to death his terminally ill father to spare him further hopeless suffering.<sup>81</sup> Under the MPC, both killers are murderers: killing another purposely constitutes murder,<sup>82</sup> and a person acts purposely with respect to a result (death of another) if it is his conscious object to cause such a result.<sup>83</sup> In both cases, the actor’s 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 this into account.

Just like in “good” surgeon example above, the mercy killer would not be able to benefit from the section 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.<sup>84</sup> 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”),<sup>85</sup> but it is uncertain whether this defense would succeed.<sup>86</sup> 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, “[w]hile intent and malice are both descriptive of the mind, malice denotes a wicked purpose . . . .”<sup>87</sup> Under this approach, the evil killing would be murder while the mercy killing could be mitigated to manslaughter due to the lack of

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81. *State v. Forrest*, 362 S.E.2d 252, 254–55 (N.C. 1987).

82. MODEL PENAL CODE § 210.2(1)(a).

83. *Id.* § 2.02(2)(a).

84. *Id.* § 3.02(1)(c) (stating that the defense may be allowed only if “a legislative purpose to exclude the justification claimed does not otherwise plainly appear”).

85. *Id.* § 210.3(1)(b).

86. In *State v. Forrest*, the court refused mitigation from murder to manslaughter. 362 S.E.2d at 256.

87. *State v. Snouffer*, 27 Ohio Dec. 386, 390 (Ct. C.P. 1917).

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.*

*Defenses.* As the discussion above shows, the only hope for a mercy killer to receive mitigation from murder to manslaughter under the MPC is due to EMED.<sup>88</sup> The EMED provision is an offense-specific mitigator, the MPC version of the traditional heat-of-passion defense.<sup>89</sup> Under the common law, however, the mitigation pursuant to the “heat of passion” defense was just one embodiment of a much broader concept: the lack of malice.<sup>90</sup> Malice was the overarching doctrine that unified various complete and partial defenses, or put differently, distinguished between the worst evils, lesser evils, and permissible conduct.<sup>91</sup> Without the doctrine of malice, under the MPC, various defenses have lost their interconnection, stopped being parts of one unifying theory of wrongdoing, and instead became independent, detached, and often poorly theorized concepts. It is noteworthy that most states have chosen not to follow the MPC EMED provision.<sup>92</sup>

*Recklessness v. Knowledge.* Traces of the concept of malice can be seen in the MPC definitions of mens rea. Take, for instance, the definition of recklessness: “A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and *unjustifiable* risk

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88. MODEL PENAL CODE § 210.3(1)(b).

89. *See id.* § 210.3(1)(b).

90. *See, e.g.,* White v. State, 40 S.E.2d 782, 785 (Ga. Ct. App. 1946) (“[V]oluntary manslaughter under either phase, a sudden heat of passion or irresistible passion under mutual combat, is based on the lack of malice and involves the taking or attempting to take human life without malice.”).

91. United States v. Serawop, 410 F.3d 656, 664 n.5 (10th Cir. 2005) (“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 the 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.

92. Of the thirty-four jurisdictions that revised their criminal codes in the post-MPC era, only five have enacted extreme emotional disturbance defenses matching the EMED, and only a dozen more adopted some features of the EMED but with significant changes. LAW COMM’N, PARTIAL DEFENCES TO MURDER 41 n.36 (2004), [http://www.lawcom.gov.uk/app/uploads/2015/03/lc290\\_Partial\\_Defences\\_to\\_Murder.pdf](http://www.lawcom.gov.uk/app/uploads/2015/03/lc290_Partial_Defences_to_Murder.pdf) [<https://perma.cc/976H-J4YW>].



that the material element exists or will result from his conduct.”<sup>93</sup> The italicized word necessitates the moral evaluation of the reasons for the risk taking and thus ensures that the “good” surgeon not be convicted of manslaughter (reckless homicide) for the extremely dangerous surgery he has performed in the hope of saving his patient. Although the surgeon may not be convicted of manslaughter under the MPC, he may 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).

*b. Grading: Recklessness v. Recklessness Under Circumstances Manifesting Extreme Indifference to the Value of Human Life.*

The doctrine of malice may provide a tool for distinguishing between different degrees of recklessness, and in the context of homicide, for setting apart ordinary recklessness qualifying for manslaughter and gross recklessness required for murder.

Under the MPC, the difference between the two kinds of recklessness—and accordingly, the two kinds of homicide—is rather murky.<sup>94</sup> The homicide is manslaughter if the offender “consciously disregards a substantial and unjustifiable risk”<sup>95</sup> that his conduct will result in a death. The homicide is murder if committed recklessly “under circumstances manifesting extreme indifference to the value of human life.”<sup>96</sup> Such circumstances are not defined but, as a matter of illustration, are presumed if the offender “is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.”<sup>97</sup>

On reflection, this illustration is not very helpful. First, all it does is provide a rebuttable presumption of recklessness and extreme indifference, but such presumption is meaningless unless there is a freestanding standard that the defendant may use in rebuttal. And second, the presumption used in the illustration of this “recklessness-plus” is overly broad, unwarranted, and ultimately unnecessary. By consciously making the choice to disregard a

93. MODEL PENAL CODE § 2.02(2)(c) (emphasis added).

94. *Id.* § 210.2 cmt. 4, at 21–22 (“[R]ecklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and . . . less extreme recklessness should be punished as manslaughter.”); see also KADISH ET AL., *supra* note 3, at 512 (“Courts applying the MPC approach have had a hard time with these issues.”).

95. MODEL PENAL CODE §§ 2.02(2)(c), 210.3(1)(a).

96. *Id.* § 210.2(1)(b).

97. *Id.*

*substantial and unjustifiable* risk of the victim's death, the offender plainly exhibits "indifference to the value of human life." Thus, the "indifference to the value of human life" language is superfluous in the definition of reckless murder; what distinguishes reckless murder from reckless manslaughter is that, for the former, the indifference has to be "extreme," while for the latter it does not. But determining the relative magnitude and quality of the offender's recklessness and indifference requires a normative moral foundation that the MPC does not provide.

Unlike the MPC, state statutes and courts have utilized the concept of malice to try to keep the difference between murder and manslaughter straight.<sup>98</sup> True, these attempts have been neither consistent nor unanimous: in some statutes and for some courts, malice is an element of both murder and involuntary manslaughter; for others, it is only present in murder.<sup>99</sup> Both approaches may have merit. On the one hand, there is a strong argument that a person who chooses to disregard a substantial and unjustifiable risk of someone's death exhibits a moral failing associated with malice; on the other hand, it is conceptually odd to hold that *involuntary* manslaughter involves malice while *voluntary* manslaughter lacks it. Under the traditional rules, recklessness of any degree encompasses malice,<sup>100</sup> a result of the historical expansion of the doctrine of malice from actual to implied intent.<sup>101</sup>

In my view, the drafters of a consistent and morally attuned penal code would be justified in excluding ordinary recklessness and limiting the application of the doctrine of malice to "recklessness-plus" (as in fact some

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98. See *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 from an intentional act . . . which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life"). Compare, e.g., 18 U.S.C. § 1112(a) (providing that manslaughter, either voluntary or involuntary, is "the unlawful killing of a human being without malice"), with *id.* § 1111(a) (providing that murder is "the unlawful killing of a human being with malice aforethought").

99. See *KADISH ET AL.*, *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.'"); 18 U.S.C. § 1112(a) (providing that manslaughter, either voluntary or involuntary is "the unlawful killing of a human being without malice"); NEB. REV. STAT. § 28-305 (2021) (implying that unintentional manslaughter involves malice); see also *Commonwealth v. Malone*, 47 A.2d 445, 447 (Pa. 1946) (justifying conviction of second-degree murder, and not manslaughter, by the presence of "the state or frame of mind termed malice").

100. See, e.g., *R v. Cunningham* [1957] 2 QB 396 (Eng.).

101. See, e.g., *R v. Pembliton* [1874] LR 2 CCR 119 (Eng.) (interpreting "maliciously" as requiring proof of intent but also holding that intent could be shown by proof of a reckless disregard for a foreseeable risk); see also *CROFTS*, *supra* note 6, at 121–24 (discussing revision of the meaning of "malice" in Stephen's works which, among other things, added "cruel recklessness" to the intentional cruel act).

statutes do).<sup>102</sup> However, even without this change, we can certainly identify *more malicious* acts (and accordingly, more serious offenses) by looking at their moral, in addition to their cognitive, qualities.<sup>103</sup> Compare, for instance, two actors—one who chooses certain conduct *despite* the risks it presents to others, and the other who chooses certain conduct specifically *because* of those risks. Clearly, the second actor is more culpable. Applying this principle to cases of homicide caused by drunk driving, the court in *United States v. Fleming* 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.<sup>104</sup>

Unlike the MPC, which offers an amorphous and essentially quantitative distinction between the gross and ordinary kinds of recklessness (in the absence of a guiding moral principle, the fact that one kind of recklessness is “extreme” while the other is not may be interpreted only in quantitative terms), the *Fleming* court used the moral inquiry to explore the *meaning* of the defendant’s reckless driving.<sup>105</sup> That inquiry allowed the court to distinguish between the conduct that is (a) merely irresponsible and (b) *intentionally* irresponsible pursuant to the actor’s *evil design* to play with others’ lives. The doctrine of malice here provides tools for categorical evaluation of one’s moral culpability.

Using the doctrine of malice to distinguish between different kinds of recklessness has one more advantage over the MPC scheme: the higher degree of recklessness does not have to be limited to homicide. One can play “Russian Roulette” in other areas of life too. For example, there is a significant moral difference between an offender who acts recklessly about his sexual partner’s consent due to, say, his own intoxication, and an offender

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102. For examples of statutes that define manslaughter as killing without malice, see sources cited *supra* note 98.

103. For an interesting proposal to develop a set of specific criteria for varying degrees of recklessness (“culpable indifference”), see Kenneth W. Simons, *Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”?: Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 BUFF. CRIM. L. REV. 219, 306–13 (2002).

104. *United States v. Fleming*, 739 F.2d 945, 948 (4th Cir. 1984).

105. *Id.*

who acts recklessly *on purpose*, because he finds this uncertainty (the risk of having nonconsensual sex) sexually thrilling.

In sum, the concept of malice, consistently applied, fulfills two important functions: it distinguishes between (a) criminal and non-criminal behavior; and (b) greater and lesser criminal liability.

*c. Inconsistency*

Consider another issue: why, under the MPC, is EMED not a general principle but merely an offense-specific mitigation? Why does EMED not apply to, say, assault or destruction of property? True, the “heat of passion” or provocation, in most states, is also available just in the context of homicide. Only 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.<sup>106</sup> 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 defense, whereas one who has caused a lesser injury is not? As a matter of both logic and public policy, this outcome is seriously flawed.<sup>107</sup>

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.”<sup>108</sup> Packer observed that the MPC “provisions reflect an awareness that the discernment of right principles is only the beginning of rational lawmaking and that the besetting sin of rationality is the temptation to press a principle to the outer limits of its logic.”<sup>109</sup> Concerned about

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106. See OHIO REV. CODE ANN. § 2903.12 (West 2021) (reducing a charge from felonious assault to aggravated assault in case of serious provocation by the victim); KY. REV. STAT. ANN. § 508.040 (West 2021) (allowing a reduction in charge when an assault is committed under extreme emotional disturbance); MO. REV. STAT. § 565.052 (2021) (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) (2021) (reducing first-degree assault from a class three to a class five felony if committed in the heat of passion); *id.* § 18-3-203(2)(a) (reducing second-degree assault from a class four to a class six felony if committed in the heat of passion).

107. For a more detailed discussion of this, see Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 432–36 (2005).

108. See Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594 (1963).

109. *Id.*

succeeding in reforming American criminal law, the MPC “drafters took care to ground the code firmly in existing law and frequently sacrificed theoretical consistency for pragmatic expediency.”<sup>110</sup>

In contrast with the MPC, some courts have applied the defense of provocation across the board and allowed it in contexts other than 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.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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

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110. Robinson & Dubber, *supra* note 51, at 325.

111. See, e.g., GA. CODE ANN. § 16-7-21 (2021) (criminal trespass); *id.* § 16-7-23(a)(1) (criminal damage to property in the second degree); KAN. STAT. ANN. § 21-5813 (2021) (criminal damage to property); LA. STAT. ANN. § 14:56 (2021) (simple criminal damage to property); N.C. GEN. STAT. § 14-127 (2021) (willful and wanton injury to real property); *id.* § 14-160 (willful and wanton injury to personal property); W. VA. CODE § 61-3-30 (2021) (injury to or destruction of property); see also MODEL PENAL CODE § 220.3(1)(b) (AM. L. INST. 1985) (providing that a person is guilty of criminal mischief if he “purposely or recklessly tampers with tangible property of another so as to endanger person or property”); Bergelson, *supra* note 107, at 433.

112. See, e.g., Thomas v. State, 30 Ark. 433, 435 (1875) (finding that malicious mischief is not committed when the act was done under provocation); Mosely v. State, 28 Ga. 190, 192 (1859) (holding that “injuries inflicted upon personal property in a passion, or under reasonable provocation, stand . . . upon different footing”); State v. Martin, 53 S.E. 874, 876 (N.C. 1906) (holding that malicious mischief is not committed when such act is prompted or done “under the influence of sudden aroused passion”). In each of these cases, provocation completely exonerated the defendant—a result quite different from its usual effect.

113. See *Brown v. United States*, 584 A.2d 537, 544 (D.C. 1990). For contrary treatment of the same issue, see, for example, Denny v. State, 486 S.E.2d 417, 420 (Ga. Ct. App. 1997) (holding that “standard charges on provocation do not pertain to property offenses”); State v. Bourg, 615 So. 2d 957, 961 (La. Ct. App. 1993) (holding that harassment of the defendant by the victim was not a defense to a charge of aggravated criminal damage to property).

without reflection, destroy windows and a door in an attempt to get into her mother's house and retrieve her lost son.<sup>114</sup>

According to the court, since malice was an element of the offense and provocation negates malice, provocation was a proper defense.<sup>115</sup> 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.<sup>116</sup> The MPC has missed out 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.<sup>117</sup> 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.”<sup>118</sup> 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.<sup>119</sup>

By abandoning malice, a concept deeply rooted in just deserts, the MPC has significantly weakened its link with public morality. Without that

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114. *Brown*, 584 A.2d at 543–44.

115. *Id.* at 539.

116. *Id.* at 539 n.2. *But see* *Richmond v. Maryland*, 623 A.2d 630, 633–34 (Md. 1991) (rejecting provocation in a mayhem case).

117. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 456 (1997).

118. Kent Greenawalt, *A Few Reflections on the Model Penal Code Commentaries*, 1 OHIO ST. J. CRIM. L. 241, 241 (2003).

119. *See, e.g.*, John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 677 (2000); *see also* Mark Warr & Mark Stafford, *Public Goals of Punishment and Support for the Death Penalty*, 21 J. RSCH. CRIME & DELINQ. 95, 99–101 (1984) (noting that people explicitly name retributivism as the philosophy that should govern punishment in our society).

concept, it is sometimes difficult to provide satisfactory reasoning for distinguishing between degrees of wrongdoing. For example, what makes killing under the influence of EMED a lesser offense than murder? 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 behavior and of degrees of wrongdoing."<sup>120</sup> 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).
2. The actor kills in self-preservation (*R v. Dudley & Stephens*<sup>121</sup> scenario).
3. The actor kills under duress out of fear of being 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 in order 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.<sup>122</sup> That does not mean of course that they do not deserve punishment; that only means that they are not as wrongful

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120. Greenawalt, *supra* note 118, at 241; *see, e.g.*, Barry Mitchell, *Brief Empirical Survey of Public Opinion Relating to Partial Defences to Murder*, in LAW COMM'N, PARTIAL DEFENCES TO MURDER app. C at 180, 195–96 (2004), [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc290\\_Partial\\_Defences\\_to\\_Murder\\_Appendices.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc290_Partial_Defences_to_Murder_Appendices.pdf) [<https://perma.cc/JX7K-8GJ5>].

121. KADISH ET AL., *supra* note 3, at 89 (citing *R v. Dudley & Stephens* [1884] 14 Q.B.D. 273 (Eng.)).

122. *But see* *State v. Forrest*, 362 S.E.2d 252, 256 (N.C. 1987) ("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.").

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.<sup>123</sup>

This exercise confirms at least three important things: one, we can morally distinguish degrees of wrongdoing based on the 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.”<sup>124</sup> Nevertheless, he was convicted of first-degree murder and sentenced to life in prison.<sup>125</sup> Both the conviction and the sentence have been upheld on appeal.<sup>126</sup>

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 alleviated, and the motives of the two defendants can be taken into account. That is true; however, it is also true that 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 stigma associated with the status of a murderer are punishment in itself. The very fact that the mercy killer has been convicted of the same crime as the worst possible vicious killer is already injustice, and that injustice could have been avoided had the MPC retained the concept of malice.

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123. See, e.g., MOORE, *supra* note 59, at 408 (opining that “[k]illing or torturing, or disfiguring for the sheer joy of it seems rather paradigmatic of true evil”); cf. Mitchell, *supra* note 120, at 195 (discussing public reactions to a series of hypotheticals involving homicide).

There was undeniably widespread condemnation of the killer in scenario E (the contract killer), and a good deal of sympathy and support for the mercy killer in scenario I, albeit that many respondents would be less understanding if, for example, there was no desire to die expressed by the victim.

*Id.*

124. *Forrest*, 362 S.E.2d at 255.

125. *Id.* at 253.

126. *Id.* at 260.



## IV. 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 have done 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 need be, malice may be defined in negative terms, similarly to how a "voluntary act" is defined in section 2.01(2).<sup>127</sup> Even if such definition is not all-encompassing, it would cover most typical instances of malice.

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,<sup>128</sup> and perhaps it should be, 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 all complete and partial justifications.<sup>129</sup> Whereas motives may provide certain, often remote and self-contradictory, insights into 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.<sup>130</sup> It does not deal with moral reasons for the actor's actions. And secondly, "unlawfulness" does not distinguish between more and less serious

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127. See MODEL PENAL CODE § 2.01(2) (AM. L. INST. 1985) (listing bodily movements that are not "voluntary acts" within the meaning of that section).

128. See, e.g., Binder, *supra* note 9, at 5–7; Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 89 (2006).

129. See *supra* note 67 regarding proper characterization of duress.

130. MODEL PENAL CODE § 3.11 ("[U]nlawful force' means force, including confinement, that is employed without the consent of the person against whom it is 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.").

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

The MPC reform, particularly its revision of the culpable mental states, was an enormous accomplishment; however, together with the arcane, imprecise, and 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 up until this day suggests that the moral inquiry presented by that concept is important to the communal 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.