

Reconsidering motive's irrelevance and secondary role in criminal law

K NAIDOO*

1 Introduction

The consideration of a perpetrator's motive¹ as an element of a crime is ostensibly a novel idea in criminal law since it contradicts the maxim in most Western systems of criminal law² that in principle, motive is irrelevant to proving intention and criminal liability and plays, at most, a secondary role.³ In most Western systems of criminal law a perpetrator's criminal liability is partly based on his mental state at the time he committed the proscribed conduct.⁴ This mental state is referred to as *mens rea*, which is more commonly referred to as intention.⁵ Since the recognition of hate crime⁶ as a specific category of criminal conduct in the United States of America and the proliferation of hate-crime laws in that country⁷ an apparent exception to

* Senior Lecturer in Criminal Law, University of South Africa.

¹ It would suffice at this point to describe motive as the reasons why a person commits a particular crime, or the thoughts and the ideas underlying a perpetrator's guilty state of mind. See Gerstenfeld *Hate Crimes: Causes, Controls and Controversies* (2013) 47.

² Reference to Western systems of criminal law in this article is to systems of law in the Western world which includes the USA and Western Europe. While South Africa is an African country, it is the writer's submission that the South African legal system may still be considered as a Western or Westernised system of law since its origins lie in the United Kingdom and the Netherlands.

³ See eg Herring *Criminal Law: Text, Cases and Materials* (2012) 201; Gaumer "Punishment for prejudice: a commentary on the constitutionality and utility of state statutory responses to the problem of hate crimes" 1994 *South Dakota Law Review* 1 13; Canin *Droit Pénal Général* (2009) 66 and Burchell *Principles of Criminal Law* (2016) 353.

⁴ Cook "Act, intention and motive in the criminal law" 1917 *The Yale Law Journal* 645 646. According to Cook, the perpetrator's criminal liability is also based on his conduct, which is termed the *actus reus*.

⁵ Snyman *Criminal Law* (2014) 146. Snyman cautions that modern writers avoid the term *mens rea* in favour of other terms such as "fault", "blameworthiness" and "culpability", which are synonymous with the concept of *mens rea*. As will be discussed in more detail below, in current Anglo-American, Continental (for example French) and South African criminal law, *mens rea* means to act purposefully with knowledge of unlawfulness of the conduct. A wicked or malicious motive is not required.

⁶ Hate crimes may be described as crimes that are motivated by the perpetrator's prejudice or bias towards personal characteristics of the victim. The perpetrator's motivation is referred to as a bias motive. The personal characteristics that are the object of a perpetrator's bias or prejudice could include, *inter alia*, the race, ethnicity, sexual orientation, gender, religion or disability of the victim.

⁷ In the late twentieth century initiatives were taken in the United States of America (USA) to recognise unlawful conduct motivated by personal bias or prejudice as a specific category of criminal conduct worthy of an enhanced penalty. Hate-crime laws have been passed at both state and federal level in the USA. See: Gerstenfeld (n 1) 31 and Freeman "Hate crime laws: punishment which fits the crime" 1992-1993 *Annual Survey of American Law* 581 582. As regards federal hate-crime laws in the USA, refer to the Hate Crimes Sentencing Enhancement Act of 1994 (codified as 28 USC §999 (1994)) and the Matthew Shepherd and James Byrd Junior Hate Crimes Prevention Act of 2009 (codified as 18 USC §249). The enactment of hate-crime laws in the USA has had an influence on a number of other jurisdictions, particularly those in democratic Western nations. In 1998 the United Kingdom passed the Crime and Disorder Act of 1998, which is the British equivalent of a hate-crime law. In 2003 France passed its first hate-crime law, *Loi No 2003-88 du 3 février 2003*, hereinafter referred to by its more common name, *la loi Lellouche*, or the "Lellouche law". Despite several calls by the civil-society and academic sectors for the enactment of a hate-crime law in South Africa, such a law has yet to be passed.

the maxim that motive is irrelevant and plays a secondary role seems to exist. The distinguishing feature of hate-crime laws is that the perpetrator's bias motive is regarded as an element of the offence itself.⁸ Commencing with the historical origins of *mens rea* and motive, this article considers the irrelevance or secondary role of motive in several Western systems of criminal law,⁹ closely examines the concept of motive, suggests possible reasons for its irrelevance or secondary role in criminal law and questions whether the irrelevance of motive is actually a fiction. The article concludes with a consideration of whether the apparent irrelevance of motive or its secondary role in South African criminal law would be an obstacle to the enactment of a hate-crime law in South Africa.

2 *The historical origins of mens rea and motive*

Since English law has influenced Anglo-American and South African criminal law, the historical discussion that follows is largely based on the English-law origins of *mens rea*. However the Roman-law origins of the mental element of criminal conduct will first be examined since it is accepted that Roman law has had some influence on Anglo-American law¹⁰ and on most Western European systems of law, including the French system of criminal law.¹¹ The origins of South African law can also be found in Roman law, which was received in the Netherlands between the thirteenth to the sixteenth centuries and brought to South Africa by the Dutch in the seventeenth century.¹²

The mental requirement of a crime or the requirement that the perpetrator should possess a guilty mind existed in the Roman law of the Twelve Tables.¹³ The crime of arson, for example, required the perpetrator to set fire to a house "knowingly and consciously".¹⁴ Levitt¹⁵ refers to the crime of murder in the Twelve Tables, which required the perpetrator to have "maliciously and knowingly" killed another person. There is thus some evidence that early Roman law required a mental element for certain crimes. In later Roman law, as laid down in the *Corpus Iuris Civilis*,¹⁶ the mental element required for a crime took the form of either *dolus* or *culpa*, which may be translated into the present requirements of intention and negligence

⁸ See eg s 7(a)(1) of the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act of 2009, which creates the specific offence of wilfully causing bodily injury to a person because of that person's actual or perceived race, colour, religion or national origin.

⁹ English, American, French and South African criminal law will be considered in this submission.

¹⁰ Levitt "The origins of the doctrine of *mens rea*" 1922-1923 *Illinois Law Review* 117. According to Levitt, Anglo-American criminal law was also influenced by Anglo-Saxon law, Christian theology, Hebrew law and Irish law.

¹¹ Bodenstein "Phases in the development of criminal *mens rea*" 1919 *SALJ* 323 324. Bodenstein writes that apart from Roman law, Western European systems of law were also influenced by Germanic law and canon law.

¹² Snyman (n 5) 6-7.

¹³ Gardner "The *mens rea* enigma: observations on the role of motive in criminal law" 1993 *Utah Law Review* 635 642 and Levitt (n 10) 118.

¹⁴ Gardner (n 13) 642.

¹⁵ Levitt (n 10) 118.

¹⁶ According to Snyman (n 5) 6, the Roman emperor Justinian who ruled from 527 to 565 AD ordered the compilation of the various texts of Roman law into a single code, which came to be known as the *Corpus Iuris Civilis*. The *Corpus Iuris Civilis* consisted of the *Institutiones*, the *Digesta* or *Pandectae*, the *Codex* and the *Novellae*. Snyman writes that criminal law can be found in the *Digesta* and the *Codex*.

respectively.¹⁷ While *dolus* referred to the state of mind of the perpetrator and the conscious direction of his will towards achieving a result, *culpa*, a less serious mental state, referred to a lack of skill, a lack of foresight, or a failure to take the necessary measures to prevent injury.¹⁸

Despite the present role of *mens rea* as one of the indispensable requirements of criminal liability in English criminal law, the idea that an accused had to possess a guilty mind was not a strict requirement in early English criminal law.¹⁹ In early English criminal law the distinction between crimes and torts²⁰ was not as apparent as it is today, since a compensatory system consisting of fines and tariffs existed which meant that a victim of a crime, or his next of kin, could literally be “bought off”.²¹ Moreover, some evidence exists that in early English criminal law a person could be criminally liable for having caused the unintentional death of another.²² According to Gardner, by the 12th century, canon law, which taught that mental culpability was an essential requirement of guilt and sin, began to exert considerable influence on English criminal law.²³ Gardner’s conclusions about early English criminal law are based on the writings of the thirteenth-century cleric and judge Henry Bracton, whose treatise was influenced by canon law.²⁴ The influence of canon law led to the development of defences such as youth and insanity, since children and the insane lacked the mental and moral guilt necessary for criminal liability.²⁵ According to Sayre,²⁶ the canon law insistence on moral guilt conflicted with early English criminal law and English judges began to experience difficulties in finding a perpetrator criminally liable in the absence of a mental element. A procedural solution was devised in the form of the king’s pardon to overcome this conflict. If a person killed another without intention, or in self-defence, English judges would still find him guilty but he was permitted to secure the king’s pardon.²⁷

Apart from the influence of canon law, some consensus exists that between the twelfth and thirteenth centuries Roman law was revived by legal scholars and jurists in Europe. During this period the concepts of *dolus* and *culpa* were “grafted” onto

¹⁷ Bodenstein (n 11) 323-327; Mueller “*Mens rea* and the law without it” 1955-1956 *West Virginia Law Review* 34 35; Chesney “The concept of *mens rea* in criminal law” 1939 *Journal of Criminal Law and Criminology* 627 630 and Sayre “*Mens rea*” 1932 *Harvard Law Review* 974 982-983. According to Bodenstein (n 11) 327, the Dutch equivalents of the terms “*dolus*” and “*culpa*” are “*opset*” and “*skuld*” respectively.

¹⁸ Bodenstein (n 11) 333. Bodenstein writes that in order to determine “*culpa*” Roman law used the criterion of what the prudent, diligent man would have, or ought to have foreseen under the same circumstances. The present reasonable person test in cases of negligence can thus be traced to Roman law.

¹⁹ Gardner (n 13) 642. According to Gardner “no systematic *mens rea* requirement” existed in early Anglo-Saxon law. A similar view has been expressed by Mueller (n 17) 35.

²⁰ Torts are referred to as delicts in South African law.

²¹ Gardner (n 13) 644.

²² Sayre (n 17) 980.

²³ Gardner (n 13) 654. It should be pointed out, however, that some critics have expressed doubts about the influence of canon law on early English criminal law. Binder “The rhetoric of motive and intent” 2002 *Buffalo Criminal Law Review* 1 15, *eg* regards early English criminal law and canon law as serving two distinct functions: canon law regulated the life of the clergy, whereas criminal law dealt with breaches of the King’s peace. Binder opines that the *mens rea* requirement of “evil motive” is “really a modern polemical construct”, or a requirement created by academic debates and discourse.

²⁴ Gardner (n 13) 655.

²⁵ Gardner (n 13) 656.

²⁶ Sayre (n 17) 980.

²⁷ Sayre (n 17) 980. According to Sayre the procedural solution of the king’s pardon was eventually statutorily enacted in the Statute of Gloucester of 1278.

English criminal law.²⁸ Mueller²⁹ refers to the role that monks and scholars (who were trained in both canon law and Roman law) played in importing the Roman concepts of *dolus* and *culpa* into English criminal law. In referring to the mental element in early English criminal law based on the writings of Bracton, Gardner³⁰ writes that *mens rea* required not only an intentional mind, but also an ulterior motive or purpose. The concept of *mens rea* in early English criminal law was thus a “normative judgement of subjective wickedness” which required intention as the concept is presently understood, as well as a “wicked purpose”, an “evil mind” or a “vicious will”.³¹ Thus from the twelfth to the thirteenth centuries, *mens rea* in English criminal law comprised both intention and an evil, malicious motive.

There is some evidence that from the nineteenth century onwards English courts began to interpret the requirement of an evil, malicious motive more strictly. In the case of *Regina v Pembliton*³² the accused (X) while in a drunken state started an altercation with a group of people. X picked up a stone, which he hurled at the group. X missed his target, however, and shattered the window of a nearby house instead. On a charge of unlawfully and maliciously committing damage to the property of another, the crown argued that X’s motive in throwing the stone was malicious and urged for recognition of the common law rule that malice meant a wicked motive. However, the court reasoned that X’s wicked, malicious motive with regard to the crime of assault could not be transferred to the breaking of the window. It was held that X did not intend to break the window and that he did not maliciously commit damage in terms of the law. X’s wicked intention for the crime of assault could not be substituted for the intention requirement in the crime of malicious damage to property. X’s conviction for malicious damage to property was consequently quashed.³³

The subsequent case of *Regina v Faulkner*³⁴ illustrates the rejection of the requirement of evil motive in English law. In *casu* the accused was charged with a statutory form of the crime of arson, which included the burning of a ship. The accused had entered the hold of a ship in order to steal some rum. He bored a hole in a container of rum, which caused the rum to run out into the hold. In order to obtain more light, he lit a match, which ignited the rum and set fire to the ship. While it was accepted in the court *a quo* that the accused had no intention to burn the ship, the crown argued that he had acted maliciously in stealing the rum and therefore had the *mens rea* necessary for the crime of arson. The trial judge agreed with the crown’s contention and instructed the jury that the defendant should be found guilty of arson fire despite his absence of intention to burn the ship. The jury convicted the accused but on appeal the court held that in order to be found guilty, the accused had to either have intended burning the ship or to have acted with knowledge of the risk of it burning. The case of *Regina v Faulkner* also illustrates the rejection of the evil motive requirement in favour of intention or recklessness relating to the specific conduct elements of the offence.

²⁸ Chesney (n 17) 630 and Sayre (n 17) 980-983. According to Mueller (n 17) 35, the Roman law concepts of *dolus* and *culpa* helped to make the mental element more rigid in English criminal law.

²⁹ Mueller (n 17) 35.

³⁰ Gardner (n 13) 658.

³¹ Gardner (n 13) 663.

³² 1874 LR-Cr Cas 119.

³³ *Regina v Pembliton* (n 32) 120.

³⁴ 1876 11 Ir RCL 8, 11 (Cr Cas Res 1877).

Evidence also exists to illustrate that the malicious motive requirement was rejected in nineteenth-century American criminal law in favour of specific states of mind focusing merely on the question whether the perpetrator had acted purposefully when performing the unlawful conduct. In the case of *Commonwealth v Adams*³⁵ the court held that the driver of a speeding sleigh who intentionally violated a speeding ordinance and injured a pedestrian could not be charged with the additional offence of assault and battery since he did not possess the necessary intention for assault and battery.

Despite an insistence on the requirement of a malicious motive in early English criminal law, this requirement seems to have been abandoned by the nineteenth century in English and American criminal law in favour of specific, subjective states of mind.

3 *Mens rea and motive in contemporary Western systems of criminal law*

In modern English criminal law it is said that “*mens rea* should not be confused with motive”.³⁶ This view has been endorsed by British courts. In *R v Moloney*³⁷ the British house of lords on appeal from the court of appeal held that “intention is something quite different from motive or desire”.³⁸ In English criminal law four forms of fault fall under the concept of *mens rea*: intention or recklessness as to a specific consequence and knowledge of or recklessness as to a specified circumstance.³⁹ In *R v Cunningham*⁴⁰ Byrne J opined that the word “maliciously” did not mean a wicked state of mind. Instead he used the following words to describe the states of mind required in English law:

“In any statutory definition of a crime, ‘malice’ must be taken ... 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 (ie the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).”⁴¹

According to Hessick,⁴² in American criminal law, intention can broadly be considered as referring to “an actor’s state of mind toward her illegal action: whether she performed the act purposefully, knowingly or recklessly”. According to the American Model Penal Code, only four mental states are recognised in American criminal law: purpose, knowledge, recklessness and negligence, and can be said to constitute *mens rea*.⁴³

In South African criminal law the requirement of *mens rea*⁴⁴ is an indispensable requirement of criminal liability.⁴⁵ The requirement of *mens rea* was endorsed by

³⁵ 114 Mass 323 (1873).

³⁶ Reed and Fitzpatrick *Criminal Law* (2009) 58.

³⁷ 1985 AC 905 (HL).

³⁸ the *Moloney* case (n 37) 926.

³⁹ Ashworth and Horder *Principles of Criminal Law* (2013) 170.

⁴⁰ 1957 2 QB 396.

⁴¹ *R v Cunningham* (n 40) 399.

⁴² Hessick “Motive’s role in criminal punishment” 2006 *Southern California Law Review* 89 95.

⁴³ Robinson and Dubber at (<https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf> (18-02-2016)).

⁴⁴ *Mens rea* is also referred to as “culpability”, the term preferred by Snyman (n 5) 146, or “fault”, the term preferred by Burchell (n 3) 341-347.

⁴⁵ Burchell (n 3) 341. The other requirements of criminal liability are unlawful conduct and criminal capacity.

O'Regan J in *S v Coetzee*.⁴⁶ *Mens rea* refers to the will to commit an act or cause the prohibited result which is contained in the definition of a crime while possessing the knowledge that such conduct is unlawful.⁴⁷ Thus in South African criminal law intention can be said to consist of will and knowledge. Three possible states of mind or forms of intention could fall under the description of intention:

Direct intention, which is also referred to as *dolus directus*, is present where a person directs his will towards achieving the prohibited result or performing the prohibited act. The accused actually means to cause the prohibited result or commit the prohibited conduct.⁴⁸

Indirect intention, which is also referred to as *dolus indirectus*, occurs where the prohibited conduct or result is not the accused's main aim but he realises that in order to achieve his goal the prohibited conduct or result will certainly materialise.⁴⁹

Dolus eventualis or "intention by foresight"⁵⁰ exists where an accused directs his will towards a prohibited result or conduct while foreseeing the possibility of another event or result ensuing but nevertheless proceeds with his original plan.⁵¹

In short, in the present English, American and South African systems of criminal law, *mens rea* refers to specific mental states without the requirement of an evil or malicious motive.

In French criminal law, *mens rea* is referred to as either *l'element intellectuel*, *l'element moral* or *l'element psychologique*.⁵² According to Canin,⁵³ for a person to be criminally responsible, one must be able to impute responsibility to him and in order to do this he must be culpable. The psychological or moral element is recognised in articles 121-123 of the French *Code Pénal*,⁵⁴ which provides that serious crimes or major crimes cannot exist without intention. The psychological or moral element can be divided into two mental states or types of intention: *le dol général* and *le dol spécial*.⁵⁵ These types of intention could be translated into English as general intention and special intention respectively. Since the French Penal Code does not provide definitions of either type of intention, one has to refer to definitions provided by academic writers. Elliot cites the following definition of general intention which was provided by the nineteenth century criminal lawyer Emile Garçon: "Intention, in its legal sense, is the desire to commit a crime as defined by the law ... it is the accused's awareness that he is breaking the law".⁵⁶ According to Dreyer,⁵⁷ intention is the will on the part of the perpetrator to engage in conduct

⁴⁶ 1997 3 SA 527 (CC).

⁴⁷ Snyman (n 5) 176 and Burchell (n 3) 344.

⁴⁸ Snyman (n 5) 177 and Burchell (n 3) 345.

⁴⁹ Snyman (n 5) 178 and Burchell (n 3) 350.

⁵⁰ Snyman (n 5) 178. Burchell (n 3) 351-352 prefers the term "legal intention".

⁵¹ Snyman (n 5) 178-179 and Burchell (n 3) 351.

⁵² Elliot *French Criminal Law* (2001) 64-66. These terms could be translated into English as "the intellectual element", "the moral element" and the "psychological element" respectively. It should be noted that as a French second-language speaker, all French to English translations in this article are the writer's own.

⁵³ Canin (n 3) 61.

⁵⁴ S 121(3) of the *Code Pénal* (hereinafter referred to as the French Penal Code) provides: "*Il n'y a point de crime ou de délit sans l'intention de le commettre*". In French criminal law a distinction is drawn between *les crimes* or serious crimes, *les délits* or major crimes and *les contraventions* or minor crimes. See Elliot (n 52) 8.

⁵⁵ Elliot (n 52) 64-66.

⁵⁶ as cited in Elliot (n 52) 66.

⁵⁷ Dreyer *Droit Pénal Général* (2012) 566.

that is capable of a penal sanction.⁵⁸ Canin⁵⁹ regards intention as the direction of will towards an unlawful result.⁶⁰ The essential components of intention in French criminal law are thus the perpetrator's will and awareness and the direction of this mental state towards a specific unlawful end. There is no requirement of a malicious motive in French criminal law.

4 *The concept of motive: a brief overview*

In order to explain motive, some scholars tend to compare the concept with intention and adopt what could best be described as a "what and why" approach.⁶¹ In terms of this approach, motive explains why a perpetrator committed a criminal act and intention explains what state of mind he possessed when committing the act. In the words of Candeub,⁶² "motive goes to the why of an action while intent goes to the what". Candeub⁶³ further explains that while intention is closely associated with a perpetrator's mental state at the time he committed the offence, "motives are concerned with the broader picture ... the actor's general views, his abstract beliefs and greater social directives". Gaumer⁶⁴ similarly opines that "the term motive can best be described as simply the why behind a defendant's conduct". However, both the aforementioned scholars agree that the simplistic "what and why" approach to distinguish between intention and motive does not always point to the applicable motive. Candeub,⁶⁵ for example, writes that an intention to commit assault could consist of a number of motives: it could be motivated by hatred, a desire to rob the victim, a general need for violence or racial *animus*.

Some legal scholars regard motive as the reason or the explanation for a perpetrator's criminal conduct.⁶⁶ Hessick⁶⁷ describes motive as going beyond "mere states of mind" to the reasons for performing an action. Chiu⁶⁸ succinctly states that motive is "the reason a defendant does what he does". Binder⁶⁹ explains this approach to motive in terms of "desiderative states", or motives consisting of the "desires, purposes or ends" of an accused's criminal conduct. However, as with the "what and why" approach discussed above, to consider motive as the reasons, desires, purposes or explanation for a perpetrator's criminal conduct does not necessarily explain the most operative or applicable motive of a perpetrator's criminal conduct. If for example, X shoots Y, X's intention could have been to kill Y, to scare Y or to simply test his firearm. If, however, X did indeed intend to kill Y, then X's reasons, or the explanation for his conduct, could have been revenge in order to settle a long-standing feud, hatred towards Y, jealousy, or perhaps pecuniary gain in order to claim a life insurance policy.

⁵⁸ In the words of Dreyer: *Le désir, chez l'agent, de réaliser un comportement susceptible de recevoir une qualification pénale*. See Dreyer (n 57) 566.

⁵⁹ Canin (n 3) 62.

⁶⁰ In the words of Canin (n 3) "*L'intention est ... la volonté tendue vers un résultat illicite*" 62.

⁶¹ Candeub "Motive crimes and other minds" 1993-1994 *University of Pennsylvania Law Review* 2071 2105 and Gaumer (n 3) 13.

⁶² Candeub (n 61) 2105.

⁶³ Candeub (n 61) 2107.

⁶⁴ Gaumer (n 3) 13.

⁶⁵ Candeub (n 61) 2106.

⁶⁶ See eg Burchell (n 3) 353; Chiu "The challenge of motive in criminal law" 2005 *Buffalo Criminal Law Review* 653 664 and Hessick (n 42) 95.

⁶⁷ Hessick (n 42) 95.

⁶⁸ Chiu (n 66) 656.

⁶⁹ Binder (n 23) 4.

In interrogating the concept of motive, Chiu⁷⁰ explains that attempts to define motive can be divided into three categories. The first category regards motive as completely different and distinct from intention, the second category regards motive as a sub-category of intention and the third category adopts a more functional definition of motive.⁷¹ With regard to the first category, motive is regarded as a “cognitive state of mind”, which includes “expectations and perceptions of risk”.⁷² However, it is submitted that this approach is tantamount to the “what and why” approach discussed above. As regards the second category, motive is regarded as a “sub-type” of intent, or as an “ulterior intention”.⁷³ However, Chiu⁷⁴ cautions that criminal conduct consists of a “chain of intention” in terms of which every intent becomes a motive for a prior intent. The third category adopts a more functional approach to motive according to which motive is not distinguished from intention, but refers to a number of “action initiators” which can be considered “further intentions, reasons or other underlying mental states”.⁷⁵ However, Husak,⁷⁶ who advocates this approach to motive, concedes that it is sometimes difficult to ascertain which “action initiators” actually constitute relevant motives.

The concept of motive in criminal law is complex and elusive and escapes precise academic definition. Descriptions of motive vary depending on the approach adopted by the legal scholar. Motive could refer to the reasons for a perpetrator’s criminal conduct and could therefore explain such conduct. Motive could also refer to the perpetrator’s desires, ends or purpose.

5 *The irrelevance of motive and its secondary role in contemporary Western systems of criminal law*

While consensus exists that it is acceptable to consider a perpetrator’s motive at the sentencing stage of a criminal trial when punishment is imposed,⁷⁷ motive is ostensibly irrelevant in the determination of criminal liability in English, American, South African and French criminal law. It is submitted that the present irrelevance of motive in Anglo-American and South African criminal law could be attributed to the nineteenth-century English law rejection of the evil motive requirement as discussed above.⁷⁸ Husak sums up this reality as follows: “The exceptional significance that Anglo-American criminal law attaches to intention stands in stark contrast to its (alleged) complete disregard of motive”.⁷⁹

⁷⁰ Chiu (n 66) 664.

⁷¹ Chiu (n 66) 664.

⁷² Chiu (n 66) 664.

⁷³ Chiu (n 66) 665.

⁷⁴ Chiu (n 66) 665.

⁷⁵ Husak “Motive and criminal liability” 1989 *Criminal Justice and Ethics* 8. Cook (n 4) 660, *eg* writes that motive is “another name for desire coupled with intention”. He uses the example of A whose object in killing B was to obtain B’s money. Cook writes that A’s intention was to kill B but his motive was to obtain B’s money. Cook thus defines motive as “a desire and intention to bring about ... [an] ... ulterior consequence”.

⁷⁶ Husak (n 75) 8.

⁷⁷ Snyman (n 5) 186; Fletcher *Basic Concepts of Criminal Law* (1998) 121; Fletcher *Rethinking Criminal Law* (1978) 452 and Singer and La Fond *Criminal Law* (2007) 66.

⁷⁸ This submission would apply to Anglo-American and South African criminal law, which were influenced by English law. It does not, however, apply to French criminal law.

⁷⁹ Husak (n 75) 5.

This disregard of motive is often expressed in the maxim “motive is irrelevant”.⁸⁰ In American criminal law, motive has been described as “just a bit player”⁸¹ which appears in only “limited circumstances”⁸² and not as a component of criminal liability. On a similar note, the American writer Gaumer⁸³ writes that “as a general rule motive has never been considered an element of a crime that must be proved at trial”.

In modern English criminal law motive is also considered as irrelevant and plays a secondary, marginal role. According to Padfield, “a person’s motive, or reason, for doing something is usually not relevant to criminal liability”.⁸⁴ Herring writes that “it is often said that motive is irrelevant in criminal law”.⁸⁵ A similar view is expressed by Molan, who writes that “motive is generally said to be irrelevant”.⁸⁶

The irrelevance of motive maxim is also applicable in South African criminal law.⁸⁷ According to Burchell,⁸⁸ “motive is considered to be irrelevant to the determination of criminal liability ... the general rule is that a person’s motives, whether good or bad, are irrelevant to the determination of criminal intent”. Snyman similarly writes that “intention must not be confused with the motive for committing a crime ... in determining whether X acted with intention, the motive behind the act is immaterial”.⁸⁹

In French criminal law, motive, or *le mobile*, is not required to prove criminal liability.⁹⁰ Motive in French criminal law has been described as the concrete reasons that influence an individual to engage in conduct.⁹¹ Motive has also been described as the personal reasons that influence the perpetrator to commit a crime.⁹² According to Canin,⁹³ a general principle of French criminal law is that it is indifferent to motives, but this principle is subject to exceptions.⁹⁴ Dreyer⁹⁵ similarly refers to the disregard of motive in French criminal law but concedes that motive may be relevant as an additional indicator of intention.

6 Why is motive regarded as irrelevant?

It is the writer’s submission that the irrelevance of motive and its secondary role in the determination of criminal liability are ascribable to a number of factors:

Firstly, motive is more difficult to prove than intention. Motives are said to be hidden deep within the subconscious and consequently “inaccessible, even to the

⁸⁰ Dressler *Understanding Criminal Law* (2009) 121 and Hessick (n 42) 89.

⁸¹ Motive is not, in other words, the “main actor” or “protagonist” in criminal liability.

⁸² Hessick (n 42) 90.

⁸³ Gaumer (n 3) 13.

⁸⁴ Padfield *Criminal Law* (2008) 41.

⁸⁵ Herring (n 3) 201.

⁸⁶ Molan, Bloy and Lanser *Modern Criminal Law* (2003) 54.

⁸⁷ The irrelevance of motive in determining criminal liability was endorsed in several South African cases. See *S v Nkombani* 1963 4 SA 877 (A) 896B and *S v Van Biljon* 1965 3 SA 314 (T) 318F-G.

⁸⁸ Burchell (n 3) 353.

⁸⁹ Snyman (n 5) 186.

⁹⁰ Canin (n 3) 66.

⁹¹ Dreyer (n 57). According to Dreyer a single criminal act may be accomplished by different motives including curiosity, lust, greed, xenophobia, political or religious beliefs.

⁹² Canin (n 3) 66. Canin writes that different motives could underpin the commission of a crime and they could include revenge and love.

⁹³ Canin (n 3) 66.

⁹⁴ In the words of Canin (n 3) 66: *Le principe en droit pénal français est celui de l’indifférence des mobiles ... mais ce principe comporte des exceptions.*

⁹⁵ Dreyer (n 57) 581. Dreyer refers to motive as an *indice supplémentaire de l’intention*.

perpetrator of a crime”.⁹⁶ While intent is closer to the accused’s criminal conduct with which it has a “direct causal relationship”, motives are not as present in the accused’s criminal conduct and require a more in-depth examination of the perpetrator’s subjective mental state and further interpretation, which creates room for uncertainty and inaccuracy.⁹⁷

Secondly, the consideration of motive in the determination of criminal liability could conflict with the principle of legality. According to Burchell, the principle of legality strongly suggests that criminal liability should not be imposed on the basis of “personal and individual ethics and motivation”.⁹⁸ Burchell refers to the case of *R v Peeverett*,⁹⁹ which concerned a failed suicide pact. The accused alleged that he did not wish or desire to cause the death of the other party. However, this personal wish or desire of the accused was distinguished from his intention and was not taken into consideration by the court when convicting him of attempted murder.

Gardner¹⁰⁰ similarly opines that the consideration of motive in determining criminal liability could conflict with the principle of legality. However, his view is based on the consideration of motive within the context of hate-crime laws. According to Gardner, the consideration of a perpetrator’s motive creates tensions with the principle, which calls for certainty in criminal law.¹⁰¹ Gardner¹⁰² refers to the example of an accused who is charged with damage to property but who only becomes aware at trial that the state has decided to consider his anti-Semitic bias motivation and that he will be charged with a more serious felony offence instead.

Thirdly, a consideration of motive could impact upon the morality of criminal conduct.¹⁰³ Burchell¹⁰⁴ illustrates how motive relates to the morality of conduct by referring to the South African case of *S v Hartmann*¹⁰⁵ in which a medical practitioner was charged with murder for injecting morphine into the drip of his terminally ill father. The fact that the accused was motivated by mercy and pity at his father’s suffering¹⁰⁶ did not alter the court’s finding of murder. The British writer Molan¹⁰⁷ also refers to the example of euthanasia, albeit a hypothetical one, to illustrate that the consideration of an accused’s motive impacts upon the morality of conduct.

Fourthly, within the context of the United States of America and specifically with reference to hate-crime laws, the consideration of a hate-crime perpetrator’s bias motive is said to infringe upon the accused’s first amendment rights, which protect the right to free speech.¹⁰⁸ If, for example, an accused’s past conduct included collecting pro-Nazi literature or recounting sexist or racist jokes, such conduct, which Gardner cautions falls within the sphere of first amendment protection, could be regarded as part of his bias motive.¹⁰⁹

Several writers have argued that proving motive is not simply difficult but almost impossible. According to Candeub proving *mens rea* and motive requires proof of

⁹⁶ Gardner (n 13) 686.

⁹⁷ Candeub (n 61) 2105-2106.

⁹⁸ Burchell (n 3) 354.

⁹⁹ 1940 AD 213.

¹⁰⁰ Gardner (n 13) 720.

¹⁰¹ Gardner (n 13) 720.

¹⁰² Gardner (n 13) 720.

¹⁰³ Burchell (n 3) 354.

¹⁰⁴ Burchell (n 3) 354.

¹⁰⁵ 1975 3 SA 532 (C).

¹⁰⁶ It is submitted that mercy and pity could be regarded as “moral” motives.

¹⁰⁷ Molan *et al* (n 86) 54.

¹⁰⁸ Gardner (n 13) 720.

¹⁰⁹ Gardner (n 13) 720.

“highly subjective states” that could require “reading minds”.¹¹⁰ However, in the case of negligence, which employs the objective criterion of the reasonable person, this difficulty does not exist.¹¹¹ The problem of reading minds is often framed within the philosophical debate of “other minds”¹¹² in terms of which it is difficult to determine with certainty what exists in the mind of another person. Candeub explains the “other minds” problem as follows: “Since intention, beliefs and motives are mental states, they cannot easily be described in physical terms ... it is difficult to ascertain with certainty what another person is thinking”.¹¹³

According to Ayer:

“If in order to know what another person is thinking or feeling I have literally to share his experience and if at the same time nothing is going to count as my literally sharing his experience then plainly nothing is going to count as my knowing, really knowing what he thinks or feels.”¹¹⁴

According to Ayer’s sceptical view, it is impossible to know the thoughts and feelings of another person. How is it possible then to surmount the problem of knowing the thoughts and feelings in another person’s mind? Consensus exists that the “other minds” problem can be overcome by drawing inferences by analogy from another person’s behaviour and from verbal evidence.¹¹⁵ According to Candeub, one of the only ways in which to infer what is going on in the mind of another person is to base it on one’s own behaviour, since the behaviour of another person is often analogous to our own behaviour. He goes on to explain that most judges and juries use inference by analogy in order to infer intention.¹¹⁶ However, Candeub concedes that two minds can operate similarly only if two people have been closely connected and share similar backgrounds. Otherwise inference by analogy is not really applicable because two minds do not necessarily operate similarly.¹¹⁷

As regards verbal evidence, while it appears simpler to infer an accused’s intention or motive from his verbal utterances, this is not always the case. According to the theory of radical translation, which is attributed to Quine, problems arise when translating the language of “hitherto untouched people” into one’s own language.¹¹⁸ In terms of the theory of radical translation, it is not possible to conclude that two people derive the same meaning from the same word, and the problem is compounded if two different languages are involved, since words can often not be translated precisely from one language to another.¹¹⁹ Mastros¹²⁰ opines that the theory of radical translation is applicable only in cases where a field linguist is faced

¹¹⁰ Candeub (n 61) 2075.

¹¹¹ Candeub (n 61) 2075.

¹¹² Ayer “One’s knowledge of other minds” 1953 *Theoria* 1 20; Candeub (n 61) 2077 and Singer and La Fond (n 77) 64.

¹¹³ Candeub (n 61) 2078.

¹¹⁴ Ayer (n 112) 7.

¹¹⁵ Ayer (n 112) 9-10; Candeub (n 61) 2088-2089 and Singer and La Fond (n 77) 64.

¹¹⁶ Candeub (n 61) 2089.

¹¹⁷ Candeub (n 61) 2093.

¹¹⁸ Quine *Word and Object* (1960) 28. However, it is the writer’s submission that this is an extreme, and perhaps, far-fetched example of the problems associated with translation.

¹¹⁹ Candeub (n 61) 2095.

¹²⁰ Mastros at <http://www.ugcs.caltech.edu/2abszero/backup/quine.html> (08-01-2016) and Candeub (n 61) 2095.

with a language that is completely unrelated to his own language and culture and attempts a translation in the absence of an interpreter.¹²¹

The problem of drawing inferences from a person's verbal utterances is further complicated by Ryan's reference to the "narrative psychology" perspective.¹²² According to Ryan,¹²³ the criminal trial is highly subjective since it consists of a number of stories being told by the witness, the attorney and the accused, which makes it difficult to distinguish between truth and fiction. Since judges and juries have their own perspectives or versions of events, words, which are the "ingredients" of these narratives, are often difficult to understand and are open to different interpretations, which further complicates the courtroom scenario.¹²⁴

The preceding discussion has illustrated that motive is difficult to prove and a consideration of motive in order to prove criminal liability could impact on the principle of legality, on personal ethics and motivation, on the morality of criminal conduct and in the context of the United States, on first amendment or free-speech issues.¹²⁵

7 *The irrelevance of motive maxim and motive's secondary role: a legal fiction?*

Several scholars have expressed doubts regarding motive's secondary role in criminal law and the veracity of the irrelevance maxim.¹²⁶ These doubts are ostensibly due to the proliferation of hate-crime laws in the United States, which criminalise an accused's bias motive. The debate around the conventional view that motive is irrelevant was ostensibly started by Husak, who writes that "commentators should have been more critical of the thesis that motives are and ought to be material to sentencing but not to liability".¹²⁷ In American criminal law, motives are incorporated into the definitions of a number of offences in specific intent crimes¹²⁸ and in crimes that criminalise the possession of certain items with an unlawful purpose.¹²⁹ Motive also plays a role in the common law defences of self-defence, necessity and public authority.¹³⁰ Hessick opines that even when motive is not specified as an element of an offence it can still play a role and refers to the example of the crime of treason, where motive may be used by the prosecution in order to prove the accused's guilt.¹³¹

¹²¹ However, according to Quine (n 118) 29, the problem of translation in such circumstances could be surmounted if the field linguist provides external stimuli in order to obtain responses from native speakers of the language that can be verified by learning the words for "yes" and "no".

¹²² While "narrative psychology" or the storytelling approach has its roots in the study of literature, anthropology and history it has found its place in psychology. See Ryan "Punishing thought: a narrative deconstructing the interpretive dance of hate-crime legislation" 2001 *The John Marshall Law Review* 123 133.

¹²³ Ryan (n 122) 136.

¹²⁴ Ryan (n 122) 136-137.

¹²⁵ In the South African context, the consideration of a perpetrator's motive could, it is submitted, also impact negatively on the right to freedom of belief and opinion, which is enshrined in section 15 of the Constitution of the Republic of South Africa, 1996.

¹²⁶ Husak (n 75) 3; Chiu (n 66) 656-657 and Hessick (n 42) 95.

¹²⁷ Husak (n 75) 3.

¹²⁸ Chiu (n 66) 668; Husak (n 75) 8 and Dressler (n 80) 121.

¹²⁹ Hessick (n 42) 96.

¹³⁰ Chiu (n 66) 67 and Dressler (n 80) 121.

¹³¹ Hessick (n 42) 97. Hessick refers to the 1947 case of *United States v Haupt* 330 US 631. As will be explained below, an accused's motive could also be used by the prosecution to prove his guilt on a charge of treason in South African criminal law.

Similarly, in modern English law, Herring¹³² writes that motive may be relevant in determining criminal liability and that it is misleading to describe it as irrelevant. A similar view is held by Molan.¹³³ In modern English law motive plays a role in crimes requiring proof of motive as part of the elements of an offence,¹³⁴ in defences such as self-defence and duress,¹³⁵ and in offences that include in the definition an element that requires an enquiry into the defendant's "reasons" for his conduct.¹³⁶ According to Herring,¹³⁷ it is possible for a jury to acquit a defendant because it believes that he acted with the best of motives despite a clear direction from a presiding judge that the defendant is in fact guilty of a crime.

In South African criminal law, the concept of motive plays a role in several crimes but is not specifically mentioned as a requirement or element of these crimes. In crimes that require possession of unlawful substances, the word "possession" is accorded an extended meaning, which could require an investigation into an accused's intention and reasons for possession.¹³⁸ Motive is also a requirement of certain statutory crimes that require a specific intent¹³⁹ and of several common-law crimes requiring a specific intent.¹⁴⁰ In South African law motive also plays a role in the liability of an accessory after the fact.¹⁴¹ In terms of an approach that was adopted by the erstwhile appellate division, the court held that a person is liable as an accessory after the fact only if he has a "specific objective".¹⁴² Burchell¹⁴³ writes that these specific objectives could include assisting the perpetrator to escape justice by hiding the perpetrator from the police or by disposing of evidence from the crime.¹⁴⁴

While "*dol general*" is sufficient proof of the mental element for most crimes in French criminal law, certain crimes require an additional special intention or

¹³² Herring (n 3) 202.

¹³³ Molan *et al* (n 86) 55.

¹³⁴ Molan *et al* (n 86) 55 and Herring (n 3) 202. See for example, the Crime and Disorder Act of 1998.

¹³⁵ Molan *et al* (n 86) 55 and Herring (n 3) 202. Herring writes that it is important to know what the defendant's "justifying reasons" were. For example, if the defendant acted in self-defence, he used force to defend himself and not because he was motivated by revenge.

¹³⁶ Molan *et al* (n 86) 55-56. Herring (n 3) 202 cites the example of property offences where it is not possible to determine whether the defendant acted dishonestly without a consideration of his motive.

¹³⁷ Herring (n 3) 202.

¹³⁸ In terms of the Drugs and Drug Trafficking Act 140 of 1992. See Snyman (n 5) 420-423.

¹³⁹ For example, in the crime of intimidation, s 1(1) of the Intimidation Act 72 of 1982 requires a "specific intent" to compel or induce a person to do or to abstain from doing an act or to abandon a certain standpoint. See Snyman (n 5) 455-458. In the crime of concealment of birth, section 113 of the General Law Amendment Act 46 of 1935 requires a specific intent to permanently conceal the corpse of a child. See Snyman (n 5) 432-433.

¹⁴⁰ For example, the crime of treason requires a "hostile intent" or "*animus hostilis*" to overthrow a state or government. See Snyman (n 5) 299-308 and Burchell (n 3) 847. In the crime of public violence, the perpetrators require a specific intent to disturb the public peace by violent means and to invade the rights of others. See Snyman (n 5) 311-314 and Burchell (n 3) 782. In the crime of common-law abduction, a specific intent or purpose to marry a minor or to have sexual intercourse with the minor is required. See Snyman (n 5) 395-399 and Burchell (n 3) 671-672.

¹⁴¹ Burchell (n 3) 523. An accessory after the fact is someone who, after the completion of a crime, unlawfully and intentionally associates himself with the perpetrator by helping the perpetrator to evade justice. See Burchell (n 3) 517.

¹⁴² Refer to *S v Morgan* 1993 2 SACR 134 (A) 174.

¹⁴³ Burchell (n 3) 517.

¹⁴⁴ However, Burchell also writes that this approach to accessory after the fact criminal liability overlaps with the crime of defeating or obstructing the course of justice and confuses motive with intention. See Burchell (n 3) 519.

motive.¹⁴⁵ The crime of terrorism in French criminal law requires a special intention to seriously disturb public order through terror or intimidation.¹⁴⁶ The crime of genocide requires a special intention to wholly or partly destroy a national, ethnic, racial or religious group.¹⁴⁷ Crimes against humanity require a special intention that includes a racial, religious or political motive.¹⁴⁸

Despite the existence of the irrelevance of motive maxim, motive is indeed material and relevant to a number of existing offences and in several defences in American, English, French and South African criminal law. The numerous crimes and defences in these systems of criminal law that actually take into account the perpetrator's motive seem to suggest that the irrelevance of motive maxim is a fiction in Anglo-American, South African and French criminal law.

8 *Motive as an aggravating factor at sentencing*

While the preceding discussion has focused on motive as an element of a crime, as has been pointed out earlier, motive can be regarded as an aggravating or mitigating factor at sentencing in American criminal law,¹⁴⁹ British criminal law,¹⁵⁰ French criminal law¹⁵¹ and South African criminal law.¹⁵²

9 *Conclusion*

A consideration of South African, Anglo-American and French criminal law has shown that motive indeed plays a role in the determination of criminal liability. This role is not only confined to defences, but in certain crimes motive forms part of the definitional elements of the offence. The inclusion of motive as a substantive element of hate crimes and the criminalisation of a hate-crime perpetrator's bias motive are thus not novel ideas. It is the writer's submission that notwithstanding the existence of the irrelevance of motive maxim in South African criminal law, should a hate-crime law be enacted in South Africa, this would not be an obstacle to the inclusion of a perpetrator's bias motive (for example, a bias motive based on race, ethnicity or sexual orientation) into the definitions of specific hate crimes.

¹⁴⁵ Canin (n 3) 66.

¹⁴⁶ Refer to s 421(1) of the French Penal Code.

¹⁴⁷ Refer to s 211(1) of the French Penal Code.

¹⁴⁸ Refer to s 212(1) and (2) of the French Penal Code.

¹⁴⁹ According to Dressler (n 80) 121, motive plays a role at the sentencing phase of a criminal trial in the imposition of enhanced punishment in hate crimes. A bias motive is an aggravating factor under the Hate Crimes Sentencing Enhancement Act of 1994. In this regard see Guideline § 3A1.1 of the United States Sentencing Commission. A bias motive is also an aggravating factor under s 7(a) of the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act of 2009.

¹⁵⁰ Motive is an aggravating factor under s 28 of the Crime and Disorder Act of 1998.

¹⁵¹ Motive is an aggravating factor under a 1 of the Lellouche Law.

¹⁵² Refer to the cases of *S v Dednam* 1993 1 SACR 309 (W) and *S v Matela* 1994 1 SACR 236 (A), where the accused's racist motives were regarded as aggravating factors at sentencing.

SAMEVATTING**HEROORWEGING VAN DIE IRRELEVANSIE EN SEKONDÊRE ROL VAN MOTIEF IN DIE STRAFREG**

In die strafreg word motief beskou as die rede, gedagte of idee wat onderliggend aan die pleeg van 'n misdadig is. In moderne Westerse strafregstelsels word in die algemeen aanvaar dat die motief van die misdadiger irrelevant is by die bepaling van strafregtelike aanspreeklikheid. Motief speel hoogstens 'n sekondêre rol by die bewys van die elemente van die misdadig en kom eintlik eerder by die bepaling van 'n gepaste straf ter sprake. *Mens rea* of opset is egter meestal een van die vereistes vir strafregtelike aanspreeklikheid. In die vroeë Engelse reg het die hof egter bewys van die oortreder se bose ("malicious") opset vir strafregtelike aanspreeklikheid vereis. Hierdie vereiste is in die negentiende eeu verwerp ten gunste van 'n bepaalde verwytbare gesindheid.

In hierdie artikel word die Romeinse oorsprong van *mens rea* en die Engelsregtelike oorsprong van motief ondersoek. Die begrip motief word ondersoek en moontlike redes word voorgestel vir die irrelevansie van die motief van die oortreder om strafregtelike aanspreeklikheid te bewys. Een van die redes is dat motief moeiliker is om te bewys as *mens rea*. Die oorweging van 'n oortreder se motief by die bepaling van strafregtelike aanspreeklikheid kan ook in stryd wees met die legaliteitsbeginsel.

Ondanks die beweerde irrelevansie van motief in meeste Westerse strafregstelsels word daarop gewys dat motief eintlik 'n vereiste vir verskeie verwerpe is en ook deel vorm van die omskrywings van verskeie misdade in Anglo-Amerikaanse, Franse en Suid-Afrikaanse strafreg. Motief speel dus wel 'n rol by die bepaling van strafregtelike aanspreeklikheid. Die irrelevansie van motief in die strafreg is dus skynbaar 'n fiksie. Die standpunt rakende die rol van motief moet oorweeg word in die lig van haatmisdadwetgewing wat in die Verenigde State van Amerika en in verskeie Wes-Europese demokrasieë aangeneem is. Sodanige wetgewing vereis dat die beskuldigde se motief in aanmerking geneem word wanneer strafregtelike aanspreeklikheid bewys word omdat die beskuldigde se motief gebaseer op vooroordeel 'n spesifieke vereiste van haatmisdadig is. Daar word ook oorweeg of die beweerde irrelevansie van motief in die Suid-Afrikaanse strafreg in die pad staan van die aanname van haatmisdadwetgewing.