

Intent Reconceived

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*ABSTRACT: This Essay builds the foundation of a new paradigm in legal intent that advances justice by producing an accurate fit between the blameworthy states of mind and the formal rules by which we measure culpability and punishment. The Essay begins by challenging the pervasive conflation of the states of mind of purpose and desire, a fundamental conceptual error sponsored by William Prosser, the dean of American tort law. The Essay then reveals the ambiguity inherent in our general notion of purpose by distinguishing between its non-culpable, aspirational aspect and culpable “executory purpose” that triggers the wrongdoer’s act. The concept of executory purpose also overturns the traditional view that the states of mind of purpose and knowledge are independent prongs of legal intent. Instead, this Essay argues that the decision to act, which signifies a defendant’s moral and legal culpability and underlies the state of purpose, constitutes a necessary condition of knowing action, making the division of intent into purpose or knowledge a false dichotomy. In turn, the Essay asserts that, in *Garratt v. Dailey*—the monument to tortious intent entrenched in first-year casebooks for over half a century—the Washington Supreme Court’s remand to inquire into Brian Dailey’s knowledge after the trial court found no purpose constitutes a logical contradiction. Finally, this Essay reconstructs the mental states of desire and knowledge as aggravating factors, like “premeditation,” in the grading of criminal offenses and the measurement of punishment. These insights generate new analytical tools in the calculus of culpability. This Essay asserts the reconstruction of intent as executory purpose—unfettered by the conflation of purpose and desire, the mistaken use of the aspirational sense of purpose, and the mirage of the knowledge prong—ultimately achieves a seamless fit between our mental states and the doctrine of legal intent.*

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I. INTRODUCTION

From capital punishment to punitive damages, the gravest sanctions of American justice are reserved for those who act with intent—the most egregious form of fault. As with the concept of legal insanity, however, intent resides along the murky boundaries of law, psychology, philosophy, and cognitive science. As our knowledge in these areas evolves, theories shift, and the legal doctrines upon which they rest crumble to the ground, to be rebuilt according to stricter standards. The disjointed evolution of the insanity test in our criminal law, from “McNaughton’s Rule” through the “Irresistible Impulse,” *Durham* “Product,” and the American Law Institute’s (“ALI”) “Substantial Capacity” tests to the present amalgam of rules, is a classic illustration.¹ An even more radical conceptual shift, as revealed herein, will generate the building blocks of a new paradigm of legal intent in Anglo-American law.

The impending shift in legal intent traces back to two fundamental and widespread misconceptions entrenched in the case law, treatises, and casebooks on criminal law and torts. The first misconception, documented in Part II, is the nearly universal notion that purpose-based intent is synonymous with the *desire* to bring about a consequence. By contrasting the aspirational nature of a desire with the executory nature of the state of mind of purpose-based intent, however, the flaw in the conflation of purpose and desire is revealed in Part III.

Part IV sets the stage for the identification of the second misconception, revealing the ambiguity inherent in criminal and tort law definitions of purpose, and then closely comparing the *purposeful* and *knowing* states of mind memorialized in the ALI’s Model Penal Code (“MPC”) and Restatement (Third) of Torts that are firmly rooted in case law and legal scholarship. Part

1. See DANIEL N. ROBINSON, *WILD BEASTS & IDLE HUMORS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT* 161–203 (1996); see also WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* § 6, at 272–305 (2d ed. 2010).

V explains the nature of the misconception, demonstrating that the state of purpose is actually a necessary condition of knowing action. As such, the conventional view that the states of mind of purpose and knowledge represent distinct forms of culpability—as represented in *Garratt v. Daily*, the seminal case on tortious intent on which first-year law students have cut their teeth for more than half a century—is shown to be based upon a false dichotomy, and the ostensible distinction between purpose and knowledge evaporates into thin air. Finally, Part VI demonstrates that knowledge of a high probability that a particular consequence will occur, and the desire to bring the consequence about, actually represent nothing more or less than aggravating factors in the calculus of culpability.

II. THE ODYSSEY OF LEGAL INTENT IN ANGLO-AMERICAN LAW

“[A]ctus not facit reum nisi mens sit rea (an act does not make one guilty unless his mind is guilty).”—*Latin maxim*²

“[A] civilized society does not punish for thoughts alone.”—*Model Penal Codes*³

Over the vast span of the common law, at least 78 terms have been employed to connote the state-of-mind requirement of intent in criminal law,⁴ including terms such as “evil-meaning mind,”⁵ “callously,” “spitefully,” “heedlessly,”⁶ and the oxymoronic “willfully neglects.”⁷ Scholars and jurists

2. See LAFAVE, *supra* note 1, § 4.1(a), at 166.

3. MODEL PENAL CODE § 2.01 cmt. 1 (AM. LAW INST., Official Draft and Revised Comments 1962) (1985).

4. S. REP. NO. 95-605, pt. 1, at 55 (1977). “By as early as the thirteenth century . . . English courts had begun to require proof that the person charged with a criminal offense had a culpable state of mind.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §10.01, at 117 (5th ed. 2009).

5. DRESSLER, *supra* note 4, § 10.02[B], at 118.

6. See, e.g., N.J. STAT. ANN. § 2C:11-5 hist. n. (West 1981) (criminal homicide can be found when death was caused by driving a vehicle carelessly and heedlessly, in a willful or wanton disregard of the rights or safety of others). The statute was amended to have a recklessness standard by 1981 N.J. Laws 1222 (West).

7. S. REP. NO. 95-605, pt. 1, at 55.

have lamented the thicket of terms⁸ as “elusive,”⁹ “baffling,”¹⁰ “hopelessly confused,” “redundant . . . [and] contradictory,”¹¹ noting that many of them, such as “improperly,” “unlawfully,” “feloniously,” “corruptly,” and “general immorality of motive” are tautological, conclusory,¹² and fail to describe mental states at all.¹³ As the U.S. Supreme Court has observed: “Few areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime.”¹⁴ And in his classic critique of intent doctrine, Professor Francis Bowes Sayre concluded, “it is quite futile to seek to discover the meaning of mens rea by any common principle of universal application running alike through all the cases.”¹⁵

A. THE MAZE OF INTENT UNDER THE MODEL PENAL CODE

In the latter half of the last century, the chaos of criminal intent under the common law was replaced by the virtually impenetrable definitions promulgated in the ALI’s MPC, which, along with most of the other provisions of the Code, were rapidly and extensively absorbed into American law. Although the MPC’s formulation of the four categories of mental culpability of purpose, knowledge, recklessness, and negligence is often regarded as helpful in “clarif[ying] mens rea analysis,”¹⁶ many commentators have assailed the maze of mental states enumerated in the Code.¹⁷ Within the four categories of culpability, the drafters describe a series of vague and conflicting mental states, assigning one or more of them as the culpable states with respect to three different elements of criminal offenses—conduct, results, and

8. Oliver Wendell Holmes observed that “most of the difficulties as to the *mens rea* was due to having no precise understanding what the *mens rea* is.” Letter from Oliver Wendell Holmes, U.S. Supreme Court Justice, to Harold J. Laski (July 14, 1916), in *HOLMES–LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI* 3, 4 (Mark DeWolfe Howe ed., 1953). Professor Sanford Kadish remarked that “[t]he term ‘*mens rea*’ is rivalled only by the term ‘jurisdiction’ for the varieties of senses in which it has been used and for the quantity of obfuscation it has created.” Sanford H. Kadish, *The Decline of Innocence*, 26 *CAMBRIDGE L.J.* 273, 273 (1968). Professor George Fletcher noted that “[t]here is no term fraught with greater ambiguity than that venerable Latin phrase that haunts Anglo-American criminal law: *mens rea*.” GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.2.1, at 398 (1978). A U.S. Senate report referred to the “bewildering array of terms used to describe the mental element of an offense” in federal criminal law. S. REP. NO. 95-605, pt. 1, at 55.

9. *Morissette v. United States*, 342 U.S. 246, 252 (1952).

10. Francis Bowes Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in *HARVARD LEGAL ESSAYS* 399, 411 (1934).

11. Kenneth R. Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 *AM. CRIM. L. REV.* 123, 125 (1980).

12. *Id.*

13. *Id.* & n.12.

14. *United States v. Bailey*, 444 U.S. 394, 403 (1980).

15. Sayre, *supra* note 10, at 404.

16. See Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 *STAN. L. REV.* 681, 692 (1983).

17. See Feinberg, *supra* note 11, at 125.

attendant circumstances. The nebulous results, catalogued in Table 1 below, have been largely ignored in practice as well as in the classroom.¹⁸

B. *THE TORTUOUS PATH OF TORTIOUS INTENT*

“[The type of intent] based on an actor’s desires[] has never raised much controversy.”—Anthony J. Sebok¹⁹

On the tort side of the law’s effort to define and redress the mental aspect of bad acts, the doctrine of legal intent has fared no better under the fitful changes of course in the ALI’s three Restatements of tort law. Table 1 also enumerates the states of mind that constitute tortious intent under the current Restatement.

A comprehensive examination of the contradictions in the contemporary rules governing criminal and tortious intent would be a voluminous and daunting project beyond the scope of this Essay. Nonetheless, the Essay will unearth several of the more disturbing contradictions within the present-day doctrine of criminal and tortious intent, and propose the foundation of a new model of intentionality in Anglo-American law. This new model, in turn, generates a unique set of analytic tools to precisely calculate the culpability of wrongdoers and allocate punishment among them.

18. Robinson & Grall, *supra* note 16, at 757 (“[M]ost American courts have failed to take note of the modern criminal code shift to element analysis.”).

19. Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)’s Definition of Intent*, 54 VAND. L. REV. 1165, 1169–70 (2001).

Table 1. Culpable States of Mind Under the MPC and the Restatement (Third) of Torts

Formal Classification of Mental State	Criminal Law or Torts	Source of Law	Mental State(s) Supporting Particular Element of Offense		
			Result Element	Conduct Element	Element of Attendant Circumstances
Purposely	Criminal Law	MPC	“conscious object” to cause the result ²⁰	“conscious object” to engage in the conduct ²¹	awareness, belief, or “hope” that the circumstances exist ²²
	Tort Law	Rest. (3d)	“purpose” or “desire” to cause the result ²³	none specified	none specified
Knowingly	Criminal Law	MPC	awareness that the result is “practically certain” to occur ²⁴	awareness of the nature of the conduct ²⁵	awareness of the existence of the circumstances ²⁶
	Tort Law	Rest. (3d)	belief that the result is “substantially certain to” occur ²⁷	none specified	none specified

20. MODEL PENAL CODE § 2.02(2)(a)(i) (AM. LAW INST., Official Draft and Revised Comments 1962) (1985). With respect to the element of the result of one’s conduct, “[a] person acts purposely . . . [if] it is his [or her] conscious object to . . . cause such a result.” *Id.*

21. *Id.* With reference to the element of one’s conduct, “[a] person acts purposely . . . [if] it is his [or her] conscious object to engage in conduct of that nature.” *Id.*

22. *Id.* § 2.02(2)(a)(ii). With regard to the element of attendant circumstances, “[a] person acts purposely . . . [if] he [or she] is aware of the existence of such circumstances or . . . believes or hopes that they exist.” *Id.*

23. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1(a), cmt. (AM. LAW INST. 2010).

24. MODEL PENAL CODE § 2.02(2)(b)(ii) (AM. LAW INST., Official Draft and Revised Comments 1962) (1985). With regard to the element of the result of one’s conduct, “[a] person acts knowingly . . . if . . . he [or she] is aware that it is practically certain that his [or her] conduct will cause such a result.” *Id.*

25. *Id.* § 2.02(2)(b)(i). With reference to the element of one’s conduct, “[a] person acts knowingly . . . if . . . he [or she] is aware that his [or her] conduct is of that nature.” *Id.*

26. *Id.* § 2.02(2)(c). Culpable recklessness also requires that the act constitute what is known, more or less, as “criminal negligence”: “The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” *Id.*

27. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1(b) (AM. LAW INST. 2010).

Recklessly	Criminal Law	MPC	“consciously disregards a substantial and unjustifiable risk that the material element [of conduct, result, or attendant circumstances] exists or will result from his [or her] conduct” ²⁸		
	Tort Law	Rest. (3d)	awareness of serious objective risk that the result will occur ²⁹	none specified	none specified
Negligently	Criminal Law	MPC	“should be aware [but is not] of substantial and unjustifiable risk that the element [of conduct, result, or attendant circumstances] exists or will result from his [or her] conduct” ³⁰		
	Tort Law	Rest. (3d)	none specified	none specified	none specified

III. PROSSER’S MISCONCEPTION: THE CONFLATION OF DESIRE AND TORTIOUS INTENT

No one has had more influence over a major area of American law than William Prosser, universally acknowledged as the dean of modern tort law. His treatise and casebook remain, nearly 40 years after his death, the predominant teaching tools on the subject. Nonetheless, Prosser, who served as the initial reporter and principal architect of the Restatement (Second) of Torts promulgated in 1965, misconceived intent in a way that, to this day, reverberates throughout case law, scholarship, and the classroom.

The first Restatement of Torts, sponsored by the ALI in 1933, defined intent as the “purpose” to bring about the proscribed consequence or, alternatively, “know[ing]” that one’s conduct was “substantially certain” to bring it about.³¹ Prosser, however, oversaw the substitution of the term “desire” in place of purpose in the second iteration of the Restatement, which explains that the “word ‘intent’ is used throughout the Restatement [Second] of this Subject to denote that the actor *desires* to cause consequences of his act, or that he believes that the consequences are substantially certain to result

28. MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST., Official Draft and Revised Comments 1962) (1985).

29. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 (AM. LAW INST. 2010).

30. MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST., Official Draft and Revised Comments 1962) (1985). Culpable negligence also requires that:

The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his [or her] conduct and the circumstances known to him [or her], involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

Id.

31. See RESTATEMENT OF TORTS: INTENTIONAL HARMS TO PERSONS, LAND, AND CHATTELS § 13(a) cmt. d (AM. LAW INST. 1934).

from it.”³² In the explanatory comments and illustrations following the definition, the term “purpose” was also replaced by desire.³³ In light of this serious error in conflating purpose and desire, great irony inheres in Prosser’s observation that intent is “one of the most often misunderstood legal concepts.”³⁴

A. THE PERVASIVE USE OF DESIRE IN LEGAL INTENT

Although in the Restatement (Third) of Torts: Physical and Emotional Harm the ALI has recently replaced “desire” with “purpose” in the definition of tortious intent,³⁵ the explanatory comments and illustrations that follow retain the term desire in explaining the meaning of purpose.³⁶ Venerable torts scholars Professor James Henderson and Aaron Twerski, the co-reporters

32. RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965) (emphasis added). The second prong of the definition of intent in the Restatement (Third) of Torts defines intent as “knowing that the consequence [of one’s act] is substantially certain to result.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (b) (AM. LAW INST. 2010) By comparison, as noted in Table 1, the MPC defines the knowledge-based prong of intent with regard to the result of one’s conduct as “aware[ness] that it is practically certain that [one’s] conduct will cause such a result” element of a crime. MODEL PENAL CODE § 2.02 (2)(b)(ii) (Official Draft and Revised Comments 1962) (1985). See also *supra* notes 24–25 and accompanying text (describing the MPC definition of knowing intent with respect to the elements of a crime that consist of conduct and attendant circumstances).

Although, until now, no controversy has arisen over the equation of desire and purpose, the knowledge prong of criminal and tortious intent has spawned a variety of criticisms. See *infra* Part V.C.

33. RESTATEMENT (SECOND) OF TORTS § 8A cmts., illus. (AM. LAW INST. 1965). While no definitive record exists of the rationale for substituting desire for purpose, Prosser appears to have favored the change. The official records of the discussion preceding the adoption of each section consist of transcripts of the proceedings at various ALI annual meetings during which the provisions of the Restatement (Second) were considered. See generally AM. LAW INST., A.L.I. PROC. (1950–1966). Oddly, according to the records of the ALI’s annual proceedings, the issue of substituting desire for purpose was not discussed at these meetings, and little, if any, information is otherwise available. Professors James Henderson and Aaron Twerski have expressed the belief that purpose was substituted for desire “solely for the dubious purpose of linking section 1 [of the Restatement (Third) of Torts] with the Model Penal Code,” thereby unifying the definition of intent across torts and criminal law. James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1154 (2001). See *infra* Part IV.A for a discussion on whether or not the doctrine of intent in torts and criminal law should be uniform.

34. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 33 (W. Page Keeton ed., 5th ed. 1984).

35. Section 1 states that “[a] person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (AM. LAW INST. 2010).

36. In the first comment following the rule, intent exists, *inter alia* and in relevant part, when an individual “acts with the desire to cause harm.” *Id.* § 1 cmt. a. Another comment explains, in relevant part, “[a]n intentional tort requires that the actor desires the harm to occur.” *Id.* § 1 cmt. d. Desire stands in for purpose in four other instances in the comments and illustrations. See also *id.* § 1 cmt. a, cmt. c illus. 3, cmt. d. Replacing desire with purpose in the formal definition of intent, only to then use desire as a synonym of purpose in the comments and illustrations contravenes logic.

for the ALI's Restatement (Third) of Torts: Products Liability,³⁷ endorse the interchangeability of the terms under the rationale that "desire . . . comports with the common understanding of intent and requires no elaboration,"³⁸ noting that the Discussion Draft "could simply substitute the concept of *desire* for that of purposefulness without making any change in substance."³⁹ The conflation of desire and purpose, anchored by the doctrine of stare decisis, thus lives on in American tort law.

The terms are often equated in our criminal law, as well.⁴⁰ Indeed, as evidenced by the excerpts in Table 2 below, Supreme Court jurisprudence,⁴¹ the leading treatises on criminal law and torts, jury instructions, and casebooks routinely reflect the deeply entrenched conflation of desire and purpose throughout the practice of law and the legal academy.⁴²

As we will see, the difficulty here is more than semantic. Many purposeful tortious and criminal acts are prompted by mental states other than desire, and the conflation of purpose and desire is a throwback to the common law's hodgepodge of overlapping terms for intent that necessarily produces inconsistent results.

37. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (AM. LAW INST. 1998).

38. Henderson & Twerski, *supra* note 33, at 1138.

39. *Id.* at 1154 (emphasis added).

40. FLETCHER, *supra* note 8, § 6.5.1, at 440 (noting that "[t]here is considerable support" for the view that "an actor intends a result only if he desires to bring about that result").

41. See, e.g., *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). In holding that tortious intent requires an actor to intend the consequences of his or her act, and not merely the act itself, Justice Ginsberg, writing for a unanimous court, indicated that a desire to injure would constitute intent: an "injury is unintended . . . [if] neither *desired* nor in fact anticipated." *Id.* (emphasis added).

42. *But see* FLETCHER, *supra* note 8, § 6.5.1, at 440 (noting pockets of support for the view "that intending should be considered apart from the issue of desiring").

Table 2. Examples of the Conflation of “Desire” and Legal Intent

Source	Sample Excerpt
Treatises	
<i>Principles of Criminal Law</i> by Professor Wayne R. LaFave	“[O]ne intends certain consequences when he desires that his acts cause those consequences” ⁴³ “[A] person who acts (or omits to act) intends a result of his act (or omission) . . . when he consciously desires that result” ⁴⁴
<i>Prosser and Keeton on the Law of Torts</i> by Professors W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen	Intent “extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow.” ⁴⁵
<i>Understanding Criminal Law</i> by Professor Joshua Dressler	“At common law, a person ‘intentionally’ causes the social harm of an offense if . . . it is his [or her] desire . . . to cause the social harm” ⁴⁶
<i>The Forms and Functions of Tort Law</i> by Professor Kenneth S. Abraham	With intent in battery, “[t]he defendant must . . . desire to bring about such contact.” ⁴⁷
<i>Torts</i> by Professor Richard A. Epstein	With intent in battery under “the conventional view,” a defendant is “responsible because of his desire to make contact.” ⁴⁸
<i>The Law of Torts</i> by Professor Joseph W. Glannon	“The word ‘intent’ is used . . . to denote the actor desires to cause consequences” ⁴⁹
<i>Understanding Torts</i> by Professors John L. Diamond, Lawrence C. Levine & M. Stuart Madden	“Intent is satisfied if the defendant desires the consequences of [his or] her acts.” ⁵⁰

43. LAFAVE, *supra* note 1, § 4.2, at 171.

44. *Id.* § 4.2(a), at 172.

45. KEETON ET AL., *supra* note 34, § 8, at 35.

46. DRESSLER, *supra* note 4, § 10.04[A][1], at 121.

47. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 23 (2d ed. 2002). Other examples include five references to intent as the *desire* to cause harm. *Id.* at 23–24.

48. RICHARD EPSTEIN, TORTS § 1.3.2.1, at 9 (1999).

49. JOSEPH W. GLANNON, THE LAW OF TORTS 5 (4th ed. 2010) (quoting RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST., 1965)). Other examples include two references to desire as the basis for intent in battery. *Id.*

50. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 1.01[B], at 3 (3d ed. 2007). Other examples include seven references to desire as intent. *Id.*

ALI Restatements of Torts	
Restatement (Second) of Torts	“The word ‘intent’ is used . . . to denote that the actor desires to cause consequences of his act” ⁵¹
Restatement (Third) of Torts: Liability for Physical and Emotional Harm	“An intentional tort requires that the actor desires the harm to occur” ⁵²
U.S. Supreme Court	
<i>Kawaauhau v. Geiger</i> , 523 U.S. 57 (1998)	“[An] injury is unintended [if] neither desired nor in fact anticipated” ⁵³
Jury Instructions	
New York Pattern Jury Instructions—Civil 2:275	“A person acts knowingly or intentionally when the person desires to bring about a particular result” ⁵⁴
California Civil Jury Instructions 1.30	“A person acts with ‘intent’ . . . when he or she desires to cause consequences of that act” ⁵⁵
Ohio Jury Instructions 9.60	“Conduct is ‘intentional’ when the actor desires to cause the consequences of the (act) (failure to act)” ⁵⁶
Casebooks	
<i>Cases and Materials on Torts</i> by John L. Diamond	“[I]ntent can be satisfied either when the defendant desires or is substantially certain the elements of the tort will occur.” ⁵⁷
<i>Basic Tort Law: Cases, Statutes, and Problems</i> by Arthur Best and David W. Barnes	With battery, “[i]ntent may be shown by demonstrating that the actor . . . desired the harmful or offensive contact” ⁵⁸ “A plaintiff can satisfy the intent requirement for battery with proof that the defendant . . . desired to cause a contact that was harmful or offensive” ⁵⁹

B. OF MICE AND MEN: A LITERARY ILLUSTRATION OF THE DIFFERENCE BETWEEN THE MENTAL STATES OF DESIRE AND PURPOSE

A poignant scene from a classic literary work, John Steinbeck’s *Of Mice and Men*, provides a clear illustration of the difference between desire and purpose.⁶⁰ At the end of the novel about the brotherly love of two itinerant

51. RESTATEMENT (SECOND) OF TORTS § 8A, at 15 (AM. LAW INST. 1965). Other examples include five references to desire as intent. *Id.* § 8A cmts. a & b, illus. 1 & 2.

52. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt. d., at 8 (AM. LAW INST. 2010). Other examples include five references to desire as intent. *Id.* § 1 cmts. a & c, illus. 3, at 3–5, 7.

53. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

54. N.Y. PATTERN JURY INSTRUCTIONS—CIVIL 2:275.3 (2014).

55. CAL. CIVIL JURY INSTRUCTIONS (BAJI) 1.30 (2004).

56. 1 OHIO JURY INSTRUCTIONS 9.60 (1996).

57. JOHN L. DIAMOND, CASES AND MATERIALS ON TORTS 4 (2001).

58. ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS 21 (2d ed. 2007). Other examples include six references to desire as intent. *Id.* at 21–22, 30–31.

59. *Id.* at 22.

60. See generally JOHN STEINBECK, OF MICE AND MEN (1937).

farm workers set in California's gristly Salinas Valley during the Depression era, George realizes that he and Lennie, the protagonists, cannot outrun the bloodthirsty mob bent on killing Lennie, George's slow-witted, but beloved, friend who had inadvertently brought about the death of the farm owner's daughter.⁶¹ In the ultimate gesture of love and pathos, as George reassures Lennie about the latter's sublime vision of their future—they will live on their own small farm where Lennie, who likes to hold soft things, will tend rabbits in the yard—he shoots his unsuspecting friend in the back of the head to spare him from a barbarous death at the hands of his pursuers.⁶²

61. *Id.* at 181–84. The fact that mercy killings constitute homicide despite the mental anguish and legal jeopardy they often entail for the actor indicates that desire is not always equated with purpose.

62. *Id.* In Steinbeck's words:

The little evening breeze blew over the clearing and the leaves rustled and the wind waves flowed up the green pool. And the shouts of men sounded again, this time much closer than before.

George took off his hat. He said shakily, "Take off your hat, Lennie. The air feels fine."

Lennie removed his hat dutifully and laid it on the ground in front of him. The shadow in the valley was bluer, and evening came fast. On the wind the sound of crashing in the brush came to them.

Lennie said, "Tell how it's gonna be."

George had been listening to the distant sounds. For a moment he was business-like. "Look across the river, Lennie, an' I'll tell you so you can almost see it."

Lennie turned his head and looked off across the pool and up the darkening slopes of the Gabilans. "We gonna get a little place," George began. He reached in his side pocket and brought out Carlson's Luger; he snapped off the safety, and the hand and gun lay on the ground behind Lennie's back. He looked at the back of Lennie's head, at the place where the spine and skull were joined.

A man's voice called from up the river, and another man answered.

"Go on," said Lennie.

George raised the gun and his hand shook, and he dropped his hand to the ground again.

"Go on," said Lennie. "How's it gonna be. We gonna get a little place."

"We'll have a cow," said George. "An' we'll have maybe a pig an' chickens . . . an' down the flat we'll have a . . . little piece alfalfa—"

"For the rabbits," Lennie shouted.

"For the rabbits," George repeated.

"And I get to tend the rabbits."

"An' you get to tend the rabbits."

Lennie giggled with happiness. "An' live on the fatta the lan'."

"Yes."

Lennie turned his head.

George faced a choice between the very two alternatives he dreaded most: (1) killing the person he was closest to in the world; or (2) allowing that person to die in a horrific manner. The divergence between desire and purpose was crystal clear to George. Whichever he selected, it would be undeniably inappropriate to characterize the choice between the last two acts he would otherwise choose to commit as a *desire*.

Perhaps one could challenge the conclusion that George's options were limited to killing Lennie or letting Lennie die at the hands of the mob. One might contend that he had numerous other options, one or more of which may have yielded *desired* results. For example, George could have attempted to have both of them hide from the mob, outrun it, fight it, confront it with a stirring speech about the need for formal justice, or negotiate with it. Generally, as the argument would go, people often: (1) fail to recognize all of the options available to them, some of which might have yielded desired consequences; or (2) prematurely dismiss desirable options as infeasible.

As true as this generalization might be, it does not mean that a potential enjoyable or satisfying—and therefore *desirable*—outcome exists in all situations, as the crewmember of a sinking ship who faces the gruesome task of choosing which passengers to usher onto the single lifeboat would certainly attest.⁶³ George, for example, may have understood that eluding or

“No, Lennie. Look down there across the river, like you can almost see the place.”

Lennie obeyed him. George looked down at the gun.

There were crashing footsteps in the brush now. George turned and looked toward them.

“Go on, George. When we gonna do it?”

“Gonna do it soon.”

“Me an’ you.”

“You . . . an’ me. Ever’body gonna be nice to you. Ain’t gonna be no more trouble. Nobody gonna hurt nobody nor steal from ‘em.”

Lennie said, “I thought you was mad at me, George.”

“No,” said George. “No, Lennie, I ain’t mad. I never been mad, an’ I ain’t now. That’s a thing I want ya to know.”

The voices came close now. George raised the gun and listened to the voices.

Lennie begged, “Le’s do it now. Le’s get that place now.”

“Sure, right now. I gotta. We gotta.”

And George raised the gun and steadied it, and he brought the muzzle of it close to the back of Lennie’s head. The hand shook violently, but his face set and his hand steadied. He pulled the trigger. The crash of the shot rolled up the hills and rolled down again. Lennie jarred, and then settled slowly forward to the sand, and he lay without quivering.

Id.

63. The belief that all human acts are the product of desire, i.e., the aspiration to enjoyment or satisfaction, is the basic tenet of psychological hedonism. DONALD PALMER, DOES THE CENTER

confronting the mob would be futile. Hence, a term other than desire must be used to represent intent since, at times, the term must encompass situations in which an actor does not desire *any* of the consequences of the available courses of action, but, like George, clearly plans to commit a criminal or tortious act. Moreover, in light of the entirely subjective nature of an individual's desires, any attempt to determine the desirability of alternative courses of action to another human being would be doomed to endless speculation over the actor's psychological makeup and over human nature itself.

The distinction between desire and purpose is of more than literary significance, coming into play whenever a defendant's purposeful act was prompted by need, obligation, sympathy, guilt, and so on, rather than by desire.

C. DISTINGUISHING PREFERENCES FROM DESIRES

Alternatively, one might contend that, even with a choice among evils, an actor can be said to desire the option chosen over those not selected. Indeed, Professors Henderson and Twerski take this position. Referring to an actor whose act results in a secondary, unwanted consequence, Henderson and Twerski assert:

[T]he actor may be said actually to "desire" the seemingly unintended consequence in the sense that the actor *prefers* to cause it rather than to avoid causing it by refraining from acting. Thus, the position "I wish I didn't have to cause this second consequence" could always be followed by the statement "But given existing constraints, I prefer (desire) to cause that consequence rather than not to act at all."⁶⁴

HOLD?: AN INTRODUCTION TO WESTERN PHILOSOPHY 269 (6th ed. 2014) [hereinafter PALMER, DOES THE CENTER HOLD?] ("[P]sychological hedonism . . . [holds] that we are motivated by the desire for pleasure."). The age-old critique of the empirical assumption that desire necessarily motivates action is that the pleasure an individual derives from achieving his or her objectives is often a secondary gain, rather than the force that motivated the act. DONALD PALMER, WHY IT'S HARD TO BE GOOD: AN INTRODUCTION TO ETHICAL THEORY 94-95 (2006) [hereinafter PALMER, WHY IT'S HARD TO BE GOOD]. As an example, Professor Donald Palmer offers the scenario in which an actor helps another person "climb out of a cesspool into which [the latter] has fallen," an activity in which the rescuer would not otherwise have engaged. *Id.* at 94.

The theory of psychological hedonism exists in contrast to the philosophy of *moral* hedonism, which asserts that "the motive behind all acts . . . *ought to be* pleasure." PALMER, DOES THE CENTER HOLD?, *supra*, at 458. Jeremy Bentham was a proponent of both psychological and moral hedonism, asserting: "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 14 (Batoche Books 2000) (1781).

64. Henderson & Twerski, *supra* note 33, at 1140 n.38 (emphasis added). The scenario employed by Henderson and Twerski, in which an act produces effects that are desired and beneficial on the one hand, and undesired and harmful on the other, is referred to in moral philosophy as the "double effect" problem. *Double effect, principle of*, OXFORD DICTIONARY OF

Accordingly, Henderson and Twerski perform the Procrustean feat of stretching *undesired* consequences into *desired* ones. They do so, however, at a high cost to the integrity of the language. The standard dictionary definition of a desire is a “conscious impulse toward an object or experience that promises *enjoyment or satisfaction* in its attainment.”⁶⁵ Satisfaction, in turn, means a “contented state of mind; gratification or pleasure occasioned by something.”⁶⁶ A preference does not constitute a desire any more than a condemned man’s choice of a firing squad over the gallows means that he anticipates being shot to death will be satisfying or enjoyable. George was anything but contented, and experienced no pleasure, at the prospect of firing a bullet in the back of his best friend’s head. Almost certainly, he had never felt worse or more unsettled.

A mere preference, therefore, is clearly distinct from a desire. Ironically, in employing desire to define purpose in the most recent Restatement, the drafters fell victim to the very perils of colloquial synonymy in legal drafting that Professors Henderson and Twerski warn against in their article *Intent and Recklessness in Tort: The Practical Craft of Restating Law*.⁶⁷ In their article, under the heading “The Drafter Should Avoid the Gratuitous Use of Synonyms,” they caution that, in “technical legal writing, especially in connection with *Restatement* drafting,” words that are loosely and commonly used as synonyms “should not be used interchangeably.”⁶⁸

D. FROM BAD TO WORSE: VIEWING ALL ACTION AS THE PRODUCT OF DESIRE

Even though the choice, or preference, of one action over another does not constitute a desire, the state of desire can still be equated with intent as long as all action is *motivated* by desire. The implications of this view, however, violate some of our most firmly held beliefs about human nature. Since desire is a “conscious impulse toward something that promises enjoyment or satisfaction in its attainment,”⁶⁹ and pleasure is the experience of “enjoyment or satisfaction,”⁷⁰ it follows that desire is a state in which one aspires to pleasure. And, if all acts are the product of desire, and desire is the aspiration

PHILOSOPHY (2d rev. ed. 2008). Philosophers have debated whether or not, and on what basis, an actor has *intended* the undesired, harmful result, and is thus morally responsible for it. See generally Phillipa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV. 5 (1967).

65. *Desire*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002) (emphasis added); see also, e.g., *Desire*, 1 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (6th ed. 2007) (defining desire (as a noun) as “the feeling that one would derive *pleasure or satisfaction* from possessing or attaining something; a longing” (emphasis added)).

66. *Satisfaction*, 2 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (6th ed. 2007).

67. Henderson & Twerski, *supra* note 33, at 1148.

68. *Id.* (offering examples of pairs of distinct terms that are conflated in legal drafting, including “‘believe’ and ‘know,’ ‘harm’ and ‘injury,’ ‘causes’ and ‘brings about,’ and ‘acting’ and ‘engaging in conduct’”).

69. *Desire*, MERRIAM–WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2004).

70. *Pleasure*, AMERICAN HERITAGE DICTIONARY (4th ed. 2001).

to pleasure, then everyone—including Mother Teresa and Santa Claus—is a shameless hedonist and the very concepts of altruism, goodness, self-sacrifice, and moral courage vanish instantly.⁷¹

E. THE DISTINCT ROLES OF THE MENTAL STATES OF DESIRE AND PURPOSE

Since desire is not the source of every human act, other states of mind must play a role in generating volitional action. Frequently, a would-be actor must sort through numerous conflicting thoughts (regarding, e.g., the feasibility, danger, cost, utility, probability, and morality of potential acts) and emotions (e.g., desires, fears, anger, guilt, joy, jealousy, etc., that influence acts) before deciding on one of many potential courses of action. While thoughts and emotions influence the actor's choice of a particular course, they do not constitute the decision itself.⁷²

Professor Michael Moore, one of a modest number of scholars who view intentionality from the intersection of law and philosophy, similarly describes the distinction between *desire* and *intent*:

An important functional difference exists between those background states of desire that direct one to action, and those executory states of intention that execute one's desires: Desire is merely a component state in the inevitable conflict one experiences between competing desires, whereas intention is the resolution of that conflict in the form of a decision. . . . One's desires will inevitably conflict because all cannot simultaneously be realized at one given time. However, to come to conflicting resolutions of that

71. As Professor Donald Palmer observes, for example, the theory of psychological hedonism denies even the clearest act of altruism, such as a soldier falling on an enemy hand grenade to save the lives of the troops around him. The hedonist's response, according to Palmer, would be along the casuistic lines that the soldier fell on the hand grenade to experience the pleasure of knowing, for example, that he will "be remembered as a hero." PALMER, DOES THE CENTER HOLD?, *supra* note 63, at 270–71. The prospect of the brief duration of the pleasure compared to the permanence of death would seem, however, to belie the rationality of the act, and thus the very possibility that the soldier would have sought pleasure in throwing himself on the grenade.

According to the most extreme version of psychological hedonism, the pursuit of pleasure is accepted as a biological fact. For a compelling refutation of the theory, see ELLIOTT SOBER & DAVID SLOAN WILSON, UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR 275–87 (1998). Recent evidence of a gene responsible for altruistic behavior, however, points to the opposite empirical conclusion. *See, e.g.*, Martin Reuter et al., *Investigating the Genetic Basis of Altruism: The Role of the COMT Val158Met Polymorphism*, 6 SOC. COGNITIVE AND AFFECTIVE NEUROSCIENCE 662 (2011).

72. With a large pinch of poetic license, Professor John Churton Collins observed the same notion nearly a century ago: "We are no more responsible for the evil thoughts which pass through our minds, than a scarecrow for the birds which fly over the seedplot he has to guard; the sole responsibility in each case is to prevent them from settling." John Churton Collins, *in* ENGLISH REVIEW (1914), *reprinted in* THE OXFORD BOOK OF APHORISMS 175, 175 (John Gross ed., 1983).

conflict—in other words, to have conflicting intentions—would be criticizably irrational.⁷³

In the context of an act or a result that is proscribed in criminal law or torts, the culpable mental state of purpose consists of the decision to act, which then triggers, i.e., *causes*, the volitionally initiated bodily movements that constitute the act. Ironically, in drawing the critical distinction between desire and culpable intent, Professor Moore appears to fall prey to the tendency to ascribe all human action to desire. In stating that “[d]esire is merely a component state in the inevitable conflict one experiences between competing desires,”⁷⁴ Moore seems to suggest that only desires compete among each other in *directing one to action*, ostensibly excluding the other motivational states that do so, several of which are mentioned above.⁷⁵

F. *VIEWING DESIRE AS INTENT: CONFUSING AN ASPIRATIONAL STATE WITH AN EXECUTORY STATE*

In essence, the conflation of desire and purpose confuses one of many *precursors* (i.e., desire) of a decision to act with the decision itself, and thus represents a logical impossibility. As a state that may “direct one to action,” desire—the impulse to attain satisfaction or enjoyment—is a purely aspirational state, distinct from the executory state in which one decides to act. Just as dark thoughts alone do not constitute a crime, the mere aspiration to wreak havoc cannot, in the absence of the decision to act that triggers voluntary action, constitute culpable intent. The conflation of desire and intent thus represents the substitution of a non-culpable aspirational state for one that must be executory in nature, a fatal conceptual error in the traditional doctrine of intentionality.

G. *“PURPOSE OR DESIRE”: THE CONFUSION OF AN ASPIRATIONAL STATE WITH AN EXECUTORY STATE REPRISED*

Primary and secondary sources of tort law, as reflected in Table 3, frequently refer to “purpose or desire” in alluding to legal intent. Such reference does not necessarily represent the interchangeable, or synonymous, use of the terms. It might, instead, represent the notion that either the state of mind of desire *or* that of purpose can fulfill the intent requirement, as with the choice of “soup or salad” as an appetizer. While such construction does not equate desire and purpose, it repeats the mistake of confusing the purely aspirational state of desire with the executory state of intent.

73. Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 322–23 (1996) (citation omitted).

74. *Id.* at 322.

75. That is, desire, fear, anger, guilt, joy, and jealousy.

Table 3. Examples of the Use of “Desire” and “Purpose” as Alternatives

Source	Sample Excerpt
Treatises	
<i>Prosser and Keeton on the Law of Torts</i> by Professors W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen	“[I]ntent . . . [includes] having in the mind a purpose (or desire) to bring about given consequences” ⁷⁶
<i>Principles of Tort Law</i> by Marshall S. Shapo	“[T]he plaintiff must show that the defendant had a desire or purpose to place the plaintiff in apprehension of a harmful or offensive contact” ⁷⁷
Case Law	
<i>Eddy v. Virgin Islands Water & Power Authority</i> , 369 F.3d 227 (3d Cir. 2004)	With intentional infliction of emotional distress, “[a] defendant acts ‘intentionally’ when he acts with the purpose or desire to inflict severe emotional distress.” ⁷⁸
<i>Lumbermens Mutual Casualty Co. v. S-W Industries, Inc.</i> , 39 F.3d 1324 (6th Cir. 1994)	Intent entails “a desire or purpose to cause a particular consequence.” ⁷⁹
<i>Travis v. Dreis & Krum Manufacturing Co.</i> , 551 N.W.2d 132 (Mich. 1996)	Intent entails “a purpose (or desire) to bring about given consequences.” ⁸⁰
<i>American National Fire Insurance Co. v. Schuss</i> , 607 A.2d 418 (Conn. 1992)	Intent entails “a purpose (or desire) to bring about given consequences.” ⁸¹
<i>White v. Muniz</i> , 999 P.2d 814 (Colo. 2000)	“With regard to the intent element of the intentional torts of assault and battery, . . . a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act.” ⁸²
<i>Zimmerman v. Valdak Co.</i> , 570 N.W.2d 204 (N.D. 1997)	Intent includes “a desire or purpose.” ⁸³
Casebooks	
<i>Torts: Cases, Problems, and Exercises</i> by Professors Russell L. Weaver, John H. Bauman, John T. Cross, Andrew R. Klein, Edward C. Martin & Paul J. Zwier II	“Most commentators . . . defin[e] intent as encompassing both purpose (or desire) and knowledge to a degree of substantial certainty.” ⁸⁴
<i>Tort Law and Practice</i> by Dominick Vetri, Lawrence C. Levine, Joan E. Vogel & Lucinda M. Finley	Referring to “the desire or purpose prong of intent for battery.” ⁸⁵

76. KEETON ET AL., *supra* note 34, § 8, at 34.

77. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW ¶ 6.01 (B), at 22 (3d ed. 2010).

78. *Eddy v. V.I. Water & Power Auth.*, 369 F.3d 227, 232 (3d Cir. 2004).79. *Lumbermens Mut. Cas. Co. v. S-W Indus., Inc.*, 39 F.3d 1324, 1328 (6th Cir. 1994).80. *Travis v. Dreis & Krum Mfg. Co.*, 551 N.W.2d 132, 142 (Mich. 1996) (quoting KEETON ET AL., *supra* note 34, § 8, at 34).81. *Am. Nat’l Fire Ins. Co. v. Schuss*, 607 A.2d 418, 422 (Conn. 1992) (quoting KEETON ET AL., *supra* note 34, § 8, at 34).82. *White v. Muniz*, 999 P.2d 814, 819 (Colo. 2000) (quoting KEETON ET AL., *supra* note 34, § 8, at 35).83. *Zimmerman v. Valdak Co.*, 570 N.W.2d 204, 208 (N.D. 1997).

84. RUSSELL L. WEAVER ET AL., TORTS: CASES, PROBLEMS, AND EXERCISES 16 (2d ed. 2005).

85. DOMINICK VETRI ET AL., TORT LAW AND PRACTICE § 8.03, at 788 (3d ed. 2006).

IV. THE LEGITIMACY OF PURPOSE AS LEGAL INTENT

Divorced from the aspirational state of desire, the term “purpose” must still pass muster as a culpable state of mind.

A. *THE INTEREST OF UNIFORMITY IN CRIMINAL AND TORTIOUS INTENT*

The reference to purpose as legal intent in both the MPC⁸⁶ and the Restatement (Third) of Torts,⁸⁷ and the resultant unity in the doctrine of intent, supports the use of the term “purpose.”⁸⁸ Consistency between tortious and criminal intent represents more than the “hobgoblin of little minds.”⁸⁹ After all, the mental states representing the highest degree of moral culpability in tort and criminal law do not vary simply because the remedies and procedures, as fashioned by the various objectives in these two areas of law, diverge.

B. *THE DISTINCTION BETWEEN ASPIRATIONAL AND EXECUTORY PURPOSE*

Purpose, as a term of art in the doctrine of legal intent, is problematic, as well. The term can connote two different states of mind, which vary significantly in the moral culpability we assign to them. In this way, the word represents an “open concept” with multiple meanings that, in the words of Ludwig Wittgenstein, bear “family resemblances” to one another.⁹⁰ Consistent

86. See MODEL PENAL CODE § 2.02(2)(a) (AM. LAW INST., Official Draft and Revised Comments 1962) (1985).

87. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (AM. LAW INST. 2010).

88. Under the rubric of “systemic consistency,” Professor Jody Armour counsels that, with respect to intent in criminal and tort law, “rules and principles across different areas of law should be consistent with one another.” Jody David Armour, *Interpretive Construction, Systemic Consistency, and Criterial Norms in Tort Law*, 54 VAND. L. REV. 1157, 1161 (2001). For example, comparing the doctrine of self-defense in tort and criminal law, Armour continues, “This is appropriate because there are no moral norms, social policies, or empirical propositions that justify any difference in the treatment of self-defense concepts in tort as against criminal law.” *Id.* at 1162. The principle of systemic consistency serves “values includ[ing] predictability, evenhandedness, harmonizing legal outcomes with the expectations of private citizens, and furthering the legitimacy of the law by demonstrating its substantive and formal rationality.” *Id.* *But cf.* Henderson & Twerski, *supra* note 33, at 1136. Professors Henderson and Twerski believe the opposite, that “intent . . . must be kept endogenous to tort without adjusting for how th[is] element[] [is] conceptualized in . . . legal contexts other than tort.” *Id.* “[S]ystems of criminal justice,” they conclude, “should be left to conceptualize intent . . . on their own, perhaps quite differently.” *Id.*

89. RALPH WALDO EMERSON, SELF-RELIANCE (1841), *reprinted in* RALPH WALDO EMERSON: THE MAJOR PROSE 127, 133 (Ronald A. Bosco & Joel Myerson eds., 2015).

90. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS: THE GERMAN TEXT WITH AN ENGLISH TRANSLATION 36° (P.M.S. Hacker & Joachim Shulte eds., G.E.M. Anscombe et al. trans., Blackwell Publ’g Ltd. 4th ed. 2009) (referring to the similarities between various types of games). “Open concepts” cannot be defined by a discrete set of necessary and sufficient conditions. See PALMER, DOES THE CENTER HOLD?, *supra* note 63, at 405.

with the standard definition of purpose as “an intention, an aim,”⁹¹ and its definition in *Black’s Law Dictionary* as “[a]n objective, goal, or end,”⁹² purpose can connote an aspirational state of mind. On the other hand, when used to represent the state in which one has *decided* to engage in a particular course of action, the term can also represent an “executory” state of mind. In this sense the decision to act that ultimately leads to the initiation of the act represents the adoption of a culpable purpose.⁹³

C. THE MISTAKE OF ASPIRATIONAL PURPOSE IN THE MPC

The drafters of the MPC defined the state of mind of purpose as an actor’s “conscious object” or “hope.”⁹⁴ In doing so, they incorrectly chose the aspirational meaning of the term.

D. THE SOURCE OF THE CONFUSION OF DESIRE AND PURPOSE

Although a desire and an aspirational state of mind such as a goal or objective do not represent identical states of mind—since one may aspire to a goal or objective that does not entail enjoyment or satisfaction—the term desire is easily confused with the aspirational sense of purpose because desire is also aspirational in nature.⁹⁵ Reference to the state of mind of purpose within the doctrine of legal intent must, therefore, exclude the *aspirational* sense of purpose, and represent only *executory* purpose. Otherwise, one who merely aspired to an act that he or she then non-volitionally brought about—that is, negligently, accidentally without fault, reflexively, unconsciously, or subject to external force—would be liable for what amounted to a wicked thought upon which they never volitionally acted.⁹⁶ Imagine an involuntary twitch in the trigger finger of one who was about to volitionally fire a gun at his or her would-be victim. In other words, the state of mind of purpose is

91. *Purpose*, 2 SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (6th ed. 2007); see also, e.g., *Purpose*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002) (defining purpose as “something that one sets before himself [or herself] as an object to be attained”).

92. *Purpose*, BLACK’S LAW DICTIONARY (10th ed. 2014).

93. The interesting issue of the relationship of the decision to act and the volitional initiation of the act falls beyond the scope of this Essay. But see Daniel Goleman, *Investigations of the Brain Finding Clues to the Mind*, N.Y. TIMES (Apr. 22, 1986), <http://www.nytimes.com/1986/04/22/science/1-investigations-of-the-brain-finding-clues-to-the-mind-108086.html> (noting Professor Benjamin Libet’s research on intent).

94. See *supra* Table 1.

95. See MODEL PENAL CODE § 2.02(2)(a) (AM. LAW INST., Official Draft and Revised Comments 1962) (1985); see also *supra* notes 67–68 and accompanying text (discussing the use of colloquial synonyms in legal drafting). Wittgenstein referred to the error of attempting to impose the set of necessary and sufficient conditions for one meaning of a term when referencing other meanings of the same term as the “linguistic bewitchment of the intellect.” See PALMER, DOES THE CENTER HOLD?, *supra* note 63, at 405. Other terms, like “triangle,” can be defined in a way that applies to all examples of the term, as when a triangle is defined as “a three-sided closed figure.” *Id.*

96. See MODEL PENAL CODE § 2.01 explanatory n. (AM. LAW INST., Official Draft and Revised Comments 1962) (1985) (“[L]iability cannot be based upon mere thoughts . . .”).

culpable only when it immediately precedes, and thus can be said to “cause,” the initiation of volitional action.⁹⁷ This culpable state will herein be referred to as “executory purpose.”⁹⁸

V. THE DEMISE OF “KNOWING” INTENT IN CRIMINAL LAW AND TORTS

A. *THE FALSE DICHOTOMY OF PURPOSE AND KNOWING INTENT: PURPOSE AS A NECESSARY CONDITION OF KNOWING ACTION*

Executory purpose is only one measure of intent in tort and criminal law. In addition to purposefully bringing about the consequence of a particular act, one is deemed to act intentionally under the Restatement of Torts if he or she acts with knowledge to a “substantial certainty” that the result will occur.⁹⁹ For example, under the “element analysis” of the MPC, when “the element involves a result of his conduct,” then “[a] person acts knowingly . . . [if] he is aware that it is practically certain that his conduct will cause such a result.”¹⁰⁰

It stands to reason that the existence of a separate knowledge-based prong of intent is only justified if the purpose prong alone fails to encompass all actors with the degree or kind of moral culpability deemed necessary to merit liability. Ostensibly, then, the two prongs represent alternative states of mind, either of which constitutes intent. However, to have volitionally acted with knowledge that a particular result was highly probable, the act must necessarily have been preceded by the decision to perform it. Executory purpose, therefore, is a *necessary condition* of knowing action, and the doctrinal division of purpose and knowledge into discreet prongs of intent constitutes a false dichotomy.

A close examination of the experience of contemplating and deciding between potential courses of action, a cognitive process summarized in Table 4 below describing “The Cognitive Stages Preceding Volitional Action,” helps

97. With respect to the element of specific intent, such as the intent to steal with larceny or the intent to commit a felony therein with burglary, executory purpose would exist when the general intent to commit the act came into existence.

98. It is said that the mens rea and actus reus must concur. *See, e.g.*, 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.3 (a), at 332 (4th ed. 2003). Properly understood, however, this rule does not require temporal concurrence, as the ultimate liability of an actor who purposely pulls the trigger, but then abandons or renounces his act before the bullet strikes the victim, suggests. Instead, the intent of a criminal or intentional tortfeasor must trigger—and be temporally consecutive with—the volitional initiation of the act. *Id.* As such, executory purpose as the causal and temporally consecutive trigger to the act is thoroughly consistent with this perspective.

99. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (b) (AM. LAW INST. 2010); *supra* Table 1.

100. MODEL PENAL CODE § 2.02 (2) (b) (AM. LAW INST., Official Draft and Revised Comments 1962) (1985). And when, under the MPC, “the element involves the nature of his [or her] conduct or the attendant circumstances,” then “[a] person acts knowingly . . . [if] he [or she] is aware that his [or her] conduct is of that nature or that such circumstances exist.” *Id.* For a description of the “element analysis” utilized in the MPC, see Robinson & Grall, *supra* note 16, at 687.

elucidate the relationship between the mental states of executory purpose, knowledge, and desire. In deciding which actions to take, an actor compares his or her options through a cognitive process ranging anywhere from a rigorous cost-benefit analysis and feasibility study to what seemingly constitutes a “mental coin flip.”¹⁰¹ In reaching a decision, the actor may or may not have considered the degree of certainty that a particular consequence will follow from the act. Thus, when an actor develops a belief that the act is substantially or practically certain to bring about the consequence required in a particular intentional tort or crime, he or she normally does so within the process of contemplating and selecting among courses of action, and, in doing so, of having adopted a purpose in the executory sense of the term. Since knowledge to a substantial or practical certainty often accompanies the mental state of executory purpose, but is not a prerequisite for it,¹⁰² the knowledge prong of intent is a subset of the purpose prong. In this way, the state of mind of executory purpose is a necessary condition of a knowing act.

B. AN ILLUSTRATION OF THE RELATIONSHIP OF KNOWLEDGE AND EXECUTORY PURPOSE

An example of our experience as we contemplate and decide among potential courses of action helps demonstrate this point. Assume that X, an office worker, is (1) laboring feverishly on a project due before the end of the workday; (2) hungry; and (3) insulted by co-worker Y. X then reflects on her options, compares the risks and benefits of each, and selects an act in light of the consequences she seeks to bring about, which she may or may not believe are substantially certain to occur. In this scenario, X might be motivated by her deadline to work through her lunch hour at noon, by her hunger to go out for lunch, and by her colleague’s insult to punch him in the nose. In deciding which option or options to pursue, and which to reject or postpone, she might weigh the benefit of each against the seriousness and probability of the risks, and then select one of the options as her next act. In her analysis, perhaps she rejects the option of eating lunch because it would cause her to miss her deadline, but opts to punch Y in the nose because it would reduce X’s anger and X would still have time to meet her project deadline. In

101. While some of the choices we make between various courses of action may seem to be arbitrary, perhaps the choice is influenced by the processing of information below our awareness. Such a phenomenon would be consistent with the growing body of evidence “that mental states need not be represented in phenomenal awareness in order to influence ongoing experience, thought, and action.” John F. Kihlstrom, *Cognition, Unconscious Processes*, BAARS-GAGE, http://www.baars-gage.com/furtherreadinginstructors/Chaptero8/Chapter8_Cognitive_Unconscious.pdf (last visited Sept. 19, 2015). Indeed, the phenomenon we experience as intuition may actually be subdoxastic flashes of reasoning. Put more colloquially, what we don’t know we know may, in fact, be put to good use.

102. Indeed, the reverse is true. The adoption of a culpable purpose through the decision to act is a precondition of all-knowing action.

deciding to bring about a contact that was harmful or offensive (i.e., the act of battery), *X* can thus be said to have adopted a culpable purpose.

X, on the other hand, may or may not have acted with the belief that a harmful or offensive contact was substantially certain to result. If she believed that, by throwing a punch at *Y*'s face, she was substantially or practically certain to hit him in the nose, then she would have satisfied the misconceived knowledge prong of tortious battery. If, instead, she was overcome with anger by the insult and never considered whether her punch would connect with *Y*, or was uncertain that her arm would reach as far as *Y*'s nose, then *X* would *not* have met the knowledge test. *X*'s belief that her punch would be substantially certain to land on *Y* seems most likely to be developed, if at all, within the decision-making process in which executory purpose is formed.¹⁰³ On the other hand, it could also develop sometime *between* whatever period of time elapsed between her decision to act (i.e., the adoption of her culpable purpose), and the commission of the act, as when *X* realizes only after she decides to throw a punch, or actually throws it, that it is virtually certain to hit the target. Either way, since the adoption of an executory purpose is a necessary condition of knowing action, knowledge-based intent is ultimately a subset of purposeful intent.

103. For example, stage 3 in Table 4 describes the cognitive stages preceding volitional action.

Table 4. The Cognitive Stages Preceding Volitional Action¹⁰⁴

Stage	Description of Mental State
Stage 1: Awareness of a Goal	This stage entails a person's awareness of an event or state to be achieved or attained, which is, itself, a function of an individual's values, desires, perceptions, inhibitions, fears, and other emotions and circumstances.
Stage 2: Awareness of Options for Action	This stage is the beginning of an attempt to solve the problem of fashioning a plan to achieve or attain the goal to which the person aspires. In this stage, a person becomes aware of various, potentially conflicting, courses of action that will attain or achieve the goal.
Stage 3: Contemplation of Options for Action	This stage consists of one's evaluation of various options for action, and can range from a careful cost-benefit analysis of conflicting options to an ostensibly arbitrary choice, or "mental coin flip." ¹⁰⁵
Stage 4: Decision to Act ¹⁰⁶	This stage consists of an individual's conscious choice of act(s) to perform—chosen from among those contemplated—that ultimately causes the volitional initiation of bodily movement that constitutes the chosen act(s) (or the inaction that constitutes an act of omission). ¹⁰⁷ In so doing, one has acted with the culpable state of mind of executory purpose.

104. Some philosophers pejoratively refer to first-person experiential accounts of human cognition as "folk psychology," or as less than scientific reports of the way we *think* we think. See, e.g., PALMER, WHY IT'S HARD TO BE GOOD, *supra* note 63, at 134. Since, however, the calibration of moral and legal culpability are innately subjective endeavors, basing these judgments on human experience is legitimate and, indeed, inevitable.

105. See *supra* note 101 and accompanying text.

106. Human decision-making and its intersection with mental competence and legal responsibility is a fertile and critical area of study to be approached with awe, trepidation, and humility. For example, the traditional view that decision-making capacity is either present or not is under siege. According to the modern view, capacity is a matter of degree. For an introduction to contemporary thought on the elements and measurement of decision-making capacity, see generally Louis C. Charland, *Decision-Making Capacity*, STAN. ENCYCLOPEDIA PHIL. (Jun. 20, 2011), <http://plato.stanford.edu/entries/decision-capacity>.

107. The concept of volition—the notion that humans consciously decide on and initiate non-reflexive action—is a controversial issue within neuroscience. See Goleman, *supra* note 93. Contrary to the popular conception that the conscious mind decides between potential courses of action and that our brain and body then dutifully execute the choice—a notion central to the concept of legal intent—experiments by noted neuroscientist Benjamin Libet and others suggest that decision-making with respect to action is an unconscious event that emerges into consciousness only after the brain has initiated the action. *Id.*; see also Alvin I. Goldman, *Action (2)*, in A COMPANION TO THE PHILOSOPHY OF MIND 117, 120 (Samuel Guttenplan ed., 1994). With respect to the order of events that occur when one acts, Libet found that "the brain started first, followed by the experience of conscious will, and finally followed by action." DANIEL M. WEGNER, THE ILLUSION OF CONSCIOUS WILL 55 (2002). For a highly readable account of Libet's experiments, see JEFFREY M. SCHWARTZ & SHARON BEGLEY, THE MIND AND THE BRAIN: NEUROPLASTICITY AND THE POWER OF MENTAL FORCE 303–08 (2002). According to this view, conscious will exists but represents only the illusion of control, as if the conscious mind were a computer programmed to conclude that it actually thought up the ideas that were put into it. Cognitive neuroscience is still in its infancy, however, and the evidence supporting unconscious decision-making has detractors in the neuroscientific community. *Id.* at 303; see also, e.g., PATRICIA

C. THE ALTERNATIVE CRITIQUE OF THE KNOWLEDGE PRONG

Others have criticized the knowledge prong of legal intent in criminal and tort law on different grounds. Some feel that knowing action is intuitively different from purposive action,¹⁰⁸ that it is indistinct and thus open to judicial abuse,¹⁰⁹ and that it should be decommissioned.¹¹⁰ Such commentators are correct that the knowledge prong should be jettisoned; however, they fail to grasp the correct reasons why. In dismissing the mental state of knowing to a substantial or practical certainty that a particular consequence will flow from one's act as a "concept . . . [with] no fixed meaning,"¹¹¹ they overlook the critical fact that purpose is a necessary condition of knowledge, as well as the importance of utilizing knowledge as an aggravating factor in the calculus of culpability.¹¹² As discussed herein, just as a defendant's premeditation bears on the degree of punishment rather than the element of intent, so should a defendant's relative certainty about the consequences of his or her act.¹¹³

D. THE UNRAVELING OF *GARRATT V. DAILEY*

1. The Decision

The 1955 case of *Garratt v. Dailey* remains the seminal case on the subject of tortious intent.¹¹⁴ As reflected in Appendix A, the case appears in the great majority of first-year torts casebooks as the principal teaching tool on intent.¹¹⁵ In the case, five-year-old defendant Brian Dailey moved a lawn chair just before the plaintiff, Ruth Garratt, attempted to sit in the chair, and she fell to the ground, fracturing her hip.¹¹⁶ The trial court found that Brian Dailey "*did not have purpose, intent or design to perform a prank or to effect an assault and battery,*" and entered judgment for the defendant.¹¹⁷

Upon the plaintiff's appeal, the Supreme Court of Washington noted that, as set forth in the first Restatement of Torts, the intentional tort of

SMITH CHURCHLAND, NEUROPHILOSOPHY: TOWARD A UNIFIED SCIENCE OF THE MIND/BRAIN 386 (11th prtg. 2000). It is, as such, a bit premature to discard the concept of individual responsibility quite yet.

108. See, e.g., Sebok, *supra* note 19, at 1173 ("The belief prong is not compatible with our governing intuitions about the meaning of the word intent [T]he concept of 'substantial certainty' . . . resembles no intuitively familiar mental state").

109. *Id.* ("[T]he concept of 'substantial certainty' . . . is famously difficult to explain It is a concept, which, having no fixed meaning, can . . . mean anything a judge wants.")

110. *Id.* at 1174 ("What would happen if [the belief prong in tort law] were removed and intent was defined by the desire prong alone? My contention is: nothing. The goals of tort law would still be achieved").

111. *Id.* at 1173.

112. See *infra* Part VI.

113. See *infra* Part VI.

114. *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).

115. See *infra* Appendix A.

116. *Garratt*, 279 P.2d at 1092.

117. *Id.*

battery requires that “the act must be done for the purpose of causing the contact . . . or with knowledge on the part of the actor that such contact . . . is substantially certain to be produced.”¹¹⁸ In an opinion that has been used to teach the concept of tortious intent to hundreds of thousands of future attorneys for over half a century, the court explained that the purpose and knowledge prongs constitute alternative forms of intent:

A battery would be established if, in addition to plaintiff’s fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. . . . The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge.¹¹⁹

Noting that the trial court had explicitly addressed the issue of Brian’s purpose, but not that of his knowledge, the Washington Supreme Court remanded the case for a finding “of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it.”¹²⁰

2. The False Dichotomy of Purpose and Knowledge as the Downfall of *Garratt*

The fact that the purpose prong is actually a necessary condition of knowing action is the death knell of *Garratt v. Dailey*, and of our present formulation of criminal and tortious intent under the MPC and the Restatement (Third) of Torts. Had the Washington Supreme Court understood the actual relationship of the states of mind of executory purpose and knowledge, the justices would have realized that, following the trial court’s finding of fact that Brian Dailey lacked purpose, further inquiry into the existence of a state of mind of which culpable purpose is a necessary condition would have been inappropriate. The ultimate conclusion that knowledge existed, made after a finding that purpose did not, represents the factual impossibility of the existence of a mental state (i.e., that of knowledge) without one of its necessary conditions (i.e., executory purpose).

The question then becomes: how should *Garratt v. Dailey* have been decided? Assuming the truth of the trial court’s initial finding of fact that Brian lacked purpose in pulling the chair away (and that the finding did not represent an abuse of the court’s discretion), the trial court’s original decision

118. *Id.* at 1093 (quoting RESTATEMENT OF TORTS § 13(a) cmt. (AM LAW INST. 1934)).

119. *Id.* at 1094.

120. *Id.* at 1095. On remand, the trial court ruled that Brian Dailey had known that the plaintiff would attempt to sit in the chair he moved and imposed a judgment for damages totaling \$11,000 on the defendant. *Garratt v. Dailey*, 304 P.2d 681, 681–82 (Wash. 1956).

that Brian Dailey lacked intent and thus did not commit battery was correct, and Washington's highest court should have affirmed upon appeal. Accordingly, *Garratt v. Dailey*, the towering monument to tortious intent, falls to pieces.

3. The Symbiotic Masking Effect of the Conflation of Desire and Purpose and the False Dichotomy of Purpose and Knowledge

As noted, the trial court's ultimate finding upon remand that young Brian understood the plaintiff would attempt to sit down where the chair had been, thus satisfying the so-called knowledge prong, contradicts the court's previous finding that bringing the harmful contact about was not his purpose. How can such contradictory findings in *Garratt v. Dailey* be explained? The answer lies in this Essay's discussion of the conflation of desire and purpose.¹²¹ For Brian to have acted with knowledge, but without "purpose," the Washington Supreme Court could only have meant that Brian knew Ruth Garratt would sit down where the chair had been but did not *desire* to bring about harm. As such, the court appears to have been operating under the notion that purpose is synonymous with desire. Accordingly, the high court found that Brian had no culpable purpose, i.e., no desire, to bring about harm. If, however, the court had conceived of purpose in its executory sense, rather than equating it with desire, it could not have concluded that knowledge existed without the necessary condition of purpose. The misconceptions that knowledge and purpose are distinct culpable states, and that purpose is the same as desire, thus work together to produce the illusion of consistency within the doctrine of intent. In this sense, these two fundamental errors mask each other in the contemporary landscape of legal intent.

4. The Real Lesson of *Garratt*: Hard Cases Make Bad Law

Garratt v. Dailey may, in fact, teach a very different lesson than the one it is used to convey in first-year casebooks. Perhaps the trial court was troubled by the prospect of holding a child who was three months shy of his sixth birthday liable for an intentional tort, and perhaps the sympathies of the Washington Supreme Court lay instead with the innocent victim. If this were the case, then, after more than 50 years as the mirage of the knowledge prong of legal intent, the case is exposed for the lesson it really teaches: hard cases make bad law.

VI. RECONCEIVING DESIRE AND KNOWLEDGE AS AGGRAVATING FACTORS IN THE CALCULUS OF CULPABILITY

While desire is not, in reality, interchangeable with purpose, the desire to bring about a harmful result can be reconceived as an aggravating factor in

121. See *supra* Parts II–III.

the calculus of culpability. Similarly, although the mental state of knowledge that a particular result is highly probable is not an independent alternative to that of the purpose prong of tortious and criminal intent, such knowledge can also be viewed as an aggravating factor.

In addition to the *mens rea* requirement in Anglo-American criminal law, a variety of states of mind have gained formal recognition as aggravating and mitigating. Among the most basic is the requirement of premeditation and deliberation in the crime of first-degree murder, which, when proved in a jurisdiction retaining capital punishment, places the defendant's own life in jeopardy.¹²² In contrast, the level of punishment when homicide is motivated by the "heat of passion" is significantly reduced under the theory that, when it occurs under particular circumstances, the motivational state of white-hot anger lessens a killer's blameworthiness and is thus a "mitigating factor."¹²³

The conflation of desire and legal intent and the false dichotomy of knowledge and purpose undermine more than just the orderly classification of culpable mental states. By preventing desire from being viewed and measured independent from the prerequisite state of mind of executory purpose, the equation of desire and legal intent in criminal and tort law precludes the appropriate adjustment in the potential level of punishment of

122. Premeditation is typically conceived of as deliberate planning. Deliberation is said to require "a cool mind that is capable of reflection." LAFAVE, *supra* note 1, § 13.7(a), at 616. The question of the period of time over which the defendant must premeditate is a well-known conundrum. If the planning need only precede the act by a split second, rather than a more substantial period, then every defendant who was aware that the act they had decided to perform would take a life would be guilty of first-degree murder. The District of Columbia Circuit Court has correctly recognized that, "[t]o speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It . . . destroys the statutory distinction between first and second degree murder." *Bullock v. United States*, 122 F.2d 213, 213-14 (D.C. Cir. 1941); *see also* *United States v. Shaw*, 701 F.2d 367, 393 (5th Cir. 1983). This position is "growing in popularity." LAFAVE, *supra* note 1, § 13.7(a), at 616.

To preserve the distinction, the *Bullock* court rejected the notion of split-second premeditation in dicta. *Bullock*, 122 F.2d at 213-14. Presumably, extended planning is deemed to be more blameworthy—perhaps because of the failure over a lengthier period of time to experience sufficient remorse to trigger withdrawal from the plan—and thus merits a more serious charge. Of course, in suggesting that premeditation must occur over nothing clearer than an "appreciable time," the court failed to draw a recognizable line between sufficient and insufficient periods.

Traditionally, our courts have split on the issue of the length of time over which premeditation must occur. Some have mandated a period of time for "further thought, and a turning over in the mind." *Austin v. United States*, 382 F.2d 129, 137 (D.C. Cir. 1967); *see also* *State v. Guthrie*, 461 S.E.2d 163, 182-83 (W. Va. 1995) (requiring some passage of time "between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended" (quoting 2 EDWARD J. DEVITT & CHARLES B. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTION* § 41.03, at 214)). Other courts have required much less. *See* *Gov't of the Virgin Islands v. Lake*, 362 F.2d 770, 776 (3d Cir. 1966) (requiring no more than "a brief moment of thought"); *State v. Stewart*, 198 N.E.2d 439, 443 (Ohio 1964) (requiring no more than "a matter of seconds"); *see also* *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988) (holding that premeditation occurring only a "moment or instant before the killing" is sufficient (quoting *State v. Prolow*, 108 N.W.2d 873, 874 (1966))).

123. *See generally* DRESSLER, *supra* note 4, § 31.07, at 535-46.

those who act with a sadistic and antisocial desire to cause harm, diminishing our ability to fine tune punishment in the process. Likewise, the misconception that knowledge and purpose are alternative forms of mental culpability precludes consideration of an actor's knowledge of the certainty of harm as an aggravating factor in calculating culpability. Based on the facts of each case, the fate of defendants in criminal and tort actions turn on the fine-grained distinctions we draw, or fail to draw, in the mental states that constitute the intent element, in the aggravating factors that heighten punishment, and in our ability to distinguish between the two.

In failing to grasp the difference between the mental states of desire and executory purpose, or to apprehend the actual relationship of the mental states of purpose and knowledge, William Prosser could not appreciate just how correct he was when he observed: "The distinction between intentional and unintentional invasions draws a bright line of separation among shadings of almost infinitely varied human experiences."¹²⁴ The question then becomes whether the mental state of substantial or practical certainty that the proscribed consequence will occur merits the same formal recognition accorded to the mental state of premeditation, or whether the law of intent should ignore that particular shade of human experience. And the same question arises as to whether purposeful acts motivated by desire deserve a higher rank in the hierarchy of moral and legal culpability than acts that are merely purposeful.

These questions spawn more questions. Imagine the following situation: *A* has decided to try to kill *B* and *C*. *A* spots *B* across a field. The distance between them is great enough that *A*, an average marksman, will need a "lucky" shot to do in *B*. *A* fires and kills *B*. *A* then walks up to *C* and fatally shoots *C* at point-blank range. Assuming that *A* premeditated equally in killing *B* and *C*, is *A*'s moral culpability greater in *B*'s death than in *C*'s? If so, is it sufficiently greater so that the law should inflict a higher level of punishment on *A*? And finally, if one is more repulsed by the killing of *C*, does that mean that *A* was more morally culpable in *C*'s death, or just reflect a distaste for gruesome imagery? The same types of questions arise, and must be explored, when desire that motivates purposive action is weighed as a mere aggravating factor in the measurement of culpability, rather than as a separate mental state that constitutes legal intent.

VII. CONCLUSION

The suggested reconception of various elements of mental culpability, as discussed heretofore, provides the foundation for a paradigm shift in legal intent based upon the following insights. First, the interchangeable use of desire and purpose in the Restatement (Third) of Torts and throughout the case law and literature on torts and criminal law mistakenly equates two

124. KEETON ET AL., *supra* note 34, § 8, at 33.

conceptually and morally distinct states of mind. Second, the state of mind of purpose must be subdivided into its aspirational and executory forms, with the understanding that the latter state represents legal intent when it *causes* culpable action, thus correcting the mistake of the drafters of the MPC who adopted the aspirational form of purpose. Third, since the adoption of a purpose, in the executory sense, is a necessary condition of knowing action, then, in establishing the knowledge prong of legal intent as a discrete alternative to the purpose prong, the MPC and the Restatement (Third) of Torts create a false dichotomy between knowledge and purpose. Fourth, with the so-called knowledge prong exposed as a mirage, *Garratt v. Dailey*, the towering monument to tortious intent entrenched in first-year casebooks for over half a century, collapses. Finally, the mishandled states of mind of desire and knowledge are, in fact, aggravating factors in the calculus of culpability, and should play the same role as other aggravating factors in the calibration of the seriousness of an offense and the punishment meted out to those found liable.

To the extent that the verdicts rendered in our criminal and civil proceedings can turn on the precise cognitive experience of the defendant, the insights discussed above are of critical importance. Too much is at stake for the victims of heinous acts and the defendants facing the grave sanctions meted out to those who act intentionally—be it capital punishment, incarceration, or punitive damages—for us to retain the old, flawed conceptual system of intentionality. Reformulating the mental states of legal intent within this new conceptual framework advances justice by producing a true fit between the states of mind we deem to be morally blameworthy and the formal rules by which we measure culpability and punishment.

APPENDIX A

The Use of *Garratt v. Dailey* in First-Year Torts Casebooks to Teach Intent*

Torts Casebooks in Which <i>Garratt v. Dailey</i> Is the Principal Case on Intent				
Title	Authors	Publisher	Edition/Year	Page
<i>Prosser, Wade, and Schwartz's Torts: Cases and Materials</i>	Victor E. Schwartz, Kathryn Kelly & David F. Partlett	Foundation	Thirteenth/ 2015	17-20
<i>Torts: Cases and Materials</i>	Aaron D. Twerski, James A. Henderson, Jr. & W. Bradley Wendel	Wolters Kluwer	Third/2012	9-12
<i>Tort Law and Alternatives: Cases and Materials</i>	Marc A. Franklin, Robert L. Rabin & Michael D. Green	Foundation	Ninth/2011	898-900
<i>Torts and Compensation: Personal Accountability and Social Responsibility for Injury</i>	Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick	West	Seventh/ 2013	41-43
<i>Law of Torts: Cases and Materials</i>	Harry Shulman, Fleming James, Jr., Oscar S. Gray & Donald G. Gifford	Foundation	Fifth/2010	763-66
<i>Tort and Accident Law: Cases and Materials</i>	Robert E. Keeton, Lewis D. Sargentich & Gregory C. Keating	Thomson West	Fourth/ 2004	7-10
<i>Cases and Materials on Torts</i>	David W. Robertson, William Powers, Jr., David A. Anderson & Olin Guy Wellborn III	West	Fourth/ 2011	13-16
<i>Torts: Cases, Problems, and Exercises</i>	Russel L. Weaver, John H. Bauman, John T. Cross, Andrew R. Klein, Edward C. Martin & Paul J. Zwier, II	LexisNexis	Fourth/ 2013	14-16
<i>Torts: Cases and Problems</i>	Frank J. Vandall, Ellen Wertheimer & Mark C. Rahdert	LexisNexis	Third/2012	16-19
<i>Cases and Materials on Torts</i>	John L. Diamond	Thomson West	Second/ 2008	1-4
<i>The Common Law Process of Torts</i>	David Weissbrodt, Mary Patricia Byrn & Donald Marshall	LexisNexis	Second/ 2012	49-52
<i>Torts: A Contemporary Approach</i>	Meredith J. Duncan & Ronald Turner	West	Second/ 2012	23-28

Torts Casebooks in Which <i>Garratt v. Dailey</i> Is Discussed in Notes to Teach Intent				
Title	Authors	Publisher	Edition/Year	Page
<i>Tort Law: Responsibilities and Redress</i>	John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky	Wolters Kluwer	Third/2012	619
<i>Tort Law: Cases, Perspectives, and Problems</i>	Thomas C. Galligan, Jr., Phoebe A. Haddon, Frank L. Maraist, Frank M. McClellan, Michael L. Rustad, Nicolas P. Terry & Stephanie M. Wildman	LexisNexis	Fourth/2007	53
<i>Cases and Materials on Torts</i>	Richard A. Epstein & Catherine M. Sharkey	Wolters Kluwer	Tenth/2012	7-8
<i>Cases and Materials on the Law of Torts</i>	George C. Christie, Joseph Sanders & W. Jonathan Cardi	West	Fifth/2012	40
Torts Casebooks in Which <i>Garratt v. Dailey</i> Is Cited Regarding Intent, but Not Discussed				
Title	Authors	Publisher	Edition/Year	Page
<i>Torts: The Civil Law of Reparation for Harm Done by Wrongful Act</i>	Joseph W. Little, Lyriisa B. Lidsky & Robert H. Lande	LexisNexis	Third/2009	577
Torts Casebooks in Which <i>Garratt v. Dailey</i> Is Referenced Regarding Another Topic				
Title	Authors	Publisher	Edition/Year	Page
<i>Tort Law and Practice</i>	Dominick Vetri, Lawrence C. Levine, Joan E. Vogel & Ibrahim J. Gassama	LexisNexis	Fourth/2011	536
Torts Casebooks Not Referencing <i>Garratt v. Dailey</i>				
Title	Authors	Publisher	Edition/Year	
<i>Torts: Cases and Questions</i>	Ward Farnsworth & Mark F. Grady	Wolters Kluwer	Second/2009	
<i>Basic Tort Law: Cases, Statutes, and Problems</i>	Arthur Best, David W. Barnes & Nicholas Kahn-Fogel	Wolters Kluwer	Fourth/2014	

* This list of torts casebooks is not necessarily exhaustive.