The Irrelevance of the Intended to *Prima Facie* Culpability: Comment on Moore

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THE IRRELEVANCE OF THE INTENDED TO PRIMA FACIE CULPABILITY: COMMENT ON MOORE

CLAIRE FINKELSTEIN*

I. LAW AND ORDINARY MORALITY

Michael Moore argues that criminal and tort law embody different types of culpability: Criminal law embodies the “culpability of choice” and tort law the “culpability of unexercised capacity.”

Culpability of choice means that one has “chosen to do a wrongful act,” whereas the culpability of unexercised capacity “blames us despite our acting rightly in the world as we see it.” I wish to argue for the commonplace that the correct distinction between criminal law and tort law is not that between different forms of culpability, but rather that between culpability, on the one hand, and responsibility in the absence of culpability, on the other.

Moore’s view that both institutions involve culpability, I shall argue, is driven by a certain thesis he holds on the criminal law side, namely that the criminal law is organized around the notion of culpability but does not reflect its structure. Although it is beyond the scope of this Comment to mount a general argument for the congruence of the criminal law and ordinary morality, I shall argue that the two do not diverge on at least one question on which Moore thinks they do, namely the relevance of intending a prohibited act, as opposed to merely foreseeing it will follow from what one intends. I shall also argue that this mistaken view of the relation between criminal law and ordinary morality is what leads Moore to think there are moral norms buried deep within the quite different institution of civil liability: If criminal law can be fundamentally “about” moral norms without reflecting their structure, it becomes plausible to think the same might be true of tort law. If the criminal law is more or less faithful to moral norms of culpability, we should be skeptical of any attempt to find these same norms reflected in the rather different institution of tort law.

* Acting Professor of Law, University of California, Berkeley. I wish to thank Kurt Baier, Peter Detre, David Gauthier, and Michael Thompson for their helpful criticism and suggestions.

2 Id. at 320.
3 Id. at 328.
II. THE CULPABILITY OF CHOICE

According to Moore, an agent is culpable when “he chooses to do wrong in circumstances when that choice is freely made.” Moore argues there are three grades within the general category of choice-culpability, each of which corresponds to one of three representational mental states an agent can be in. First, an agent can desire something for its own sake; second, an agent can intend something as a means to something else; or third, an agent can believe that something obtains as a result of something he does. Three agents, each of whom bears one of the above relations to the same prohibited act or state of affairs, would have different levels of culpability, according to Moore: The first agent would be more culpable than the second, and the second more culpable than the third. One should be clear that Moore ascribes these levels to moral culpability, aware as he is that the law does not grade culpability in precisely this way. 6

First, I would like to tidy the picture a bit by recasting each of Moore’s categories within the language of intention. After all, it is not that the first and third categories have no place for talk of intention; it is rather that the intention bears a different relation to the prohibited act or bad state of affairs in each category. Let us suppose the thing in question is a prohibited act, namely killing. In the first category, when an agent kills for its own sake, it would be better to say her intending to kill needs no further explanation than that she desired to kill. In the third category there is also something intended by the agent, but the thing intended is not the thing for which we are assessing her culpability, namely killing. Rather, in this case the agent’s killing is a “side effect” of her doing something else, and it is the latter that is intended. We might, therefore, characterize Moore’s three categories as follows:

1) An agent intends to $\phi$ and $\phi$-ing is an end in itself;
2) An agent intends to $\phi$ and $\phi$-ing is a means to $\psi$-ing;

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4 Id. at 320.
5 Id. at 322-23.
6 Id. at 331-32.
7 I use the language of intention here as a convenience. I do not mean to suggest that I accept what Michael Bratman calls “the thesis of the distinctiveness of intention,” namely the thesis that “intentions are distinctive states of mind, not to be reduced to desires and beliefs.” Michael Bratman, Moore on Intention and Volition, 142 U. PENN. L. REV. 1705, 1706 (1994). Moore himself accepts the thesis. MICHAEL MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 120-21 (1993).
8 Since we are discussing prima facie culpability, I do not add “without justification or excuse.”

I should note as well that nothing is affected by treating the end as an action rather than as a state of affairs. For our purposes, the two could be used interchangeably, with minor linguistic adjustments.
3) An agent intends to \( \psi \) and \( \psi \)-ing is a means to \( \chi \)-ing, and the agent knows that in \( \psi \)-ing he will \( \phi \).\(^9\)

Now I think it can be shown that the above taxonomy is just a bit off for Moore’s purposes, and that he is concerned instead with the distinction between the first two categories taken together, on the one hand, and the third category, on the other. Three reasons for tinkering with Moore’s divisions present themselves.

First, Moore’s example of the first category is a person who kills because she takes pleasure in killing.\(^10\) This is arguably not a case in which killing is an end in itself, because it is not killing, but rather pleasure, that is the end. Suppose, then, one were to treat killing, or perhaps more plausibly, death, as the end. But an agent who treats death as an end and who spends her days bringing its gifts to others should perhaps be regarded as an insane benevolent rather than a rational villain, and clearly this is not what Moore has in mind. Moore must still be thinking of a case in which the end can be articulated separately from the act—a case in which a person violates a prohibitory norm for the sake of pleasure. True, the “for the sake of” relation in this case is not an instrumental one, i.e., the act is not the means to the end. If someone does something for pleasure, his receipt of pleasure usually just consists in his doing of the act, so that the act bears a constitutive, rather than an instrumental relation to the end. But unless the distinction between constitutive and instrumental acts is itself morally relevant, and I do not think Moore thinks it is, we can treat all cases in which the end is articulated separately from the act alike.

It may be that someone who kills for pleasure seems worse than someone who kills, say, for money, at least in some cases. That is, Moore’s intuition might be explained by the fact that the very content of the end when an act is done for pleasure makes the act worse. But I think this generalization must be resisted, since it will be difficult to sort the cases by the content of the end alone. Is someone who kills for pleasure always worse than someone who kills for spite? I think it would depend.

Second, even if Moore did have in mind a case in which the act truly is desired for its own sake, it is doubtful that the distinction between intending something as an end in itself and intending something as a means to a further end is at all significant. Both are a species of trying to get: The agent in both cases wants to perform the action, and he is expending energy to that effect. Although it might matter why he wants it, the fact that in the one case he wants it, while in the other his wanting it can be explained by his wanting something else, surely is not significant.

Third, a different distinction Moore makes shows greater promise, namely that between aiming at a certain result and merely foreseeing the

\(^9\) One might also allow, as a variant on the third category, a case in which the side effect is produced by an act that is an end in itself.

\(^10\) Moore, supra note 1, at 323.
result. Of course this distinction will only set Moore’s third category apart from his first two, insofar as agents who do evil acts for “their own sake,” agents who do evil acts for the sake of pleasure, and agents who do evil acts for other reasons, such as money, all aim themselves at “evil.” The relevant distinction, then, would be between Moore’s first two categories taken together, on the one hand, and his third category, on the other. Focusing on this distinction organizes Moore’s claim around a question that is familiar in the history of ethics, namely whether, as Philippa Foot says, “the difference between aiming at something and obliquely intending it is in itself relevant to moral decisions.”

Of course Moore’s version of an affirmative answer to Foot’s question is couched in the language of culpability: His claim is that it is relevant for determining a person’s level of culpability that she aimed at, rather than merely foresaw, that she would do an evil thing.

Let us say that if an agent aims at evil she intends evil, and that if an agent merely foresees that what she does will produce evil, she intentionally brings about evil that she does not intend. We can thus state the heart of Moore’s position as follows: Agents who do evil acts are more culpable when they intend to do them than when they merely do them intentionally, not intending to do them.

III. The Intuitive Case for the Distinction

The main point I wish to make about Moore’s position, stated thus, is that the assertion of the moral relevance of intending something, rather than merely doing it intentionally, is at odds with Moore’s claim that the essence of culpability is that one has chosen to do a bad thing. If culpability is grounded in choice, and if choice is present both in cases in which harm is intended and in cases in which it is merely brought about intentionally, what would justify the assertion that agents are more culpable if they intend harm rather than merely bring it about intentionally? I shall suggest that Moore is right to ground culpability in choice, but I shall also argue that a choice-based model implies that whether some-

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11 Id. at 324.
12 Philippa Foot, The Problem of Abortion and the Doctrine of Double Effect, in VIRTUES AND VICES 19, 24 (1978). Foot follows Bentham in referring to what an agent foresees as following from his voluntary act, but does not intend, as “obliquely intended.” See Jeremy Bentham, THE PRINCIPLES OF MORALS AND LEGISLATION ch. VIII, § 6. I eschew the terminology, because I think it is misleading to suggest that foreseeing can be a kind of intending.
13 While this terminology will seem objectionable to many, philosophers who work on problems of intention are increasingly becoming aware of the benefits of drawing the distinction in such terms. See Bratman, supra note 7, at 1713-14 (rejecting what he calls the “Simple View,” which maintains that one can infer a sentence of the form “A intended to φ” from a sentence of the form “A φ-ed intentionally”).
thing done intentionally was also intended is irrelevant for judgments of culpability.

Moore supports the relevance of the intended to culpability uniquely by intuitions garnered from certain pairs of cases, such as that of the terror bomber and the strategic bomber.\textsuperscript{14} I shall not rehearse the facts of these cases here. Granting, for the moment, the intuition that the terror bomber is more culpable than the strategic bomber, the question is whether there is a coherent theory that can explain the intuition. Moore does not so much argue for such a thesis as assert it, claiming that "[t]he cognitive state of belief . . . is thus not sufficient to raise the most serious levels of culpability."\textsuperscript{15} But, as Moore must recognize, we have more in this case than just the cognitive state of belief; we have an intention to $\psi$ and a belief that in $\psi$-ing one will $\phi$. On Moore's view, this amounts to a choice to $\phi$, and so Moore must claim that choosing to $\phi$ is insufficient for being maximally culpable for $\phi$-ing. But if this is true, there must be something, in addition to choice, that makes the maximally culpable agent so culpable. The extra something cannot be the fact that the maximally culpable agent intended to $\phi$, because this would be circular. We appear to have no other candidates.

Alternatively, Moore could deny that an agent chooses to do what she does intentionally but does not intend. That is, he could claim that choice tracks what is intended and not what is merely done intentionally. In this case, however, "culpability of choice" would apply only to what is intended, thus omitting such dastardly deeds as the killing of passengers by one who blows up a plane for the sake of insurance money.\textsuperscript{16} Culpability of choice, then, would not exhaust culpability proper, and we would require another account of the latter.

Since intuition supplies the only reason we have to think the intended

\textsuperscript{14} Moore, supra note 1, at 324.

\textsuperscript{15} Id. It is puzzling that Moore unequivocally asserts that belief is also not a necessary condition for the most serious levels of culpability. Id. The claim is meant to accommodate a certain kind of low probability case, for example, if I take aim at you and fire, thinking it highly improbable that I will succeed in hitting you. Id. at 324-25. Moore takes the position that one can intend to $\phi$ without believing that one will $\phi$. But one might distinguish here between choice and intention. The belief that by doing a certain thing I will $\phi$, or at least that there is a reasonable likelihood I will $\phi$, is plausibly a necessary condition for my choosing to $\phi$. If I try to do something I believe I have only a five percent chance of accomplishing, it would be better to say that I choose to try to do the thing than that I choose to do it. This, moreover, gives the right result on the level of culpability: We could not convict a person of a crime for which the requisite mens rea was "knowingly" if she thought the odds that she would do the thing in question were this low, even if she were trying to do it. Since, as I understand Moore, it is the choice to $\phi$ that makes an agent culpable for $\phi$-ing (when $\phi$-ing is a bad deed), belief should be necessary for the most serious levels of culpability.

\textsuperscript{16} See id. at 323.
significant for culpability, we might at this point question the institution’s credentials. Similarly structured cases suggest that at the very least the intuition fails to generalize. Consider the following two cases. In Case 1, I am the beneficiary of your life insurance policy and I wish to collect. I set fire to my house in the hope of killing you while you are asleep inside. In Case 2, I have a homeowner’s policy on my house on which I wish to collect. I set fire to my house, knowing that you are asleep inside and that if I succeed in burning down the house you will surely die. Moreover, I know that if I wait an hour, you will have left the house to go to work. I burn down the house now, however, indifferent to whether you perish or live. In Case 1, I intend to kill you, and I kill you intentionally. In Case 2, I also kill you intentionally, but I do not intend to kill you.

If Moore is correct, the agent in Case 1 is worse than the agent in Case 2, for the person who kills from an intention to kill is supposedly more culpable than the person who merely kills intentionally, not intending to kill. But these cases defy the intuition. The agent who does not have to kill to obtain her end, but does so anyway in a state of indifference, seems worse than the agent who must kill and does so in order to accomplish her end. The agent who intends to kill might place a higher intrinsic value on human life. Her actions are compatible with her having deep regret at having to kill to obtain her end. Agent 2, however, could not plausibly be said to place a high value on human life. She is indifferent to the prospect of killing, to the point where she would rather kill than suffer a minor inconvenience.

Where prima facie culpability is concerned, then, the distinction between evil that is intended and evil that is merely done intentionally is of dubious validity. Instead, what matters for prima facie culpability is that the agent did the evil thing intentionally, or, under Moore’s and my understanding of choice, that she has chosen to do it. Cases like the terror bomber and the strategic bomber suggest there is perhaps more to the story than this, but the something more need not pertain to the notion of culpability. We shall discuss a possible alternate account of the intuition below.17

IV. APPARENT EXCEPTIONS

There are two apparent exceptions to the irrelevance of the intended to culpability. First, although the argument so far has been about moral, not legal, culpability, one might consider the moral analogue to the category of so-called “crimes of specific intent,” that is, crimes for which the agent must have performed the act with a certain purpose in mind.18 For example, to be guilty of forgery, it is not enough to alter a writing intentionally.

17 See infra text accompanying note 28.
18 WAYNE L. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.5(a) (1986).
One must alter the writing with the intention of committing a forgery.\textsuperscript{19} Treason has traditionally had a similar structure. It is not enough to perform various acts that aid the enemy intentionally. One must perform those acts with the intention of assisting the enemy.\textsuperscript{20}

For evil deeds of this sort, however, it is not the case that the agent who intends to perform them is more culpable than one who merely performs the relevant act intentionally; there is a total absence of culpability in the absence of the relevant intention. In these cases, the prohibited act is not the thing done intentionally, i.e., altering a writing. The prohibited act is the act under its prohibited description, namely forgery. One cannot, at least in the case of forgery, perform the act without intending to perform it.\textsuperscript{21} The thesis we are considering—that doing a certain harm, intending it, is worse than merely doing it intentionally—thus is not falsified by crimes of specific intent, for these crimes cannot be done “merely intentionally.”

A second apparent exception to the irrelevance of the intended arises in a case in which an agent has violated a prohibitory norm for a reason we regard as justifying the violation. Justifications, whether moral or legal, speak to the purpose or intention with which an agent acted.\textsuperscript{22} Most bad deeds are subject to justification, and thus every judgment of culpability contains an implicit judgment about the agent’s intentions in performing the act, namely that whatever the agent intended in performing it is not sufficient to justify his having done it.

Again, however, the exception is only an apparent one. First, the intention in this case operates subsequent to a judgment of prima facie culpability. Absence of justification, once all other conditions for culpability

\textsuperscript{19} See, for example, the definition of forgery under New York law: “A person is guilty of forgery in the first degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument.” N.Y. \textsc{Penal Law} § 170.15 (McKinney 1988) (emphasis added).

\textsuperscript{20} See, e.g., Rex v. Steane, [1947] 1 K.B. 997, 1003-06 (Crim. App.) (reversing defendant’s conviction for treason on grounds that defendant did not broadcast for enemy with intent to assist enemy, but rather to save wife and children).

\textsuperscript{21} Crimes like burglary have a slightly different structure. There the specific intent required is not self-referential in the way that the intent requirement for forgery is. A typical statute, for example, defines burglary as when a person “knowingly enters or remains unlawfully in a building with intent to commit a crime therein.” N.Y. \textsc{Penal Law} § 140.25 (McKinney 1988) (emphasis added). There is no requirement that a person intend that his act of entering the building, etc., constitute a burglary. Still, without the special intent portion, the agent has not committed the crime of burglary, so again, we can say that the deed cannot be done without the agent’s intending something.

\textsuperscript{22} See, e.g., \textsc{Model Penal Code} § 3.04(1) (1985) (requiring that the defendant employ force “for the purpose of protecting himself against the use of unlawful force” in order to claim self-defense) (emphasis added).
are satisfied, entails ultimate, rather than prima facie, culpability. And Moore’s thesis is meant to apply at the level of prima facie culpability.

Second, even on the level of ultimate culpability where intention or purpose is relevant, the intention enters into culpability judgments in a different way from what Moore seems to be suggesting. When we explore a possible justification or excuse, we are interested in the particular content of the agent’s reason for violating the prohibitory norm. Moore’s thesis that intended violations of a prohibitory norm are worse than merely intentional violations implies that it is not the content of the agent’s intention that is at issue, but the mere fact that the agent intended the violation, rather than foresaw it without intending it. I shall henceforth refer to this thought by saying that for Moore, it is the mere form of action done for a reason, rather than the content of the agent’s reason for acting, that holds moral relevance. But when justifications exonerate, they exonerate on the basis of the content of the reason, not on the basis of the mere fact that there was a reason. A similar analysis can be made of the purpose requirement for crimes of specific intent. What matters in each case is that the agent altered the writing or assisted the enemy with a certain, particular intention, and not the mere fact that he did these things intending to do them, rather than merely foreseeing that he would do them. In neither case is the mere form of the relation between the agent’s reason for acting and the act relevant.

V. Two Kinds of Judgment

The sort of culpability we have been discussing emerges from judging things agents do. This is the sort of judgment which, to co-opt a phrase Moore employs in another context, “take[s] action-descriptions as [its] object.” Contrast this with another sort of judgment, one that might interest a priest, a psychotherapist, or a governor deciding whether to grant clemency. This sort of judgment pertains to the agent’s worth as a person, not with respect to particular things she does, but with respect to who she is. It takes as its object a person’s character or soul. Now the content of an agent’s reason for acting, although irrelevant for prima facie culpability, helps to reveal the character of the agent. When we want to know what sort of person someone is, we want to know, roughly, his conception of the good, what it is he values. Focusing on a single action, or even on a series of actions, is an unreliable guide to answering this question, since the person may be unable to realize his conception of the good through his actions. This second sort of evaluation, what we might call “character” as opposed to “act” evaluation, focuses naturally on motiva-


24 Moore, supra note 1, at 321.
tion, the question of why the agent did what he did.25

Now my claim is that the thesis that the intended is significant for culpability blurs the distinction between act and character evaluation. This blurring first appears in Scholastic philosophy, as part of the attempt to derive a code of conduct from the moral worth of internal features, such as the state of an agent's soul at the moment of action. The effort was thus an attempt to derive a way of judging the external from features of the internal. The clearest articulation of this methodology appears in the Catholic Doctrine of Double Effect (DDE).26 St. Thomas, for example, turns to the moral importance of what is intended as a way of arguing for the permissibility of killing in self-defense in the face of an absolute prohibition on killing.27 The DDE maintains that it may be permissible for you to do a thing you merely foresee but do not intend which it would not be permissible for you to do if you intended it. The doctrine is thus designed to evade the reach of absolute prohibitions by restricting their operation to actions performed where the prohibited thing is itself intended. Moore's claim is a near neighbor of the DDE: Moore should be understood as saying that the degree of culpability depends on whether the act was intended, whereas the DDE claims that the fact that a bad act was not intended may exonerate an agent completely. What the two claims have in common is the belief in the moral significance of the intended.

There is at least one reason, however, why the moral significance of the intended seemed sensible to Aquinas and other Catholic theologians and why it need not seem sensible to secular ethicists: Aquinas had to grapple with the difficulties created by Catholicism's adherence to absolute prohibitions. In a system of absolute prohibitions, not only do ordinary actions taken in self-defense become difficult to justify, but one can end up having to choose between two courses of action, both of which are morally prohibited. If a doctor must perform high-risk surgery or a person will die, and if the doctor has a duty to do everything in her power to treat the patient, then a system of absolute prohibitions rendering impermissible actions that impose a high risk of death on another would make the doctor sinful regardless of what she did. The focus on the form of the relation between acts and reasons for acting allows one to say that the

25 Moore appears to reject the connection between the content of an agent's reasons for acting and character. Id. at 324. Since Moore does not draw the distinction between form and content that I do, it is unclear whether he is asserting that the mere fact of aiming at harm is irrelevant to determining character, or whether it is the content of the aim that is irrelevant. If the former, I am, of course, in agreement. I am arguing here that the latter is false.

26 For a general discussion of the doctrine in secular philosophy, see generally Foot, supra note 12.

27 St. Thomas Aquinas, Summa Theologica pt. IIa-IIae, Q. 64, art. 7 (Christian Classics ed. 1981) (arguing that killing in self-defense is permissible because what is intended is not slaying of aggressor but repelling of attack).
doctor does not sin when she performs the surgery, since risking the life of the patient is “beside the intention,” while what is intended is to save a life. But absolute prohibitions make little sense in a secular ethical system, and the focus on the form of the action makes little sense without them. For in the absence of absolute prohibitions, there is a simpler, more direct way to understand the permissibility of the doctor’s behavior: She has a duty to do what stands the greatest chance of saving the patient’s life, and if this means performing a high-risk operation, she may do it. Whether this means that the doctor has a justification for doing what is by nature evil, or whether the surgery is not evil should be of little interest to secular ethicists.

My claim, then, is that saddling the distinction between what is intended and what is merely done intentionally with moral weight follows from a confusion between judgment of acts and judgment of agents. More particularly, it follows from attempting to apply a framework developed for the latter in the moral domain of the former. Moreover, it does so not in terms of the content of an agent’s reason for acting, which, I have argued, judgment of acts occasionally allows, but rather in terms of the mere fact that an agent intended to do an evil act. But the form of intentional action is not a proper object of moral inquiry for either act or character judgment. And while the focus on form is easy to understand in the case of those struggling under the weight of a system of absolute prohibitions, it is deeply puzzling in the absence of such a system.

In addition to underscoring the moral irrelevance of the form of action, the distinction between character and act evaluation can help to explain the conflicting intuitions we apparently have in response to similar pairs of cases. The cases of the terror and the strategic bomber do not suggest what they are commonly thought to suggest, namely that the terror bomber is more culpable for the bombing than is the strategic bomber. The intuition that the former is worse than the latter is one about persons: The terror bomber acts on a worse motivation than does the strategic bomber, and he may be a worse person for it. His act is not, however, worse than the strategic bomber’s, because both agents do the same thing, and they both do it intentionally. The arsonist example suggests the evaluative split more clearly: We may find that agents are equally culpable, although one who places so low a value on human life that he would rather kill than be inconvenienced is a worse person than one who kills reluctantly.

VI. THE TORT/CrIME DISTINCTION

I wish now to return to the distinction between tort and criminal liability. Criminal law, Moore and I agree, is organized around the notion of moral culpability. This claim, however, is rather more difficult for Moore.

28 See supra Part IV.
to make than for me. If Moore thinks that the structure of culpability in morals differs significantly from its counterpart in the criminal law, what is the basis for thinking that criminal law is somehow “about” culpability? It is more plausible to think of the criminal law as “about” culpability if one believes, as I do, that the structure of culpability is reflected reasonably accurately in the structure of criminal liability. The notion of choice provides the central organizing principle for this shared structure: Judgments of culpability of an agent for a deed have, as a basic minimum condition, that the agent chose to do it.

The imperfect fit between culpability in morals and culpability in crimes on Moore’s account helps to explain his view of tort law, namely that tort law is also “about” culpability, only culpability of a lower grade. Moore allows that “inadvertent risk creation cannot be accommodated within the choice model of culpability.” Choice, it is clear, has to do with awareness and control; one cannot choose to do that which one is unaware of doing. Thus the basic form of tort liability, namely negligence, will have to be explained differently. One might think this constitutes an argument against thinking of tort liability as reflecting culpability norms, but Moore instead turns to a different brand of culpability, what he calls “the culpability of unexercised capacity.” But Moore does not explain why the latter is a kind of culpability at all, and in light of the picture of culpability with which Moore has operated, we are left without a basis for including “unexercised capacity” within the fold.

If there is a unified rationale to the institution of tort law, it has nothing to do with culpability. Rather, the institution, at least at present, is designed to promote social welfare by imposing duties on agents that will help to organize their behavior prospectively in accordance with various non-moral norms. The prima facie conditions for tort liability are accordingly normative rather than psychological. If one maintains that certain psychological states lie at the heart of the notion of culpability, one should reject the suggestion that legal schemes that do not have those states as a necessary condition for liability have anything to do with culpability.

Locating choice at the center of criminal liability raises some obvious questions about criminal negligence and the occasional strict liability crime. The sort of theoretical unity that both Moore and I hope to find implicit in legal institutions is, admittedly, approximate at best. Crimes of negligence and strict liability remain relatively rare exceptions, and great expansion of these forms of liability would signal the need to revise the account of criminal liability. This would not show that we had been wrong about the criminal law all along, but would suggest rather that the

29 See Moore, supra note 1, at 328.
30 Id.
31 Moore appears to agree. Id. at 327.
32 Id. at 329.
nature of the institution had changed. Intentional torts provide the obvious objection on the civil side, but there the answer to imperfection is rather different. Either one must say that the institution of tort law does not form a theoretical whole, or one must appeal to the lowest common denominator and insist that the whole that it does form has nothing to do with culpability. Either way, the difference between the criminal law and tort law is that between an institution whose basic model posits culpability as a necessary condition for liability and one that does not.