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The law of homicide presents, if not a paradox, then at least a puzzle. Every homicide in every jurisdiction involves the same basic actus reus—namely, causing the death of another human being. And yet there are few, if any, offenses or groups of offenses that reflect as much complexity and variety in how they are labeled and graded, resulting in a hugely complex, multi-rung "ladder" of offenses of varying culpability.[1]

At the center of all this complexity lies a basic problem: how should the law of homicide distinguish the most serious killings from those that are less serious? A quarter century ago, Sam Pillsbury published an important book that addressed this problem. I read his *Judging Evil: Rethinking the Law of Murder and Manslaughter*[2] then, and I recently reread it, on the occasion of this *festschrift* and because I am currently writing a book of my own on the law of homicide. In my judgment, Pillsbury's book has held up well. While it does not solve the problem of homicide labeling and grading (it seems doubtful that any single book could), it provides real insights into a set of foundational issues that are still worthy of our critical attention these many years later.

I. SOME HISTORY

Under the traditional American law of homicide, which can be traced to the influential 1794 Pennsylvania statute, intentional homicide was divided into three basic offenses: first-degree murder,

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1. On the "ladder" concept of homicide generally, see, for example, Victor Tadros, *The Homicide Ladder*, 69 MODERN L. REV. 601 (2006); JEREMY HORDER, HOMICIDE AND THE POLITICS OF LAW REFORM (Oxford Univ. Press 2012); and Andrew Cornford, *The Architecture of Homicide*, 34 OXFORD J. LEGAL STUD. 819 (2014).

2. SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER (1998).

second-degree murder, and voluntary manslaughter.[3] The distinction between first- and second-degree murder was consequential: it could mean the difference between being sentenced to death rather than prison, or to life or many decades in prison rather than to a significantly shorter term.

Until the middle of the twentieth century, the basis for distinguishing between first- and second-degree murder was fairly simple. In most states, murder was considered first-degree if the intentional killing was "premeditated" (sometimes with an additional requirement of "deliberation") or if it was committed in furtherance of a felony or to avoid or prevent a lawful arrest. Otherwise, intentional killing was treated as second-degree murder (unless it was committed in a "heat of passion" or state of "extreme emotional disturbance," in which case it constituted voluntary manslaughter).

In the second half of the twentieth century, however, this model began to splinter. Legislatures started adding new factors to the list of circumstances in which an intentional homicide could be elevated from second-degree to first-degree (or aggravated) murder. The fact that the defendant had premeditated before killing or had killed while in the commission of another felony, while still relevant, no longer exhausted the conditions in which the more serious offense could be committed.

There were three main causes of this evolution. First was an increasingly widely shared perception among courts and commentators that premeditation, as a basis for distinguishing between more and less serious murder, is both over- and underinclusive. It is overinclusive in the sense that it requires harsh penalties for a defendant who, though he preplanned his act, nevertheless acted out of benign or even altruistic motives (the classic case being *State v. Forrest*[4]). The requirement of premeditation is also underinclusive in the sense that it fails to capture cases in which the defendant, though he acted

3. A fourth offense, involuntary manslaughter, involves unintentional homicides. For a helpful overview of the history, see Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007 (2001); and Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375 (1994). English law never recognized a distinction between first- and second-degree murder. *See* Stacy, *supra*, at 1012.

4. 362 S.E.2d 252 (N.C. 1987) (upholding conviction for first-degree murder despite defendant's altruistic motives in killing his terminally ill, bedridden father to alleviate his pain). The point is not that defendants like Forrest should not be punished at all, but rather that people like him should not be regarded as among the worst sort of killers. The case is discussed by Pillsbury. PILLSBURY, *supra* note 2, at 105.

spontaneously or impulsively, and therefore did not deliberate, nevertheless did so in a cruel or depraved manner (a classic case being *People v. Anderson*[5]).

A second major influence was the Model Penal Code (MPC), which contributed to the effort to distinguish between more and less serious intentional homicides, specifically in the context of the death penalty. The framers of the MPC sought to curb the pervasive arbitrariness and discriminatory impacts they observed throughout the regime of capital punishment by providing a list of specific factors—both aggravating and mitigating—that a court could apply at sentencing in determining whether to impose the ultimate sanction.[6]

A third influence, perhaps the most consequential, was a series of Supreme Court cases from the 1970s that had the effect of significantly changing the substance of capital punishment law. In *Furman v. Georgia*,[7] the Supreme Court had invalidated then-existing homicide (and rape) laws in numerous states on the grounds that such statutory schemes led to the death penalty's arbitrary and discriminatory application.[8] In response to *Furman*, states were obliged to rewrite their death penalty laws to mark more clearly, in statutory form, the distinction between more and less serious forms of homicide; and four years later, in *Gregg v. Georgia*,[9] the Court upheld Georgia's then-new multi-tiered homicide scheme on the grounds that it had supposedly reduced the problem of arbitrary application that had plagued the earlier statute.[10]

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5. 447 P.2d 942 (Cal. 1968) (reducing first-degree murder conviction to second-degree murder where defendant savagely stabbed a ten-year-old victim more than sixty times but did so without any preplanning). This case is also discussed by Pillsbury. PILLSBURY, *supra* note 2, at 104–05; *see also* 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 (London, MacMillan & Co. 1883) (describing case in which defendant kills impulsively out of "mere wanton barbarity").

6. *See* MODEL PENAL CODE § 210.6(3) (AM. L. INST. 2009) (listing the following aggravating circumstances to be considered in capital sentencing proceedings: (a) murder was committed by convict under sentence of imprisonment; (b) defendant was previously convicted of another murder or felony involving use or threat of violence; (c) at the time murder was committed defendant also committed another murder; (d) defendant knowingly created great risk of death to many persons; (e) murder was committed while defendant was engaged in commission of, or attempt to commit robbery, rape, arson, burglary, or kidnapping; (f) murder was committed for purpose of avoiding or preventing lawful arrest or effecting escape from lawful custody; (g) murder was committed for pecuniary gain; or (h) murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity).

7. 408 U.S. 238 (1972).

8. *Id.*

9. 428 U.S. 153 (1976).

10. *Id.* at 220–24.

II. NEW FORMS OF AGGRAVATED MURDER

So, what form did this new law of homicide take? Prior law, as noted, had relied mainly on premeditation and the commission of a felony as aggravating circumstances. The new law, which applied in both death penalty states and non-death penalty states, began incorporating new, elaborate, multipronged sets of criteria for distinguishing between more and less aggravated forms of intentional homicide. (It also often included new criteria for *mitigating* the offense, as the Model Penal Code had recommended.)

These new provisions, though varying from state to state, included long lists of aggravating factors such as that: (1) the victim of homicide was a child, an elderly person, or disabled, or held a particular position (such as police officer, prison guard, judge, prosecutor, or witness); (2) the defendant committed the killing by means of torture, terrorist acts, poison, or lying in wait; (3) the defendant was already serving a life term in prison or had previously been convicted of murder, or the killing involved more than one victim; or (4) the killing was motivated by profit or by "hate," understood as animus regarding race, religion, ethnicity, gender, or sexual orientation.[11]

It was against the background of this evolving law that Pillsbury, in *Judging Evil*, was writing. Although he did not expressly reject the use of non-motive-related aggravating factors (such as the age or disability of the victim, torture, lying in wait, or the use of poison), he did so implicitly. For Pillsbury, the key to distinguishing between more and less serious acts of intentional homicide lay primarily, or even exclusively, in the defendant's motive. As he explained:

> Motive is relevant to culpability in murder because it reveals the depth and nature of the offender's attack on value. The worst motives for killing are those that demonstrate the greatest commitment to individual or community disregard. The worst killings express a philosophy deeply hostile to individual human value and usually to the value of the community. Such a killing expresses the view that human existence has no moral dimension, that life is simply the war of

11. *See, e.g.*, N.Y. PENAL LAW § 125.27 (McKinney 2019); CAL. PEN. CODE § 190.2 (2022); MICH. COMP. LAWS § 750.316(1)(a) (2022); *see also Crimes Punishable by Death: Aggravating Factors by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/aggravating-factors-by-state [https://perma.cc/863Q-EGL9] (listing aggravating factors for death penalty eligibility in each death penalty state).

> all against all. The hallmarks of such killings are: (1) extreme selfishness, and (2) extreme hostility to the idea of a lawful, moral community.[12]

And what kinds of motives specifically did Pillsbury find relevant? He identified five, any of which, he argued, should potentially justify enhanced penalties. These were purposeful killings committed: (1) for profit, (2) to further a criminal endeavor, (3) to effect public policy or legal processes, (4) because of animosity toward the victims' race, religion, ethnicity, sex, or sexual orientation, or (5) to assert "cruel power over another."[13]

III. SHOULD MOTIVES BE THE FOCUS?

People kill, and do so intentionally, in a vast range of circumstances and for a wide variety of reasons. They can shoot a victim through the heart, poison him, defenestrate him, pull the plug on his ventilator, fail to rescue him when he's drowning, starve him, or torture him to death. They can plan it all out in advance, lie in wait, or act on a sudden impulse. They can be motivated by money, love, jealousy, duty, honor, altruism, hate, racism, misogyny, or the desire for fame. They can kill out of mercy, or for a thrill. Their victim can be a young child, a senior citizen, a person with disabilities, a police officer, or a president. They can kill in furtherance of a felony, to evade capture, obstruct justice, end tyranny, or when already serving a life sentence in prison. They can act in self-defense, in defense of others or of property, under duress, out of necessity, or in a state of emotional distress. A few of these types of intentional killings are no crime at all; the law regards them as justified or excused. The rest are clearly criminal. But how they should be labeled and graded, and which circumstances and motives are relevant to that undertaking, remain deeply contested.

Some courts and commentators have taken the position that the defendant's motives should never, or almost never, play a role in labeling or grading homicide offenses.[14] I plan to consider this complex

12. PILLSBURY, *supra* note 2, at 112.

13. *Id.* at 110.

14. Leading works include Antony Duff, *Principle and Contradiction in the Criminal Law: Motives and Criminal Liability*, *in* PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE 156 (1998); Jeremy Horder, *On the Irrelevance of Motive in Criminal Law*, *in* OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES 173 (Horder ed., 2000); Douglas N. Husak, *Motive and Criminal Liability*, *in* THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS 53 (2010);

literature elsewhere. For present purposes, however, I shall simply assume that it is permissible in principle to do so and focus instead on two subsidiary questions. First, which particular types of motives should play a role in distinguishing between more and less serious acts of homicide? Second, should such motives be considered to the exclusion of other types of non-motive-based aggravating circumstances?

Let us start with the first question. As noted, Pillsbury identifies five kinds of motives he thinks should justify enhanced penalties: (1) for profit, (2) to further a criminal endeavor, (3) to effect public policy or legal processes, (4) because of animosity toward the victims' race, religion, ethnicity, sex, or sexual orientation, or (5) to assert "cruel power over another."[15] It is not clear how Pillsbury arrived at this list of motives. Some came from existing statutes. Others seem to have been his own invention. This raises an obvious question: Is the list of motives he identified sufficient to capture all of the cases he wants to capture, while excluding those he does not think worthy of consideration?

One way to approach this question is to consider a selection of cases in which motive seems to have played a distinctive role and ask whether Pillsbury's scheme would capture them; and if not, whether it should have. Consider, for example, the following:

(1) A lonely college dropout attempts to kill the president of the United States to "impress" a movie star with whom he has an obsessive fixation.[16]
(2) A Texas cab driver allegedly kills his two daughters because one of them has dated a non-Muslim and he wants to restore the "honor" of the family.[17]
(3) An environmentalist kills a poacher after the poacher allegedly massacres a herd of wildebeests in a Zambian nature preserve.[18]

Christine Sistare, *Agent Motives and the Criminal Law*, 13 SOC. THEORY & PRAC. 303 (1987); and Whitley R.P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 CRIM. JUST. REV. 317 (2003).

15. *See* PILLSBURY, *supra* note 2, at 110.

16. *See* United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982).

17. *Trial Begins for Texas Taxicab Driver Accused in "Honor Killings" of Teen Daughters in 2008*, CBS NEWS (Aug. 2, 2022, 7:11 AM), https://www.cbsnews.com/news/yaser-abdel-said-trial-accused-honor-killings-teen-daughters-sarah-amina-2008/ [https://perma.cc/3EGV-HQRA].

18. Laura Miller, *The Dark History Behind the Year's Bestselling Debut Novel*, SLATE (July 30, 2019, 5:50 AM), https://slate.com/culture/2019/07/delia-owens-crawdads-murder-africa.html [https://perma.cc/DDV3-CYJX].

(4) A shooter enters a high school in Florida and kills seventeen victims because he believes the act will make him famous.[19]

(5) A nurse administers to his patients a fatal amount of muscle-paralyzing drugs, sending them into respiratory arrest, then quickly tries to revive them and save their lives, hoping he will appear as a hero. Some of the patients end up dying.[20]

So far as I can see, none of these cases fits easily into any of the five categories Pillsbury identified. Perhaps the cab driver's motivation for killing could be categorized as a kind of "out of group animus," to the extent that he killed two women and did so because of their connection to a person of a different religion. But honor killings need not, and often do not, involve killing someone from outside of one's religious or ethnic group. The environmentalist presumably had an ideological objection to poaching, but his motive for killing does not seem to have been to change public policy or legal processes as such. The remaining cases—attempting to kill the president, perpetrating a school massacre, administering muscle-paralyzing drugs—all arguably involve an attempt to obtain fame or admiration, which is not among Pillsbury's list of motives.

This is not to say that any or all of these cases necessarily *should* qualify as aggravated homicide. Perhaps Pillsbury would conclude they should not. Still, the question remains: once we decide to expand the role of motives in grading homicide, how should we determine which motives to include and which not to?

The second question is whether, having expanded the role of motive-based factors in grading, we should simultaneously reduce or eliminate the role of actus-reus- or modus-operandi-based aggravators of the sort that became an increasingly common fixture of American law starting around the middle of the twentieth century. As indicated, Pillsbury did not address this question explicitly, but I think it is implicit in his discussion of motives that he would want to do so.

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19. *See* Jaclyn Schildkraut, *The Media Should Stop Making School Shooters Famous*, VOX (Mar. 31, 2018, 11:07 AM), https://www.vox.com/the-big-idea/2018/2/22/17041382/school-shooting-media-coverage-perpetrator-parkland [https://perma.cc/7F6X-3FUW].

20. Philip S. Gutis, *Former Patient Points to Nurse in Murder Trial*, N.Y. TIMES (Oct. 20, 1989), https://www.nytimes.com/1989/10/20/nyregion/former-patient-points-to-nurse-in-murder-trial.html [https://perma.cc/2MP5-RJN7].

One obvious attraction of jettisoning aggravators based on actus reus and sticking solely with those based on motive would be to avoid the possibility of overcomplexity that might come with retaining both kinds of factors.[21] The worry, though, is that by eliminating actus reus aggravators across the board we might inadvertently throw out the baby with the bathwater. Recall that Pillsbury described the "worst killings [as] express[ing] a philosophy deeply hostile to individual human value and usually to the value of the community."[22] "Such a killing," he says, "expresses the view that human existence has no moral dimension, that life is simply the war of all against all."[23] If he is right, we need to know if by eliminating actus reus factors such as the use of torture or terror, poison or lying in wait, the youth, old age, disability, or official position of the victim, or the targeting of multiple victims, the law of homicide would lose some of the moral sensitivity it now has, in a manner that could not adequately be captured by resorting solely to motive-based factors.

The answer will vary from aggravating factor to aggravating factor.

Two of the most common actus-reus- or modus-operandi-based aggravating circumstances—the use of poison and lying in wait—are probably best understood as constituting evidence of premeditation. My best guess is that both types of circumstance could indeed be jettisoned without much loss to the moral richness of homicide law (though perhaps there is an argument that poisoning in some cases may cause the victim particular pain).

Another common aggravator in American law arises when the victim is very young or very old, is mentally or physically disabled, or holds a particular position (such as that of police officer, prison guard, judge, juror, or witness).[24] There is little explanation in the legislative

21. On the possibility of overcomplexity in the labeling of homicide and other offenses, see generally Matthew Gibson & Alan Reed, *Reforming English Homicide Law: Fair Labeling Questions and Comparative Answers*, *in* HOMICIDE IN CRIMINAL LAW: A RESEARCH COMPANION 37 (Routledge ed., 2019); Andrew Cornford, *Beyond Fair Labelling: Offence Differentiation in Criminal Law*, OXFORD J. LEGAL STUD. 1 (2022); and Kenneth W. Simons, *Is Complexity a Virtue? Reconsidering Theft Crimes*, 47 NEW ENG. L. REV. 927 (2013).

22. PILLSBURY, *supra* note 2, at 112.

23. *Id.*

24. *See generally Crimes Punishable by Death*, *supra* note 11. For example, Arizona makes it an aggravated homicide to kill a person who is 70 years of age or older. ARIZ. REV. STAT. ANN. § 13-751(b) (2022). There is also a collection of statutes that make it a crime to kill someone who holds a particular position—such as a police officer, prison guard, firefighter, teacher, judge, probation or parole officer, or President

histories or elsewhere as to what the rationale for such provisions is supposed to be. Some of these provisions presumably have to do with protecting the most vulnerable among us. Others seem addressed to preventing the kind of social disorder and destabilization that might occur as the result of killing a public official. Perhaps there is some deterrent rationale for treating these as aggravated homicides, but it is harder to articulate exactly why they should be viewed as deserving of more punishment. Moreover, where the victim is a public official, some cases will be captured by the third of Pillsbury's motives—namely, that the killing was perpetrated to affect public policy or legal processes. Overall, in my view, the criminal law would not lose much of its moral authority in eliminating these types of aggravating factors.

On the other hand, I believe that something significant *would* be lost with respect to at least three other types of actus-reus-based aggravators. The first concerns killing by means of torture. No doubt some cases of torture would be covered by the fifth of Pillsbury's motive-based factors—namely, that the killing involved the "cruel" assertion of "power over another."[25] In these kinds of cases, he says, power is the "preeminent motivation for the attack, outweighing all other aspects of the attacker-victim interaction. . . . [T]he homicide comes not as the means of settling a personal controversy about money, sex, love, or personal rivalry, but as the end itself. The killer uses the victim's body and life to express personal dominance generally."[26]

Undoubtedly, some cases of torture would qualify as such, but I doubt all of them would. Surely a defendant could use torture, instrumentally, to settle a personal controversy or to extract information or a confession. What characterizes torture, at its most basic, is the infliction of severe pain or suffering on a person, for any number of different motives.[27] To eliminate torture as an aggravating circumstance would be a significant loss to the moral content of homicide law. The

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of the United States. DEL. CODE ANN. tit. 11, § 4209 (2022); ALA. CODE § 13A-5-40(a)(5) (2022); ARK. CODE ANN. § 5-10-101(a)(3) (2021); 18 U.S.C. § 1751.

25. PILLSBURY, *supra* note 2, at 117–19.

26. *Id.* at 116.

27. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, para. 1, *opened for signature* Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 (defining "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person").

same could be said about eliminating provisions applying to killers who are already serving a life term in prison, have previously been convicted of murder, or intend to kill more than one victim. All three types of killing seem to be among the "worst of the worst." Offenders who kill under these kinds of circumstances are arguably deserving of enhanced punishment, regardless of precisely *why* they did it.

IV. CONCLUSION

A rereading of Sam Pillsbury's *Judging Evil*, nearly twenty-five years after its publication, offers both bad news and good. The bad news is that, in the years since, our legal system has made little progress in reforming the way we label and grade homicide offenses: the system remains a conceptual morass, full of poorly-thought-through, overlapping, and redundant provisions.[28] The good news is that his analysis—lucid, well-informed, and morally sensitive—remains relevant to anyone who wishes to think through the issues in a rational and systematic manner. As Professor Pillsbury heads into retirement, I believe that his work will endure as a vital piece of the scholarly discourse.

28. A few states, to be sure, have made piecemeal changes to the law of homicide. *See, e.g.*, Act effective Aug. 7, 2020, Pub. Act 101-0652, 2020 Ill. Laws 2476, https://www.ilga.gov/legislation/publicacts/101/101-0652.htm [https://perma.cc/QTG9-2NV5] (felony murder rule); S.B. 21-124, 73d Gen. Assemb., Reg. Sess. (Colo. 2021), https://leg.colorado.gov/bills/sb21-124 [https://perma.cc/P7UM-ZY3W] (same); Jeff Amy, *Georgia Gov. Kemp Signs Repeal of 1863 Citizen's Arrest Law*, ASSOCIATED PRESS NEWS (May 10, 2021), https://apnews.com/article/ahmaud-arbery-georgia-arrests-government-and-politics-276c5e51f5363112537ceab4159f9dc5 [https://perma.cc/QG5Q-RLFP] (use of lethal defensive force); S.B. 2279, 2018 Gen. Assemb., Jan. Sess. (R.I. 2018), https://legiscan.com/RI/text/S2279/id/1809715 [https://perma.cc/2XJK-VXM2] (drug-related homicide); H.B. 1831, 2017 Gen. Assemb., Pub. Chapter 1039 (Tenn. 2017), https://legiscan.com/TN/text/HB1831/2017 [https://perma.cc/SVE8-WDJ] (same). Since Pillsbury's book was published, eleven states have also abolished the death penalty, almost invariably replacing it with a sentence of life imprisonment with no possibility for parole. *See State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/ZW7K-2B6V].