

Who Cares About the Cult of Ptolemy?: A Surreply to Katz

Andrew Verstein

The Rosetta Stone is an ancient fragment communicating nearly identical content through three scripts: the hieroglyphics of Ancient Egypt, the Demotic script of later Egypt, and the letters of Ancient Greek.¹ While the Stone's content has some intrinsic interest as a legal text, documenting the formation of the Cult of King Ptolemy V following his coronation, its real importance is of course as a locus of translation.² The Rosetta Stone so greatly advanced scholarly engagement with baffling texts that it has become idiomatic for conceptual or communicative advances.³ Aided by the Stone, scholars could finally form meaningful opinions about what the Ancient Egyptians wrote, thought, and did.⁴

In his response to my recent article,⁵ Martin Katz pays me a compliment by likening my work to the Rosetta Stone. While I doubt that any law review arti-

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1. See J.D. RAY, *THE ROSETTA STONE AND THE REBIRTH OF ANCIENT EGYPT* 3 (2007).
 2. RICHARD B. PARKINSON & R.S. SIMPSON, *CRACKING CODES: THE ROSETTA STONE AND DECIIPHERMENT* 12 (1999) (“the Rosetta Stone, famous for the texts inscribed upon its surface which have made it an icon of all decipherments and of all attempts to access the ancient past on its own terms”); *id.* at 25-26 (stating the Rosetta Stone is inscribed “with a priestly decree—the Memphis Decree—concerning the cult of King Ptolemy V Epiphanes”).
 3. *Rosetta Stone*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/167583> [<http://perma.cc/EHL7-DF5C>] (using “Rosetta Stone” to define a thing that acts as “a key to some previously undecipherable mystery or unattainable knowledge”).
 4. And, if only there had remained any practicing members of the Cult of Ptolemy V in 1799 when the Stone was discovered, information could surely have flowed in both directions.
 5. Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 *YALE L.J.* 1106 (2018).

cle could withstand the comparison, Katz's analogy certainly honors the ambition of my project. Like the Rosetta Stone, *The Jurisprudence of Mixed Motives* serves as a point of translation. Courts and scholars differ greatly in how they talk about motives in the law. It is hard to understand the functioning and implications of various legal standards. That problem is most acute when more than one motive is involved. In *Mixed Motives*, I catalogue how various areas of the law address mixed motives, and I offer a vocabulary for describing motives and motive standards, so that we can compare and critique the many ways that motives are processed in the law. Like the Rosetta Stone, *Mixed Motives* uses three languages. It helps us to understand one language—the judicial opinions concerning motive—by way of two others—a new technical vocabulary and a system of numerical/graphical presentation.

I would be grateful to Katz even if his response did not adopt its tone of enthusiasm and agreement. As any reader can observe, his response is thoughtful and full of good ideas for consideration regarding subsequent projects. Alas, Katz does not only come with praise. He also writes that there are “some flaws that prevent [Verstein’s] framework from achieving Rosetta Stone status.”⁶ His two concerns are as follows:

First, Verstein fails to provide an adequate justification for the quantification of mental causation that lies at the core of his model. Second, instead of using standard causal terminology in his model and his taxonomy, Verstein creates a new taxonomy, which may cause more confusion and decrease the utility of the model he has developed.⁷

To paraphrase, when I describe motives with numbers, Katz wanted more explanation for why I use numbers, and when I describe motives with words, Katz would have preferred different words.

In what follows, I elaborate Katz's concerns and respond to them. Part I addresses the question of whether motives can be finely quantified. I briefly explain why I believe motive is amenable to quantification, and why this conclusion does not depend on specific views about causation. Part II discusses competing vocabularies. I argue that Katz's concerns are best seen as additional translations of my motive framework. Insofar as these translations broaden the use of the framework, I welcome these as friendly amendments. Finally, I offer some concluding remarks.

6. Martin Katz, *A Rosetta Stone for Causation*, 127 YALE L.J. F. 877, 880 (2018).

7. *Id.* at 884.

I. JUSTIFYING QUANTIFICATION

Katz's first objection concerns explicating my choice to quantify motives. My framework describes motives using "quantitative," rather than just "qualitative" measures. That means I am willing to denote a given motive's strength by reference to a number. For example, I might say that a given motive's strength was 1.05 or 1.1 or simply "greater than one." I might do this as way of positing that the motive was strong *enough* to motivate action. These numerical descriptions of motives prove elemental in further discussions. They allow me to describe an individual's motives in a Cartesian space and to make claims about how the law treats (and ought to treat) different motive pairings.

"Yet," Katz observes, "despite the importance of quantification to his project, Verstein does little to justify his quantification of motives."⁸ I offer some reasons why numerical description might be illuminating, familiar, and reasonable, but I do not set forth an extended argument for why this presentation is altogether "true" or even permissible.

So Katz is right that my explication is sparse. Is this a problem? Well, we often leave justifications unstated where there is no need to take a stand on a number of plausible justifications. Absence of justification is really troublesome only when the conclusion is dubious, and the reader fears that no justification *could* be offered. *That* is not Katz's concern. He finds it easy to supply a satisfactory justification and accept quantification: "[A]pplying a quantitative conception of motives, as Verstein does, seems justified. The Rosetta Stone's foundation seems solid."⁹

Although Katz does not pursue the point, I recognize the risks of describing numerically that which is rarely quantified in daily life or prior scholarship. In other areas of law, quantified description has stirred controversy. For example, scholars of evidence have long debated the relevance of quantification to the evaluation of evidence at trial.¹⁰ Does it make sense to say that juries do or should convict when they think the required elements are ninety-five percent likely? That jurors do or should conduct their fact finding in accord with Bayes Theorem? Quantification critics have objected in numerous ways: for example,

8. *Id.* at 884.

9. *Id.* at 888. For Katz, the answer emerges from his embrace of a version of mental-causation. He takes motive to be a causal phenomenon, and he finds quantification natural to causation. *Id.* at 885-88. However natural it is to derive quantification from causation, causes are not the only things that we can express as vectors, and there is no reason to think that causation is a necessary premise in Cartesian motive depictions.

10. See generally Stephen E. Fienberg & Mark J. Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and for Legal Decisionmaking*, 66 B.U. L. REV. 771, 782-83 (1986) (listing criticisms of numerical approaches).

that jurors cannot in fact reason using such algorithms¹¹ and that the use of such terminology, if communicated to the jury, could confuse them or bias them against qualitative evidence.¹²

Whatever the merits of quantified description in other domains, I believe it is innocuous here. The use of numbers in *Mixed Motives* does not commit the reader to the notion that motives are observed with fine granularity, nor that they are *actually* numerical (whatever that would mean). The quantification in *Mixed Motives* can be read as just a tractable metaphor for describing hard-to-observe or nonnumerical phenomena.

Indeed, the most cautious users of the framework can think of the quantification as fundamentally special: the numerical values are coordinates used to identify points and regions on the various figures. The figures only purport to show the various motive combinations that the law takes into account. For example, a numerical description of Jill's motives as B-Motive=1.3 A-Motive=1.1 describes Jill as having two independently sufficient motives for action, one of which (*B*) predominated over the other. The law clearly requires factfinders to discern an individual's motives in such cases, finding predominance in some cases, sufficiency in others. Some people think visually, and numerical coordinates are necessary to be precise in plotting the law's often ambiguous requirements.

It remains a judge's choice whether to instruct juries about their responsibilities by use of numbers or visual figures. If a court thinks that this approach would muddle things for laypeople, it is free to select whatever instructions will prove more familiar and helpful. The *Mixed Motives* terminology can still have been useful to the court in understanding precisely what content to communicate to the jurors, regardless of the words.

The utility of the numerical descriptions does not commit users to a particular theory of motives. For Katz, quantification fits with his causal conception of motives (as I explore further in the next Part). Other readers may reject motive-causation and instead associate the numbers with, say, felt intensity of the motive. Here, as elsewhere, I hope to be ecumenical.

II. TERMINOLOGY

Since Katz ultimately accepts my framework, numbers and all, what remains is his second worry, which focuses on word choice. Word choice matters

11. See, e.g., Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1507 (2001).

12. Laurence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1361-65 (1971).

in a project that is focused on translation and clarification, so it is worth thinking carefully about his points. That is particularly true because Katz's response supplies an alternative rhetoric, which he urges me to use. Some readers will be familiar with Katz's proposed terms, which are drawn from discussions of causation.

Although Katz's alternative terminology may be ideally suited for some purposes, I resist the claim that a jurisprudence of mixed motives *ought* to begin with his terminology. The remainder of this surreply concerns terminology.

I coin many terms in *Mixed Motives*. Katz considers many of these terms to be confusing or superfluous,¹³ and he proposes that I replace them with more familiar terminology. Instead of referring to where two motives are each independently sufficient to motivate action as "Overdetermination," Katz prefers "B Sufficient (but not Necessary)."¹⁴ What I have called "Sole Determination (A)," Katz would call "B Neither Necessary Nor Sufficient."¹⁵ When the B-Motive is very small indeed, I call this a "B-Tiny" case and Katz suggests that we use the term "Material" to describe it (or, anyway, its negation).¹⁶

"Necessary," "Sufficient," and "Material" surely have a familiar ring to them and so may speed a reader's comprehension of the article's ideas.¹⁷ That is why I decided to include most of these familiar terms to explain my terms and concepts; they appear in body text and footnotes to elaborate and paraphrase my own terminological choices.¹⁸ Supplying multiple descriptions is consistent with my objectives. I want to facilitate understanding and translation, rather than to convert my reader to my new and preferred vocabulary. If some people understand the framework better using causal language, they will find it in *Mixed Motives* and they have my blessing in using it.

Indeed, it would be silly for anyone (Katz or me) to dogmatically insist that readers adopt their preferred terms. Not everyone is at liberty to change how they speak about motives. Judges applying a motive standard may be bound by the applicable law's terminology. They may be required to search for a "motivating factor," even if that phrase does not end up being central to the Katz or

13. Katz, *supra* note 6, at 889-92.

14. *Id.* at 890.

15. *Id.* at 890.

16. *Id.* at 900.

17. They have been "used to describe causal relationships for millennia." *Id.* at 879.

18. See, e.g., Verstein, *supra* note 5, at 1125 n.83 (sufficiency and using many causal terms); *id.* at 1128 n.88 (necessity and sufficiency); *id.* at 1130 nn.94 & 96 (using many causal terms including necessity and sufficiency); *id.* at 1146-47 (insufficiency); *id.* at 1153 (sufficiency); *id.* at 1156 (sufficiency and necessity); *id.* at 1160-62 (sufficiency).

Verstein description. I hope that judges and others will find my framework useful to understand what the term “motivating factor” might entail, but they do not have to start saying or even thinking “Verstein’s Any Motive standard” or “Katz’s Minimal Causation standard.” The use of the Rosetta Stone was to translate Ancient Egyptian, not to teach Ancient Egyptians to speak differently.

Still, there is a reason that I chose to make my new vocabulary central and other terms, such as Katz’s causal terminology, secondary. By focusing on new terms, we can discuss motives without accidentally incorporating preconceptions lodged in terminology from other areas of life and law. I worried that in adopting familiar tort language in my framework, I would tacitly endorse and perhaps spread a causal conception of motives. I opted to deemphasize that language because I wished to remain open on the question of whether motives are causes in the sense familiar to tort scholars, and I wanted my framework to remain useful to those dubious of motive-causation.

A causal conception of motives is controversial. If motives are causes, then our acts may follow deterministically from our beliefs and appetites, which might imply an absence of free will. Does the law regard us as lacking free will? Even if motives *are* causes, it does not follow that the law scrutinizes them for their causal impact. For example, the law may care about motive not because it caused anything (though, perhaps it did), but rather because the law is concerned with character, and bad motives show bad character.¹⁹ Even if motives are causes and the law scrutinizes them for their causal properties, we would still want to be cautious. The courts that seem to have examined motives as causes did so with a particular conception of causation in mind: the sort of causation embedded in tort law. These courts cite to English precedents and the Restatement of Torts,²⁰ rather than tort-free causal literature, such as the work of philosophers like Hume and Mackie.²¹ Is tort theory authoritative on causation, even in other areas of law, such as tax, which differ greatly from tort law?²² I built my framework to be agnostic on all of this, trying not to pick winners in all of these debates.

19. See, e.g., Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, UTAH L. REV. 635, 748 (1993) (arguing for character-related motive analysis in criminal sentencing).

20. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524-25 (2013); *Gross v. FBL Fin. Services*, 557 U.S. 167, 176-77 (2009); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 263 (1989); *id.* at 259 (White, J., concurring); *id.* at 262 (O’Connor, J., concurring); *id.* at 279 (Kennedy, J., dissenting);

21. See DAVID HUME, *A TREATISE OF HUMAN NATURE* (Oxford, Clarendon Press 1888); J.L. MACKIE, *THE CEMENT OF THE UNIVERSE: A STUDY OF HUMAN NATURE* (1980).

22. See *United States v. Generes*, 405 U.S. 93, 103-105 (1972) (considering policy arguments for why the tort concept of causation “has little place in tax law where plural aspects are not usual, where an item either is or is not a deduction, or either is or is not a business bad debt,

Katz is no agnostic on this point. He is confident that motives should be analyzed as causes. The opening words of his response make this clear: “The law of mental causation, also known as motive . . .”²³ Katz’s outlook reflects his reading of the law: “[W]hatever one might believe about the role of motives in decision making as a matter of psychology or philosophy, the law treats motives as causal.”²⁴ Supposedly, even I myself partake of causation analysis in *Mixed Motives*.²⁵ For all of these reasons, Katz thinks that I ought to stop hiding the causal ball behind superficially agnostic jargon.

First, let me clear my name. Here is why Katz thinks that I have already committed myself to motive-causation:

Moreover, Verstein’s whole framework is organized around a distinctly causal concept: sufficiency. The most important value on his graph—the one that distinguishes almost all of the causal concepts in his taxonomy—is the value of one, which he defines as representing the level at which a motive becomes independently sufficient to trigger the decision in question.²⁶

The key words here are “sufficient” and “trigger.” I use them, but I do not think that I use them in a way that assumes causation. The word “sufficiency” can be used causally, but it has many other noncausal uses. For example, the fact that a shape has three sides is “sufficient” for it to be a triangle. Here “sufficient” means something *mathematical*, *epistemic*, or *logical* but probably not causal. By saying that B-Motive is sufficient to motivate action, I am leaving open whether it is causal sufficiency or some other sufficiency.

And as for “trigger,” that term does have a causal ring to it,²⁷ suggesting spring gun tort cases where the defendant’s causal contribution was obvious.²⁸ But that is why I never say that a decision was “triggered” by a given motive. The only time I use “trigger” is when noting whether liability is triggered un-

and where certainty is desirable”); *see also* *Weddle v. Comm’r of Internal Revenue*, 325 F.2d 849, 852 (2d Cir. 1963) (Lumbard, C.J., concurring) (“To import notions of proximate causation distilled from the great body of tort law into consideration of § 166 is of little value, because factors such as time, space, and foreseeability, and the very basic notion of causation in fact which underlies the law of proximate causation are by their nature incapable of application to a problem which requires dissection of different motivations toward a similar objective.”).

23. Katz, *supra* note 6, at 877.

24. *Id.* at 877 n.1.

25. *Id.* at 887-88.

26. Katz, *supra* note 6, at 886 n.24.

27. Katz, *supra* note 6, at 882 n.17.

28. *E.g.*, *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971).

der a given test.²⁹ Instead, when I relate motives to actions by way of a verb, I prefer “motivate,” which is clearly agnostic on whether the mechanism is causal.³⁰

Of course, what matters most is not how Verstein feels about causation, but rather how the law does.³¹ So how about that? Does the law take motive to be a form of mental causation?

The answer depends on the context. Employment discrimination has been thoroughly “tortified,” with tort-derived causation coming to completely occupy mixed-motive analysis over the past forty years.³² But other areas, such as taxation, have explicitly rejected this influence and do not appear to be conducted as causal inquiries.³³ Many other areas of the law are not sufficiently consolidated to make any claim about how they analyze this issue. By codifying my framework using causal terms comfortable to employment lawyers, I might influence the development of the law in other areas by suggesting that inherent in the concept of motive is the causation approach applied in employment discrimination.

Even if the law everywhere explicitly incorporated motive as a causal concept, I would still be reluctant to embed that in the framework because it would foreclose certain avenues of legal reform. Some scholars have lamented the causation-based approach to motive that reigns in employment discrimination. If they have good philosophical and policy arguments, we ought to be able to have a debate about removing causation from motive analysis. I would like my framework to aid in conducting such a debate and remain useful even if causation were to fall out of vogue.

My project is intended to help scholars and jurists engage in careful analysis and communication. Familiar terms can accelerate that process, but they can also conceal suppressed assumptions and sloppy reasoning. I introduced a technical language in my transsubstantive project because I do not want any

29. Verstein, *supra* note 5, at 1138, 1141, 1152, 1160.

30. See, e.g., *id.* at 1132, 1137 n.112, 1153. I also use the word “prompt,” *id.* at 1125, and “spur,” *id.* at 1126.

31. It is worth noticing that everyday experience with motive seems open to noncausal conceptions of strength. Introspection suggests that we can have motives of varying magnitude even if we do not feel deterministically compelled by them. Such observations are the starting point for jurists and philosophers seeking a non-causal understanding of motive. It is a virtue of my approach that it accommodates the lived experience of motive as well as the causal conception Katz proposes.

32. Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012).

33. *United States v. Generes*, 405 U.S. 93, 103-105 (1972) (rejecting tort causation as a useful framework for a tax mixed-motives case).

one approach or area of substance to exert unconscious influence over another. Transplanting language from causation or any other field would tacitly link motive jurisprudence to that specific field. By contrast, if our motive jurisprudence is to be general enough to link many areas of law, then its specific terms must be fully native to none of them.

CONCLUSION

The Rosetta Stone was written in three scripts: two Egyptian and one Greek. Would it have been *preferable* for the third language to have been contemporary English? English is easier for many people to read than Ancient Greek. And yet, it is easy enough to reach those people by creating an English translation of a Greek-written Stone. And there are some advantages to having the original Stone be in a language no one now speaks, since it divests the stele from any incidental inferences embedded in contemporary usages.

Katz concludes that “with the additions proposed here, I believe that Verstein has found the Rosetta Stone.”³⁴ I appreciate Katz’s careful and insightful work, and I think his additions are very helpful. Still, I think they are useful as *additions* rather than *substitutions* for the framework I presented, to be used in conjunction with the original, like an English-language translation of the Rosetta Stone.

In some ways, the Rosetta Stone inscribes orthodoxy; its communicative content demands submission—to the Cult of Ptolemy. Nevertheless, its enduring significance is in empowerment, permitting open-ended translation and study. I am grateful to Katz for the chance to explain the similar ambitions of my project.

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34. Katz, *supra* note 6, at 907.