University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 119

JANUARY 1971

No. 3

THE THEORY OF CRIMINAL NEGLIGENCE: A COMPARATIVE ANALYSIS *

GEORGE P. FLETCHER †

I. INTRODUCTION

Negligence is a problematic ground for criminal liability. Every major Western legal system punishes negligent as well as intentional violations of protected interests;¹ but theorists both here and abroad feel uneasy about the practice.² Negligent motoring and negligent manufacturing significantly threaten the public interest; yet Western judges seem more comfortable punishing counterfeiters and prostitutes than imposing sanctions against those who inadvertently take unreason-

* I am indebted to my colleague Herbert Morris for his criticism and encouragement; his thoughts on the subject of punishing negligence are so persuasive that it is remarkable we disagree.

† Acting Professor of Law, University of California at Los Angeles, B.A. 1960, University of California at Berkeley; J.D. 1964, M. Comp. L. 1965, University of Chicago. Member, California Bar.

¹ This Article focuses on the laws of West Germany, the Soviet Union, England, and the United States. Reference will also be made to Swiss, Austrian, and French law. For a general survey of the negligence law of these jurisdictions, see Lang-Hinrichsen, *Die Schuld- und Irrtumslehre*, 2 MATERIALIEN ZUR STRAFRECHTSREFORM 407-13 (1954). The analysis is directed only to inadvertent negligence, excluding reckless offenses, a generally recognized distinction. See MODEL PENAL CODE §§ 2.02 (2) (c), (d) (Proposed Official Draft 1962); R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) § 9; A. SCHOENKE & H. SCHROEDER, STRAFGESETZBUCH 519-20 (15th ed. 1970).

² The response of critics is varied. Some have recommended outright abolition of negligence offenses. *E.g.*, Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963). Others have favored reducing negligence to a quasi-offense, *e.g.*, A. BAUMGARTEN, AUFBAU DER VERBRECHENSLEHRE 113 (1916), or an administrative offense within the jurisdiction of the police, *e.g.*, Germann, *Rechtssicherheit*, 49 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 257, 322-23 (1935). Others have despaired at the prospect of changing the law. *E.g.*, A. KAUFMANN, DAS SCHULDPRINZIP 164 (1961). Although Soviet writers have not opposed the punishability of negligence, opposition did exist in prerevolutionary Russia. See V. MAKASHEVIL, UGOLOVNAJA OTVETSTVENNOST' ZA NEOSTOROZHENOST' (Criminal Responsibility for Negligence) 50 (1957).

able risks. Negligence appears indeed to be an inferior, almost aberrant ground for criminal liability. Every interest protected by the criminal law is protected against intentional violations; but only a few—life, bodily integrity, and sometimes property—are secured against negligent risks. Although any offense may be committed intentionally, the prevailing Western rule of statutory interpretation is that negligence is punishable only if the criminal code so prescribes.³ Many common law courts hedge further against punishing negligence by requiring something more than ordinary negligence to support a criminal conviction.⁴ All of these restrictions reflect the assumption that intentional conduct occupies the core of the criminal law while negligent risk-taking is a theory relegated to the fringes of criminal responsibility.

Although all Western jurisdictions maintain a conservative posture toward punishing negligence, common law courts are even more conservative than their European counterparts. Negligent arson was not a crime at common law, and is rarely punished today.⁵ Negligent

³ The rule is expressly recognized in more recent codifications of the criminal law, such as the Swiss StGB (C. PÉN.) § 18 and the new German StGB § 15 (effective October 1, 1973). See also MODEL PENAL CODE § 2.02(3) (Proposed Official Draft 1962). It is urged as the standard for interpreting the Soviet criminal codes. See V. MAKASHVILI, *supra* note 2, at 217; Chkhikvadze, *Voprosy sovetskogo ugolovnogo prava v svyazi s razrabotkoy proekta ugolovnogo kodeksa SSSR* (Question of Soviet Criminal Law in Connection with Reworking the Draft of the USSR Criminal Code), 1954 SOVETSKOE GOSUDARSTVO I PRAVO 59, 66 (No. 4); Sergeeva, *K voprosu ob opredelenii prestupnoy nebrezhnosti* (On the Question of Defining Criminal Negligence), 1947 SOVETSKOE GOSUDARSTVO I PRAVO 18, 27 (No. 4). The advantage of this rule of construction in Continental jurisdictions is that the legislature can simplify the code by omitting references to intentional conduct; with intentional and negligent conduct the only forms of culpability, a provision silent on the form of culpability would be read as requiring an intentional violation. See P. THORMANN & A. VON OVERBECK, *DAS SCHWEIZERISCHE STRAFGESETZBUCH* 91 (1940). Just the opposite inference is drawn in common law jurisdictions if a statutory prohibition fails to include a reference to *mens rea*, namely that the legislature intended to enact a rule of strict liability. *E.g.*, *Cundy v. Le Locq*, 13 Q.B.D. 207 (1884) (offense of selling liquor to a drunken person; Stephen, J., interpreted the statute to be one of strict liability because it failed to specify that the sale had to be made "knowingly"). But cf. *Sweet v. Parsley*, [1969] 1 A11 E.R. 347 (H.L.) (favoring a presumption of gross negligence as the required culpability if the legislature is silent on the issue). An exception to the Continental pattern is Austria, where courts punish negligent commission of offenses in the absence of authorization by the criminal code. 1 T. RITTLER, *LEHRBUCH DES OESTERREICHISCHEN STRAFRECHTS* 226 (1954).

⁴ There is considerable disagreement about the appropriate characterization of criminal negligence. See, *e.g.*, *Andrews v. Director of Public Prosecutions*, 26 Crim. App. 34 (H.L. 1937) ("reckless," "indifference to risk"); *People v. Penny*, 44 Cal. 2d 861, 285 P.2d 926 (1955) ("aggravated, culpable, gross or reckless"); *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944) ("wanton or reckless conduct"; gross negligence not enough); *State v. Blaine*, 104 N.J.L. 325, 140 A. 566 (1928) (Ct. Err. & App.) ("gross"). Note that while the Model Penal Code punishes simple negligence, it defines negligence to require "a gross deviation from the standard" of the reasonable man. MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft 1962).

⁵ 4 W. BLACKSTONE, COMMENTARIES *222 ("[n]o negligence or mischance amounts to [arson]"); *Morris v. State*, 124 Ala. 44, 47, 27 So. 336, 337 (1900) (intent to burn required for arson). Blackstone does refer to legislation penalizing servants who negligently set fires. But the provision referred to in fact provides for a fine to be

battery has evolved into a crime in the United States only because its courts have been willing to indulge in the fiction of imputing intent in cases of negligence.⁶ West German and Soviet codes, on the other hand, openly prescribe punishment for these and other negligent offenses against personal and property interests.⁷ It is curious that common law courts should be so wary of negligence as a basis for liability. For if negligence is suspect as a deviation from the paradigm of intentional criminality, then strict liability—namely punishing in the absence of specifically proven culpability—would seem even more untoward. But the same common law courts that shy away from negligence have abandoned culpability altogether in cases ranging from statutory rape to improper labeling.⁸ Continental jurisdictions, on the other hand, punish negligence more liberally,⁹ but within a framework of criminal theory that stigmatizes strict liability as taboo.¹⁰

distributed among the "sufferers of such fire" and imprisonment in a workhouse or house of correction only in the event of nonpayment. See An Act for the Better Preventing Mischiefs That May Happen by Fire, 6 Anne, c. 31, § III (1708).

⁶ E.g., *Brimhall v. State*, 31 Ariz. 522, 255 P. 165 (1927); *State v. Hamburg*, 34 Del. 62, 143 A. 47 (1928); *Davis v. Commonwealth*, 150 Va. 611, 143 S.E. 641 (1928). See generally Hall, *Assault and Battery by the Reckless Motorist*, 31 J. CRIM. L.C. & P.S. 133 (1940).

⁷ West Germany: StGB §§ 222 (negligent homicide), 230 (negligent battery), 309 (negligent arson) (C. H. Beck 1969); see *id.* §§ 163 (negligent perjury), 138(3) (negligent failure to report a crime); cf. K. BINDING, *DIE SCHULD IM DEUTSCHEN STRAFRECHT* 119 (1919) (noting that arson, battery, homicide, and allowing a prisoner to escape were the four offenses that could be committed negligently under the ancient German common law of crimes).

Switzerland: StGB (C. PÉN.) §§ 117 (negligent homicide), 125 (negligent battery), 222 (negligent arson).

Soviet Union: R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) §§ 106 (negligent homicide), 114 (negligent battery), 99, 150, 205 (negligent destruction of property). See also *id.* §§ 76 (negligently losing a document containing state secrets), 152 (negligently manufacturing inferior goods); Filanovskij, *Prestuplenija sovershaemye po neostorozhnosti* (Crimes That Can Be Committed Negligently), 1969 PRAVOVEDENIE 75 (No. 2).

France: C. PÉN. §§ 319 (negligent homicide), 320 (negligent battery), R. 38-4 (negligent arson) (Daloz 1952). On the history and complexities of the current law of negligent arson, see L. LAMBERT, *TRAITÉ DE DROIT PÉNAL SPECIAL* 530-32 (1968).

⁸ Liability is analyzed as strict (culpability presumed) with respect to a particular element(s) of the offenses. The leading cases are *Regina v. Prince*, L.R. 2 Cr. Cas. Res. 154 (1875) (conviction affirmed for unlawfully taking a girl under 16 years from the custody of her parents; prosecution did not have to prove that the defendant was culpable with respect to the age of the girl); *United States v. Dotterweich*, 320 U.S. 277 (1943) (conviction affirmed for introducing misbranded drugs into interstate commerce; culpability presumed with respect to misbranded status of drugs). The subject is thoroughly explored in Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107; Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933); Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

⁹ See sources cited note 7 *supra*.

¹⁰ This proposition holds in West Germany, see, e.g., J. BAUMANN, *STRAFRECHT: ALLGEMEINER TEIL* 96 (5th ed. 1968); R. MAURACH, *DEUTSCHES STRAFRECHT: ALLGEMEINER TEIL* 476 (3rd ed. 1965); and in the Soviet Union, see, e.g., *SOVETSKOE UGOLOVNOE PRAVO* (Soviet Criminal Law) 313 (M. Shargorodskij & N. Beljaev eds. 1960) ("Responsibility without culpability is foreign to Soviet criminal law"); V. MAKASEVILI, *supra* note 2, at 40 (criticizing a 1939 case in which liability was

This divergent pattern begins to make sense when one views strict liability as negligence conclusively presumed from the occurrence of harm.¹¹ The divergence thus resolves into differing common law and European postures on the use of presumptions in proving criminal guilt. Common law judges, more than their civilian colleagues, readily invoke presumptions of guilt to simplify the factfinding process.¹² While the common law is replete with presumptions of every hue, European jurists have cultivated a doctrinal aversion to presumptions and other evidentiary rules that distract the decisionmaker from the uniqueness of the individual case.¹³

It is remarkable that common law commentators and practitioners so willingly tolerate institutions like presumptions of guilt and strict liability that run counter to the grain of individualized decisionmaking in the common law tradition. If case by case adjudication is preferred to the hegemony of rules in many areas of private and constitutional law, it is odd that the same sensitivity to the uniqueness of individual cases should not control approaches to factfinding in criminal trials. This apparent heavy-handedness of common law factfinding may derive from an institutional bias against clarification and analysis of the substantive issues of criminal responsibility. It is noteworthy that the idiom of presumptions is most dense in the context of difficult theoretical issues, such as the nature of the intent required for conviction and the relevance of mistake of law. Note the infamous common law presumption that every man intends the natural and probable consequences of his acts.¹⁴ By shifting the question of intent to an inquiry about the natural and probable consequences of acts, common law judges and commentators could avoid discussing the difference between

strict); but there are pockets of strict liability in French law, see P. BOUZAT & J. PINATEL, *TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE* 195-97 (2d ed. 1970), and Italian law, see Lang-Hinrichsen, *supra* note 1, at 385.

¹¹ This thesis is thoughtfully developed in Wasserstrom, *supra* note 8.

¹² A classic presumption of guilt is that of theft arising from possession of stolen goods. The presumption was applied in *State v. Haggard*, 89 Idaho 217, 404 P.2d 580 (1965); *State v. Sims*, 192 Kan. 587, 389 P.2d 812 (1964); 1965 CRIM. L. REV. 233. Presumptions of guilt also derive from legislative enactment. See, e.g., *United States v. Gainey*, 380 U.S. 63 (1965); Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970).

¹³ E.g., E. HAFTER, *LEHRBUCH DES SCHWEIZERISCHEN STRAFRECHTS* 100 (1926); V. MAKASHVILI, *supra* note 2, at 39; 1 T. RITTLER, *supra* note 3, at 225-26; Booss, *Keine Schuldvermutung im Verkehrsstrafrecht*, 1959 NEUE JURISTISCHE WOCHENSCHRIFT 373. On possible exceptions in Italy and Denmark, see Lang-Hinrichsen, *supra* note 1, at 39. For a fuller development of this point, see Fletcher, *The Presumption of Innocence in the Soviet Union*, 15 U.C.L.A.L. REV. 1203, 1207-09 (1968).

¹⁴ This presumption is used sometimes as a common sense rule for proving intention, e.g., *Sparks v. State*, 245 Ind. 245, 195 N.E.2d 469 (1964), but more often as a legal fiction to impute intentional conduct to those who do not in fact act with the required intention, e.g., *State v. Hamburg*, 34 Del. 62, 143 A. 47 (1928); *Director of Public Prosecutions v. Smith*, [1961] A.C. 290 (1960). After the latter decision, which was widely criticized, Parliament prohibited instructing juries that they were bound to infer intent from the natural and probable consequences of an act. Criminal Justice Act of 1967, c. 80, § 8.

intentional and negligent conduct and the adequacy of proof of intentional conduct. Similarly, the fanciful presumption that every man knows the law¹⁵ circumvents the difficult theoretical problem of distinguishing those cases in which a mistake of law should preclude liability from those in which it should not. The common law judiciary's frequent recourse to presumptions of guilt may well express its aversion to difficult substantive issues of criminal responsibility.

Strict liability has had a comparable appeal to common law judges. By conclusively presuming negligence from the occurrence of harm, the judiciary could avoid formulating instructions on an issue of considerable theoretical difficulty. When the question whether the appropriate ground for liability is gross negligence, criminal negligence, or ordinary negligence can generate an appellate crisis,¹⁶ it is not surprising that trial judges might prefer to circumvent the nettlesome issues of criminal negligence.

Should the courts forever appeal to strict liability, presumptions, and other devices to avoid troublesome theoretical issues? Or should the judiciary and the academic community probe the issues of substantive theory in the hope of refining the moral constructs that express convictions of policy and principle? Of all the major Western legal systems, the common law has paid least attention to substantive theoretical issues. This is a shortcoming—with consequences not only for daily legal practice, but also for our legal tradition as the repository of basic social and moral perceptions. The paradoxical disinterest of common law judges in criminal negligence renders it an area particularly in demand of theoretical analysis. For negligence to emerge from the camouflage of strict liability, its theoretical foundation must receive the attention it deserves.

II. THE THEORY OF CRIMINAL NEGLIGENCE: A PREVIEW

The theoretical difficulties of negligence cluster about the seemingly prosaic question whether negligence represents a subjective or an objective standard of liability. This question has generated a cacophony of responses among Continental writers,¹⁷ but has gone unsung in the common law literature. Holmes' thoughtful account of

¹⁵ M. HALE, *PLEAS OF THE CROWN* 42 (1694).

¹⁶ See note 4 *supra*.

¹⁷ Proponents of the objective view include: in Germany, E. KOHLRAUSCH, *SOLLEN UND KOENNEN ALS GRUNDLAGEN DER STRAFRECHTLICHEN ZURECHNUNG* 25 (1910), discussed in V. MAKASHVILI, *supra* note 2, at 64; H. MANNHEIM, *DER MASSSTAB DER FAHRLAESSIGKEIT* 42-57 (1912); and, in the Soviet Union, G. MATVEEV, *VINA V SOVETSKOM GRAZHDANSKOM PRAVE* (Guilt in Soviet Private Law) 281 (1955) (noting that every criminalist and civilist found it necessary to take a position on the issue). For proponents of the subjective standard, see note 20 *infra*.

the problem¹⁸ has convinced generations of common law jurists that the standard is objective and external.¹⁹ West German and Soviet theorists now hold, with equal conviction, that liability for negligent conduct is based on a subjective standard of responsibility.²⁰ This divergence should give us pause. Although little evidence suggests that the two standards—the common law objective and the Continental subjective standards—would yield different results in concrete cases,²¹ considerable significance attaches to the practice of describing negligence as objective or subjective. The labels we use shape our perception of negligence. As we characterize negligence as subjective or objective, we tend to regard it either as an aberrant or as a normal ground for the imposition of sanctions. For those who regard negligence as aberrant, intentional conduct is paradigmatic of a subjective standard while negligence departs from this paradigm as an objective, external standard of liability. For those wishing to expand the use of

¹⁸ O. HOLMES, *THE COMMON LAW* 50-59, 61, 81-82, 107-09 (1881) [hereinafter cited as HOLMES].

¹⁹ Relying on Holmes, Seavey concluded that the standard of negligence must be thought of as objective; the critical factor in his analysis was that judging conduct required "some external standard . . . with which . . . the actor's conduct is compared." Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 5 (1927). Jerome Hall accepted a variation of this view in the 1940's, Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 980 (1943), and suggests in his current writing that merely assessing whether an actor should have known of a risk is enough to say that the standard is objective. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 133 (2d ed. 1960) [hereinafter cited as HALL]. Glanville Williams argues: "To some extent, at least, the 'objective' determination of negligence is a necessary one." G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 100-01 (2d ed. 1961) [hereinafter cited as WILLIAMS]. The draftsmen of the Model Penal Code also thought their standard was objective. MODEL PENAL CODE § 2.02, Comment at 126 (Tent. Draft No. 4, 1955). For the thoughtful beginnings of a contrary trend, see H.L.A. HART, *Negligence, Mens Rea and Criminal Responsibility*, in *PUNISHMENT AND RESPONSIBILITY* 152-57 (1968).

²⁰ E.g., K. BINDING, *supra* note 7, at 125; H. JESCHECK, *AUFBAU UND BEHANDLUNG DER FAHRLÄSSIGKEIT IM MODERNEN STRAFRECHT* 21 (1965); V. MAKASHVILI, *supra* note 2, at 42; R. MERLE, *DROIT PÉNAL GÉNÉRAL* 246-47 (1957); 1 T. RITTIER, *supra* note 3, at 220; A. SCHOENKE & H. SCHROEDER, *supra* note 1, at 531; P. THORMANN & A. VON OVERBECK, *supra* note 3, at 101; cf. StGB (C. PÉN.) § 18; R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) § 9, both expressly adopting subjective standards.

²¹ The evidence would consist of convictions in common law cases that would have resulted in acquittals in a Continental jurisdiction. Yet the typical cases thought by common law judges and writers to represent an objective standard would be decided the same way under a subjective standard in a jurisdiction like Germany. Nothing in a subjective standard would excuse the truck driver in *Beeman v. State*, 232 Ind. 683, 115 N.E.2d 919 (1953) (defendant crashed in broad daylight into a row of stopped cars, visible from 1600 feet), which Jerome Hall cites as an example of the objectivity of negligence. HALL 133. And disregarding a motorist's inexperience on the ground that the "standard is an objective standard, impersonal and universal," *McCrone v. Riding*, [1938] 1 All E.R. 157 (K.B.), would be rationalized under the German subjective standard as an example of *Ueberrahmeverschulden* (guilt deriving from an undertaking). See H. JESCHECK, *LEHRBUCH DES STRAFRECHTS* 385 (1969) (citing a case disregarding a motorist's inexperience); A. SCHOENKE & H. SCHROEDER, *supra* note 1 at 529. Yet Continental writers tend to assume, quite reasonably, that common law judges and writers mean the same thing by "objective" as do Continental jurists. Thus they conclude that the common law of negligence is less sensitive to individual culpability than, for example, German law. E.g., H. JESCHECK, *supra* note 20, at 24. This is a mistake that derives from insufficient appreciation for the extent of conceptual confusion in common law doctrine.

negligence as a basis for imposing criminal sanctions, the allegedly objective nature of the standard poses a barrier to law reform. Thus the conceptual differences between negligence and intentional conduct, as expressed in labels like "objective" and "subjective," are of prime importance to the rational framing of the substantive criminal law.

Assessing the similarities and differences of intentional and negligent conduct requires first, an account of the culpability of inadvertently creating unreasonable risks; and second, an analysis of whether this form of culpability is sufficiently distinguishable from that of intentional conduct to merit the label "objective" rather than "subjective." To explore these issues, we shall consider in some detail two frequently made claims that negligence represents an objective or external standard of liability and that this characterization significantly distinguishes negligence from intentional conduct. The first claim is that because negligence is "objective" or "external" it is not a form of *mens rea*. The second is that rules of law are rules of general application; therefore, if negligence is a rule of law, it must be abstracted from individual human idiosyncracies and applied generally as an objective standard. The first claim is addressed to the relationship between objectivity and culpability; the second, to the relationship between objectivity and legality.

It is important to distinguish both of these claims about the nature of negligence from the policy question whether the standard of liability should be made more or less objective by including or excluding specific personal characteristics of the defendant. The question of objectifying the standard of liability, say by holding teenage drivers to the same standard of care as that applied to adult drivers, is not a question about the nature of negligence; it is an issue of policy, of adjusting the balance of advantage between litigants by disregarding excuses such as the claim that the defendant drove as he did because he was an immature teenager. In tort disputes, courts might well seek to minimize the excuses available to the defendant by so objectifying the standard of liability. But this process is not unique to the issue of negligence. To favor the plaintiff in a battery action, common law courts similarly abstract the dispute from the characteristics of the defendant by narrowing the issue of intention required for liability; the defendant's capacity for self-control, his sanity, intoxication at the time of the act, his motive for acting, and his affection or malice toward the plaintiff are all irrelevant in determining tort liability.²² The process of objectifying the standard of liability functions much like

²² *E.g.*, *McGuire v. Almy*, 297 Mass. 323, 8 N.E.2d 760 (1937) (sanity, self-control); *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P.2d 1091 (1955) (motive, malice). See generally W. PROSSER, *LAW OF TORTS* 31-32 (3d ed. 1964).

decisions to allocate the burden of persuasion: it is a low visibility device for adjusting the interests of competing classes of litigants.²³ It is a process both appropriate and necessary in tort disputes, but out of place in determining the susceptibility of a criminal defendant to a condemnatory sanction. The question in the criminal context is not one of adjusting the interests of competing classes of litigants, but of justifying the state's depriving an individual of his liberty. Yet the standards of criminal responsibility in common law jurisdictions are often objectified; this poses a serious question of policy to which we shall return in conclusion. To isolate the policy issue, we must first wind our way through the conceptual arguments that negligence is, by its nature, objective. For the conceptual arguments are readily used to cloud or even to foreclose the policy inquiry. If negligence is intrinsically objective, then it might seem inappropriate to challenge an objectified standard of responsibility. In the interest, then, of keeping conceptual claims distinct from policy issues, we turn first to a clarification of the structure of negligence as a form of liability.

III. NEGLIGENCE, *Mens Rea*, AND CULPABILITY

The most obvious difference between intentional and negligent conduct is that in the former case, the actor chooses to do harm, while in the latter, he is unaware that he is causing harm. This difference accounts for most of the anxiety about the culpability of negligent conduct: How can a man be culpable for something he is not aware of doing? And if he is not culpable, how can it be fair to subject him to criminal sanctions? A tempting resolution of this quandary is to insist that negligence does indeed involve a psychological or mental state. This maneuver, although conflicting with the definitional requirement that a negligent actor be unaware of the risk he is taking, has appealed to theorists, both here and abroad, who have been anxious to characterize negligence as a species of the same genus of culpability as intentional conduct.²⁴ To reconcile the view that negligence is a mental state with the fact of the actor's unawareness, Continental writers indulged in some convoluted claims. For generations, German commentators argued that negligence was not an affirmative, but rather

²³ For a more thorough treatment of this point, see Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 894-95, 930-32 (1968).

²⁴ For common law attempts to characterize negligence as a mental state, see M. BIGELOW, *THE LAW OF TORTS* 19 (8th ed. 1907) ("Negligence consists in a passive state of mind . . ."); J. SALMOND, *JURISPRUDENCE* 410 (7th ed. 1924) (Negligence defined as "the mental attitude of undue indifference with respect to one's conduct and its consequences.") (emphasis omitted). This position was criticized in Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1926).

a negative mental state.²⁵ One Soviet writer has theorized that the negligent actor is abstractly, but not concretely aware of the risk that he is taking.²⁶ It is difficult to understand the notion of "negative mental state" or to distinguish between "abstract" and "concrete" states of awareness. Yet these constructs recur in discussions of negligence as manifestations of the deeply felt need to attribute indices of conscious choice to negligent conduct.

One way to attack the view that negligence involves a state of mind is to assert that negligence is to be judged not by an internal, but by an external standard. This is the argument many commentators have in mind when they assert the externality or objectivity of negligence. For example, in 1962, Packer wrote: "[N]egligence and strict liability share reliance on an external standard that ignores the actual state of mind of the offender."²⁷ And, in *The Common Law*, Holmes suggests that the opposite of an external standard is one that considers "the condition of a man's heart or conscience"²⁸ or one that is dependent on "the degree of evil in the particular person's motives or intentions."²⁹

In this context, the point of saying that negligence is based on an external standard of liability is simply to make it clear that liability does not require proof of a subjective psychological state. Yet stripping negligence of its subjective state seems to many observers to set it apart from intentional conduct, thus evoking doubts about the propriety of punishing negligent conduct. The main strains of these doubts in the common law literature are, first, that *mens rea* pre-

²⁵ The doctrine stems from E. KLEIN, *GRUNDSATZE DES GEMEINEN UND PREUSSISCHEN PEINLICHEN RECHTS* (1796), discussed in F. EXNER, *DAS WESEN DER FAHRLAESSIGKEIT* 13 (1910). For a survey of German claims that negligence is a form of *Willensschuld* (guilt based on acts of the will), see F. EXNER, *supra* at 12-94. Exner criticized the element of will imported into negligent conduct as a "phantom." *Id.* 74. Yet the view that negligence was willed found sustenance in Binding's theory that the act causing the consequences was willed, if not the consequences themselves; this sufficed, in Binding's view, to classify negligence as a form of *Willensschuld*. K. BINDING, *supra* note 7, at 127. See generally H. JESCHECK, *LEHRBUCH DES STRAFRECHTS* 376 (1969). The view that negligence is a form of *Willensschuld* is no longer to be found in the West German literature, but it survives in Austria. See 1 T. RITTLER, *supra* note 3, at 215.

²⁶ O. IOFFE, *OTVETSTVENNOST' PO SOVETSKOMU GRAZHDANSKOMU PRAVO* (Responsibility in Soviet Private Law) 122-24 (1955). This view is criticized in A. PRONTOVSKIY, *UCHENIE O PRESTUPLENIH* 375-76 (1961). The Soviet literature still maintains, however, that negligence consists in a psychic (*psikhicheskoe*) relationship of the actor to the consequences of his action. UGOLOVNOE PRAVO (Criminal Law) 163 (N. Beljaev & M. Shargorodskij eds. 1969). This psychic relationship is variously defined as the "real possibility of foresight," V. MAKASHVILI, *supra* note 2, at 56, or the "absence of foresight of consequences," Sergeveeva, *supra* note 3, at 18-19.

²⁷ Packer, *supra* note 8, at 144. The statement is not repeated in Packer's analysis of negligence in 1968. H. PACKER, *LIMITS OF THE CRIMINAL SANCTION* 127-29 (1968) [hereinafter cited as PACKER]. But he does say that asking the question whether an actor "should have known" about a risk is to ask a question about "objective fault." *Id.* 128.

²⁸ HOLMES 50.

²⁹ *Id.*

supposes a subjective element and that therefore the basic maxim *actus non facit reus nisi mens sit rea* does not encompass negligence; and secondly, that Latin maxims aside, negligence is simply not culpable in the absence of a subjective state. Exposure and criticism of these doubts require first that they be unraveled.

A. *Is Negligence a Form of Mens Rea?*

The widespread claim that negligence is not a form of *mens rea* might take any of three forms: First, the claim might be definitional so far as the proponent defines *mens rea* as the subjective element of the offense and then deduces from this definition that negligence, because it lacks a subjective element, cannot be a form of *mens rea*. Secondly, the claim might be historical so far as it is argued that intentional offenses comprise the core of common law crimes and that therefore the concept of *mens rea* should be construed to express the distinguishing characteristic of intentional conduct: the choosing to do harm coupled with the foresight that harm will result from one's actions. Thirdly, the claim might be normative so far as the analysis of *mens rea* merges with the question whether negligent conduct ought to be punished.

Neither a definitional nor a historical approach to *mens rea* can help us evaluate whether negligence ought to be punished. Nothing prevents Granville Williams, Frances Sayre, and others from defining *mens rea* as the "mental element necessary for the particular crime."³⁰ But it would be a mistake to think that one thereby furthers the discussion of the question whether negligence ought to be a basis for criminal liability. One cannot pick a definition at will and then assume that this definition provides a test for the propriety of punishment.³¹ Of course, writers of this school would invite the assistance of the common law tradition to defend their definitions. According to the common law, the argument would run, *mens rea* refers to a state of mind; this is supposedly clear in the case of intentional offenses, and therefore one should hold that awareness or foresight of consequences is a necessary condition for *mens rea* and a necessary condition for

³⁰ WILLIAMS 31; Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1026 (1932); accord, J. MILLER, HANDBOOK OF CRIMINAL LAW 53-54 (1934); S. STEWART, A MODERN VIEW OF THE CRIMINAL LAW 46 (1969) ("an intention to achieve . . . the result forbidden by law"). See also Regina v. Tolson, 23 Q.B.D. 168, 184-93 (1889) (Stephen, J.) (*mens rea* maxim only a requirement of proof as to the "state of mind" included in the definition of every crime).

³¹ It is important to distinguish this line of analysis from Jerome Hall's position, which holds that "*mens rea* is intended to refer to actual distinctive states of mind," HALL 70-71, but which simultaneously seeks to interpret *mens rea* as a normative concept. *Id.* 70-104. Hall's approach does provide a standard for assessing the propriety of punishing negligent conduct, even if his conclusion is at odds with the thesis of this Article. See also Hall, *supra* note 2.

satisfying the maxim *actus non facit reum nisi mens sit rea*. This is a pervasive argument in the common law literature and has left its traces in the work of virtually every commentator.³² It can be stilled only by a reexamination of the sources and function of the *mens rea* concept.

The maxim *actus non facit reum nisi mens sit rea* first appeared in 1641 in Coke's *Institutes*³³ and has come to be one of the few stable principles of criminal justice in Anglo-American jurisdictions. Though the principle is widely quoted, no one seems entirely sure of its relevance. Many commentators, including Francis Sayre and Jerome Hall, have mistakenly invoked Coke to support the view that *mens rea* is the subjective state that makes an act punishable under the law.³⁴ According to this view, the requirement of *mens rea* is like the condition that harm occur for conduct to be punished; the requirement is typically satisfied but its absence is not a bar to legislative action. As the characteristics of harm may be absent in attempt and other inchoate offenses, the characteristic of *mens rea* may be absent in cases of strict liability and negligence. Yet if Coke is properly interpreted and analyzed, his use of the *mens rea* maxim captures more than a characteristic of criminal conduct; it speaks to the premises for justly punishing those who cause harm.

Coke invokes the maxim to explain why acquittals would be appropriate in two hypothetical cases. The first case is embezzlement (not a crime in the seventeenth century); the actor formulates the intent to steal after he takes possession of the goods.³⁵ The second is suicide by an actor *non compos mentis*.³⁶ According to Coke, neither actor should be convicted because in each case the element of *mens rea* is absent. The first actor did not have the requisite intent to be guilty of larceny; the second was not accountable for his act of suicide. It is tempting to focus solely on the larceny hypothetical and argue that in invoking the concept of *mens rea*, Coke meant merely to say that the actor must have the intent proscribed by law in order to be guilty of the offense. This is indeed the reading of Coke that has prompted so many common law jurists to argue that the absence of *mens rea* is merely the absence of a particular subjective state. Yet this interpretation of Coke is hardly compatible with his analysis of suicide by

³² E.g., PACKER 127 ("[N]egligence is an extension rather than an example of the idea of *mens rea* in the traditional sense."); J. TURNER, KENNY'S OUTLINES OF CRIMINAL LAW 37-40 (19th ed. 1966) (arguing that negligence is not a form of *mens rea* because it allegedly did not suffice for manslaughter at common law).

³³ There are earlier references to the phrase *mens rea*, but apparently not to the maxim as it was used by Coke in E. COKE, THIRD INSTITUTE 54, 107 (Brooke Ed. 1797). See generally HALL 77-83; Sayre, *supra* note 30, at 983-1004.

³⁴ E.g., HALL 82; Sayre, *supra* note 30, at 1000.

³⁵ E. COKE, *supra* note 33, at 107.

³⁶ *Id.* 54.

a nonresponsible actor. In the latter case, the absence of *mens rea* is the absence of responsibility, not the absence of a particular intention or mental state proscribed by law. A man *non compos mentis* might well manifest a prohibited intention in his conduct. Of course, one could save the theory that *mens rea* refers to a subjective state by maintaining that the distinguishing characteristic of voluntary, responsible suicide is a particular subjective state which would be absent in the case of an insane actor. Yet from the perspective of punishing negligence, this is hardly a helpful maneuver. For if one maintains that voluntariness is a subjective state, it is no more contemptuous of reality to say that negligence is also a subjective state, thereby resolving the dispute whether negligence is a form of *mens rea*.

Coke's two references to *mens rea* seem to point in opposite directions. In the larceny example, *mens rea* seems to refer narrowly to a mental or subjective state; in the suicide example it functions as a broader concept encompassing the culpability of the act in question. These two examples correspond to the two sides of an ongoing common law debate whether *mens rea* does or does not encompass criteria of voluntary conduct and culpability. The courts repeatedly perceive that excusing conditions like insanity and duress are incompatible with *mens rea*;³⁷ yet the judges are often chided for this view by academic writers, particularly Turner and Williams, who hold fast to the view that *mens rea* means nothing more than the state of mind proscribed by the statute.³⁸ It is largely in recent American writing that criminal theorists have come to appreciate the utility and promise of viewing *mens rea* as a category encompassing the issue of responsibility.³⁹

The dispute between the narrow and broad interpretations of *mens rea* reflects a more pervasive disagreement whether the concepts of the criminal law ought to be value-free, morally neutral standards, or whether they ought patently to express the underlying moral issues of criminal liability. This conflict is expressed in the vicissitudes of the concept of guilt in the criminal law; sometimes it merely refers to liability under the positive law, sometimes it means moral culpability. The same conflict arises in formulating the test for insanity; the McNaughton test appeals to those who prefer to reduce the question of responsibility to a seemingly neutral question of knowledge: Did the actor not know the nature of his act? Did he not know that what he

³⁷ See, e.g., *United States v. Currens*, 290 F.2d 751, 773 (3d Cir. 1961) (insanity); *Regina v. Bourne*, 36 Crim. App. 125 (1952) (Crim. App.) (duress).

³⁸ 1 J. TURNER, *RUSSELL ON CRIME* 53 (12th ed. 1964); WILLIAMS 387.

³⁹ See, e.g., PACKER 105-31; Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 862-65, 872 (1963); Kadish, *The Decline of Innocence*, 26 CUMB. L.J. 273, 275, 282 (1968); cf. P. BRETT, *AN INQUIRY INTO CRIMINAL GUILT* 40 (1963).

was doing was wrong?⁴⁰ On the other hand, tests focusing as well on the actor's capacity for self-control require a more sensitive evaluation of the facts bearing on criminal culpability.⁴¹ The same pattern is expressed in conflicts about the scope of *mens rea*. The followers of Steven, Sayre, and Williams prefer to think of *mens rea* as a limited concept divorced from the normative issues of criminal responsibility;⁴² yet some contemporary writers, like Packer and Kadish, prefer to view *mens rea* as encompassing culpability for illegal conduct.⁴³

The general trend of the common law is toward exposing the moral content of questions like criminal guilt and insanity. The same evolution is due to occur in the use of *mens rea*. Admittedly, the use of Latin inhibits our understanding of the normative content of the concept. In German and Russian law the same word (*Schuld, вина*) is used to refer both to criminal guilt and to the sources of culpability (intention, recklessness, and negligence). In a perceptive article a half-century ago, the German writer Rheinhard Frank was able to transform the German counterpart of *mens rea* from a term describing mental states into a normative standard of culpability.⁴⁴ Anticipating the techniques of analytic philosophers, Frank relied on ordinary German usage to show that the concept of guilt admitted of degrees, and that these differences of degree reflected evaluation of the exculpating and inculpating circumstances attending instances of intentional and negligent conduct.⁴⁵ Thus Frank generated a normative conception of *mens rea* that has since become pivotal in German criminal theory.⁴⁶

⁴⁰ McNaughten's Case, 8 Eng. Rep. 718 (H.L. 1843).

⁴¹ See, e.g., MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962); United States v. Currens, 290 F.2d 751 (3d Cir. 1961). Continental tests of insanity typically include an inquiry about the actor's capacity to control his conduct. See StGB (German) § 51 (C. H. Beck 1969); R.S.F.S.R. 1960 Ugoz. Kod. (Criminal Code) § 11.

⁴² See sources cited note 38 *supra*. This position has found legislative sanction in the MODEL PENAL CODE §§ 2.02(2) (a), (b) (Proposed Official Draft 1962), which define the terms "purposely" and "knowingly" as "Kinds of Culpability"—a definition that yields the odd result that an actor might be "culpable" in acting knowingly with respect to the material elements of the offense, yet have a good defense of duress or insanity. This conceptual oddity could have been avoided by treating the terms defined in § 2.02(2) as "Sources of Culpability" or "Grounds for Finding Culpability." Cf. note 85 *infra* & accompanying text.

⁴³ PACKER 105-31; Kadish, *supra* note 39, at 275, 282.

⁴⁴ R. FRANK, UEBER DEN AUFBAU DES SCHULDBEGRIFFS (1907).

⁴⁵ *Id.* 4-5.

⁴⁶ The normative theory of guilt is closely tied to the development of the *finale Handlungslehre* (literally: goal-directed theory of the act), which holds, *inter alia*, that the issues of intention and negligence are to be treated as questions bearing on the illegality, not just the culpability, of conduct. It relates also to the evolution of the prevailing theory of mistake of law, discussed in the text accompanying notes 63-66 *infra*. These highly significant developments, particularly the *finale Handlungslehre*, have yet to receive due attention in the English-language literature. For the leading German accounts, see H. JESCHECK, *supra* note 25; H. WELZEL, DAS DEUTSCHE STRAFRECHT (11th ed. 1969). Soviet scholars have shown considerable interest in

Though we cannot rely on ordinary usage to fathom the meaning of *mens rea*, there are good reasons for recognizing the universality of Frank's thesis and applying it to render the concept of *mens rea* equivalent to the normative concept of culpability. We require *mens rea* as an essential condition for criminal liability, not because we suppose that mental states are essential to criminality, but because we realize intuitively that the condemnatory sanctions should apply only to those who are justly condemned for their conduct. And men are not justly condemned and deprived of their liberty unless they are personally culpable in violating the law. That is the point of Coke's saying: the act is not culpable under the law (*actus non facit reum*) unless the actor is culpable for acting as he did (*nisi mens sit rea*).

The proper construction of Coke's embezzlement case is that if the actor lacks the intent required by the law as it existed in the seventeenth century, he is not culpable for violating the law: there is neither an act prohibited by the law nor personal culpability for engaging in the prohibited act. It does not follow, inversely, that if the actor intended to steal at the time he received possession of the goods that the maxim *actus non facit reum nisi mens sit rea* would be satisfied. The actor might be *non compos mentis*, and Coke demonstrably would say that he lacked *mens rea* even though he intentionally took the goods of another.⁴⁷ Similarly, the actor might have performed the act under duress or necessity, and in these situations, his conduct should be treated the same as the conduct of an actor *non compos mentis*. In all of these cases, the actor acts with the subjective state prohibited by law, namely, the intention to take the goods of another. But he is not personally culpable—he lacks *mens rea*—if he is insane, or if his conduct is rendered involuntary by duress or necessity.

Once the normative status of *mens rea* comes into focus, the problem of negligence as a form of *mens rea* is tractable. If *mens rea* refers not to a specific subjective state, but to the actor's moral culpability in acting as he does, then there might logically be a way to establish personal culpability without referring to a state of mind. In the normal case of intentional conduct, where the actor is sane and his conduct is not excused by duress or necessity, it might be sufficient in establishing *mens rea* to show that the actor acted intentionally. But surely it does not follow that intentional conduct, or something like it,

Frank's normative theory of guilt, but they have subjected it to caustic criticism. The main objection is that Frank's theory disengages the concept of culpability from its "material" basis. V. MAKASHVILI, *supra* note 2, at 49; A. PIONTOVSKIJ, *supra* note 26, at 373; B. UTEVSKIJ, *VINA V SOVETSKOM UGOLOVNOM PRAVE* (Guilt in Soviet Criminal Law) 277 (1950).

⁴⁷ Caveat: An historical interpretation of the phrase *non compos mentis* might lead one to conclude that Coke had in mind cases of insanity so egregious as to preclude a finding of intentional conduct.

is a necessary condition for criminal culpability. Structural differences between negligence and intentional conduct do not preclude treating negligence as a form of *mens rea*. Nor is the issue settled by the characteristic externality of negligent conduct. Whether negligence constitutes *mens rea* depends on whether negligent conduct is a ground for justly blaming another. To that question we now turn.

B. *Is Negligence Culpable?*

At first blush it seems odd that anyone would argue that negligence is not an appropriate ground for censuring the conduct of another. From the late Roman Empire to the present, in Continental and common law jurisdictions, the courts have punished acts negligently causing harm.⁴⁸ In daily conduct, we all confidently blame others who fail to advert to significant risks. If we confront a motorist driving without his lights on and thereby endangering the lives of many others, we would hardly condition our condemnation of his conduct on whether he knew his lights were off. His failure to find out whether his lights were on or off would itself be a basis for condemning him. Yet theorists have repeatedly argued that this judicial practice is primitive and that, as a matter of principle, an actor must *choose* to do harm in order to be culpable and fairly subject to penal sanctions. Jerome Hall has vigorously advanced this view.⁴⁹ And in Germany, Arthur Kaufmann is the latest in a line of commentators who have maintained that guilt is always attributable to an act of the will.⁵⁰ From the fourteenth century legal renaissance in Italy to H. L. A. Hart's analysis, the proponents of punishing negligence have relied upon the same reply: the culpability of negligence is not the culpability of choice, but rather of failing to bring to bear one's faculties to perceive the risks that one is taking.⁵¹ Though joined for centuries, the

⁴⁸ There is considerable disagreement whether negligence was punished under Roman law. The Lex Aquilia recognized negligence as a ground for liability, Digest IX.2.31, in F. LAWSON, *NEGLIGENCE IN THE CIVIL LAW* 116-19 (1950), but there is doubt about the criminal implications of the Lex Aquilia. *Id.* 11. Karl Binding argued that negligence was not punishable at all under Roman law, K. BINDING, *CULPOSE VERBRECHEN IM GEMEINEN ROEMISCHEN RECHT* (1877); accord, T. MOMMSEN, *ROEMISCHE STRAFRECHT* 89 (1899). But cf. H. MAYER, *LEHRBUCH DES DEUTSCHEN STRAFRECHTS* 218 (1888) (arguing that Binding incorrectly assimilated cases of gross negligence (*culpa lata*) to cases of intentional conduct). By the mid-16th century, negligence was statutorily acknowledged on the Continent as a ground for criminal liability. CAROLINA CONSTITUTIO CRIMINALIS §§ 134, 136, 146, 180 (1532); see H. ZOEFL, *DIE PEINLICHE RICHTSORDNUNG KAISER KARLS V* 240-50 (1842). Early common law liability for negligence took the form, in part, of strict liability for the unintended consequences of unlawful acts. See E. COKE, *supra* note 33, at 56; R. MORELAND, *A RATIONALE OF CRIMINAL NEGLIGENCE* 1-7 (1944).

⁴⁹ See HALL 136-39; Hall, *supra* note 2.

⁵⁰ A. KAUFMANN, *supra* note 2, at 156-86 (relying primarily on the work of Kohlrausch).

⁵¹ Compare 2 L. VON BAR, *GESETZ UND SCHULD IM STRAFRECHT* 439 (1907) (views of Decianus and Baldus), with H.L.A. HART, *supra* note 19, at 152. See also

issue is hardly resolved. It might be helpful to develop some perspective on the conflict between these two theories of culpability in an effort to understand why some theorists tenaciously reject predicating culpability on an actor's failure to bring to bear his capacity to perceive and avoid a substantial and unjustified risk.

There are at least two sophisticated strategies that one might pursue in upholding a sharp differentiation between the culpability of choice and the culpability of inadvertence. The battleground of one segment of the literature is the role of culpability in justifying criminal sanctions. Jerome Hall argues, for example, that "in the long history of ethics . . . *voluntary* harm-doing is the essence of [culpability]." ⁵² From this premise he reasons that negligence is involuntary, and that therefore it is unjust to punish negligent risk-taking. The question Hall raises is the right one. We do wish to know whether it is just to punish the negligent actor. It is not enough to show that punishing negligence has a deterrent impact on other potential risk-creators, for the goal of deterrence, however sound, does not speak to the fairness of forcing the specific defendant to be the object of exemplary sanctioning. Yet the issue of fairness to the defendant is not resolved by positing that negligence is not voluntary and therefore not culpable. Surely, the negligent actor, like the intentional actor, has the capacity of doing otherwise; he could have brought to bear his faculties to perceive and to avoid the risk he created. That is all we typically require to label conduct as voluntary. But Hall has a more limited concept of voluntariness in mind. He equates voluntariness with choice and thus has little difficulty with the question whether negligence is voluntary. Yet unsupported definitions of voluntariness will not still the debate. We still wish to know whether the proper interpretation of voluntariness and culpability would confine these concepts to instances of choice or would expand them to encompass cases of culpable inadvertence.

It might be helpful to start with a clearer account of why criminal sanctions should be limited to culpable, voluntary conduct. The usual account is negative in form: one should not punish involuntary conduct because it is unjust to the individual to expose him to sanctions for blameless conduct. Yet that negative perspective provides little assistance in clarifying the concepts of culpability and voluntariness. When we turn to positive accounts, however, we find a divergence of views that does correspond to the dispute between conflicting schools on the

H. JESCHECK, *supra* note 25, at 377; V. MAKASHVILI, *supra* note 2, at 91; N. TAGANTSEV, *LEKTSII PO RUSSKOMY UGOLOVNOMU PRAVU* 695 (2d ed. 1888).

⁵² Hall, *supra* note 2, at 635 (emphasis in original).

contours of culpability and voluntariness. If one focuses on the just desert of the offender, as do strict retributivists, one is likely to reason along the following lines. Justice requires that punishment be inflicted to the extent that the offender deserves punishment. To assess a man's just desert, we must fathom the kind of a man he is; to do that within the criminal law, we must rely exclusively on the offender's illegal act as the index of his moral character. The choice to do harm manifests character flaws, such as moral arrogance and greed; and these flaws reveal the offender to be a man deserving of punishment. Negligent acts, on the other hand, at best ambiguously manifest an actor's character; it tells us little about a man to know that on one occasion of nighttime driving he forgot to turn on his headlights. As Holmes said, negligence does not reveal the "condition of a man's heart or conscience."⁵³ And if it does not, then it is not a fitting ground for blame and punishment.

This approach to the punishability of negligence invites replies at several levels. One can dispute the alleged link between choosing to do harm and moral character. After all, insensitivity and egocentricity are moral flaws and both of these manifest themselves in incidents of negligent risk-taking. Also, it is far from clear that every intentional violation of the law (even of a just law) demonstrates a defect in the violator's character. In specific instances, such as draft evasion and euthanasia, one might regard the illegal conduct as morally sound, yet favor a conviction to inhibit others from asserting their private moral views at the expense of the community. These lines of criticism are worth pursuing, but alas, they meander on the surface of the issue.

At the core of this case against punishing negligence is the premise that culpability functions as a standard for assessing the moral desert of the offender. Yet the requirement of culpability shields the individual from unjust punishment even if the standard is viewed not as one of moral desert, but as one of moral forfeiture. With the idea of forfeiture in the foreground, culpability functions as the touchstone of the question whether by virtue of his illegal conduct, the violator has lost his moral standing to complain of being subjected to sanctions. If his illegal conduct is unexcused, if he had a fair chance of avoiding the violation and did not, we are inclined to regard the state's imposing a sanction as justified. The defendant's failure to exercise a responsibility shared by all, be it a responsibility to avoid intentional violations or to avoid creating substantial and unjustified risks, provides a warrant for the state's intrusion upon his autonomy as an individual. From the viewpoint of culpability as a standard of moral forfeiture, it seems fair and

⁵³ HOLMES 50.

consistent to regard negligence as culpable and to subject the negligent offender to criminal sanctions.

The dispute about the contours of culpability is reduced, then, into a conflict about the role of culpability in justifying criminal sanctions. Is culpability a standard of moral desert or of moral forfeiture? Negligence is arguably an unreliable index of the actor's moral desert, but it does qualify as a plausible rationale for the partial forfeiture of the actor's autonomy. The conflict between these two views is not readily resolved. According to the former view, the criminal act is significant because it reveals the moral character of the offender; according to the latter view, the act is abstracted from the actor's character and treated as the sole test of liability to punishment. It is fair to say that most common law commentators regard culpability as a standard of moral forfeiture and thus pay little heed to the connections between culpability and character traits of the offender.⁵⁴ Yet a significant tradition supports the view that punishment is justified solely by the desert of the offender,⁵⁵ and this view inclines us toward insisting that criminal acts manifest character traits relevant to assessing the offender's just desert. Though we cannot now resolve this conflict, we may at least note the depth of the differences between those who would reject and those who would acknowledge the culpability of inadvertence. If a theorist wishes to exclude negligence from the criminal law, he should provide a convincing account of why culpability ought never to function as a standard of moral forfeiture. Yet neither that convincing account nor its definitive refutation has emerged in the literature of criminal theory.

An alternative strategy for challenging the punishability of negligence builds on the observation that culpability for inadvertence, like culpability for omissions, presupposes a finding that the defendant had a duty to assert himself to avoid liability. In cases of omissions, the duty is to fend off impending harm; in cases of negligence, it is to inform oneself of the risk one is running. These duties derive not from statutory prescriptions, but from judicial decisions. Thus they differ from the general duties of restraint defining legislative rules of the sort prohibiting arson and battery. In the one case, the duty is imposed judicially on a case by case basis; in the other, by the legislature's enactment of a general rule restricting interference with the interests of others.

Judicially imposed duties are disquieting for several reasons. They raise subtle problems about the role of judicial lawmaking and fair notice to the accused on trial. Of particular concern to those wary of punishing negligence are the criteria invoked to establish these duties.

⁵⁴ *E.g.*, P. BRETT, *supra* note 39, at 37-80; PACKER 62-70; H. SILVING, *CONSTITUENT ELEMENTS OF CRIME* 12-16 (1967).

⁵⁵ *E.g.*, I. KANT, *PHILOSOPHY OF LAW* (Hastie transl. 1887).

The particularized duties in cases of omissions and negligence seem to depend on community expectations of the behavior of reasonable men. In contrast, the general duties not to steal, rape, or kill seem to be grounded in moral principle, rather than in conventional practices of the community. Let us see what can be made of this distinction.

There is a point in saying that intentionally interfering with the interests of others is wrong regardless of the expectations of the victim or third parties. It is hardly a justification for rape, robbery, arson, or homicide to point out that because of a high crime rate the victim expected a criminal attack. The defense of assumption of risk has no place in the law of intentional crimes. Thus it seems that there is at least a *prima facie* duty not to commit theft, battery, and kindred offenses that is wholly independent of conventional practices and expectations in the community.

In assessing the culpability of inadvertence, on the other hand, we rely heavily on community expectations. How can we determine whether a man ought to have been more attentive to the risks latent in his conduct except by gauging our expectations of what other men do under similar circumstances? We would be inclined to reprove a man for forgetting an appointment or failing to notice that someone needs aid only if it is customary in the group to take appointments seriously or to be attentive to the needs of others. Thus the duty to apprise oneself of a risk seems to derive from the demands of others, not from a principle of moral action. That it seems to be up to others whether one has a duty to act (and is culpable for not so acting) leads to claims, like those of the German Professor Arthur Kaufmann, that punishing negligence exaggerates the impact of community values in the substantive criminal law.⁵⁶

Though it seems intuitively persuasive, the distinction between the culpability of choice and the culpability of failing to meet expectations suffers from closer examination. Expectations play a role in determining the culpability of intentional as well as negligent conduct. It is obvious that some intentional acts, like the kissing and touching of others, vary in their acceptability with local conventions. One could describe this variation by saying that the intentional touching of another is always *prima facie* forbidden, and that local customs function merely to generate a privilege to engage in the conduct. On this view of the matter, one could say that intentional acts were at least *prima facie* forbidden regardless of local conventions, while the duty to perceive a risk arises only as a result of the demands and the conventions of others. Yet one might equally well say that the acceptable touching of others is

⁵⁶ A. KAUFMANN, *supra* note 2, at 160.

not even *prima facie* forbidden, and that the touching of others becomes impermissible only when local conventions so dictate. It is unclear which of these descriptions of permissible touching is the more appropriate.⁵⁷ And, therefore, one should have doubts about the allegedly unique role of expectations in prescribing the culpability of negligent conduct.

Upon closer examination one finds some remarkable implications of the view that culpability under the law should be always attributable to a choice to do harm. If that position were rigorously pursued, the choice necessary for conviction would be of two parts: the choice to do harm (or to run the risk of harm) and the choice to violate the law. There is surely nothing deserving of censure in choosing to sell a pornographic book unless one is aware not only of the contents of the book, but also of the law prohibiting the sale of pornographic books and of the legal status of the particular book as a pornographic book. These latter two aspects of the choice required to make the sale of a book culpable typically are not required for conviction in Anglo-American jurisdictions. Ignorance of the legal prohibition and the legal status of the book are treated as mistakes of law; and in many legal traditions, including the common law, mistakes of law do not excuse illegal conduct.⁵⁸ But if culpability is to be predicated on choice alone, then surely mistakes of law should negate the culpability of a choice to the same extent as does ignorance of the risks latent in one's conduct.

Common law commentators opposed to punishing negligence have never perceived the connection between ignorance of factual risks and ignorance of legal risks. J. W. C. Turner and Jerome Hall, for example, indulge in a highly principled rejection of negligence as a suitable basis for punishment;⁵⁹ but at the same time they accept the common law view that mistake of law is not a defense.⁶⁰ Thus they oppose punishing actors ignorant of factual risks and favor holding everyone strictly accountable for knowing the law. It is a curious position. Neither author provides an account of the difference between inadvertently caus-

⁵⁷ This is not to say that the issue could not be resolved by rational inquiry. German theory has fostered a number of disputes of this sort, the latest of which turns on the question whether the doctrine of *soziale Adaequanz* (encompassing the common law doctrines of implied consent and reasonable risk) should be regarded as part of the *prima facie* case (*Tatbestand*) or as doctrine of justification. Compare H. WELZEL, *supra* note 46, at 55-58, with J. BAUMANN, *supra* note 10, at 166-68.

⁵⁸ For an excellent comparative survey, see Ryu & Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421 (1957).

⁵⁹ HALL 136-39; Turner, *The Mental Element in Crimes at Common Law*, 6 CAMB. L.J. 31, 44-48 (1936).

⁶⁰ HALL 382-88; Turner, *supra* note 59, at 47. Both authors acknowledge the traditional exception that mistake of law is a defense where it negates a required *mens rea*, such as *animus furandi* in larceny. HALL 392-401; 1 J. TURNER, *supra* note 38, at 78-80.

ing harm and inadvertently transgressing the law.⁶¹ Nor does it seem possible to generate a distinction on their behalf.⁶² In a transaction, such as selling a book or getting married, there is a risk that one might create a situation objectively incompatible with the law. Yet that risk is divisible into three components:

(1) a factual component: determining the content of the book or the identity of the prospective spouse.

(2) a component of legal status: determining whether the book is pornographic, or whether the prospective spouse is still married.

(3) a legal component: determining whether the selling of a pornographic book or marrying the spouse of another is prohibited by law.

There is no obvious basis for saying that the factual component of the risk of illegal conduct is different, in principle, from the two legal risks. Yet common law commentators who oppose the punishability of negligence uncritically assume there is a distinction permitting us to excuse every inadvertent factual risk and to endorse strict liability for risking a violation of the law.

In the absence of a plausible distinction between legal and factual risks, opponents of punishing negligence seem to be bound to treat every mistake of law as a complete defense to liability. Yet so far as we know, no Western legal system has ever so rigorously implemented the hypothesis that all culpability derives from known choices. One school of thought that has come close to this position is the *Vorsatztheorie* (Intent-theory) in the German and Soviet literature.⁶³ It is so named because it favors treating mistakes of law as conditions, like mistakes of fact, negating the intention required for establishing an intentional offense. Yet the theory does admit of punishing conduct committed

⁶¹ Hall's central argument is that recognizing mistake of law as a defense would be incompatible with a "legal order." HALL 383. The same point does not apply to mistake of fact, and thus Hall would have a sound distinction if his characterization of mistake of law were plausible. Yet his position on mistake of law builds on a confusion of the questions of legality and culpability. See Houlgate, *Ignorantia Juris: A Plea for Justice*, 78 ETHICS 32, 38-41 (1967).

⁶² Jescheck argues that the legality of intentional conduct is directly knowable, while the verification of factual conditions depends on surrounding circumstances. H. JESCHECK, *supra* note 20, at 301. Yet this is true only with respect to an insignificant number of offenses and is wholly inapposite in the typical case, where determining the legality of conduct requires consultation, research, and a prediction of official behavior.

⁶³ J. BAUMANN, *supra* note 10, at 420-24; E. METZGER, STRAFRECHT 181-82 (10th ed. H. Blei ed. 1963); Schroeder, *Tatbestands- und Verbotsirrtum*, 1951 MONATSSCHRIFT FUER DEUTSCHES RECHT 387. The theory found temporary support in Soviet theory, V. KIRICHENKO, ZNACHENIE OSHIBKI PO SOVETSKOMU UGOVONOMU PRAVU 26 (1952); B. UTEVSKIJ, *supra* note 46, at 211-34, but was vigorously criticized in V. MAKASHVILI, *supra* note 2, at 181, and it seems no longer to be in favor. It was also supported in Switzerland by E. HAFTER, *supra* note 13, at 119; and in Austria by 1 T. RITTLER, *supra* note 3, at 210.

under negligent mistake of law if the offense in question may be committed negligently under the criminal code. If a theorist favored this view of mistake of law and was opposed to punishing negligence, he would be committed, in principle, to regarding every mistake of law as a complete insulation against liability for intentional and negligent crimes. This alliance of position is appealing to those seeking a consistent rejection of liability based on culpable inadvertence.

Yet this extension of skepticism about the culpability of inadvertence poses problems of its own. How would one deal under this view with the person who repeatedly violated the law out of casualness toward his legal obligations? Or how would one protect society against the morally arrogant offender who characteristically regarded his conduct as legally justified on spurious theories of justification? There is obviously a strongly felt need to justify criminal punishment in these cases. And that cannot be done unless one concedes, at least in some cases, that a man mistaken about his legal obligations might be held accountable under the criminal law.

German theorists have devised a number of rationales to justify punishment in situations in which the violator does not grasp that he is violating community norms. One approach is simply to disregard mistake of law as a defense if it is based on an "unsound conception of right and wrong."⁶⁴ Another is to create a separate crime of legal negligence, which would have the merit of unifying treatment of all cases of culpable inadvertence toward legal obligations.⁶⁵ The position that has finally gained supremacy in the German courts, and which the federal legislature has adopted in its revision of the criminal code, is that negligent mistakes of law should provide no defense to liability, even as to charges of intentional criminality.⁶⁶ With varied doctrinal techniques and with different legal implications in view, German jurists concur on the central point: actors who unknowingly but negligently violate the law are, at least sometimes, appropriately and fairly punished. A more extreme rejection of the culpability of inadvertence would offend basic sensibilities of justice in cases of insensitive and arrogant perceptions of legal duties.

⁶⁴ E. METZGER, *MODERNE WEGE DER STRAFRECHTSDOGMATIK* 43 (1950).

⁶⁵ Schroeder, *Die Irrtumsrechtsprechung des BGH*, 65 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT* 178, 199 (1953).

⁶⁶ The leading case is the judgment of the Federal Supreme Court, Combined Panel for Criminal Matters, Mar. 18, 1952, 2 BGHSt. 194, holding that the crime of intentional extortion is committed by one who is negligently mistaken about the legality of an intimidating act. The revised Criminal Code § 17, effective October 1, 1973, provides that mistake of law is a defense only if it was unavoidable; if the mistake was avoidable, it bears on sentencing, but not on liability. This position is denominated the *Schuldtheorie* (guilt-theory) in the German literature; for a summary of the theory in English, see Ryu & Silving, *supra* note 58, at 448-58.

This line of analysis does not dispose of the doubts that some theorists might have about punishing negligence. But it does force the case against punishing negligence into a defensive posture. In order to maintain that negligently risking harm should be free of criminal sanctions, one has the burden either of (1) distinguishing negligently risking harm from negligently risking violation of the law, or (2) providing a rationale for not punishing negligent mistakes of law, particularly in cases in which the negligence reflects avoidable indifference to the moral sentiment and the legislated rules of the community. Neither of these alternatives is duly pursued in the literature; and thus the case against punishing negligence must await further attention to the problematic implications of rejecting the culpability of inadvertence.

C. Negligence as a Form of Culpability

If inadvertent risk-taking is sometimes culpable, it is not always so. No one is subject to blame merely because his conduct results in harm or violates the law. What, then, are the criteria for deciding when inadvertence is rationally subject to censure? The threshold requirement—one that applies in assessing the culpability of intentional as well as negligent conduct—is that the running of the risk be voluntary. As the intentional actor is not culpable if he could not have avoided his act, the inadvertent actor is not culpable if he could not have informed himself of the risk he created. Thus insanity, automatism, and involuntary intoxication should be defenses to charges of negligent as well as intentional conduct. But the capacity to inform oneself of a risk is not enough to ground culpability for the failure to do so. In cases of omissions as well as negligence, we require as a condition of culpability that the actor be under a "duty" to assert himself, either to avoid impending harm or to inform himself of the risks latent in his conduct. The relationship between duties and culpability is one that requires closer attention.

There are many different ways to express the threshold at which an actor comes under a duty of inquiry. We say sometimes that the context of his conduct "puts him on notice" of the risk, or that the circumstances give him "reason to think" that his conduct is either legally untoward or dangerous to others. All of these verbal formulae focus on the circumstances in which the inadvertent actor generates an impermissible risk. Thus the question becomes one of analyzing the impact of circumstances in bringing to bear warnings that inquiry is imperative.

Yet the phenomenon of immanent factual warnings is not readily amenable to analysis. It is true that variations of the same factual

situation lend themselves to comparative ranking. For example, if the defendant is working in a liquor store rather than in a soda fountain, he has greater reason to think that a drink he is selling is an alcoholic beverage. Or if he is selling books in an adult book store rather than in the corner drug store, he has greater reason to think that a book he is selling is pornographic. One can draw a spectrum of cases, but that does not resolve the question when the warning latent in circumstances becomes sufficiently strong to warrant condemnation of the actor for having failed to respond.

There are, at least, some fairly clear cases at both ends of the spectrum. By examining these we might be able to generate criteria for assessing the bulk of borderline cases. Two United States Supreme Court cases exemplify nonculpable risk-taking. In *Lambert v. California*,⁶⁷ the Court held that the defendant had not received adequate notice of her duty to register as an ex-felon in Los Angeles to be criminally liable for having failed to do so. A similar position is reflected in the Court's holding in *The Nitro-Glycerine Case*,⁶⁸ that the defendant Wells-Fargo was not tortiously liable for the harm to persons and property resulting from its employees' opening a crate of nitro-glycerine with a mallet and chisel. The premise for the decision was that nothing about the outward appearance of the box should have put the defendants on notice that the contents were dangerous. The rhetoric of these opinions is admittedly different. *Lambert* focuses on the constitutional requirement of due notice. *The Nitro-Glycerine Case* assesses whether reasonable men would have acted the same way under the circumstances. Yet the problem in both cases is the same. Did Mrs. Lambert's coming to Los Angeles as an ex-felon put her on notice that she should inquire about possible duties to register? Did the Wells-Fargo Company have reason to think that opening the package with a mallet and chisel would cause it to explode? Our intuitive response in both situations is that the circumstances were insufficient to put the defendant on notice and, therefore, that Mrs. Lambert's mistake about the law and the Wells-Fargo agents' mistake about the contents of the package were both excusable.

It is equally easy to devise cases of culpable failures to make inquiries about the risks possibly incident to one's conduct. Suppose that upon her release from prison, Mrs. Lambert received a pamphlet entitled "Legal Duties of Released Felons" which she discarded without reading. Would her excuse of not knowing of her duty to register still be convincing? Suppose a customer in a gas station throws a match into a pail full of clear liquid. Would it do for him to argue that he did not

⁶⁷ 355 U.S. 225 (1957).

⁶⁸ 82 U.S. (15 Wall.) 524 (1872).

know the liquid was gasoline and that therefore he was not culpable? Although these hypothetical cases are at the opposite pole from *Lambert* and *The Nitro-Glycerine Case*, it is not so easy to derive criteria from these paradigm examples for determining the point on the spectrum at which the circumstances render ignorance of risks subject to censure. Every legal system has its favorite word for describing the threshold of culpability. Common lawyers speak of unreasonable mistakes; Germans, of avoidable mistakes; Russians, simply of negligent mistakes; and Frenchmen, of vincible mistakes. Whatever the description of the issue, it seems equally unamenable to definitive analysis.

Nevertheless, it is possible to formulate the negative conclusion that assessing the culpability of a mistake, whether it be of law or of fact, is not a matter of assessing the costs and benefits of a course of conduct. In a case like *Lambert*, where the inadvertence is not culpable, the best rationale might simply be the conclusionary point that no one in the defendant's situation would think to find out whether he was breaching a duty under the law. Of course, one could rationalize the *Lambert* decision by saying that the burdens of making an inquiry outweighed the benefits of doing so. Yet a calculus of costs and benefits is appropriate only where one is evaluating a choice that is open or a specific risk that is taken. Mrs. Lambert did not choose to risk violation of the law. The problem is precisely that she was totally unaware of the risk that she was in fact running by living in Los Angeles without having registered. It distorts the problem of evaluating the culpability of her inadvertence to treat the issue exactly as though she chose to risk violating the law. Where the issue is the culpability of inadvertence, rather than the culpability of choice, the only standard of evaluation seems to be our expectations of what other members of the community would do under the same circumstances.

It is significant that the conventional common law theory of negligence obscures the difference between evaluating risks and assessing the culpability of inadvertence. The same test—the test of what the reasonable man would do under the circumstances—applies to the solution of both problems. Yet it is important to realize that the same test functions in two different ways. If the issue is the reasonableness of a risk consciously chosen, the standard of the reasonable man under the circumstances expresses the principle of balancing burdens and benefits as the criterion for determining which risks are permitted and which are not. The same principle is expressed in the Soviet definition of negligence as a socially dangerous risk,⁶⁹ and in the German definition of negligence as the failure to take the care required under the circum-

⁶⁹ R.S.F.S.R. UGOL. KOD. (Criminal Code) § 9.

stances.⁷⁰ If, however, the issue is the culpability of inadvertence, the reasonable man standard directs our attention not to the benefits and burdens of insensitivity to risk, but rather to our expectation of what average individuals would do if faced with the same circumstances. The genius of the common law test is that it united both of those inquiries under one question: What would a reasonable man do under the circumstances? Yet the unity of the test is purchased at the cost of distorting the difference between a question about the utility of a risk and a question about one's expectation of inadvertence in a particular situation.

The conclusion seems unavoidable that inadvertence to a risk as well as choosing to take a particular risk might warrant the just censure of others. When the circumstances give the actor reason to think that his conduct risks harm to another, his failure to apprise himself of the risks latent in his conduct is culpable. There is thus reason to believe that culpable inadvertence is a form of *mens rea*, and that negligence may support condemnatory sanctions as convincingly as does intentional conduct.

IV. IS NEGLIGENCE INVARIABLY MEASURED AGAINST AN OBJECTIVE STANDARD?

In the preceding section, we explored one sense in which negligence is conceptually objective or external and argued that this kind of externality—the absence of a subjective mental state—does not denigrate negligence as a basis for criminal liability. Despite this kind of externality or objectivity, there are good reasons to regard negligence as culpable, to regard it therefore as a form of *mens rea*, and to subject negligent conduct to criminal sanctions. A totally different argument, however, asserts that negligence is suspect because it is objective, not subjective. This argument holds that a subjective standard of negligence is conceptually untenable because it would take each individual as the measure of the propriety of his own conduct, thus rendering evaluation impossible by merging the standard of evaluation with the conduct to be evaluated.

⁷⁰ Negligence is defined neither in the Criminal Code of 1871 nor in the revised Code, effective October 1, 1973. But contemporary writers, particularly those who think of negligence as consisting both of dimensions of legality and of culpability, see text accompanying note 76 *infra*, invoke the definition of the civil code, BGB § 276 (C. H. Beck 1969) (*die im Verkehr erforderliche Sorgfalt*), to characterize the legal dimension of negligence. E.g., H. JESCHECK, *supra* note 20, at 382. Writers who disagree with the two-tiered structure of negligence stress the violation of a duty as the core idea of negligence. E.g., J. BAUMANN, *supra* note 10, at 440-42.

This point is nicely captured in Tindal's famous admonition to avoid a standard of negligence that would be "as variable as the length of the foot of each individual."⁷¹ And again by Holmes:

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.⁷²

The argument is undoubtedly sound—as far as it goes. It is true that legal rules, like all other rules, must apply to a range of cases. It follows that if liability for negligence is to be based on legal rules, the standard of liability must transcend individual differences; in this sense, the standard of liability is general, abstract, and objective. With this much we can agree.

It is the next step that provokes disagreement. On the basis of the invariable objectivity of the standard of negligence, common law analysts are inclined to view negligence as significantly different from intentional conduct. Their reasoning would run like this: A man's intentions are gauged by an individualized, subjective standard; it is *his* intention we try to establish, not that of an average man. But this is not the case with negligence where the issue is the behavior of an average member of the community. Therefore, the standard of negligence is less sensitive to individual culpability than the standard of intentional conduct; and accordingly, it should be used sparingly, if at all, as a ground for liability.

Although this line of reasoning may seem plausible, it derives from the false premise that standards of liability must be either subjective or objective, but not both.⁷³ This premise is never subject to critical assessment because common law writers assume that the only relevant question is the ultimate one of liability (and that, presumably, must be either subjective or objective). But there is a distinction, commonplace in German and Soviet thought, between the legality of conduct and the culpability of the individual who engages in the conduct. This is a distinction of considerable explanatory force, particularly in the field of

⁷¹ *Vaughan v. Menlove*, 3 Bing N.C. 468, 475, 132 Eng. Rep. 490, 493 (C.P. 1837).

⁷² HOLMES, *supra* note 18, at 108.

⁷³ The synthesis of objective and subjective standards is a familiar theme in the Soviet literature. *E.g.*, V. MAKASHVILI, *supra* note 2, at 104-05, 117; A. PRONTOVSKIY, *supra* note 26, at 384-85; B. UTEVSKIY, *supra* note 46, at 294-96. In *Commonwealth v. Welankys*, 316 Mass. 383, 398, 55 N.E.2d 902, 910 (1944), the Massachusetts Supreme Judicial Court referred to a standard that was "at once subjective and objective," but the court's usage of those terms is different from that in the above text. The Massachusetts court merely meant to point out that there were some things the defendant had to know, and other things he did not have to know in order to be guilty of "wanton or reckless conduct."

negligence. Because it diverges from the common law style of thought, its application requires some clarification.

It might be difficult for lawyers of the common law tradition to understand the use of the term "legality" as it is used to express the distinction between legality and culpability. Anglo-American writers are wont to equate legality or lawfulness with the operational standard of liability. According to common law usage, conduct is legal if it is immune from liability, and illegal if it triggers liability. If culpability bears on the issue of liability, it would seem also to bear on the issue of legality. To illustrate the fusion of these three concepts—liability, legality, and culpability—in common law thought, consider how the average common law practitioner would respond to the question: If conduct is excused on the ground of duress, insanity, or mistake of law, is it legal or illegal? My supposition is that most men trained in the common law would say: If the defendant has a good defense, his conduct is legal.⁷⁴

In contrast, Soviet and German lawyers work within a framework that distinguishes rigorously between legality (*Rechtswidrigkeit*, *protivopravnost'*) and culpability (*Schuld*, *vina*). At its core, this distinction is an affirmative formulation of the line between justifying conduct and excusing it. According to German and Soviet theory, conduct is legal if justified (or privileged), and illegal if unjustified. It is significant that illegal (unjustified) conduct is subject to criminal sanctions only if, in addition, it is unexcused. The question whether illegal conduct is excused is but a way of asking whether it is subject to censure, that is, whether it is culpable.⁷⁵

The distinction between legality and culpability is readily illustrated in the context of intentional conduct. In this context common law as well as Continental writers distinguish between justificatory privileges, such as self-defense and necessity, and excusing conditions, such as duress and insanity. There is a familiar difference between justifying the killing of moose out of season because it is necessary to

⁷⁴ There are some supportive data. First, the Model Penal Code defined the term "unlawful force" carefully to distinguish between unlawfulness and punishability. MODEL PENAL CODE § 3.11(1) (Proposed Official Draft 1962). Yet this distinction was lost in the adaptations of the Code in Wisconsin and Illinois. ILL. ANN. STAT. ch. 38, § 7-1, Comment No. 3 (Smith-Hurd 1964); WIS. STAT. ANN. § 939.48(6) (1954). The change in the definition appears to be a reversion to ordinary usage. Secondly, Jerome Hall builds an entire theory of mistake on the explicit identification of legality and punishability. HALL, *supra* note 19, at 382-83. Thirdly, the term "unlawfulness" appears in some common law rules, such as Coke's rule that causing death by an unlawful act is murder. E. COKE, *supra* note 33, at 56. It seems obvious that Coke's rule would not encompass a case in which the act causing death was excused and therefore nonculpable. Therefore, he must have been using the term "unlawful" to mean "punishable."

⁷⁵ For a fuller exposition of the German theoretical scheme, see Fletcher, *supra* note 23, at 913-17.

protect crops, and excusing the killing on the ground of the actor's insanity. The defense of necessity is a general claim, available to all farmers who might face a similar risk to their crops. Therefore, it is appropriate to follow the pattern of German thought and regard the defense of justification as a claim about the legality of the conduct under the circumstances. Acquitting the defendant on the ground of insanity, on the other hand, posits no general exception to the norm prohibiting the shooting of moose out of season. The acquittal is based on an assessment of the defendant's individual capacity and culpability. It provides no guidance to others seeking clarification of their duties under the criminal law. Other excuses, like duress and mistake of law, are similarly individualized. They represent a judgment not about the scope of legal rules applicable to the conduct, but about the accused's ability to conform to these rules under special circumstances. Justificatory defenses are objective in the sense that they are general claims about the legality of conduct; excusing conditions are subjective in that they focus on the individual defendant's capacity and culpability under unique circumstances. This analysis reveals that the standard for imposing liability for intentional crime comprises the issues both of legality and culpability; it consists of an objective, rule-oriented dimension (legality) and a subjective, individualized dimension (culpability).

Thinking of negligent conduct as consisting of dimensions both of legality and culpability leads one to regard the standard for negligence as, at once, objective and subjective. The objective issue is whether the risk is justified under the circumstances; the subjective issue is whether the actor's taking an unjustified risk is excusable on the ground of duress, insanity, or some other condition rendering his conduct involuntary and thus blameless. German theorists have recently come to conceptualize negligence as consisting of dimensions both of legality and culpability.⁷⁶ There is also considerable evidence that common law analysts have long flirted with the same basic insight about the nature of negligence. For example, Holmes stresses that negligence is an objective standard; yet he concedes that conditions like blindness, infancy, and insanity should constitute excuses from liability.⁷⁷ It seems contradictory for Holmes to admit the relevance

⁷⁶ *E.g.*, H. JESCHECK, *supra* note 20, at 7-9; H. MUEHLHAUS, *DIE FAHRLAESSIGKEIT IN RECHTSPRECHUNG UND RECHTSLEHRE* 13 (1967); *cf.* K. ENGISCH, *UNTERSUCHUNGEN UEBER VORSATZ UND FAHRLAESSIGKEIT IM STRAFRECHT* 344-60 (1930) (an older study expressing the same theory). The theory received a significant impetus from its adoption by the Federal Supreme Court in a civil dispute. *See* Judgment of the Combined Chamber in Civil Matters, Mar. 4, 1957, BGHZ 24, 21; *accord*, V. MAKASHVILI, *supra* note 2, at 122; 1 T. RITTLER, *supra* note 3, at 217.

⁷⁷ HOLMES, *supra* note 18, at 109.

of individualized excuses in the same passage in which he postulates that the "standards of the law are standards of general application [taking] no account of the infinite varieties of temperament, intellect, and education" ⁷⁸ Perhaps Holmes proceeded in intuitive deference to the distinction between legality and culpability. In emphasizing the generality of standards, he acknowledged the dimension of legality in the structure of negligence. In sensitively assessing the role of excuses in defeating liability,⁷⁹ he displayed appreciation for the individualization of negligence. This interpretation establishes the consistency of Holmes' views by providing an account of how the standard of negligence can, at once, be of general application and yet accommodate excuses based on individual incapacities.

The Model Penal Code also displays an appreciation for the distinction between the dimensions of legality and culpability in the structure of negligence. Its definition of negligence specifies first that the risk in question be "substantial and unjustifiable." Secondly, it provides that the actor's "failure to perceive it [the risk] . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." ⁸⁰ The first prong of the definition focuses on the justification and the legality of the risk; the second, on the culpability of the actor's ignorance of the risk. This definition invites criticism for its obvious circularity: it seeks to define negligence as a "kind of culpability," ⁸¹ yet the key factor in the definition is whether the actor was culpable in failing to perceive a particular risk. This duplicative reliance on the concept of culpability derives from the Code's confused use of the concept to refer sometimes to mental states, as in the definition of "purposely," ⁸²—and sometimes to the blameworthiness of inadvertence, as in the definition of negligence. Thus negligence emerges as a "kind of culpability" that requires a special finding of culpability. The merit of this portion of the Code is obviously not its consistency, but rather its insight in delineating the factors of legality and culpability within the structure of negligence.

Analyzing negligent and intentional acts in terms of objectivity, subjectivity, justification, and excuse demonstrates the underlying structural unity of both forms of criminal responsibility. Moreover, this analysis provides a conceptual framework for resolving a number of troublesome problems. Three persistent problems in the theory of negligence are: (1) the question of good faith in negligence cases;

⁷⁸ *Id.* 108.

⁷⁹ *Id.* 109.

⁸⁰ MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft 1962).

⁸¹ *See id.* § 2.02(2).

⁸² *Id.* § 2.02(2)(a).

(2) the vagueness of "reasonableness," "due care," and other terms describing the standard for permissible risks; and (3) why some differences among individuals are relevant in assessing culpability while others are not.

A. Good Faith and Mistakes of Law

The role of good faith in negligence cases has concerned the courts more than any other single issue in the theory of negligence. The problem is typified in *Commonwealth v. Pierce*⁸³ by the prosecution of a person, publicly practicing as a physician, for negligently causing the death of a patient by applying kerosene-soaked flannels to her skin. Justice Holmes, then of the Supreme Judicial Court of Massachusetts, rejected the claim of good faith by reasoning, as he had several years previously in *The Common Law*, that negligence was an "external" standard and that therefore the defendant should be liable if his act would have been "reckless in a man of [reasonable] prudence."⁸⁴ Thus in one stroke, Holmes disposed of the problem of good faith in *Pierce* and established the principle that men may be criminally liable if their conduct diverges from the conduct of exemplary, ordinary men.

By fashioning negligence as a special form of liability, Holmes' rationale in *Pierce* obscures the generality of the question of good faith in cases of criminal conduct. *Pierce* had presumably concluded that the therapeutic prospects of his treatment outweighed the risk of injury to his patient. Although he was wrong, his error was no different from the errors of other men whose values diverge from prevailing assessments of competing interests. Consider the physician who commits euthanasia in the good faith belief that his conduct is justified by the welfare of his patient. Consider also the man who thinks he is entitled to use force to prevent a motorist from blocking his driveway, or the good samaritan who thinks he is entitled to shoot unleashed dogs to protect the children of his neighborhood from the risk of rabies. In each of these cases, the actor's good faith assessment of competing interests diverges from the values incorporated in the legal system. Killing the patient, using force against the motorist, or shooting dogs is unjustified by the respective competing interests and thus is objectively illegal.⁸⁵ The relevant question in assessing liability in each of

⁸³ 138 Mass. 165 (1884).

⁸⁴ *Id.* at 176.

⁸⁵ The first systematic Anglo-American approach to necessity is MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962), which provides that the "evil sought to be avoided" must be "greater than that sought to be prevented by the law defining the offense charged." A comparable standard is to be found in the new German StGB § 34 (effective Oct. 1, 1973), and in the R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) § 14.

these cases is whether a good faith mistake about the legality of conduct negates the actor's culpability and thus defeats the inference of liability. Similarly, in *Pierce*, the risk was objectively illegal: the prospective cost to the patient outweighed the prospective benefit. But this conclusion should not exhaust the inquiry. The question remains whether a good faith mistake about the legality of the risk he took ought to excuse Pierce from liability.

It may be correct to conclude, as did Holmes, that Pierce had no satisfactory excuse for taking an unjustified risk. It was arguably his duty to comprehend the factual risks of the treatment and to adhere more closely to the conventions of the profession in which he claimed competence. If he was capable under the circumstances of appreciating the illegality and wrongfulness of his conduct, then it is appropriate to blame him for inadvertence to the risk of illegality latent in his conduct. Yet it is one thing to assess whether in a specific case a good faith mistake should excuse illegal risk-taking and conclude that under the circumstances it should not; it is quite another thing categorically to reject the relevance of good faith in assessing liability for negligence. In choosing the latter course, Holmes expressed the general insensitivity of the common law tradition to the impact of mistakes of law on criminal responsibility. Yet the heavy-handedness of the traditional common law approach to mistake of law is no more justified in cases of negligent than in cases of intentional criminality. Fairness and consistency require in both contexts that legal risks be treated on a par with factual risks. Neither form of risk-taking is culpable unless the actor has sufficient notice of the risk to render his subsequent inadvertence subject to rational condemnation.

B. *Vagueness and Legality*

In comparison with intentional conduct, negligence has long seemed to be an excessively vague criterion for liability. This image of negligence results from taking the relatively precise fact of intention to be the analogue of assessing whether a risk is substantial and unjustified. But this may be a misleading comparison. As risks may or may not be justified, intentional conduct may or may not be justified. It is therefore appropriate to compare the question whether a risk is negligent, and thus illegal, to the question whether intentional conduct is unjustified and thus illegal. As a finding of negligence presupposes a finding that a substantial risk is unjustified, a finding that intentional conduct is illegal presupposes a determination that the action is not justified by considerations of consent, self-defense, or necessity.

Comparing negligence not to the fact of intention but to the determination that intentional conduct is unjustified undercuts the suggestion that negligence is a particularly vague legal standard. Determining whether a risk is justified on a cost-benefit analysis is no more imprecise than determining whether intentional conduct is justified on grounds of necessity and self-defense. Indeed, the conventional formula for analyzing necessity is only an application of the Learned Hand formula comparing the costs and the benefits of a risk.⁸⁶ Both negligence and necessity require assessment of competing interests, each weighted to reflect the probability that it will be affected by the conduct in question. It is thus hard to perceive a structural difference between analyzing whether a substantial risk is unjustified and analyzing whether an intentional crime like theft or killing moose is unjustified. If one standard is unacceptably vague, so is the other.

This analysis invites the response that allegedly negligent risks must be subjected to a cost-benefit analysis in every case, while necessity is a highly exceptional defense, which the defendant must at least raise, if not prove; it is wrong, therefore, to compare the regular cost-benefit analysis of alleged negligence with the rare cost-benefit analysis of necessity cases. Yet illegal conduct is a requirement of conviction in every case. Perhaps it does not matter whether the trier of fact makes an express or an implicit finding that none of the recognized grounds for justification applies to the case. There may be more "clear" cases of unjustified intentional conduct than of unjustified risk-taking; but this is at least in part the result of the long-standing hostility of common law courts to the justification of intentional offenses.⁸⁷ The proper resolution of this quandary requires a general theory of the nature and sources of vagueness in legal rules. For the present, we may be content to note that applying the distinction between legality and culpability in the field of negligence casts serious doubts upon the proposition that negligence is an unusually vague standard of liability.

C. Culpability and Differences Among Individuals

Although we have stressed the symmetry of liability for negligent and intentional criminality, we have yet to explain the frequent irrelevance of individual differences of "temperament, intellect, and education" in assessing liability for negligence. This characteristic of negligence inspired much of Holmes' analysis in *The Common Law*. It is

⁸⁶ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

⁸⁷ See MODEL PENAL CODE § 3.02, Comment at 6-7 (Tent. Draft No. 8, 1958). Compare the tendency of Continental courts to develop a case law of justified intentional violations. *E.g.*, J. BAUMANN, *supra* note 10, at 329-43; P. NOLL, *UEBERGESETZLICHE RECHTFERTIGUNGSGRÜNDE* (1955).

another line of defense for those who insist that negligent criminality is significantly different from intentional criminality.

Individual differences are ignored in determining the legality of risks; the point of distinguishing between permissible and impermissible risks is to formulate a rule applicable to all men in the same situation. But many individual differences are also ignored in specifying the excuses bearing on culpability. Insanity is an excuse, but not awkwardness. If it is impossible for an actor to appreciate the illegality of the risk that he is running, he ought to be excused; if it is merely difficult for him to appreciate what others readily understand, his ignorance is not excusable. That differences among men are not always manifested in the criteria of excuses requires explanation.

It is important to note first that the practice of disregarding individual differences also prevails in assessing liability for intentional offenses. Duress is a defense to theft, but greediness is not. An irascible man, one easily provoked into fights, has a more difficult time avoiding liability for battery and homicide than does a man of even temperament. Legal systems inevitably impose greater burdens of compliance on some than on others. Norms of legal conduct cut across a wide range of human inclinations and capacities. Some men have an easier time than others in complying with prohibitions against negligent and intentional conduct; those for whom compliance is relatively easy are, to that degree, more culpable than others transgressing the law. Although this excess of culpability may be relevant in sentencing, it has no bearing on the issue of liability.

The point of excusing conditions is not to gauge degrees of culpability, but to determine when the actor's culpability falls below the threshold required for a fair conviction. Some men may be more culpable than is necessary for conviction; others may barely pass the required threshold. So long as the minimum threshold of culpability requires a finding that the defendant has a fair chance to avoid liability, it is immaterial whether some violators are more culpable than he. The goal of justly distributing sanctions is not one of finding the most culpable offenders, but one of assessing whether each alleged violator is sufficiently culpable to forfeit his freedom from sanctions.

V. SOME QUESTIONS

The purpose of this Article has been to clear away the conceptual snares lurking in the description of negligence as an objective standard of liability. As we have seen, the term "objective" may be on point; but the point is trivial. True, negligence is objective in the sense that it is not a state of mind, but the external conduct of taking an un-

excused, impermissible risk. It is objective also in the sense that it contains a dimension of rules prohibiting the running of substantial and unjustified risks. Yet neither of these conceptual descriptions provides a basis for distinguishing negligent from intentional criminality. The absence of a mental state does not preclude a finding of culpability, and the objective dimension of legality is perfectly compatible with a subjective dimension of culpability. Thus we are left with the impression that negligence is a parallel rationale for criminal culpability, less culpable than intentional and reckless conduct, yet adequate to support the fair imposition of criminal sanctions.⁸⁸

This account of criminal negligence affords a useful perspective on the distinct policy question of objectifying the standard of negligence by disregarding relevant personal characteristics of the actor, such as his age, experience, maturity, and sanity. In the terms we have come to use, the question of objectifying negligence focuses not on the standard for determining the legality of risks, but on the range of excuses to be admitted to negate a finding of culpability. In this respect, the standards of liability for both intentional and negligent crimes lend themselves to objectification. Every time a court disregards an excuse bearing on the accused's opportunity to avoid a legal transgression, it objectifies the standard of responsibility. Though the touchstone of our inquiry is "objectivity" in the field of negligence, the practice of disregarding relevant excuses is more acute in the common law of intentional crimes. Witness the treatment that excuses such as mistake of law, necessity, provocation, and uncontrollable impulse have received in the common law tradition; these are excuses bearing on culpability that have been either disregarded or rendered substantially unavailable.⁸⁹ Though the test of the reasonable man under the circumstances readily accommodates excusing conditions in negligence cases, there is a constant temptation to abstract the standard from personal conditions that might excuse the defendant's taking an unreasonable, illegal risk.

⁸⁸ There is, admittedly, something more that concerns those who claim that negligence is necessarily objective and that this is a significant difference between negligent and intentional conduct. See authorities cited note 19 *supra*. The thought seems to be that the culpability of negligent conduct cannot be assessed unless it is abstracted from the individual case. As H. L. A. Hart has argued, this view is no more plausible than supposing that one cannot assess intentional acts unless they are abstracted from their concrete circumstances. H.L.A. HART, *supra* note 19, at 152. Though the felt need to abstract from individual cases is readily refuted, it is not so easily explained as an intuitive tenet of common law thought. Accounting for the urge to abstract from individual cases has vast ramifications, and requires treatment in a separate article.

⁸⁹ See text accompanying notes 41 & 60 *supra*. The defense of provocation was undermined in the case of *Bedder v. Director of Public Prosecutions*, [1954] 1 W.L.R. 1119 (H.L.), which held the personal defect of impotency was irrelevant in assessing the culpability of a man provoked to kill by a prostitute's taunts. The excuse of necessity received short shrift in the famous case of *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884).

Thus it is of considerable importance to assess the policy arguments so often heard in favor of objectifying the standard of negligence by disregarding personal excuses bearing on the accused's culpability.

The arguments in favor of disregarding excuses are typically arguments of efficiency and social utility. Admittedly, it is efficient to suppress subtle, easily abused defenses such as mistake of law and personal incapacity to conform to the law. Eliminating these excuses no doubt enhances the deterrent impact of criminal sanctions by making it more difficult for those causing harm to avoid liability. Although these arguments highlight the social advantages of punishing non-culpable offenders, they pay little heed to countervailing arguments of fairness. These opposing arguments are of two sorts: one is based on respect for the autonomy of the individual; the other, on the principle of equality under the law. As the first argument goes, it is inconsistent with our respect for human dignity to subject an individual to sanctions if he has not had a fair chance to prevent the occurrence of the proscribed act. To ask whether he had this "fair chance" merely restates the question whether his conduct is excusable and thus non-culpable. To punish a man whose conduct is morally excusable is to deprive him, without warrant, of his autonomy as a free man. The second argument maintains that it is discriminatory to single out one excuse bearing on culpability, be it mistake of law or intoxication, and decree that this class of nonculpable offenders must suffer sanctions while other nonculpable offenders, such as those acting under duress or in self-defense, are acquitted. These are two powerful arguments, couched in familiar criteria of fairness and equality, that should insulate the system of criminal justice from beguiling considerations of efficiency and utility. Yet these arguments have so far proved more persuasive in the Soviet Union and in West Germany than in common law jurisdictions.

The paradox of criminal law reform in the United States is that we are so engaged by the glittering constitutional issues of criminal procedure that we hardly notice the injustices rampant in the substantive criminal law. The common law of crimes is still replete with primitive devices, like presumptions of guilt, shifts in the burden of persuasion, objectified standards of responsibility, and strict liability, all of which simplify the process of convicting both culpable and non-culpable offenders. More advanced Continental systems have rejected all of these fictitious distortions of criminal justice. It is time that lawyers in the United States direct as much attention to substantive standards of liability as to the process of arrest, interrogation, and trial. Guaranteeing the right to counsel during pretrial interrogation may be an important advance, but how much can counsel in the

stationhouse protect a man from the common law's insensitivity to mistakes of law and other excusing conditions? The right to a trial by jury may be sacred, but what is the merit of a jury if the critical question of culpability is kept from it by a rule of strict liability? These are embarrassing questions. They force us to recognize that the quality of our civilization is measured not only by our system of procedure, but also by our sensitivity in assessing when a man has forfeited his right to be free of governmental sanctions.

The theory of negligence urged in this Article would both limit and expand the role of negligence in substantive criminal law. It would limit the punishability of negligence by requiring that courts and juries consider all excuses bearing on the culpability of taking illegal risks. Yet by stressing the status of negligence as a parallel ground for sanctioning, the theory would increase the number of offenses that could be committed negligently. Law reformers should begin to ask themselves why the negligent destruction of property and negligent battery should be exempt from criminal sanctions. These and other negligent harms are punished in the Soviet Union, West Germany, and other Continental jurisdictions.⁹⁰ Is there a good reason for not bringing them within the framework of the criminal law?

It may be just to punish negligence. But does that mean it is a sound commitment of scarce resources to do so? The system of criminal justice is already vastly overcommitted. With such a large share of our police and prosecutorial resources devoted to pursuing victimless crimes, like vice and narcotics offenses, it may be inappropriate to propose yet another distraction from the primary task of apprehending and convicting burglars, rapists, armed robbers, and other serious offenders. Yet there is a difference between the generally favored retreat of the criminal law from victimless offenses and continuing to abstain from punishing negligent battery and the negligent destruction of property. In the former case, the advocates of reform, taking their lead from John Stuart Mill, have doubts about the justice of punishing self-regarding conduct.⁹¹ But those doubts should not extend to punishing men who negligently interfere with the protected interests of others. The case against expanding the punishment of negligence should turn solely on the argument that our scarce police and judicial resources are better used in combating other threats to public security.

⁹⁰ See note 7 *supra*.

⁹¹ *E.g.*, H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967). See generally PACKER, *supra* note 27, at 249-366.

One source of pressure on the criminal system to provide more sanctions against negligent conduct might be the retreat of the tort system from its emphasis on fault as the rationale for liability. The movement toward auto compensation plans, strict products liability, and social insurance may eventually leave the criminal system as the only social medium for articulating rules of safe conduct and sanctioning those who violate the rules. There has already been a vast increase in statutes directed to negligent vehicular homicide. It may be necessary in time to add provisions covering negligent battery, negligent manufacturing, negligent arson, and even negligent medical and legal care. This is an area where we should tread carefully, yet we should move toward law reform, unhaunted by anxieties about the fairness and appropriateness of punishing negligent conduct.