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The Fault of Not Knowing

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Despite the outpouring of interest in tort and criminal theory over the last thirty years, not much progress has been made toward understanding the basic concepts for analyzing liability. Common law theorists of torts and criminal law tend to accept the conventional distinction between objective and subjective standards and the view that objective negligence is not really fault in the way that subjective negligence is. The author's view is that this distinction between objective and subjective standards is misunderstood and that, in fact, so-called objective negligence is a test of fault or culpability in the same way that subjective standards are. This paper seeks to defend inadvertent negligence as a proper basis for blaming someone for causing harm, whether in the context of tort law or criminal law, whether the standard is regarded as objective or subjective. The first part of the paper, the historical part, engages in an extended analysis of Oliver Wendell Holmes' writings on negligence. The second part of the paper, the philosophical part, addresses the general question of how people can be considered at fault and be blamed for not knowing critical attributes of their conduct, which might be either matters-of-fact or matters of moral evaluation.

INTRODUCTION

Despite the outpouring of interest in tort and criminal theory over the last thirty years, we have not made much progress toward understanding the basic concepts for analyzing liability. We operate within the paradigm of the opposition of fault and strict liability and assume that this basic dichotomy lies at the foundation of the system. This dualistic assumption is to be

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found in the literature of both corrective justice and law & economics. All the treatises and casebooks follow this basic format, adding as well the distinction between intentional torts and negligent torts. The latter are two forms of fault, while strict liability, generally defined negatively as the absence of fault, covers everything else.

The difficulties of the tort theoretical system are evident in the use of the phrase "strict liability" as though it states a ground or rationale of liability.[1] Of course it does not. It merely says that there is no fault (whatever that term might mean), and surely the absence of something cannot state an argument for imposing liability. Economists argue that fault consists in acting in violation of the Learned Hand Formula of cost/benefit analysis. Faultful conduct is inefficient in the sense that its costs exceed its benefits. Liability for efficient conduct is called strict (the argument being that liability might be efficient because it would internalize the costs of the conduct). The only problem is that there are an infinite number of cases of efficient conduct, and they typically do not entail liability. The use of the term "strict liability" is obviously a conclusion that tells us nothing at all about the criteria for distinguishing between those cases of efficient conduct that result in liability (e.g., flying airplanes and crashing, with damage to structures and people on the ground) and those cases of efficient behavior that entail no liability (driving cars and crashing, with damage to structures and people next to the highway).

The same basic structure — intention and negligence versus strict liability — extends to criminal law, except that the criminal theorists play on a more restricted board of possibilities. They start from the assumption that strict liability is an improper basis for liability. Perhaps it might be necessary on utilitarian grounds in exceptional cases, but no one seriously argues — not even economists — that it provides a potential rationale for routine cases of criminal punishment. In contrast to tort theorists, American criminal lawyers make a radical assumption about the distinction between recklessness and negligence.[2] This constructed distinction, based on whether the actor is aware of the risk being run, turns out to be a structural feature of today's criminal law. Recklessness is an acceptable form of *mens rea*; inadvertent negligence is a dubious deviation from the principle that *mens rea* consists in choosing to do wrong. The assumption is that those who are aware of the risk they

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1 Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 Harv. L. Rev. 961 (2001).

2 The leading formulation of the distinction is in Model Penal Code §§ 2.02(2)(c), (d) (1962).

run are on the same side of some crucial barrier as those who choose; those who are unaware of the relevant risk are on the other side of the line.[3]

In the way that many criminal theorists picture the world of fault and mental states, there are three relevant categories: (1) real *mens rea*, including intentional, knowing, and reckless behavior; (2) inadvertent negligence; and (3) strict liability, or no fault at all. It is this picture that led Glanville Williams to describe negligence as "a half-way house" between real fault and strict liability.[4] The MPC implicitly takes the same line by restricting the application of inadvertent negligence to cases explicitly authorized by the provision defining the offense. If the statutory provision is silent about the required *mens rea*, then at least recklessness is required.[5] Some people still defend the view, once argued with great vigor by Jerome Hall, that inadvertent negligence is an improper basis for criminal liability.[6]

The sharp divide in American criminal theory, then, is between conscious and inadvertent risk-taking, but this architectonic distinction plays no role in torts, where the great divide runs between fault and no-fault, between negligence and intentional conduct taken together, on the one hand, and strict liability, on the other. These boundaries that carve up these respective disciplines have a whiff of the conventional about them. It would be entirely possible, for example, for the system of criminal law to be more casual about the distinction between conscious and inadvertent risk-taking, between recklessness and negligence. In German criminal law, for example, they are both treated as variations of negligence. Or it might be possible to structure the system of tort law with the same assiduous attention to mental states that the MPC shows in the field of criminal liability. For example, instead of relying on the concept of "gross negligence" to trump certain claims by the defendant, e.g., in guest statute cases, tort law could rely on the MPC's concept of reckless conduct instead.

Despite these differences in approach to the question of culpability in defining liability, common law theorists of torts and criminal law tend to accept the conventional distinction between objective and subjective standards and concur with the view that objective negligence is not really fault in the way that subjective negligence is. My own view, argued on many occasions, is that this distinction between objective and subjective standards

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3 I argue against this way of grading culpability in George P. Fletcher, Basic Concepts of Criminal Law 115-16 (1996).

4 Glanville Williams, Criminal Law: The General Part 262 (1961).

5 Model Penal Code § 2.02(3).

6 Jerome Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963).

is misunderstood and that, in fact, so-called objective negligence is a test of fault or culpability in the same way that subjective standards are.

Within the framework of all these debated points of doctrine, I want to defend inadvertent negligence as a proper basis for blaming someone for causing harm, and this is true whether we are speaking about torts or criminal law, whether the standard is regarded as objective or subjective. I will approach the problem first by engaging in an extended analysis, in the first part of the paper, of Oliver Wendell Holmes' writings on negligence. These merit attention for several reasons. First, Holmes set forth the basic categories of analysis that remain with us today, and further, his texts easily lend themselves to misreading. At least, my sense today is that I have misread him in the past, and this is an opportunity to set the record straight. In the second part of the paper, I will address the general question of how people can be considered at fault and be blamed for not knowing critical attributes of their conduct. These critical features might be either matters-of-fact or matters of moral evaluation. The first part, then, is historical; the second part philosophical.

Before beginning this exploration, I should note that the problem of inadvertent negligence pervades the criminal law. It arises not only in thinking about the basic mental state required for conviction, but surfaces also in considering the problem of mistakes with regard to claims of justification and excuse. Any time a defense of consent or self-defense is denied on grounds that the defendant's belief in the underlying facts was not reasonable, we encounter a problem of inadvertent negligence. The same is true with regard to claims of mistake of law. Whenever the defendant acts in good faith but is subject to blame on the ground of having deviated from the standard of the reasonable person, we collide with the same conundrum of imposing blame for not knowing that which one is supposed to know.

I. HOLMES ON NEGLIGENCE

When carefully read, Holmes' argument in *The Common Law* turns out to be at odds with conventional views on tort theory that prevail today. Let us take the very distinction between fault and strict liability. His first cut at this distinction is that fault is the "personal fault"[7] characteristic of criminal liability and that this personal fault is located "in the state of the

7 Oliver Wendell Holmes, Jr., The Common Law 80 (1881).

party's mind."[8] The alternative to fault is acting "at one's peril." The basis of this strict liability, apparently without fault, is that someone has chosen voluntarily to act and damage ensues. "If the act was voluntary, it is totally immaterial that the detriment which followed from it was neither intended nor due to the negligence of the actor."[9] Thus we find the basic distinction between fault and strict liability that governs the discussion today.

A careful reading reveals, however, that this dichotomy reflects the way "others" interpret the history of tort law, not the way Holmes thinks is correct. If you follow his argument carefully, you realize that Holmes' view is that the principle of acting at one's peril, or strict liability without fault, never really existed at common law. Going back to the yearbooks and *The Thorns' Case* in 1466,[10] Holmes argues that in every case of supposedly acting at one's peril, some element of "fault" or "blameworthiness" is implicit in the judgment of liability. In *The Thorns' Case*, the defendant trimmed his rose bush and the thorns fell onto his neighbor's land. Liability was affirmed on the basis of trespass, and it looks very much like liability based on no more than a voluntary act producing an invasion of another's land. Yet Holmes reasoned that the bush-trimmer could have prevented the thorns from falling. "The defendant ought to have acted otherwise, or in other words, he was to blame."[11]

This is a very revealing sentence. The notions of fault and negligence shift from the sense Holmes attributed to John Austin's analysis of criminal liability — namely, negligence as a state of mind — to a "personal" fault to the fault of not having acted otherwise. The basic ground for "blaming" someone for causing harm, as Holmes writes, is acting voluntarily to cause harm. Since the notion of voluntary conduct is built into the conditions of "acting at one's peril," the standards of fault and of strict liability collapse into one another. The only requirement is that "voluntary action" contain a sufficient element of foreseeable consequences to conclude that the actor ought to have done otherwise. This conclusion should come as no surprise, for the purpose of Holmes' argument was to show that strict liability never really existed at common law. The proper reading of tort history leads to the view, Holmes claims, that the defendant was always "to blame," even in the cases once thought to be examples of acting at one's peril.

The closest Holmes comes to recognizing strict liability in the

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8 *Id.*

9 *Id.* at 82.

10 *The Thorns' Case*, Y.B. 6 Edw. 4, 7, pl. 18 (1466).

11 Holmes, *supra* note 7, at 82.

conventional sense is in his description of damage done by grazing cattle. The owner is liable for intrusion on another's land, fault and foreseeability seemingly playing no part. Holmes concedes that this case from the common law is on the borderline between fault and strict liability.[12]

The discussion so far has generated two distinct senses of fault. One is that fault is personal and identified with a state of mind. The second is that fault is equivalent to breaching a duty to act otherwise and amounts to no more than acting in a way that is properly subject to blame. Each of these generates a conception of strict liability as its opposite. The first opposite is that liability is strict when it does not require a state of mind, a personal fault. The second opposite is strict when it applies regardless of whether there is any basis for blaming the defendant for causing the harm in question.

These different senses of fault and strict liability come into play in trying to understand what Holmes is getting at when he introduces the idea of "objective" negligence. The critical pages are 108 and 109, and these repay a careful examination of the logic and the context of the argument. The argument begins with the claim that the law consists in "standards of general application."[13] It follows, in Holmes' view, that the law cannot take into account "the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men."[14] It seems that in this remark, Holmes is rejecting the idea that negligence is a form of fault based on the "internal character" or "state of mind" of the individual. This is the first of a series of remarks that has generated the dominant picture of "objective" negligence as being a standard of liability that falls short of true fault. True fault is personal. It is linked to a "subjective" state of mind. As the criminal lawyers say, fault points to "a guilty mind," that is, to a form of consciousness that is self-consciously guilty.

Objective negligence is the fault that satisfies the fictitious standard of the reasonable person under the circumstances. According to the conventional view, subjective fault is a moral standard, but objective negligence is not. Holding people to general standards, exacting this "sacrifice" from them, is justified on the supposedly utilitarian standard of promoting the "general welfare."[15]

A whole series of remarks in these two pages support this claim

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12 *Id.* at 116-17.

13 *Id.* at 108.

14 *Id.*

15 *Id.* at 48 ("Public policy sacrifices the individual to the general good."). In my earlier work, I took this and other references to the general welfare to be sufficient to

that objective negligence — disregarding the "infinite variety" of personal characteristics — is something other than a moral conception of fault. Here are some of them:

1. "[The law] does not attempt to see men as God sees them."[16] Presumably the way God sees men exemplifies morality. The law is an institution necessary to serve the welfare of society.

2. "If a man is born hasty or awkward," he cannot claim this "congenital defect"[17] as an excuse. His being prone to accidents will be recognized in the "courts of Heaven,"[18] but not in the courts of this life. Why? Because his slips are just as troublesome to his neighbor "as if they sprang from guilty neglect."[19]

3. The reference to "guilty neglect" in this last passage reinforces the difference between objective and subjective negligence. The latter is based on guilty neglect.

4. An objective standard, one based on laws of general application, expresses the needs of potential victims to "require" the accident prone "to come up to their standard."[20]

5. If the "hasty or awkward" person fails to meet the standards of his neighbors, he should be held liable "at his proper peril."[21] The use of the word "peril" in this context reinforces the association between objective negligence and strict liability.

6. The alternative to requiring the "hasty or awkward" to meet the standards of his neighbors is for the courts "to take the personal equation in account," but this the courts decline to do. The phrases that stand in opposition to objective accumulate. The image of what negligence in tort law is not now includes not only the "personal equation," but reference to the "courts of Heaven" and to acting with "guilty neglect."

7. The conclusion that derives from these premises is the "law considers ... what would be blameworthy in ... the man of ordinary intelligence and prudence, and determines liability by that."[22]

Given all of these mutually supportive comments, one cannot be surprised

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classify Holmes' theory as utilitarian. George P. Fletcher, Rethinking Criminal Law 507 (1978). Today I would be more inclined to regard this language as surplusage.

16 Holmes, *supra* note 7, at 108.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 86-87.

21 *Id.*

22 *Id.* at 87.

that the tradition has read Holmes to have introduced a standard of liability that in fact has more in common with strict liability than with true fault. The orthodox view that prevails in the profession today is that negligence is based on the projected behavior of the reasonable person. This standard is "objective" rather than "subjective."

Holmes did not use the terms "objective" and "subjective," but lawyers are drawn to them to capture the difference that Holmes sought to elaborate. The only difficulty with the opposition of objective and subjective is that these terms obscure two possible approaches to negligence that can be classified as "subjective." The opposite of objective negligence either can be the "state of mind" that Holmes associated with John Austin's view of negligence or it can be the standard that takes into account the "infinite variety" of individual differences among different actors. To distinguish between these strains of thinking in Holmes, I prefer to use the two sets of opposites: external versus internal and general versus individualized. Holmes apparently thought that negligence is external and general and neither internal nor individualized. As I will show later, Holmes believed that negligence can, at one and the same time, consist in standards of general application and be individualized in the assessment of personal responsibility.

Holmes has been systematically misread. And I confess that I have misread him in some of my earlier work.[23] Part of the misunderstanding is of his own doing. He held a restricted and rather primitive view about the contours of morality. In his lexicon, the general welfare is a safer, more sensible standard than ultimate issues of right and wrong, virtue or vice. Phrases like "guilty neglect" and the "courts of Heaven" supposedly refer to a moral standard, while the general welfare serves as a concept that people can understand without waxing ideological about natural law and ultimate truths. As I have argued elsewhere, Holmes' pragmatism is closely related to the moral fatigue that beset the United States in the wake of the Civil War.[24]

There is no doubt that Holmes' language accounts for, or at least provides support for, the massive shift toward the theory of negligence-as-inefficiency that has occurred in the law and economics movement. Vast numbers of scholars today actually think that negligence means no more than violating the rules of efficiency, of acting in a way that the costs of one's conduct exceed its benefits. In the efficiency-minded part of the profession, at least,

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23 *See, e.g.*, Fletcher, *supra* note 14, at 504-15.

24 George P. Fletcher, Our Secret Constitution: How Lincoln Redefined American Democracy 225-29 (2001).

the link to blameworthiness and the criteria of responsibility in a just society have been lost.

Despite the evidence to the contrary, I want to argue that Holmes did not mean to disengage negligence from just criteria of responsibility and this approach to negligence has nothing to do with the prevailing view that objective negligence is more like strict liability and "acting at one's peril" than it is like fault as a state of character or a state of mind of the individual actor.

This then is the thesis: *Negligence, even if it is objective rather than subjective, is a basis for attributing fault in the fullest sense of the word.* I intend to demonstrate this thesis by showing first that this was Holmes' view and then further that this view is correct. In order to make the second part of the argument, I shall have to defend the idea of fault in the absence of consciousness of fault. This is what I call the fault of not knowing.

With regard to the correct interpretation of Holmes, we have to keep in mind that in the first part of the chapter, Holmes seeks to interpret the history of tort law to show that the standard of blameworthiness has always applied, despite the suggestions to the contrary in the idiom used to discuss the writ of trespass. If that is the overall thrust of his reading of history, it would be odd — to say the least — for him to reintroduce the dichotomy between blameworthiness and strict liability and argue that negligence lies someplace between the two.

Three points direct toward a sounder interpretation of the law of negligence, both as Holmes wrote about it and as negligence in fact has evolved over time. First, we should leave aside the reference to promoting the general welfare. There is nothing wrong with a system of tort law or criminal law that has the overall effect of promoting the welfare of society, but this utilitarian appeal does not justify imposing liability in particular cases against those who are unjustly held accountable for the harm they do. Everything in Holmes' work — except his distancing himself from "moral" readings of the law — leads to the view that liability is imposed solely in cases where the defendant is blameworthy for not having done otherwise.

Second, we should understand the references to the "man of ordinary intelligence and prudence" — the forerunner of the reasonable person — as a heuristic device necessary to explain how one could be blameworthy without having acted in bad faith or with a wicked motive. One way to explain the fault of having fallen short of community expectations is to invent a hypothetical person and then to reason, as did Holmes, that negligence is "the failure to exercise the foresight of which [the reasonable person] is capable."

Third, Holmes never said that the standard of the hypothetical person is

a fictitious standard or that all people are simply presumed to be capable of acting the way a reasonable person would act. His recurrent phrase is that "the law presumes or requires a man to possess ordinary capacity to avoid harming his neighbors." If "presumes" were the only verb in this phrase, I would have to concede that Holmes was willing to rely upon a fictitious standard of fault that would simply camouflage strict liability for failing to meet the standards of the reasonable person. But the word "requires" carries an entirely different connotation. To be required to do something is to be subject to a duty, and to fail to meet that duty can be a basis, as Holmes argued, for concluding that the actor ought to have done otherwise and was thus to blame for causing harm to his neighbors. The practice of "requiring" also carries a subtle connotation of "ought implies can." It makes sense to require something of someone only if the addressee is capable of doing the thing required. It is hardly coherent to require of the insane or the feebleminded that they act like reasonable people. One can "presume" or "pretend" that they are reasonable persons, but one cannot, plausibly, require them to be what they are incapable of being.

This explains the recognition of exceptions to the principle that negligence should be judged by standards of general application. Holmes argues that these exceptions illustrate the "moral starting-point of liability in general."[25] He gives three examples: (1) a blind person,[26] (2) infants,[27] and (3) insanity.[28] Blindness both excuses and aggravates. The blind person is not required to act as though he could see, but if he might anticipate the consequences of being unable to see in a dangerous situation, he is bound to take precautions in advance. If he encounters a hazard that he could not expect, e.g., a hole that a seeing person could easily avoid, he is not at fault if he is injured. But if he tries to drive a car, he cannot complain after a collision that a seeing person could easily have avoided. These are obvious points, and they follow readily from the principle of personal responsibility for risk-creating conduct.

The second exception is for infants, which, according to Holmes, cannot be held to the same standard as adults.[29] This clearly validates a principle of individualization in holding risk-creators responsible for causing harm. The third exception for the insane brings home the point. Whether an insane person should be excused depends, Holmes argues, on whether the individual is "capable of taking the precautions and being influenced by the motives,

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25 Holmes, *supra* note 7, at 109.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*

which the circumstances demand." If the "insanity is of a pronounced type, manifestly incapacitating the sufferer from complying with the rule which he has broken,"[30] then of course he should be excused.

This last sentence is particularly well-crafted, for here Holmes recognizes two critical points about denying liability in cases of insanity. First, in the cases in which the "sufferer" fails to comply with or violates the rule of law, the standard is one of general application. Second, the proper word to describe the law's disposition toward those who cannot comply with the legal standard is not "justification," but "excuse."

Had Holmes been clearer about the relevance of both "the man of ordinary intelligence and prudence" and "excuses" in defining negligence, he might have spared the tradition an enormous amount of confusion. With a little more care (perhaps more than "due care"), he might have hit upon the fundamental distinction between defining a permissible risk and holding someone accountable for creating it. Thus he might have ended up with the structure introduced much later in German law and found today as well in MPC section 2.02(2)(d):

> A person acts negligently with respect to a material element of an offense if he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

The insistence on standards of general application is found in the phrase "substantial and unjustifiable risk," and the inquiry about responsibility and excusability is found in the concluding phrase "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." There is nothing in this definition of negligence that would make Holmes uneasy.

If this is true, we should be troubled by only one question: Why does Holmes confuse the issue with language like, "The law considers ... what would be blameworthy in the average man ... If we fall below the level in these gifts it is our misfortune"?[31] Holmes' difficulty lies in two propositions: (1) that falling below the common standard can be a basis for finding fault;

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30 *Id.*

31 *Id.* at 108.

and (2) some people — those of less intelligence and less prudence — may find it harder to comply with the community standard than do others.

It is not surprising that Holmes had difficulty with what is appropriately called the fault of not knowing. It is a rather common difficulty, even today among thinkers with a greater claim to philosophical sophistication. For example, Jules Coleman claims that negligence is not really liability for fault, because "failure to measure up to the standard of reasonable care, whether or not one is capable of doing so, suffices to render one's conduct negligent."[32] He also says that, "[A]scriptions of fault (negligence) are not normally defeasible by excuses."[33] Ernest Weinrib shares this view about the irrelevance of excuses because, for reasons that I have never been able to comprehend, he thinks that excuses are incompatible with the theory of corrective justice.[34] These are views that make one appreciate Holmes' account of the common law.

Explaining why "falling short" of the required standard is a form of fault or negligence — properly subjecting a person to blame — is not so easy. The very difficulty of this philosophical puzzle led Holmes to his reliance on blameworthiness in the average person as a surrogate explanation. There is ample evidence, however, that Holmes regarded this account as a heuristic device for two purposes: to explain to the reader how someone might be blameworthy for not knowing and to explain to the jury how they adjudge someone at fault for failing to meet the community standard. The proof of this claim lies in the general structure of the Third Lecture in *The Common Law*. Within a few pages of his discussion of blameworthiness and excuses, Holmes turns to the procedural problems of administering criteria of negligence before a jury.[35] The jury exemplifies the "neighbors" of the defendant, and it can decide whether someone is at fault by comparing his conduct with the standard that it takes to be the community level of care. Holmes did not define negligence in a way to make it appear divorced from personal blameworthiness, but he did use language in the borderland of substance and procedure that has been falsely understood as a substantive theory of objective and faultless negligence.

As far as the law goes, there is very little evidence that the law of negligence today is much different from the way Holmes described it as a general standard supplemented by criteria of excuses denying responsibility

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32 Jules Coleman, Risks and Wrongs 219 (1992).

33 *Id.*

34 Ernest Weinrib, *Law as a Kantian Idea of Reason*, 87 Colum. L. Rev. 472, 475 n.10 (1987).

35 Holmes, *supra* note 7, at 98-103.

for running the risk. Perhaps the law of insane actors is less accommodating to the excuse than in Holmes' reading of the law,[36] but by and large, it is simply false to argue that the law of negligence applies regardless of individual capacity to conform with the community standard. Much is made of the case of *Vaughan v. Menlove*,[37] in which a defendant was held liable for a fire that resulted from his keeping a flammable hayrick on his land. The court had ruled against the defendant, and in the rule *nisi* for a new trial, the defendant's counsel alleged that his client did not possess "the highest order of intelligence." The defendant was at fault for falling short of the ordinary standard of care, and though he might have been less intelligent than his neighbors, there was no proof that it was impossible for him to meet the required standard. Chief Justice Tindal of the Court of Common Pleas made the oft-quoted remark "[L]iability for negligence should [not] be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual."[38] But this point merely anticipates Holmes' statement that the analysis of risk should consist of "standards of general application."

As do most lawyers today, Holmes tried to resolve the puzzles of negligence by relying on the projected behavior of a reasonable person — called in his idiom "the average man." This language is unfortunate because it introduces an element of fiction in the "objective" standard of negligence. Since the concrete defendant is not "the average man" — no one embodies the average man — this way of speaking suggests that one is no longer judging the actual defendant on trial. Of course, the jury always judges the defendant, even if they employ the heuristic of "what a reasonable person would do under the circumstances." The language of the reasonable person may be useful in practice, but it has misled theorists since Holmes in their efforts to understand what negligence is about.

We rely on the crutch of the reasonable person because we find it hard to understand the fault of not knowing — the fault of someone like the farmer in *Vaughan* who paid no attention to the risks latent in keeping his haystack in combustible condition. In my view, this fault is not fictional. It is as well grounded as any other form of fault or culpability recognized in torts or criminal law. In order to understand the fault of not knowing, we have to turn to the general problem of how and why people can be blamed for not knowing the truth about their potentially harmful conduct.

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36 Foucha v. Louisiana, 504 U.S. 71 (1992).

37 132 Eng. Rep. 490 (C.P. 1837).

38 *Id.* at 493.

II. GUILT IN AN INNOCENT MIND: THE GENERAL PROBLEM

A good transitional case for illustrating the general problem came before Holmes when he was a Massachusetts Supreme Court judge.[39] A doctor named Pierce treated a patient by applying kerosene-soaked rags to her skin. The patient died from the treatment, and though there was no suggestion of ill will on the doctor's part, the state prosecuted him for murder. Holmes wrote the opinion confirming the conviction on the ground that as judged against an "external" standard, the doctor had been reckless (meaning: grossly negligent) in providing this treatment. The case is both similar to and distinguishable from *Vaughan*, where the defendant was a passive possessor of the dangerous haystack. Yet the culpability of both lies in not understanding the dangers latent in their conduct. Arguably, the doctor was more culpable because he presumably received stronger signals that there might be something harmful in using kerosene-soaked rags as a method of medical treatment. Yet the brunt of Holmes' opinion for conviction was that the doctor's good faith could not be a justification for his conduct, just as the defendant in *Vaughan* could not claim good faith as an excuse. This was the relevance of an external standard in judging Pierce's conduct against an external standard.

It is not clear from the facts in *Pierce* whether the defendant had simply been oblivious to the danger of using kerosene-soaked rags or whether he had made the wrong cost/benefit judgment about whether the danger outweighed the potential benefit. In the pure case of not knowing of the danger, the fault lies in having failed to investigate the risks attendant upon his affirmative conduct of treating the patient.

Looking at the doctor's fault as an aspect of a larger activity says something important about how we have to think about negligence in torts and criminal law. If we look just at the doctrines of negligence, the structuring of issues very much resembles liability for omissions. That is, as every first-year law student knows, a finding of negligence requires a finding of duty and breach of duty.[40] The analysis of intentional torts and of intentional (affirmative) crimes does not require a finding of duty. The only field of law that is structured in the same way as the standard analysis of negligence in torts is liability for omissions — both in torts and criminal law.

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39 Commonwealth v. Pierce, 138 Mass. 165 (1884).

40 These factors recently received renewed theoretical interest. *See* John Goldbert & Benjamin Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657 (2001).

No one is liable for an omission unless there is a duty to intervene and prevent the harm from occurring.

The duty requirement reflects liberal anxieties about making people come forward and take initiative. We can easily blame aggressors who interfere with the rights of others (those who do not recognize that their liberty ends where the nose of their neighbor begins). But it is hard to blame people for failing to take initiative — for not recognizing an outstretched hand. The classic way of understanding negligence — not in Holmes but in the case law — was to stress the analogy between taking steps to learn of the risk and taking measures to avoid the occurrence of harm to others. This accounts for the emphasis on duty and breach as the doctrinal cornerstones of negligence and omissions. Duties arise only in special relationships. The guiding premise of the law was that a special relationship should be required to blame someone for not informing himself of the risks implicit in his action or for failing to rescue someone in distress.

As the law of negligence evolved, however, the failure to exercise due care — an omission — came to be seen as part of affirmative risks to others — the risks of driving, of medical care, of handling weapons, of manufacturing goods. In the context of these larger activities, the omission is but an epicycle on the arc of risk generated by the affirmative conduct. The omission becomes a minor part of the actor's assertive conduct. This is the way criminal lawyers think of negligence — as a way of killing or committing assault or destroying property. Thus, Dr. Pierce created a risk of death by the way he administered medical treatment. His gross negligence appeared to be less of a failure to realize a certain risk and more, as the MPC would describe it, of introducing in the world a "substantial and unjustified risk" for which there was no excuse.[41] The fault was not the passivity of an omission, but the affirmative wrong of creating an unreasonable risk.

It is not surprising, then, that criminal lawyers rarely speak of duty and breach when they discuss negligence. The survival of this terminology in torts reflects a throwback to a previous way of looking at risk-creation as a wrong that inheres in the fault of not knowing of a danger lurking in one's conduct.

The doctrine of unforeseeability reflects, I believe, the former way of looking at negligence as a fault of not knowing. Thus when the risk is too bizarre and the outcome so unexpected that no one can be faulted for running it, the appropriate way of talking about fault is to focus on the difficulty

41 Note that MPC section 2.02(2)(d), reproduced above in the text, does not mention duty or breach as elements of negligence.

of knowing the unforeseeable. A good example is the nitroglycerine case decided by the Supreme Court.[42] At about the time TNT was invented, agents for the Wells-Fargo Company received a mysterious crate that was leaking a liquid that they could not identify. They tried to open the case with a hammer and chisel. After the crate exploded and caused injury to bystanders, the company found itself being sued. The Court affirmed a finding of non-liability on the ground that the explosion was unforeseeable.

In all three of these cases — *Vaughan, Pierce*, and *Wells-Fargo* — the defendants acted on a good-faith belief that there was nothing wrong, nothing risky, with their conduct. The case of inadvertent negligence provides a bridge, therefore, to the more general problem of good-faith beliefs in the justification of knowingly harmful conduct. An example that never ceases to engage my imagination is the German case known in the profession as the *Katzenkönig* or *The King-Cat Case*. The facts reveal a situation in which somebody was at fault for not knowing and not understanding the wrong that he had committed. Two women in a sadomasochistic cult manipulated a psychologically weak, gullible man, the defendant, into fearing a demon called King-Cat. For personal reasons, one of the cult leaders wanted to get rid of a woman named N. She induced the defendant into believing that if he did not kill N, "King-Cat" would claim a million victims. The defendant came to the conclusion that the lesser evil was to kill N, and he actually attacked her and stabbed her three times. All three parties were indicted and convicted of attempted murder.[43]

For our purposes, the intriguing question is whether the defendant could have mounted a good claim that his good faith belief should have insulated him from criminal liability. Had the threat been real, he might have had a good argument based on necessity as a justification[44] (although killing an innocent is always problematic under the theory of necessity, even when really necessary to save a million people). Could he have argued that he was not at fault because he did not realize that the threat was false? He was in a situation like that of Lot's daughters who thought that the destruction of Sodom and Gomorrah had brought the world to an end; they had no reasonable choice, as they understood the world, but to get their father drunk and sleep with him in order to continue the human species.[45] Faced with the possible death

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42 Parrot v. Wells-Fargo Co., 82 U.S. 425 (1872).

43 Judgment of July 26, 1994, BGHSt 40, 219.

44 Art. 34 StGB.

45 *Genesis* 19:32-33.

of a million innocent people, the defendant in *The King-Cat Case* had no reasonable choice, as he saw the world, but to sacrifice one innocent person.

Remarkably, the German Supreme Court conceded that the defendant's claim should be taken seriously as a mistake of law. He had been mistaken in good faith about the necessity of his actions. In the end, however, the Court rejected the claim of mistake of law, because the mistake was not unavoidable as required by the Code.[46] The teachings of *The King-Cat Case* were eventually used to aggravate the liability of accessories,[47] but buried in the opinion is the idea that good-faith mistakes by ideological offenders should be taken seriously as a ground of mitigation, if not as a complete excuse.

The great danger of this principle of mitigation is that it could easily apply on behalf of virtually all ideological offenders. Timothy McVeigh, Ted Kaczynski, Yigal Amir — they all tendered good-faith beliefs about why their homicidal conduct was necessary under the circumstances. They all thought they were acting for the greater good. And these are the offenders who live among us as one of us. Threatening us as well are outsiders, terrorists convinced of the rectitude of their actions and yet perceived by us as evil incarnate.

It is hard to know whether we live in an age in which ideological crimes have become more common than in the past, but understanding why we condemn and punish good-faith offenders has become an urgent matter on the agenda of criminal theory.

There are basically two ways to account for the attribution of wrongdoing and guilt to offenders who believe in their hearts that they are doing the right thing. One argument is based on an analogy with inadvertent negligence, the other on abstract principles of right and wrong. I call the first the "sociological" argument and the second the "moral realism" argument.

The sociological argument is based on the observation that a little effort in consulting people in the neighborhood can avert the risks that led to the burning of the haystack in *Vaughan* or the use of kerosene-soaked rags in medical treatment in *Pierce*. The idea that the harm was "foreseeable" means that the actor was put on notice that there might be something risky in his conduct or in the state of the things in his charge. There is warrant for talking to others, for being open to advice about the correct path of conduct. When, as in the nitroglycerine case, it is extremely unlikely that anyone would

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46 Art. 17 StGB.

47 For the impact of the case in analyzing the criminal liability of East German officials for the criminal conduct of border guards who shot at fleeing citizens, see Fletcher, *supra* note 3, at 199-200.

know of the danger, the case falls under the excuse of "unforeseeability." The sociological approach has some bearing on cases like King-Cat, McVeigh, and Kaczynski, where the slightest consultation with others outside one's immediate circle would lead to doubts about the suitability of the conduct in question. In such a situation, the fault of not knowing that the conduct is wrong is the fault of separating oneself from the potential self-correction one receives from being embedded in a community of opinion.

Of course, there are some cases of ideological conduct where everyone in the available environment supports the conduct as right, even honorable. This is the situation of Yigal Amir and Palestinian suicide-bombers. They know others outside their circles think the conduct to be wrong, but these diverse opinions have no bearing on their convictions that they are doing the right thing. In these cases, the sociological argument runs dry. The only basis for condemning these good-faith actors is the "moral realism" argument: That their killing of innocent people is wrong is simply beyond question. It is a moral universal, and as the tradition of moral argument holds, ignorance of a universal truth is no excuse.

The argument of moral realism may well be right, but it has the ring of dogmatism. One person's universal moral truth may well be another's conventional piety. Yet in the extreme case, some recourse to this argument is necessary to preserve our convictions that ideological actors are nonetheless guilty of wrongdoing. The analogy with inadvertent negligence helps, however, in the broad range of cases. Our moral lives are not so different from our learning about the risks latent in our conduct. If we are open to the opinions of others, we increase our capacity for self-correction. And having the opportunity to correct one's belief and failing to exercise that capacity lie at the foundation of the fault of not knowing.