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PUNISHMENT FOR NEGLIGENCE: A REPLY TO PROFESSOR HALL

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In this paper I attempt to show that punishment for negligence is not necessarily excluded by the *mens rea* requirement. That it is excluded is argued by Jerome Hall,[1] perhaps the foremost advocate for retention of *mens rea,* and assumed by Lady Wootton,[2] perhaps the foremost advocate for abolition of *mens rea.* In this paper I shall be concerned primarily with Hall's "ethical reasons" for not punishing negligence.

I. DEFINITION AND ISSUES

A person acts negligently when he fails to perceive a substantial and unjustifiable risk of which he should have been aware.[3] Negligent con-

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1. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960); Hall, *Negligent Behavior Should be Excluded from Penal Liability,* 63 COLUM. L. REV. 632 (1963).

2. *See, e.g.,* B. WOOTTON, CRIME AND THE CRIMINAL LAW 52 (1963), where Wootton equates *mens rea* with "guilty intention".

3. The definition of negligence in this paper is essentially that adopted by the Model Penal Code with the exception of the requirement in the Code that the deviation from the standard of care be "gross":

> (d) Negligently.
>
> A person acts negligently with respect to a material element of an offense when 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.

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

Hall's claim that the Model Penal Code's definition of negligence might be construed to include actual awareness of the risk is unfounded. Hall argues that since the first sentence of the Code's formulation states that a person acts negligently if he "should be aware of a substantial and unjustifiable risk" one might conclude that as a normal person the offender was actually aware of the risk. The second sentence of the formulation, however, removes this objection by specifying that the risk be one which the actor failed to perceive. Hall's other argument in favor of this construction is that the Model Penal Code requires that the deviation from the standard of reasonable care be "gross." This requirement is a qualification of the test applied in ordinary civil negligence, but there would be little basis for arguing that this qualification refers to the state of awareness of the actor. For the purpose of discussion in the *Columbia Law Review* article, Hall assumes that the Code means ordinary civil negligence. Hall, *supra* note 1, at 632-33.

duct is distinguished from reckless conduct in terms of awareness of risk. The negligent offender is not aware of the unjustifiable risk he takes; the reckless offender consciously disregards that risk. Both modes of culpability require an evaluation of the accused's conduct against a prescribed standard of conduct. To define negligence as simply a failure to conform to a standard of care would be misleading, therefore, since that failure might be reckless. On the other hand, negligence is not to be defined solely in terms of some mental attitude such as inadvertence. Rather, as H. L. A. Hart has pointed out,[4] when we say that someone has acted negligently we are not merely describing the actor's psychological state as inadvertent, but making the specific claim that the actor failed to comply with the standard of care that a reasonable person would have observed in the situation.

There is no need to spend time here on the old dispute over whether negligence should be defined as a particular state of mind or as unreasonably dangerous conduct. The motive for defining negligence in terms of a particular mental element seems to be the desire to include negligence in *mens rea* as a matter of definition. Thus the purpose of Salmond's definition that negligence "essentially consists in the mental attitude of undue indifference with respect to one's conduct and its consequences"[5] is seen by his further comment that "[n]egligence, as so defined, is rightly treated as a form of *mens rea,* standing side by side with wrongful intention as a formal ground of responsibility."[6] The result of this type of account is to generate merely verbal disputes as to whether negligence is a form of *mens rea* and to invite superficial objections such as the following by Glanville Williams:

> Although negligence has occasionally been treated as a form of *mens rea,* there seems to be every argument against this view. (1) Negligence is not by definition a state of mind, except in the negative feature of absence of intention . . . . It would be linguistically objectionable to describe something that is not a mental state as *mens.*[7]

In this paper I shall deal with the real question, and not with this merely verbal one, of the justifiability of including negligence as a basis for criminal liability by considering the following objections: (1) punishment for negligence, unlike punishment for intentional or

4. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 148 (1968).
5. J. SALMOND, JURISPRUDENCE 410 (8th ed. 1930).
6. *Id.*
7. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 102-03 (2d ed. 1961).

reckless conduct, violates the *mens rea* requirement since negligent conduct is not voluntary; and (2) negligent conduct is not morally blameworthy.[8]

II. Whether Negligent Conduct is Voluntary

Hall argues that the principle of *mens rea* requires that only voluntary offenses be proscribed. My own view is that the doctrine of *mens rea* as it relates to excusing conditions[9] is indeed important in assuring

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8. Another of Hall's objections is that punishment for negligence is not justified on a deterrence rationale of punishment. Punishment for negligence, the argument goes, cannot have a deterrent effect since the threat of punishment cannot reach the inadvertant offender. The requirement of intention (or foresight) is necessary in order to provide the potential offender with the opportunity of considering the disadvantages of his future conduct.

This is based on too narrow a view of the deterrent effect of punishment. It assumes that the deterrent effect takes place only if the thought of the sanction crosses a person's mind and just as he is about to commit an offense. This would be to discount evidence that punishment for negligent conduct provides "men with an additional motive to take care before acting." Model Penal Code § 2.02, Comment 3 (Tent. Draft No. 4, 1955).

I have not discussed this objection at length since I believe that it has been persuasively criticized by Hart and others. *See, e.g.,* H.L.A. Hart, *supra* note 4, at 134.

> A man drives a car with one arm round his girlfriend's neck and gazes into her eyes instead of at the road, and is subsequently punished for careless driving in spite of his protestations that he "just didn't think" of the possibilities of the harmful outcome to others on the road.
>
> Surely it is not absurd to hope that, as a result, next time he drives he may approach his car, and perhaps also his girl friend, in a very different spirit. Recollection of the punishment and the knowledge that others are punished may make a driver think; and if he thinks (since he has no intention to drive badly) he may say to himself "this time I must attend to my driving", and the effect may well be that he drives with due care and attention. No doubt the connexion between the threat of punishment and subsequent good behaviour is not of the rationalistic kind pictured in the guiding-type of case. The threat of punishment is something which causes him to exert his faculties, rather than something which enters as a reason for conforming to the law when he is deliberating whether to break it or not. It is perhaps more like a goad than a guide. But there seems to me to be nothing disreputable in allowing the law to function in this way, and it is arguable that it functions in this way rather than in the rationalistic way more frequently than is generally allowed.

See also Wechsler, *On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code,* 339 Annals 24 (1962); Wasserstrom, *Strict Liability in the Criminal Law,* 12 Stan. L. Rev. 730 (1960).

9. The doctrine of *mens rea* is important in two different respects. (1) It is important in relation to excusing conditions where the concern is with a rationale of excuses. The *mens rea* requirement as relevant to excusing conditions, I would argue, rules out conviction for non-voluntary conduct. (2) The doctrine of *mens rea* is also important where the voluntariness of conduct is not in question. In what I have termed the doctrine of *mens rea* "in relation to the definition of crime", we are interested both in (a) the reasons for making a particular mental element, such as intention, part of the definition of offense, and (b) the distinctions, and the justification of those dis-

that those whose conduct is not voluntary are not subject to the stigma of conviction. I disagree, however, with Hall's claim that negligence is excluded as a proper mode of criminal liability (and also moral culpability) as a consequence of this view. This consequence follows only if one holds that the limiting of criminal liability to voluntary offenses also results in a limitation to intentional offenses. This is the view of Hall in which criminal liability is limited, by the principle of *mens rea,* to "voluntary (intentional or reckless)"[10] commission of offenses. The aim of the following discussion is to distinguish the meaning of "voluntary" from this traditional view represented by Hall.

The inquiry into whether conduct is voluntary is not a search for any particular mental element prior to that conduct. In saying that the question of "voluntariness" is relevant to the doctrine of *mens rea* I do not mean to make the same type of claim that Hall makes when he uses his concept of "effort" to distinguish "voluntary" movements (and forbearance) from "inadvertent" bodily movements and omissions.[11] Hart's criticism of any such theory which holds that we must first determine whether a "psychological cause" preceded a bodily movement before classifying it as a voluntary action is convincing. One of his persuasive criticisms of such a theory is that whatever element is said to be required, whether it be "setting ourselves," "effort" or "desire for muscular contractions," it turns out that such an element is not present in the normal case, though it may be present in certain voluntary actions. For example, the "desire for muscular contractions" may be present in certain rare cases, for example, flexing one's muscles in a gymnasium class, but hardly in the normal action of walking to the door.[12] Nor is the presence of "knowledge" or "consciousness" sufficient to guarantee that conduct is voluntary. This is true not only in some cases of "insanity" where the afflicted person may "know" what he is doing, but also in cases of physical compulsion.

My claim is that "intentional" does not imply "voluntary" nor

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tinctions between the different modes of culpability (e.g. intentional, reckless, negligent). In this paper I have dealt only with the doctrine of *mens rea* as it relates to excusing conditions. For the distinction between the doctrine as it relates to excusing conditions and in the definition of an offense, see generally J. Brady, The Doctrine of *Mens Rea:* A Study in Legal and Moral Responsibility, May 1970 (unpublished Ph.D. dissertation in University of Michigan Library (microfilm)).

10. J. HALL, *supra* note 1, at 146.

11. Hall requires the "internal effort of intention" for *mens rea.* Crimin·l "conduct" for Hall includes the further element of "manifested effort" which "externalizes" *mens rea. Id.* at 179.

12. H.L.A. HART, *supra* note 4, at 102.

does "voluntary" imply "intentional." The thesis that conduct can be intentional without also being voluntary is perhaps easier to defend. The example that first comes to mind is the case of someone doing something under a serious threat made by another person. The presence of duress makes the action not fully voluntary, but it is still intentional.[13] A second example of intentional conduct which is not voluntary is presented by some cases of mental abnormality in which a person may fully intend to do certain actions, and may even employ a great deal of cunning to accomplish his plans—and yet he may lack substantial capacity to conform his conduct to the requirement of law due to that mental abnormality.[14] There are, indeed, certain cases of

13. Anscombe in discussing the distinction between the voluntary and the intentional writes, "(4) Every intentional action is also voluntary, though again, as at (2), intentional actions can also be described as involuntary from another point of view, as when one regrets 'having' to do them. But 'reluctant' would be the more commonly used word." G. ANSCOMBE, INTENTION 90 (2d ed. 1963). Immediately prior to this, Anscombe discusses point (2) referred to above:

> Something is voluntary though not intentional if it is the antecedently known concomitant result of one's intentional action, so that one could have prevented it if one would have given up the action; but it is not intentional: one rejects the question "Why?" in its connexion. From another point of view, however, such things can be called involuntary, if one regrets them very much, but feels "compelled" to persist in the intentional actions in spite of that.

Id. at 89.

It is not clear whether either point 2 or 4 are meant to cover the case of duress. If they are, rather odd conclusions follow. Consider the following example of duress: A gunman threatens a cashier with death if he does not open a safe. Now if we take the description of the action, under one point of view, as "opening the safe" would it be more natural to say that he does that "reluctantly" rather than "involuntarily"? The statement that he opened the safe "voluntarily, but reluctantly" seems far too weak a statement in this situation. Perhaps the appropriate response is to say that his action of opening the safe was "not voluntary", if the term "involuntary" is commonly understood as referring to cases of physical compulsion, reflex actions, etc.

If we consider the action in the gunman situation from only the first point of view implied by Anscombe, then it looks as if the "duress" negates "intention", so that if duress is present it would be incorrect to describe "the action" as "opening the safe", but rather as "saving my life." "Duress" would then be a "defense" to the description of the action as "intentional" rather than a showing that the action was not voluntary.

14. *See, e.g.,* the following criticism of *M'Naghten:*

> It is well established that there are offenders who know what they are doing and know that it is wrong . . . , but are nevertheless so gravely affected by mental disease that they ought not to be held responsible for their actions.

Royal Commission Report on Capital Punishment in H. MORRIS, FREEDOM AND RESPONSIBILITY 414 (1961). Concerning melancholia the report states:

> The sufferer from this disease experiences a change of mood which alters the whole of his existence. He may believe, for instance, that a future of such degradation and misery awaits both him and his family and that death for all is a less dreadful alternative. Even the thought that the acts he con-

mental disease in which the person's consciousness is so clouded and disturbed as to prevent him from forming any intention. But it seems dogmatic to say that this is true in *all* cases of severe mental disease. To make the reply that "normal" intention is not present in any case of mental disease in which the person is deprived of substantial capacity to control his conduct, as perhaps Hall might maintain, is simply to beg the question. An "insane" person may "act intentionally" or "with an intention," therefore, and yet his action may not be voluntary.[15] The refusal to admit that intentional action may not be voluntary in cases of insanity may be explained as the survival of the ancient belief that "knowledge" is sufficient for control "so that if the agent knows the consequences of his action we are bound to say 'he could have helped it.' "[16]

Similarly, the notion that conduct cannot be voluntary unless it is also intentional (or at least "reckless" where both concepts are understood as including foresight) can be regarded as a result of the belief that "knowledge" is necessary for control. Punishment for negligent conduct, however, is not necessarily punishment for conduct which is not voluntary. Hart points to the obvious fact that we do not have to say in *all* cases where a person is not attending to his action or omits to think about the situation before he acts, that the conduct is not voluntary. Sometimes we do want to say this, but this is because of information we have about the personal history of the agent involved;

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templates are murder and suicide pales into insignificance in contrast with what he otherwise expects. The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman.

Id. at 417.

15. The assumption that *mens rea* is to be identified with a particular mental element creates difficulties not only in the area of negligence but also underlies many of the problems surrounding the insanity defense. If *mens rea* is defined as "criminal intent," insanity appears to be relevant to negating a particular mental element as part of the definition of an offense. This approach may explain the emphasis on cognitive capacity in many tests for insanity. Lack of cognitive capacity is required, not for the purpose of showing that conduct is not voluntary, but since it is *conclusive* evidence negating the particular element of intention. Thus, the proper focus on voluntariness is obscured. *See, e.g.*, the instruction in Arnold's case:

> [G]uilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and *consequently of his intention*, he cannot be guilty; and if that be the case, though he had actually killed . . . he is exempted from punishment: punishment is intended for example, and to deter other persons from wicked designs; but the punishment of a madman, *a person that hath no design*, can have no example.

[Trial of Edward Arnold, 16 Howell St. Tr. 696, 764 (C.P. 1724) (emphasis added).]

16. H.L.A. HART, *supra* note 4, at 150.

we know that he is so mentally incompetent that he doesn't have the capacity to distinguish dangerous situations from harmless ones. There is no need to conclude that this is true in all cases. We would want to distinguish cases such as the mentally incompetent or the child from

> the case of a signalman whose duty it is to signal a train, if the evidence clearly shows that he has the normal capacities of memory and observation and intelligence. He may say after the disaster, "Yes, I went off to play a game of cards. I just didn't stop to think about the 10:15 when I was asked to play." Why, in such a case, should we say "He could not help it—because his mind was a blank as to the consequences"? The kind of evidence we have to go upon in distinguishing those omissions to attend to, or examine, or think about the situation, and to assess its risks before acting, which we treat as culpable, from those omissions (*e.g.* on the part of infants or mentally deficient persons) for which we do not hold the agent responsible, is not different from the evidence we have to use whenever we say of anybody who has failed to do something "He could not have done it" or "He could have done it". The evidence in such cases relates to the general capacities of the agent; it is drawn, not only from the facts of the instant case, but from many sources, such as his previous behaviour, the known effect upon him of instruction or punishment, etc.[17]

To say that a person could not have done otherwise, that his conduct was not voluntary, is thus not the same as saying that his conduct was unintentional. In some cases of accident or mistake, which establish the action as unintentional, instead of saying "he could not have helped doing what he did" we want to say "he could have helped it if he had exercised the care that a reasonable person would have taken in that situation." The mere fact that the negligent offender is not aware of the risk of harm does not make punishment for negligence necessarily an imposition of objective liability. The further question is whether the accused had the capacity to take reasonable precautions. As Hart has pointed out we need to ask two questions in regard to negligent conduct:

> (i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken? (ii) Could the accused, given his mental and physical capacities have taken those precautions?[18]

If an affirmative answer to the second question is required before

17. *Id.* at 150-51.
18. *Id.* at 154.

the imposition of liability, then punishment for negligence is not open to the charge of being an application of objective liability since the actual capacities of the accused to exercise due care, not merely the hypothetical characteristics of the reasonable man, has to be determined.[19] If only the first question is in issue then punishment for negligence would be an example of objective liability, but such objective liability is not peculiar to negligence. As Hart argues,

> If our conditions of liability are invariant and not flexible, *i.e.* if they are not adjusted to the capacities of the accused, then some individuals will be held liable for negligence though they could not have helped their failure to comply with the standard. In *such* cases, indeed, criminal responsibility will be made independent of any "subjective element", since the accused could not have conformed to the required standard. But this result has nothing to do with negligence being taken as a basis for criminal liability; precisely the same result will be reached if, in considering whether a person acted intentionally, we were to attribute to him foresight of consequences which a reasonable man would have foreseen but which he did not. "Absolute liability" results, not from the admission of the principle that one who has been grossly negligent is criminally responsible, for the consequent harm even if "he had no idea in his mind of harm to anyone", but from the refusal in the application of this principle to consider the capacities of an individual who has fallen below the standard of care.[20]

As Hart noted later there are some difficulties in this formulation

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19. The Model Penal Code section on negligence does not explicitly allow for an inquiry into the actual capacities of the accused and so appears to contain only an objective standard. The provision on negligence originally submitted to the American Law Institute did not incorporate a reasonable man standard as such, but only required that the jury find "substantial culpability." The comments to this section indicate that the draftsmen did not think the distinction between the preferred and the alternative section very important since

> [t]he tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned. Whether that finding is verbalized as "substantial culpability," as the draft proposes or as "substantial deviation from the standard of care that would be exercised by a reasonable man under the circumstances," as the alternative would put it, presents the same problem here as in the case of recklessness. The jury might find fault and find it was substantial; that is all either formulation says or, we believe, that can be said in legislative terms.

MODEL PENAL CODE § 2.02, Comment (Tent. Draft No. 4, 1955). One might interpret this, "under the circumstances" phrase, as leaving the decision to the jury in each case of whether negligence is based only on an objective standard or whether the actual capacities of the accused are to be considered. Even under this liberal interpretation the Model Penal Code section on negligence would fail to assure that punishment for negligence would not be an application of objective liability.

20. H.L.A. HART, *supra* note 4, at 154-55.

of the two-stage test.[21] The phrase, "with normal capacities," in the first part of that test seems to exclude those with physical incapacities from liability for negligence. For example, a blind man doesn't have "normal capacities," and therefore cannot be expected to take the same precautions as the ordinary person, yet he could and is expected to take other precautions to avoid causing harm. Hart, therefore, would now modify the first part of the test by dropping the phrase "with normal capacities" and treating the phrase "in the circumstances" as including physical incapacities. For example, the jury would be asked in the case of a blind man to determine what the reasonable man "in the circumstance" of being blind would have done.

As Hart himself noted in the earlier article, this is a queer use of "circumstance." However, the real difficulty, as he acknowledges, is not with physical incapacities but with mental and psychological ones. The question is whether the standard to be applied in the first stage is to be the "reasonable man with normal mental capacities" or whether the actual mental disabilities of the accused are to be incorporated in the standard through the "in the circumstances" clause. If the reasonable man standard is unmodified by a reference to mental disabilities in the first part of the test, then the application of the second stage of the test concerning the actual capacities of the accused will exclude from liability all those suffering from mental disability differing from the hypothetical reasonable man. If we do incorporate the mental disabilities of the accused in the first part of the test to determine the standard, the jury would be asked whether the accused, who in fact suffers from some mental disability, exercised the care that, for example, "a reasonable man in the circumstance of being mentally deficient" would have exercised. As Hart points out, in cases of severe mental disorder this results in the paradoxical question of what a "reasonable man in the circumstance of psychosis, imbecility, etc. (*i.e.*, one who is unreasonable) would have done." Even where the mental disability is not this severe, Hart believes that it is unrealistic to ask the jury to speculate as to what the "reasonable man in the circumstance of mental disability" would have done since the jury cannot imaginatively put themselves in the position of such a person and render a meaningful answer.[22]

Hart gives two possible answers to this problem. The first is to exempt from liability for negligence all those who, because of mental

21. *Id.* at 261-62.
22. *Id.*

disability, cannot come up to the reasonable man standard. Alternatively, to exempt only those who suffer from a specified type of mental abnormality. If our concern is with applying a subjective test in negligence the first procedure is preferable since in an individual case the person might not be suffering from a type of mental disorder specified in the statute, and yet still might not have the capacity to conform to the standard.

I have argued, therefore, that Hall's claim that punishment for negligence is objectionable since it would be punishment for "inadvertent behavior" rather than voluntary conduct rests on two mistakes. First, it is a mistake to view any particular mental element, such as Hall's "effort", as necessary for voluntary conduct. Second, punishment for negligence is not objectionable as being punishment for non-voluntary conduct if an inquiry into the person's actual capacities is required before conviction. Not all cases of inadvertence or not attending to what one is doing are examples of conduct which is not voluntary.

III. Whether Negligence is Blameworthy

Hall's belief that negligent offenders are not morally blameworthy is intimately connected to his view that such conduct is not voluntary. Hall has other reasons, moreover, for not considering negligent conduct blameworthy. Hall's claim that *mens rea* should be limited to the "intentional doing of a morally wrong act" needs to be examined carefully since at first glance one might take this to mean that awareness that the act is morally wrong is necessary. In fact, however, Hall argues that "consciousness of wrong-doing is not essential in *mens rea*"[23] and denies that good motivation or ignorance of the law should excuse. But if the accused need not intend to commit a moral offense why is intention to do the act (which the accused also may not know is legally proscribed) required for "moral culpability"? Why isn't negligence sufficient for moral culpability?

An answer to why Hall insists that intentional (or reckless) commission of morally wrong acts is required for penal liability rests on a particular conception of the justification of punishment. Hall's claim that moral culpability is necessary before the imposition of punishment, unlike a similar insistence on moral culpability in a retributive theory, does not seem to rest on the rationale of punishment that the

23. J. Hall, *supra* note 1, at 164.

return of suffering for moral evil is itself a moral good, or on any theory of restoration of the "moral order" of the universe.[24] In discussing why negligence does not involve moral culpability Hall indicates, though he does not present it as such, the following justification of the institution of punishment. Hall considers the question of whether it is consistent, having excluded negligent offenders from penal liability, to include offenders who acted in conformity with their consciences:

> This problem concerns offenders who, though they acted, were not, in the light of their own consciences, intentional *harm-doers*. They did, however, consciously commit what are regarded by the community as major harms. One must be wary here of the metaphor, "sick conscience", for the fact is that we are not discussing sick people such as psychotic or feeble-minded persons; and we are discussing the simple values of penal law concerning major crimes. It is in this context that the (conscious) conduct of minorities, uneducated persons and fanatics must be sharply contrasted with mere inadvertence. Voluntarily doing what is proscribed as a serious harm in a rational penal code *challenges* the community's sound values. The offender, whether he be unlettered or a genius, has consciously done what the community in its freely evolved penal law has emphatically condemned as a felony or serious misdemeanor—and he now seeks exculpation. On what ground? On the alleged ground that what he did was right or, at the minimum, that although, *e.g.* he assaulted a member of a despised race or burned his house, he did not know it was wrong to do that. Both pleas must be rejected by reference to the objective meaning of the principle of *mens rea* and the necessary conditions of a legal order, epitomized in the principle of legality. In some measure, however mitigated, it must be made clear that sane adults who consciously commit such harms act immorally and in violation of the law. If this represents a loss of value in some extreme cases, that is the inevitable consequence of the preservation of greater values in an imperfect world.
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> In some imagined state of anarchy, the theorist, allocating to himself the powers of Omniscience, may wish to probe the issues further, and in a glow of magnanimity (at others' expense!) exclude such harmful conduct from the scope of the ideal code. The above discussion rests upon the premises of an actual society, a functioning legal order, and the responsibility to take appropriate action to preserve the values of the community expressed in a rational penal law.[25]

Hall claims that consciously doing what the penal law proscribes is a violation of the "objective ethics" of the community and is some-

24. *See id.* at 296-309.
25. *Id.* at 140.

how a greater *challenge* to community values than inadvertently causing harm. Even if we grant this, why are we justified in imposing penal liability on those whose "conscious" conduct constituted an offense? Hall's answer seems to be that the community ethic is in danger of being overthrown in every such case and that it is justifiable to impose liability to protect community values from this challenge even if (as in the case of the offender with "good motivation") some individual values are sacrificed. This rationale of punishment seems to have been stated more clearly by Rousseau:

> Further, every malefactor, by attacking the social right, becomes by his crimes a rebel and a traitor to his country; by violating its laws, he ceases to be a member of it and, in fact, makes war upon it. The existence of the State then becomes incompatible with his; one of the two must therefore perish; and when the criminal is executed he suffers less as a citizen than as an enemy.[26]

The claim that society is justified in imposing penal liability on the offender who intentionally (but through ignorance of the law or good motivation) committed a morally wrong act as a matter of the community's "self-protection" of its ethic rests on several dubious assumptions. Implicit in Hall's argument,[27] and explicit in the statement by Rousseau, is the notion that every criminal offense is not only a challenge to the particular value which might be represented by that offense but also a challenge to the entire "community ethic." This would be to view all cases of criminal activity as comparable to treason, as expressing hostility towards the entire social order. Now, this may be plausible in a rare number of cases, for example, arson and looting in riots, but hardly in every case of criminal conduct.

But perhaps Hall does not have to view every crime as "treason" in order to support his rationale of the community's self-protection of its ethic. He may be arguing that a criminal offense is a direct challenge only to the particular value represented by a specific offense, but that each such challenge threatens the existence of the other values represented by the criminal law.[28] A "challenge" to a particular law,

26. J. ROUSSEAU, *Social Contract*, bk. II, ch. V, in THE SOCIAL CONTRACT AND DISCOURSES 32 (G.D.H. Cole transl. 1950).

27. *See, e.g.*, "Voluntarily doing what is proscribed as a serious harm in a rational penal code *challenges* the community's sound values." J. HALL, *supra* note 1, at 140.

28. This would be to view the morality represented by the criminal law as, in Hart's term, "a single seamless web," deviation from any part of which supposedly leading to deviation from the whole. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY 51 (1966).

however, would not necessarily put all the values represented by the criminal law in jeopardy. For example, even if we regard a case of consensual homosexuality as expressing the accused's hostility to the sexual mores of the community, it would not follow that the values represented by laws prohibiting assault or proscribing property damage would be put in question.

While I believe that at least implicit in Hall's position is the view that each criminal offense poses a challenge to the entire "community ethic," let us suppose that Hall is making the claim that a criminal offense is a challenge only to the particular value represented by the law proscribing that conduct. Even in this modified version there are substantial difficulties. Why is the community justified in holding the individual who commits an offense either from "good motivation" or from ignorance of the law "morally" culpable? First of all, there is a hint of another Rousseauian doctrine, the identification of the "general will" with the individual's "real will," in Hall's statement that one may not validly contrast the community ethic with the individual's "because the individual participates in the determination and development of the community's ethics, hence, in that sense these are, also, his ethics."[29] Second, there is a startling incongruity in Hall's aside that in an "ideal" code perhaps ignorance of the law should excuse but that in an "actual" system one must take action "to preserve the values of the community expressed in a *rational* penal law."[30]

The most fundamental criticism of Hall's rationale, as reformulated to mean that a criminal offense is a challenge to the particular value represented by the law prohibiting such conduct, is that at best it only fits the case of a person who deliberately flouts the law. In a situation where the person knows that his conduct will be against the law, believes that the law correctly represents conventional morality, and acts with the purpose of defying the law and its authority, we can plausibly argue that to allow him to escape penal liability would be to ignore a real challenge to the particular value. The difficulty in Hall's position is that this rationale is supposed to explain why persons who violate the law with "good motivations" or in ignorance of the law ought not to be excused. In these situations, where there is no deliberate flouting of the law's authority at the time of the offense, it is hard to see how such conduct can be interpreted as a challenge. Whatever plausi-

29. J. HALL, *supra* note 1, at 385.
30. *Id.* at 245 (emphasis added).

bility Hall's rationale has is these situations would seem to depend on the argument that it is not the conduct at the time of the offense that is relevant, but conduct at time of trial. At the time of trial these defendants know that their past conduct violated the penal law (and the community ethic in Hall's argument). Their "challenge" to that "ethic" is in making the plea at trial that what they did was right. Their moral fault seemingly is in not being repentant and acquiescing to the imposition of penal liability once it has been pointed out to them that their conduct was "objectively wrong" as judged by the community.[31] The difficulty in accepting this interpretation of "moral culpability" or moral fault in Hall's system is that it would seem to apply equally to negligent offenders. The point of Hall's argument was to explain why it is justifiable to exclude inadvertent harm-doers from moral culpability and yet include those who violated the law either from ignorance of the law or in conformity with their consciences. Yet this type of "moral fault"—refusing to accept blame after it has been pointed out that one's past conduct was morally blameworthy in light of the standards of the community—can be found in negligent offenders as well.

While Hall considers the claim that the ethical insensitivity of inadvertent harm-doers might be a ground for considering negligent conduct morally blameworthy, he finally rejects this claim by arguing the following: (1) In most cases of negligence in modern society the cause of the harm is not ethical insensitivity, but such "ethically irrelevant" factors as a dull mind, awkwardness, etc.; (2) Even if "ethical insensitivity" were the cause of negligent harm-doing, the adult offender cannot be blamed for having these attitudes since they are part of the "fixed structure of his personality" traceable back to his childhood; and (3) There is no evidence that "sporadic" punishment for negligent conduct can change the personality of these "ethically insensitive" offenders.[32]

What is remarkable about these objections to punishment for negligence is that they seem to apply equally to the intentional or reckless offender whom Hall believes ought to be punished. Take, for example, a person with a "dull mind" and a quick temper who intentionally assaults someone. It seems equally plausible to argue that limited intelligence and other personality traits are the underlying

31. *See* material cited *supra* note 24 where Hall's emphasis does seem to be on the plea of exculpation at time of trial.

32. J. HALL, *supra* note 1, at 138-39.

causes of much intentional crime. And, there is no reason to think that limited intelligence and a quick temper are any less part of a "fixed" structure of personality formed in childhood than the attitudes Hall attributes to the ethically insensitive negligent offender. The realization that a person's negligent conduct is a reflection of what the person is, and that his character has been formed in part by factors "traceable back to his childhood," cannot be confined to inadvertent conduct. When we hold a person morally blameworthy for an intentional offense it is no excuse to plead that "I could not help doing it since I am not a different person." Determinism has no special force in the area of negligence.[33]

CONCLUSION

I have argued, therefore, that Hall has raised no special difficulties in regard to holding negligent offenders blameworthy.[34] The plea of the negligent offender that "I just didn't think" does not substantiate the claim that he could not have done otherwise. The failure to exercise normal capacities to avoid harm makes the conduct blameworthy. We blame the person for being carelessly indifferent to the interests of others. In this paper I have not dealt with the general question of

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33. *See* H.L.A. HART, *supra* note 4, at 156.

34. Hall also criticizes the Model Penal Code's provision of comparatively slight penalties for negligent conduct. If there is evidence that punishment for negligence does deter, asks Hall, why not impose very severe penalties? Again, the justification of punishment for negligence on a rationale of deterrence encounters no special difficulties. The same difficulty may be claimed in respect to the punishment of intentional offenses involving slight harms. Why not punish the offense involving a slight harm more severely, if deterrence really works? J. HALL *supra* note 1, at 137; *Hall supra* note 1, at 641. The answer to Hall's criticism of the Model Penal Code's distinction between the seriousness of crimes committed purposely, knowingly, recklessly and negligently is that these distinctions are not made on a pure deterrence rationale but based on distinctions of culpability. As such a limit is put on the goals of deterrence that we may pursue.

Another of Hall's questions concerning the Model Penal Code section on negligence is why the draftsmen, believing as they did that punishment for negligence does have a deterrent effect and is justifiable, restricted liability for negligence to a few specified crimes. One answer to this is that the timidity of the draftsmen may be explained on historical grounds, and that the proper thing to do is to increase the number of crimes that may be committed negligently. This would not be a complete answer, however, for we are met with the same problem that we encounter in punishment for attempts; the degree of punishment being determined by the amount of harm actually caused. Why should the person who is negligent but whose negligent conduct does not result in harm be punished less severely, (or not at all) than a person who may have been negligent in the same degree, but unfortunate in that his negligent conduct resulted in harm? Though this a real problem, it is not confined to punishment for negligence. *See* H.L.A. HART, *supra* note 4, at 131.

the rationale for the doctrine of *mens rea.* I have been concerned only with showing that the *mens rea* requirement, understood as a culpability requirement, does not necessarily exclude negligence from the reach of the criminal law. To that extent the *mens rea* requirement need not conflict with the preventative function of the criminal law to the degree which advocates of its abolition, such as Wootton, assume.