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Jerome Hall

*Indiana University School of Law*

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# NEGLIGENT BEHAVIOR SHOULD BE EXCLUDED FROM PENAL LIABILITY†

JEROME HALL\*

The adoption of the Model Penal Code<sup>1</sup> by the American Law Institute raises the question, long a subject of discussion among legal commentators, of the justification of punishing persons who negligently damage social values. In this writer's judgment, it would be a great step forward to exclude negligent behavior from the scope of penal liability. The Model Penal Code holds otherwise.

## I. THE MODEL PENAL CODE'S APPROACH TO NEGLIGENCE

The Code differentiates the requirements of what is there called "culpability" necessary to convict a person, by reference to whether he "acts" purposely, knowingly, recklessly, or negligently.<sup>2</sup> It provides:

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

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† The subject of this paper is more fully discussed in a book by the author, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960), but certain additional matters are here treated in the light of comparative discussions in the author's seminar conducted at the University of Freiburg in 1961. The substance of this paper was presented at the meeting of the Association Internationale de Droit Pénal in Lisbon on September 22, 1961.

\* Distinguished Service Professor of Law, Indiana University.

1. The Model Penal Code is hereinafter cited as MPC. Unless otherwise indicated, all citations are to the 1962 Official Draft.

2. See MPC § 2.02(2).

The meaning of "negligence" is confused in the Model Penal Code by the failure to employ well-known legal terms and by the ambiguous use of other terms by reference to which "negligence" must be defined. For example, "intentionally" is not used but "purposely" is employed to define the first and, presumably, the most serious type of "culpability." It is stated: "A broader distinction is perceived between acting either purposely or knowingly and acting recklessly." MPC § 2.02, comment 3 at 125 (Tent. Draft No. 4, 1955). But a reckless person acts "purposely" with regard to "an action of that nature," e.g., he purposely accelerates the speed of his automobile. It is also stated that "intentionally . . . means purposely." MPC § 1.13(12). But again, the difference between intentional harm-doing and reckless harm-doing is not stated. These doubts involving "negligence" are increased by "the circumstances known to him" and by the statement that "a prior voluntary act, such as the act of driving, or a prior omission, such as failing to stop as he felt illness approaching, may, under given circumstances, be regarded as sufficiently *negligent* for liability to be imposed." MPC § 2.01, comment 2 at 120 (Tent. Draft No. 4, 1955). (Emphasis added.)

Troublesome questions regarding other relevant terms cannot be discussed here. But attention must be called to the unfortunate use of "act" to include both voluntary and involuntary movements, MPC § 1.13(2), the consequent failure to distinguish conduct from behavior, MPC § 1.13(5), and the pejorative listing of negligence as a type of criminal culpability. MPC § 2.02(2)(d). On the above questions see HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960).

deviation from the standard of care that a reasonable person would observe in the actor's situation.<sup>3</sup>

Unlike current statutory formulations,<sup>4</sup> the first sentence of the above provision does not state that the "act" is inadvertent; hence, it is possible to argue that if the "actor" "should be aware" and so on, he was, as a normal person, in fact, aware. The second sentence may be thought to cure the omission but this is complicated by the requirement of "gross deviation from the standard of care that a reasonable person would observe in the actor's situation." "Gross deviation" is also employed in the Code's provision on recklessness, and "gross" in conjunction with "negligence" has been very frequently interpreted in judicial decisions to mean "recklessness." The question regarding the defendant's state of mind is further complicated by the fact that ordinary negligence, the subject of tort liability, does not require a gross deviation.<sup>5</sup> One is left uncertain whether ordinary civil negligence is intended or whether a new species of "negligence" is proposed. For the purpose of this discussion, however, it will be assumed that the Code penalizes ordinary negligence, as that is understood in the law of torts.

Negligent behavior is not culpable, under the Code, unless the definition of the crime so indicates.<sup>6</sup> It is criminal if the defendant's negligence results in homicide<sup>7</sup> or bodily injury with a deadly weapon,<sup>8</sup> and it is a noncriminal "violation" if it results in damage to property by fire, explosives, or other dangerous means.<sup>9</sup> The reasons for restricting the penal liability of negligent persons to the instances noted above are not, to the writer's knowledge, discussed by the draftsmen of the Code.<sup>10</sup>

3. MPC § 2.02(2)(d).

4. Negligence is defined in § 3(1) of the New York Penal Law as "a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns . . ." Other state statutes adhere to this formulation. See, e.g., ARIZ. REV. STAT. ANN. § 1-215 (Supp. 1962); CAL. PEN. CODE § 7; IDAHO CODE ANN. § 18-101 (1947); MINN. STAT. ANN. § 610.02(1) (1945); NEV. REV. STAT. § 193.010(14) (1961); N.D. CENT. CODE ANN. § 12-01-04(2) (1959).

5. "Negligent conduct may be either: (a) an act which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." RESTATEMENT, TORTS § 284 (1934).

6. See MPC § 2.02(3).

7. MPC § 210.4.

8. MPC § 211.1(1)(b).

9. MPC § 220.3(1), (2).

10. In addition to those offenses mentioned, a criminal prosecution may be maintained for strict liability offenses—considered noncriminal violations in the Code—in which negligence will suffice to establish "culpability." See MPC § 2.05(2)(b).

The Code further provides that a defendant charged with a crime as to which negligence suffices to establish "culpability" may be deprived of an otherwise valid defense when his alleged justifiable conduct was occasioned by his lack of due care. For example, a defendant who would ordinarily be excused upon proof that he sought to avoid more serious harm loses the defense when the forced choice of evils results from his negligence in creating the situation or appraising the necessity of his conduct. MPC § 3.02(2). Similarly, the defense of duress cannot be successfully claimed by the actor whose dilemma was caused by his prior negligence. MPC § 2.09(2). Finally, the

## II. THE IMPORTANT DISTINCTION BETWEEN NEGLIGENT BEHAVIOR AND VOLUNTARY HARM-DOING

It should from the outset be borne in mind that negligent behavior implies inadvertence and must therefore be sharply distinguished from voluntary harm-doing, *i.e.* from conduct that includes at least an awareness of possible harm. If, for example, one who is about to drive an automobile knows that he is ill or very tired or if he drinks alcoholic beverage knowing this will incapacitate him, subsequent damage may justifiably be attributed to the immediately prior conduct. Taking all the directly relevant facts into account, it is tenable, though far from self-evident, to hold that he was reckless, not merely negligent. This would seem to fall within the Model Penal Code's definition of recklessness as conscious disregard for "a substantial and unjustifiable risk."<sup>11</sup> So, too, a railroad guard, who knows he has not read recently issued regulations concerning his work, acts recklessly when he controls the traffic despite his known ignorance.<sup>12</sup> With respect to negligent damage, however, neither at the time of the damage nor shortly prior to it, *i.e.*, the time immediately related to the dangerous behavior in issue, does the defendant have knowledge, belief, or suspicion that he is endangering anything socially valued. The vast difference between voluntary harm-doing and negligent damage was expressed in Mr. Justice Holmes's graphic terms that even a dog understands the difference between being kicked and being stumbled over.

## III. THE HISTORICAL TREND TOWARD EXCLUDING NEGLIGENCE FROM PENAL LIABILITY

The reasons in support of the position urged here, that negligence should be excluded from the scope of penal liability, are ethical, scientific, and historical. The historical ground rests upon the progressive restriction of the range of negligence in penal law in many, perhaps all, modern legal systems during the past millenium. This trend has gone very far in Anglo-American law; for example, today it is well established in the common law of most of these jurisdictions that conviction for manslaughter, including homicide by automobile, requires at least recklessness. Indeed, a well known English scholar has stated: "it should now be recognized that at common law there is no *criminal* liability for harm thus caused by inadvertence."<sup>13</sup> The extent

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actor cannot claim the defense of justifiable force when his belief in its necessity was negligently held or when he used otherwise allowable retaliation in a negligent manner toward third persons. MPC § 3.09(2), (3). For criticism of these positions see HALL, *op. cit. supra* note 2.

11. MPC § 2.02(2)(c).

12. Cf. MPC § 2.01, comment 2 at 120 (Tent. Draft No. 4, 1955), quoted in note 2 *supra*.

13. TURNER, KENNY'S OUTLINES OF CRIMINAL LAW 34 (1962).

to which this has been carried in England is illustrated by a decision reversing the conviction of a doctor whose negligent treatment caused the death of ten children.<sup>14</sup>

It must be granted, however, that negligence persists in statutes and in various corners of the Anglo-American criminal case law. Unfortunately, although the vast majority of states in the United States require that the actor's "negligence" be "criminal,"<sup>15</sup> "culpable,"<sup>16</sup> or "gross,"<sup>17</sup> the uncertainty of these terms and the confusion of the "external" standard of the "reasonable man" employed in the method of proof with the standard of liability required by *mens rea* have given rise to decisions of very dubious validity.<sup>18</sup> At the same time, it must also be recognized that in the civil law code systems, negligence is not criminally punishable absent a specific provision to that effect, and such provisions are very few.

History is often a dubious ground upon which to support a thesis. But when there has been a long and sustained movement in many legal systems, such as the progressive narrowing of negligence in penal law, and this long course of history represents the efforts of many thoughtful lawyers, the significance of such historical evidence should not be ignored. Instead, it should place the burden upon the proponents of penalization of negligent behavior to prove that their opinion is sounder than the preponderant view of the judges expressed in the common law on this subject, especially in this century.

#### IV. THE ETHICAL REASONS FOR EXCLUDING NEGLIGENCE

The main issues in the current polemics are ethical ones. People differ regarding many ethical questions; therefore, all the more significant is the enduring agreement in the long history of ethics that *voluntary* harm-doing is the essence of fault.<sup>19</sup> Accordingly, the proposal to exclude negligence

14. *Akerele v. The King*, [1943] A.C. 255 (P.C. 1942) (W. Afr.).

15. *E.g.*, ARIZ. REV. STAT. ANN. § 13-131 (1956); IDAHO CODE ANN. § 18-114 (1947); NEV. REV. STAT. § 193.190 (1961).

16. *E.g.*, MINN. STAT. ANN. § 619.18(3) (Supp. 1961); N.Y. PEN. LAW § 1052(3); N.D. CENT. CODE ANN. § 12-27-19 (1959).

17. *E.g.*, CAL. PEN. CODE § 192.

18. *Cf.* HALL, *op. cit. supra* note 2, at 227-28, 232-33.

19. In his essay, *Negligence, Mens Rea, and Criminal Responsibility*, Professor H. L. A. Hart criticizes Dr. J. W. C. Turner for holding that "unless a man 'has in his mind the idea of harm to someone,'" it is "bad law" and "morally objectionable . . . to punish him." OXFORD ESSAYS IN JURISPRUDENCE 29, 42 (Guest ed. 1961). In fact, Dr. Turner also requires that there be voluntary conduct. Again, Professor Hart equates forgetting and inadvertence with decision, *id.* at 44, and he does not consider the relevant action, the manifested effort, which is basic in law. An assumption of determinism is applied indiscriminately in disregard of everyday experience that there is a crucial difference between thoughts that come and go and (voluntary) conduct. Obviously, it is possible to say that everything is determined, but, on that premise, there is no point in any discussion since that, too, is determined.

Professor Hart concentrates on capacity, especially on the capacity to take due care, and he criticizes various writers on the dubious assumption that they do not recognize its importance. Here, again, induced perhaps by interpretations of *mens rea* in solely cognitive terms, is the failure to recognize that not only capacity but also (voluntary)

from penal liability is far from being a radical innovation.<sup>20</sup> That choice, and therefore (voluntary) action, are the *sine qua non* of fault was expounded by Plato, Aristotle, Kant, Hegel, and many succeeding philosophers. Most of the current polemics directly or covertly recognize that principle.

The requirement of (voluntary) action becomes even more persuasive in penal law. For, certainly among moralists, *punishing* a human being is a very serious matter. No one should be punished unless he has clearly acted immorally, *i.e.*, voluntarily harmed someone, and unless a criminal sanction is both suitable and effective. The implication is that if there is any doubt regarding any of the relevant criteria—voluntariness and the suitability and effectiveness of punishment—the issue should be resolved by narrowing penal liability. In terms of current polemics, the question is this: even assuming that in a wide sense of “fault” a negligent harm-doer is culpable, should not serious doubts regarding the *degree* of his culpability be resolved, contrary to the Model Penal Code’s provision, by narrowing punishable guilt to voluntary harm-doing?

Aristotle held consistently to his view of volition as the ground of culpability when he disapproved an act done in ignorance or in a state of intoxication if that condition was the result of past voluntary misconduct.<sup>21</sup> But Aristotle nowhere suggested that this phase of his theory of fault should be applied to legal liability. When that question is faced, at least two serious problems are met, the first of which challenges Aristotle’s assumption; namely, are the misdeeds of childhood and youth the “substantial cause” of the subsequent negligence that is immediately in issue? And second, even if such a causal connection is assumed, how can a suitable penalty be fixed on that basis? In other terms, granted the large element of tradition and chance in current scales of punishment for voluntary crimes, does not the attribution of negligence to preceding voluntary wrongdoing raise additional, practically insoluble, difficulties due to the impossibility of appraising the subjective element in that view of negligent damage?

Moreover, since Aristotle’s time, the findings of psychology, both individual and social, have contributed much to our knowledge of human personality. The growth and formation of personality from infancy onward, in the family and other primary groups, is not now considered to be a matter of individual control. Even if one is skeptical of psychiatric theories of the enduring, pervasive effect of the conditions of infancy, one may doubt

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action is important in criminal law. Since such action includes or presupposes normal capacity, concentration on capacity is irrelevant to the insistence on action as the condition of just, legal punishment.

20. Among the German and Swiss writers who have advocated this are von Buri, Galliner, Kohlrusch, Radbruch, and Germann.

21. See ARISTOTLE, *ETHICA NICHOMACHEA* bk. III, 5, 1113b-1114a; bk. V, 8, 113ba, 5-10 (Ross transl. 1925); ARISTOTLE, *MAGNA MORALIA* bk. I, 33, 1195a, 28-32 (Ross transl. 1915). See also HALL, *op. cit. supra* note 2, at 113-39, 368-72.

whether the failure to acquire normal skill is a moral fault with which criminal law may be properly concerned. There is, of course, an element of conditioning in much voluntary harm-doing. But a crucial difference remains in the extremely important degree of individual freedom, autonomy, and awareness which are expressed in (voluntary) action by a normal adult. Even if it is believed that sensitivity to moral duties is definitely related, as a by-product, to good deeds, the process of such character development is too intricate to be influenced by the simple controls prescribed in penal law; and the evaluation of the fault ("guilt") thus attributed to negligently caused damage lies beyond the legislative competence, at least as represented in the current codes. Indeed, it may be doubted whether it is within any human competence to appraise this sort of assumed immorality—the accumulation of countless faults from childhood to the instant damage—in quantitative terms of specific penalties.

Whereas Aristotle was quite consistent in resting moral disapproval upon (voluntary) action, some modern writers, although they seem to recognize the validity of this position, do not actually adhere to it. Two principal ethical arguments are offered in support of the punishment of inadvertent harm-doing. The first states that negligent harm-doers exhibit such an indifference to social values, such a calloused character, that they deserve punishment.<sup>22</sup> But this expands the meaning of "fault" to include ignorance and insensitivity. Although these characteristics are to be deplored, they do not amount to voluntary harm-doing. Such an insensitive person is by definition *not aware* of his dangerous behavior. Calloused character cannot be identified or equated with voluntary misconduct. Moreover, negligently caused damage, unlike voluntary harm-doing, does not challenge the community's values as expressed in the penal law.

For these reasons, it is not tenable to argue that in certain dangerous situations one who knowingly increases the risk should be held no more culpable than one who inadvertently does so. Such general assertions overlook the fact that the standard of due care must be determined by reference to the various actual situations, and that it is the *unjustifiable* increase in the risk, determined in relation to the relevant situation and standard, that is pertinent. Accordingly, one must always ask whether the actor knew he was creating an unwarranted, unreasonable risk. If he knew he was unjustifiably increasing the risk, the fact that he thought he would not actually harm anyone does not exculpate him, although he is less culpable than one who was indifferent to possible harm.

The other prevailing ethical argument in support of the punishment of negligent damage runs as follows:

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22. See HALL, *op. cit. supra* note 2, at 135-36.

1. There is a moral duty to take care not to harm social values.
2. One who violates this duty deserves punishment.
3. A negligent harm-doer has violated this duty.
4. Therefore, he merits punishment.

With deference to the distinguished proponents of this view, it is respectfully submitted that it will not survive critical analysis. First, one may grant the above major premise (1 *supra*) especially if one notes the ambiguity of the term "moral" and bears in mind the distinction, emphasized by Hartmann, between moral and situational values.<sup>23</sup> But much more important is that acceptance of the above major premise does not require agreement with conclusions 2, 3, and 4. Premise 2 would include violators of contracts and of insignificant duties; and it does not help to qualify premise 2 by "illegality" since this merely supplies a formal criterion. The fact that a code or statute imposes punishment rather than another kind of sanction is no substantive support of the above thesis.

Second, instead of indulging in assumptions, one should face the questions: what does it mean to "violate" a moral duty, and what *degree* of violation is required to justify the punishment of human beings? The term "violate" is ambiguous in the precise regard that forms the moot issue. "Violate," in a moral context, cannot mean merely that a disvalue has been caused in the sense of physical causation. Granted that there is a duty to take care not to injure social values, it should not be assumed that any behavior that damages social values is a violation of that duty. As to negligence, different answers are given in the tort law and criminal law of different systems. This raises the problem to be solved. In sum, the proponents of the above thesis should articulate the reasons for holding that a violation of a moral duty, not merely a situational disvalue, has occurred when damage is caused negligently. Careful attention should be given to the precise nature of the alleged fault in negligent damage. And, it should be asked, why is punishment rather than civil liability or some other nonpunitive sanction deserved in such cases?

It is often assumed that the negligent person violated a moral duty because he "could have" acted carefully and thus conformed to his duty. The Model Penal Code holds a person culpable when he "should be aware" of a substantial risk,<sup>24</sup> but the problems noted above are not discussed. In either formulation, there is a gap in the argument that if a person has the capacity, for example, to drive an automobile carefully and he drives it negligently, he is morally culpable. The basis of culpability cannot in this view be any voluntary action or forbearance. What, then, is the link between normal competence

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23. See HARTMANN, *ETHICS* (Coit transl. 1932).

24. See note 3 *supra* and accompanying text.

and inadvertent damage which supports a judgment of moral culpability? Next, one may normally have sufficient capacity, but on the occasion in issue one may have been tired, worried, excited, and so on. Serious accidents are rare in most persons' experience and the element of chance determining inadvertent damage is large. What, then, is the justification for imposing a punitive legal sanction? Again, suppose a person is unable to use due care, *e.g.*, in driving an automobile, although, as is apt to be the case, he thinks he has the required capacity. What is the basis for criminal liability for negligent damage by such a person?

Sometimes it is implied or suggested that just prior to the damage, the actor diverted his attention from the risk of his behavior. But the fact is that what he did at that time was either voluntary, *i.e.* intentional or reckless, or it was not voluntary. If (voluntary) conduct is meant, then negligent inadvertence, as the ground of liability, has been abandoned unless there is also an implied reliance upon Aristotle's thesis that an act done in ignorance may be the result of long past voluntary misconduct. This, as has been suggested, must be rejected when applied to penal law because it cannot be shown that negligence is a condition voluntarily produced and, even if the contrary be assumed, no rational basis supports determining a penalty for present negligent damage attributed to voluntary wrongs committed in the distant past, perhaps in the course of a whole lifetime.

So, too, the assertion that negligent damage and reckless harm-doing are alike because both involve dangerous behavior and because both violate the law and morality *assumes* the moot issue—should not the two be sharply distinguished? It obscures the fact that they are utterly different in the crucial criterion of volition and, in effect, abandons the traditional ground that fault rests on *voluntary* harm-doing. In sum, the fact that inadvertence is not advertence is inescapable. The two, like life and death, are mutually exclusive.

In recent writing on this subject, psychological notions about "unconscious willing" are sometimes advanced as the basis of penal liability. As to such interpretations, it need only be stated: first, that this psychological theory is far from being well established in critical circles; and second, even if it is assumed that this theory is valid, it has only the remotest relevance to the (conscious) action that is the *sine qua non* of just punishment. To open the Pandora's box of modern psychiatry, which delves principally into the unconscious aspects of human nature, is to obscure the central issue and to abandon completely the essential criterion of the morality of penal law. This applies also to the fine-spun theory that in any action, as for example, driving an automobile, stimuli are sent to the driver and he attends to them even if he ignores them. For the plain fact is that in the situation under consideration, either the driver did not receive the normal stimuli or he inadvertently failed to guide his conduct in conformity with them. The

relevant concern is not with one who drives an automobile while attending to the possible danger, but, instead, is with the driver who is inadvertent, *i.e.*, insensitive to the danger of his behavior.

A person either has that sensitivity or he lacks it. If he had normal sensitivity, presumably he would have expressed it in taking due care, especially because a collision also endangers his own life. If he lacks that sensitivity, he may be careless. To declare that a person had the competence to be sensitive to ordinary dangers is a tautology, since competence is or includes that sensitivity. In other terms, is one to be blamed because one is not normally sensitive to ordinary danger or to a duty to attend to such danger? This statement of the issue, in terms relevant to penal liability, also reveals the superficiality of determining this difficult factual problem in a courtroom. For, as regards the determination of sensitivity to social values and the possibility of danger, a quick glance at the education, vocation, and mentality of the negligent person leads only to guesswork.<sup>25</sup> The result is strict penal liability, not punishment based on fault.

Perhaps the most persuasive argument in support of the view that negligent damage involves a moral fault is based on the familiar fact that many, perhaps most, persons suffer from self-reproach after a damage has occurred in which they played some necessary part. That we refer to such experience as "pangs of conscience" or "remorse" should not obscure the fact that the much more important function of conscience is prescience, *i.e.* foreknowledge, guidance toward good ends and away from bad ones. When there is only post-knowledge, there may be regret at causing a disvalue, in a physical sense of "causation," but that is not the kind of reproach or remorse that follows the realization of having voluntarily harmed someone.

Everyone has sometime experienced self-reproach after a *faux pas*, a thoughtless remark that hurt someone's feelings, a deed carelessly omitted that should have been done, and so on. In some instances, such self-reproach for inadvertent damage is a result of past conditioning and, also, the recognition of social values. That one may concede a duty to compensate or even believe he deserves to be punished is often an emotional attitude reflecting this conditioning or tardy awareness of values, but it does not always or necessarily signify moral culpability. There are values to be created and disvalues to be avoided, and one is more or less aware of an almost normal falling short of his full potentialities in this regard. But morality, in the sense recognized almost throughout modern penal law, is restricted to action,

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25. The Code drafters state that the criterion of negligence is deprived "of all its objectivity" if consideration is given to the actor's heredity, intelligence, or temperament. MPC § 2.02, comment 3 at 126 (Tent. Draft No. 4, 1955). But they do not consider the justice of punishment imposed on a strictly external (objective) standard, and it is at least arguable that valid decisions can be based on knowledge of individual (subjective) characteristics.

*i.e.*, to manifested effort. The fact that only certain disvalues are specified in criminal codes penalizing negligence does not alter the quality of such behavior. Instead, it raises questions of consistency and the survival of emotional reactions, for example, against homicide and "assault" with a deadly weapon, but not against other major harms.

Finally, the reason we reproach ourselves for damage caused when we were not alert to possible danger is often an earlier, voluntary misdeed, *e.g.*, drinking intoxicating liquor with the knowledge that this would affect our subsequent behavior, driving an automobile when we knew we were ill or very tired, and so on; our self-reproach does not focus upon our inadvertence but goes beyond that to the real cause in the relevant, immediately prior, voluntary misconduct.

In sum, although many persons are frequently blamed, this does not warrant a leap from that commonplace fact to the conclusion that punishment for negligence is justified. "Blame" is a very wide notion and, like praise, it permeates almost all of daily life. Important differences exist between raising an eyebrow and putting a man in jail, between blame for not developing one's potentialities and blame for voluntarily harming a human being, between blame that can be rejected or that leaves the censured person free to do as he pleases and the blame signified in the inexorable imposition of a major legal privation, and, finally, between the blame expressed in a judgment for damages and the blame implied in punishing a criminal.<sup>26</sup>

Some scholars who support the penalization of those who negligently cause damage do so on the utilitarian ground of deterrence. But this position encounters many difficulties, apart from the fact that deterrence culminates in cruelty when it is most effective, or in inconsistency if it is tacitly subordinated to ethical concern. In any case, it must be asked of the Model Penal Code draftsmen and other scholars who take their stand on deterrence: why the slight penalty for negligent damage, found typically in modern codes and in the Model Penal Code, since, presumably, the greater the penalty the higher would be the deterrence? And next, why restrict penalization for negligence to a few specified crimes; why not extend it generally?

The theory of deterrence rests on the premise of rational utility, *i.e.* that prospective offenders will weigh the evil of the sanction against the gain of the imagined crime. This, however, is not relevant to negligent harm-doers since they have not in the least thought of their duty, their dangerous behavior, or any sanction.<sup>27</sup> Insofar as potential offenders do think of these matters, they are at least reckless when they act dangerously.

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26. Cf. Hart, *supra* note 19, at 44.

27. The draftsmen of the Code state: "Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct."

It follows that a theory of deterrence must rest on the assumption that punishment exercises an indirect influence or conditioning. It would still need to be shown, however, why such conditioning is not effected by the punishment of reckless harm-doers, *i.e.*, why it is also necessary to punish for negligent damage. In any event, no evidence whatever supports the assumption that, in some mysterious way, insensitive negligent persons are improved or deterred by their punishment or that of other negligent persons. Studies of children made by educators point to an opposite conclusion. Moreover, the discipline of children, if assumed to be effective, provides no apt analogy because punishing an adult implies moral culpability on his part. Besides, the disciplining of a child is a constant everyday matter. Is it, therefore, sound to assume that mildly punishing a negligent adult two or three times in the course of many years will have any favorable result? Punishment in such cases may provide emotional satisfaction but there is no evidence to show, or reason to think, that it is sufficiently related to the causes of inadvertence and insensitivity to support the theory of deterrence.

#### V. SCIENTIFIC GROUNDS FOR EXCLUDING NEGLIGENCE FROM PENAL LIABILITY

Last, but certainly not least important, are the scientific grounds for excluding negligence from penal liability. First are the inconsistencies resulting from the restriction of negligence to the currently specified crimes. A person may negligently misrepresent facts, he may negligently take other persons' property, or he may negligently enter a dwelling-house; and, indeed, a vast array of damage indicated in most proscribed harms, if not all of them, can be caused negligently. At the same time, the inconsistencies indicated above cloud the social meaning of the current law of voluntary harm-doing.

Second, current discussions run into further inconsistencies in avowing a teleological theory while, at the same time, insisting upon the inclusion of negligence within the orbit of penal liability. But the distinctive essence of negligence, it seems impossible to overemphasize, is inadvertence, precisely nonpurposiveness.

Third, the notion of fault becomes a vague congeries of diverse elements since inadvertent damage is assumed to be of the same genus as voluntary harm-doing. This results in formalism and injustice.

Fourth, the inclusion of negligence in penal law imposes an impossible function on the judges, namely, to determine whether a person, about whom very little is known, had the competence (sensitivity) to appreciate certain

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MPC § 2.02, comment 3 at 126-27 (Tent. Draft No. 4, 1955). But "motive," in its usual sense, is a reason or ground, *i.e.*, a consciously held basis for (voluntary) action. It is precisely this which is lacking in inadvertent behavior, although, presumably, all normal adults have the above knowledge. If the question of fact cannot be determined, the issue should be resolved by restricting criminal liability.

duties and dangers in a particular situation—when the facts plainly indicate that he did not exhibit that competence.<sup>28</sup>

Finally, and most serious of all from the viewpoint of maximizing knowledge of criminal law, the inclusion of negligence bars the discovery of a scientific theory of penal law, *i.e.*, a system of propositions interrelating variables that have a realistic foundation in fact and values.<sup>29</sup>

In sum, the exclusion of negligence from penal liability is based on the great difference between consciousness and unawareness, between action or conduct and mere behavior. It is in accord with the most enduring truth in the history of ethics—that voluntary conduct is the essential condition of disapproval and, certainly, of legally sanctioned punishment. Hence, too, the application of this perennial principle to penal law would be more humane than the approach of the Model Penal Code. By the same token, it would clarify in the public mind the vast difference between voluntary harm-doing and inadvertent damage. It seems likely also that the narrowing of penal law to genuine crimes will make the punitive sanction more effective within the restricted sphere of its operation. Thus, the exclusion of negligence from penal liability would further consistency, avoid formalism and injustice, and remove the greatest bar to the discovery of a realistic, scientific theory of criminal law.

## VI. CONCLUSION AND SUGGESTIONS

If the above analysis is sound, the correct implication is not that nothing should be done about negligently caused damage, but, instead, that punishment is not a fit instrument. It is evident that the community should protect itself against damage caused by lack of skill, inadvertence, and insensitivity. But the first step toward effective legal control is the recognition of the actual nature of the problem.

The following are suggested as meriting consideration in this connection:

1. The complete escape of negligent persons from any civil liability via insurance should be re-examined; as between the insurance company and the negligent insured, the latter should be compelled to pay at least part of the damage, and this might take the form of increased insurance rates. As to uninsured negligent persons, the possibility of devising feasible methods of enforcing compensation should be explored.

2. The control of licenses should be more rigorous, first, to exclude persons who are not qualified to operate dangerous instrumentalities or to

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28. Cf. MPC § 2.02, comment 3 at 126 (Tent. Draft No. 4, 1955) (admission by Code draftsmen that the definition of negligence, see text accompanying note 3 *supra*, is a "tautological articulation of the final question" under which "the tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned.").

29. See HALL, *op. cit. supra* note 2, at 14-26; Hall, *The Scientific and Humane Study of Criminal Law*, 42 B.U.L. REV. 267 (1962).

engage in certain vocations and, second, to suspend or revoke licenses when adverse personality traits are discovered. This implies a consideration of psychical as well as physical faculties not only in the grant but also, and especially, in the suspension or revocation of licenses.

3. A vast improvement in administration has made available concrete possibilities for education and instruction. Resort to the courts is no longer the only approach to the solution of this problem.

4. Finally, the institutions and influences in social life that form sensitive, normal personality should be improved and helped to provide the psychological and ethical conditions that are conducive to the desired end. This is the most difficult of all reforms. But a difficult problem calls especially for measures that take due account of the actual, relevant behavior and its underlying causes.

The likelihood is that the proposed methods would be much more effective than punishment because they would come to grips with the actual problem of negligent damage. But even if one is dubious about the suggested measures for dealing with such negligence, still, it does not follow that punishment is necessary or helpful. Moreover, punishment, if it is ethically defensible, must rest not upon the deficiencies of alternative methods, but on its own positive grounds. When punishment sanctioned by law is not justifiable, the significance of just punishment is dissipated and the public is confused regarding criminal conduct. It is regrettable that the Model Penal Code has obscured and weakened the central thrust of the common law of crimes by perpetuating the vestiges of penalization for negligent behavior.