A THEORY OF CRIMINAL NEGLIGENCE

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A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy

Graduate Department of Philosophy

University of Toronto

ABSTRACT

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Doctor of Philosophy
1998

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Is the imposition of criminal liability ever justified in cases of negligent (that is, unreasonable, but inadvertent) conduct? On a subjectivist approach, which regards the culpability of the accused as a necessary condition of criminal liability, it would not be, since only subjective intent and foresight are considered morally culpable, and thus criminally liable. An objectivist approach, however, permits criminal liability for negligence, but rejects the fundamental importance assigned by subjectivists to moral culpability. It seems, then, that we must either dismiss the significance of moral culpability in assigning criminal liability or reject negligence as a basis for criminal liability.

This dissertation rejects this putative dilemma. Negligence is a legitimate basis for imposing criminal liability because, in at least some defined circumstances, it is morally culpable. According to the character theory of responsibility which this dissertation

defends, negligence is culpable because we are responsible, as moral agents, not only for our actions, but for our moral characters. Specifically, we are responsible for our moral view of the world (our "moral outlook") and for any unreasonable and inadvertent actions that flow from a defect in our moral outlook (such as a lack of regard for others), particularly in situations involving serious risks to fundamental rights and interests of other persons. In these situations, we have a criminal law duty to hold these fundamental rights and interests in proper moral regard so as to avoid inadvertently harming others.

ACKNOWLEDGEMENTS

I am indebted to Professor Mark Thornton for his encouragement and support, and for his invaluable insights and comments on the many drafts of this dissertation. I am also extremely grateful to Professors Ernest Weinrib and Arthur Ripstein whose comments on earlier drafts inspired new approaches and arguments. A research paper that I prepared for Professor Alan Brudner during my LL.B. paved the way for this dissertation. I am thankful to him for the many discussions we had which helped me to appreciate the complexity of the issues addressed in these pages.

Many others, in different ways, helped make my journey a smooth one: Professor David Dyzenhaus, Director of the combined LL.B./Ph.D. (Philosophy) programme; the partners, associates, and staff at Stockwood, Spies & Campbell; and Joyce Wright, the Graduate Secretary at the Department of Philosophy.

Most of all, Sandy, Sharon, Ruby, and Victor J. have been my inspiration and moral support every step of the way. They are the reason this dissertation has come to be.

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CHAPTER ONE

INTRODUCTION: THE PROBLEM OF CRIMINAL NEGLIGENCE

The devoted mother of a diabetic child sincerely believes that God has spoken to her in a dream and assured her that her son has been cured through divine intervention and that he no longer requires insulin. Although having been warned previously of the dangers of withdrawing the insulin treatment, the mother, believing her son to be cured, withdraws it anyway. A few days later the child dies of complications of diabetic hyperglycaemia. The child's parents are charged with manslaughter by criminal negligence.[1]

A Laotian refugee and member of the Hmong tribe living in California takes his fiancée to his cousin's home and has sexual relations with her. Later he is charged with kidnapping and rape. In his defence he argues that although his fiancée protested his advances, he honestly believed she had consented to a cultural ritual known as *zij poj niam* or "marriage-by-capture." According to this ritual, after an extended period of courtship, the man, on a chosen date, takes his fiancée to his family home and consumates the marriage. The woman protests the man's advances in a show of virtue and the man persists to prove that he is strong enough to marry her.[2]

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[1]These are roughly the facts of *R.* v. *Tutton* (1989), 48 C.C.C. (3d) 129 (S.C.C.).

[2]*People* v. *Moua*, No. 315972 (Fresno Super. Ct., 1985).

On a country road, an intoxicated driver decides to "play chicken" and see how close he can get to an oncoming hayride, consisting of three tractor-pulled wagons and carrying some 40 or 50 people. He races toward the hayride on the left (wrong) side of the highway at 70 miles per hour and pulls into the right lane at the last moment. As he passes the hayride, he strikes five members of the hayride party who had been running alongside; one is injured, four are killed. The driver is charged with criminal negligence causing death.[3]

In each of these cases, serious harm has befallen the victims. A diabetic child dies, a woman's sexual autonomy is violated, and several people are killed or injured. Moreover, the harm to the victim in each of these cases has come about because the accused acted in a way that would generally be regarded by others as *unreasonable*: it seems unreasonable, from an extrinsic perspective, for the mother to withdraw the insulin because of a "vision," for the Hmong man to dismiss the possibility that his fiancée did not consent to the "marriage" ritual, and for the driver to play chicken with the oncoming hayride. At the same time, however, in each of these situations, the wrongful act is *inadvertent*. None of the accused is aware that harm will come of his or her actions: the devoted mother believes that her son has been cured, the Hmong man believes that his financée consents to a marriage ritual, and the intoxicated driver believes that he can avoid causing any harm to the members of the hayride party.

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[3]*R.* v. *Waite* (1989), 48 C.C.C. (3d) 1 (S.C.C.).

The unreasonableness of the conduct and the inadvertent act of the accused – what I shall refer to as "negligent conduct" or "negligence" – in these cases seems to pull at our intuitive responses from different directions. The unreasonableness of the conduct makes us think that the accused should have to answer for their actions; but their inadvertence, their lack of intent to do harm, suggests that we should be lenient as, after all, they did not act with malice. The fact that each of these individuals was charged with a criminal offence brings us to the following question: Is the imposition of criminal liability ever justified in cases of negligence?

This question divides jurists and legal theorists alike. The jurisprudence reveals a disagreement between "subjectivists" and "objectivists": subjectivists argue that in the absence of some minimal subjective awareness on the part of the accused of a risk of harm, it is inconsistent with basic principles of criminal liability to impose such liability for objectively unreasonable conduct; objectivists are prepared to prevent harm by imposing criminal liability even in the absence of subjective foresight. Legal theorists also disagree, with traditional consequentialists insisting that the imposition of criminal liability (including criminal liability for negligence) is ultimately justified only if it prevents harm by deterring similar conduct, and with traditional deontologists maintaining that negligent conduct is not culpable and therefore must not be subject to criminal sanctions.

In this dissertation, I defend the view that criminal liability may justly be imposed for some forms of negligent conduct – not for reasons of deterrence (even though criminal liability might in fact deter negligent conduct), but because these forms of negligence are morally culpable. Thus I argue that although negligence itself is not sufficient for criminal liability, some forms of negligence are morally culpable and properly subject to criminal liability. On the theory I propose, negligent conduct is culpable because we are as moral agents morally responsible not only for those of our actions that we intend, but also for those inadvertent actions that flow from defects in our moral outlook, particularly in situations involving serious risks to the fundamental rights and interests of other persons. In these situations, we have an affirmative duty to hold the rights and interests of others in proper moral regard so as to avoid harming them inadvertently. In this chapter, I begin by considering how the jurisprudence of criminal law has approached the issue of criminal liability for negligence. I then go on to consider the theoretical issues that emerge from this approach, and explain how these issues will be addressed in subsequent chapters.

A. The Jurisprudence of Criminal Negligence

The jurisprudence of the criminal law attempts to define, in principled fashion, the parameters of criminal liability. The two approaches, which divide jurists into subjectivists and objectivists, reveal different understandings both of the normative foundations of the

criminal law and the conditions of liability. Subjectivist jurisprudence reveals an attempt to limit the imposition of criminal liability to situations involving intentional wrongdoing or, at most, to situations involving subjective foresight (as opposed to objective *foreseeability*) of a risk of harm. This approach therefore rules out criminal liability for negligence. In contrast, objectivist jurisprudence will in some circumstances impose criminal liability in the absence of subjective foresight; objectivists will not rule out criminal liability on the basis of a negligence or "strict liability" standard. From these conflicting jurisprudential approaches to criminal liability emerge the theoretical issues that will become the focus of this dissertation.

(1) The Subjectivist Jurisprudence

Subjectivists usually insist that criminal liability must not be imposed in the absence of moral culpability. For this reason, they will impose criminal liability only in those situations where there is an *intent* to cause harm or, at the very least, a subjective awareness of a risk of harm, which, for subjectivists, signifies moral culpability.

(a) The Normative Approach to "Mens Rea"

At the heart of the subjectivist approach[4] is the Latin maxim *actus non facit reum, nisi mens sit rea*, which is taken to signify one of the most simple and enduring normative principles of the criminal law – that there can be no guilty act without a "guilty mind." In accordance with this principle, the law, for doctrinal and procedural reasons, typically analyses criminal offences in terms of the external elements of the offence (the *actus reus*) and the accompanying mental state of the accused person (the *mens rea*, or "guilty" mind). For subjectivists, this common law principle underscores the fundamental axiom of the criminal law, that a morally innocent person must not be convicted. From this principle can be generated the basic principles of criminal liability. The criminal law, on this view, can be seen as a coherent, normative order.[5]

A constitutionally entrenched bill or charter of rights can be used by subjectivists to support of this normative understanding of *mens rea*. For instance, since the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms*[6] in 1982, Canadian courts

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[4]Sometimes called "orthodox subjectivism": see Earl Fruchtman, "Recklessness and the Limits of Mens Rea: Beyond Orthodox Subjectivism (Part I)" (1986-87), 29 *Criminal Law Quarterly* 315, especially at 317-19, which uses this term to describe the approach to criminal responsibility discussed in this paragraph.

[5]Compare Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Massachusetts: Harvard University Press, 1995), at 11-14.

[6]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*

have had the additional responsibility of ensuring that the criminal law respects certain "principles of fundamental justice."[7] Since the earliest cases decided under the *Charter*,[8] the Supreme Court of Canada has understood this as conferring upon it the mandate to invalidate any criminal legislation which is inconsistent with the principles of fundamental justice.[9] And since these early cases, this task has been understood to require a normative assessment of the legislation in light of the *mens rea* principle. As Lamer J. explains in *R.* v. *Vaillancourt*, "as a general rule, the principles of fundamental justice require proof of a subjective *mens rea* with respect to the prohibited act, in order to avoid punishing the 'morally innocent.'"[10] To the extent that this principle is constitutionally or, to a lesser extent, doctrinally entrenched, the prohibition against punishing the morally innocent reflects the basic normative structure of criminal law.

(U.K.), 1982, c. 11 [hereinafter *"Charter"*]. In the United States of America, the ability of the courts to judicially review legislation was confirmed in *Marbury* v. *Madison*, 1 Cranch 137 (1803).

[7]Section 7 of the *Charter* provides that everyone "has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[8]See, for example, *Reference re Section 94(2) of the Motor Vehicle Act* [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, 48 C.R. (3d) 289. The *Charter* was proclaimed in force April 17, 1982.

[9]In *R.* v. *Vaillancourt* (1987), 39 C.C.C. (3d) 118, the Supreme Court of Canada held (*per* Lamer J., for the majority), that following the enactment of the *Charter* and, more specifically, of s. 7, "while Parliament retains the power to define the elements of a crime, the courts now have the jurisdiction and, more important, the duty, when called upon to do so, to review that definition to ensure that it is in accordance with the principles of fundamental justice" (133).

In the absence of constitutional limitations and judicial review, the subjectivist's normative approach to criminal liability is threatened by the supremacy of the legislature, which has the power to eliminate the subjective intent requirement. However, in these circumstances, subjectivists have used *mens rea* as a common law limitation on the imposition of criminal liability when interpreting criminal legislation. For instance, where no express mention is made of the mental element in the legislative definition of a criminal offence,[11] judges favouring the subjectivist approach have wider scope to import subjective standards, using the *mens rea* principle to define the appropriate mental element. But to the extent that judicial attempts to give normative structure to the conditions for criminal liability are subject to legislative reversal, there remains a basic tension between the *mens rea* principle in its normative sense and the doctrine of legislative supremacy.

(b) Intention and Recklessness

On the subjectivist approach to the criminal law, offences of negligence are excluded from criminal liability because they do not require that the accused person be subjectively aware of the circumstances and consequences of the impugned conduct. On this view,

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[10] *Ibid.*, at 133.

[11] One example would be s. 280 of the *Criminal Code*, which makes it an offence to take an unmarried person under the age of sixteen out of the possession of that person's parents or guardians without their consent.

inadvertence precludes criminal liability. Accordingly, the *mens rea* for criminal offences is limited to intention or recklessness.

The concept of intention is most closely associated with the subjectivist paradigm. I act intentionally with respect to a particular criminal offence,[12] when it is my conscious objective that my actions bring about the proscribed result. This legal concept of intention is often held to encompass both acting purposely (in which case I act *in order to* bring about the proscribed harm since it is in fact my goal) and acting knowingly (in which case I am aware that the harm will result from my actions, although I may not actually desire that the proscribed harm come about, as it is not my goal).[13]

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[12]See Donald Davidson, "Agency," in *Essays on Actions and Events* (Oxford: Clarendon Press, 1980), 43-61.

[13] It is not obvious, however, that acting knowingly is equivalent to acting intentionally. The distinction between intention and knowledge is the source of considerable legal and philosophical controversy. Problems generally arise in cases where the proscribed harm is both foreseeable and foreseen by the actor, but is not the actor's immediate purpose. Indeed, the actor may hope that the harm does not materialize. Often, an attempt is made to assimilate knowledge and purpose into the same legal category. But there is an important conceptual distinction between these categories that turns on the goal of the actor. Situations in which the accused acts with the knowledge that his or her conduct may cause harm are perhaps more closely related to cases involving recklessness than cases of purposive action. Recklessness is generally considered to involve acting in the face of a known risk. Where there is little doubt that the harm will materialize (as in a case where the accused causes an explosion on a plane in order to destroy the insured cargo), we may well speak of the accused's purpose of destroying the cargo and "knowledge" that passengers will die. If the cargo is destroyed in a mid-air explosion, the passengers' death is practically or morally certain: see, for instance, R.A. Duff, *Intention,*

In contrast with instances of "knowledge," it is more common to make a conceptual distinction between recklessness and intention if the risk is less than virtually certain. The Canadian jurisprudence typically defines recklessness in terms of conscious risk-taking.[14] Thus, in *R.* v. *Sansregret*,[15] a rape case in which the accused obtained the ostensible consent of a woman by threatening her, the Supreme Court of Canada explains that in contrast with negligence, and in "accordance with well-established principles for the determination of criminal liability, recklessness, to form part of the criminal *mens rea*, must have an element of the subjective" (at 233). Recklessness, Justice McIntyre goes on to explain, "is found in the attitude of one who, aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk" (at 233). On this orthodox understanding, recklessness involves conscious or advertent risk-taking on the part of the accused.[16]

Agency and Criminal Liability (Oxford: Basil Blackwell, 1990), at 90-91. In this type of situation, it is often urged that knowledge should be assimilated with intent (at 95). See also: Law Reform Commission of Canada, *Working Paper on Homicide* 33 (Ottawa, 1984), at 52-53.

[14]As the Law Reform Commission of Canada explains in *Working Paper on Homicide* 33 (1984), while recklessness is ordinarily understood as either advertent or inadvertent risk-taking, conventional legal wisdom, "especially in the context of offences like malicious damage, malicious wounding and murder, developed a narrower meaning for the term; it limited recklessness to the conscious taking of a serious and unjustified risk" (at 55).

[15](1985), 18 C.C.C. (3d) 223.

[16]*Cf. R.* v. *Pappajohn* (1980), 52 C.C.C. (2d) 481 (S.C.C.).

In tandem with the Canadian approach, American jurisprudence rejects the notion that recklessness includes inadvertent wrongdoing, favouring a distinction between recklessness and negligence based on the subjective awareness of the accused. In *Farmer* v. *Brennan*,[17] the U.S. Supreme Court considered the mental element requirement in an action by an inmate against prison officials for showing "deliberate indifference" in failing to keep him from harm. In the course of his judgment, Justice Souter equates "deliberate indifference" with recklessness rather than negligence,[18] and then proceeds to examine the parameters of recklessness in the criminal law. He explains that, while recklessness in civil law includes failing "to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known," the criminal law "generally permits a finding of recklessness only when a person disregards a risk of harm *of which he is aware*."[19] To the extent that this judgment regards recklessness as conscious risk-taking, it is entirely consistent with the traditional, subjectivist approach to the criminal law.

The approach shared by the Canadian and American courts stands in stark contrast to the position of the House of Lords in *R.* v. *Caldwell*.[20] In this case, the accused, Caldwell, after a dispute with the owner of a hotel where he had been working, got drunk and set fire to

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[17]114 S.Ct. 1970 (1994).

[18]At 1978.

[19]*Ibid.* (emphasis added).

the hotel in revenge. The fire was discovered and extinguished before any serious damage resulted and before any of the guests were injured. At trial, Caldwell pleaded guilty to the charge of intentionally or recklessly destroying or damaging the property of another, but answered not guilty to the more serious charge of damaging property with intent to endanger life or being *reckless* as to whether life would be endangered. Caldwell claimed that the thought of endangering the lives of the occupants of the hotel never crossed his mind. He was convicted at trial. The issue on the appeal to the House of Lords was the proper test for recklessness. In his reasons for judgment, Lord Diplock explained that the legal meaning of reckless "includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognized as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was" (at 966).

What sets Lord Diplock's decision apart from the position shared by Justice McIntyre and Justice Souter is the extension of the traditional notion of recklessness as conscious risk-taking (which involves some degree of subjective awareness on the part of the accused) to encompass inadvertent wrongdoing ("failing to give any thought to whether or not there is any such risk"). While the Canadian and American courts focus on the *consciousness* of the risk, the House of Lords emphasizes the *unreasonableness* of the risk. The result is that

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[20][1981] 1 All E.R. 961.

Caldwell permits the imposition of criminal liability in cases of inadvertent conduct. The *Caldwell* case demonstrates that the concept of recklessness straddles the outer limit of orthodox subjectivism.

The closest the subjectivist jurisprudence comes to imposing criminal liability for negligence can be seen in the notion of wilful blindness. Simply put, wilful blindness refers to a conscious closing of one's mind to an obvious risk. This concept is explained by McIntyre J. in *Sansregret*:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need of some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by the consciousness of the risk and proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.[21]

Like recklessness, wilful blindness remains perilously close to the limit of the subjectivist approach. But because it is said to involve a minimal *awareness* of the need for inquiry and a *deliberate* failure to inquire into the risk, unlike "*Caldwell* recklessness," subjectivists insist that it is consistent with their approach.[22]

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[21] *Supra*, note 15 at 235.

[22] See also *R.* v. *Tutton*, *supra*, note 1 at 154, *per* Wilson J.

Both recklessness and wilful blindness involve some advertence on the part of the accused.[23] What drives the orthodox subjectivist approach is the underlying normative assumption that a person cannot be morally culpable in the absence of *subjective* awareness of, and assent to, the risk. For those committed to this approach, negligence and, indeed, "*Caldwell* recklessness," are conceptually distinct from and antithetical to this normative paradigm.

(2) The Objectivist Jurisprudence

Particularly when interpreting criminal statutes, objectivists often justify the doctrines of criminal liability without reference to the moral culpability of the accused, but defer to legislative intent; it is for the legislature to specify the "mental element" necessary for criminal liability, be it subjective intent, negligence, or strict liability. Objectivists therefore tend to understand *mens rea* in a descriptive or positivistic sense.[24]

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[23]Fruchtman, *supra*, note 4 at 319: "In modern criminal law systems, liability for negligence is based on express statutory provision and is seen by orthodox subjectivism as either exceptional or inappropriate."

[24]See George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978), at 396-401.

(a) The Descriptive Sense of "Mens Rea"

When used in this manner, *mens rea* means simply the required "mode of liability" for a given criminal offence. The *mens rea* for an offence is therefore determined simply by examining the statutory provision which creates the offence. Thus, one leading English textbook of criminal law describes *mens rea* in non-normative terms:

> *Mens rea* is a term which has no single meaning. Every crime has its own *mens rea* which can be ascertained only by reference to its statutory definition or the case law. The most we can do is state a general principle, or presumption, which governs its definition.[25]

This understanding of *mens rea* stresses the supremacy of the legislature and its corresponding ability to stipulate whatever mental element it chooses for a given offence.[26] Thus, where the principles of the common law are subject to legislative supremacy, the

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[25]J.C. Smith & B. Hogan, *Criminal Law*, 7th ed. (London: Butterworths, 1992), at 70.

[26]For instance, s. 434 of the *Criminal Code* (Canada), R.S.C. 1985, c. C-46, which creates the offence of arson, provides that every person "who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person" is guilty of an offence. In this particular section, the mental element is expressly indicated to be either intention or recklessness. In other sections, the mental element can be inferred from the particular wording of the provision. Thus, under s. 229(a)(i) of the *Criminal Code*, where a person "who causes the death of a human being . . . means to cause his death" that person is guilty of murder. The mental element for murder under this particular provision is understood judicially to be intention. Section 229(a)(ii) relaxes the mental element, thus extending the ambit of murder to instances in which the person "means to cause [another human being] bodily harm that he knows is likely to cause his death, and is *reckless* whether death ensues or not" (emphasis added).

internal, normative force of the *mens rea* principle within the common law may be circumscribed.

(b) Strict Liability

The objectivist jurisprudence does not preclude the imposition of criminal liability in the absence of subjective intent or foresight. In fact, on this approach, criminal liability may be imposed not only for inadvertent conduct, but even for *reasonable* conduct. Under a regime of strict liability, individuals would be deemed responsible for the consequences of their actions without regard for the normative character of their actions, whether or not they were "at fault." On such a scheme, the primary inquiry would be into the so-called *actus reus* of the offence. Liability would follow on proof that the person caused the harm in question. Neither the reasonableness of the person's behaviour nor the person's perception of his or her actions as harmless affords a defence to a strict liability offence.

The *mens rea* principle excludes strict liability from the criminal law since the person charged with such an offence may not have a "guilty mind" – may not be morally responsible for the impugned act. To the extent that a strict liability scheme ignores the moral culpability of the accused person, it stands in opposition to the normative understanding of *mens rea*. To the extent that a strict liability offence is justified, it is

regarded as an exception to the *mens rea* principle. Nevertheless, offences of strict liability do find their way into the criminal law in several contexts.

One such context is the offence of constructive murder (known in some jurisdictions as "felony-murder"). The underlying idea behind this type of offence is that a person is deemed to have committed murder if, while that person is committing a separate (secondary) offence, someone is killed. The mental element in the offence of murder is "constructive" because the accused person's mental state with respect to the death is irrelevant; it is sufficient that the accused have the requisite mental element for the secondary offence.

Previously, in Canada, someone who caused the death of another during the commission of an offence was guilty of murder "whether or not the person mean[t] to cause death . . . and whether or not he [knew] that death [was] likely to be caused," if he were carrying a weapon at the time.[27] Accordingly, a person could be convicted of murder without

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[27]Before it was struck down by the Supreme Court of Canada as unconstitutional in *R.* v. *Vaillancourt*, *supra*, note 9, what was then s. 213(d) of the *Criminal Code* (R.S.C. 1970, c. C-34, as amended) provided that a person is guilty of murder where "a person causes the death of a human being while committing or attempting to commit [any of a list of offences, including rape, robbery, and arson], whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if . . . he uses a weapon or has it upon his person . . . during or at the time he commits or attempts to commit the offence . . . and the death ensues as a consequence."

subjective foresight of death (intention or recklessness) or without even *reasonable* foreseeability of death (negligence). This provision was struck down by the Supreme Court of Canada as unconstitutional because it did not even require that the accused's conduct be negligent.[28] Nevertheless, the felony-murder rule persists in other jurisdictions. In these jurisdictions, a person may be found guilty of murder simply on proof that a death occurred during the commission of a felony offence.

Another context in which strict liability offences are found is that of "regulatory," "quasi-criminal," or "public welfare" offences. These offences "relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like."[29] In offences of strict liability, guilt follows merely on proof of the proscribed act. The problem, for subjectivists, is that these offences are often enforced within the framework of the criminal law.

To the extent that subjectivists do accept strict liability, they would remove it from the realm of criminal law into a distinct sphere of regulatory offences. Thus, although these offences might use the "machinery of the criminal law," they would be "in substance of a

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[28]In *R.* v. *Vaillancourt*, *supra*, note 9, the Supreme Court of Canada found this provision to be contrary to the principle of fundamental justice on the narrow ground that it did not "even meet the lower threshold test of objective foreseeability" (at 134). That is, it did not even require that the accused come up to an objective standard of reasonable conduct.

civil nature and might well be regarded as a branch of administrative law to which the traditional principles of criminal law have but a limited application."[30] And since subjectivists consider negligence to be normatively indistinguishable from strict liability for the purpose of attributing criminal liability, they would prefer to regard offences of negligence as distinct from those offences that are "criminal in the true sense."[31] Objectivists, however, have no need for this distinction, and impose criminal liability on the basis of strict liability even for those offences that subjectivists would regard as "true crimes."

(c) Negligence

At the outset of this chapter, I defined negligence in terms of inadvertence and unreasonableness. The objectivist jurisprudence reveals that inadvertence need not

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[29] *R.* v. *City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 357 (S.C.C.).

[30] *Ibid.*

[31] *Ibid.* Dickson J. explains in *Sault Ste. Marie* that public welfare offences are generally offences in which the prosecution need not prove the existence of *mens rea*, but where it is open to the accused to "avoid liability by proving that he took all reasonable care" (at 374). (The terminology in this case is confusing because Dickson J. labels *these* offences of strict liability. In fact, they are offences of negligence. Even more confusingly, Dickson J. refers to a third category of offences of "absolute liability" in which "it is not open to the accused to exculpate himself by showing that he was free from fault" (at 374). He regards this as an exceptional category of offences. Only where the legislature has made it clear that guilt is to follow merely on proof of the proscribed act would an offence be regarded as one of "absolute liability." Again, the terminology is confusing since these offences are generally referred to as "strict liability" offences.)

preclude criminal liability. Moreover, the only conceptual difference between criminal negligence and strict liability is that reasonableness is a defence to negligence, but not to strict liability. But if, on the objectivist approach, criminal liability may be imposed even when a person's conduct is reasonable, there is no principled objection to criminal liability for negligence.

(d) The Negligence Standard in the Criminal Law

While some criminal statutes explicitly create offences of "criminal negligence," they often make no specific mention of the required mental element, but leave it to be inferred from the wording of the statute or the conceptual requirements of the offence. There are, however, other ways, apart from express statutory prohibition, by which a negligence standard can find its way into the criminal law. For instance, some offences or common law rules, by limiting the scope of certain defences (such as the defence of mistake), can effectively create offences of criminal negligence.

One class of offences prohibits negligent or careless behaviour without regard to its consequences. For example, a person may be liable for pointing a firearm (loaded or unloaded) at another person, or storing a firearm "in a careless manner or without

reasonable precautions for the safety of other persons."[32] Similarly, a criminal provision could make it an offence to drive "in a manner that is dangerous to the public, having regard to all the circumstances."[33] To the extent that driving in a dangerous manner is determined by whether, viewed objectively, the conduct constituted a "marked departure from the standard of care that a reasonable person would observe in the accused's situation,"[34] the offence would be one of negligence. What is common to these offences is that it is not the *result* of the behaviour, but the creation of an unjustified *risk* that is considered harmful.[35] The legislation is pre-emptive in that it seeks to discourage, through the criminal law, conduct that is regarded as potentially dangerous; it prohibits the creation of the risk without regard for whether the risk materializes.

A second set of offences premises liability on the occurrence of a particular result, most often death or bodily harm, which is caused by the negligent conduct. The offences known as "causing death by criminal negligence," "involuntary manslaughter," and "manslaughter by criminal negligence" are typical examples. In these offences, the focus is not the creation of a risk (as in the first class of offences), but the materialized risk. There is no offence until the risk manifests itself as actual harm.

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[32]See s. 86 of the *Criminal Code*.

[33]Section 249(1)(a).

[34]*R.* v. *Hundal* [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97, at 888 [S.C.R.].

Criminal negligence may also include an omission to do one's legal duty.[36] Statutorily imposed duties include the duty to take care when undertaking dangerous acts,[37] the duty to provide necessaries of life to dependents,[38] and other context-specific duties.[39] In such circumstances, it is generally believed that there is a special obligation to take care that arises either from the nature of the conduct (such as a dangerous act) or the nature of the relationship (such as a parental or spousal one).

Finally, any offence can be converted into an offence of criminal negligence by limiting the scope of available defences. One example involves the defence of mistaken belief. Where a mistake, to exculpate, is required to be reasonable or based on reasonable grounds, the offence becomes an offence of negligence.[40]

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[35]Fletcher, at 486.

[36]In section 219 of the *Criminal Code*, a person may be criminally negligent for "omitting to do anything that it is his legal duty to do."

[37]Section 216.

[38]Section 217.

[39]For example, the duty of care when handling explosives (s. 79) and the duty of care in handling firearms (s. 86).

[40] Following Glanville Williams, *Textbook on Criminal Law*, 2nd ed. (London: Stevens & Sons, 1983), 129-38.

(b) The Negligence Standard and Mistaken Belief

The defence of mistaken belief provides one illustration of the jurisprudential controversy over the propriety of the negligence standard in the criminal law. For the subjectivist jurist, an honest but mistaken belief about the circumstances or consequences of one's action is inconsistent with criminal liability because it "negates" the mental element. In such a situation, because the actor is unaware of the facts that make the conduct criminal, there can be no culpable mental state. In *R.* v. *Pappajohn*, Mr. Justice Dickson of the Supreme Court of Canada, set out the parameters of the defence:

> Mistake is a defence, then, where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as the negation of guilty intention than as an affirmative defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and none the less commits the *actus reus* of an offence. Mistake is a defence, though, in the sense that it is raised by an accused.[41]

Within the subjectivist jurisprudence, an honest mistake is a proper defence to a criminal charge by reason of the normative understanding of *mens rea*. From the accused's perspective at the time of the alleged offence, there was nothing improper about his or her actions.

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[41] *Supra*, note 16 at 494. See also *D.P.P.* v. *Morgan*, [1975] 2 All E.R. 347 (H.L.).

Objectivist jurists (and legislators concerned with public safety) often take a different approach to mistaken belief, by requiring that any mistake, to exculpate, must be reasonable. Thus, it would not be enough for the accused to claim that the mistake was "honest" or "genuine." When conjoined with the defence of mistake, a reasonableness requirement converts an offence of intention or recklessness into an offence of negligence.

The defence of mistaken belief surfaces most frequently in rape and sexual assault cases. Typically, the accused argues that he (it is usually he) is not liable because he honestly believed that the woman was consenting. Historically, the Anglo-Canadian jurisprudence has maintained that an honest belief in consent, however unreasonable, is a complete defence to rape or sexual assault, since it negates the subjective mental element.[42] In the *Pappajohn* case, there is some disagreement as to whether the defence of mistaken belief can be put to the jury absent some evidence beyond the mere assertion of belief in consent by the accused. The majority, held that there must first be a sufficient evidentiary basis to support such a defence.[43] For subjectivists, the defence of mistaken belief is available because it negates subjective intent, and with it the "guilty mind" necessary for criminal liability.

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[42]See *Pappajohn*, *supra*, note 16, and *D.P.P.* v. *Morgan*, *supra*, note 41.

[43]*Per* McIntyre J., 509. Compare *People* v. *Williams*, 841 P.2d 961 (Cal 1992), 966, and *People* v. *Mayberry*, *infra*, note 44.

In contrast, in most jurisdictions in the United States, a mistaken belief must be reasonable in order to be a defence to rape.[44] In fact, in some jurisdictions, even an honest and reasonable belief is not sufficient to exculpate.[45] This latter type of rule effectively converts the offence of rape into a strict liability offence. In any event, consistent with the objectivist approach to criminal liability, the requirement of an honest *and* reasonable belief in consent effectively imposes liability for negligence.[46] This objectivist approach to the defence of mistake is also reflected in other contexts, such as self-defence, where a negligent mistake about whether one's life is in danger precludes the defence.[47]

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[44]See *People* v. *Mayberry*, 542 P.2d 1337 (Cal. S.C. 1975): "If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite . . . "(at 1345).

[45]*Commonwealth* v. *Ascolillo*, 541 NE.2d 570 (Mass. 1989).

[46]A similar result has been established legislatively in Canada. Parliament has recently attempted to reverse the effects of *Pappajohn* by amending the law of sexual assault (which now encompasses rape). Now, under s. 273.2 of the *Criminal Code*, an honest belief in consent is no longer a defence to sexual assault where the accused's belief "arose from the accused's . . . self-induced intoxication, or . . . recklessness or wilful blindness" or if the accused "did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting." The requirement that the accused take "reasonable steps," while qualified by his subjective awareness of the circumstances, implies that the accused cannot be negligent as to the complainant's consent.

[47]For instance, s. 34(2) of the *Criminal Code*, provides that a person is justified in killing in self-defence if "he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and . . . he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."

B. Theoretical Approaches to Criminal Negligence

These two approaches – the subjectivist and the objectivist – have the following general implications for criminal negligence. The subjectivist jurisprudence, with its normative understanding of *mens rea*, regards the culpability of the accused as a necessary condition of criminal liability; but since only subjective intent and foresight are considered culpable, criminal liability for negligence is rejected. The objectivist approach, however, permits criminal liability for negligence, but rejects the fundamental importance of culpability and the normative understanding of *mens rea*. It seems, then, that we must either reject the subjectivist approach to culpability or reject criminal liability for negligence. This tension in the jurisprudence and the correlative dispute over the content and boundaries of criminal liability is not merely a disagreement over the correct interpretation of the *mens rea* principle or criminal legislation, nor is it a dispute about the best "policy" choice; it is rather a fundamental dispute about the normative foundations of criminal law.

The philosophical response to whether criminal liability for negligence can be justified depends on how we understand the nature of the justification that is required. Consequentialist and deontological legal theorists approach this question in different ways. Some traditional consequentialists argue, for instance, that criminal liability for negligence is justified, particularly in cases of serious harm, because punishment is generally a more effective deterrent than mere civil sanctions (such as an award of damages), and the social

benefits of imposing punishment (reducing the incidence of harm caused by negligence) outweigh the costs to society and to the individual wrongdoer. If, as these consequentialists believe, the overarching purpose of the criminal law is to protect society from harm, punishment may be justified to the extent that it deters dangerous conduct and fosters careful behaviour. Some offences of criminal negligence usefully serve these ends.

The traditional deontological view is that criminal liability should not be imposed for negligence because the accused is morally innocent, having never intended to cause harm. What makes offences of criminal negligence improper for these legal theorists is that they do not seem to require the *mens rea* or "guilty mind" which is an essential condition of both moral and legal responsibility.[48] Someone who sincerely (but unreasonably) believes her conduct to be harmless might be careless or ignorant, but is not morally culpable; she is unaware of the circumstances or consequences of her act that make it an offence. Including negligent conduct within the criminal law exceeds the normative bounds of the criminal law because it punishes the morally innocent.

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[48]In most of the philosophical literature on criminal law, proponents of this theory are referred to as retributivists and the theory they advocate is known as retributivism. Retributivism, however, implies a particular theoretical stance on the issue of punishment (roughly, that punishment is required to annul the morally culpable intent accompanying a criminal offence). Because I do not take a stand on *this* issue, but argue for the weaker claim that punishment cannot rightfully be imposed in the absence of moral culpability, I use the generic term, *deontology* (unless I am referring to retributivism in the sense I have just described).

Against both of these views, this dissertation defends the proposition that, at least in some delimited circumstances, negligence can be a legitimate basis for imposing criminal liability, but on deontological, rather than consequentialist, grounds. Although the traditional consequentialist approach to criminal liability is able to justify criminal liability for negligence, it does so by dismissing the significance of the accused's culpability as an essential precondition for criminal liability. Although this traditional consequentialist approach provides a *valid* argument in support of criminal liability for negligence, it is one that is of concern to many because its implications are both threatening to our liberty and to our dignity as responsible moral agents. I argue instead that although moral culpability should play an important limiting role in the criminal law, this in itself does not preclude criminal liability for negligence.

My primary goal in this dissertation is to explain why criminal liability for negligence is justified, at least in certain specific situations, on broadly deontological grounds. I do not, however, adopt the traditional deontological approach, manifested in the subjectivist approach to criminal liability. In response to this view, which, as we have seen, considers subjective intent or awareness to be a necessary condition of criminal liability, I argue that negligent conduct, although inadvertent, is in some situations morally culpable such that criminal liability can justly be imposed.

One of the risks in attempting to navigate between the traditional consequentialist and deontological theories of criminal liability is that of unprincipled compromise. The challenge, then, is not merely to defend a position that seems to fall between two theoretical poles, but to ensure that this position is based on a secure and coherent set of principles. Failure in this task leaves a legal theory vulnerable to the criticism that the law is indeterminate and political.[49] The object of this dissertation, therefore, is not merely to refute the traditional arguments I outlined earlier on, but also, and more important, to develop a coherent normative theory of criminal negligence. To this end, I propose a broadly deontological, *character-based* theory that explains why some inadvertent conduct is morally culpable, and thereby justifies, on non-consequentialist grounds, the imposition of criminal liability for negligent conduct.

My argument develops in the following stages. Chapter Two explains that while the traditional consequentialist approach is able to justify criminal liability for negligence, it does so only by dismissing the importance of culpability as a precondition of criminal liability—a result that for many deontologists, and even some consequentialists, is unacceptable. H.L.A. Hart's alternative consequentialist approach is considered in Chapter Three. Hart proposes a utilitarian theory of criminal liability that acknowledges something like culpability as a necessary condition, while at the same time allowing for criminal

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[49]Alan Brudner, *The Unity of the Common Law* (Berkeley: University of California

liability for negligence. I explain that Hart's theory, while reaching a conclusion similar to my own, fails to provide a satisfactory understanding of moral agency and moral responsibility. The choice theory, while seeming to provide an adequate foundation for Hart's approach, is rejected in Chapter Four as conceding too much to the deterministic arguments that inspire it.

In the next three chapters, I develop the character-based justification of criminal negligence. Chapter Five introduces the character theory and its understanding of both moral agency and responsibility. This theory holds that even if the determinist is correct that our attitudes, beliefs, and values are determined, we remain, as rational moral agents, capable of reflecting upon, evaluating, and revising the way we look at the world. Each person is, in short, responsible for his or her *moral outlook* and for any unreasonable, even if inadvertent, conduct that flows from a defect in that moral outlook. Chapter Six distinguishes criminally negligent conduct from "mere" civil negligence, on the basis of the character theory, where the actor fails to have the proper regard within his or her moral outlook, for the fundamental rights and interests of other persons. Chapter Seven then transforms the character theory of criminal negligence into a standard that can be used to identify those instances of negligence that should be subject to criminal liability. Finally, in Chapter Eight, I return to the three cases described at the opening of this chapter, and consider whether, on the theory I propose, criminal liability ought to have been imposed.

Press, 1995), 216.

One final point remains concerning the nature of the argument advanced in this dissertation. The common law justifies its constitutive principles and doctrines internally, on the basis of its implicit understanding of responsibility in human action, and thus may be regarded as an autonomous normative system: a system "that generates – wholly within its discourse – a consistent set of reasons sufficient to justify the standards it articulates, and in particular the obligations it creates."[50] But the principles of the common law can also be assessed externally; they can be measured against an external normative standard that may not be embodied wholly within the discourse of the criminal law. Particularly in the context of codified criminal law, in which not only criminal offences, but their requisite mental elements, are defined by legislative enactment, any normative assessment of the substantive criminal law must be an external one; that is, it must justify, without appealing to common law doctrine, why the criminal law ought to adhere to a particular set of principles. The overarching argument in the following chapters is twofold: first, that criminal liability for negligence is justified on the basis of the normative principles of criminal liability expressed in the common law precisely *because* these principles reflect a qualified deontological theory of responsibility; second, that this theory of responsibility *ought to* guide the jurisprudence and legislative development of the criminal law.

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[50]Jerome E. Bickenbach, "Law and Morality" (1989), 8 *Law and Philosophy* 291-300.

C. Liability, Responsibility, and Culpability (A Note on Terminology)

Before proceeding to the consequentialist approach to criminal negligence, I should clarify my use of three key terms: liability, responsibility, and culpability. Liability will be understood as a legal concept, signifying a formal finding of wrongdoing, whether in a criminal law or a civil law setting. Thus, the broad issue addressed in this dissertation is whether criminal *liability* should be imposed for negligent conduct, that is, whether a person who acts negligently should be found guilty of criminal wrongdoing within the formal structure of the criminal law. Although the concept of moral responsibility will be explained at length in Chapter Three, it is sufficient for our present purposes if we agree that a person is responsible for her conduct if she is a moral agent: her conduct belongs to her or flows from her person in some non-arbitrary way so that she might properly be praised or blamed for that conduct.[51] Finally, culpability will be regarded as a species of moral responsibility. A person is culpable if morally responsible *and* blameworthy. We are morally responsible for our actions, right or wrong, but culpable only in relation to our wrongdoings. Thus, to say that a person is culpable implies that his conduct is blameworthy and he is morally responsible for it. But as we shall see in the next chapter,

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[51]The concepts of causal and moral responsibility are both significant to the criminal law, although my discussion will generally focus on moral responsibility, and its role in the justification of criminal liability. Unless I expressly refer to "causal responsibility," my use of the term "responsibility" can be taken to mean moral responsibility.

some consequentialists argue that moral responsibility is not a necessary condition of criminal liability – that criminal liability can be imposed in the absence of culpability.

CHAPTER TWO

CONSEQUENTIALISM AND CRIMINAL NEGLIGENCE

Consequentialist and deontological theories provide competing justifications of the criminal law and of the necessary conditions for imposing criminal liability.[1] Traditional consequentialist theories (the subject of this chapter) generally regard harm as the organizing concept of the criminal law and the prevention of harm as its ultimate purpose. The principles according to which criminal liability is imposed, such as the doctrine of *mens rea*, are understood in relation to this basic objective. In contrast, traditional deontological theories (the subject of the Chapter Four) usually consider the intentional transgression of the victim's right to be the central concern of the criminal law and the annulment of this criminal wrongdoing to be its purpose. What makes the transgression of the victim's right a crime, rather than a tort, is its intentional character. Accordingly, for

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[1]This dichotomy between consequentialism and deontology is perhaps overemphasized as the two categories may not be mutually exclusive or irreconcilable. See, for instance: (1994), 5 *Journal of Contemporary Legal Studies* 1-398, being the proceedings of the 1994 JCLI Symposium, *Harm v. Culpability: Which Should be the Organizing Principle of the Criminal Law?* However, by focusing on the key areas in which these approaches differ, we might better be able to appreciate the conceptual parameters of criminal liability. For an alternative, tripartite distinction, see George P. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown and Company, 1978), summarized at 388-90. In addition to "subjective criminality" (an actor-centred or culpability-based approach), and "harmful consequences," Fletcher adds a third pattern of liability which he calls "manifest criminality," in which the manifestation in the act of the criminal purpose is the central analytic focus.

these deontologists, it is the wrongdoer's culpable state of mind that justifies the imposition of criminal liability and punishment.

It is tempting to believe that if criminal liability for negligence is justified at all, it would be justified on the basis of a consequentialist theory. These theories, unlike their rivals, stress the importance of preventing harm; the defendant's subjective intent is of secondary or derivative importance. Since negligence is often thought to involve inadvertence on the part of the wrongdoer, and inadvertence implies the absence of intent, a theory that justifies the mental element requirement instrumentally, in relation to the overarching objective of preventing harm, seems to be in a better position to justify criminal liability for negligence.[2]

In this chapter, I construct what might be called the "traditional" consequentialist justification of criminal liability for negligence. I hasten to point out that by "traditional" I do not claim, as a matter of historical scholarship, that *this* justification has been advanced by consequentialists, nor do I suggest that it reflects completely the view of any one

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[2]See, for instance, Williams, *infra*, note 48; Wootton, *infra*, note 10 at 25; Holmes, *infra*, note 8.

consequentialist legal thinker.[3] Rather, the argument I have in mind is one that is consistent with many, if not most, of the basic premises of consequentialist theories of criminal law and criminal liability and that the premises of the argument are ones that can be (and at one time or another have been) defended on consequentialist grounds.

After setting out this consequentialist justification of the imposition of criminal liability for negligence, I then go on to consider its drawbacks. I do not propose in the course of my argument to challenge the validity of the argument I present; I concede that its conclusion follows from its premises. Rather, I consider the arguments that might be advanced to challenge the truth of its premises. The objective of this dissertation is to explain how the imposition of criminal liability for negligence is justified on the basis of what might broadly be regarded as a deontological theory of criminal law. As such, the argument that I advance in defence of criminal liability for negligence is directed, at least in part, at those deontologists who insist that a deontological theory of criminal liability precludes criminal liability for negligence.

But my argument is also directed at consequentialists. It is directed at those consequentialists (and others) who disagree with my arguments against the

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[3]However, as will become clear later in the discussion below, Richard Posner's economic argument in support of criminal liability for negligence comes the closest to the consequentialist justification that I consider in this Chapter.

consequentialist account, but also insist that *only* a consequentialist theory of criminal liability is able to justify criminal liability for negligence. And it is directed at those consequentialists who have incorporated into their theories of criminal liability a fundamental role for the moral innocence of the accused, and who might be prepared to grant some of my arguments against the traditional conseqeuntialist account. These consequentialists might even find themselves in broad agreement with the justification I propose for imposing criminal liability for negligence. I do not, however, attempt to refute consequentialism as a normative theory. Instead, I develop an affirmative account of responsibility, grounded in a broadly deontological theory, which offers an alternative justification of criminal liability for negligence based on an independently viable and, I hope, compelling account of responsibility.

As we shall see in the next chapter, H.L.A. Hart also attempts to justify offences of criminal negligence within a broadly consequentialist approach to criminal law, but one that differs substantially from the traditional account.[4] Hart argues both that culpability (or, at least, something *like* culpability[5]) is an essential precondition of criminal liability and that the imposition of criminal liability for negligence is justified. But while I agree with

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[4]Particularly as set out in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968).

[5] See my discussion of Hart's theory in Chapter Three and, in particular, note 2 of that chapter.

the broad intentions of Hart's project (in particular, his attempt to justify offences of criminal negligence based on the blameworthiness of the actor), I disagree with the choice-based theory of responsibility that he offers in support of his argument. For now, however, I begin with an outline of the basic propositions of the traditional consequentialist approach to criminal liability.

A. The Traditional Consequentialist Approach to Criminal Liability

The traditional consequentialist approach to criminal liability may be understood as consisting of the following basic propositions:

> (1) Criminal liability (or punishment[6]) is justified when necessary to prevent harmful conduct, on balance.
>
> (2) Harmful conduct is prevented through a system of deterrence.
>
> (3) The presence of a subjective intent to cause harm is important only instrumentally, to identify those individuals or classes of individuals for whom deterrence will be effective.

These three premises define the general principles of criminal liability. They capture the consequentialist concern for prevention of harm (in contrast with the deontological focus on

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[6]I do not in this dissertation distinguish between "criminal liability" and "punishment," except where specifically indicated otherwise.

the culpability of the actor), and the centrality of deterrence in the consequentialist approach. The third premise reflects the subordinate role assigned to subjective intent. To these propositions can be added a fourth (which in relation to negligent conduct might be called the "empirical premise"), which establishes the link between the general principles of criminal liability and criminal liability for negligence:

(4) Negligent conduct can be deterred.

The conclusion follows: When civil sanctions are inadequate, criminal sanctions are justified to deter negligent conduct, even in the absence of subjective intent (provided that the harm prevented is greater than the harm caused by the imposition of the punishment).[7]

(1) Criminal liability is justified when necessary to prevent harmful conduct, on balance.

Consequentialist theories of criminal law, in contrast with consequentialist theories generally, are expressed not in terms of maximizing the good, but rather in terms of minimizing or preventing harm. For example, Oliver Wendell Holmes argues that the purpose of the criminal law is best understood in terms of what he calls the "preventive

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[7]The formally validity of this argument also depends on these premises: (a) that negligent conduct is harmful; and (b) that criminal sanctions are necessary to deter harmful conduct when civil sanctions are inadequate. (I thank Derek Allen for pointing this out to me.) In this chapter, proposition (a) may be understood to be true by definition. Proposition (b) is considered true by traditional consequentialists such as Bentham, and is discussed *infra* (note 19 and accompanying text). My focus, however, is on the other four premises.

theory."[8] The justification for criminal law is to prevent harm by inducing conformity to socially beneficial rules. As against retributivist or deontological theories of criminal law, Holmes insists that although "no civilized government sacrifices the citizen more than it can help," they nevertheless "sacrifice his will and his welfare to that of the rest."[9] Similarly, in *Crime and the Criminal Law*,[10] Barbara Wootton argues that the preventive concept of the criminal law "is greatly to be welcomed and might with advantage be both more openly acknowledged and also accelerated."[11] While there are numerous accounts of what constitutes harm, the proposition that the purpose of the criminal law should be the prevention of harm is the central, unifying feature of consequentialist theories of criminal law.[12]

One influential consequentialist account of harm, the counterpart of Jeremy Bentham's hedonistic, utilitarian theory[13] of the good, identifies harm with pain. According to

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[8]*The Common Law* (New York: Dover Publications, 1991), 42.

[9]*Ibid.*, at 43. Holmes explains that the purpose of the criminal law "is only to induce external conformity to rule" (at 49).

[10](London: Stevens & Sons, 1963).

[11]*Ibid.*, at 41.

[12]C.L. Ten, *Crime, Guilt, and Punishment* (Oxford: Clarendon Press, 1987), at 7. See also J.W.C. Turner, "The Mental Element in Crimes at Common Law" in L. Radzinowicz and J.W.C. Turner, eds., *The Modern Approach to Criminal Law* (London: Macmillan and Co., 1945), at 196.

[13]Utilitarianism is a species of consequentialism. Both of these concepts admit of

Bentham, punishment causes pain and is therefore an evil that can be justified only to the extent that it prevents some greater evil.[14] Pleasure and pain are the basic commodities of his account; pleasure is to be maximized and pain is to avoided. But harm need not be understood in these terms alone. An alternative theory defines harm in economic terms, as inefficiency or the waste of resources. For instance, Richard Posner[15] defends an economic version of consequentialism, according to which the purpose of law is the maximization not of utility, but of economic wealth or efficiency.[16] For Posner, not only can the substantive doctrines and principles of the criminal law be *understood* as an attempt to promote economic efficiency, they are also *justified* on these grounds.[17]

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numerous variations, but for our present purposes, it is sufficient to define as "consequentialist" any moral theory which holds that the normative value of a particular act, rule, or policy is determined by reference to the good consequences it produces. Utilitarian theories hold that the relevant consequences are those that promote individual happiness or pleasure (or that satisfy human preferences). Most consequentialist theories insist that it is *aggregate* consequences that matter, and that on whatever theory of the good is adopted (pleasure, economic wealth, preference satisfaction, etc.), this value should be *maximized*. See Geoffrey Scarre, *Utilitarianism* (London and New York: Routledge, 1996), 1-26.

[14]*Principles of Morals and Legislation* (New York: Hafner Press, 1948), at 170.

[15]In *The Problems of Jurisprudence* (Cambridge, Massachusetts: Harvard University Press, 1990); "An Economic Theory of Criminal Law" (1985), 85 *Columbia Law Review* 1193-1231; *Economic Analysis of Law* (fourth edition), (Boston: Little Brown and Company: 1992).

[16]Posner denies that his theory is utilitarian: see "Utilitarianism, Economics, and Legal Theory" (1979), 8 *Journal of Legal Studies* 103. Note also that where loss is inevitable, Posner seeks to *minimize inefficiency*.

[17]Richard A. Posner, *The Problems of Jurisprudence*, *supra*, note 15; "An

Bentham and Posner offer different monistic theories of harm, which define harm in terms of a single value (such as pain or inefficiency). While monistic versions of consequentialism may, in some situations, lead us to different conclusions,[18] they all share a common approach to criminal law: they evaluate the doctrines and principles of the criminal law by weighing the costs of imposing criminal liability in accordance with them (whether these costs are defined in terms of efficiency, utility, or some other form of social welfare) against the harm prevented (through the reduction in the incidence of crime) as a result of their implementation.

The prevention of harm justifies both the substantive offences of the criminal law and the doctrines and principles which govern the imposition of criminal liability and punishment. For instance, according to Bentham, punishment is painful and therefore ought not be inflicted in any of these four circumstances: (i) where, on balance, the conduct in question causes no harm (when the pleasure derived from the conduct outweighs the pain that it causes); (ii) where punishment would be ineffective since the offender would not have been deterred; (iii) where (although the conduct in question is, on balance, harmful) the social cost of imposing punishment is too high relative to the benefit that would be

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Economic Theory of Criminal Law," *supra*, note 15. As we shall see later on, the normative branch of economic analysis of law is not accepted by all economic legal theorists as an appropriate part of their approach.

[18]Posner, *Economic Analysis of Law*, *supra*, note 15 at 13.

obtained by the punishment, or where non-punitive measures would be more effective or less costly;[19] or (iv) where the conduct could have been prevented without the imposition of criminal penalties.[20]

Apart from the second category (which I return to below, when I consider the role of intent on the consequentialist account), the remaining three circumstances described by Bentham impose utilitarian constraints on the substantive content of the criminal law. Bentham's theory implies, for instance, that conduct that is socially beneficial should not be criminalized. Thus, he explains that there is no justification for imposing punishment where consent has freely been given,[21] where the harm caused is outweighed by other beneficial effects of the conduct (as when precautions must be taken to prevent an "instant calamity"), and where the harm caused can and will be adequately compensated.[22] Moreover, even when, on balance, harm has been caused by the conduct, punishment should still not be imposed when the cost of its imposition both to the offender and the society at large are too great or when the conduct could be prevented without resort to

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[19]Thus, where the conduct in question would be more efficiently regulated by social stigma, mores, and other forms of non-penal social pressure, state-imposed penal sanctions should not be applied.

[20]Bentham, *Principles*, *supra*, note 14 at 171-77.

[21]*Ibid.*, at 171. This category includes situations "in which the act was such as might, on some occasions, be mischievous or disagreeable, but the person whose interest it concerns gave his *consent* to the performance of it" (at 171).

penal sanctions. In all of these situations, Bentham disapproves of the imposition of criminal penalties where the social consequences of the conduct are in fact beneficial, or where the imposition of punishment would be too costly. Essentially, for Bentham, the standard against which a proposed criminal offence is measured is the effect on the aggregate welfare of the society.[23] What needs to be emphasized here is that in defining the substantive offences of the criminal law along utilitarian lines, the prevention of harm should be understood as the prevention of harm *on balance*, such that the harm that the criminal law seeks to prevent is weighed against the harm that the punishment imposes.

(2) Harmful conduct is prevented through a system of deterrence.

While the first premise sets out the goal of the criminal law, the second premise establishes the means by which the goal of prevention is achieved: it is the *threat* that punishment will be imposed that creates an incentive on the part of the individual to refrain from engaging in the harmful conduct. The system of punishment is therefore designed to appeal to the individual's instrumental rationality; the level of punishment is such that, in weighing the

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[22]Bentham, *Principles*, *supra*, note 14 at 171-72.

[23]Other utilitarians have used utilitarianism as a "critical principle" against which to measure the content of the criminal law. See, for instance, H.L.A. Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) and, in particular, his discussion of utilitarianism as a principle of critical morality, at 22-23.

benefits of the conduct against the penal consequences, the instrumentally rational agent will see the benefit of refraining from the harmful conduct.

Consider, for instance, Posner's theory of tort law and, in particular, his theory of negligence. Posner's theory of negligence is a theory of incentives.[24] For Posner, the main purpose of the law of negligence is to encourage efficient behaviour. The economic concept of efficiency is often explained in terms of the "Hand formula."[25] According to the Hand formula, a particular course of conduct is inefficient if the cost of avoidance or the burden of taking adequate precautions (B) is less than the expected loss (PL) should the precautions not be taken (and the precautions are not in fact taken). The expected loss is expressed as a function of the probability that the risk will materialize (P) multiplied by the amount of the loss (L). A finding of negligence, together with damages in the amount of the loss incurred (or slightly more to create an incentive), is appropriate only when the cost of avoidance is less than the expected loss, or when $B < PL$.

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[24]See also Robert Cooter, *Prices and Sanctions* (1984), 84 *Columbia Law Review* 1523.

[25]This formula was first articulated by Mr. Justice Learned Hand in United States v. *Carroll Towing Co.*, 159 F.2d 169 (2d Cir. Ct. of Appeals 1947). See also Allen M. Linden, *Canadian Tort Law* (5th ed.) (Toronto and Vancouver: Butterworths, 1993).

The following example (borrowed from Posner's discussion of tort law[26]) will help to illustrate the role of the Hand formula in Posner's theory of negligence. Suppose that the cheapest way to prevent the loss of my pinky finger in an automobile accident is for the other driver to drive more slowly. Now assume that the cost to the other driver of reducing his speed (*B*, the cost of avoidance) is $8 and the expected accident cost (*PL*) is $10 (an accident probability of .001 x the value of my pinky finger, $10,000). On these facts, it would be efficient for the other driver to slow down. The law of negligence creates an incentive for the other driver to slow down by holding him liable for the $10,000 loss (or slightly more) in the event of an accident. Since the expected legal judgment cost is $10 (ignoring legal and other expenses), the driver will be induced[27] to invest $8 (by slowing down) to reduce the expected judgment cost to zero. If, however, the accident-avoidance cost was $12 and the expected accident cost was $10, the law would not impose liability in the event of an accident since the result would be inefficient. The risk of the loss would be borne by the plaintiff.[28]

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[26]Posner, *Economic Analysis of Law*, *supra*, note 15 at 163-64.

[27]The law and economics approach assumes that individuals are rational maximizers of their self-interests and justifies this assumption by reference to its predictive power: see Posner, *Economic Analysis of Law*, *supra*, note 15 at 2, 17.

[28]Shifting the burden of the loss to the plaintiff is efficient when the probability of the loss is remote. Posner refers us to one case, *Blyth* v. *Birmingham Water Works* (1856), 156 E.R. 1047, 11 Exch. 781, in which a water company was found not to be negligent for

Posner explains how doctrines of tort law, such as the reasonable person standard and the doctrine of contributory negligence, all serve the goal of efficiency by shifting the burden of the loss to the party who can most efficiently prevent it. For our present purposes, we need not concern ourselves with the details of these arguments. The crucial point is that, for Posner, the goal of tort law is to promote socially efficient behaviour. What distinguishes criminal law from tort law is not this goal, but rather the means that it uses to achieve this result.[29]

Posner's theory therefore adopts the consequentialist premise that the purpose of criminal law is to prevent harm,[30] although for Posner, the harm to be avoided is understood in terms of economic efficiency. Nevertheless, his approach is consistent with Bentham and other consequentialists who regard the prevention of harm as the fundamental objective of the criminal law, however harm might be defined. Now the question becomes this: If tort law already seeks to deter inefficient behaviour, why is criminal liability necessary? The

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failing to bury its water pipes deep enough to prevent them from bursting as the result of a frost, causing damage to the plaintiff's property. The court based its decision on the fact that the frost had been of unprecedented severity (*P* was small). Posner explains that the "damage was not so great as to make the expected cost of the accident greater than the cost of prevention, which would have involved a heavy expense in burying the pipes deeper" Posner, *Economic Analysis of Law*, at 166). An award of damages to the plaintiff in this case would have induced other public works companies to spend *unnecessarily* on burying their pipes deeper even though the risk of harm is already small. For Posner, the goal of efficiency was served in this case by shifting the loss to the plaintiff.

[29] I examine the distinction between civil and criminal negligence in Chapter Six.

main problem (as Posner see it) is that in most situations involving the intentional infliction of harm, optimal damages in tort law would exceed a tortfeasor's ability to pay.[31]

This is so for three reasons. First, in crimes causing death or a substantial risk of death, the optimal damages would be astronomical since a "normal person will demand an extremely large amount of money to assume a substantial risk of immediate death–an infinite amount, if the probability is one."[32] Second, the probability of harm is greater when the conduct is deliberate than when it is accidental.[33] Since the optimal level of damages is a function of the expected loss, the optimal level of damages is higher. A third, related problem is that of concealment. Most accidents, being the by-products of otherwise legal activity, take place in public; however, the intentional infliction of harm is often concealed so as to avoid detection. The difficulties of detection caused by concealment can be factored into the optimal damage award by making damages inversely proportional to the probability of the person being caught and made to pay for the loss.[34] But this increase in

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[30]See discussion *supra*, page 38*ff*.

[31]Posner, *Economic Analysis of Law*, *supra*, note 15 at 221-22.

[32]*Ibid.*, at 221.

[33]However, Posner observes that it is possible to deter some forms of intentional, inefficient conduct without resort to criminal law; thus, tort law recognizes a distinct class of "intentional torts," which includes trespass, assault, simple battery, fraud, and conversion: *Economic Analysis of Law* (third edition, 1986), at 191-95.

[34]Posner uses the following formula to express the relation: $D=L/p$, where D is the optimal damage award, L is the harm caused, and p is the probability of being caught and

the optimal damages only exacerbates the problem of solvency.[35] Criminal law is necessary to supplement tort law so as to maintain the deterrent impact of law. In Benthamite terms, punishment is necessary since the conduct cannot be deterred without resort to penal sanctions.

For many consequentialists, including Bentham and Posner, the common objective of tort law and criminal law is to prevent dangerous or harmful conduct through a system of deterrence. The difference between the two systems is the form that the deterrence takes: tort law uses monetary penalties (damages) to deter, while criminal law also resorts to imprisonment (and, perhaps, other physical forms of punishment such as capital punishment, deportation, hard labour, and the like). The implication of this emphasis on deterrence, however, is that the concept of subjective intent is relegated to a subordinate role in the consequentialist framework.

(3) The subjective intent to cause harm is important only instrumentally, to identify those individuals or classes of individuals for whom deterrence will be effective.

Many consequentialists reject the idea that subjective intent is a necessary precondition to a finding of criminal liability. Consider the second of the four circumstances, mentioned by Bentham, in which punishment should not be imposed: where punishment is ineffective

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made to pay for the loss (at 221).

because the offender would not be deterred.[36] For Bentham, the requirement of a subjective mental element is justified instrumentally because it helps to identify the class of individuals for whom punishment is ineffective.

As Hart explains in his exposition of legal responsibility, there are, implicit in Bentham's theory, two situations in which deterrence may be ineffective: first, where the threat of punishment could not prevent the person from performing any action of the sort (as in the case of insanity or infancy); second, when punishment has no deterrent effect because of the offender's lack of knowledge or control.[37] Thus, an activity that ought generally to invite criminal sanction in light of the harm that it causes (taking into account the cost of punishing it) might not warrant punishment in the particular circumstances if, for reasons specific to the offender, the deterrent effect would be minimal.[38] This argument, for Bentham, explains the necessity of excuses. The main issue in deciding whether to impose

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[35]Posner, *Economic Analysis of Law*, *supra*, note 15 at 222.

[36]Bentham, *Principles*, *supra*, note 14, at 171-75. Bentham refers to these situations as "cases in which punishment must be inefficacious" (at 172).

[37]H.L.A. Hart, *Punishment and Responsibility*, *supra*, note 4 at 41.

[38]See Richard B. Brandt, "A Utilitarian Theory of Excuses" in *Morality, Utilitarianism, and Rights* (Cambridge University Press, 1992), 215-234 at 220.

criminal penalties, then, is whether the person belongs a class of persons whose exemption from punishment would not weaken the deterrent effect.[39]

Consequentialists can still require subjective intent as precondition of criminal liability, on the argument that a policy of punishing only those who act with subjective intent would have the most beneficial consequences for all. Such a position would, however, preclude punishing negligent conduct, and since I am attempting (for the sake of argument) to construct the strongest consequentialist argument in support of criminal liability for negligence, I shall assume that subjective intent, while important on the consequentialist account, is not necessary.

Consider Posner's discussion of the role of intent in the criminal law. Like Bentham, Posner believes that the doctrine of *mens rea* can be explained by reference to its consequences. The concept of intent serves three economic functions: first, it identifies what he calls "pure coercive transfers of wealth" (a transfer that "is not an incident of a productive act," in contrast with a voluntary transfer in the market); second, it estimates the

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[39]Hart, "Legal Responsibility and Excuses," in *Punishment and Responsibility*, *supra*, note 4.

probability of apprehension and conviction; and third, it "determines whether the criminal sanction will be an effective (cost-justified) means of controlling undesirable conduct."[40]

The first function of intent is to distinguish pure coercive transfers of wealth from accidents that exactly resemble them (such as mistakenly taking an umbrella and stealing it). The reason we need to distinguish the accidental case from the intentional one is to avoid over-deterrence. Conduct is over-deterred if the law encourages individuals to take unnecessary precautions; that is, if the law encourages individuals to take precautions when the burden of taking those precautions (the cost of avoidance) is greater than the expected loss.

While Posner acknowledges that it is easier (and therefore less costly) not to have to prove intention, the failure to distinguish between "pure coercive transfers" and the accidents they resemble results in "excessive criminal punishment, leading to all sorts of serious social costs from avoidance of lawful activity–checking umbrellas in a restaurant's cloakroom, for example."[41] Posner admits exceptions, however, where the activity is one that we do not mind discouraging (as with the felony-murder rule[42]) or where we want to encourage cautious behaviour (as with statutory rape). As such, we "introduce a degree of

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[40]Posner, "An Economic Theory of the Criminal Law," *supra*, note 15 at 1221.

[41]*Ibid.*

strict liability into criminal law as into tort law when a change in activity level is an efficient method of avoiding a social cost."[43] So even though overdeterrence can generally be avoided by punishing only "pure coercive transfers," Posner still believes (as an exception to his argument in support of an intent requirement) that strict liability is an acceptable means by which to influence socially undesirable behaviour in certain limited circumstances.[44]

The second function of intent identified by Posner also relates to the Hand formula. In instances of planning and deliberation, the probability of apprehension and conviction is minimized since "one who plans a murder in advance will also take steps to avoid detection afterward."[45] Moreover, one who plans a murder is more likely to succeed than one who acts in the heat of passion. Harsher penalties will deter premeditated conduct, but are less likely to deter impulsive crimes. This relates to the third function of intent in

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[42]See Chapter One.

[43]Posner, "An Economic Theory of the Criminal Law," *supra*, note 15 at 1222. As Posner explains in *Economic Analysis of Law*, there are two ways of avoiding an automobile accident: driving more slowly and driving less. The imposition of negligence is said to induce a change in care level, by creating an incentive for those involved in the activity to exercise more care (driving more slowly, in Posner's example). In contrast, strict liability is said to lead to changes in the activity-level of a particular class of activities, reducing the level of participation in the activity generally (driving less). See *Economic Analysis of Law*, *supra*, note 15 at 173, 175-78.

[44]The next section examines Posner's argument in support of this exception.

[45]"An Economic Theory of the Criminal Law," *supra*, note 15 at 1223.

Posner's theory (also reminiscent of Bentham), namely, the effectiveness of the criminal sanction in controlling the conduct. Impulsive crimes are more difficult to deter and, hence, the efficacy of penal sanctions is substantially lower than in the case of deliberate crimes.

Posner comes to the same general conclusion as Bentham with respect to intent: the concept of intent in the criminal law serves the instrumental goal of ensuring effective and efficient deterrence. These general considerations relating to intent, together with the "steering clear" costs (the costs associated with avoiding criminal conduct), lead Posner to the conclusion that, as a general rule, unintentional conduct should not be criminalized. Posner explains that the punishment of accidental conduct would discourage legitimate activities because individuals would avoid taking permissible (and even reasonable or desirable) risks to avoid being negligent:

> To be absolutely certain of never hitting another car as a result of negligence, one must forego driving altogether. Since criminal sanctions are severe, to attach them to accidental conduct would create incentives to avoid what may be a very broad zone of perfectly lawful activity in order to avoid the risk of criminal punishment.[46]

However, Posner does not regard this general rule precluding criminal liability for accidents as absolute and the exceptions he admits include an exception for criminal negligence.

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[46] *Ibid.*, at 1226.

(4) The Empirical Premise: Negligent conduct can be deterred.

The first three premises constitute the basic consequentialist position with respect to the necessary preconditions for imposing criminal liability. Essentially, the consequentialists' position is that criminal liability should be imposed only when civil sanctions are unable to deter harmful conduct, provided that the negative consequences of imposing penal sanctions are less than the benefits obtained through deterrence. A consequentialist faced with the prospect of imposing criminal liability for negligence must therefore consider the threshold question, whether it is possible to deter negligent conduct in the first place.

Consequentialists are divided on the answer to this question. Bentham, for instance, does not consider negligence to be deterrable. His position is that only those who act with subjective intent (or recklessness) are capable of being deterred since only they are able to take into account the threat of punishment. Negligent conduct, he argues, cannot be deterred since it stems from inadvertence, and therefore it should not be subject to punishment.[47]

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[47]Bentham, *Principles*, *supra*, note 14 at 174. Bentham argues, for instance, that punishment ought not to be imposed where, although the actor "may know that he is about to engage in the *act* itself, yet, from not knowing all the material circumstances attending it, he knows not of the *tendency* it has to produce that mischief, in contemplation of which it has been made penal in most instances."

Other consequentialists disagree with Bentham; indeed, the prevalent consequentialist view is to the contrary. As Glanville Williams observes in his textbook on criminal law, "[t]he reason for punishing negligence is the utilitarian one that we hope thereby to improve people's standards of behaviour."[48] Similarly, Barbara Wootton, in her consequentialist theory of criminal law, argues that "the time has come for the concept of legal guilt to be dissolved into a wide concept of responsibility or at least accountability, in which there is room for negligence as well as purposeful wrongdoing."[49] And Oliver Wendell Holmes insists that in those areas of law that are concerned primarily with establishing standards of conduct (tort law and criminal law), it is "natural" that the tests of liability are "external, and independent of the degree of evil in the particular person's motives or intentions."[50]

I do not intend to engage in this debate among consequentialists. If Bentham is right that negligence cannot be deterred, then a consequentialist justification of criminal liability for negligence along the lines that I have been exploring would be undermined. However, since I want to put the consequentialist account in its most favourable light, I am prepared to grant that Bentham is wrong and that negligence can, as an empirical fact, be deterred.

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[48]Glanville Williams, *Textbook of Criminal Law* (second edition) (London: Stevens & Sons, 1983), at 91.

[49]*Crime and the Criminal Law*, *supra*, note 10 at 25, 56.

[50]*The Common Law*, *supra*, note 8 at 50.

What is of greater significance for our purposes are the normative conclusions that follow from this empirical premise.

(5) Conclusion: When civil sanctions are inadequate, criminal sanctions are justified to deter negligent conduct

The consequentialist's argument leads to the conclusion that, provided that the harm prevented through deterrence is greater than the harm caused by the criminal sanctions, criminal liability for negligent conduct is justified. Once again, Posner provides us with an example of this line of reasoning. For Posner, the emphasis in the criminal law on subjective intent makes sense economically, but it is not an absolute rule. It is justified because it is efficient and efficiency is the final justificatory standard against which the doctrines of the criminal law are measured. This means that if a certain doctrine of criminal liability were contrary to the general rule requiring subjective intent, but nevertheless could be justified in terms of economic efficiency, such doctrine would be a legitimate exception to the general rule. Such is the case with offences of criminal negligence.

Posner argues, first, that in terms of the Hand formula, the case for criminal liability is stronger where the cost of avoidance (B) is low and the expected loss (PL) is high. Since the social costs of criminal sanctions are high, most accidental injuries are best left to the tort system, particularly when the gravity of the loss (L) is small. But when the risk created

by the conduct is substantial and the cost of avoidance is minimal, criminal liability for negligent conduct may be justified. Such is the case where extremely careless driving creates a risk of death. Posner concludes that reckless or grossly negligent conduct "still fits the basic model for criminal liability, and one is therefore not surprised to find that reckless and grossly negligent life-endangering conduct is criminal."[51]

Second, Posner insists that even some strict liability offences, such as driving over the speed limit, are acceptable. In these situations where the offence "is punished by a small and nonstigmatizing fine," the fine is really the "practical equivalent" of tort damages that are paid to the state.[52] It makes practical sense to supplement tort law with this sort of sanction since, in the case of life-endangering conduct, it is difficult to put a price on human life and, in any event, the tortfeasor would not likely have sufficient money to pay damages.[53] Thus, Posner agrees with the tendency of the law to permit strict liability in regulatory offences. But although we might concede this point, Posner's tolerance of strict

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[51]Posner, "An Economic Theory of the Criminal Law," *supra*, note 15 at 1226. This line of reasoning might also justify criminalizing other sorts of careless activity that creates a risk of harm to a person's bodily integrity (although Posner himself does not expressly extend the argument this far).

[52]*Ibid.*, at 1227.

[53]*Ibid.*

liability is not limited to regulatory offences; as we have seen,[54] he is equally willing to tolerate strict liability in more serious offences, such as statutory rape and felony-murder.[55]

The greater the social cost of the harm, the more the consequentialist calculus favours the imposition of criminal liability and the more acceptable departures from the subjectivist doctrines of the criminal law become. Posner's economic theory, for instance, leads us to the view that offences of both criminal negligence and strict liability can be justified instrumentally on a theory of deterrence. But this conclusion is not unique to Posner's theory; rather, it is consistent with any theory that accepts that negligent conduct can be deterred and regards the subjectivist doctrines of the criminal law as defeasible in the face of sufficiently compelling consequentialist factors.

B. Alternatives to the Consequentialist Approach

From the premises of the traditional consequentialist argument, it follows that negligence is, in principle, properly subject to criminal liability. But for most deontologists, and at least some consequentialists, the propositions advanced in support of this argument may

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[54]*Supra*, page 53.

[55]Posner addresses a third exception to the general rule that liability should not be imposed for unintentional conduct: criminal liability of corporations ("An Economic Theory of the Criminal Law," *supra*, note 15 at 1227-29).

well not be true. In this part of the chapter, I consider some of the extrinsic arguments that might be advanced against the traditional consequentialist approach to criminal liability and, in particular, against its understanding of the role of subjective intent and culpability in the assigning of criminal liability. If these arguments are mistaken, we are left with a consequentialist justification of criminal liability for negligent conduct, which I leave for those sympathetic to this approach to refine and defend; but if the traditional consequentialist argument is insufficient, then we need to develop an alternative justification for the imposition of criminal liability for negligence – one based on the *culpability* of the offender.

I want to comment briefly on the third proposition of the consequentialist account, that the presence of a subjective intent to cause harm is important only instrumentally, to identify those individuals or classes of individuals for whom deterrence will be effective. For reasons which will become clear later in my discussion, I agree with the rejection of subjective intent as a necessary condition of criminal liability. However, I reject it for reasons quite distinct from those advanced by the consequentialists. The rejection of subjective intent as the sole basis for criminal liability does not imply the rejection of *culpability* as an essential precondition. Nor does the rejection of the subjectivist approach as the exclusive basis for criminal liability imply a lack of concern for the moral outlook of the actor in determining questions of culpability. As we shall see later, it is precisely the

actor's moral outlook that grounds criminal liability for negligence. I refrain from elaborating now and leave the defence of this argument to subsequent chapters.[56]

The most serious concern about the traditional consequentialist account concerns the first proposition. By emphasizing the *prevention* of crime, as opposed to the *punishment* of offenders, the traditional approach rejects the significance of the person as a responsible moral being. This can be seen in its simultaneous rejection of culpability as a precondition of liability. The traditional approach seems to warrant punishment or sacrifice of the morally innocent in certain situations, if doing so would serve consequentialist goals.

Consider, for instance, Oliver Wendell Holmes's theory of criminal liability. Holmes insists that in its efforts to prevent crime, the criminal law must be "ready to sacrifice the individual so far as necessary to accomplish that purpose."[57] As such, Holmes argues that "the actual degree of personal guilt involved in any particular transgression cannot be the only element, if it is an element at all, in the liability incurred."[58] The fact that consequentialism may permit the punishing of the innocent may give us cause for concern;

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[56] See, in particular, Chapter Five, in which I defend a character-based theory of moral responsibility.

[57] Holmes, *supra*, note 8 at 49.

[58] *Ibid.*

for it seems both unfair and unjust to suggest that whatever the status of the negligent person's culpability, criminal liability might still be justified on the basis of deterrence.

Consider also the implications of the consequentialist justification of criminal offences based on negligence and strict liability. As we have seen in our discussion of Posner, the very same line of reasoning can also justify offences of strict liability, thereby ignoring the significant difference in culpability between these two modes of liability. Indeed, arguments in favour of strict liability are generally of a consequentialist nature, appealing to the supposed benefits of imposing liability.[59] This can be seen in Posner's willingness to tolerate the imposition of criminal liability for rape in cases of statutory rape and murder in cases involving felony-murder (or constructive murder) within his own broadly consequentialist theory.[60]

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[59]Wootton, *Crime and the Criminal Law*, *supra*, note 10 at 25; Richard A. Wasserstrom, "Strict Liability in the Criminal Law" 12 *Stanford Law Review* 730-45, reprinted in Herbert Morris, *Responsibility and Freedom* (Stanford: Stanford University Press, 1961), 273-81. See also "Strict Liability: An Unorthodox View" in Sanford H. Kadish, *The Encyclopedia of Crime and Justice* (New York: Free Press, 1983), 1512-18 (reprinted in D. Adams, *Philosophical Problems in the Law*, 2nd ed. (Belmont: Wadsworth Publishing Company, 1996), 370-76), where Mark Kelman argues that if the accused's conduct is regarded in a broader time-frame (rather than at the precise moment of the act), then the accused will no longer be seen as powerless to prevent the criminal conduct and will thus be seen as culpable. This argument supports the view that even strict liability can be deterred.

[60]*Supra*, page 53.

In these two types of cases, the accused is held liable for the principal offence of rape or murder even though he is guilty only of some lesser offence (if any at all). For instance, in cases of statutory rape, a man can be convicted even though he honestly believed (on reasonable grounds) that the young woman was over the statutory minimum age for consenting to sexual relations. Similarly, in felony-murder cases, the accused can be convicted of murder for merely participating in a felony (such as a robbery) in which a death results, even if she took reasonable steps to prevent harm (such as using unloaded weapons). For Posner (and for consequentialists generally), the imposition of liability in these cases is justified because the offences are serious enough to warrant a harsh response and the deterrent impact[61] of the rule outweighs its detrimental effects.[62]

From a deontological perspective, strict liability ignores the degree of culpability of the accused and the proportionality or "fit" between the punishment and the crime.[63] But even on a broadly consequentialist theory, there is reason to think that the criminal liability of

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[61]These strict rules might have other salutary effects, from a consequentialist perspective. For instance, as George P. Fletcher observes, the felony-murder rule might also "bludgeon defendants into pleading to lesser charges": "Reflections on Felony-Murder" (1980), 12 *Southwestern Law Review* 413-429, as reprinted in Adams, *supra*, note 59 at 366.

[62]Yet other consequentialists argue that strict liability is justified because "it is burdensome to inquire into the defendant's state of mind." See Adams, *supra*, note 59 at 360.

[63]Fletcher, "Reflections on Felony-Murder," *supra*, note 59.

the accused should depend on some form of personal moral fault. Now it might be replied in defence of strict liability that at least in cases involving felony-murder, the accused *is* involved in culpable conduct (the felony). It might be argued, for instance, that by participating in the felony, the accused *waives* the right to proportional punishment or, in engaging in such conduct, the accused is "morally tainted."[64] Now the argument sounds more deontological. But even if we were to grant this point as an argument in favour of strict liability, the punishment is still disproportionate to the crime; there remains, for deontologists, a significant difference in culpability between someone who takes all reasonable care to avoid causing harm and one who intentionally, or even inadvertently, causes the same harm.

Similar concerns arise when we consider the optimal level of punishment for negligent conduct. As we have seen, the optimal level of deterrence is a function of the probability of apprehension and conviction and the magnitude of the loss. And Posner explains that in the case of accidental conduct, the probability of apprehension is higher since there is no problem of concealment. However, negligent conduct may well be more difficult to deter than intentional conduct precisely because it is unintentional, suggesting that the optimal level of deterrence may well have to be higher than for intentional conduct, particularly when the level of harm is great. That such a conclusion is consistent with Posner's theory

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[64] *Ibid.*, at 368.

is implicit in his discussion of the optimal level of punishment for impulsive crimes. The fact that impulsive crimes are more difficult to deter might suggest that punishment is inefficacious and society should "buy less of it."[65] But Posner explains that the opposite conclusion may be warranted:

> [T]he fact that a given increment of punishment will deter the impulsive less than the deliberate criminal could actually point to heavier punishment for the former. Suppose that a 20-year sentence is enough to deter virtually all murders for hire, but to achieve the same deterrence of impulsive murderers would require 30 years. The additional sentence is costly, but if the cost is less than the social benefit of the additional deterrence produced it may still be a good investment.[66]

On the traditional consequentialist approach, a parallel argument could be made concerning the deterrence of negligent conduct. Stiffer penalties may well alert people to dangerous situations and encourage them to exercise greater caution, thereby resulting in fewer accidents. While severe penalties might create a chilling effect on activities that might otherwise be legitimate (that is, they may cause a reduction in the activity level), this cost may be offset by the lives that are saved. Indeed, this line of reasoning is used by Posner to justify strict liability offences such as statutory rape and felony-murder. These offences are justified because they encourage cautious behaviour. For similar reasons, these offences

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[65]Posner, *Economic Analysis of Law*, *supra*, note 15 at 237.

[66]*Ibid.*, at 238.

should be punished even more severely than would premeditated murder or deliberate sexual assault.

Precisely because the subjective mental element is valued only instrumentally, it can be dispensed with where expedient. The traditional consequentialist approach to criminal liability is thus prepared to subordinate the requirement of subjective intent to further the regulation of dangerous social behaviour. Subjective intent can no longer serve as a limiting principle to prevent concerns about social costs from justifying broad incursions of the criminal law power. Accordingly, there is nothing inherently wrong with punishing negligence more severely than intentional conduct.

To the extent that consequentialist accounts are able to justify criminal liability for negligence, they are faced with two problems: first, they must ignore the difference in culpability between cases of negligence and cases of strict liability and thus regard both as potential bases for imposing criminal liability; second, they are committed to the view that negligent conduct should sometimes be punished more severely than deliberate conduct to preserve its deterrent impact. Common to these criticisms are assumptions about the significance of culpability and proportionality to the imposition of criminal liability. These concerns are not unique to the deontological perspective. Indeed, the next chapter considers how, even within a consequentialist framework, culpability can be still be regarded as a necessary condition of criminal liability.

The possibility that a consequentialist theory of criminal liability permits the punishment of the morally innocent in the name of deterrence casts a pall over the consequentialist account. It seems to require that we treat the negligent wrongdoer as a dangerous object[67] rather than as a person. Of course, some consequentialists, including Holmes, regard this implication of their theory as a necessary cost of preventing harm. Posner seems to agree. Indeed, few would deny that the prevention of harm is a laudable social objective. But equally few would deny that a theory that at once respects the actor as a person *and* values the prevention of harmful conduct would be even more attractive than one that subordinates the individual to the social good. The next chapter considers Hart's attempt to provide precisely such an account.

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[67]Holmes, "The Path of the Law" (1897), 10 *Harvard Law Review* 457 at 470-71. See also, Posner, *The Problems of Jurisprudence*, *supra*, note 15 at 168.

CHAPTER THREE

HART'S THEORY OF CRIMINAL RESPONSIBILITY

Not all consequentialists are prepared to allow for the punishment of the morally innocent. Some acknowledge the importance of culpability and have attempted to build into their theories of criminal law constraints on the *direct* pursuit of consequentialist good, however defined. The reason this strategy can still be accepted by consequentialists is that its ultimate goal is to promote the overarching consequentialist aim (whether utility, efficiency, welfare, or some other consequentialist value). These theories are premised on the assumption that the best way to maximize the chosen consequentialist value is not necessarily to seek that value on each occasion of choice.[1] Rather, they employ an indirect strategy for promoting (or maximizing) welfare, one that employs at least some non-consequentialist *decision-making* criteria in the pursuit of consequentialist goals. Rule-utilitarianism, which insists that utility is best promoted by following general rules instead of making case-specific determinations about the aggregate welfare, is a well-known example of an indirect decision-making consequentialist strategy. On any such theory, a rule (which may well be framed as a "right") is respected and followed at the decision-making level, but the maximization of socially beneficial consequences remains the ultimate goal.

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[1]L.W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), at 180.

This indirect strategy, which has been employed to rehabilitate utilitarianism and defend it from the standard objections of its critics, may also be used to defend the place of subjective fault within a consequentialist account of criminal law. H.L.A. Hart's theory of criminal responsibility illustrates this sort of approach. Hart proposes a consequentialist account that accepts culpability as a necessary condition of criminal responsibility *and* holds that criminal negligence is justified. Hart's theory of criminal negligence, in particular, is significant because its objectives are, in some respects, similar those of the theory I propose: to *justify* criminal liability for negligence within a general theory of criminal liability that regards something like culpability[2] as an essential precondition.

Notwithstanding the common objectives, our accounts differ in that Hart's theory depends on a choice-based theory of responsibility, while my theory defends a character-based account of responsibility. In contrast with the traditional consequentialist approach to criminal liability, Hart insists that "out of considerations of fairness or justice to individuals we should restrict even punishment designed as 'preventative' to those who had a normal capacity and a fair opportunity to obey." [3] As will be explained at much

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[2] I say "somthing like culpability" because Hart does not actually use culpability as a substantive concept in this theory. As I explain in more detail below, Hart relies on a libertarian argument, rather than a substantive theory of responsibility in support of his "culpability" requirement.

[3]H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), at 201. Also cited in Michael S. Moore, "Choice,

greater length in this and subsequent chapters, a choice-based theory of responsibility holds that individuals are responsible for their actions when they could have chosen to do otherwise, while the character-based theory I propose insists that individuals are responsible for their moral outlook to the extent that it influences their inadvertent conduct. Before we consider the choice theory of responsibility, however, we need first to consider the three components of Hart's theory that bear on his justification of criminal liability for negligence: (1) his account of the general justifying aim of the criminal law; (2) his general theory of criminal liability; and (3) his justification of criminal liability for negligence.

A. The General Justifying Aim

According to Hart, there are several distinct theoretical questions about the criminal law. For instance, in the context of punishment, it is important to distinguish conceptually among the following types of questions: questions that concern the general justifying aim of the institution (questions of why and in what circumstances it is a good institution to maintain), and questions that concern distribution, which comprises the issues of liability (the conditions under which individuals become liable to punishment) and amount (how

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Character, and Excuse" in *Crime, Culpability, and Remedy*, E.F. Frankel et al., eds. (Oxford: Basil Blackwell, 1990), 29-58 at 33.

much punishment is required).[4] Extending this approach to criminal law generally, there is an important conceptual distinction between the overarching goal of the criminal law and conditions according to which criminal liability is imposed. On Hart's theory, it is entirely consistent to hold that the ultimate goal or "general justifying aim"[5] of the criminal law is the utilitarian aim of protecting society from harm while at the same time maintaining that punishment should be applied only to those who have chosen to disobey the law.[6]

B. Criminal Liability and Excuse

Even though the general justifying aim of punishment is for Hart a utilitarian (as opposed to a deontological or retributivist) one, on the question of liability, "it is still perfectly intelligible that we should defer to principles of justice or fairness to individuals, and not punish those who lack the capacity or opportunity to obey."[7] Such individuals are *excused* from criminal liability; excusing conditions need not "conflict with the social utility of the law's threats."[8] Hart therefore proposes a theory which regards the individual's ability or capacity to comply as an essential precondition of criminal liability. He therefore rejects

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[4] *Ibid.*, at 8-13.

[5] *Ibid.*, at 8-11.

[6] *Ibid.*, at 48-49, 81.

[7] *Ibid.*, at 244. See also 77-83.

[8] *Ibid.*, at 49, 152.

the traditional consequentialist proposition, described in the last chapter, that dismisses the significance to determinations of criminal liability of the actor's capacity to comply with the standard. Instead, his theory of the general justifying aim allows him to argue, within a broadly consequentialist account, that the criminal law's reflection of the "fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it,"[9] is justified on moral grounds.

In support of this theory of criminal liability, Hart offers the following arguments. First of all, he explains that excusing conditions are necessary to ensure that the law is predictable, and that individuals should be able to plan their lives without indiscriminate interference by the state. Hart argues that in providing for excusing conditions, the criminal law thereby recognizes the significance of individual liberty and attempts to "maximize the individual's power at any time to predict the likelihood that the sanctions of the criminal law will be applied to him."[10] Thus, as a matter of political (as opposed to moral) philosophy, Hart seems more concerned with *negative* liberty or the absence of external impediments to action (which is often associated with consequentialism), rather than with *positive* liberty or the power of self-governance or autonomy (which is more closely linked to the

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[9] *Ibid.*, at 49, 174.

[10] *Ibid.*, at 47.

deontological approach).[11] Thus, in contrast with Bentham's approach, which Hart criticizes for regarding the criminal law "simply as a system of stimuli goading the individual by threats into conformity," [12] Hart argues that the criminal law guides "individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them with choice." [13]

Hart's argument from negative liberty is closely linked to his view that, as a matter of moral theory, choice is an essential component of moral responsibility. From the perspective of moral philosophy, punishment is justified only if the actor could have done otherwise:

> One necessary condition of the just application of a punishment is normally expressed by saying that an agent 'could have helped' doing what he did, and hence the need to inquire into the 'inner facts' is dictated not by the moral principle that only the doing of an *immoral* act may be legally punished, but by the moral principle that no one should be punished who could not help doing what he did. This is a necessary condition (unless strict liability is admitted) for the moral propriety of legal punishment and no

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[11]The terms "positive liberty" and "negative liberty" are generally attributed to Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118-72.

[12]Hart, *Punishment and Responsibility*, *supra*, note 3 at 44.

[13]*Ibid.*

> doubt also for moral censure; in this respect law and morals are similar.[14]

The criminal law therefore introduces "the individual's choice as one of the operative factors determining whether or not . . . sanctions shall be applied to him."[15] The individual is regarded by the criminal law as a *choosing being* rather than as a dangerous object to be controlled.[16] The theory of responsibility that grounds this theory of criminal liability is a choice theory of responsibility, since liability is premised on the ability of the actor to have chosen to do otherwise. As will become clear in this and the next two chapters, this underlying theory of responsibility (with all of its implications for criminal liability) represents the most significant difference between Hart's justification of criminal liability for negligence and my own.

C. Hart's Justification of Criminal Liability for Negligence

Hart's theory is also important for our purposes because he argues that criminal liability for negligence is justified. In two different essays, Hart offers two distinct justifications for this view. First, in his essay, "Intention and Punishment," Hart argues that criminal liability

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[14] *Ibid.*, at 39-40.

[15] *Ibid.*, at 47.

[16] *Ibid.*, at 49.

for negligence exemplifies the rule that intention "is generally, though not always sufficient and generally necessary for criminal liability."[17] In this essay, Hart argues that negligent conduct may be subject to criminal sanctions for reasons of deterrence. Although the imposition of criminal liability for negligence does not enter into a person's deliberations "at the moment when he considers whether or not to commit the crime," [18] it nevertheless causes him to think the next time. This is a consequentialist justification of the sort we considered earlier: criminal liability for negligence is justified for reasons of deterrence.

At the same time, however, in arriving at this consequentialist conclusion, Hart criticizes those writers who hold what he calls a "rationalistic picture" of criminal deliberations, according to which punishment acts as "a *guide* to deliberation on the assumption that he would be tempted to commit a crime and he would deliberate." [19] On the contrary, Hart argues that the "threat of punishment is something that 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."[20] The crucial point here, and the one that I shall take up later as I develop my version of the

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[17] *Ibid.*, at 132.

[18] *Ibid.*, at 133.

[19] *Ibid.*, at 133.

character theory of responsibility, is that a person's conduct depends on more than just his or her deliberations at the moment of decision.

Hart's second justification for imposing criminal liability for negligence, which is found in his essay "Negligence, *Mens Rea*, and Criminal Responsibility,"[21] is much closer both in argument and in spirit to his general theory of criminal liability. Hart's main objective in this essay is to refute the argument that inadvertent negligence should not be criminalized because, *inter alia*, to punish in the absence of "foresight of the consequences" would be "to revert to a system of 'absolute' or strict liability in which no 'subjective element' is required."[22] Hart has several responses to what might be called the "subjectivist" argument against criminal liability for negligence. The most significant of these is his rejection of the argument that it is repugnant to punish someone whose mind was "a mere blank" since to do so would be to eliminate the doctrine of *mens rea*. To this concern, Hart responds:

> [W]e must not be stampeded into the belief that we are faced with this dilemma. For there are not just two alternatives: we can perfectly well both deny that a man may be criminally responsible for "mere inadvertence" and also deny that he is only responsible if he has an idea in his mind of harm to someone. Thus, to take a familiar example, a workman who is mending a roof in a busy town starts to throw down into

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[20] *Ibid.*, at 134.

[21] *Ibid.*, at 136-57.

[22] *Ibid.*, at 139.

> the street building materials without first bothering to take the elementary precaution of looking to see that no one is passing at the time. We are surely not forced to choose, as Dr. Turner's argument suggests, between two alternatives: (1) Did he have the idea of harm in his mind? (2) Did he merely act in a fit of inadvertence? Why should we not say that he has been grossly negligent because he has failed to take the most elementary of the precautions that the law requires him to take in order to avoid harm to others?[23]

Hart explains that negligence and inadvertence are distinct. Our negligence in failing to consider the situation in advance *results* in inadvertence. Hart then argues that our concern should really be whether the actor had both the capacity to comply with the standard of conduct imposed by the criminal law and "a fair opportunity to exercise these capacities." Thus, unlike the utilitarian justification offered in the first essay, Hart's justification here reveals a concern about the culpability of the actor.[24]

Hart's justification of criminal liability for negligence is therefore premised, in part, on a measure of fairness to the actor; it is unfair to hold a person criminally liable in relation to a standard with which he or she is simply unable to comply. He also accepts that in situations involving a lack of capacity or opportunity to comply, the "moral protest is that it is morally wrong to punish because 'he could not have helped it' or 'he could not have

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[23] *Ibid.*, at 147.

[24] *Ibid.*, at 152.

done otherwise' or 'he had no real choice.'"[25] Hart therefore proposes the following test to determine whether criminal liability should be imposed in cases of negligence:

> (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?[26]

Hart calls the first part of this test the "invariant standard of care" and the second, the "individualised conditions of liability."[27] If the first question is answered in the negative and the second in the affirmative – that is, if the accused did not take reasonable precautions but had the capacity to do so – then criminal liability for negligence is justified. The accused is punished "for a failure to exercise control."[28]

It remains then to determine which forms of incapacity should be recognized by the criminal law (or, in terms of Hart's test, how far the conditions of liability should be "individualised"). Hart proposes that as a practical matter, the criminal law can excuse

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[25] *Ibid.*

[26] *Ibid.*, at 154.

[27] *Ibid.* Hart refrains from using the terms "objective standard" and "subjective standard" on the grounds that they "obscure the real issue" (at 153).

[28] *Ibid.*, at 153.

> only whose who suffer from gross forms of incapacity, viz. infants, or the insane, or those afflicted with recognizably inadequate powers of control over their movements, or who are clearly unable to detect, or extricate themselves, from situations in which their disability may work harm.[29]

Hart explains that excuses like infancy or mental illness are relevant only in relation to the second part of the test (the individualized conditions of liability), since otherwise we would be forced to ask such unusual questions as whether an infant took precautions that a reasonable *man* would have taken in the circumstances. Finally, Hart dismisses the determinist's objection that *every* characteristic of the individual should be taken into account, by arguing that determinism presents no *special* problem for criminal negligence since, if it were true, it would equally undermine criminal liability for intentional conduct.[30]

Hart concludes that criminal liability for negligence is justified. I acknowledge that the basic thesis of Hart's argument is essentially correct; criminal negligence is justified even on a theory which regards culpability as an essential precondition for the imposition of criminal liability. But this argument needs to be grounded in a more sophisticated understanding of moral responsibility. In the last two parts of this chapter, I first step back

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[29] *Ibid.*, at 155.

[30] *Ibid.*, at 156. In Chapter Seven I consider, at greater length, Hart's bifurcated approach to criminal negligence.

and reconsider the normative framework of Hart's theory and then explain the basis of my objections to his account.

D. The Nature of Hart's Theory

There is some question as to whether Hart's theory of criminal liability is a consequentialist theory in the first place. Nicola Lacey, for example, has argued that Hart's theory is actually a "mixed" theory.[31] In fact, given the important role of the principles of fairness and justice in his theory, one author concludes that Hart's argument "is perhaps more Kantian than utilitarian, the principle remains one stemming from the retributivist tradition."[32] Hart himself admits that, on his theory, "excusing conditions are accepted as *independent* of the efficacy of the system of threats."[33] On the other hand, Lacey argues that "arguments based on fairness, but which appeal to the values of predictability, certainty and security indeed look suspiciously utilitarian."[34] And, indeed, Hart concedes that when considerations of fairness clash with those of utility (given "enough misery"), it

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[31]Lacey, *State Punishment* (New York and London: Routledge, 1988), at 47-49.

[32]Michael D. Bayles, "Character, Purpose and Criminal Responsibility" (1982), 1 *Law & Philosophy* 5-20 at 7.

[33]Hart, *supra*, note 3 at 48 (emphasis added).

[34]Lacey, *State Punishment*, *supra*, note 31 at 48.

might be necessary to sacrifice the principle of fairness to the principle that we should protect society at any cost.[35]

It is fruitless to attempt to resolve this dispute here. What is clear is that although Hart's general approach to criminal law is utilitarian (and hence consequentialist), his approach to criminal liability reveals striking similarities with the deontological approach. In particular, Hart has serious misgivings about imposing criminal liability in the absence of "culpability" (or, in Hart's phraseology, when "excusing conditions" are present). The proposition that punishment must not be imposed in the absence of moral culpability (that is, that culpability is a necessary but not sufficient condition of punishment) has come to be known as "negative retributivism."[36] While I disagree with Hart's consequentialist reasons for embracing this proposition, I agree (for the reasons mentioned above and other reasons which will later become clear) with his rejection of any theory of criminal liability that does not accept negative retributivism among its basic propositions.[37] But the point to be gleaned from Hart's theory of criminal law is that it is possible to accept negative

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[35]*Ibid.*, at 81.

[36]See J.L. Mackie, "Retributivism: A Test Case for Ethical Objectivity" in Joel Feinberg and Hyman Gross, *Philosophy of Law* (third edition) (Belmont, California: Wadsworth Publishing, 1986), 622-29. In Mackie's words, "One who is not guilty must not be punished" (at 623).

[37]I am indebted to Professor C.L. Ten for his comments on this aspect of my argument.

retributivism, while remaining agnostic[38] on the matter of the general justifying aim of the criminal law.[39]

E. Hart's Underlying Theory of Responsibility

I have already explained why I find Hart's theory an attractive one: he justifies offences of criminal negligence on the basis of a theory that considers something like culpability – the actor's ability to comply with the standard imposed by the law – to be a necessary precondition of criminal liability. Moreover, his account implies a willingness to look beyond the moment of decision in imposing criminal liability. However, I want now to explain why I find his justification of criminal liability for negligence to be inadequate.

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[38]A similar "agnostic" approach is taken by Anthony Kenny in *Freewill and Responsibility* (London: Routledge & Kegan Paul, 1978), at 33, on the issue of determinism.

[39]Although I do not intend to rehearse them at length here, there are other consequentialist arguments in favour of negative retributivism. For instance, in addition to the general rule (or indirect) utilitarian arguments discussed earlier, consequentialists have argued that (as a matter of logic) it is impossible to "punish" the innocent (see A.M. Quinton, "On Punishment" (1954), 14 *Analysis* 1933-42, reprinted in Morris, *Freedom and Responsibility*, *supra*, note 62 at 512-17) and that as a matter of historical scholarship the "sacrifice of the innocent" was never contemplated by Bentham (F. Rosen, "Utilitarianism and the Punishment of the Innocent," conference paper presented at the International Society for Utilitarian Studies conference in New Orleans, March 1997). Indeed, as J.L. Mackie observes in "Retributivism: A Test Case for Ethical Objectivity," *supra*, note 36, negative retributivism "could occur as [a] derived [rule] in, for example, a utilitarian theory, where [it] would be explained and justified by [its] beneficial consequences, but [it] would not then constitute any sort of retributivism" (at 625).

According to Hart's general theory of criminal liability, criminal liability may be imposed if the actor had both the opportunity and the capacity to act otherwise. Hart then argues that an inadvertent actor may well have had the capacity and the opportunity to act otherwise,[40] and therefore is liable to be punished in accordance with Hart's general theory. If the accused had the capacity to take precautions, but failed to exercise these capacities, then the accused is liable. A failure to exercise one's capacities implies a "failure to exercise control."[41] But in what sense are we responsible for this failure to exercise our capacities? Hart does not provide an adequate answer to this question.

The answer would have to be found in his underlying "choice theory" of responsibility. But a choice-based account of responsibility understands freedom (and control) negatively, as the absence of external impediments (and certain defined "internal" impediments, such as the inexperience of childhood or mental illness). On this model, our actions are *assumed* to be free unless impaired by these various impediments. As we shall see in the next chapter, however, the choice-based account of responsibility does not explain whether, or on what basis, we are responsible for having chosen as we have. But without such explanation, we cannot know why we *ought* to be held responsible for our inadvertent conduct.

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[40]Hart, *supra*, note 3 at 152-57.

[41]*Ibid.*, at 153.

F. Conclusion

Hart's theory of criminal liability is significant in its attempt to validate the negative retributivist thesis that punishment should not be imposed in the absence of culpability, while maintaining that negligent conduct is properly punishable. But while acknowledging the importance of deontological-like constraints on criminal punishment, Hart fails to provide a correlative theory of moral responsibility in support of his position on criminal negligence. In the next chapter, I examine the choice theory and argue that it is inadequate both in its response to determinism and in its attempt to explain moral agency and responsibility. I then proceed, in subsequent chapters, to develop an alternative, character-based theory of moral responsibility.

CHAPTER FOUR

THE CHOICE THEORY OF RESPONSIBILITY

The choice theory of responsibility represents a utilitarian (or, more broadly, consequentialist) response to the challenge of determinism. Modern consequentialist legal theorists, like their nineteenth-century utilitarian counterparts, attempt to provide an account of law that does not depend on the existence of "dubious metaphysical entities" such as natural rights or free will, while at the same time offering an empirical account of law that is straightforward and mechanical in application.[1] For this reason, these theories focus on the empirical, measurable features of the harm, rather than on the culpability of the offender, which seems inevitably to lead to difficult metaphysical questions about the nature of moral responsibility and human freedom. In place of a theory of free will, a determinist model of behaviour is postulated, one that attempts to predict individual or societal responses to various situations.

Barbara Wootton has argued that because responsibility cannot meaningfully be defined, it should be allowed to "wither away."[2] This claim becomes much more compelling if "hard determinism" is correct in its metaphysical claim that because determinism is true, moral

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[1]Richard Posner, *The Problems of Jurisprudence* (Cambridge, Massachusetts: Harvard University Press, 1990), at 14.

[2]*Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist*

responsibility is impossible. It would then be tempting to replace the retributivist institutions of the criminal law with some combination of a system of threats and involuntary confinement (preventative detention) to restrain dangerous individuals, and a parallel system of treatment to reform them. In short, the model of criminal law defended by traditional consequentialists would be much more plausible.

If hard determinism were true, it might seem that we would have to concede that the criminal law would not be justified in linking criminal liability to moral guilt.[3] But, as *compatibilists* argue, we need not concede so quickly either that hard determinism is true or that its supposed truth undermines responsibility.[4] Although I have no pretensions of conclusively refuting hard determinism (I leave this task to metaphysicians), I argue in this chapter and the next that moral responsibility can be defended in a way that is compatible with determinism or, at very least, immune from the force of its objections. However, the compatibilist argument that I have in mind does not depend, as the choice theory does, on a theory of freedom of *action* as freedom from constraints on our ability to act. If freedom

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(London: Stevens & Sons, 1963), at 66.

[3]A related implication of this view is that negligent conduct is not materially different from intentional action for the purposes of criminal liability. In both instances, the goal of the criminal law is to prevent harm; the only difference will be the means used to achieve this end. In fact, on this view, the distinction between criminal and civil liability begins to blur; both attempt to regulate behaviour, individually and collectively, through a set of economic and penal sanctions.

[4] See *infra*, note 26, and accompanying text.

and responsibility make any sense at all, they make sense not because we are free to act on our choices, but because we are the *authors* of our choices – choices which express our considered moral view of the world.

In the context of the non-consequentialist theory of criminal negligence advanced in this dissertation, the hard determinist's argument challenges us to justify the concept of moral responsibility as the foundation for criminal liability and to explain how someone who acts negligently can ever be responsible in a way that matters to the criminal law. This chapter begins this twofold task by considering why the choice theorist's response to determinism is inadequate. The next chapter develops an alternative, character-based theory, which in contrast with the social scientific account of human behaviour posited by determinism, explains moral responsibility and agency in terms of the capacity for self-reflection and self-evaluation.

A. Determinism and Responsibility

The negative retributivist thesis described in the last chapter insists that it is wrong to punish the morally innocent, that moral culpability is a necessary condition of punishment. But the concept of moral culpability and the corollary notion of moral innocence rest on the assumption that we are morally responsible for our conduct – and some refuse to accept moral responsibility as the theoretical foundation of the criminal law. These theorists make

two sorts of objections, one epistemological, the other metaphysical.[5] The epistemological objection is that it is difficult, if not impossible, to know whether individuals are responsible, either generally or on specific occasions, for their conduct. For this reason alone, we should refrain from imposing criminal liability. The metaphysical objection is the hard determinist's view that determinism precludes moral responsibility. Although I am more interested in the second of these objections, I want briefly to comment on the first.

Wootton's Epistemological Concerns

According to Wootton's social scientific account of crime,[6] the causes of crime are both psychological and sociological; in every case both a personal and environmental factor is present. The focus of the criminal law on the mental element is misguided since it is difficult, if not impossible, to determine with any certainty the appropriate degree of culpability. Dangerous driving offences, for instance, impose liability for a whole range of

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[5]Anthony Kenny, *Freewill and Responsibility* (London: Routledge & Kegan Paul, 1978), at 9. Kenny mentions a third "ethical" objection to the notion of responsibility, that "it is tied up with a theory of retributivist punishment, a view of punishment as allotting to a criminal his strict deserts, rendering an evil for an evil, an eye for an eye and a tooth for a tooth, in a barbarously vindictive manner" (*ibid*). Given, however, that I embrace only the *negative* retributivist thesis (see Chapter Two), this objection does not apply to my account, so it is unnecessary for me to respond to it here. (In any event, the thesis that responsibility implies positive retributivism has been refuted by Hart in *Punishment and Responsibility*, *infra*, note 25.)

[6]*Crime and the Criminal Law*, *supra*, note 2; see also, Wootton, "Diminished

conduct, from the wholly accidental to the positively culpable. It is difficult to establish at what point culpability should be assigned. Yet as much or more harm is caused by negligence than by deliberate wickedness. Since we are unable to resolve definitively the question of when a person is responsible, the primary objective of the criminal courts should be preventive rather than punitive. Any consideration of the mental element of the offence should be given after conviction to determine the appropriate measures to be taken.[7] Most importantly, since we cannot distinguish in any meaningful way between the "wicked" and the "mentally abnormal" offender, the concept of responsibility "should be allowed to wither away." [8] Liability could then be regarded as an issue of causation, and only after a finding of liability would the law consider the subjective mental state of the offender, and then only with a view to determining the most promising form of *treatment*.[9]

Wootton's argument here reflects an epistemological concern about imposing criminal liability on the basis of responsibility. She argues that because we cannot, as an empirical matter, distinguish morally responsible from mentally abnormal offenders, we should

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Responsibility: A Layman's View" (1960), 76 *Law Quarterly Review* 224.

[7]*Crime and the Criminal Law*, *supra*, note 2, at 51-57.

[8]*Ibid.*, at 66.

[9]*Ibid.*, at 77. As Wootton explains, " to discard the notion of responsibility does not mean that the mental condition of an offender ceases to have any importance, or that psychiatric conditions become irrelevant. The difference is that they become relevant, not to the question of determining the measure of his culpability, but to the choice of the treatment most likely to be effective in discouraging him from offending again" (at 77).

abandon the concept of moral responsibility altogether as a basis for imposing punishment. Consider her view of the moral responsibility of psychopaths:

> For my own part I have never found, either in the records of court proceedings or in the literature, any convincing demonstration that an intelligible distinction between psychopathy and wickedness can be drawn in terms of *any meaningful concept of moral or criminal responsibility.* In the description of behaviour patterns, the concept of "psychopath" does correspond to a particular type of personality whose conduct follows a familiar and predictable course; but attempts made to establish a moral distinction strike me as intellectually hopeless.[10]

Propositions about moral responsibility are not subject to empirical validation.[11] Neither science nor philosophy can distinguish morally responsible conduct from "mental abnormality and impaired responsibility."[12]

Wootton's concern stems, in part, from the epistemological problems associated with proving the contents of other minds. For some, our inability to have direct access to the thoughts and "mental states" of others suggests a purely empirical approach to human

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[10]"Diminished Responsibility: A Layman's View," *supra*, note 6 at 233 (emphasis in the original).

[11]In *Crime and the Criminal Law, supra*, note 2, Wootton argues (at 74): "[N]either medical science nor any other science can ever hope to prove whether a men who does not resist his impulses does not do so because he cannot or because he will not. The propositions of science are by definition subject to empirical validation; but since it is not possible to get inside another man's skin, no objective criterion which can distinguish between 'he did not' and 'he could not' is conceivable."

[12]"Diminished Responsibility: A Layman's View," *supra*, note 6 at 235.

behaviour, one that denies the existence of mental states altogether. [13] Behaviourists, for instance, maintain that "when we attribute mental states or events to people we are really making roundabout statements about their actual or hypothetical bodily behaviour."[14] As one behaviourist has argued, unverifiable assumptions about supposed non-material phenomena are "just an inevitable extension of the myth of the ghost in the machine."[15]

There are many ways of responding to these epistemological concerns, most of which lead us into serious issues relating to philosophy of mind. So as not to digress too far from the problem of responsibility, I limit my response here to three brief points. First, the modern approach to philosophy of mind is to reject both the assumptions of dualism (that our mental states are publicly inaccessible) and those of behaviourism (which deny the significance of mental states) in favour of an intermediate position which regards behaviour as an expression or manifestation of our various mental processes.[16] On this view, "there is no epistemological reason to reject the mentalistic concepts which are used

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[13]Kenny, *Freewill and Responsibility*, *supra*, note 5 at 10.

[14]*Ibid.*

[15]Gilbert Ryle, "The Will" in Herbert Morris, ed. *Freedom and Responsibility* (Stanford: Stanford University Press, 1961), at 97.

[16]Kenny, *Freewill and Responsibility*, *supra*, note 5 at 11, referring to Ludwig Wittgenstein's philosophy of mind; see also Thomas Nagel, *The View From Nowhere* (New York and Oxford: Oxford University Press, 1985), at 13-27, 36-37.

in the legal assessment of responsibility."[17] Second, epistemological concerns need not force us to deny subjective perspectives on the world. As Thomas Nagel argues, "[r]eality is not just objective reality, and any conception of reality must include an acknowledgement of its own incompleteness."[18] Finally, as a practical matter, our system of justice implicitly acknowledges the difficulty in assessing a person's subjective perspective on the world through its procedural safeguards, which are designed to ensure that any reasonable doubt about the accused's subjective beliefs or intentions is resolved in favour of an acquittal.

If the only problem were of an epistemological or evidentiary nature, it would then be open to us to appeal to the modern approach to philosophy of mind and to argue that however difficult it might be to determine responsibility in a particular instance, this is still a task that ought to be undertaken, with the appropriate procedural safeguards, by the criminal courts. But there remains a deeper metaphysical concern about the nature and causes of human behaviour that is implicit in Wootton's argument.[19] This concern gives rise to the second broad proposition embraced by opponents of a culpability-based scheme of

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[17]Kenny, *ibid.*

[18]Nagel, *supra*, note 16 at 26.

[19]Wootton herself maintains, however, that her argument does not depend on any metaphysical argument about free will and determinism: see *Crime and the Criminal Law* (second edition).

criminal liability, that moral responsibility is impossible because determinism is true. We must therefore turn to the metaphysical challenge presented by "hard" determinism.

(b) Determinism and the Social Sciences

Much of the methodology of the social or human sciences (psychology, economic, and sociology, for example) rests on the deterministic premise that human behaviour can be exhaustively explained by reference to a set of causal factors that have nothing to do with responsibility:

> Many believe that human actions are determined by the social or economic or familial environment of individuals, in such a way that someone with a complete knowledge of the histories of individuals and societies, and a complete mastery of the law of the appropriate disciplines, would in principle be able to forecast their futures.[20]

From the perspective of these disciplines, the criminal law, to the extent that it is based on assumptions about moral responsibility and freedom, is misguided. Criminal behaviour is the product not of responsible human agency, but of social, psychological, historical and economic factors beyond the individual's control.

This social scientific approach has its roots in a world view according to which there exist certain "social facts" about human behaviour that can be isolated and subjected to scientific

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[20]Kenny, *supra*, note 5 at 23.

scrutiny. Whether in economic analysis[21] or criminology, there is often an assumption, either express or implied, that responsible human agency plays no part in a social scientific theory.[22] Sociology and criminology, in particular, still reflect the objective of early sociology, described by one of sociology's founders, Emile Durkheim, "to extend the scope of scientific rationalism to cover human behaviour by demonstrating relationships of cause and effect, which, by an operation no less rational, can then be transformed into rules of action for the future."[23]

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[21]Posner, *The Problems of Jurisprudence*, *supra*, note 1.

[22]The tension between the deterministic assumptions of the social sciences and philosophical questions about moral responsibility is occasionally acknowledged (but rarely pursued) in the social scientific literature. For instance, one author in a sociological piece observes that the theory of "differential association" (which seeks to explain criminal behaviour as *learned* behaviour stemming from social dis-organization) is "built on a deterministic philosophy of human behaviour in contrast to the allegiance in the system of criminal law to a doctrine of free will" and that this "philosophical distinction is one of the major explanations for the continuous rupture between criminology and criminal law": Gilbert Geis, "Sociology and Crime" in Joseph S. Poucek, ed. *Sociology of Crime* (New York: Philosophical Library, 1961), at 21. However, rather than pursuing the philosophical issue, Geis attributes the rupture to the "failure of the disciplines of law and sociology to cooperate to produce material of particular value to the main body of thought in either discipline, or to resolve important matters of joint concern to both disciplines" (at 21). Philosophical distinctions are regarded as an *impediment*, rather than as an aid, to progress. More recently, "critical" criminologists, while recognizing the deterministic assumptions of positivist criminology (which assumes that human behaviour is determined by factors beyond an individual's control), "do not attempt to answer the question whether man's behaviour is free or determined. Rather, they focus on the process by which man creates the social world in which he lives": George B. Veld, *Theoretical Criminology* (second edition) (Oxford: OUP, 1979), at 11.

[23]*The Rules of Sociological Method* (Steven Lukes, ed.) (New York: The Free

This approach to human behaviour leads to a rejection of the model of the individual as a responsible, choosing being. Indeed, many social scientists "who regard themselves as scientists reject *a priori* the idea that choice can cause human behaviour . . . because they find 'choice' incompatible [with] or even contrary to the scientific notion of determinism."[24] Similarly to Bentham's "economy of threats," this approach regards the criminal law "simply as a system of stimuli goading the individual by its threats into conformity."[25] The individual is seen as a mechanical being, whose behaviour is but a product of external stimuli. This is not just a theory of causation; it is a deterministic account of human behaviour that rules out moral responsibility.

(c) Approaches to Hard Determinism

Theories of determinism and responsibility are concerned with two propositions: (a) that all of nature, including human behaviour, is predictable and causally determined, and (b) that humans beings are morally responsible for their actions. The philosophical position

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Press, 1982), at 33.

[24]Michael R. Gottfredson and Travis Hirschi, *A General Theory of Crime* (Stanford: Stanford University Press, 1990), at 83.

[25]H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), at 44. Hart prefers a legal system that, by making liability dependent on the absence of excusing conditions, guides "individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving it to them to choose" (*ibid.*). As with private law, the value of the criminal law is to "render effective the individual's considered and informed choices"

which insists that these propositions cannot both be true is known as *incompatibilism*. Incompatibilism can take two forms. Those who deny (a) because they assert the truth of (b) are known as *libertarians*; they insist that humans are morally responsible and deny that they are part of the realm of causation. They assert a form of *contra-causal* freedom. In contrast, *hard determinists* deny (b) and affirm (a). Those social scientists who deny that choice plays any role in the explanation of human behaviour would properly be regarded as hard determinists.

In contrast with incompatibilism is (not surprisingly) *compatibilism*, the view that claims about the truth of both determinism and moral responsibility are not inconsistent. As noted at the beginning of this chapter, compatibilists argue that human behaviour is caused, but that the truth of determinism does not undermine moral responsibility. Indeed, compatibilists often argue, not only that determinism and moral responsibility are compatible, but that freedom would be impossible without determinism – that "the doctrines both of necessity and liberty . . . are not only consistent with morality, but are absolutely essential to its support."[26]

(*ibid.*).

[26]David Hume, "Of Liberty and Necessity" in Herbert Morris, ed., *Freedom and Responsibility*, at 448. See also Moritz Schlick, "When Is A Man Responsible?" in Bernard Berofsky, ed., *Free Will and Determinism* (New York: Harper & Row, 1966), at 54-62.

There are therefore two ways to refute hard determinism directly: by defending the libertarian notion of a contra-causal freedom or by affirming the compatibility of determinism and responsibility. The next part of our discussion focuses on a version of compatibilism that is typically invoked in support of the choice theory of freedom: the theory of freedom as *freedom of action.* According to this theory, freedom is analysed purely in terms of a person's ability to realize her desires through rational action; it is a negative concept, implying the absence of constraints on rational action. Freedom means freedom to act on one's desires. One aspect of the compatibilist argument is a hypothetical or conditional argument which tries to show that moral responsibility survives the challenge of determinism because we are free to do otherwise; a person "is free to perform an action just in case, if he were to choose to perform it, he would do so."[27] As we shall see, the problem with this approach is that, although compatible with determinism, it fails as an account of moral responsibility because it dismisses the importance of the *source* of our desires upon which we are free to act.

I do not intend to offer a direct refutation of hard determinism. I do, however, develop further the argument that the theory of freedom of action advanced by the choice theorist is insufficient in that it considers it unnecessary (and therefore fails) to explain the source of our desires or choices. As an alternative to the choice theory, I propose (in the next

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[27]John Martin Fischer (ed.), "Introduction: Responsibility and Freedom" in *Moral*

chapter) a substantive, character-based conception of moral responsibility that acknowledges the significant (but not decisive) effect that extrinsic influences have on us, but at the same time locates the basis of moral responsibility at the level of character rather than action, providing a plausible account of moral responsibility founded on our capacity as moral agents to evaluate and revise our moral outlook. First, however, it is important to understand the significance of the alternative approach to responsibility and freedom, which focuses on freedom of action.

B. Freedom of Action and The Choice Theory of Responsibility

One way to explain the nature of moral responsibility is to relate it to the ability of the actor to act in accordance with his or her choices. One *genre* of moral theory typically begins with the proposition, accepted widely by moral philosophers, "that moral responsibility requires freedom to do otherwise."[28] The "freedom to do otherwise" is then explained in conditional terms, and has come to be known as the "conditional" analysis or

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Responsibility (Ithaca: Cornell University Press, 1986), at 44.

[28]John Martin Fischer, ed., "Introduction: Responibility and Freedom" in *Moral Responsibility* (Ithaca: Cornell University Press, 1986), at 15. In the context of criminal responsibility, see: Michael S. Moore, "Choice, Character, and Excuse" in *Crime, Culpability, and Remedy* (Oxford: Basil Blackwell, 1990), 29-58 at 32; See also H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), at 174, and the discussion of this aspect of Hart's theory in the previous chapter.

theory of freedom. According to this approach, to determine whether the person could have done otherwise, all that is necessary is that that the following be true: *if* the agent had chosen to do otherwise, then she would have done otherwise. If this conditional statement is true, then the person is free. The supposed advantage of this approach is that it avoids the challenge of determinism; determinism presents no serious problem for the conditional analysis because it is entirely possible that the "choice" is determined and yet the person is still free. A person who is free in this sense is morally responsible for his or her actions. The question then becomes one of explaining the nature of free action rather than free choice. The conditional account of freedom thus clears the way for a theory of responsibility based on freedom of action.

To understand the nature of free action by a rational agent, it is necessary on the choice theory to examine the relationship between a person's beliefs, desires and actions.[29] For instance, in *Intention, Agency and Criminal Liability*, Antony Duff argues that an agent acts with the intention of bringing about a particular result (and succeeds in doing so) when the following conditions are satisfied: (a) the agent wants (or desires) that result; (b) she believes that what she does might bring about that result; (c) she acts as she does because

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[29]See Donald Davidson, "Freedom to Act," in *Essays on Actions and Events* (Oxford: OUP, 1980), 63-81.

of that want and that belief; and (d) what she does causes that result.[30] This model of intentional agency is based on the idea of rational action. According to Duff, this account "explicates the *paradigm* of *rational* action and intention."[31] But since the concept of a "free" agent is also understood in terms of rational agency, "intentional agency provides the paradigm of responsible agency."[32]

Although Duff goes on to expand criminal responsibility beyond these paradigmatic cases, the paradigm of responsibility that he presents reflects a particular philosophical understanding of responsibility.[33] By focusing on the relationship between the agent's desires and the results of her actions, this paradigm assists us in distinguishing instances of

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[30]*Intention, Agency and Criminal Liability* (Oxford: Basil Blackwell, 1990), at 66.

[31]*Ibid.*, at 72.

[32]The full text of Duff's argument expressly links intentional agency and free will (at 102): "Now the meaning of 'free will,' as a precondition of responsibility, is a matter of long controversy. I think it can best be explained, however, in terms of the concept of rational agency: an agent is 'free' in so far as his actions are guided by his understanding of good reasons for action. But if free or responsible agency is essentially a matter of rational agency; and if intentional agency is, paradigmatically, rational agency: then intentional agency provides the paradigm of responsible agency."

[33]As see shall see later in this discussion, it is unclear to what extent Duff endorses this theory of responsibility. At one point, Duff explains that the four conditions outlined above are sufficient (although not necessary) conditions of "intended agency" (at 66). But although he presents these conditions as the "*paradigm* of *rational* action and intention" (at 72), his theory of "practical indifference" which rejects the significance of subjective intent (see *infra*, note 47, and discussion of Duff's theory in Chapter Six) suggests a significant tension in his account.

acting purposely from instances of acting knowingly,[34] and thus allows us to distinguish intentional actions (which are at the core of criminal liability) from reckless and unintentional actions (for which it is less clear whether criminal liability ought to be imposed). However, it does not tell us whether the actor is, in fact, responsible for the desires which themselves form the basis of intentional action. In fact, Duff insists that an account of *why* we are responsible for our characters is unnecessary for a theory of responsibility.[35]

An account of freedom which considers it unnecessary to inquire into the source of the agent's choices, is at the centre of the choice theory of criminal responsibility.[36] As we observed in our discussion of Hart's theory of criminal liability in the previous chapter, the choice theory of responsibility insists that "we are responsible for wrongs we freely choose to do, and not responsible for wrongs we lacked the freedom (capacity and opportunity) to

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[34]See Chapter One.

[35]In "Choice, Character and Criminal Liability" (1993), 12 *Law and Philosophy* 345-83, Duff rejects the view that "we are responsible for what we do only if we are also responsible for our characters." He argues instead that "we can more plausibly say that we are our characters, and are for that reason responsible for the actions which flow from them" (at 367).

[36]See, for instance: Moore, "Choice, Character and Excuse," *supra*, note 28, 29-58; Duff, "Choice, Character and Criminal Liability," *supra*, note 35; Peter Arenella, "Character, Choice and Moral Agency" in *Crime, Culpability, and Remedy*, *supra*, note 28, 59-83.

avoid doing."[37] Capacity, on Hart's account, is understood as the capacity to have done otherwise, in the conditional sense that one would have done otherwise if one had chosen to.[38] The lack of capacity to have chosen otherwise is associated with a defect in "the equipment of the actor."[39] The focus here is on the actor's ability to translate her desires into actions, and thus on "the actor's instrumental reasoning abilities."[40] In contrast, the version of the character theory of responsibility that I defend criticizes the choice theory for focusing too narrowly on "act-responsibility," and proposes instead an account that explains responsibility in relation to the source of the desires and choices themselves in the capacity of the actor, as a moral agent, to critically evaluate her attitudes, beliefs, and values, and to revise her character accordingly.

C. Problems with the Choice Theory of Responsibility

The main problem with the choice theory is that it avoids addressing the more difficult issue of freedom of choice. The point here turns on a distinction between freedom of action, understood as the freedom to *do* what one wants, and the freedom to *choose* what

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[37]Moore, "Choice, Character and Excuse," *supra*, note 36 at 29.

[38]*Ibid.*, 35. See also Hart, *Punishment and Responsibility*, *supra*, note 25 at 152-57.

[39]*Ibid.*

[40]Arenella, "Character, Choice and Moral Agency," *supra*, note 36 at 63.

one wants.[41] The "choice" theory (a genuine misnomer, from this perspective) grounds its account of responsibility on the first sort of freedom, the freedom to do what one wants. A common objection to this theory is that its concept of freedom is inadequate since it is consistent with desires having been implanted in me through brainwashing, subliminal advertising, hypnosis, or some other irresistible extrinsic force.[42] The essence of this objection is captured in the following critique of the conditional account:

> [T]here is a very real question, at least for any person who approaches the question of moral responsibility at a tolerably advanced level of reflection, about whether [the agent] could have *chosen* otherwise . . . For how can a man be morally responsible, he asks himself, if his choices, like all other events in the universe, could not have been otherwise than they in fact were?[43]

It is unsatisfying for me to be told that I could have acted otherwise because I would have, *if* I had chosen to act otherwise, even though I could not have chosen (and did not choose) otherwise in the first place. Freedom in this sense is entirely consistent with my choices being manipulated by forces beyond my control; I am not an agent in any deep sense, but a conduit for the fulfilment of wants and desires that I happen to have.

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[41]Fischer, *supra*, note 28 at 44.

[42]See, for instance, Arenella, *supra*, note 36 at 75-77.

[43]C.A. Campbell, "Is 'Free Will' a Pseudo-Problem" in Morris, *Freedom and Responsibility*, *supra*, 473-86, at 481. Compare Fischer, "Introduction: Responsibility and Freedom," at 17: "I believe that [the conditional analysis of freedom] is inadequate, because freedom of action can be undermined by a lack of freedom of choice, and the conditional analysis fails to be sensitive to this fact."

In the third chapter of *Intention, Agency and Criminal Liability*,[44] Antony Duff considers the relationship between the conduct in question and the actor's beliefs and desires. Indeed, much of the criminal law depends on the way this relationship between desire, belief, and conduct is understood. The presence of a subjective mental element (such as intention or recklessness) depends on the existence of the proper nexus between a person's actions and her beliefs and desires, such that her conduct is attributed to her and she is answerable for it.[45]

But this approach to the question of criminal liability captures only one aspect of moral responsibility.[46] For although it is sometimes enough to say that a person is liable for assault on the basis of his intentions (for instance, because he wants to hurt someone, believes that striking him would bring about this result, acts as a consequence of his desire and belief, and causes the intended result), there will often be instances in which it is necessary to probe further, and to ask why he wanted to cause harm in the first place. This

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[44]*Supra*, 38-73.

[45]This approach to criminal law neatly parallels the philosophical project of distinguishing actions from events by reference to the concept of intention: see, for instance, Donald Davidson, "Agency" in *Essays on Actions and Events* (Oxford: OUP, 1980), 43-61.

[46]Duff implicitly acknowledges this point later in *Intention, Agency and Criminal Liability* (in Chapter Seven) when he expands the paradigm of criminal responsibility to include recklessness and some forms of negligence, and in "Choice, Character and Criminal Liability" (1993), 12 *Law and Philosophy* 345-83.

is an inquiry into responsibility in a broader sense. In the course of this inquiry, we might find that although he fully intended his actions, he acted as he did because he suffers from paranoid delusions or because he was brainwashed into thinking that his victim was the devil. In such circumstances, he is excused because the act cannot properly be attributed to *him*, although his powers of instrumental reasoning may remain intact.

While the criminal law typically focuses on the nexus between desire and action, there is also a commitment to the proposition that the actor must be the author of the desires upon which he acts. Thus, in the cases described above, we excuse the actor from responsibility for the action on the basis that the action was not, ultimately, a product of the person's character; he was not responsible for his beliefs, whether or not he *acted* freely. It is irrelevant in these instances whether his conduct bears the correct relationship to his beliefs and desires, since it is those very beliefs and desires the origin of which is in question. [47]

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[47]In a recent article, Duff seems to agree with much of what I have said against the choice theory, notwithstanding his account of intention as the paradigm of rational action: see "Choice, Character and Criminal Liability," *supra*, note 30. Duff expressly attempts to distance himself from both the choice theory and the character theory, arguing instead for what he describes as "an account of liability grounded in actions" (at 346). Specifically, he argues that what makes a person responsible is "a wrongful action which, as the action of a responsible moral agent, manifests in and by itself some inappropriate attitude toward the law and the values it protects" (at 380). (As we shall see later, this argument is consistent with his approach to liability for recklessness and negligence, which he argues are imposed on the basis of an attitude of "practical indifference" manifested in the agent's conduct.) This view of responsibility as based on the manifestation of an inappropriate attitude is

There are, then, two main problems with the choice theory. First, although the underlying concept of freedom of action might help us to understand the relationship between a person's desires and beliefs, on the one hand, and the person's actions on the other, it does not provide us with a complete account of moral responsibility. It prevents us from looking beyond the choices of a rational individual to determine the source of these choices. A second, related problem is that it assumes that only our subjective intentions express our values, beliefs and desires. Again, however, this assumption reveals an unduly narrow understanding of responsibility. If our negligent conduct is to attract the attention of the criminal law for reason of our responsibility for such conduct, we must be able to demonstrate a deeper sense of responsibility, one that extends beyond our subjective intentions. The absence of such an account on the traditional approach thus precludes criminal liability for negligence.

D. Conclusion

The choice theory may be able to respond to determinism, but it does so by refusing to inquire into the source of our choices. Instead, it focuses on the relationship between our

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difficult to square with his theory of intention and the paradigm of responsibility. The explanation for this shift can be understood, perhaps, in light of Duff's theory of mind in *Intention, Agency and Criminal Liability* (*supra*, note 30), which holds that "we begin with people and the actions" and that "these are what we can directly observe and directly

beliefs, choices, and actions, and the instrumental rationality of our decisions. We are responsible, on this theory, if we act as instrumentally rational agents. But the choice theory leaves open the possibility that we are not responsible for the very choices that form the subject of our instrumentally rational actions. The concept of responsibility that the choice theory defends is a meagre one.

If we are to explain why criminal liability for negligence is justified because it is culpable, we need a sophisticated theory of responsibility. We need a theory of responsibility that is consistent with the culpability principle (in its negative retributivist sense) and that explains culpability in terms broader than freedom of action. A character-based deontological theory does precisely this: it accepts that criminal liability must not be imposed in the absence of culpability, while rejecting the assumption that culpability is limited to what we subjectively intend. It maintains instead that as moral agents we are primarily responsible for conduct, intentional or inadvertent, that is expressive of our moral character.

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know" (at 129). I defer a detailed examination and critique of Duff's theory to subsequent chapters.

CHAPTER FIVE

RESPONSIBILITY AND CHARACTER

One problem with the choice theory of freedom is that it locates responsibility at the level of rational action, without regard for the origin of the choices that form the basis of the person's action. What we need instead is a theory of responsibility that takes seriously the very choices that the choice theory disregards and dismisses as unknowable; we need a theory that explains how it is that we are responsible for these choices themselves. Rather than assessing responsibility from the perspective of a detached, external observer, we need to understand how the desires and choices that we have been discussing are regarded by the person whose desires and choices they are.

As we shall see, such an approach leads us to an understanding of the person as a being with a moral outlook,[1] one who evaluates not only the world around her, but her attitudes, beliefs, and desires as well. We are responsible for our conduct, on this account, because we are responsible for our moral outlook – our attitudes towards others, our normative assessment of persons, situations, and choices, our evaluation of ourselves – in short, our moral character. This character theory locates freedom not simply at the level of action, but rather at the level of the person's moral character. This account of the person leads us to a

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[1]Eugene Schlossberger, *Moral Responsibility and Persons* (Philadelphia: Temple University Press, 1992), at 3.

much richer understanding of responsibility and of what it is to be free. And, more important, it explains how we can be morally responsible for our negligent conduct.

This chapter begins with a discussion of the traditional deontological approach to criminal liability. Although I agree with the traditional deontologists that punishment should not be imposed in the absence of culpability, I disagree that culpability must be defined exclusively in terms of intent. The character theory provides an alternative. In this chapter, I argue that, on the character theory of responsibility, we are responsible for our conduct, both intentional and inadvertent, provided that it flows from our normative view of the world (what I refer to as our "moral outlook"), because we are responsible for that moral outlook. After explaining the basic premises of this argument, I then consider and respond to the choice theorist's objections to the character theory. In explaining and defending the character theory of responsibility, this chapter attempts both to overcome the inadequacies of the choice theory and to provide the theoretical basis for holding us responsible, as moral agents, for our negligent conduct.

A. The Traditional Deontological Approach

According to the traditional consequentialist account, the main goal of the criminal law in imposing criminal liability is to prevent harm by means of deterrence. In contrast, Hart's theory of criminal liability, with its emphasis on capacity and opportunity, recognizes

something like culpability as an essential precondition of criminal liability.[2] The deontological approach takes the culpability of the actor to be the primary basis for criminal liability and punishment; but, unlike Hart's account, it rejects the imposition of criminal liability for negligence.

The deontological approach is both retrospective (it is concerned with actions and events that have already taken place, rather than with their consequences) and act-oriented (it regards the offence as an instance of human agency rather than as a "mere" event). In looking back at the offence as an instance of human agency in an attempt to determine the culpability of the actor, this theory of criminal liability provides a philosophical foundation for the approach to criminal liability set out by Justice Lamer in *Vaillancourt*, which insists on "proof of a subjective *mens rea* with respect to the prohibited act" (to establish that the offence was a product of human agency) "in order to avoid punishing the 'morally innocent'" (the non-culpable).[3]

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[2]H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968). Hart does not actually develop "culpability" as a substantive concept within his theory; rather, he proposes that punishment should be applied "only to those who have broken the law and *to whom no excusing conditions apply*" (at 52). It may be that a theory of excuses implies a substantive theory of culpability, but this is not an argument that Hart himself develops. See also my discussion of Hart's theory in Chapter Three.

[3]*R.* v. *Vaillancourt* (1987), 39 C.C.C. (3d) 118 at 133 (S.C.C.).

The identification of culpability with subjective *mens rea* or subjective intent, however, precludes the imposition of criminal liability for negligence since, with respect to the prohibited act, the actor does not intend to commit the offence (the actor is not subjectively aware that he or she is committing the offence). Criminal liability for inadvertent conduct cannot be justified on this version of the deontological theory of criminal liability. Since historically most deontological theories of criminal law (including those of Immanuel Kant and G.W.F. Hegel) have identified culpability with criminal intent, I shall refer to these theories collectively (although I acknowledge the nuances and differences among them) as the "traditional deontological approach" to criminal liability.

This chapter assumes that the deonotological approach is correct in its negative thesis – that criminal liability should not be imposed in the absence of culpability. Thus, it assumes the correctness of the *negative* retributivist thesis.[4] At the same time, however, it criticizes the traditional deontological approach as being much too restrictive in its understanding of what is culpable. The problem with this theory, I contend, is the narrow and misleading conception of responsibility that sustains it. By failing to look beyond the subjective foresight of the agent, the traditional deontological approach is confined to a narrow and improbable account of responsibility and, by implication, of criminal liability.

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[4]See discussion of negative retributivism in Chapters Two and Three.

The traditional deontological approach to criminal liability is commonly referred to as *retributivism*. I avoid this label for my own approach because retributivism is usually associated with a theory of punishment, while my own theory is primarily a theory of criminal responsibility. In any event, the "traditional" deontological or retributivist approach historically has been associated with one or more of the following related, but conceptually distinct, propositions: (i) that the harm inflicted by the offender should be visited upon the offender in kind (the principle of *lex talionis* or, colloquially, "an eye for an eye"); (ii) that in committing an offence, the offender forfeits his or her rights or takes unfair advantage, thereby justifying punishment by the state to restore the normative equilibrium; (iii) that, as a person, the offender has a right to be punished; (iv) that the punishment ought to be inflicted *whenever* (positive retributivism) or *only if* (negative retributivism) it is deserved; and (v) that punishment is deserved if the crime is expressive of the goals and desires of a rational moral agent.

Although I want to focus on (iv) and (v), a few preliminary remarks are required concerning the other propositions. First, the principle of *lex talionis* is generally regarded unfavourably by those who regard themselves as deontologists for several reasons. First, it provides clear guidance in only a limited number of situations since it is not always possible to return in kind the harm that is caused by the offender (it might make sense for

murder, but not for multiple homicides or fraud).[5] Second, the *lex talionis* principle fails to capture the greatest strength of the deontological approach, namely, the limitation it places on imposing criminal liability based on the culpability of the offender. [6] This is not to say that the principle could not be combined with a limiting principle based on culpability; but *lex talionis* does not itself contain a limiting principle.

While the second proposition might describe the criminal offence in a variety of ways (as a forfeiture of rights[7] or the taking of an unfair advantage), the justification for state intervention and punishment is the same: the state is justified in intervening to restore the moral equilibrium that was upset by the criminal offence. [8] This understanding of the broader political justification for state punishment is certainly consistent with my position on criminal liability for negligence. However, since it is unnecessary for me to take a position on this broader issue, I refrain from doing so here. Indeed, if Hart is right that the

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[5]Nicola Lacey, *State Punishment* (New York and London: Routledge, 1988), at 17.

[6]*Ibid.*

[7]For instance, according to G. W. F. Hegel in *Philosophy of Right*, T.M. Knox, trans. (OUP, 1967), to the extent that the infringement of the victim's right "is only an injury to a possession or to something which exists externally . . . [the] annulling of the infringement, so far as the infringement is productive of damage, is the satisfaction given in a civil suit, i.e. compensation for the wrong done" (¶98). Punishment, in contrast, is an annulment of the particular will of the offender; it is a repudiation of the criminal's implied assertion that the victim has no rights (¶99).

[8]Lacey, *supra*, note 5 at 17.

general justifying aim of the criminal law is a consequentialist one, this need not concern us since the argument I propose is consistent with his mixed theory of criminal law.

As for the third proposition, it has also been argued under the banner of retributivism that in punishing an offender for an offence, we respect the offender's status as a person. As Hegel explains, it is through the imposition of punishment that we honour the offender as a rational being. [9] What is crucial here is the importance that the deontological account accords to the personhood of the offender; for it is the fact that the offender is a person and a moral agent that ultimately justifies the imposition of criminal liability on the basis of desert.

This brings us to the last two, interrelated propositions: that the punishment ought to be inflicted *whenever* or *only if* it is deserved (broadly, the culpability principle) and that punishment is deserved only if the crime reflects the subjective intentions of the moral agent. These two propositions, which together capture the essence of the traditional deontological account of criminal liability, are the focus of the balance of this chapter.

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[9] Hegel, *Philosophy of Right*, *supra*, note 7, ¶100; see also Herbert Morris, "Persons and Punishment" (1968), 52(4) *The Monist* 475-501.

(1) The Culpability Principle

The culpability principle holds that desert is (at the very least) a necessary condition of punishment. In contrast with the consequentialists' forward-looking, prevention-oriented response to crime,[10] the deontological approach is retrospective and deed-oriented. The utilitarian benefits of punishment are not considered in determining whether punishment ought to be imposed. According to Kant, the criminal "must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or his fellow citizens."[11] Criminal liability and punishment are therefore inextricably linked to the moral culpability of the offender, and only incidentally to the consequentialist goal of deterrence.

Although the culpability principle can be interpreted narrowly, as standing for the proposition that culpability is a *necessary* condition of punishment (the *negative* retributivist thesis discussed in the previous chapter), the traditional deontological approach often regards culpability as a *sufficient* condition, requiring the imposition of punishment. This difference need not preoccupy us now, however, since in either case, the culpability principle is generally thought to be justified on the basis of a theory of moral

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[10]Barbara Wootton, *Crime and the Criminal Law* (London: Stevens & Sons, 1963), at 51.

[11]Immanuel Kant, *The Metaphysical Elements of Justice*, J. Ladd, trans. (New York: Macmillan, 1986), at 100.

responsibility (and thus of culpability) premised on the actor's status as a rational moral agent. According to this *genre* of moral theory, the actor is responsible for those of his or her actions which reflect the actor's purposes.

(2) Subjective Intent and Responsibility

The proposition that punishment is deserved if the crime is expressive of the goals and desires of a rational moral agent is of particular concern. Whether criminal liability for negligence is justified on the deontological account depends on how this proposition is understood. The traditional approach understands moral agency in terms of the subjective intentions of the agent; that is, individuals are responsible, and their actions are expressive of their moral agency, if they bear the proper, rational relationship to the individual's purposes. One of the key elements of this relationship, however, is that it is "intended" or "willed" by the agent.

In *Philosophy of Right*, for instance, G.W.F. Hegel explains that what makes an act deserving of punishment on the traditional account is precisely its intentional character. Hegel abstracts from the external harm caused by the offender and asks what it is about crime, *qua* crime, that makes it deserving of punishment.[12] The answer is that it is the "particular will of the criminal," the purposive infringement of the right, that gives the crime its positive existence, and it is this positive existence that must be annulled through

the imposition of punishment (¶99). This inquiry is ultimately concerned with the criminal's subjective purposes as a rational, moral agent. As Hegel explains, the "subjective, moral quality of crime rests on a higher distinction implied in the question of how far an event or fact pure and simply is an action, and concerns the subjective character of the action itself" (¶96).

The "subjective moral quality" of a criminal offence is also what distinguishes it from a civil wrong (and hence justifies the imposition of punishment):

> Suppose now that A had knowingly and without justification invaded B's protected sphere of autonomy, either by intentionally injuring him or by knowingly imposing an excessive risk that materialized in harm. His act once again implies a claim to more liberty than is consistent with the equal liberty of A and B, and so he is still liable to compensate B in order to rectify their boundary between each other. However, his act now implies something more. Because A knowingly infringes B's right, his act now signifies a knowing claim of right to an unlimited liberty, and so an explicit challenge to the very idea of a protected sphere of autonomy.[13]

The knowing infringement of the right is what invites the penal response; only those who intentionally inflict harm are deserving of punishment. While tort law is concerned solely with compensation for damage caused by the infringement of a right, criminal law addresses itself to the subjective mental state or culpability of the wrongdoer.

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[12]Hegel, *supra*, note 7 at ¶90-103.

[13]Alan Brudner, "Imprisonment and Strict Liability," (1990), 40 *University of Toronto Law Review* 738 at 756.

Thus understood, the implications for criminal negligence of this traditional deontological approach to criminal liability are clear. By focusing on the subjective intentions and foresight of the actor, the traditional approach precludes liability for inadvertent conduct and therefore for negligence. For instance, as Jerome Hall explains, criminal liability should not be imposed for negligent conduct precisely because it is inadvertent.[14] The exclusion of negligence from penal liability, he argues, "is based on the great difference between consciousness and unawareness, between action or conduct and mere behaviour."[15] Hall, equating conscious behaviour with voluntary behaviour, argues that voluntary conduct is an essential aspect both of moral blameworthiness and criminal liability.

On the traditional deontological account, if culpability requires subjective intent, then inadvertent conduct cannot be considered culpable. But an account of culpability that defines it in terms of subjective intent is not the only account available to the deontologist. On the contrary, a character-based theory of responsibility is also consistent with a broadly deontological account of criminal liability; indeed, it is an account that is independently attractive as a theory of moral responsibility.

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[14]"Negligent Behaviour Should be Excluded from Penal Liability" (1963), 63 *Columbia Law Review* 632-44.

[15]*Ibid.*, at 643.

B. The Character Theory of Responsibility

The character theory that I defend in this chapter is defined by the following propositions. First, we are responsible for our conduct insofar as we are responsible for our character. Second, we are responsible for our character because: we have the capacity for a moral *outlook*; we have the capacity to reflect upon and revise that moral outlook; and we have the capacity to be motivated by and to conduct ourselves in accordance with that moral outlook.[16] Together, these propositions imply that we are responsible not only for our intentional actions, but also for our negligent conduct. Let us consider why this is so.

(1) Two Versions of the Character Theory

There are, in the philosophical literature, several theories that purport to be "character" theories of responsibility. One version of the character theory holds that we are responsible for our actions because they flow from our characters. On this version of the character

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[16] Peter Arenella, "Character, Choice and Moral Agency", in *Crime, Culpability, and Remedy* (Oxford: Basil Blackwell, 1990), 29-58. Arenella outlines four distinguishing features of the character theory: (i) an appreciation of the normative significance of moral norms (*moral responsiveness*); (ii) an ability to exercise *moral judgment* concerning the application of the norms to a particular context; (iii) a capacity to act on the basis of the applicable moral norm (*moral motivation*); and (iv) a modest capacity for *critical self-reflection* and *self-revision*. What Arenella calls "moral responsiveness" and "moral judgment" together correspond to what I have described as a "moral outlook"; and *moral motivation* corresponds roughly to what I have called "moral agency."

theory (which is generally associated with David Hume), holding individuals responsible for their actions is really a proxy for holding them responsible for their character traits:

> Blame and punishment are not directly for acts but for character traits. On this view, 'character trait' is not, as in the Aristotelian view, restricted to traits which people can voluntarily control possessing or manifesting in behaviour. Instead, it refers to any socially desirable or undesirable disposition of a person. Acts may or may not indicate character traits.[17]

This Humean version of the character theory is concerned with the dispositions of the actor quite apart from the expression of those dispositions in action. The object of moral blame is the character itself.

Another version of the character theory is Aristotelian in origin. This theory holds that we are responsible for our actions because we are responsible for our characters. Aristotle begins his discussion of responsibility in *Nicomachean Ethics*[18] with the proposition that we can only be praised or blamed (that is, we can only be considered responsible[19]) for our voluntary actions. A voluntary act is defined by Aristotle as one where the "moving principle" is in the agent and the agent is aware of the particular circumstances of the act.

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[17]Michael D. Bayles, "Character, Purpose, and Criminal Responsibility" (1982), 1 *Law and Philosophy* 5-20 at 7.

[18] In *The Complete Works of Aristotle*, Richard McKeon, ed. (New York: Random House, 1941), 935-1126.

Involuntary acts, in contrast, occur when the agent acts under compulsion (where, for instance, the cause of the act is external to the agent) or owing to some forms of ignorance. Since involuntary acts are acts for which the agent is not responsible, and only some forms of ignorance are considered involuntary, it is essential that we understand the distinction between voluntary and involuntary ignorance, or more precisely, between culpable and non-culpable ignorance.

Aristotle distinguishes between acts that are done *by reason of ignorance* and acts that are done *in ignorance* (1110*b*). Acts done *by reason of ignorance* are acts in which the agent is ignorant of "particulars," the circumstances of the action and the objects with which it is concerned.[20] These circumstances include ignorance of who the agent is, what he is doing, what or whom he is acting upon, what instrument he is using, or how he is doing the act. In these situations, the agent's ignorance is said to be involuntary; the agent is not responsible for his actions. In contrast, where the cause of the agent's ignorance is within the agent, he acts *in ignorance*, and his actions are therefore voluntary.[21] Thus, a person whose

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[19] Jonathan Glover, *Responsibility* (New York: Humanities Press, 1970), at 4.

[20]Aristotle contrasts ignorance of particulars with ignorance of what is to one's advantage and ignorance of universals. Neither of these is "involuntary" and for both we are properly blamed (1110*b*).

[21]Although Aristotle's theory can be understood generally in terms of a distinction between voluntary and involuntary actions, his account of ignorance does include a third category: acts which are not voluntary but not involuntary either. Aristotle explains that although everything done owing to ignorance is *not* voluntary, only those actions that

ignorance results from a state of drunkenness (or rage) acts voluntarily since he is thought to be responsible for his state, and hence, his ignorance (1113*b*).

Aristotle acknowledges that the voluntariness of our actions (and our responsibility for them) is different from the voluntariness of our characters (1115*a*):

> [A]ctions and states of character are not voluntary in the same way; for we are masters of our actions from the beginning right to the end, if we know the particular facts, but though we control the beginning of our states of character the gradual process is not obvious, any more than it is in illness; because it was in our power, however, to act in this way or not in this way, therefore the states are voluntary.

Practically, the distinction between action and character does not ultimately make a difference since we are responsible for both; we are responsible for acts done carelessly, because each of us is responsible for being (or becoming) the type of person who does not take care. On this view, what makes us responsible for our negligent conduct is our responsibility for our moral characters, our responsibility for our deep moral selves, since it is within our power to be careful and, more specifically, to be more attentive to the

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produce subsequent pain or remorse are *in*voluntary (1110*b*). He believes this distinction to be necessary because of those people "who act by reason of ignorance he who repents is thought an involuntary agent, and the man who does not repent may, since he is different, be called a not voluntary agent" (1110*b*20-25). It is difficult to see why this distinction is needed, since it does not figure in the balance of his discussion of ignorance and it is based on an *ex post facto* consideration, namely, the *subsequent* pain or remorse of the agent. As this third category adds nothing to our discussion, it is best to focus on Aristotle's distinction between voluntary and involuntary acts.

fundamental rights and interests of others. On an Aristotelian view, then, I am responsible for my careless act, *because* I am responsible for being a careless person.

This contrasts with the Humean view, which imposes responsibility for conduct that flows from character, but without considering whether we are responsible for our characters. This difference is significant because most of the objections directed at "the" character theory of responsibility are actually objections to the Humean version of the theory, and hold little sway with the Aristotelian account. Before we consider these objections, however, we must clarify briefly one significant feature of the Aristotelian version of the character theory that I defend: its focus on the *moral* character of the actor.

When we consider a person's character, we might think of several things: whether she is sociable, whether she laughs easily, whether she is ambitious, whether she is eloquent, whether she is treats others with respect, and so on. Of the many characteristics that we might associate with her, however, only some of these are properly part of her moral outlook. For instance, her sense of humour, while admirable, is not an essential feature of her moral outlook, while the way in which she regards and treats others is fundamentally so. In the introduction to this chapter, I alluded to some other features of her *moral* character: her normative assessment of persons, situations, and choices, and her ability to reflect upon and evaluate herself. It is with these normative or "moral" features of her

character that the character theory is concerned, and it is over these features that the character theory regards her as having some control.

The Aristotelian version of the character theory that I defend asserts that we are to be responsible for our conduct (not only own intentional actions), only on the assumption that we are responsible for our moral character. We must therefore consider on what basis we are responsible for our moral character.

(2) Character and the Evaluative Self

In contrast with the choice theory, which is concerned primarily with freedom of action, the character theory is concerned with our moral outlook on the world, our ability to conduct ourselves in accordance with that moral outlook, and our ability to reflect upon and adjust our moral outlook. In rejecting the choice theory and its notion of freedom as simply "doing what one wants,"[22] the character theorist[23] observes that to deprive a person of physical freedom, say, by imprisonment, takes away only freedom of action (which

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[22]Fischer, ed., *Moral Responsibility*, *infra*, note 27, 65-80, at 74.

[23]See Susan Wolf, "Sanity and the Metaphysics of Responsibility" in Ferdinand Schoeman, ed., *Responsibility, Character and the Emotions: New Essays in Moral Responsibility* (Cambridge: Cambridge University Press, 1987), 46-62 at 50, in which Wolf describes the theories of Frankfurt, Watson and Taylor (discussed *infra*) collectively as the "deep-self view."

animals also have); the ability to do what one wants is not a sufficient condition for freedom of the will.[24]

Harry Frankfurt describes freedom of the will in terms of a "capacity for reflective self-evaluation" or an ability to reflect upon and either identify with (or reject) one's basic wants and desires. Frankfurt expresses this reflective process in terms of a person's "first-order" desires (our basic, pre-reflective wants and desires) and "second-order" desires (our self-reflective, considered desires about our first-order desires). When a second-order desire is accompanied by a desire to be motivated to action by a particular first-order desire, it becomes a "second-order volition," which is essential to being a person.[25] In contrast with the picture of the person (shared by many social scientists and philosophers

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[24] Harry Frankfurt, "Freedom of the Will and the Concept of a Person," in John Martin Fischer, ed., *Moral Responsibility* (Ithaca: Cornell University Press, 1986), 65-80.

[25] *Ibid.*, at 70-71. In contrast to a person with second-order volitions is what Frankfurt calls a "wanton," a being that does not care about its will and whose "desires move him to do certain things, without it being true of him either that he wants to be moved by those desires or that he prefers to be moved by other desires" (at 71). What distinguishes a wanton from a person is not an absence of rationality, but rather that the wanton "is not concerned with the desirability of the desires themselves" (at 71). Thus, a wanton may still be able to deliberate about his desires, but in so doing, does not question what those desires should be. Frankfurt illustrates this distinction by describing two addicts, a wanton addict and an unwilling addict. The unwilling addict has conflicting desires to take and to refrain from taking the drug, but is not neutral as between them. He identifies with his desire to refrain from taking the drug, and he wants this desire to constitute his will and be effective in motivating him to action. In contrast, the wanton addict does not prefer one of his conflicting desires: "His actions reflect the economy of his first-order desires, without his being concerned whether the desires that move him to act

of action) as an empirical being constituted by desires whose origins are entirely extrinsic, Frankfurt presents us with an image of free persons as being able to stand apart from their desires and both reflect upon and evaluate them. This is a picture of the person as an evaluative being.

While Frankfurt's theory provides us with an explanation of the origins of our first-order desires and thus gives us a more sophisticated account of freedom, it is open to the objection that it leads to an infinite regress of orders of desire.[26] This problem with his account has been the focus of much criticism, even from philosophers who agree with his broader objectives.[27] Gary Watson argues that there is no particular reason why second-order volitions should be any closer to the person's true self.[28] What Frankfurt's account requires, according to Watson, is not a distinction between types or orders of desire, but rather between sources of motivation. Watson therefore revives the classical (Platonic)

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are desires by which he wants to be moved to act" (at 72).

[26]This can be seen in his explanation of the complexity of a person's desires, during which he observes: "There is no theoretical limit to the length of the series of desires of higher and higher orders; nothing except common sense and, perhaps, a saving fatigue prevents an individual from obsessively refusing to identify himself with any of his desires until he forms a desire of the next higher order" (at 76). Recognizing the possibility of this infinite regress of desires, Frankfurt offers this response: "It is possible, however, to terminate such a series of acts without cutting it off arbitrarily. When a person identifies himself *decisively* with one of his first order desires, this commitment 'resounds' throughout the potentially endless array of higher orders" (at 76).

[27]See, for instance, Gary Watson, "Free Agency," in John Martin Fischer, ed., *Moral Responsibility* (Ithaca: Cornell University Press, 1986), 81-96.

distinction between valuing and desiring, and explains: "The problem of free action arises because what one desires may not be what one values, and what one most values may not be what one is finally moved to get."[29]

For Watson, this distinction gives rise to a further distinction between the sources of our wants, between motivation (what motivates us to act) and evaluation (what we value). A free agent "has the capacity to translate his values into action; his actions flow from his evaluational system."[30] Watson describes a person's values as those "long-term aims and normative principles that we are willing to defend" and a person's evaluational system as the "standpoint" or "point of view from which [that person] judges the world."[31] Although our values and desires will not always coincide (Watson admits that there will be conflicts and tensions), it is our capacity to overcome our desires through our evaluational system that makes us free and responsible agents.[32]

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[28]*Ibid.*, at 93.

[29]*Ibid.*, at 85.

[30]*Ibid.*, at 91.

[31]*Ibid.*, at 91.

[32]For Watson, we are therefore confronted not by an array of competing desires or preferences which need only be weighed, but rather by our desires or preferences on the one hand, and the demands of duty on the other. Ultimately, it is this choice between desire and duty as it presents itself in different contexts for which we are responsible, if we are ever responsible. Watson seems to acknowledge this struggle between desire and duty when he argues that it is because the kleptomaniac's desires "express themselves independently of his evaluational judgments that we tend to think of his actions as unfree"

The Aristotelian version of the character theory of responsibility that I propose incorporates the insights of Frankfurt and Watson by explaining freedom by reference to our ability to evaluate our first-order desires. Our perception and evaluation of the world, and our conduct in, it in normative terms, and our ability to be motivated to act in accordance with this moral outlook, enable us to resist our basic, primitive responses and desires and to respond to the world as reflective and responsible moral agents.

(3) Character and Moral Outlook

One significant difference between the choice theory and the character theory, then, is the underlying concept of freedom. The choice theory describes freedom in terms of our ability to translate our desires into action; the character theory explains freedom in terms of its conception of the person as a moral agent capable of making normative evaluations. The character theorist provides an account of our subjective understanding of and relation to our desires as evaluative beings. One part of this explanation concerns our ability to evaluate the world in moral terms; the other part concerns our ability to reflect upon, evaluate and modify our normative values themselves.

(at 96) It is our capacity for critical evaluation that, for Watson, accounts for the normativity of our actions.

The significance of having a moral outlook is evident when we consider our reasons for not treating young children as full moral agents "despite their capacity for practical reason."[33] Peter Arenella explains that until they have come to appreciate the significance of moral norms (until they have "internalized" them as "worthy of respect"), we do not treat them as full moral agents[34] (although we might still punish them, presumably as a form of moral education). Children therefore fail to be moral agents in the most basic way as they are not morally responsive; they are unable to perceive the world in normative terms. As such, they fail to be full moral agents in other ways, since they are unable to exercise moral judgment or to be motivated by moral considerations.

But our moral outlook is not limited to our normative perceptions of the external world. A second key element of the character theory is our capacity for self-reflection and self-revision – our normative assessment of ourselves. To say that responsibility requires that I have control of my desires is to imply that I am conscious of myself as a moral agent and that I can revise my moral outlook on the world. In "Responsibility for Self,"[35] for instance, Charles Taylor contrasts the utilitarian concept of the person as a "simple weigher" of alternatives with a concept of the person as a "strong evaluator," or someone who reflects on moral situations as well as his or her own desires using qualitative (rather than

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[33]Arenella, *supra*, note 16, at 67 *ff.*

[34]*Ibid.*, at 68-69.

[35]In A.O. Rorty, ed., *The Identities of Persons* (Berkeley: University of California

quantitative) language. A strong evaluator does not, as the simple weigher does, accept unquestioningly his or her *de facto* desires, but rather ascribes a value to these desires, characterizing them with such terms as "higher or lower, noble or base, courageous or cowardly, integrated or fragmented, and so on."[36] Evaluation through reflection on our desires is therefore essential to personhood and responsibility. And whatever our values may be, there is always room for reconsideration or re-evaluation, however difficult this may be:

> Evaluation is such that there is always room for re-evaluation. But our evaluations are the more open to challenge precisely in virtue of the very character of depth which we see in the self. For it is precisely the deepest evaluations which are least clear, least articulated, most easily subject to illusion and distortion. It is those which are closest to what I am as a subject, in the sense that shorn of them I would break down as a person, which are among the hardest for me to be clear about.
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> The question can always be posed: ought I to re-evaluate my most basic evaluations? Have I really understood what is essential to my identity? Have I truly determined what I sense to be the highest mode of my life?[37]

This ability to question our most basic values defines us as moral beings and makes us morally responsible for our actions. While Taylor agrees with Frankfurt that the key to responsibility is our ability to reflect upon our basic, "first-order" desires, his analysis is closer to Watson's in that Taylor regards evaluation not merely as a separate order of

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Press, 1976), 281-99.

[36]Taylor, *supra*, note 35 at 288.

[37] *Ibid.* at 296.

desire, but as categorically distinct from desire.[38] Evaluation is not merely a higher-order desire about a lower-order desire, but rather a qualitative assessment and affirmation of that desire.

Whatever our first-order desires may be, they do not themselves define who we are. Rather, it is the deeper, reflective self – the self that reflects upon those desires and evaluates them – that constitutes our true character. Distinctive to this approach to freedom is the proposition that "if we are responsible agents, it is not just because our actions are within the control of our wills, but because, in addition, our wills are not just psychological states *in* us, but are expressions of our characters that come *from* us, or that at any rate are acknowledged and affirmed *by* us.[39] This is the defining proposition of the character theory, that our actions emerge from our characters and truly belong to us.[40] We are not merely the

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[38]Frankfurt does distinguish, however, between second-order desires and second-order volitions. It is possible, he observes, for a being to have second-order desires and still be a wanton (not a person): Frankfurt, *supra*, note 24 at 71. The reason for this is that to be a person it is not enough that I have a positive or negative attitude toward my first-order desires; I may well wish that I did not crave cigarettes, for instance, but (according to Frankfurt) I would not be a person simply by virtue of this second-order desire. What is required beyond this for moral agency is that I desire to make this second-order desire my will; I must therefore be able to reject my first-order desires, identify with certain second-order desires, and incorporate the latter into my actions. The concept of second-order volitions and the agent's *identification* with his first-order desires does seem close to Taylor's understanding of the strong evaluator.

[39]Wolf, *supra*, note 23 at 49.

[40] And as Professor Mark Thornton pointed out to me, the fact that if hard determinism is true, then beliefs and values can be traced to causes outside ourselves does not necessarily make them any the less *ours*.

conduits of forces beyond our control, but are capable of evaluating ourselves and of acting in accordance with our deeply-held beliefs and values. It is the normative process of evaluating that allows us to question and recreate who we are.[41] What is important is our "stance of attention" and our "readiness to receive any gestalt shift in our view of our situation" that enables us to re-evaluate ourselves.[42]

Consider once again the status of young children as responsible moral agents. Jeremy Horder attributes the exclusion of young children from criminal liability to a lack of moral agency and, specifically, their inability to make moral evaluations of their own conduct, notwithstanding that they can be rationally motivated and can act both voluntarily and intentionally:

> In the case of very young children, their exemption from criminal liability might be justified on a number of grounds, such as the wish to avoid undue harshness in the application of criminal process and sanctions. Nonetheless, what gives grounds such as this their force is that, whilst even very young children are quite capable of engaging in intentionally harmful conduct, they do not have developed moral characters to which such conduct can be related. It is the possession of such a character that makes possible the formation of and action upon an intelligent conception of the good (in) life, and hence makes it possible to subject one's (potential) conduct to critical moral evaluation, and shape it in the light of that evaluation.[43]

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[41]Schlossberger, *supra*, note 1, *passim*.

[42]Taylor, *supra*, note 35 at 297.

[43]Jeremy Horder, "Pleading Involuntary Lack of Capacity" (1993), 52 *Cambridge Law Journal* 298 at 301.

It is a person's capacity to subject her potential conduct to critical moral evaluation that makes her morally answerable for that conduct[44] and, as in the case of insanity, it is her correlative inability to evaluate her conduct that excuses a person from moral responsibility. This inability to evaluate her conduct critically amounts to an absence of moral agency which exempts her from liability.

The character theory recognizes that a person can possess freedom of action (the freedom to bring about, through rational action, the results that one desires) and still not be free to determine what those desires are in the first place. It accepts that my ability to do anything that I desire does not in itself make me free; I must also have some control over the content of my desires. The character theory therefore rejects freedom in the formal or "negative"[45] sense in favour of a richer understanding of freedom and responsibility grounded in the agent's moral outlook. But it is the capacity to be motivated by and to conduct ourselves in accordance with our moral outlook that ultimately makes us responsible. The ability to be motivated by our moral outlook provides a bridge between our moral outlook and the world with which we interact. Our intentional actions are one means by which our moral outlook is impressed upon the world. But it is not the only way. An Aristotelian version of

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[44]See also Bernard Williams, "Voluntary Acts and Responsible Agents" (1990), 10(1) *Oxford Journal of Legal Studies* 1-10.

[45]Compare Charles Taylor, "What's Wrong with Negative Liberty," in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University

the character theory implies that our inadvertent conduct can also reflect the very moral outlook for which we are responsible as moral agents. To see why this is so, we need to consider the implications of the character theory for negligent conduct.

C. Character and Responsibility for Negligence

On the choice theory, negligent conduct is not blameworthy because it is inadvertent and thus not the outcome of instrumental reasoning. Michael Moore explains:

> Responsibility for negligence *is* difficult to square with the choice conception of responsibility for the obvious reason that a negligent actor does not choose to do the complex act (such as killing) that is forbidden. True, such an actor does choose to do some basic action, such as moving his finger on the trigger of his gun; and it also may be true that he chooses to do more complex acts (such as hitting a target) through his doing of the basic act of moving his finger. But in the sense of choice earlier described, he does not choose the complex action forbidden by morality and law (such as killing the man standing behind the target) because his mind was not adverting to that aspect of his action.[46]

Orthodox subjectivist criminal lawyers, such as J.W.C. Turner, would agree with this analysis. Turner explains, for instance, that there can be no criminal liability in cases of negligence because the actor's mind "is blank as to the consequences in question."[47] The choice theory of responsibility supports Turner's "subjectivist" approach to criminal

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Press, 1985), 211-29.

[46]Michael S. Moore, "Choice, Character, and Excuse," in *Crime, Culpability, and Remedy* (Oxford: Basil Blackwell, 1990), 29-58 at 56.

[47]"The Mental Element in Crimes at Common Law," in L. Radzinowicz and J.W.C.

liability according to which the actor must have some subjective foresight of the consequences of her actions. Subjective foresight provides the essential normative link between the actor's desires and the consequences of her actions. Inadvertent conduct is excluded from criminal liability because its consequences are unintended, unforeseen, and therefore played no role in the agent's deliberations.

The character theory, however, focuses not on the actor's subjective intentions at the time of the act, but rather on whether the actor's conduct is expressive of the actor's moral outlook and, in particular, the actor's moral regard for others. In the context of negligent conduct, this issue is whether the actor, as a reflective moral agent, had the capacity to act non-negligently. To the extent that the negligent conduct stems from a failure on the part of the actor to modify her moral outlook so as to respect the fundamental rights and interests of others as a reasonable person would, the actor is morally responsible for negligence.[48] The ability to have acted otherwise refers not to the actor's instrumental *reasoning* ability, but rather to her ability to remedy, through critical self-evaluation and reflection, any moral "defect" in her character.

Turner, eds., *The Modern Approach to Criminal Law* (London: Macmillan, 1945), at 211.

[48]Arenella, *supra*, note 16 at 73.

In contrast with the choice theory's rational agent, the moral agent described by the character theory is aware of his relation to others and the world generally, in more than just his conscious, deliberative conduct:

> The mature agent . . . will recognize his relation to his acts in their undeliberated, and also in their unforeseen and unintended aspects. He recognizes that his identity as an agent is construed by more than his deliberative self.[49]

This broader awareness of the effects of one's conduct epitomizes the full moral agent and makes him morally culpable for failing to consider, when evaluating his moral outlook, those aspects of his character that bear directly on the safety and well-being of others.

D. Objections to the Character Theory

Having concluded this preliminary discussion of the character theory of responsibility, we need to consider the various and disparate objections that have been levelled against it: first, that the character theory unjustly blames us for our bad characters rather than our bad acts; second, that any plausible version of the character theory collapses into the choice theory; third, that the character theory would unjustly hold us responsible for our stupidity or for a momentary lapse; and, finally, that moral responsibility is impossible because our characters are determined by factors beyond our control.

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[49] Williams, *supra*, note 44 at 10.

(1) Bad Character or Bad Acts

One common misunderstanding concerning the nature of the character theory by choice theorists requires some clarification. Many choice theorists criticize the character theory for holding individuals responsible for "bad character" rather than for the specific wrongful conduct in question. For instance, R.A. Duff suggests that the character theory considers us morally responsible for character even if not manifested in action or conduct.[50] The question then is: why require an act at all?

This question may be addressed in terms of whether, if I have never had occasion to express a disposition (if, for instance, I have never had to act courageously), I can still be said to have that disposition (to be courageous). [51] Another way of expressing this question is whether I can be said to have a definitive moral outlook apart from my conduct. I doubt that a categorical answer to these questions is satisfactory. As the sorts of reflective moral beings described by Frankfurt, Watson, and Taylor, we react to and learn from our experiences and, in turn, develop a moral outlook which governs our conduct. If we suffer from "weakness of the will" and succumb to temptation, we might resolve to be stronger the next time. Our actions inform our character and our character informs our actions. Our conduct, however, is the true test of our moral resolve, of the depth of our commitment to

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[50] R.A. Duff, "Choice, Character, and Criminal Liability" (1993), 12 *Law and Philosophy* 345-83 at 371; see also R.A. Duff, *Criminal Attempts* (Oxford: Oxford University Press, 1996), 184.

our moral outlook. It may be that our convictions are strong enough that we know that our resolve will not bend; but we may yet be surprised. Our actions, then, confirm our commitment to our moral outlook.

But there are other reasons why the act requirement is important. As a matter of evidence, it may well be difficult to determine, in the absence of an act, the content of a person's moral outlook or the strength of the person's resolve. Libertarian concerns about excessive state interference would (quite rightly, I believe) discourage us from allowing the state, through its criminal powers, too broad a scope to invade the privacy of our thoughts. But once our thoughts begin to affect the fundamental rights and interests of others, they become a matter of public concern. The act requirement thus helps us to define the limits of state interference with the liberty of its citizens. Of course, this sort of argument is not unique to a discussion of responsibility for negligence; we are equally hesitant to punish evil thoughts alone, in the absence of their manifestation in action.[52]

Moore also expresses a related concern about the relationship between character and action. He argues that character theory is unable to accommodate responsibility for negligence because it cannot bridge the "gap" between "the failure of a negligent actor to advert to the risk that made his action negligent *at the time of the action*, on the one hand,

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[51] Duff, *Criminal Attempts*, *supra*, note 50 at 185.

[52] Duff, "Choice, Character, and Criminal Liability," *supra*, note 50 at 184-86.

and the *general tendency* of such an actor to be inadvertent about such risks, on the other."[53] Although we sometimes do draw such inferences, Moore explains, "we hold negligent actors responsible irrespective of whether one can draw such an inference or not."[54]

This objection mistakenly confuses two issues: (a) what we are held responsible for and (b) why we are considered responsible. The character theory holds that we are responsible *for* our intentional and negligent conduct *because* we are responsible for our moral character. Arenella, for instance, distinguishes two independent features of a theory of responsibility: the attributes that an actor requires to qualify as a moral agent who has the capacity for responsible action and the types of moral or legal blame that we impose (whether act-based or character-based).[55] The character-based theory does not exclude the possibility of imposing moral blame or criminal liability for actions; indeed, it explains why it is that we are responsible for our actions in a deeper sense than is suggested by the choice theorist's appeal to instrumental rationality. As Arenella explains, we might blame individuals "for their choice to violate minimal act-regarding norms, but the culpability of their choice might depend on our assumption that moral agents can control those aspects of their

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[53]Moore, *supra*, note 46 at 57.

[54]*Ibid.*

[55]Arenella, *supra*, note 16 at 74.

characters that motivate such choices."[56] The character theory is therefore more than a justification of criminal liability for negligent conduct; it is also a general theory of moral responsibility (or, at least, of that area of moral responsibility that most concerns the criminal law).

A related mistake is thinking that the character theory is necessarily about general tendencies or character "traits." This may be true of the Humean version of the character theory,[57] but it is untrue of the Aristotelian account. On the Aristotelian account, it is not the bad character itself that we are evaluating and blaming, but the failure of the agent to take affirmative steps to remedy defects in her moral outlook that conflict with her moral and legal obligations to avoid harm to others.[58] The character theory explains what it is that makes us responsible moral agents; it is not "bad character" that is blameworthy but the agent's failure (prior to the negligent conduct in question) to have remedied those defects that contribute to it, such as the agent's attitude toward the basic rights and interests of

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[56] *Ibid.*

[57] On the Humean account, an act would be merely "evidence" of bad character, but this would be its *only* relevance: see Duff, "Choice, Character, and Criminal Liability," *supra*, note 50 at 371.

[58] Aristotle does acknowledge that the voluntariness of our actions (and our responsibility for them) is different from the voluntariness of our characters (1115*a*). Practically, however, the distinction between action and character does not ultimately make a difference since we are responsible for both. And it is our responsibility for our moral characters, our responsibility for our deep moral selves, that makes us responsible for our negligent conduct, for it is within our power to be careful and, more specifically, to be more attentive to the rights and interests of others.

others. We are no more responsible for our "bad characters" in themselves than we are responsible for our "bad intentions" alone. It is only when character defects and bad intentions are revealed in action that they become expressive of our desires or moral outlooks.[59]

Finally, Moore argues that the character theorist is unable to bridge the gap between "the actor who does 'systematically, characteristically make unreasonable mistakes' and the bad character of such an actor."[60] Moore points out that a person can be careless, not because of a "bad character" in the form of a general attitude of practical indifference, but "due to awkwardness and stupidity," but we nevertheless assign blame for carelessness irrespective of *why* someone is careless.[61] I shall come to the question of "stupidity" in the next section. With regard to negligence, however, the character theory regards us as responsible only for such negligent conduct as flows from a defect in our *moral* character.[62]

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[59] Duff, "Choice, Character, and Criminal Liability," *supra*, note 50 at 353; see also Aristotle, *Nicomachean Ethics*, III.2-4, VI-VII.

[60]Moore, *supra*, note 46 at 57.

[61] *Ibid.* at 58.

[62] Kenneth W. Simons argues in "Culpability and Retributive Theory: The Problem of Criminal Negligence" (1994), *Journal of Contemporary Legal Issues* 365-68, that only those deficiencies which stem from a "moral lapse" would be sufficiently serious to warrant criminal sanction. Simons' argument will be considered at greater length in the next chapter. For now, it is sufficient to note that Moore fails to appreciate that the *reason*

(2) Liability for Lack of Intelligence

Like Moore, Duff objects to the character theory on the ground that it might hold responsible (and ultimately liable to criminal punishment) a "well-meaning but stupid person."[63] But the character theory does not demand that moral agents be "smart" or "intelligent," but only that they be respectful of the rights of others. Thus, a moral agent who is stupid, but otherwise respectful and well-meaning, would not have a defective moral outlook and therefore would not be morally responsible for negligence.[64] In this situation, the person's deficient intellect would inhibit "the actualization of that respect for rights and interests of others which a well-meaning but stupid person does have."[65] If, however, a person is so unintelligent as to be incapable of appreciating the difference between right and wrong, then there is some doubt about whether we are even dealing with a full moral agent in the first place. In these circumstances, the person might be excluded from moral responsibility on the basis of the "insanity" defence; such a person, being

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for a person's carelessness might help us to distinguish *criminal* negligence from civil negligence.

[63] Duff, "Choice, Character, and Criminal Liability," *supra*, note 50 at 369; Moore, *supra*, note 61 and accompanying text.

[64] As Duff observes in *Criminal Attempts*, *supra*, note 50, the conduct "of one who 'systematically, characteristically makes unreasonable mistakes, causing danger to the interests of others' *might* reveal a 'genuine practical indifference to the interests protected by the criminal law' which is criminally culpable. On the other hand, it might reflect a purely cognitive deficiency in intelligence, which is surely not culpable" (at 179, citing Lacey, *supra,* at 5). Such a person, while culpable, might nevertheless be subject to civil liability on the basis of an "objective" standard: see, for instance, *Vaughan* v. *Menlove* (1837), 132 E.R. 490. (This case will be discussed at greater length in the next chapter.)

unable to make moral evaluations of his or her own conduct, would be excluded from the class of moral agents and therefore not subject to moral blame.[66]

(3) Liabilty for a Momentary Lapse

The treatment by the Aristotelian version of the character theory of "momentary lapses" by persons who otherwise have good characters helps to illustrate that it is not the person's character itself that is important, but whether the inadvertence in question can be traced to a moral defect for which the actor is liable. Arenella explains that "sensitive and attentive actors who uncharacteristically engage in negligent behaviour also deserve moral blame for failing to execise their character strength because of some momentary distraction."[67] I would qualify this statement, by saying that otherwise sensitive and attentive actors who are negligent in a particular instance because of a momentary distraction also deserve moral blame, if the reason for their being distracted can itself be traced to a defect in their moral character. This means that there can be no general "out-of-character" defence of the sort some character theorists have defended[68] and choice theorists have opposed.[69]

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[65] Duff, *Criminal Attempts*, *supra*, note 50 at 179-80.

[66] Horder, *supra*, note 43, and accompanying text.

[67] Arenella, *supra*, note 16 at 75.

[68] Lacey, *supra*, note 5 at 68. Lacey here defends one aspect of Bayles' Humean version of the character theory, its view that "it is unfair to hold people responsible for

Any such defence must be able to show that the momentary distraction was not the product of a defect (even a latent defect) in the actor's moral outlook (such as a lack of regard for the fundamental rights and interests of others); if the actor can show that the distraction was the product of something other than a moral defect, and that although distracted, the actor still had the proper moral regard for others, then a defence[70] would be made out. For instance, if a father, while driving, is momentarily distracted because his young daughter in the back seat suddenly begins to choke, he should be able to argue, as a defence, that the momentary distraction was not the product of his latent lack of regard for others. Such a defence might not be available to another driver who, while generally respectful of the fundamental rights and interests of others, takes to the highway in her car and causes an accident after yet another sleepless night. We might properly question the strength of the latter's commitment to her moral outlook.[71]

(4) The Character Theory Collapses into the Choice Theory

Another objection is that any plausible version of the character theory collapses into the choice theory. Moore argues that if we are responsible for our characters "because we

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actions which are out of character, but only fair to hold them so for actions in which their settled dispositions are centrally expressed."

[69] Moore, *supra*, note 46 at 52-53.

[70] In Chapter Seven, I call this defence the defence of "good faith."

[71] Duff, *Criminal Attempts*, *supra*, note 50 at 187.

choose to become persons with such character," the character theory "collapses the character conception of responsibility back into a choice conception of responsibility."[72]

The response to this argument is two-fold. First, the character theorist need not deny that, in some sense, we *can* choose our characters. Indeed, this is precisely what distinguishes the Aristotelian version of the theory from its Humean counterpart. The Aristotelian theory can be seen as extending the time-frame of responsibility; the agent could have chosen otherwise at an earlier point. Second, the proposition that the character theory collapses into the choice theory is based on a misunderstanding of the main difference between the two theories: the choice theory is concerned with the instrumental rationality of actions and takes choices as given; in contrast, the character theory insists that our choices express the very moral outlook that we define for ourselves as moral agents. If this means that we "choose" our characters, this does not necessary imply that the character theory collapses into the choice theory; for the character theory can consistently admit that, as evaluative beings, we choose our characters, but deny the theory of freedom (freedom of action) that anchors the choice theory.

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[72] *Supra*, note 53 at 45. Duff makes a similar argument in "Choice, Character, and Criminal Liability," *supra*, note 50 at 378, suggesting that the distinction between the choice theory and the character theory is illusory. Duff, however, seems to have as his target the Humean version of the character theory.

(5) Determinism

We should now reconsider the hard determinist's claim from the perspective of the character theory. The hard determinist's response to the character theory might be expressed as follows: even if conduct can be traced to a person's moral outlook, there is no reason to think that this moral outlook is within the person's control in any sense that is consistent with moral responsibility. Moreover, even if it is conceded that some individuals have the power to evaluate and revise their characters, what of those who cannot? Are "wanton" individuals thereby excused from any moral responsibility for their conduct?

The rejoinder to this objection is three-fold. First, most modern character theorists are willing to concede that our deepest values or second-order desires may not be entirely transparent to us.[73] Nevertheless, they maintain that it is a person's *capacity* for self-reflection (not actual self-reflection) that is constitutive of agency. Frankfurt thus stresses the importance of "the capacity for reflective self-evaluation,"[74] while Taylor explains that what is important to us "will already have an articulation"[75] even before we begin to reconsider our basic values. Indeed, it is precisely when our deeply-held beliefs and desires come into conflict with the demands of duty that we are forced to engage in critical self-

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[73]*Infra*, note 78, and accompanying text.

[74]Frankfurt, *supra*, note 24 at 67.

evaluation and either affirm or revise our beliefs. Indeed, the conceptual link between evaluation and the concept of duty gives rise to a critical role for duty in an account of criminal responsibility and criminal negligence, for it is the existence of a duty that engages our capacity for self-evaluation and challenges us to draw upon it.

The second response is that however determined our moral characters may be, it is through the conscious *process* of evaluating (and assenting to) the normative demands on our conduct that we become free; for we become aware that whatever our desires may be, we are still capable of evaluating them in relation to the demands of duty. Those (such as children and the insane) who are incapable of evaluating their moral outlook must indeed be excluded from moral and legal (that is, criminal) responsibility. However difficult Wootton might find it to distinguish, as an epistemic matter, the "wicked" from the "insane," (or even the responsible adult from the blameless infant), there is an important metaphysical difference between one who is capable of moral evaluation and one who is not.

These first two responses still might not satisfy hard determinists. Critics of responsibility often rely on a concept of the person that is rooted in a positivist or reductionist world view. These attempts to rid the criminal law of the concept of responsibility leave us with a picture of the person–even the most self-aware, reflective person–as a helpless conduit for

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[75]Taylor, *supra*, note 35 at 296.

overwhelming, impersonal forces of history. But even in their commitment to determinism, some human scientists are prepared to accept that there may, in fact, be *degrees* of freedom. Consider, for instance, John Hospers' discussion of the view that deterministic causation extends to the unconscious. How, then, is there any room left for human freedom? His response is telling:

> If practising psychoanalysts were asked this question, there is little doubt that their answer would be along the following lines: they would say that they were not accustomed to using the term "free" at all, but that if they had to suggest a criterion for distinguishing the free from the unfree, they would say that a person's freedom is present in *inverse proportion to his neuroticism*; in other words, the more his acts are determined by a *malevolent* unconscious, the less free he is. Thus they would speak of *degrees* of freedom. They would say that as a person is cured of his neurosis, he becomes more free–free to realize the capabilities that were blocked by the neurotic affliction. The psychologically well-adjusted individual is in this sense comparatively the most free. Indeed, those who are cured of mental disorders are sometimes said to have *regained their freedom*: they are freed from the tyranny of a malevolent unconscious which formerly exerted as much of a dominion over them as if they had been the abject slave of a cruel dictator.[76]

Freedom may not be an all-or-nothing matter. But if it makes sense to speak of a causally determined unconscious and of degrees of freedom, there must be some criterion for determining these degrees, and of determining when a person can be said to be free from the "malevolent unconscious." The criterion is, in fact, implicit in the character theory and

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[76]John Hospers, "Free Will and Psychoanalysis," in Herbert Morris, ed., *Freedom and Responsibility: Readings in Philosophy and Law* (Stanford: Stanford University Press, 1961), 463-73 at 473.

echoes the psychoanalytic explanation; it is a person's ability to come to know, to reflect upon, and to evaluate the influences on his or her values that make that person more or less free.

Does the character theory provide an adequate response to determinism? In one sense, it does. The character theory acknowledges that our desires might all be determined by extrinsic factors. But even if this were so, it affirms the existence of an evaluative perspective on these desires that is critical of them and that can rise above them to act in accordance with the demands of duty. The character theory recognizes a subjective, moral *perspective* on our desires that is independent from the empirical fact of the desires itself.[77]

Perhaps we can never definitively refute hard determinism. But we are now in a better position to understand what we must give up if we are to accept the hard determinist's position. First, if we accept the determinist's argument, we must also be prepared to sacrifice an understanding of the person as an evaluating being, a being that is capable (at least some of the time) of self-evaluation and re-creation. Second, we must reject the significance of the subjective perspective on the world. To the extent that the person is but a cluster of desires or preferences, there is no intrinsic reason why this person should be entitled to respect as a moral being. Whatever significance is accorded to the person is

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[77]See, for instance, C.A. Campbell, "Is 'Free Will' a Pseudo-Problem" (1951), 60

based simply on that person's status as a receptacle of pleasure. And, as we have seen, all of this has profound implications for the importance of the mental element and subjective considerations in the criminal law.

At the same time, however, hard determinism forces character theorists to moderate the force of their claims. For instance, none of its modern proponents is prepared to say that our responsibility for our characters is absolute; all acknowledge, in some fashion, the complexity of human psychology and the relative opacity of our deeper selves. For instance, Taylor admits that "it is precisely the deepest evaluations which are the least clear," while Frankfurt acknowledges that there is "as much opportunity for ambivalence, conflict and self-deception with regard to desires of the second order, for example, as there is with regard to first-order desires."[78] Thus, while Aristotle's account implies that our responsibility for character is absolute, his modern counterparts seem to regard reflective self-evaluation as an ideal towards which we (or at least some of us) strive, but which we do not always realize.

But if the modern proponents of the character theory are correct in their cautious approach, how then can the character theory justify considering individuals responsible for their negligent conduct? The answer to this question lies in the recognition by the moderns that,

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Mind 473-86 at 486.

although self-reflection is made difficult by the opacity of our deepest values and beliefs, we have, as rational, responsible agents, the *capacity* for reflective self-evaluation.[79] We are capable, upon self-reflection, of acknowledging our carelessness, or our indifference to taking precautions, or our unwillingness to acknowledge and investigate the potential risks created by our conduct. But although we may not ordinarily reflect upon these matters in our daily lives, we may find ourselves, particularly on those occasions where fundamental human interests are involved, under a special obligation to do so. And it is this special obligation, this duty to take care, to be cautious, or to make further inquiries, that triggers an obligation to evaluate our conduct; it is our response to this obligation for which we are properly held responsible.

E. Criminal Liability for Negligence

It might be objected that even if we accept the character theory defended in this chapter, all that has been demonstrated is that we are, as moral agents, responsible for our negligent conduct. But moral responsibility of this sort might not be sufficient to warrant the imposition of criminal liability. Negligent behaviour (the objection continues) might be subject to moral censure, and even civil liability, but not criminal liability. To respond to

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[78]Taylor, *supra*, note 35 at 296; Frankfurt, *supra*, note 24 at 75.

[79]Horder, *supra*, note 43 at 302: "For only the ability (even if unexercised) to evaluate conduct within the context of one's moral character gives individual (criminal)

this argument, we must now proceed to explain how negligent conduct can invite *criminal* liability, and what, if anything, distinguishes criminal negligence from civil negligence.

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capacity and responsibility its full meaning."

CHAPTER SIX

CIVIL NEGLIGENCE AND THE OBJECTIVE STANDARD

After leaving aside the traditional consequentialist approach to criminal liability, we concluded that culpability should be regarded, at the very least, as a necessary condition of criminal liability (that is, that the negative retributivist thesis is correct). The character theory of responsibility brings us to another conclusion: that as beings capable of critical self-evaluation and self-revision, we are morally responsible for negligent conduct. The character theory locates morally responsible agency in the capacity to have, reflect upon, and revise one's moral outlook; it then holds us responsible for our conduct to the extent that it flows from that outlook. Unlike the traditional deontological account, it does not limit moral responsibility to intentional action. Inadvertent conduct that flows from our moral outlook is equally subject to moral appraisal. The goal of this dissertation is to show how the character theory of responsibility justifies the imposition of *criminal* liability for negligence. This chapter takes two steps closer to that goal: first, it considers and rejects the proposition that, even if negligence were morally culpable, only *civil* liability would be justified; second, it explains, by reference to the character theory, what it is that distinguishes criminal negligence from civil negligence.

This chapter advances the argument that in rejecting moral culpability as the basis for civil liability and imposing liability on the basis of an "objective" standard of fault, tort law is simply unable to capture the sense in which we are morally responsible for our inadvertent

conduct on the character theory of responsibility. Tort law imposes liability for all negligent conduct, regardless of whether that conduct flows from a person's moral outlook. Thus, while tort law imposes civil liability on those persons who, on the character theory, are morally responsible for negligent conduct, it does not attempt to distinguish this group of individuals from those who would be morally innocent on the character theory. In short, tort law imposes civil liability regardless of culpability. But it is precisely the character theory that provides us with the conceptual framework for identifying those who are morally responsible for negligent conduct and distinguishing them from all other negligent actors.

Before I turn to the substantive argument, a preliminary point needs to be made: the argument in this chapter is advanced in support of the conclusion that there is a category of negligent conduct that might also be subject to criminal liability. This is not to say, however, that civil liability should not be imposed concurrently for such conduct; the imposition of civil liability does not preclude criminal liability or vice versa. Nor does my argument imply that any distinction[1] between tort law and criminal law must be illusory. [2]

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[1]As an institutional matter, several features distinguish tort law from criminal law. First, the parties are different. In tort law, the victim, as plaintiff, brings an action against the defendant; the parties are for the most part private citizens. In criminal law, the state usually prosecutes the accused (defendant); the victim is rarely a party to the action. The standard of proof also differs. In tort law, the plaintiff must prove her case on a "balance of probabilities"; in criminal law, the state must prove guilt "beyond a reasonable doubt." Substantively, criminal law emphasizes the mental state of the wrongdoer, while tort law

If, as I have argued, criminal liability should be imposed only for culpable conduct, tort law may well (and generally does) impose liability for other, independent reasons (whether deontological or consequentialist). Thus, in justifying the imposition of criminal liability for negligence, we can still reject the claim that tort law and criminal law necessarily converge. I begin now by considering the theoretical foundations of tort law.

A. Consequentialism and Tort Law

Consequentialists and deontologists agree that civil liability for negligence does not depend on moral culpability. As we observed in Chapter Two, on the consequentialist account, the purpose of both criminal law and civil law is to regulate social behaviour through the imposition of penalties: in tort law, these penalties take the form of monetary damages; in criminal law, imprisonment is also employed. In both situations, the law operates through a system of incentives so as to deter socially harmful (inefficient) conduct. The distinction between tort and crime, then, is simply a distinction in the

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stresses the external reasonableness of the tortfeasor's conduct. Finally, on the issue of remedy, these two areas of law diverge; those convicted of criminal offences are subject to punishment, often in the form of imprisonment, while tortfeasors are required to compensate those who have been harmed by their actions.

[2]Oliver Wendell Holmes and Barbara Wootton share this theoretical belief: see Chapter Two. Others have argued that in practice the rigid distinction between compensation and retribution seems to dissolve in light of such phenomena as punitive damages in civil actions and restitution orders by the criminal courts: See Kenneth Mann, "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law" (1992), 101 *Yale Law Journal* 1795-1873.

empirical means used to induce the desired behaviour; conceptually, there is little else to distinguish the two. Indeed, for Holmes, criminal law and civil law are unified in a much stronger sense: both seek to induce conformity to law by holding individuals to an extrinsic standard of reasonable conduct.[3]

I have already indicated some of the difficulties with the consequentialist approach to criminal law.[4] I shall not repeat these here. I merely point out that, while I have expressed reservations about the traditional consequentialist account of criminal law, I have not taken a position on the propriety of a consequentialist theory of *tort law*. It remains open, therefore, to distinguish civil from criminal negligence by imposing a consequentialist framework on civil law, while insisting on the deontological basis for the criminal law. Indeed, if civil law were concerned with social welfare and criminal law with moral responsibility, the distinction between the two would be clear. Yet, a mixed theory of this sort would have to explain why concepts that are common to both (such as rights, duties, harm, and wrongdoing) are to be understood in different ways depending on whether the context is civil or criminal, and why a mixed theory is preferable to a unifying one. Moreover, a consequentialist account would have to argue that tort law is not really what it

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[3] Oliver Wendell Holmes, *The Common Law* (New York: Dover Publications, 1991), at 49-50.

[4] *Supra*, Chapter Two.

purports to be, and that concepts of rights and duties are really proxies for utilitarian or economic phenomena (for example).[5]

I do not mean to suggest that a mixed theory would necessarily fail. And if it were to succeed, its success would not affect the account of criminal negligence that I defend. The crucial point for our present purposes, however, is that the underlying theory of fault in civil negligence cases, on both the consequentialist and the deontological approach to tort law, is an objective one; that is, civil liability is imposed irrespective of the moral culpability of the actor. But because the traditional deontological account seeks to distinguish criminal liability on the basis of a subjective intent requirement (and therefore rejects criminal liability for negligence),[6] I focus on the deontological approach in this chapter. For, if we can distinguish criminal and civil negligence within the deontological theory, the more difficult challenge will have been met, and we can assume, *a fortiori*, that

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[5]As Nicola Lacey observes in *State Punishment* (London and New York: Routledge, 1988), the "utilitarian approach seems incapable of generating some familiar distinctions such as that between punishment and compensation, given that it takes what has been dubbed the 'extrinsic' approach to both, viewing them in instrumental or reductive terms" (at 43).

[6]Of course, there are many deontological accounts of law that could be considered "classical." Among these are the accounts found in G.W.F. Hegel, *Philosophy of Right*, T.M. Knox, trans. (Oxford, Oxford University Press, 1952), and Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd, trans. (New York: Macmillan Publishing Company, 1986). The nuances of these theories are important, but there are common features to these accounts, one of which is the assumption, discussed above, that unintentional conduct falls outside the reach of the criminal law. It is this aspect of the

an independent consequentialist account of tort law is compatible with a deontological account of criminal liability for negligence.

B. The Deontological Approach to Civil Negligence

As a matter of common law, civil negligence involves an injurious act by one person (the tortfeasor; defendant in the civil action) for which the victim (plaintiff in the civil action) is entitled to compensation. There are several elements of civil negligence: there must be a *duty of care* on the part of the defendant, toward the plaintiff; the defendant must have breached the *standard of care* required in the circumstances; and the defendant's breach must be the *proximate cause* of the plaintiff's injury.

The concept of a "duty of care" demarcates the person or class of persons to whom the defendant owes a duty. The duty is regarded as a correlative one; it links the defendant to the plaintiff. The existence of the duty is relative to the circumstances of the conduct and is owed to a particular person or persons. There is no duty "in the air":

> To be liable for an injury he has caused, the defendant's carelessness must not only have been in breach of a duty to exercise care, but the duty must be owed to the plaintiff. In other words, the latter cannot take advantage of the fact that the defendant happened to be committing a wrong to someone else, he must bottom his claim on the violation of a right of his own.[7]

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classical account with which, as stated earlier, I am the most concerned.

[7]John G. Fleming, *The Law of Torts*, 7th ed. (London: The Law Book Company

This approach regards the relationship between the plaintiff and the defendant as the central element of the inquiry into the existence of a duty of care.

This correlative approach to the duty of care was established in the landmark American case, *Palsgraf* v. *Long Island R.Co.*[8] In *Palsgraf*, a guard on the platform of a train station helped to push a passenger onto a train as it began to move. The passenger was carrying a small package, covered by a newspaper, that happened to contain fireworks. As the passenger was pushed onto the train, the package became dislodged, fell onto the platform and exploded. The explosion caused a scale at the far end of the platform to fall over, striking the plaintiff, who later sued the railroad company in tort.

The New York Court of Appeals held that the although the railroad company may have been negligent toward the passenger, it did not owe a duty of care to the plaintiff. Justice Cardozo, for the majority, explains that the guard's conduct, while wrong in relation to the passenger, was not wrong in relation to the plaintiff. The defendant owes a duty only when "the eye of vigilance perceives the risk of damage," yet "there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread

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Limited, 1987), 130-31. Fleming also refers us to *Bottonley* v. *Bannister*, [1932] 1 K.B. 458, which holds that "English law does not recognize a duty in the air, so to speak; that is, a duty to undertake that no one shall suffer from one's carelessness" (at 476).

[8]162 N.E. 99, 248 N.Y. 339 (N.Y. C.A. 1928) [cited to N.Y.]. The rationale in *Palsgraf* was adopted by the English courts in *Bourhill* v. *Young*, [1943] A.C. 92.

wreckage through the station." Justice Andrews, in his dissenting opinion, expresses the opposing view, that everyone "owes to the world at large a duty of refraining from those acts which unreasonably threaten the safety of others."[9] An act of negligence having been committed, the defendant is liable for the consequences, subject only to limitation based on the doctrine of proximate cause.

Justice Cardozo's emphasis on the correlativity of the defendant's wrongdoing and the plaintiff's suffering is regarded by some as expressive of a normatively coherent, deontological approach to tort law.[10] Thus, the majority opinion has been understood by deontological theorists as emphasizing "the relational quality of negligence"[11] by integrating the wrongfulness and the resulting injury. And it has been said to rely implicitly upon the assumption that "a right to another's care is the product of a relationship of mutual concern and respect."[12] This correlativity of the wrong and the suffering also illuminates the role of rights and corrective justice on the deontological account.

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[9]*Palsgraf, supra*, note 8 at 345.

[10]Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, Massachusetts: Harvard University Press, 1995), 159-64; Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley: University of California Press, 1995), at 192-94.

[11]Weinrib, *The Idea of Private Law*, at 160.

[12]Brudner, *The Unity of the Common Law*, at 193.

A rights-claim to the care of others is based on the notion of equal liberty. The deontological account is based on the Kantian assumption that rational, moral agents are normatively equal. Each has a moral sphere of autonomy and each is, by virtue of his or her ability to reason and to act in the world, equal to every other moral agent. However, as social beings, our conduct necessarily affects others; we need the freedom to pursue our goals and projects, without interference from others. However, we recognize that others also make a claim to non-interference. Equal liberty in the pursuit of individual goals and projects requires the mutual and reciprocal recognition of rights, together with a commitment to take reasonable care to avoid trenching upon those rights. The right of each person to the care of others corresponds to their duty to take care in their actions.

The reciprocity of right and duty also means that a breach of the duty of care is a breach of a duty that is owed to me by a particular person, the defendant. As Justice Cardozo explains in *Palsgraf*, since negligence and duty are "strictly correlative," the plaintiff sues "in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."[13] The remedy for a breach of duty is that the defendant must compensate the plaintiff so as to annul the loss resulting from the breach and to restore the plaintiff to her original state. This remedy reflects the Aristotelian notion of corrective justice, according to which the law "looks only to the distinctive character of the injury,

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[13] *Palsgraf*, *supra*, note 8 at 342.

and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it" (1132*a*).[14] In these circumstances, "the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant" (1132*a*).

That the defendant owes the plaintiff a duty of care is not sufficient for liability; it must also be shown that the defendant breached the required standard of care. Not all activity that creates a risk to others is prohibited. In a complex and technologically advanced society, some risk of harm is present in even the most common, everyday activities. Individual liberty would be greatly curtailed if a certain level of risk were not permitted. This minimum risk is not only consistent with equal liberty, it is practically necessary to ensure that equal liberty obtains. Liability for negligence is concerned only with conduct that exceeds the bounds of permissible risk. Thus, liability is imposed only when the defendant fails to exercise the level of care that a reasonable person would have exercised in the circumstances. This brings us to the reasonableness standard.

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[14]Aristotle, *Nicomachean Ethics*, Book V, 4. This relational understanding of negligence is reflected in Cardozo J.'s judgment in *Palsgraf*, *supra*: "Negligence, like risk, is a term of relation. Negligence in the abstract, apart from things related, is surely not a tort if indeed it is understandable at all" (at 345).

In American jurisprudence, the standard of care is expressed in terms of the Hand formula.[15] According to the Hand formula, the defendant is liable if the cost of avoidance is less than the expected loss (the probability of the loss multiplied by the gravity or seriousness of the loss), or when B < PL.[16] In contrast with the American jurisprudence, the English approach, as set out in *Bolton* v. *Stone*,[17] does not take into account the cost of avoidance, except where it is so small as to be negligible. As such, on the English approach, the defendant cannot defend the conduct based on its cost-effectiveness. Once the conduct, viewed by itself, without reference to any advantage the defendant secures, creates an unreasonable risk of harm to the plaintiff, the defendant is liable. The English approach has been defended as the preferable approach on the ground that the American approach "permits self-preference even if the risk exceeds the ordinary and so allows scope for liberty greater than that consistent with the equal security of both."[18]

The concept of the reasonable person determines the content of the standard of care. This standard imposes an "objective" test for liability, since it assesses the conduct, not from the perspective of the actor, but from an extrinsic perspective. [19] On the American approach,

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[15]*United States* v. *Carroll Towing Co.* (1947), 159 F.2d 169 at 173 (2d. Cir.).

[16]See discussion of the Learned Hand test, *supra*, Chapter Two.

[17][1951] A.C. 850 (H.L.).

[18]Brudner, at 192.

[19]The distinction between an objective standard of conduct and an objective theory

the concept of the reasonable person is superfluous: what is reasonable is strictly a function of the Hand formula. However, on the English approach, the reasonableness standard determines the level of risk that is acceptable (when the risk imposed by a person's conduct exceeds an acceptable minimum risk that is consistent with equal liberty).

In the celebrated English case, *Vaughan* v. *Menlove*,[20] the defendant had constructed a hay-rick on the extremity of his land, near the plaintiff's property. The hay-rick was inflammable and eventually ignited. The plaintiff's barn, stables, and cottage were consumed by the fire. The defendant argued that his conduct should be judged by his subjective intentions, specifically, by whether "he had acted bona fide to the best of his judgment" (492). In his decision, Tindal C.J. rejects that argument as being "so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various" (493). Instead, he adopts a standard of reasonableness, requiring "caution such as a man of ordinary prudence would observe" (493).

This case firmly entrenched the reasonable person standard into the law of civil negligence. From a deontological perspective, this principle reflects the normative equality of the plaintiff and the defendant, since it favours neither. The rules proposed by the defendant would subject the interests of the plaintiff to the subjective purposes and judgment of the

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of fault is discussed at length, *infra*.

defendant; a rule of strict liability, in contrast, would subordinate the defendant's liberty to that of the plaintiff.[21] A standard of reasonableness, in contrast, acknowledges that the defendant's conduct must conform to a standard without imposing liability absolutely; the defendant's conduct is negligent only if it exceeds what is consistent with the equal liberty of both parties.[22]

According to Ernest Weinrib, the deontological approach to civil negligence is based on three propositions: first, the legal concept of civil negligence is founded on the rational agency and autonomy of the individual; second, the concept of corrective justice provides the justificatory framework within which the correlativity of the defendant's wrongdoing and the plaintiff's injury are addressed; third, neither the plaintiff's injury nor the defendant's culpability is uniquely important, since both yield to the reasonableness standard.[23] Although not all deontologists agree with all three aspects of Weinrib's account, there is a broad theoretical consensus on the following point: in tort law, the defendant's

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[20](1837), 132 E.R. 490.

[21]Weinrib, *supra*, note 10 at 177-79.

[22]The standard of reasonableness provides one limitation on the extent of the defendant's liability; the concept of proximate cause provides another. Once a breach of the duty of care is established, the defendant is liable not for all of the consequences of the negligence, but only for those that are "proximate" or reasonably foreseeable. This concept is implicit in Justice Cardozo's rejection of the notion of a duty to the world at large in *Palsgraf* and it is expressly relied upon in the dissenting judgment, as a means by which to limit what would otherwise be virtually unlimited liability for the consequences of a negligent act.

culpability yields to the reasonableness standard. This point is crucial, however, because the reasonableness standard, as it is understood in the context of tort law, is unable to capture the sense in which, on the character theory, we are morally responsible for negligent conduct that flows from our character.

C. Moral Blame and Civil Liability

In response to the character theory of negligence, it might be argued that even if negligence were morally blameworthy, its blameworthiness would only justify the imposition of civil liability. This is essentially Jerome Hall's response to the suggestion that one who is negligent is morally blameworthy:

> [A]lthough 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.[24]

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[23]Weinrib, *supra*, note 10, *passim*.

[24]Hall, "Negligent Behaviour Should be Excluded from Criminal Liability" (1963), 63 *Columbia Law Review* 632-44 at 641.

On this view, negligence is blameworthy, but to a lesser degree than (or, perhaps, more precisely, in a manner categorically different from) knowing or purposeful conduct. The problem with Hall's argument is that even if tort law imposes liability for some conduct that is blameworthy, its blameworthiness is not the *basis* upon which it is imposed. To see why this is so, we need to examine the objective standard of reasonableness.

The objective standard of reasonable conduct is the standard of care against which the alleged negligent wrongdoer's conduct is typically evaluated. Conduct which falls below this standard is considered negligent; conduct which meets or exceeds the standard is immune from liability for negligence. One of the basic elements of civil negligence is that the defendant's conduct breached the standard of care required in the circumstances. As we observed in *Vaughan* v. *Menlove*, that standard in the civil context is the standard of the reasonable person. In rejecting the view that liability for negligence "should be co-extensive with the judgment of each individual, which would be a variable as the length of the foot of each individual,"[25] Chief Justice Tindal imposes a standard that is based on considerations that have no bearing on whether the actor is morally responsible. Although the civil standard might take account of "well-known exceptions such as infancy and

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[25]*Supra*, note 20.

madness,"[26] it generally disregards the particular features of the actor's background and character.

The objective standard does not consider *why* a person is negligent. It fails to distinguish between two sorts of negligence: (a) negligence that flows from a defect in the person's moral character (the sort of negligence that is morally blameworthy on the character theory); and (b) negligence which occurs notwithstanding the actor's proper, or even exemplary, moral outlook. That is to say, the objective standard in tort law imposes liability regardless of whether the actor's conduct is morally blameworthy. Tort law therefore reflects a conduct-based theory of fault that is unconcerned with the underlying reasons for the conduct. Even if, as on Weinrib's account, civil liability is premised on the rational agency and autonomy of the individual, these concepts do not lead to a culpability principle; negligence need not flow from either the actor's subjective intent or blameworthy moral character before civil liability will be found.

Hall's argument suggests that even if negligence is blameworthy, it would still only attract civil, and not criminal, liability. The general acceptance of the objective standard of liability in tort law on both consequentialist and deontological accounts, however, indicates that civil liability is not imposed *because* the tortfeasor is morally responsible. Indeed, the objective standard imposes liability regardless of whether the negligent conduct flows from

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[26]Holmes, *supra*, note 3 at 50.

the tortfeasor's character. Civilly negligent conduct is "morally blameworthy" only if, by definition, conduct that is inconsistent with the objective standard of reasonableness were deemed to be "morally blameworthy." Hall might be right in suggesting that, in everyday life, we use the concept of "blame" in the broad sense he proposes. But of all the negligent conduct that falls within the scope of this broad definition, there is only one category of negligent conduct that is regarded as morally blameworthy on the character theory of responsibility; and it is this category of negligent conduct that is properly subject to criminal liability. But how is the negligent conduct that falls into this category identified?

D. Identifying Criminally Negligent Conduct

The view that I defend begins with the proposition that criminal negligence and civil negligence are not mutually exclusive. Rather, those forms of negligent conduct that are subject to criminal sanction are but a sub-category of a genus encompassing all civilly negligent conduct.[27] Thus, we are not so much "drawing a line" between two categories of

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[27] It might be argued that moral culpability is sufficient for criminal liability, so that if all negligent conduct is morally blameworthy, then all negligent conduct should be subject to criminal punishment. This argument, I take to be a *reductio ad absurdum*, for it justifies too much. Not only is it overbroad with respect to criminal liability for negligent conduct, but it implies that other sorts of morally blameworthy conduct that is not subject to penal liability ought to be. Lying, for instance, would be captured by this principle. In any event, as I shall explain at greater length in the next chapter, the character theory does not regard all negligent conduct as morally culpable.

negligence as we are attempting to determine which forms of negligent conduct are also *criminally* negligent.

The criminal courts have struggled to explain what it is about criminal negligence that sets it apart from negligent conduct that is exclusively "civil" in character. The case, *R.* v. *Greisman*,[28] involved a traffic accident between a tram and an automobile. Greisman was charged under a provision of the *Criminal Code*, R.S.C. 1906, c. 146, which made it an offence to undertake a dangerous act without taking reasonable precautions to avoid endangering human life (s. 213).[29] It was clear from the facts that Greisman, the driver of the tram, did not see the other vehicle until almost the moment of impact and there was no suggestion that he "did not do everything possible in the moment that elapsed . . . [before] the actual impact." Greisman was convicted at trial. On appeal, the court distinguished civil and criminal negligence, referring to the English case, *R.* v. *Bateman*[30]:

> In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence,

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[28](1926), 46 C.C.C. 172 (Ont. C.A.).

[29]This version of section 213 provided: "Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whether which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

[30](1925), 19 Cr.App.R. 8.

> but on the amount of damage done. In a criminal court, on the contrary, the amount and degree of negligence are the determining question. There must be *mens rea*.

Although the court in *Bateman* does not expressly equate *mens rea* with subjective awareness, the implication is that negligence must be extreme before criminal liability will be imposed. However, the English court is unable to clarify what it is that makes negligent conduct criminal:

> In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted to a crime, judges have used many epithets, such a 'culpable,' 'criminal,' 'gross,' 'wicked,' 'clear,' 'complete.' But whatever epithet be used and whether an epithet is used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between the subjects and showed such disregard for the lives and safety of other persons as to amount to a crime against the state and conduct deserving of punishment.[31]

This passage invites the question: What is it about criminal negligence that goes "beyond a mere matter of compensation" so as to "amount to a crime against the state" and be deserving of punishment?

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[31]*Greisman, supra*, 176, citing *Bateman, supra*, at 11-12. Compare the American cases: *Santillanes* v. *State*, 849 P.2d 358, 365 (M.N. 1993); *State* v. *Jones*, 126 A.2d 273 at 275 (Me. 1956); *Commonwealth* v. *Heck*, 491 A.2d 212 at 225 (Pa. Super. Ct. 1985).

(a) Duff's Theory of Practical Indifference

Antony Duff provides us with one answer to this question. For him, what is blameworthy in cases of criminal negligence is the "practical indifference" toward the victim's life or safety that the conduct displays.[32] More specifically, to say that someone was indifferent to a risk or cared nothing for it "is not to infer some distinct mental state of 'indifference' from his failure to notice the risk," but rather to claim that the very action itself *shows* the indifference.[33] To illustrate this point, Duff uses the example of a bridegroom who is in a pub with his friends and forgets about his wedding.[34] Although forgetting the wedding may be less culpable than intentionally missing it, the groom's conduct manifests a lack of concern for his bride and the marriage, so the bride is justified in condemning him. According to Duff, the example shows that "I can be indifferent to what I do not notice" and that "my very failure to notice something can display my utter indifference to it."[35]

Duff's theory is important because it argues, without resorting to consequentialist premises, that inadvertent conduct is properly subject to criminal liability. And contrary to the traditional deontological position, Duff's theory recognizes that it is not merely my

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[32]*Intention, Agency & Criminal Liability* (Oxford: Basil Blackwell, 1990), at 162.

[33]*Ibid.*, at 163.

[34]*Ibid.*

[35]*Ibid.* See also Duff, "Choice, Character and Liability" (1993), 12 *Law & Philosophy* 345-83 at 371-80.

subjective intentions that are blameworthy, but the attitudes that inform my conduct. In this way, it appears to be consistent with a character-based theory of responsibility. However, Duff's theory falters because (notwithstanding Duff's arguments to the contrary, which we shall consider in due course), although Duff wants to impose criminal liability for negligence in some situations, his concept of practical indifference proves unable to explain the normative basis for distinguishing these instances of criminal negligence from those involving only civil negligence. The reason for this inadequacy is that, by focusing too narrowly on the *external manifestation* of the defendant's attitude, his theory is unable to explain what it is about the actor's conduct subjectively that is morally blameworthy.

Duff purports to use the concept of practical indifference to distinguish criminal and civil liability for negligence. In response to the objection that his account "blurs what should be a sharp distinction" between what he calls recklessness (which includes practical indifference) and "mere" civil negligence, Duff offers the following response:

> The distinction between this kind of practical indifference that, I have argued, constitutes recklessness, and the kind of carelessness that rather constitutes negligence, is indeed partly one of degree; both involve a species of thoughtlessness or lack of care. But we can still draw an appropriate categorical distinction between them. What makes a reckless agent more culpable, more fully responsible for the risk she creates, is that she displays a gross indifference to that particular risk or to the particular interests which she threatens: negligence, however, involves a less specific kind of carelessness or inattention which does not relate the agent so closely, as an agent, to the risk which she creates. To show that I recklessly endanger someone's life it must be shown that my action manifested a culpable indifference to her life: but negligently endangering her life need involve

> only a lack of attention to what I am doing – not a specific indifference to that particular risk.[36]

But is there really a categorical difference on Duff's account between inadvertent conduct which invites criminal liability and inadvertent conduct that does not?

The problem with Duff's approach is that by describing "practical indifference" in terms of the external manifestation of the agent's conduct (for instance, in terms of the "gross indifference" that the actor "displays"[37]), he is unable to escape the objective standard of conduct imposed in tort law. Indeed, even if this formula (practical indifference) were to help us to identify the type of conduct that is blameworthy, it does not tell us what it is about the actor, as a responsible, moral agent, that makes her criminally responsible for objectively unreasonable conduct in one situation, but only civilly liable in the other.

At one point in his argument, however, Duff suggests a second, seemingly more convincing basis for the distinction between civil and criminal negligence which might circumvent this problem. In one crucial passage, Duff argues that it is not *any* failure to notice a risk which matters. It is erroneous, he explains, to think that "*any* failure to notice an obvious (and serious) risk created by one's action displays a reckless indifference to that risk; for what matters is not just *that*, but *why*, the agent fails to notice an obvious risk; she

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[36]Duff, *supra*, note 32, at 165.

is reckless only if she fails to notice it *because* she does not care about it."[38] In this critical passage, Duff appears to acknowledge the importance of the agent's attitude from the agent's own perspective; and, indeed, it is this subjective component of his theory that provides a solid basis for distinguishing civil and criminal liability.

By insisting that it is the *external* manifestation of the actor's conduct that matters, however, Duff's theory precludes any serious consideration of the conduct from the perspective of the actor as a moral agent. For instance, immediately after acknowledging the importance of determining "*why* the agent fails to notice an obvious risk," Duff explains the practical approach to be taken by a jury in cases of "recklessness" in the following terms:

> In order to conclude that a defendant failed to notice an obvious risk because he did not care about it, the jury need not *infer* some hidden mental state or feeling (or some general character-trait) of indifference from his external conduct; it is rather a matter of the meaning of his particular action – the practical attitude that the action displayed. A jury could usefully ask this question: "how else could a person who acted thus have failed to notice that risk if not because he did not care about it?"[39]

This explanation is once again framed in terms of practical indifference. But while the jury might rely on the practical attitude manifested in the conduct to determine when to impose

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[37] *Ibid.*

[38] *Ibid.*, at 165-66 (emphasis in original).

liability in cases of criminal negligence, Duff still does not explain why not caring about the risk is morally culpable in a way that matters to the criminal law.

Such an explanation, however, requires a theory of responsibility, such as the character-based theory I have defended; the reason liability is justifiably imposed is because the conduct signifies a moral fault on the part of the actor, the culpability of which can be understood only in relation to the accused's moral outlook and his failure to take steps to remedy character defects that might endanger others. Duff rejects this approach, however, arguing that his external account of liability "as grounded in actions" displaces the need for a choice- or character-based theory of responsibility.[40] Duff's theory is important because it explains how, by examining the conduct of a moral agent, we can make inferences about his attitudes and indeed his moral outlook. But his theory is essentially an evidentiary theory; it is not a normative account that can assist us in distinguishing criminal from civil negligence.

(b) The Character Theory

In contrast with Duff's approach, the character theory of responsibility provides us with a normative basis for distinguishing cases of criminal negligence from all other cases of

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[39]*Ibid.*, at 166.

[40]Duff, "Choice, Character, and Liability," *supra*, note 35, at 346.

negligent conduct. Specifically, it provides us with the conceptual framework for identifying that sub-class of negligent conduct that is morally culpable and thus properly subject to the criminal liability. The character theory recognizes that not all negligent conduct flows from a defect in the agent's moral outlook; there are many other reasons why a person might be negligent. Tort law is not concerned with these reasons; it is sufficient for the purposes of tort law that the tortfeasor's conduct fell below the objective standard of care. Criminal liability for negligence demands more: it demands that the agent be culpable before liability for negligence is imposed. And it is the character theory that gives us the required link between the negligent conduct and the agent's moral culpability.

The ability of the character theory to distinguish between morally blameworthy negligence and other forms of negligence is demonstrated by Kenneth Simons's essay on criminal negligence, in which he attempts to delineate a category of criminally culpable negligence which he calls "culpable indifference."[41] Simons argues that civil negligence (what he refers to as "simple negligence"[42]) is insufficient for criminal liability because it is not sufficiently blameworthy; in most instances, "the fault is only an error of skill, judgment,

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[41]Kenneth W. Simons, "Culpability and Retributive Theory: The Problem of Criminal Negligence" (1994), *Journal of Contemporary Legal Issues* 365-98.

[42]For Simons, there are three standards that can be used to evaluate negligent conduct: a cognitive standard (conscious recklessness); a conduct-based standard (simple negligence); and a conative standard (culpable indifference) (at 380).

attention, or memory."[43] Although these deficiencies "can reflect a *moral* lapse," they are not serious enough by themselves to warrant serious criminal sanctions.[44]

But while a "conduct-based" conception of negligence (Simons' description for the objective conception of negligence expressed in tort law) may, in the same manner as the culpable indifference standard, presuppose insufficient concern for the fundamental rights and interests of others, this insufficient concern "is not the actual criterion of liability; rather, it merely helps to explain the judgment that the conduct was deficient."[45] On the conduct-based, objective standard, "we ask whether the actor should have exercised a reasonable degree of skill or attention, and not whether the actor's conduct demonstrated insufficient concern for the interest of others."[46]

For Simons, the critical issue is why the actor was unaware.[47] Consistent with the Aristotelian version of the character theory of responsibility, the actor is liable if the reason for the ignorance or inadvertence is itself blameworthy.[48] Culpable negligence, Simons

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[43] *Ibid.*, at 386.

[44] *Ibid.*, at 386. Simons would, however, permit minor penalties.

[45] *Ibid.*, at 387.

[46] *Ibid.*

[47] *Ibid.*, at 388.

[48] Simons goes on to explain how this standard for liability reflects a character-based retributivist theory (at 389).

explains, is not merely a matter of an error of skill or judgment, but of a *moral* lapse or failing. What makes the defendant's negligence a moral lapse is that it reflects a particular defect in the defendant's character, namely, the defendant's insufficient concern for others. But the objective standard in tort law glosses over this distinction and imposes liability without regard for why the actor's conduct was negligent.

E. Character and Responsibility

I do not dispute the deontological claim that intentional, purposeful action expresses most profoundly and convincingly our moral outlook and perspective in the world. Through such conduct we subjectively affirm our actions and those of their consequences that we foresee. But deontologists are wrong if they think that *only* intentional action reflects our moral outlook. For the most part, the wrongdoer's negligent disrespect for the rights of the victim may not be as transparent as an intention to harm. As a practical matter, it will be necessary to infer his moral attitude from the external manifestation of his conduct. But whatever our conclusions about the objective unreasonableness of the actor's conduct, a determination of the criminal responsibility of a negligent actor still requires an appreciation of the actor's moral outlook. Ultimately, what makes the conduct culpable is not simply that, objectively, it falls below the prescribed standard (although this may be a

good indication of culpability), but the defendant's culpable attitude toward the well-being and safety of those who cross her path.

The character theory insists that our moral characters are also expressed in ways that are perhaps less evident to us at the very moment of action; and yet we are also responsible for our inadvertent conduct, for it too reflects our moral outlook on the world. This is the central insight of the character theory of responsibility; our inadvertent conduct, while perhaps not as deeply expressive of who we are (in that it does not have the "stamp" of our reflective affirmation at the moment of action), is nevertheless expressive of who we are and the reflective moral beings we have, or have allowed ourselves to, become.

CHAPTER SEVEN

THE STANDARD FOR CRIMINAL NEGLIGENCE

We have now considered the distinction between civil and criminal negligence. In tort law, civil liability for negligence is based on an objective standard of conduct, the reasonable person or reasonableness standard. In assessing the alleged wrongdoing, this standard makes no allowance for the moral culpability of the actor. All rational, adult persons are judged by the same standard of conduct, regardless of whether they are morally responsible for their conduct. In contrast, the character theory of responsibility explains how a moral agent who causes harm through inadvertence is responsible for failing to have proper regard, within his or her moral outlook, for the rights and interests of others. Having thus propounded a theory of responsibility that grounds criminal liability for negligence, I want now to consider how this theory can be transformed into a test for determining when a person is criminally liable for negligence.

We have already seen one attempt to formulate such a test in H.L.A. Hart's article on criminal negligence.[1] Hart proposes a two-part test for criminal negligence, in which the question of whether the actor's conduct conforms to that of a reasonable person with normal capacities (the "invariant" standard) is separate from the question of whether the

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[1]See H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), 154 *ff.*, discussed in Chapter Three, *supra*.

accused, given his or her capacities, could have conformed to that standard (the "individualised" standard). Although I argued in Chapter Three that, in formulating this test, Hart fails to provide a satisfactory theory of responsibility to ground this test, I nevertheless agree with the bifurcated approach that he, and others such as George Fletcher,[2] propose. The challenge now is to explain why this approach makes sense in the context of the character theory of responsibility. This is the task of this chapter.

The argument in this chapter has three sections. The first explains the theoretical justification for the bifurcated approach to criminal negligence; in particular, it examines why this approach is consistent with the character theory of responsibility. The second section considers the two branches of the test, the objective or "invariant" standard and the subjective or "individualized" standard, focusing on the latter; this section explains how the second part of the test should be understood in terms of the character theory, and how it differs from that proposed by Hart and Fletcher. It attempts to explain more fully the relationship between our moral outlook and the objective normative values of the criminal law. The final section explains how the scope of criminal liability for negligence is limited by the seriousness of the rights and interests that the criminal law endeavours to protect.

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[2] George P. Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis" (1971), 119 *University of Pennsylvania Law Review* 401-52, at 429.

A. The Bifurcated Approach to Criminal Negligence

On the character theory, what is required in addition to an objective standard of reasonableness is an assessment of the culpability of the defendant in failing to comply with the objective standard. Hart recognizes the need to qualify the objective standard in his essay, "Negligence, *Mens Rea* and Criminal Responsibility," where he argues for an "individualised" standard of care in his test for criminal liability for negligence.[3] It is not enough simply to ask whether the defendant's conduct conformed to the standard of care which the reasonable person would have exercised in the circumstances; it is also necessary to determine whether the defendant could have conformed to that standard, given his or her capacities. Hart therefore formulates a bifurcated test (which we encountered earlier, in our discussion of his theory[4]) for determining whether the defendant's conduct was negligent:[5]

> (1) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?

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[3] In *Punishment and Responsibility*, *supra*, note 1, at 154 *ff.*

[4] Chapter Three, *supra*.

[5] *Supra*, note 1 at 154. See also Fletcher, *supra*, note 2.

(2) Could the accused, given his mental and physical capacities, have taken those precautions?

In formulating the two parts of this test, Hart abandons the terms "objective" and "subjective" standard in favour of the "invariant" and "individualised" standard, on the basis that the term "objective" standard "may lead to an individual being treated as if he possessed capacities for control of his conduct which he did not possess, but which an ordinary or reasonable man possesses and would have exercised."[6] But the terminology of "objective" and "subjective" standards is misleading also because, as I argue below, there remains an "objective" or extrinsic element to the second branch of the test: our moral culpability must be understood, in part, by reference to the objective demands upon our moral outlook. Thus while the first branch of the test does correspond to the "objective" standard discussed in the previous chapter, I shall, in the rest of this chapter, adopt Hart's terminology and refer to the two branches of the test as the "invariant" and "individualised" standards, respectively.

By dividing the analysis of criminal negligence into two parts, Hart separates the issue of the objective (or "extrinsic") reasonableness of the defendant's conduct from questions relating to the actor's ability to comply with the standard, thereby acknowledging the importance of both the extrinsic reasonableness of the conduct and the defendant's

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[6] *Ibid.*, at 153.

subjective accountability. Hart recognizes that if the standard is an invariant one, if it is "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."[7] One of the crucial features of criminal responsibility that the bifurcated test acknowledges is the difference between the criminal prohibition and the attribution of blame, or, in Fletcher's words, between "legality and culpability."[8] For Fletcher, the first branch of the test addresses the legality of the conduct (what he calls the "objective issue"), asking "whether the risk is justified under the circumstances," while the second branch asks "whether the actor's taking an unjustifiable risk is excusable."[9] On the character theory of responsibility, it is the second branch of the test that distinguishes criminal from civil fault, for it launches us into an assessment of the ability of the actor, as a moral agent, to comply with the standard.

The substantive question that arises from this bifurcated approach to criminal negligence is this: what is it that justifies holding these two issues apart? For Hart, the answer is that only the second question addresses the issue of whether the accused could comply with the invariant standard. The character theory proposes a different explanation for holding these

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[7] *Ibid.*

[8] Fletcher, "A Theory of Criminal Negligence," *supra*, note 2 at 429.

[9] *Ibid.*

issues apart: only the second branch of the bifurcated test goes to the question of whether the accused is morally responsible for failing to comply with the invariant standard, by reason of a defect in the accused's moral outlook for which he or she is responsible.

On a character-based deontological approach, criminal negligence is concerned both with the external reasonableness of the risk *and* our moral outlook, through which we perceive and evaluate the risks before us. Indeed, these two aspects are closely linked; for it is the seriousness of the risk, understood objectively, that triggers a duty on the part of full moral agents to remedy any defects in their moral outlook that might come into conflict with their moral and legal obligations to avoid injuring others.[10] Let us consider now how the two branches of the bifurcated test relate to the character account of criminal negligence.

B. The Standard for Criminal Negligence

The invariant standard asks whether the accused took such precautions as a reasonable person would have taken in the circumstances. We already encountered this standard in our

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[10] The separation of the analysis into two parts is also consistent with the distinction between civil and criminal negligence: tort law, in imposing an objective or invariant standard, is unconcerned (for the most part) with the subjective reasons for the accused's non-compliance, while criminal law, in an effort to ensure that the accused is morally responsible for the conduct probes deeper into the underlying reasons for the non-compliance. If it turns out that the reasons for non-compliance can be traced to a defect in the accused's moral outlook, such as a lack of regard for the rights and interests of others,

discussion of civil liability for negligence.[11] This so-called "objective" standard is considered appropriate in the context of civil liability for negligence, since tort law is unconcerned with the accused's moral culpability in imposing liability; but to impose this standard *alone* in the criminal context would be inconsistent with the thesis of negative retributivism, which considers culpability a necessary condition of criminal liability. This is not to say, however, that the objective or invariant standard is irrelevant to criminal negligence. On the contrary, it helps us to identify conduct that is, from an extrinsic perspective, unreasonable. Specifically, the objective standard helps us to determine whether the conduct in question falls within the broad ambit of negligent conduct, of which, as we observed in Chapter Six, criminally negligent conduct forms a smaller part. But the analysis does not end here, for we need to inquire further to determine whether the actor is also morally responsible for such conduct. And this inquiry leads us to the second part of the bifurcated test, the "individualised" standard.

(1) Moral Culpability and the Individualised Standard

The second part of the test brings us to the heart of the matter, for it inquires into the reasons for the actor's non-compliance with the invariant standard. In asking (on Hart's

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then on the basis of negative retributivism it is permissible to impose criminal liability for negligence.

[11] See Chapter Six, *supra*.

version of the test) whether the accused, given his mental and physical capacities, could have complied with the standard, we are inquiring into the culpable aspect of our moral outlook that justifies our being held criminally liable for our negligence. One of the reasons that the term "subjective" is misleading is because we are not here concerned with the requirement of subjective intention or foresight in the sense of the traditional deontological approach to criminal liability. Rather, we are engaging in an inquiry into the moral outlook or *perspective* of the actor, as a moral agent (it is in this sense only that the standard here imposed is "subjective"). The character theory is of particular importance here, for it helps us to determine whether an actor whose conduct is unreasonable on the first part of the test is culpable.

In contrast with the character approach, Duff's theory of practical indifference[12] (which we considered in the previous chapter) is incomplete because it does not explain the relationship between practical indifference and the defendant's culpability as a moral agent. By relying on a theory of mind that emphasizes the external manifestation of the actor's conduct, Duff loses the ability to inquire into the subjective perspective of the actor and the actor's obligations as a moral agent. What we need is an account that relates the external unreasonableness of the conduct to the duty, on the part of the actor, to take steps

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[12] Antony Duff, *Intention, Agency & Criminal Liability* (Oxford: Basil Blackwell, 1990), at 162 *ff.*

to revise any aspect of his or her moral outlook which, if left unchecked, would present a danger to others. That is to say, we need to understand the relationship between the extrinsic unreasonableness of conduct and the actor's failure to fulfil the duty to take care.

In his essay on criminal negligence, Fletcher characterizes the issue in the following manner:

> The are many different ways to express the threshold at which an actor comes under a duty of inquiry. We say sometimes that the context of his conduct "puts him on notice" of the risk, or that the circumstances give him "reason to think" that his conduct is either legally untoward or dangerous to others. All of these verbal formulae focus on the circumstances in which the inadvertent actor generates an impermissible risk. Thus the question becomes one of analyzing the impact of circumstances in bringing to bear warning that inquiry is imperative.[13]

Fletcher quickly cautions that "the phenomenon of immanent factual warnings is not readily amenable to analysis"[14]; he then attempts to illuminate the phenomenon through the use of several hypothetical[15] and actual[16] situations of immanent and non-immanent

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[13]Fletcher, *supra*, note 2 at 423.

[14]*Ibid.*

[15]Fletcher explains that someone working in a liquor store has better reason than someone working in a soda store to think that he might be selling alcohol, while someone working in an adult bookstore has greater reason that someone working in a drugstore to think that a book he is selling might be pornographic.

[16]To illustrate situations in which the factual warnings were insufficient to give rise to a duty, Fletcher refers us (at 424) to two United States Supreme Court cases. In *Lambert*

warnings. He does not, however, provide us with a conceptual link between these extrinsic signals and the agent's duty to take care. The reason that the concept of an immanent factual warning is not readily amenable to analysis is precisely that it is not merely a "factual" matter. We are not merely concerned with what it is about a particular factual phenomenon that puts the actor "on notice" or gives the actor "reason to think,"[17] but with why these signals should trigger the agent's moral obligations. In short, we need to know which traits of a person's moral character we have a right to demand of one another.[18] But to understand the relationship between factual signals and moral obligations, we must delve briefly into the substantive content of the criminal law and consider the sorts of rights and interests that the criminal law seeks to protect.

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v. *California* (1957), 355 U.S. 225, the Court held that a defendant who had not received adequate notice of her duty to register as an ex-felon was not criminally liable for failing to register. In *The Nitro-Glycerine Case* (1872), 82 U.S. 524, the defendant was found not to be liable in tort for damage caused to persons and property when he opened a crate of nitro-glycerine with a mallet and chisel, since "nothing about the outward appearance of the box should have put the defendant on notice that the contents were dangerous" (Fletcher, *supra*, note 2 at 424).

[17]In the context of mistake of law, Douglas Husak and Andrew von Hirsch have argued, in similar fashion, that mistakes of law should not excuse where the circumstances "provide some 'clue' – some reason for believing – that [the defendant's] conduct may be proscribed": "Culpability and Mistake of Law" in Stephen Shute, John Gardner and Jeremy Horder, eds., *Action and Value in the Criminal Law* (Oxford: Clarendon Press, 1993), 157-74 at 169.

[18] I owe the formulation of the issue in these terms to an article by Edmond L. Pincoffs, "Legal Responsibility and Moral Character" (1973), *Wayne Law Review* 905, in which he attempts to answer the following question (at 907): "Are there any character traits we have a moral right to demand of one another?"

(2) The Normative Content of the Criminal Law

Let us begin with the following observation: the criminal law does not seek to protect us from every invasion or threat to our rights or interests. For instance, it does not protect us from all forms of lies and dishonest conduct (although it does protect us from fraud), or from discrimination, or from defamation of our character. Indeed, whatever the theoretical basis for defining the content of the criminal law (whether consequentialist, deontological, or otherwise), there seems to be a general consensus (particularly in liberal democratic systems) that the state is justified in intervening in our lives only to protect a limited set of vital rights or interests. In many legal systems, the extent to which the state can interfere with individual conduct is circumscribed by way of a constitutionally-protected sphere of individual rights and liberties. I do not intend here to digress too far into political theories of the state, which do, of course, have important implications for the way in which the criminal law is conceived. For now, I limit my comments to this observation: in the sorts of legal systems with which I am concerned, and to which I would maintain that the theory of criminal negligence I defend applies, there is a core of fundamental rights and interests that the criminal law can legitimately protect. That these fundamental human interests constitute an expression of an "objective" normative order can be seen by considering the

way in which ignorance of the moral values of the criminal law has been treated by the criminal courts in the common law.

The legal doctrine that ignorance of the law is no excuse implies that there is an affirmative obligation on individuals to know the substantive content of the criminal law.[19] Several justifications have been proposed in defence of this principle. One of these is based on the practical consideration that to allow ignorance of law as an excuse would force courts to engage in an indeterminate inquiry, such that "the administration of justice would be arrested."[20] Another, more theoretical, justification is proposed by Holmes, who relies on the utilitarian consideration that to allow the excuse would encourage the very ignorance that the law seeks to prevent.[21] Perhaps the most compelling account of ignorance of law, however, is that of Jerome Hall. While Hall is an orthodox subjectivist (in the traditional deontological sense) in his approach to criminal responsibility (and is ostensibly opposed

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[19]As a practical matter, this means that the prosecution need not prove that the accused knew that her conduct was contrary to the law. See Michael J. Allen, *Textbook on Criminal Law* (3rd ed.) (London: Blackstone Press, 1995), 80. In Canada, this principle is codified in s. 19 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[20]John Austin, from *Lectures on Jurisprudence*, as cited in H. Morris, *Freedom and Responsibility: Readings in Philosophy and Law* (Stanford: Stanford UP, 1961), at 360.

[21]*The Common Law* (New York: Dover Publications, 1991), at 47-48.

to criminal liability for negligence[22]), he nevertheless rejects, on non-consequentialist grounds, ignorance of law as an excuse.[23]

Hall begins his analysis of ignorance with the premise that "moral obligation is determined not by the actual facts but by the actor's opinion regarding them."[24] This declaration positions Hall comfortably within the orthodox subjectivist approach to criminal law. But even though it would seem that the subjectivist approach should allow ignorance of law as an excuse (since the actor would not have intended the harm), Hall nevertheless maintains that it does not excuse. Hall offers two arguments in support of this position. The first argument is that to allow ignorance as an excuse would offend the principle of legality. This principle consists of two propositions: (i) that the rules of law express objective meaning and (ii) that only certain authorized officials shall, after a prescribed procedure, describe what those meanings are.[25] To permit an excuse based on ignorance of law would contradict these legal postulates. For Hall, a legal order is based on an objective, judicial, authoritative declaration of what the law is.

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[22]See, for instance, "Negligent Behaviour Should be Excluded from Penal Liability" (1963), 63 *Columbia Law Review* 632-44.

[23]*General Principles of Criminal Law*, second edition (Indianapolis: Bobbs-Merrill, 1960), excerpts reprinted in H. Morris, *Freedom and Responsibility*, *supra*, note 21, 365-75.

[24]*Ibid.*, at 365.

[25]*Ibid.*, at 368.

His second argument is based on a vision of the criminal law as representing an "objective ethics."[26] To permit an excuse based on ignorance of law would be inconsistent with the moral principles represented by the criminal law. This understanding of the criminal law relies on the assumption that "normal conscience" or "moral attitudes" can be "relied upon to avoid the forbidden conduct."[27] In certain lesser offences, where the prohibitions are not discoverable by normal moral attitudes, Hall would permit ignorance of law as an excuse. But these lesser offences aside, Hall argues that "legality cannot be separated from morality in a sound system of penal law."[28]

Before we go on, we need to understand fully the claim that the criminal law represents an objective ethics. This claim does not necessarily conflict with a defence based on ignorance of law, for the defendant may well accept the objective validity of the criminal law and nevertheless maintain that her ignorance *excuses* her. (However, the claim of objective validity *does* conflict with the claim that cultural values provide a justification.[29]) It is only when the claim of objective validity is supplemented with a duty to know the law that the defence of ignorance of law is challenged. And it is precisely this duty that is implied by Hall's claim that legality and morality are inseparable.

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[26] *Ibid.*, at 369.

[27] *Ibid.*, at 373.

In asserting the inseparability of law and morality, Hall is concerned not only with the moral content of the law, but equally with the significance of moral agency. In short, Hall's argument is that (but for genuine cases of insanity[30]) a moral agent can be expected to be aware of the moral assumptions and propositions that inform the basic offences of the criminal law. In support of this view, Hall relies on the distinction between *mala in se* and *mala prohibita*. Offences which are *mala in se* are inherently wrong; offences which are *mala prohibita* are wrong only because they are forbidden by the positive law. Hall arrives at the Aristotelian conclusion that the rational, moral agent is obligated to know what is inherently wrong.[31]

Now it is important to realize that in rejecting ignorance of law as a defence, we need not be committed to such metaphysical assumptions about "inherent" moral truths. It is important to separate the duty to *inform* oneself of the law from the duty (as a moral agent, for instance) to *know* the content of the law. On one reading of Hall's theory, he is asserting only that we have an obligation to accept the criminal law as a representation of

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[28]*Ibid.*, at 370.

[29]See the discussion of justification, below.

[30]I do not mean to suggest that the parameters of what constitutes "genuine cases of insanity" is non-controversial. However, I assume for the purposes of the present discussion that such a distinction can be made.

[31]According to Aristotle, ignorance of the universal is blameworthy: *see Nicomachean Ethics*, Book III.

an objective normative order. We need not be committed to its metaphysical "truth." Consider, for instance, J.L. Mackie's view that, as a general rule, "moral judgments are universalizable."[32] The implication of this proposition is this:

> Anyone who says, meaning it, that a certain action (or person, or state of affairs, etc.) is morally right or wrong, good or bad, ought or ought not be done (or imitated, or pursued, etc.) is thereby committed to taking the same view about any other relevantly similar action (etc.).

As a normative enterprise, the criminal law also makes universal prescriptions and judgments. Thus, if killing is prohibited in this case, it is wrong in all similar cases; and if it is justified in that case, it is justified in all morally relevant cases. Indeed, we can consistently maintain that a particular criminal prohibition is morally wrong and yet maintain that the criminal law represents an "objective ethics" because it imposes a universal standard of conduct. To allow for subjective judgments as to what the criminal law is or ought to be would undermine the criminal law as a coherent normative enterprise.

Hall accepts this argument. However, he seems also to embrace the view that the *mala in se* offences of the criminal law are "true" crimes in a much stronger sense; they are offences that embody certain fundamental ethical rules. Hall believes that "normal conscience" or "moral attitudes" can be relied upon to guide us, as rational beings, to these

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[32]J.L. Mackie, *Ethics: Inventing Right and Wrong* (London: Penguin, 1977), at 83.

basic rules. I think there is much to be said for this Kantian argument. But even if we reject its metaphysical basis, we might still argue that, at the very least, there is a civil obligation on us, to inform ourselves of the laws of our country, and an obligation on us, as moral agents, to appreciate the nature of a normative claim upon us and therefore to respect the objective status of the laws of foreign countries, even though we might disagree with the values they express or even consider them unworthy of obedience (that is, we can accept their claim to normative status while choosing to object to them for reasons of conscience). The implication of the latter proposition is that we cannot claim that our subjective interpretation of the law is authoritative; the law, as a normative institution, represents an objective normative order that applies equally to all.[33]

A third point made by Hall is that it is often difficult to distinguish ignorance of fact from ignorance of law. In some situations, the actor may be aware of the facts and of the law, but may be ignorant as to whether the law *applies* to the facts. For instance, the actor who knowingly carries a weapon might know that the law prohibits the possession of dangerous weapons, but may be ignorant as to whether the particular weapon he is carrying is considered by the criminal law to be dangerous.[34] In these circumstances, it is the very

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[33]This, as I understand it, is a basic presupposition of the "rule of law."

[34]See *R.* v. *Phillips* (1978), 44 C.C.C. (2d) 548 (Ont. C.A.).

nature of the law that creates the ambiguity.[35] The actor's ignorance cannot easily be characterized as ignorance of law or mistake of fact. Indeed, some courts have held that a mistake of fact which stems from this sort of moral failure can therefore be classified as an *unreasonable mistake of fact* such that it no longer amounts to an excuse.[36] But this legal approach echoes Hall's theoretical point that the classification of the mistake as a legal or factual one is unimportant; what is crucial is the moral relevance of that mistake.[37]

The significance of Hall's argument is this: if, as Hall argues, we are justified in expecting that individuals be aware of the moral assumptions that inform the criminal law *and* we regard these individuals as moral agents who are responsible for their moral outlooks, then we are also justified in holding them responsible for ensuring that their moral outlooks are consistent with the fundamental values that are reflected in the criminal law. And this conclusion need not be regarded as an undue threat to our liberty; for, as one Aristotelian scholar has observed, on the character theory of criminal responsibility, the law's interference is confined by the "indirect requirement that we not voluntarily lose the

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[35]According to H.L.A. Hart, this sort of definitional ambiguity is a consequence of what he calls the "open texture of the law": see Chapter VII, "Formalism and Rule-Scepticism" in *The Concept of Law* (Oxford: Clarendon Press, 1961), 121-50, *passim*.

[36] See, for instance, *People* v. *Mayberry*, 542 P. 2d 1337 (Cal. S.C. 1975), and discussion of mistaken belief in Chapter One.

[37]Hall, *supra*, note 23 at 367.

capacity to abide by the law"[38] or, perhaps more to the point, to hold others, through the lens of our moral outlook on the world, in the proper moral regard demanded of us by the criminal law.

The second branch of Hart's test captures this objective dimension of Hall's account, for it asks whether the accused could have complied with the objective standard, given his or her physical and mental capacities; it does not, however, make any allowance for the accused's moral beliefs or values which might conflict with the fundamental values of the criminal law. While a physical or mental disability is a legitimate excuse for non-compliance, a moral "incapacity" is not. We have an obligation, as responsible moral agents (and perhaps also as human beings, but at the very least as citizens), to ensure that our moral outlook conforms to the underlying values of the criminal law. There is therefore an element of the objective in the second branch of the bifurcated approach, which concerns the normative adequacy of the actor's moral outlook. If the reason for non-compliance with the objective standard can be traced, for instance, to a lack of concern for the safety of others, then, on the second branch of Hart's test, the actor would be criminally liable. If instead, the actor fails to comply with the standard for reasons other than a deficient moral outlook – for

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[38] Pincoffs, *supra*, note 18. On a similar note, Professor Arthur Ripstein observed, on reading an earlier draft of this dissertation, that there is a close analogy between the character theory that I defend and the way in which voluntary intoxication inculpates; both

instance, if the actor, in good faith, was attempting to avoid harming others – then criminal liability should not be imposed (although civil liability may well be appropriate).

The second branch of the test, then, effectively provides for a qualified defence of "good faith." If the actor can show, notwithstanding the *non-moral* unreasonableness of the conduct, that he or she nevertheless had the appropriate regard and concern for the safety of others, criminal liability will not be imposed. While civil negligence is concerned with the general unreasonableness of the conduct, criminal negligence is concerned only with its moral unreasonableness. A defence of "good faith" amounts to this: an admission that the act was generally unreasonable, with a qualification that it was not *morally* unreasonable.[39] Of course, as a practical matter, this inquiry may not be a straightforward one; it will necessarily involve an attempt to understand the accused's moral character; but it is no more difficult than attempting to establish that the accused's conduct was done knowingly or intentionally.

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hold that a more general responsibility for one's disposition to look out for others underwrites specific attributions of responsibility.

[39] As we shall see in the next chapter, the distinction between *moral* and *non-moral* unreasonableness, and the defence of good faith, will be particularly significant in our discussion of *R.* v. *Tutton* (1989), 48 C.C.C. (3d) 129 (S.C.C.).

C. The Scope of Criminal Liability for Negligence

Our analysis of the second branch of the bifurcated approach to criminal negligence confirms that there is indeed an objective element in the "individualised" standard. The scope of our responsibility for our moral outlook, together with our obligation to reflect upon and evaluate our moral conduct, is a function of the extrinsic seriousness of the rights and interests at stake. This might be contrasted with other situations involving negligent conduct, in which the margin for error is considerably wider. Recall the deontological account of civil negligence. Civil negligence is premised on the assumption that a certain level of mutual risk is acceptable. We need not conduct our lives in such a manner as to avoid *any* harm to the interests of others–for in a complex society we would be unable to step outside the front door. Our actions inevitably affect the interests of others. Only when our activities cross the line of what is reasonable are we liable to compensate the plaintiff for exceeding the threshold of acceptable risk.

This system allows us the freedom not to be overly attentive in our everyday lives; we can, for the most part, be *generally* careful, without being obsessively concerned about the safety of others. Our conduct is governed by a standard of reasonableness, not of perfection. In most situations (to invoke the language of the Hand formula), the probability of harm is slight or the seriousness of the (potential) harm is small. We are at liberty to

exercise reasonable judgment about the requisite level of care. But matters are different when the activity threatens fundamental human interests. In these circumstances, we do not have the luxury of conducting ourselves in a generally careful manner because the gravity of the situation implies that the margin for error is narrow. A small error can seriously threaten the autonomy and interests of others; there is a tight nexus between the autonomy of one person and the unrestricted conduct of the other. These situations call not simply for a reasonable judgment about the appropriate level of care, but for a heightened sensitivity to the manner in which our conduct affects the safety and autonomy of other persons.

For example, in the context of sexual relations, we are not at liberty to be careful more or less. We must be particularly attentive to the reasonableness of our conduct given the *serious* threat that inattention poses to sexual autonomy and bodily integrity. Other situations that may be regarded as empirically dangerous in the sense that there is a narrow margin of error, include such activities as driving, heart surgery, the storage and handling of firearms and explosives, and the care of infants. In these situations, the margin of error between reasonable and unreasonable conduct is narrow since incremental variations in the level of care taken by the actor can seriously threaten the safety of other persons.

Not surprisingly, the prohibitions against negligent conduct are and have historically been concerned with activities that are regarded, quite explicitly, as dangerous. In Canada, for

instance, an early formulation (from 1906) of the modern provisions dealing with criminal negligence provided that:

> Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of such precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid such danger, and is criminally liable for the consequences of omitting, without lawful excuse, to perform such duty.[40]

This general provision relating to the "duty of persons engaging in dangerous acts" expresses, perhaps more succinctly than some of the modern versions of criminal negligence,[41] the correlation between the obviousness and seriousness of the risk and the duty of the actor to take reasonable precautions.

Serious risks to the fundamental rights and interests protected by the criminal law therefore give rise to an affirmative duty on the part of the moral agent to take care. We must, as responsible moral agents, be aware that our conduct often affects others in ways that we do not intend. As we observed in the discussion of civil negligence, the concept of a duty of care identifies that defendant as the person who stands in a special relationship with the

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[40]*Criminal Code*, R.S.C. 1906, c. 146, s. 247.

[41]See, for example, *Criminal Code*, R.S.C. 1985, c. C-46, ss. 249(1) (dangerous operation to a motor vehicle), 216 (duty to use reasonable knowledge, still and care in the administration of surgical or medical treatment), 86 (careless use, storage of firearms and explosives), 215 (duty to provide necessaries of life to children, dependent others).

plaintiff, such that the plaintiff has a moral and legal claim to the defendant's care. This concept of a duty of care is equally significant in criminal negligence, although its scope is not nearly as broad.[42] The criminal law is concerned with unreasonable conduct in situations where the nature of the activity creates a direct and immediate threat to the fundamental rights and interests that are the subject of the criminal law, such as the "lives and safety of other persons."[43]

That the breadth of activities that fall within the scope of criminal negligence is narrower than that of civil negligence can be explained by reference to the character theory. The greater the danger an activity presents to the fundamental rights and interests of others, the more exacting the demand upon us, as moral agents, to avoid causing harm and the stronger the interest of the criminal law becomes in ensuring our compliance. Where then are we to draw the line between the sorts of conduct that invite criminal liability for negligence and those that do not? As our discussion of Hall's theory suggests, the answer to this question might be metaphysical or political. A metaphysical answer focuses on the fundamental nature of the rights that are involved. A political answer looks to the role of the state in protecting the well-being of its citizens, the extent to which interference with individual liberty is justified on these grounds, and the nature of a citizen's duty to others. I

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[42]Heidi M. Hurd, "The Deontology of Negligence" (1996), 76 *Boston University Law Review* 249-72 at 261.

shall not attempt to resolve this issue here, except to venture that at the very least an obligation to avoid harm to the lives and safety of others is consistent both with a liberal-democratic political theory and understanding of rights.[44]

D. The Theory of Criminal Negligence in Practice

The imposition of criminal liability for negligence need not be considered merely an effective method of deterring harmful conduct. Through the course of this dissertation, I have defended the claim that some forms of negligent conduct are justifiably subject to criminal liability because they are morally culpable. Hart's bifurcated approach, once it is anchored in the character theory of responsibility, provides us with a test for identifying negligent conduct that ought to fall within the domain of criminal law. It remains to be seen whether this test, and the theoretical justification that informs it, can provide us with an acceptable framework through which to evaluate negligent conduct and ultimately determine whether criminal liability should be imposed.

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[43]*Criminal Code*, s. 219.

[44]As a matter of fairness, it may be necessary to set out expressly the sorts of affirmative obligations that we have as citizens, or in particular social roles, that are subject to criminal enforcement: see, for instance, s. 219 of the *Criminal Code*, which provides that an omission by a person to do anything that it is his duty to do and which "shows wanton disregard for the lives and safety of other persons" amounts to criminal negligence. Crucially, "duty" is defined as "a duty imposed by law."

CHAPTER EIGHT

CONCLUSION: THE PRACTICAL IMPLICATIONS OF THE THEORY

I have attempted over the course of the preceding chapters to develop a qualified deontological justification of criminal liability for negligence which: (a) regards the moral culpability of the actor as a necessary condition of criminal liability; and (b) finds moral culpability in the failure of the actor to have the proper regard, within his or her moral outlook, for the fundamental rights and interests of others. In this chapter, I explore the practical implications of my theory of criminal negligence and clarify its impact on some of the substantive doctrines of the criminal law by returning to the three situations described in the opening chapter: the mother who, after having what she believed to be a vision of God telling her that her diabetic son was healed, withdrew his insulin treatments, causing his death (*Tutton*);[1] the Hmong man who sexually assaulted his financée, believing that she consented to the cultural ritual "marriage-by-capture" (*Moua*);[2] and the intoxicated driver who, in "playing chicken" with an oncoming hayride on a country road, killed four and injured one of the participants (*Waite*).[3]

Each of these cases found its way into the criminal justice system and the actors were charged with criminal offences, essentially because their actions, while inadvertent, were

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[1] *R.* v. *Tutton* (1989), 48 C.C.C. (3d) 129 (S.C.C.).

[2] *People* v. *Moua*, No. 315972 (Fresno Super. Ct. 1985).

[3] *R.* v. *Waite* [1989] 1 S.C.R. 1436, 48 C.C.C. (3d) 1 (S.C.C.) [cited to S.C.R.].

"objectively" unreasonable: their conduct was considered negligent. For the most part, I shall assume that, in these circumstances, the conduct in question was unreasonable (although I shall have more to say on this point in my discussion of *Moua*). And, indeed, from a philosophical or jurisprudential perspective, the reasonableness of the conduct is not the main cause of theoretical concern in these situations. Rather, the issue these cases raise is whether, given the unreasonableness of the conduct, criminal liability is justified.

The theory of criminal negligence articulated in the preceding chapters provides us with a framework for analysing this issue. This chapter applies this theoretical framework to these three cases. I do not intend to argue that my theory provides a definitive answer to the question of whether criminal liability should be imposed. My claim is more modest: I venture only that the theory I have defended in this dissertation asks the right questions about these cases, and provides an acceptable normative framework within which to consider whether criminal liability ought to be imposed.

A. *Waite* and Negligent Miscalculation of Risk

Let us begin with the Canadian case *R.* v. *Waite*.[4] After several hours drinking beer at a fair one fall afternoon, the accused, Waite, and two friends left the fair by car, with Waite at the wheel. While driving along a public road with a bottle of beer in hand, the accused

encountered on the road ahead of him a church hayride. Three tractor-pulled wagons loaded with bales of hay carried some forty or fifty people, mostly young. The events which gave rise to the criminal charges against the accused are set out by Mr. Justice McIntyre in his judgment:

> Evidence was given by certain witnesses that some of the hayride participants, four or five in number, were walking or running along the road beside the wagons and moving from the second wagon to the first wagon. The appellant drove past the wagons and he and his passengers testified that in passing the vehicles they did not observe anyone on the roadway. Having passed the hayride, the appellant proceeded some distance down the highway and there turned his car around and drove back along the road towards the now oncoming hayride. The appellant gave evidence that at the time he said to his companions: "Let's see how close we can get." One of the passengers testified that the accused had said: "Let's play chicken." . . . He continued in the left lane approaching the hayride until he was, according to the evidence, some 150 feet from the leading tractor, at which time he swerved into the right lane to pass the hayride. As he passed the wagons he struck five members of the hayride party who were running along beside the wagons. Four were struck by the car and killed; one was injured, suffering a fractured leg. After the impact the appellant brought his vehicle to a halt and removed a cooler of beer from the truck and threw it into the adjacent field.

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[4] *Ibid.*

> . . . The appellant and his passengers testified that they had not expected to find any of the hayride party on the road, and the appellant testified that he was not aware of the presence of anyone on the road until the accident occurred.[5]

Waite was charged with criminal negligence causing death. Like the two other cases under consideration, *Tutton* and *Moua*, Waite's conduct seems, from an extrinsic perspective, unreasonable. The facts of this case suggest that, at the very least, the accused would be found civilly liable to his victims or their estates. The question that concerns us is whether and on what basis he ought also to be subject to criminal liability.

The Supreme Court of Canada allowed an appeal by the accused and directed a new trial, on the basis that the trial judge misdirected the jury on the standard to be applied. Although the Court was unanimous in finding that the trial judge placed too high an onus on the Crown, it was evenly divided as to the proper test to be applied.[6] I am not so much concerned with the Court's reasoning in this case,[7] as I am with the nature of the offence with which the accused was charged and the way the this case would be understood on the character-based theory of criminal negligence.

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[5] *Ibid.*, at 1439-40 [S.C.R.].

[6] The Supreme Court of Canada split 3-3, along the same lines as in *Tutton* (see discussion, *infra*) on whether the test should be a "subjective" or an "objective" one. I discuss below, in more detail, the different lines of argument.

Before we examine how such a theory would approach this case, let us step back for a moment and consider a traditional subjectivist (and deontological) interpretation of *Waite*. The traditional approach inquires into the subjective intentions and foresight of the actor. In general, the traditional approach would impose liability only if the actor either intended to cause harm (which appears not to have been the case) or was aware of an unreasonable risk of harm and acted in the face of that risk. In the latter case, the actor would be considered reckless and would be liable on that basis. The facts of *Waite* suggest that the accused did not think that anyone was on the road and was confident that he could "pull away" at the last moment and avoid causing harm. Thus, even if he was aware of a risk of harm, he appears to have dismissed it as a reasonable one, believing there was no one on the road and, presumably, that he could pull away at the last moment. If indeed he honestly believed that there was no unreasonable risk of harm, then on the traditional analysis he would not be liable because he would have lacked the minimal subjective awareness that would make his conduct culpable, however unreasonable the risk in fact was from an external or "objective" perspective.

Now consider Antony Duff's account. Duff wants to broaden the notion of recklessness to include inadvertent conduct. Thus, he argues that an agent "should sometimes be held to be

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[7]In all three judgments, the judges deferred to their reasons in *Tutton*, which is discussed at length below.

reckless as to a risk which she does not notice" and that "in some contexts a mistaken belief in the absence of risk should preclude the ascription of recklessness only if that belief is reasonable."[8] In contrast with the subjectivist approach, Duff attempts to explain recklessness not in terms of choosing to create a risk, but rather in terms of practical indifference. Duff would therefore be able to justify imposing criminal liability in *Waite* (on the basis that the accused's conduct manifests practical indifference to the lives and safety of others), but two problems would still arise from his account. First, in casting the net of recklessness so broadly, Duff is unable to explain what it is that makes negligence less serious (as he acknowledges it to be[9]) than recklessness. Second, Duff's theory would not expressly allow for a defence based on the propriety of the accused's moral outlook (what I have called the "good faith" defence[10]). In contrast, the character theory both conceptually distinguishes recklessness from criminal negligence and allows for a defence based on "good faith."

Discussions of criminal negligence typically focus on whether the defendant's conduct amounts to a moral failure to *perceive* an unreasonable risk to the fundamental rights or interests of others. The *Waite* case indicates another mode of conduct that might also be

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[8]Duff, *supra*, at 157.

[9] Duff, *supra*, at 155.

classified as criminal negligence: where the actor is aware that her conduct creates a risk of harm, but incorrectly believes the risk to be a reasonable one. This second mode of criminal liability for negligence involves not a failure for moral reasons to appreciate a risk, but rather a miscalculation of a known risk. Consider an analogous English case. In *Chief Constable of Avon & Somerset* v. *Shimmen*,[11] a martial arts expert was attempting to demonstrate his proficiency by kicking at and missing a shop window. His intention was to miss the window by two inches. In fact, he broke the window and was charged with criminal damage. Shimmen had considered the possibility that he would break the window, but believed that he had minimized it, given his level of skill and the precaution of missing by two inches (rather than two millimetres, which he believed he could do).

In cases like *Shimmen* and *Waite*, the accused knowingly takes what he believes to be justified risk, but which in fact is objectively unreasonable; however, neither case falls comfortably within the traditional analysis of conscious risk-taking or inadvertence. Rather, they seem to involve a miscalculation, on the part of the actor, of the reasonableness of the risk. In contrast with Duff's account, the character-based theory of criminal negligence allow us to distinguish the following three situations:

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[10] See my discussion of the good faith defence in Chapter Seven, towards the end of the section entitled "B. The Standard for Criminal Negligence."

[11] [1987] 84 Cr. App. R. 7.

(A) Recklessness (as conscious risk-taking): where the agent is aware of the unreasonableness of the conduct (of the unjustified risk), but still persists in the conduct.

(B) Negligent Miscalculation of Risk: where the agent considers whether the conduct is unreasonable, and decides, incorrectly, that it is reasonable (that the risk is justified) or that, in fact, no risk exists.

(C) Inadvertent Negligence: Where the agent is unaware of the possibility of a risk, but ought to be.

Cases in category (C) are the sort of cases we have been discussing in the context of criminal negligence, where the actor is unaware of a serious and obvious risk. Cases in category (A) are the paradigmatic instances of recklessness. Recklessness is considered by traditional deontologists (or "orthodox subjectivists") to be an acceptable basis for criminal liability, since it involves a degree of subjective awareness on the part of the actor. For instance, as we observed earlier on,[12] the Supreme Court of Canada defines "reckless" in terms of conscious risk-taking which includes "an element of the subjective."[13] In the paradigmatic cases of subjective recklessness, the actor persists even though she knows that her conduct is unreasonable (that is, she knows that it creates an unjustified risk to the fundamental rights or interests of others). The actor is morally culpable because she is "willing to risk" the security of others in pursuit of her own selfish interests.

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[12]See discussion of recklessness in Chapter One.

[13]*R.* v. *Sansregret* (1985), 18 C.C.C. (3d) 223, 233 (S.C.C.).

The question is whether cases in category (B) fall within the broad normative ambit of criminal negligence. In his article on criminal negligence, Fletcher argues that in applying the same test – what a reasonable person would have done in the circumstances – to categories (A) and (B), the common law "obscures the difference between evaluating risks and assessing the culpability of inadvertence."[14] The evaluation of the risks, he argues, is concerned with the utility of the agent's disregard for the risk, while the culpability of inadvertence is "a matter of our expectation of what the average person would do if faced with the same circumstances."[15] The unity of the reasonable person test, he concludes, "is purchased at the cost of distorting the difference between a question about the utility of the risk and a question about one's expectation of inadvertence in a particular situation."[16]

But while Fletcher may be correct in his view that a categorical distinction can be drawn between two modes of criminal negligence, there may yet be an underlying normative unity such that the distinction between the two is not morally significant. It is true that the structure of these moral failures differs. In those situations in which the defendant fails to perceive the risk, the problem is an epistemic one; the moral failure (if there is one) occurs *ab initio.* In cases involving the miscalculation of a known risk, the moral failure occurs in

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[14]George P. Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis" (1971), 119 *University of Pennsylvania Law Review* 401-52, at 425.

[15]*Ibid.*, at 426.

the defendant's *assessment* of the risk. But the agent's mistaken assessment of the risk, even if properly understood in utilitarian terms, is ultimately a failure to give adequate consideration to others in evaluating the risk.

Cases involving conscious risk-taking and those involving miscalculation are categorically different because in the latter the agent honestly believes that what she is doing is permissible.[17] But while these two situations might be distinguished on normative grounds, the distinction between cases of miscalculation and cases of complete inadvertence is not nearly as compelling. In both instances, the agent believes his conduct is legal. Now it is true that in cases of complete inadvertence, the agent's belief that the conduct is permissible may not be an occurrent belief (that is, the agent may not be thinking *as he is acting* that the conduct is legal).[18] But at the very least, it does not cross his mind that his conduct is wrong. The crucial point is that in both miscalculation and inadvertence, the actor subjectively believes that his conduct does not (or does not *consider* whether it does)

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[16]*Ibid.*

[17]For instance, Glanville Williams distinguishes between two types of recklessness: subjective and objective: see *Textbook of Criminal Law* (second edition) (London: Stevens & Sons, 1983), at 97*ff.*

[18]We are not conscious at every moment of all of our beliefs. For instance, I may believe that Ottawa is the capital of Canada with actually being aware of this belief unless someone asks me (or unless I ask myself) what the Canadian capital is.

pose an unreasonable risk to others, even though, as an objective matter, the conduct is unreasonable.[19]

On the character theory, the normative justification of criminal negligence ultimately rests on the adequacy of the agent's concern for the fundamental rights and interests of others, whether in the context of a miscalculation of a risk or inadvertence to an unreasonable risk. Criminal negligence therefore articulates a threshold standard of respect for others, a threshold which is concerned with fundamental rights and interests (such as the lives and safety of persons). The character theory directs us to consider whether the accused failed to cultivate, within his or her moral outlook, a minimum standard of concern for others which would have informed his assessment of the seriousness of the risk and show it to be unreasonable; if so, criminal liability is justified.

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[19] By focusing on the agent's choice, orthodox subjectivists are able to draw a line between conscious risk-taking, which they consider to be the only true instance of recklessness, and the other two modes of conduct. Others might extend the concept of recklessness to include cases of miscalculation, but exclude from liability those cases involving complete inadvertence. Antony Duff wants to extend the concept of recklessness to include cases of negligence in the third category in which the agent's conduct displays practical indifference. My own view is that the while the orthodox subjectivists are correct in recognizing conscious risk-taking as a distinct normative category, they are wrong to exclude the two other modes of conduct from criminal liability. Moreover, cases of miscalculation and complete inadvertence fall into the same normative category since they are morally culpable for the same reasons.

In *Waite*, the accused miscalculated the nature of the risk before him, judging it to be a reasonable one. The character theory of criminal negligence tells us that the accused's culpability turns on whether his miscalculation of the risk can be traced to his lack of concern for others. Of course, this lack of concern will have to be inferred from the evidence, testimonial or otherwise. But the issue before us is whether we can infer this lack of concern on the part of the accused. It would be open to him to lead evidence to convince us that he in fact did hold the lives and safety of others persons in proper moral regard, but in light of the evidence, this would probably be a difficult task. Nevertheless, the character theory would allow him to raise this as a defence.

B. *Moua*: Mistaken Belief in Consent and Negligent Sexual Assault

The defence of mistaken belief in consent in cases of rape or sexual assault has long preoccupied legal theorists. In cases where this defence is pleaded, it is conceded that the victim did not consent to the encounter. However, the accused claims that he (usually, but not necessarily, *he*) honestly believed that the woman was consenting. The dispute in these cases centres on whether the mistaken belief in consent must be a reasonable one. If the law requires it to be reasonable, then we are faced with a negligence standard: only a non-negligent belief in consent would be exculpatory. Matters are even more complicated when

the mistaken belief in consent arises from the accused's particular cultural background. Consider the 1985 California case, *People* v. *Moua.*[20]

On April 25, 1985, the defendant, Kong Moua, a Laotian refugee living in California, drove to Fresno City College looking for his fiancée, Xeng Xiong. When he found her, he took her to his cousin's home where he had sexual relations with her. Moua was subsequently charged with kidnapping and rape. Moua was a member of the Hmong tribe, a group of nomadic farmers from the isolated hills of Laos. Several generations of Hmong have lived in the United States. Since 1980, an estimated 30,000 Hmong have moved to the San Joaquin Valley near Fresno, California.[21] The Hmong practice a marriage ritual called *zij poj niam*, translated as "marriage-by-capture." A Hmong man may choose the bride of his choice, but must inform her parents. The ritual begins with a courtship which involves flirting, exchanging letters and tokens of affection, and chaperoned dating. On the date chosen for the marriage, the man abducts his intended bride, takes her to his family home,

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[20]No. 315972 (Fresno Super. Ct., 1985). The facts of this case are recounted in numerous law review articles since 1985. My synopsis of this case is derived from the following accounts: Julia P. Sams, "The Availability of the 'Cultural Defense' as an Excuse for Criminal Behavior" (1986), 16 *Georgia Journal of International & Comparative Law* 335-54; Malek-Mithra Sheybani, "Cultural Defence: One Person's Culture Is Another's Crime" (1987), 9 *Loyola of Los Angeles International & Comparative Law Journal* 751-83; Taryn F. Goldstein, "Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize A 'Cultural Defence'?" (1994), 99 *Dickinson Law Review* 141-68; Carolyn Choi, "Application of a Cultural Defence in Criminal Proceedings (1990), 8 *Pacific Basin Law Journal* 80-90.

and consummates the union. According to the custom, the woman is expected to protest at the last moment in a display of virtuousness and chastity and the man is required to persist in the face of the protests, to demonstrate his strength and masculinity.[22]

Moua was said to have been surprised when Xiong subsequently filed a criminal complaint.[23] Apparently, he "believed he had received the proper cultural signals from the victim, signifying her agreement to the marriage ritual."[24] The trial judge and the prosecutor were convinced both that the defendant honestly believed that the victim had consented and that the victim did not genuinely consent. At the trial, the charges of kidnapping and rape were dropped and the defendant pleaded guilty to the misdemeanor of false imprisonment. Moua was sentenced to 90 days imprisonment and fined $1000. The case squarely raises the issue of whether (and, if so, to what extent) a person's cultural values, practices or beliefs ought to give rise to a defence in the criminal law.

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[21]Sheybani, *supra*, note 20 at 773.

[22]I have, no doubt, simplified the complexities of this cultural practice. I have relied almost exclusively on secondary materials in producing this summary. This being a philosophical, not an anthropological study, however, my main concern is not with the nuances of the marriage ritual, but with the implications of this practice for criminal responsibility.

[23]Goldstein, *supra*, note 20 at 150.

[24]Choi, *supra*, note 20 at 84.

(1) The Cultural Defence

In describing his "individualised" standard of conduct for criminal negligence, H.L.A. Hart expressly mentions two broad categories of incapacity that may be considered exculpatory: mental and physical incapacities.[25] But there may well be other forms of incapacity that do not fall readily into these categories. For instance, someone might argue that he is not to blame for failing to meet the reasonableness standard because of his or her particular normative values. But can a person's moral values ever amount to a form of "moral" incapacity on the part of the actor that can excuse criminally negligent conduct?[26] The ensuing discussion focuses on four arguments that might be used in defence of a charge of criminal negligence: mistake of fact, mistake of law, incapacity, and moral justification. In particular, this part of the chapter analyses these arguments in the context of the so-called "cultural defence."[27]

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[25] *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), at 154.

[26] There are two ways in which a criminal defence can operate: as an excuse and as a justification. An excuse concedes that the conduct was wrongful but insists that the *actor* is not responsible for the wrongdoing; it seeks "to avoid the attribution of the act to the actor." In contrast, claims of justification admit that the act took place, but deny that the conduct amounts to a wrongdoing. See George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978), at 759.

[27] See Harvard Note, *infra*, note 28.

In cases involving a cultural defence, the accused essentially argues that her conduct should be excused because she lacked the *moral* capacity to comply with the standard of reasonableness. Proponents of the cultural defence insist that what is reasonable must be understood in terms of the actor's cultural values and that the actor's ability to comply with the law may be diminished by her cultural background. Arguments of this nature force us to consider whether, on a character-based theory of responsibility, the cultural background of the actor should be taken into account in determining whether the actor could be expected to alter her behaviour so as to avoid harming others. My position in response to these claims is that the cultural defence cannot be used to undermine the fundamental, objective values articulated in the criminal law and that to the extent that accepting the cultural defence as an excuse implies a tolerance of moral ignorance, it cannot, on a character-based justification of criminal negligence, be accepted as a formal defence. An examination of the arguments in support of a cultural defence provides an opportunity both to refine the approach I have been developing and to explain, in concrete terms, the implications of this theory for arguments based on the "moral incapacity" of the actor.

(2) Three Forms of the Cultural Defence

There are several forms that a cultural defence may take, some of which amount to an excuse, others a justification. But most of these variations fall into one of three broad

categories. First of all, the cultural defence may speak to the ignorance of the actor. For instance, the actor might simply be unaware of the prohibition. The author of an anonymous "Note" in the *Harvard Law Review* entitled "The Cultural Defence in the Criminal Law" argues that a new immigrant who is ignorant of the law should be excused on the basis of fairness and equity (and therefore of individualized justice), because he has not had the opportunity, through exposure to social institutions, to absorb the underlying norms of the criminal law.[28] The actor might therefore argue *ignorance of law* as an excuse. Alternatively, the actor might erroneously believe the facts to be other than they are because of his cultural background. In this situation, the actor would argue that his conduct should be excused as a *mistake of fact*. The defendant in *Moua* was relying on a form of defence based on ignorance, although, as we shall see, his mistake might not be so easily categorized as a legal or factual error.

Second, the actor might be aware of the criminal prohibition, but choose not to comply, arguing as a defence that according to her cultural beliefs the conduct in question is justified. What is really at stake in this situation is a dissonance between the defendant's subjective values and the values expressed in the criminal law. Should the criminal law take these cultural beliefs into account? More specifically, should the reasonable person

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[28](1986), 99 *Harvard Law Review* 1293, 1299 [hereinafter "the *Harvard Note*"].

standard take into consideration the defendant's moral views as part of the inquiry into criminal liability?

Finally, the actor might be aware that a particular activity is illegal, but argue that she is unable to refrain from that activity because her cultural beliefs require that she participate or engage in the activity. Thus, some individuals, who have been "inculcated in a different set of norms will likely feel morally obligated to follow those norms" such that "conformity with conflicting laws becomes more difficult."[29] The author of the *Harvard Note* argues that by punishing individuals only in accordance with the values of their native society, we advance the goal of equality by preserving the values of particular cultures, thereby maintaining cultural diversity. In rejecting the cultural defence, we risk sending a message of intolerance to the group in question, further alienating them from the mainstream of society. The essence of the defence, however, is that the defendant's responsibility is diminished because of the influence of her cultural upbringing.

(i) Ignorance and Mistake

As we observed in the previous chapter, the criminal law distinguishes two types of ignorance: ignorance of law and mistake of fact. Proponents of the cultural defence argue that both forms of ignorance should excuse the defendant. But even when understood as a

defence based on ignorance, the cultural defence raises serious questions about the extent to which ignorance of the basic moral principles expressed in the criminal law can excuse criminal wrongdoing. Those who support the defence argue that one who is ignorant cannot be considered morally culpable.

In the context of sexual assault, it is not always clear whether a mistake as to consent stems from mistake of fact or ignorance of law. In *Moua*, the orthodox legal approach suggests that the defendant was unaware of the *fact* that the victim did not consent to the marriage ritual. Some have argued, however, that this sort of mistake is really a mistake of law in that he failed to appreciate that the victim's conduct during the encounter was not legally considered as signifying consent.[30] It has been suggested that the defendant's failure to appreciate the significance of the victim's behaviour is no defence to sexual assault:

> If the accused was *ignorant* of the law or did not fully understand what it meant in the context of a social encounter (as, for example, when the accused explains he did not know that women *really* had a legal right not to comply, or that verbal refusal combined with unsuccessful resistance or submission was not the same as consent, or that a particular woman had a legal right to refuse), he is liable to be convicted, it is submitted, because section 19 [of the Canadian *Criminal Code*] bars an excuse negativing *mens rea* on the basis of either ignorance or misinterpretation of the law or misapplication or non-application of the law to the facts. In these circumstances, as long as the accused is shown to have been aware of what

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[29]*Ibid.*, at 1300.

[30]Lucinda Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987), 2 *Canadian Journal of Women and the Law* 233-309.

> he was doing, aware of how the complainant was behaving described in socio-empirical terms, and to have intended to do what he did in full awareness of the facts, a conviction will result when the *actus reus* has been proved beyond a reasonable doubt.[31]

This approach to sexual assault, which classifies mere mistakes as to consent as mistakes of law, is regarded as justified on grounds of "policy" to challenge social myths about the nature of consensual sexual relations.[32] But a similar approach might also be justified on the character theory. What is significant about a mistake as to consent is that it implies a failure, on the part of the defendant, to hold the victim's sexual autonomy within his moral outlook with the proper moral regard.

In a limited sense, however, the defendant's cultural background may yet give rise to an excuse; someone who for reasons of unfamiliarity or inexperience in a new environment makes a factual mistake that does not bear on the autonomy of others would still be able to claim a defence based on ignorance. The crucial difference is that in the context of sexual assault, what constitutes consent is very much tied to the notion of sexual autonomy that justifies the criminal prohibition. In a case like *Moua*, the mistaken belief in consent stems

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[31] *Ibid.*, at 297.

[32] *Ibid.*, at 303.

from a set of beliefs which devalues women's sexual autonomy.[33] As such, it takes on a crucial moral significance.

But this implies that a mistake which does not constitute a moral lapse could still amount to an excuse. Hall's analysis of ignorance of law suggests that it is not the distinction between ignorance of law and ignorance or mistake of fact that is significant, but rather the moral significance of the actor's ignorance or mistake. The character theorist embraces this conclusion as consistent with the distinction between a "moral lapse" and a mere error of skill or judgment.[34] The crucial distinction is rather between what we might call "moral" and "non-moral" unreasonableness (whether ignorance or mistake). Thus, a negligent actor who genuinely respects the autonomy of others may nevertheless make a factual or "non-moral" mistake which causes harm. In these circumstances, he would be excused from criminal liability, even though his conduct, when viewed from an objective perspective, might still be regarded as unreasonable, although not morally so. Such an actor would be subject to civil, but not criminal, liability.

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[33]See Douglas Husak and Andrew Von Hirsch, "Culpability and Mistake of Law," in Stephen Shute, John Gardner, and Jeremy Horder, eds., *Action and Value in the Criminal Law* (Oxford: Clarendon Press, 1993), at 170.

[34] Kenneth W. Simons, "Culpability and Retributivist Theory: The Problem of Criminal Negligence" (1994), *Journal of Contemporary Legal Issues* 365-68.

(ii) Justification

Now consider a situation in which an actor, while aware of the criminal prohibition, chooses not to comply because he believes that the criminal prohibition conflicts with his cultural values. In this situation, the actor might argue not that his conduct should be excused, but rather that his conduct is morally permissible or even required, *given* his cultural values. This is an argument from *justification.* Perhaps the most contentious of Hall's arguments against permitting ignorance of law as a defence is his claim that the criminal law represents an objective ethics. This argument perhaps more than the others we have considered thus far, directly conflicts with the cultural defence and, more specifically, with the view that the cultural defence is really a form of justification.

The problem with this view is that, taken to its logical conclusion, it would completely undermine the criminal law. Like an excuse, it suggests an exception from the criminal prohibition based on certain subjective features of the actor's experience. Unlike an excuse, it asserts that the actor's conduct was in fact morally permissible. Thus, conduct which may be an offence for one person may not be an offence for another, depending on the person's ethical beliefs. What is considered a criminal offence is determined not by reference to a common, public standard, but by the subjective values of each individual.

The criminal law no longer provides an objective – or, in fact, any – standard of conduct at all.

To avoid this result, a clear line must be drawn between a *justification*, which describes a set of external circumstances which constitute an exception to what would otherwise be a criminal offence and an *excuse*, which is specific to the situation of the particular actor.[35] While an excuse is sensitive to subjective circumstances, a justification represents a more detailed expression of the criminal prohibition. Self-defence is considered to be a paradigmatic example of a justification; it is an exception to the general prohibition against harming and killing. The prohibitions expressed in the criminal law must be universal prescriptions; otherwise they fail to constitute normative standards.[36]

This is not to say that the criminal law should be insensitive to the constellation of attitudes, beliefs, and values that inform that defendant's perception of his conduct. However, in the criminal law, to the extent that these features of the defendant's subjective character are relevant, they are taken into account only when considering the culpability of the defendant, not the legitimacy of the prohibition itself. There is an important distinction

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[35]See George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978), 759.

[36]J.L. Mackie, *Ethics: Inventing Right and Wrong* (London: Penguin, 1977), at 83 *ff.*

between the context of the criminal law and the concept of moral responsibility which governs our ascriptions of liability. This is precisely why the bifurcated approach to criminal negligence is significant: it separates the question of what sort of conduct is prohibited from questions concerning the attribution of criminal liability.[37]

The rejection of a cultural defence of justification does not imply that cultural pluralism ought generally to be discouraged. On the contrary, it can be maintained without inconsistency that cultural pluralism and diversity should nevertheless be encouraged. A society that favours pluralism, however, may well recognize and pursue these goals within the context of the criminal law by other means than by recognizing an independent, formal cultural defence. For instance, it may choose to organize its system of criminal justice so as to reflect Mill's harm principle[38] and limit the state's interference with individual liberty to instances of harmful, other-regarding activities. But this sort of liberalism limits the content of the criminal law, while leaving the justificatory concept of moral responsibility intact.

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[37]Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis" (1971), 119 *University of Pennsylvania Law Review* 401-52 at 429.

[38]*On Liberty* (Harmondsworth: Penguin, 1986), at 68.

(iii) Cultural Incapacity

An excuse may also be said to arise because "cultural influences can, and often do, constitute serious impediments to responsible agency."[39] This possibility grounds the argument from moral or cultural incapacity. Proponents of this view attempt "to establish that, at least sometimes, widespread moral ignorance can be due principally to the cultural limitations of the era, rather than to individual moral defects."[40] At the very least, they argue that cultural pressures result in the diminished capacity of the defendant to comply with the criminal law.[41] Indeed, some have even argued that defendant's cultural beliefs give rise to a defence of "cultural insanity."[42] If these arguments are correct, the second part of Hart's test (the individualized standard) would have to include cultural incapacity as

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[39]Michele M. Moody-Adams, "Culture, Responsibility, and Affected Ignorance" (1994), 104 *Ethics* 291, 292, referring to Michael Slote, "Is Virtue Possible?" (1982), 42 *Analysis*, reprinted in R. Kruschwitz and R. Roberts, eds., *The Virtues* (Belmont, California: Wadsworth, 1982), 100-105; and Lawrence Rosen, "The Anthropologist as Expert Witness" (1979), 79 *American Anthropologist* 555-78.

[40]Moody-Adams, *supra*, note 39 at 292.

[41]Goldstein, *supra*, note 20 at 152.

[42]See Tomao, *supra*, note 20, which considers and rejects, *inter alia*, the view that an immigrant defendant is entitled to invoke an insanity defence because "her cultural understanding of the situation causes her to suffer from a mental impairment and . . . this impairment precludes a finding of the *mens rea* essential to the commission of the crime" (at 245). One proponent of the cultural defence rejects the notion of "cultural insanity" as "an affront to the dignity of the accused" which "may be more degrading than being branded a criminal": *Harvard Note*, *supra*, note 28.

a form of moral incapacity which excuses what would otherwise constitute criminal conduct.

The plausibility of this argument rests on a deterministic understanding of human behaviour. According to this view, cultural values do not give us reasons for acting but rather compel us to act as we do; accordingly, no one can choose to do wrong. It also suggests that even when confronted with values different from our own, we are incapable of reflecting on, questioning, and evaluating our moral beliefs. As I suggested in Chapter Four, if hard determinism were true, then this point would have to be conceded, but on the theory I advanced in that chapter, it is precisely because we can question our moral beliefs that we are capable of responsible action.

None of what I have said is meant to preclude excuses based on insanity (or, in the current parlance, mental disorder) which rest on the actor's inability to "know that he was doing a wrong or wicked act."[43] And although the parameters of the insanity defence may be controverted, a mere difference in ethical values should not in itself be regarded as constituting insanity, for if insanity is to make any sense as a clinical phenomenon, an inability to appreciate the wrongness of one's actions is a disorder that must be trans-cultural.

Cases of genuine mental disorder aside, the *failure* to question critically one's cultural beliefs (even if ultimately affirming them) may be considered morally blameworthy. One author has argued that affected ignorance – "choosing not to know what one can and should know" – may be blameworthy when it involves "refusing to consider whether some practice in which one participates might be wrong."[44] As we have seen, this argument provides the basis for rejecting ignorance of law as an excuse, but it is even more compelling when the actor is confronted with a conflicting normative prescription in the form of a criminal prohibition.

By allowing cultural values as an excuse which diminishes the defendant's culpability, we are not merely identifying a limited set of circumstances (such as psychological or physical circumstances) in which the defendant may be unable to comply with the standard; rather, we are allowing the accused's moral beliefs, however contrary to those expressed in the law, to vindicate her conduct, while rejecting the possibility of morally responsible conduct. If we are prepared to accept the cultural defence as a form of moral incapacity, then, we must also be prepared to reject moral responsibility as the proper foundation of the criminal law.

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[43]*M'Naughten's Case* (1843), 10 C. & F. 200.

[44]Moody-Adams, *supra*, note 39 at 296.

On the character theory of responsibility (the underlying theory of fault for criminal negligence), a moral agent is obligated not only to refrain from causing harm intentionally, but also to be attentive to those aspects of his character which might pose a threat to others. Particularly where the actor's course of conduct presents a serious and obvious risk to others, a moral agent must be that much more attentive. He will, as Bernard Williams puts it, "recognize his relation to his acts in their undeliberated, and also in their unforeseen and unintended aspects."[45]

In the context of rape or sexual assault, an honest but unreasonable belief in consent (that is, a negligent belief in consent) is, in a growing number of jurisdictions, no longer a defence to rape or sexual assault. Thus, if the accused paid little attention or was dismissive of indications by the victim that she did not consent, he is held liable if his inadvertence with respect to her non-consent was, according to an external or "objective" standard, unreasonable. The crucial point is that what justifies criminal liability in these circumstances is the wrongdoer's inattentiveness to the victim's wishes, notwithstanding the serious and obvious risk to her sexual autonomy should he proceed without her consent. One author describes the obligation to respect the autonomy of a sexual partner in the following way:

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[45]"Voluntary Acts and Responsible Agents" (1990), 10(1) *Oxford Journal of Legal Studies* 1 at 10.

> Assuming that each person enters the encounter in order to seek sexual satisfaction, each person engaging in the encounter has an obligation to help the other seek his or her ends. To do otherwise is to risk acting in opposition to what the other desires, and hence to risk acting without the other's consent.
>
> But the obligation to promote the sexual ends of one's partner implies the obligation to know what those ends are, and also the obligation to know how those ends are attained. Thus, the problem comes down to a problem of epistemic responsibility, the responsibility to know.[46]

In intimate settings involving the dependence of one person on the conduct of another, respect for autonomy involves an obligation to take the necessary steps to ensure that the other person's needs as an autonomous being are met. What gives rise to the obligation to exercise care is that the autonomy of another person is immediately, and in a non-trivial manner, affected (or perhaps threatened) by the conduct of another. It is the strong correlation between the conduct of the initiator of the sexual encounter and the potential dangers to the victim that, on the character-based theory of criminal negligence, triggers a duty on the part of the initiator to be attentive to the sexual autonomy of his partner.

What is culpable in cases of what might be called negligent sexual assault (or negligent rape) is a failure to have proper moral regard for the victim's sexual autonomy and well-

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[46]Lois Pineau, "Date Rape: A Feminist Analysis" (1989), 8 *Law and Philosophy* 217-43 at 234.

being.[47] And although this failure is manifested in the defendant's conduct, it is not the extrinsic unreasonableness in itself that makes it culpable. Rather, it is the serious and obvious risk that it creates, that triggers a duty on the part of moral agents to be attentive to that risk and to take whatever steps are necessary, including the revision of character defects, to avoid it.

(3) Negligent Sexual Assault and the Cultural Defence

This discussion of the cultural defence leads us to three broad propositions about criminal responsibility that bear directly on criminal negligence and the standard of reasonableness. First, at least in the context of "true" crimes, moral ignorance is not an excuse; second, subjective disagreement with the normative standards expressed in the criminal law does not constitute a justification for disobeying the law; and finally, neither cultural nor moral beliefs give rise to a moral incapacity on the part of the defendant.

The first proposition, that moral ignorance does not excuse, suggests that what is considered a (subjectively) reasonable mistake of fact is a mistake that is not morally

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[47] Several legal theorists have reached a similar conclusion: see James Faulkner, "*Mens Rea* in Rape: *Morgan* and the Inadequacy of Subjectivism" (1991), 18 *Melbourne University Law Review* 60; Victoria Dettmar, "Culpable Mistakes in Rape: Eliminating the Defence of Unreasonable Mistake of Fact as to Victim Consent" (1984), 89 *Dickinson Law Review* 473; Mark Thornton, "Rape and *Mens Rea*" (1982), *Canadian Journal of Philosophy* (Supplementary Volume VIII), 119-46 at 132.

relevant in the sense that it does not involve a failure to respect or appreciate the rights of others. We must be wary of assuming, however, that all or even a majority of the prohibitions set out in the positive criminal law necessarily reflect an objective ethical framework. Indeed, it is only in respect of those offences which are *mala in se* that a defence of ignorance of the law is excluded on deontological grounds.[48] But this concession should not prevent us from recognizing, at least within the context of a liberal-democratic society, certain moral principles (such as a basic right to security from harm) from which "true crimes" can be derived.

The second proposition echoes Hall's view that the prohibitions expressed in the criminal law and any justification offered in defence of non-compliance with these prohibitions represent an objective normative order. This is not to say that the criminal law cannot be sensitive to the context in which the conduct in question takes place. For instance, what might be considered "reasonable" when a petite woman is defending herself against an aggressive man may differ from what is considered "reasonable" when one man is attacked by another of equal size. However, the standard here is still an objective one since it is concerned not with the defendant's beliefs but with the factual context in which the act of self-defence takes place. Thus, there are two different senses of "objective," one of which

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[48]Hall admits that in certain "petty offences," ignorance of law may well be an excuse: *General Principles*, in H. Morris, ed., *Responsibility and Freedom*, at 373.

may not be *purely* external in that it might consider what is objectively reasonable *given* certain features of the actor's situation (such as her gender, height, and so on), the other which disregards the actor's perspective entirely.

Finally, the third proposition expresses the view of moral agency developed in our discussion of responsibility and determinism. It also reflects a view of the person as a self-reflective and self-evaluative being. While our ability to comply with the criminal law may be diminished by a number of factors, including physical incapacity and genuine cases of insanity, the criminal law cannot consistently recognize *moral* incapacity as an excuse.

C. *Tutton*: Negligence and Good Faith

In the *Tutton* case, the following facts were established at trial.[49] Carol Anne and Arthur Tutton were the parents of a five-year-old diabetic child, Christopher. The Tuttons were loving and responsible parents, and were also deeply religious. The nature of their religious beliefs, as established at trial, is described by the Supreme Court of Canada in the following terms:

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[49] *Supra*, note 1. The account of the facts in this paragraph is based on McIntyre J.'s summary (at 133-34) and Wilson J.'s additional comments (at 143-44).

> [T]hey belonged to a religious sect which believes in faith healing. Their religious convictions did not prevent them from seeking and acting on medical advice nor from taking medicines, but they believed that divine intervention could miraculously effect cures for illnesses and ailments beyond the power of modern medical science.

When Christopher was diagnosed as a diabetic, the Tuttons received formal instructions at a diabetic education centre concerning their son's condition and how to deal with it. When they later discussed with their general practitioner the possibility of a spiritual cure, they were told that there was no possibility of a miraculous cure and that their son could never discontinue insulin injections.

The Tuttons twice ignored this advice and discontinued their son's injections, believing that he was being healed spiritually. The first time they did this, on October 2, 1980, the child became seriously ill and was taken to a hospital emergency unit. The child survived. However, upon learning that the Tuttons had intentionally withheld the insulin treatment, the attending physician admonished them and sought and received their assurance that they would not again withhold the insulin without consulting a doctor.

A year later, on October 14, 1981, with her husband's consent, Carol Anne Tutton again withheld Christopher's insulin after she had a vision in which she claimed that God had spoken to her, telling her that her son was healed. The Tuttons claimed that because of their

religious convictions "they sincerely believed that he had been cured by divine intervention and were unaware of the serious nature of his illness following the withdrawal of insulin."[50] The child quickly sickened and was taken to the hospital, where he was pronounced dead on arrival. A post-mortem examination determined that he died from complications of diabetic hyperglycemia. The Tuttons were charged with committing manslaughter by criminal negligence.

The central issue before the Supreme Court of Canada was whether the Tuttons could be found criminally liable, in light of their honest belief that Christopher was cured. The legal issue was framed in terms of the appropriate standard for criminal negligence. One option was to adopt the "objective test" of "reasonableness, and proof of conduct which reveals a marked and significant departure from the standard which could be expected of a reasonably prudent person in the circumstances."[51] Another possibility was a subjective test, which "requires some degree of awareness or advertence to the threat to the lives or safety of others or alternatively a wilful blindness to that threat which is culpable in light of the gravity of the risk that is prohibited."[52] Although the appeal to the Supreme Court of Canada was heard by a panel of seven, only six judges took part in the decision. These six

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[50] *Ibid.*, at 144.

[51] *Ibid.*, at 140, *per* McIntyre J.

[52] *Ibid.*, at 151, *per* Wilson J.

judges split evenly on the issue of which test should be applied, with McIntyre J. supporting the objective standard and Wilson J. adopting the subjective standard.[53]

(1) McIntyre J's Objective Standard

McIntyre J. imposes an objective standard for criminal negligence. His argument is based not on principles of liability, but on principles of statutory interpretation. An objective standard is required, in his view, to maintain a clear distinction between the "traditional *mens rea*" offences and the offence of criminal negligence. In McIntyre J.'s view, if criminal negligence were interpreted to require some form of subjective awareness, it would no longer be an offence of negligence. McIntyre J. allows, however, that the accused's perception of the facts, while not to be considered for the purpose of assessing malice or intention, may still be considered "to form a basis for a conclusion whether or not the accused's conduct, in view of his perception of the facts, was reasonable."[54]

McIntyre J. explains that the accused's perceptions would be relevant, for instance, where, as in the *Tutton* case, the accused raises the defence of mistake of fact:

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[53] Lamer J. agreed with McIntyre J. that the objective test applied, but with the qualification that "there must be made 'a generous allowance' for factors which are particular to the accused, such as youth, mental development, education" (at 142).

[54] *Ibid.*

> If an accused . . . has an honest and reasonably held belief in the existence of certain facts, it may be a relevant consideration in assessing the reasonableness of his conduct. For example, a welder, who is engaged to work in a confined space believing on the assurance of the owner of the premises that no combustible or explosive material is stored nearby, should be entitled to have his perception, as to the presence or absence of dangerous materials, before the jury on a charge of manslaughter when his welding torch causes an explosion and a consequent death.[55]

McIntyre J. goes on to explain that in offences of negligence, an honest but unreasonable mistake does not exculpate. Thus, on the facts of *Tutton*, he concludes that the Tuttons' assertion that they believed their child to have been cured by divine intervention would have to have been both honest and reasonable to afford them a defence.

McIntyre J.'s approach is consistent with the bifurcated approach in one sense: he is prepared to consider the reasonableness of the accused's perspective. However, he does not distinguish between the accused's moral and non-moral beliefs. For instance, the approach he proposes would not be able to distinguish between a belief on the part of the Tuttons that, say, their child's life was less important than their religious beliefs and, on the other hand, that a divine healing had taken place.

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[55] *Ibid.*, at 141.

On the contrary, my interpretation of the character theory would recognize this distinction. What is relevant to an assessment of culpability is whether the reason for the negligent conduct can be traced to a defect in the accused's moral outlook. A belief that the child's life was less important than the parents' religious beliefs would arguably be a defect in the Tuttons' moral outlook, while a belief in faith-healing, although perhaps objectively unreasonable, would not be. The latter belief is entirely consistent with a defence of good faith – the claim that the Tuttons honestly believed that no harm would come to their son. In *Moua*, however, the accused's failure to consider the possibility that his fiancée did not consent to the ritual speaks to his general lack of regard for her sexual autonomy, a clear defect in his moral outlook. By failing to distinguish between these two forms of unreasonableness (moral and non-moral), McIntyre J.'s approach is unable to capture important nuances in moral culpability among negligent wrongdoers.

(2) Wilson J.'s Subjective Standard

Wilson J. comes to the opposite conclusion. She argues that although "conduct which shows a wanton and reckless disregard for the lives and safety of other persons"[56] (essentially, objectively unreasonable conduct) constitutes *prima facie* evidence of criminal negligence, this conclusion is "rebuttable and leaves room for acquitting an accused who,

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[56] *Ibid.*, at 154.

for whatever reason, lacked the minimal awareness that would normally accompany the commission of high risk or violent acts."[57] Thus, the failure of the accused to avert to the risk is a defence to criminal negligence, no matter how unreasonable that failure might have been. In contrast with McIntyre J., Wilson J. adopts the "orthodox subjectivist" approach to criminal liability, insisting on subjective intention or foresight as a necessary condition of criminal liability.

Wilson J. seems to struggle, however, to find a way of imposing liability in a case like *Waite*. Her solution is to invoke the legal concept of wilful blindness, the idea that a person "who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth."[58] She is particularly concerned about high-risk motoring:

> I would think that in the driving context where risks to the lives and safety of others present themselves in a habitual and obvious fashion, the accused's claim that he or she gave no thought to the risk or had simply a negative state of mind would in most, if not all cases amount to the culpable

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[57] *Ibid.*, at 161 (emphasis added).

[58] As defined by McIntyre J. in *R.* v. *Sansregret* (1985), 18 C.C.C. (3d) 223 at 235 (S.C.C.). See also my discussion of wilful blindness and the *Sansregret* case in Chapter One.

> positive mental state of wilful blindness to the prohibited risk.[59]

In resorting to the concept of wilful blindness, Wilson J. implicitly acknowledges one important premise of the character theory of criminal negligence: that the actor's culpability for the deed may arise from his prior responsible conduct. For Wilson J., such conduct would be the actor's "declining to inquire"; for the character theorist, it is the failure to revise the defects in one's moral character. I venture that the difference here is negligible. The character theory can adequately explain, without stretching the bounds of its normative framework, why these cases of "wilful blindness" are culpable: the actor has, prior to the impugned act, decided not to be concerned with the impact that his conduct has on others.

I am not arguing that Wilson J. was conscious of this theory. Indeed, she expressly considers and rejects the bifurcated approach to criminal negligence proposed by Hart and Fletcher, arguing that it would be both over-inclusive and under-inclusive in identifying culpable individuals.[60] (On this point, she is probably correct, since neither Hart nor Fletcher provides us with the conceptual tools for distinguishing morally unreasonable conduct from otherwise unreasonable conduct.) But Wilson J.'s argumentative step reveals

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[59] *Tutton*, *supra*, note 1 at 156.

[60] *Ibid.*, at 157-58.

an underlying concern about the orthodox subjectivist approach which, I would argue, can be explained by the narrow understanding of responsibility that provides its theoretical support.

D. The Character Theory of Criminal Negligence in Practice

Some might think that the philosophical terminology of the character theory would be out of place in a criminal court. My concern, however, is not with the particular wording of a legal test. Rather, my argument is simply that the character theory should inform whichever legal standard is applied in cases of negligence. One possibility mentioned in the previous chapter that is consistent with the character theory is the development of a defence of "good faith" in cases of negligence. Such a defence might amount to a claim, for instance, that the accused had the proper regard for, say, the "lives and safety of other persons." I leave it to defence lawyers and criminal courts to develop and refine a defence that would reflect the basic components of the character theory of criminal negligence. My goal here has been merely to provide a coherent normative foundation, both for imputing criminal liability for negligence and for exculpating negligent conduct from criminal liability where appropriate.

* * *

Criminal liability for negligence need not be branded and dismissed by deontologists as a consequentialist notion to be relegated, if at all, to the regulatory fringes of the criminal law; rather, it can be understood and defended quite properly within a broadly deontological framework, as a justifiable component of criminal liability to be imposed on the basis of and in proportion to the actor's culpability. I have attempted to demonstrate in this dissertation that a coherent, principled, and, I believe, compelling justification can be made for imposing criminal liability for negligence, on the basis of a character theory of moral responsibility.

The justification of criminal liability for negligence I proposed evolved in the following manner. I began with the proposition that while traditional consequentialist theories can justify criminal negligence, they do so only by rejecting culpability, which poses a threat to individual liberty and autonomy. Assuming that such a threat is to be minimized, the one promising utilitarian justification of criminal negligence within a normative framework that is respectful of these values was that of H.L.A. Hart, whose theory of criminal liability recognizes the importance of something akin to culpability *and* holds that criminal negligence is justified. Unfortunately, the choice theory of responsibility does not explain why we are responsible for our choices and therefore is unable to provide an adequate foundation for Hart's theory.

The choice theory, in response to the perceived challenge of hard determinism, tries to explain responsibility in terms of instrumental rationality without regard to the origin of individual choices. But responsibility makes little sense absent an explanation of why we are responsible for having those choices in the first place. While the traditional deontological approach does regard us as responsible moral agents, it finds culpability only in subjective intent or awareness, and it therefore refuses to acknowledge that we might also be responsible for our inadvertent conduct, which flows from the moral outlook that informs our purposive conduct.

The character theory of responsibility, in contrast, explains that we are morally responsible even for our inadvertent conduct, to the extent that it flows from our moral outlook, for which we are responsible. The character theory helps us to identify those cases of civil negligence that are also subject to criminal liability; only in those cases where negligence can be traced to a defect in the actor's moral outlook (specifically, a disregard for fundamental rights and interests) will criminal liability be imposed. Hart's bifurcated test can be used, with appropriate modifications based on the character theory, as a general framework for assessing criminal liability for negligence. Moreover, our obligation to remedy defects in our moral outlook is part of our broader responsibility, as moral agents and as citizens, to inform ourselves and to act consistently with the fundamental values

reflected in and protected by the criminal law. Criminal liability for negligence is justified when the actor is morally culpable, and the actor is morally culpable on the character theory of negligence only when the negligent act can be traced to a defect in the actor's moral outlook, which amounts to a disregard for the fundamental rights and interests of others.

The theory developed in this dissertation leads to a criminal law duty to be respectful, in the course of our conduct, when the fundamental rights and interests of other persons are threatened. That we have such a general criminal law duty should not be surprising; for it is precisely these interests that the criminal law recognizes as worthy of its protection. That we might be criminally liable for negligence when we fail to cultivate this general respect for fundamental rights and interests should also not be surprising; to hold otherwise suggests that a person's deeply entrenched moral disregard for these rights and interests could be invoked as an excuse.

This argument implies that, to the extent that we are responsible moral agents, our responsibility is not limited to our intentional, purposive, and reckless conduct; we are also (although perhaps to a lesser degree) responsible for the way in which our moral outlook affects others. At the same time, however, this theory of criminal liability for negligence

recognizes that, to the extent that we are respectful of the fundamental rights and interests of others, we have acted in good faith; in these circumstances, the reasonableness of our moral outlook will excuse otherwise unreasonable conduct. On this approach to criminal negligence, and in contrast with civil negligence (and strict liability), the moral innocence of the accused remains an excuse.

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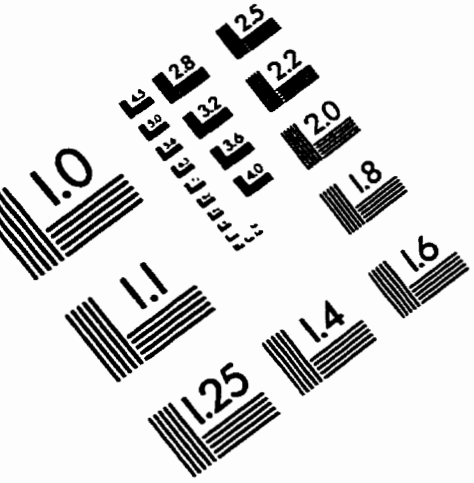

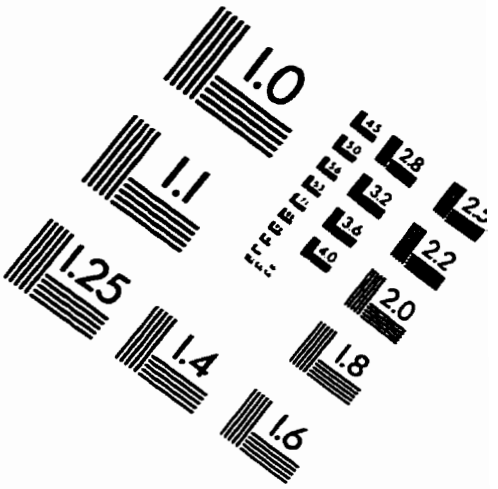

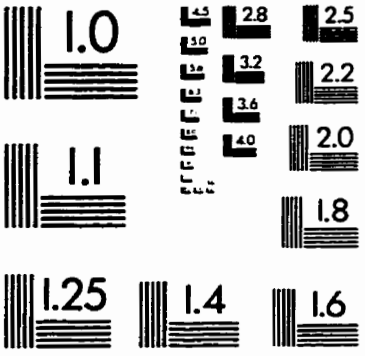

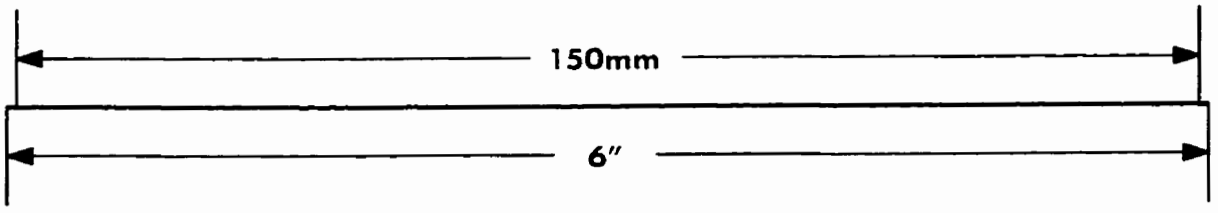

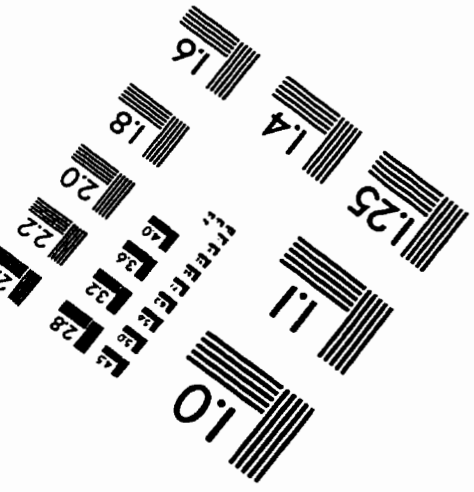

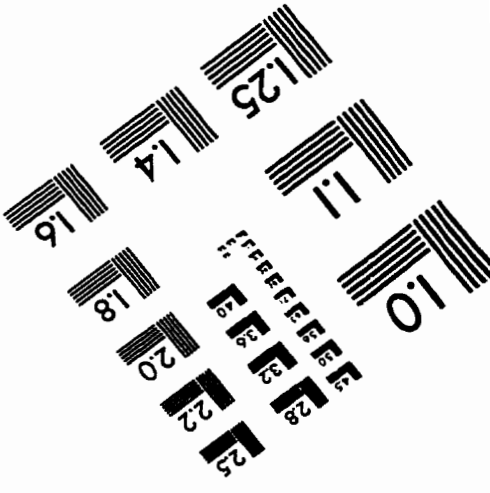

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