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PHILOSOPHICAL AND LEGAL FOUNDATIONS OF STRICT
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PHILOSOPHICAL AND LEGAL FOUNDATIONS
OF STRICT LIABILITY

BY

STEVEN SAMUEL NEMERSON

A DISSERTATION SUBMITTED TO THE GRADUATE
FACULTY IN PHILOSOPHY IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR
OF PHILOSOPHY, THE CITY UNIVERSITY OF NEW
YORK.

1973

THIS MANUSCRIPT HAS BEEN READ AND ACCEPTED FOR THE GRADUATE
FACULTY IN PHILOSOPHY IN SATISFACTION OF THE DISSERTATION
REQUIREMENT FOR THE DEGREE OF DOCTOR OF PHILOSOPHY.

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TABLE OF CONTENTS

INTRODUCTION	I
CHAPTER	
1. MORAL FAULT AND GENERAL CRIMINAL LIABILITY	4
MORAL FAULT	
GENERAL REQUIREMENTS FOR CRIMINAL LIABILITY	
EXCUSING CONDITIONS	
INSANITY	
IGNORANCE OR MISTAKE OF FACT	
NECESSITY	
COERCION	
AUTOMATISM	
INFANCY	
ACCIDENT	
IGNORANCE OR MISTAKE OF LAW	
2. MORAL FAULT AND GENERAL TORT LIABILITY	35
PROTECTION OF INTERESTS	
PUNITIVE DAMAGES	
COMPENSATORY DAMAGES	
INTENDED TORTS	
RECKLESS TORTS	
NEGLIGENT TORTS	
3. STRICT LIABILITY	49
CRIMINAL LAW	
TORT LAW	
RYLANDS V. FLETCHER	
ULTRAHAZARDOUS ACTIVITIES	
KEEPING DANGEROUS ANIMALS	
MISREPRESENTING FACTS CONCERNING SOLD GOODS	
SELLING PRODUCT IN UNREASONABLY DEFECTIVE CONDITION	
CLASS OF HARMS	

CHAPTER

4. UTILITARIANISM AND STRICT LIABILITY	77
GENERAL UTILITARIAN THEORY	
CRIMINAL LAW	
TORT LAW	
UNACCEPTABILITY OF A UTILITARIAN THEORY OF SANCTIONS	
5. RETRIBUTIVE JUSTICE	149
CRIMINAL LAW	
TORT LAW	
6. TELEOLOGICAL RETRIBUTIVISM	178
SELECTED BIBLIOGRAPHY	189

INTRODUCTION

IT IS A FEATURE OF BOTH THE LAW OF TORTS AND THE CRIMINAL LAW THAT UNDER CERTAIN CIRCUMSTANCES AN INDIVIDUAL MAY BE LIABLE TO BE PUNISHED OR TO BE MADE TO PAY RECOMPENSE FOR A STATE OF AFFAIRS OF WHICH SOME STATE OF HIS WAS A CAUSE, BUT WHICH OCCURRED WITHOUT FAULT ON HIS PART. SUCH LIABILITY IS TERMED "STRICT," "ABSOLUTE," OR "WITHOUT FAULT." THESE TERMS ARE GENERALLY USED INTERCHANGEABLY IN LEGAL LITERATURE, I.E., IN JUDICIAL DECISIONS, JOURNALS AND LAW BOOKS,¹ AND WILL BE SO USED IN THIS PAPER. THE PRACTICE OF IMPOSING SUCH LIABILITY IS EXEMPLIFIED IN THE FOLLOWING TWO CASES:

1) IN 1875 PRINCE WAS CONVICTED OF A MISDEMEANOR FOR HAVING TAKEN ANNIE PHILLIPS, AN UNMARRIED GIRL OF FOURTEEN, OUT OF THE POSSESSION AND AGAINST THE WILL OF HER FATHER. AT THE TIME OF THE ACT A STATUTE PROVIDED THAT "WHOSOEVER SHALL UNLAWFULLY TAKE OR CAUSE TO BE TAKEN ANY UNMARRIED GIRL, BEING UNDER THE AGE OF SIXTEEN YEARS, OUT OF THE POSSESSION AND AGAINST THE WILL OF HER FATHER OR MOTHER, OR OF ANY PERSON HAVING THE LAWFUL CARE OR CHARGE OF HER, SHALL BE GUILTY OF A MISDEMEANOR." NOW, ALTHOUGH SHE WAS IN FACT FOURTEEN, THE GIRL TOLD PRINCE BEFORE HE TOOK HER AWAY THAT SHE WAS EIGHTEEN YEARS OF AGE.

¹E.g., CARTER, J. IN LUTHRINGER V. MOORE, 31 CAL.2D 489, 190 P.2D 1 (1948): "WE HAVE PRESENTED THE QUESTION OF WHETHER MOORE WAS ABSOLUTELY LIABLE FOR THE INJURY--WAS LIABLE WITHOUT FAULT--WHETHER THE DOCTRINE OF STRICT LIABILITY IS APPLICABLE." SIMILARLY IN FOWLER V. HARPER, "LIABILITY WITHOUT FAULT AND PROXIMATE CAUSE," MICHIGAN LAW REVIEW, XXX, No. 7 (1932), AND IN FRANCIS L. BOHLEN, CASES ON THE LAW OF TORTS (5TH ED.; INDIANAPOLIS: THE BOBBS-MERRILL COMPANY, INC., 1953).

THE JURY FOUND THAT PRINCE HONESTLY BELIEVED HER TO BE ABOVE THE AGE SPECIFIED IN THE STATUTE AND THAT HIS BELIEF WAS REASONABLE. NONE-
THELESS, PRINCE WAS CONVICTED AND HIS CONVICTION AFFIRMED ON APPEAL.¹

2) IN 1969 A VERDICT AGAINST THE DEFENDANTS YOMMER FOR RECOVERY OF \$3,500 BY PLAINTIFFS MCKENZIES WAS AFFIRMED BY THE COURT OF APPEALS OF MARYLAND. THE YOMMERS OPERATED A GASOLINE STATION NEXT TO THE HOME OF THE MCKENZIES. THE LATTER'S WELL WAS CONTAMINATED BY GASOLINE FROM A LARGE STORAGE TANK 60 TO 70 FEET AWAY AND USED BY THE YOMMERS IN CONNECTION WITH THEIR FILLING STATION. ALTHOUGH NO EVIDENCE WAS PRODUCED SHOWING THAT THE YOMMERS HAD FAILED TO EXERCISE REASONABLE CARE TO PREVENT SUCH AN OCCURRENCE, THE APPELLATE COURT HELD THAT THEY MIGHT JUSTIFIABLY BE MADE TO PAY COMPENSATION.²

WRITERS CONCERNED WITH EXAMINING THE JUSTIFIABILITY OF IMPOSING SUCH LIABILITY MAY BE DIVIDED INTO TWO CATEGORIES. THE FIRST ARE PHILOSOPHERS, WHO DEAL WITH THE PROBLEM FROM THE VIEWPOINT OF VARIOUS THEORIES OF MORAL OBLIGATION. THEY CHIEFLY CONCERN THEMSELVES WITH ANSWERS TO THE FOLLOWING QUESTIONS: IS STRICT LIABILITY EVER JUSTIFIABLE FROM THE VIEWPOINT OF THOSE THEORIES OF MORAL OBLIGATION WHICH HAVE BEEN USED TO DEFEND THE IMPOSITION OF SANCTIONS GENERALLY AND, IF SO, UNDER WHAT CONDITIONS? DO ANY OF THESE THEORIES FURNISH AN ACCEPTABLE PERSPECTIVE ON THE IMPOSITION OF SANCTIONS?

THE SECOND ARE JURISTS, WHO ARE MAINLY CONCERNED WITH ANSWERING THE FOLLOWING QUESTIONS: TO WHAT DEGREE IS MORAL FAULT GENERALLY REQUIRED AS A NECESSARY CONDITION FOR PENAL OR CIVIL LIABILITY? FOR

¹REG. V. PRINCE, L.R. 2 CR. CAS. RES. 154 (1875).

²YOMMER V. MCKENZIE, 255 MD. 220, 257 A.2D 138 (1969).

WHICH OFFENSES, AND TO WHAT EXTENT, HAS THIS CONDITION BEEN ABANDONED IN EACH AREA OF LAW? WHAT ARE THE MAJOR LEGAL DOCTRINES AND PRINCIPLES USED TO JUSTIFY THE PRACTICE OF IMPOSING LIABILITY WITHOUT FAULT?

UNFORTUNATELY, HOWEVER, A SYNTHESIS OF THESE TWO SORTS OF EXAMINATION IS NOT OFTEN UNDERTAKEN; RARELY DOES THE PHILOSOPHER OR THE JURIST GO ON TO EXAMINE THE COGENCY OF THE LEGAL DOCTRINES AND PRACTICES IN TERMS OF THE RELEVANT MORAL THEORIES. IT IS CLEAR, THOUGH, THAT SUCH A SYNTHESIS IS DESIRABLE. THE LEGAL THEORIST WOULD BENEFIT FROM A PHILOSOPHICAL ANALYSIS OF THE BASIC CONCEPTS IN TERMS OF WHICH HIS PRINCIPLES ARE EXPRESSED, AND FROM AN EXAMINATION OF THE JUSTIFIABILITY OF THOSE PRINCIPLES; THE WORK OF THE PHILOSOPHER WOULD BECOME MORE VALUABLE IF HIS THOUGHT WAS DIRECTED NOT MERELY TO EVALUATING SOME POSSIBLE SYSTEM OF STRICT LIABILITY BUT WAS RATHER EXTENDED TO A CRITICAL STUDY OF SOME ACTUAL SYSTEM.

FOR THESE REASONS MY EXAMINATION OF THE PROBLEM OF STRICT LIABILITY WILL INCLUDE, BUT WILL NOT BE LIMITED TO, A CRITICAL SURVEY OF THE LEGAL AND PHILOSOPHICAL ARGUMENTS RELEVANT TO THE ISSUE. HAVING MADE SUCH A STUDY I WILL ALSO ATTEMPT THE SORT OF SYNTHESIS WHICH I HAVE RECOMMENDED; I SHALL TRY TO BRING THE TOOLS AND CONCLUSIONS OF PHILOSOPHICAL ANALYSIS TO BEAR ON CURRENT JUDICIAL PRACTICES.

CHAPTER I

MORAL FAULT AND GENERAL CRIMINAL LIABILITY

MORAL FAULT

CENTRAL TO ANY DISCUSSION OF STRICT LIABILITY IS THE NOTION OF AN INDIVIDUAL BEING MORALLY AT FAULT, AND I WILL THEREFORE BEGIN WITH AN EXAMINATION OF THE CONDITIONS UNDER WHICH WE HOLD A PERSON CULPABLE.

(1) AN INDIVIDUAL, P, ENGAGES IN X, SOME VOLUNTARY ACT OR VOLUNTARY OMISSION.

(2) SOME INTENDED OR FORESEEN ASPECT, A, OF X, OR SOME INTENDED OR FORESEEN CONSEQUENCE, C, OF X, VIOLATES A MORAL RULE, R.

(3) P BELIEVES THAT THERE IS AN UNREASONABLE RISK THAT SOME ASPECT, A, OF X EXISTS OR THAT SOME CONSEQUENCE, C, OF X WILL OCCUR, AND THAT A OR C VIOLATES A MORAL RULE, R.

(4) P IS NOT AWARE THAT THERE IS AN UNREASONABLE RISK THAT SOME ASPECT, A, OF X EXISTS OR THAT SOME CONSEQUENCE, C, OF X WILL OCCUR, WHICH VIOLATES A MORAL RULE, R; BUT P POSSESSES THE PHYSICAL AND MENTAL CAPACITIES NECESSARY TO FORESEE SUCH A RISK.

(5) P KNOWS MORAL RULE R.

IT IS, I BELIEVE, NECESSARY AND SUFFICIENT FOR JUSTIFIABLY ATTRIBUTING MORAL FAULT TO AN INDIVIDUAL THAT HE SATISFY CONDITIONS 1&5&(2v3v4). THE FOLLOWING HYPOTHETICAL CASES MAY SERVE TO ILLUSTRATE THESE CONDITIONS AND TO SHOW THAT THEY ARE INDEED SUFFICIENT:

(A) P ENGAGES IN X, THE FIRING OF A RIFLE IN THE WOODS. HE

INTENDS FOR THE BULLET TO HIT AND KILL V, AN INDIVIDUAL TO WHOM HE OWES A LARGE SUM OF MONEY. HE KNOWS THAT SHOOTING AN INNOCENT INDIVIDUAL VIOLATES A MORAL RULE. P SATISFIES CONDITIONS 1&2&5. HE IS CLEARLY MORALLY AT FAULT IN THIS CASE. NOTE THAT THIS IS TRUE WHETHER OR NOT HE IN FACT HITS V. IT IS EVEN TRUE IF, UNDER THE CIRCUMSTANCES, IT IS HIGHLY IMPROBABLE OR PHYSICALLY IMPOSSIBLE THAT P WILL HIT V, E.G., P FIRES FROM A GREAT DISTANCE, HAS POOR EYESIGHT AND IS A TERRIBLE SHOT, OR HAS UNWITTINGLY LOADED THE RIFLE WITH BLANKS.

(B) P HAS BEEN IN THE WOODS FOR MANY HOURS HUNTING GAME, BUT HAS BEEN UNABLE TO FIND ANY. SUDDENLY HE HEARS A GREAT DEAL OF THRASHING ABOUT AT SOME DISTANCE FROM HIS POSITION. HE IS UNABLE TO SEE THE SOURCE OF THE NOISE BUT DECIDES TO TAKE A SHOT AT IT, HOPING IT WILL PROVE TO BE A DEER. HE KNOWS THAT SUCH CONDUCT CREATES AN UNREASONABLE RISK THAT HE WILL HARM ANOTHER HUNTER AND THAT THIS IS MORALLY PROHIBITED. P NONETHELESS CONSCIOUSLY DISREGARDS THE RISK AND ENGAGES IN X, THE FIRING OF HIS RIFLE. P SATISFIES CONDITIONS 1&3&5. P IS OBVIOUSLY MORALLY BLAMEWORTHY. THIS IS TRUE WHETHER OR NOT THE TARGET IS IN FACT A HUMAN BEING OR SOME GAME ANIMAL. IT REMAINS TRUE EVEN IF HE MISSES HIS MARK AND HITS NO LIVING THING.

(C) P WISHES TO TEST HIS NEW RIFLE IN THE WOODS. IN FACT, HIS SITE IS VERY CLOSE TO A HEAVILY POPULATED RESORT AND HIS CONTEMPLATED CONDUCT IS THUS UNREASONABLY DANGEROUS. P IS SO ENGROSSED IN ADMIRING HIS WEAPON THAT HE FAILS TO INQUIRE WHETHER HIS POSITION IS NEAR ANY DWELLINGS, AND IS THEREFORE UNAWARE OF THE UNREASONABLE RISK IN FIRING HIS NEW RIFLE. P IS A PERSON OF NORMAL MENTAL AND PHYSICAL CAPACITIES AND COULD ASCERTAIN THE DEGREE OF DANGER INHERENT IN HIS BEHAVIOUR. P ENGAGES IN X, THE FIRING OF HIS RIFLE. HE HAS SATISFIED CONDITIONS

1&4&5. HIS CONDUCT RENDERS HIM MORALLY CULPABLE. THIS IS TRUE WHETHER OR NOT HE IN FACT CAUSES ANY HARM.

SATISFACTION OF CONDITIONS 1&2&5, 1&3&5 OR 1&4&5 IS, THEN, SUFFICIENT FOR MORAL FAULT. THAT SATISFACTION OF CONDITION 1 IS ALSO NECESSARY FOR MORAL FAULT IS CLEAR IF WE EXAMINE THE NATURE OF MORAL BLAME. WHEN WE HOLD SOMEONE CULPABLE, WE IMPLY THAT HE HAS FAILED TO DO SOMETHING WHICH HE MORALLY OUGHT TO HAVE DONE, OR THAT HE HAS DONE SOMETHING WHICH HE MORALLY OUGHT TO HAVE REFRAINED FROM DOING, I.E., WE IMPLY THAT HE OUGHT TO HAVE DONE SOMETHING OTHER THAN WHAT HE IN FACT DID. BUT TO IMPLY THAT A PERSON OUGHT TO HAVE DONE OTHER THAN HE DID IS TO IMPLY THAT HE COULD HAVE DONE OTHER THAN HE DID, I.E., THAT HIS ACT OR OMISSION WAS VOLUNTARY. CONDITION 1 IS THEREFORE IMPLIED AS A NECESSARY CONDITION OF JUSTIFIABLE MORAL BLAME.

SATISFACTION OF ONE OF THE CONDITIONS 2, 3 OR 4 IS ALSO NECESSARY FOR MORAL FAULT. TO BLAME AN INDIVIDUAL FOR SOME ASPECT OR CONSEQUENCE OF HIS VOLUNTARY BEHAVIOUR IS TO CLAIM, AT LEAST IN PART, THAT HE SHOULD HAVE GUIDED HIS CONDUCT BY THE POSSIBILITY OF PRODUCING SUCH A STATE OF AFFAIRS. BUT IF AN INDIVIDUAL NOT ONLY DID NOT FORESEE, BUT COULD NOT HAVE FORESEEN, THE COMING TO BE OF THAT STATE OF AFFAIRS, I.E., NEITHER CONDITION 2 NOR 3 NOR 4 WAS SATISFIED, THEN WE CANNOT CLAIM THAT HE OUGHT TO HAVE BEEN GUIDED BY IT. ONE CANNOT BE GUIDED BY WHAT ONE CANNOT KNOW.

FINALLY, CONSIDER THE NECESSITY OF CONDITION 5. WHEN WE BLAME AN INDIVIDUAL FOR A MORAL TRANSGRESSION WE ALSO SEEM TO IMPLY THAT HE SHOULD HAVE GUIDED HIS CONDUCT BY SOME PARTICULAR MORAL RULE, ALTHOUGH IN FACT HE DID NOT DO SO; WE USUALLY MEAN TO IMPLY THAT HE COULD HAVE SO GUIDED HIS CONDUCT. IF, HOWEVER, AN INDIVIDUAL COULD NOT HAVE KNOWN

A MORAL RULE, THEN HE COULD NOT HAVE GUIDED HIS CONDUCT BY IT. BUT ANY INDIVIDUAL WHO FAILS TO SATISFY CONDITION 5, I.E., WHO FAILS TO KNOW A MORAL RULE, MUST BE SUFFERING FROM A MENTAL DISEASE OF SUCH A NATURE THAT IT PRECLUDES HIS KNOWLEDGE OF THAT RULE.

THIS LAST CLAIM MAY, AT FIRST GLANCE, SEEM STRONG INDEED. HOWEVER, WHAT IS NOT BEING CLAIMED IS THAT ANY INDIVIDUAL WHO FAILS TO ACCEPT THE MORAL PRINCIPLES OF HIS SOCIETY IS INSANE; WHAT IS BEING MAINTAINED IS THAT ANYONE WHO FAILS TO KNOW THE FUNDAMENTAL MORAL RULES WHICH APPLY TO HIM IS THUS AFFLICTED. CONSIDER TWO OF THESE PRINCIPLES: IT IS WRONG TO INFLICT UNPROVOKED HARM ON ANY INDIVIDUAL; IT IS WRONG TO LIE OR DECEIVE. WHEN WE ASK WHETHER AN INDIVIDUAL KNOWS THAT THESE ACTIONS VIOLATE A MORAL RULE WE ARE ASKING WHETHER HE KNOWS THAT THEY ARE EMPHATICALLY MORALLY CONDEMNED BY THE VAST MAJORITY OF HIS SOCIETY. HE NEED NOT HAVE ACCEPTED THESE PRINCIPLES, I.E., HE NEED NOT HAVE COMMITTED HIMSELF TO FOLLOWING THEM IN HIS ACTIONS, IN ORDER TO KNOW THAT THEY ARE ESPOUSED BY HIS SOCIETY. CAN ANYONE HONESTLY CONCEIVE OF A PERSON WHO HAS THE CAPACITY TO LEARN THESE RULES BUT WHO HAS NONETHELESS FAILED TO DO SO? IT WOULD BE AS EASY TO CONCEIVE OF A PERSON WITH NORMAL SIGHT WHO HAD FAILED TO OBSERVE THAT OBJECT IN THE SKY WHICH WE CALL THE SUN!

IF AN INDIVIDUAL HAS THE CAPACITY TO LEARN WHICH ACTIONS ARE THE SUBJECT OF EMPHATIC MORAL DISAPPROVAL BY HIS SOCIETY HE CANNOT BUT HELP LEARNING THEM. IF, THEN, A PERSON HAS IN FACT FAILED TO DO SO WE MAY CONCLUDE THAT HE LACKS THE NECESSARY CAPACITIES. MODERN PSYCHIATRIC THEORY DOES, INDEED, RECOGNIZE LACK OF SUCH KNOWLEDGE AS A TOUCHSTONE OF SEVERE MENTAL DISORDER.

THE TAKING OF ANOTHER'S LIFE FOR TRIVIAL REASONS, OUT OF MERE IRRITATION OR PERSONAL DISTASTE, FOR EXAMPLE, IS PROFOUNDLY

CONDEMNED AS MORALLY WRONG BY SOCIETY. THE PSYCHIATRIST KNOWS THIS; WE ALL KNOW IT. BUT WHAT IF HIS PATIENT IS ACTUALLY UNAWARE OF THIS? UNAWARENESS OF THIS FACT IS A PSYCHIATRIC INDICATOR OF GRAVE PSYCHOPATHOLOGY, OF EGO OR SUPEREGO DEFECT. . . .

ANALOGOUS COMMENTS COULD BE MADE ABOUT THIEVING, CONSTANT LYING AND CHEATING, RAPE, ARSON, AND SO ON. ONE WHO IS UNAWARE OF CERTAIN BROAD TYPES OF MORAL CONDEMNATION BY SOCIETY IN THESE MATTERS (AND OF CERTAIN TYPES OF EXCEPTIONS AND EXCUSES), ONE WHO IS UNABLE EVEN TO TAKE THESE ATTITUDES INTO ACCOUNT IN CONDUCTING HIMSELF, IS THEREBY MARKED OUT AS SUFFERING SOME PSYCHOPATHOLOGY; HE IS OUT OF TOUCH WITH REALITY JUST AS MUCH AS IF HE WERE UNAWARE OF THE GENERAL NATURE AND PURPOSE OF HOUSES, MONEY, OR POLICEMEN AND THE LAWS AGAINST CRIMES.¹

KNOWLEDGE OF MORAL RULES IS, ON THE ACCOUNT SUBSCRIBED TO HERE, A NECESSARY CONDITION OF MORAL BLAMEWORTHINESS.²

¹HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY (BERKELEY: UNIVERSITY OF CALIFORNIA PRESS, 1972), PP. 108-09.

²ON SOME VIEWS, THOUGH, SIMPLE KNOWLEDGE OF MORAL RULES IN CONJUNCTION WITH SATISFACTION OF CONDITIONS 1&(2v3v4) IS NOT SUFFICIENT TO RENDER AN INDIVIDUAL BLAMEWORTHY. SOME THEORISTS INSIST THAT IT IS A NECESSARY CONDITION OF MORAL FAULT THAT AN AGENT ACCEPT, AND NOT MERELY KNOW, THE PRINCIPLE WHICH HE HAS VIOLATED. THUS, ACCORDING TO KURT BAIER, IF WE ASK "SHOULD A PERSON WHO HAS WORKED OUT WHAT HE OUGHT TO DO AS CAREFULLY AND CONSCIENTIOUSLY AS CAN BE EXPECTED BE REBUKED FOR ACTING ON HIS RESULTS?" THE ANSWER IS PLAINLY 'No.'
THE MORAL POINT OF VIEW (ITHACA: CORNELL UNIVERSITY PRESS, 1958), p. 146. ON SUCH A VIEW, A NAZI WHO HAD CONCLUDED AFTER CAREFUL DELIBERATION THAT EXTERMINATION OF JEWS WAS MORALLY PERMISSIBLE COULD NOT JUSTIFIABLY BE HELD MORALLY AT FAULT. SUCH A PROPOSITION CERTAINLY DOES NOT SEEM TO ACCORD WITH OUR ORDINARY NOTION OF BLAMEWORTHINESS, AND HAS BEEN THE SUBJECT OF WIDE DEBATE IN THE PHILOSOPHICAL LITERATURE. FOR EXAMPLE, P. H. NOWELL-SMITH WRITES THAT "IF A MAN DOES SOMETHING BECAUSE HE DOES NOT THINK IT WRONG HE CANNOT PLEAD THAT HE DID NOT CHOOSE TO DO IT, AND IT IS FOR CHOOSING TO DO WHAT IS IN FACT WRONG, WHETHER OR NOT HE KNOWS IT, THAT A MAN IS BLAMED." ETHICS (BALTIMORE: PENGUIN BOOKS, 1954), p. 294. CONSIDERATION OF THE "CONSCIENTIOUS NAZI" AND SIMILAR EXAMPLES HAS LED ME TO ACCEPT NOWELL-SMITH'S POSITION ON THIS ISSUE. HOWEVER, A THOROUGH ANALYSIS OF THE PROBLEM AND A CAREFUL DEFENSE OF THIS VIEW IS NOT WITHIN THE SCOPE OF THIS PAPER. THE PHILOSOPHICAL AND LEGAL DISCUSSIONS OF "CONSCIENTIOUSNESS" AS A MORAL AND LEGAL EXCUSE ARE NOT CONDUCTED AS ASPECTS OF THE PROBLEM OF STRICT LIABILITY BUT, RATHER, AS A DISTINCT ISSUE. BECAUSE THE TWO ISSUES HAVE TRADITIONALLY BEEN DISSOCIATED, THE PROBLEM OF "SUBJECTIVE DUTY" WILL BE IGNORED IN WHAT FOLLOWS.

HAVING NOW CONSIDERED THE NECESSARY AND SUFFICIENT CONDITIONS OF MORAL FAULT WE MAY ATTEMPT TO ANSWER THE QUESTION "TO WHAT EXTENT DOES MORAL FAULTLESSNESS GENERALLY EXCULPATE FROM CRIMINAL LIABILITY?" WE MUST BEGIN BY EXAMINING THE CONDITIONS FOR SUCH LIABILITY.

GENERAL REQUIREMENTS FOR CRIMINAL LIABILITY

IN ORDER FOR AN INDIVIDUAL, P, TO BE HELD LIABLE FOR SOME STATE OF AFFAIRS, X, WHICH VIOLATES THE CRIMINAL LAW IN ANGLO-AMERICAN JURISDICTIONS, EITHER

(A) X MUST BE IDENTICAL TO SOME ASPECT OF SOME VOLUNTARY ACTION OF P, OR TO SOME ASPECT OF SOME OMISSION TO PERFORM SOME ACTION WHICH IT WAS PHYSICALLY POSSIBLE FOR P TO PERFORM; OR

(B) X MUST HAVE BEEN CAUSED BY SOME VOLUNTARY ACTION OF P, OR THE OMISSION TO PERFORM SOME ACTION WHICH IT WAS PHYSICALLY POSSIBLE FOR P TO PERFORM; AND FOR EACH ASPECT OF X SPECIFIED BY LAW, EITHER

(C) IT IS P'S CONSCIOUS OBJECT TO ENGAGE IN CONDUCT OF THE NATURE SPECIFIED BY THE LAW, OR TO CAUSE CONSEQUENCES OF THE NATURE SPECIFIED BY THE LAW; OR

(D) P KNOWS THAT HIS CONDUCT IS OF THE NATURE SPECIFIED BY THE LAW, OR THAT HIS CONDUCT WILL NECESSARILY RESULT IN CONSEQUENCES OF THE NATURE SPECIFIED BY THE LAW; OR

(E) P CONSCIOUSLY DISREGARDS A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT HIS CONDUCT OR A CONSEQUENCE OF HIS CONDUCT WILL BE OF THE NATURE SPECIFIED BY THE LAW; OR

(F) A SUBSTANTIAL AND UNJUSTIFIABLE RISK EXISTS THAT P'S CONDUCT, OR SOME CONSEQUENCE OF P'S CONDUCT, WILL BE OF THE NATURE SPECIFIED BY LAW, AND P'S FAILURE TO PERCEIVE THIS RISK, CONSIDERING THE

NATURE AND PURPOSE OF HIS CONDUCT, THE CIRCUMSTANCES KNOWN TO HIM, AND THE CARE WHICH WOULD BE EXERCISED BY A REASONABLE MAN IN HIS SITUATION, EVINCES A CONSCIOUS DISREGARD FOR THE RIGHTS AND WELL-BEING OF OTHERS.¹

AN INDIVIDUAL WHO SATISFIES CONDITION (C) IS SAID TO HAVE ACTED "PURPOSELY" WITH RESPECT TO THAT ASPECT OF HIS BEHAVIOUR OR ITS CONSEQUENCES.²

AN INDIVIDUAL WHO SATISFIES CONDITION (D) IS SAID TO HAVE ACTED "KNOWINGLY" WITH RESPECT TO THAT ASPECT OF HIS BEHAVIOUR OR ITS CONSEQUENCES.³

AN INDIVIDUAL WHO SATISFIES CONDITION (E) IS SAID TO HAVE ACTED "RECKLESSLY" WITH RESPECT TO THAT ASPECT OF HIS BEHAVIOUR OR ITS CONSEQUENCES.⁴

AN INDIVIDUAL WHO SATISFIES CONDITION (F) IS SAID TO HAVE ACTED "NEGLIGENTLY" WITH RESPECT TO THAT ASPECT OF HIS BEHAVIOUR OR ITS CONSEQUENCES.⁵ SUCH NEGLIGENCE IS OFTEN TERMED "CRIMINAL," "GROSS," OR "CULPABLE" IN ORDER TO CONTRAST IT WITH THE "SIMPLE" OR "CIVIL" NEGLIGENCE NECESSARY TO SUPPORT A CIVIL SUIT FOR DAMAGES.⁶ THIS LATTER SORT

¹ IN SUBSTANCE, THESE REQUIREMENTS ARE THE SAME AS THOSE PUT FORWARD IN THE AMERICAN LAW INSTITUTE'S MODEL PENAL CODE (PHILADELPHIA: THE AMERICAN LAW INSTITUTE, 1961), PROPOSED FINAL DRAFT No. 1, ART. 2, SEC. 2.02, PP. 25-26. I HAVE CHOSEN TO ALTER THE FORMAT IN WHICH THESE CONDITIONS ARE SET OUT FOR THE PURPOSES OF CLARITY OF EXPOSITION.

² MODEL PENAL CODE, PROPOSED FINAL DRAFT No. 1 (1961), ART. 2, SEC. 2.02, P. 25.

³ IBID.

⁴ IBID., P. 26.

⁵ IBID.

⁶ "GROSS NEGLIGENCE" IS THAT ENTIRE WANT OF CARE WHICH WOULD

OF CONDUCT HAS BEEN DEFINED AS ". . . A FAILURE TO EXERCISE IN A GIVEN SITUATION, THE DEGREE OF CARE WHICH A REASONABLE MAN UNDER SIMILAR CIRCUMSTANCES WOULD EXERCISE TO PROTECT OTHERS FROM HARM."¹

GROSS NEGLIGENCE THUS INVOLVES A MUCH GREATER DEPARTURE FROM THE STANDARD OF THE "REASONABLE MAN" THAN DOES CIVIL NEGLIGENCE. IT INVOLVES ". . . NEGLIGENCE THAT DIFFERS FROM ORDINARY OR SIMPLE NEGLIGENCE IN DEGREE, AS INDIFFERENCE TO PRESENT LEGAL DUTY AND AN UTTER FORGETFULNESS OF LEGAL OBLIGATIONS SO FAR AS OTHER PERSONS MAY BE AFFECTED."²

NEGLIGENT CONDUCT WHICH RESULTS IN A VIOLATION OF LAW BUT WHICH IS NOT SUFFICIENTLY DIVERGENT FROM THE CONDUCT OF THE "REASONABLE MAN" UNDER THE CIRCUMSTANCES TO BE TERMED GROSS, CRIMINAL, OR CULPABLE WILL NOT RENDER AN INDIVIDUAL LIABLE TO PENAL SANCTIONS.

IT IS, THEN, A NECESSARY CONDITION FOR CRIMINAL LIABILITY IN A GREAT NUMBER OF OFFENSES THAT CONDITIONS (AvB)&(CvDvEvF) BE SATISFIED.

RAISE THE BELIEF THAT THE ACT OR OMISSION COMPLAINED OF WAS THE RESULT OF A CONSCIOUS INDIFFERENCE TO THE RIGHT OR WELFARE OF THE PERSON OR PERSONS TO BE AFFECTED BY IT." SNYDER V. JONES, 393 S.W.2D 504 (TEX. CIV. APP. 1965); "'CULPABLE NEGLIGENCE' IS THEREFORE SOMETHING MORE THAN THE SLIGHT NEGLIGENCE NECESSARY TO SUPPORT A CIVIL ACTION FOR DAMAGES. . . . [CULPABLE NEGLIGENCE] MEANS DISREGARD OF THE CONSEQUENCES WHICH MAY ENSUE FROM THE ACT, AND INDIFFERENCE TO THE RIGHTS OF OTHERS." PEOPLE V. ANGELO, 246 N.Y. 451, 457, 159 N.E. 393 (1927); "IN EXPLAINING TO JURIES THE TEST WHICH THEY SHOULD APPLY TO DETERMINE WHETHER THE NEGLIGENCE, IN THE PARTICULAR CASE, AMOUNTED OR DID NOT AMOUNT TO A CRIME, JUDGES HAVE USED MANY EPITHETS SUCH AS 'CULPABLE,' 'CRIMINAL,' 'GROSS,' . . . BUT WHATEVER EPITHET BE USED AND WHETHER AN EPITHET BE 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 SUBJECTS AND SHOWED SUCH DISREGARD FOR THE LIFE AND SAFETY OF OTHERS AS TO AMOUNT TO A CRIME AGAINST THE STATE AND CONDUCT DESERVING OF PUNISHMENT." REX. V. BATEMAN, 19 CR. APP. R. 11.

¹SMITH V. JOHNSON, 313 P.2D 7 (CAL. APP.)

²MONTELLIER V. U.S., 202 F. SUPP. 384 (D.C.N.Y. 1962).

THE REQUIREMENT THAT EITHER CONDITION (A) OR (B) BE SATISFIED IN ESTABLISHING PENAL LIABILITY IS OFTEN REFERRED TO AS THE REQUIREMENT FOR AN ACTUS REUS, OR "EVIL ACT."

THE NECESSITY THAT AN INDIVIDUAL SATISFY EITHER (C) OR (D) OR (E) OR (F) IS ENSHRINED IN THE CRIMINAL LAW IN THE NEGATIVE MAXIM "ACTUS NON FACIT REUM NISI MENS SIT REA."¹ THE ATTRIBUTION OF MENS REA, LITERALLY "EVIL MIND," TO AN INDIVIDUAL WAS AT ONE TIME TANTAMOUNT TO AN ATTRIBUTION OF MORAL WICKEDNESS; "THE SPHERE OF THE ETHICAL ACTS COINCIDED WITH THE SPHERE OF THE LAWFUL ACTS, THE SPHERE OF THE UNETHICAL ACTS COINCIDED WITH THE SPHERE OF THE PROHIBITED ACTS, OF WHICH CRIMES WERE THE GRAVEST."² MENS REA SIGNIFIED THE MENTAL STATE OF INTENDING TO ENGAGE IN ACTS WHICH ONE BELIEVED WOULD, OR MIGHT, BREAK THESE ETHICO-LEGAL RULES, THUS A WICKED OR EVIL INTENT.

THE MEANING OF MENS REA HAS SHIFTED SOMEWHAT OVER THE YEARS. ITS CONNOTATION IS NOW THAT OF A "BLAMEWORTHY," RATHER THAN AN "EVIL," MIND. THIS IS A REASONABLE ALTERATION, SINCE WE NORMALLY RESERVE THE TERMS "WICKED" AND "EVIL" FOR INDIVIDUALS WHOSE WRONGFUL ACTS ARE BELIEVED TO BE A MANIFESTATION OF A CHARACTER TRAIT OR TENDENCY TO DO WRONG ACTS, WHILE "BLAMEWORTHY" MAY BE APPLIED TO A PERSON WHO IS NOT BELIEVED TO HAVE SUCH A TRAIT OR TENDENCY, E.G., A MAN WHO HAS LED A GENERALLY GOOD LIFE BUT WHO HAS ENGAGED IN A SINGLE VIOLATION OF LAW.

WITHIN MODERN ANGLO-AMERICAN CRIMINAL LAW, AN INDIVIDUAL WHO SATISFIES ANY ONE OF THE CONDITIONS (C)-(F) ABOVE IS FELT TO SATIS-

¹"AN ACT IS NOT MADE EVIL UNLESS THE MIND IS EVIL."

²GERHARD O. W. MUELLER, "MENS REA AND THE LAW WITHOUT IT," WEST VIRGINIA LAW REVIEW, LVIII (1955), P. 35.

FY THE REQUIREMENT OF HAVING OR HAVING HAD A BLAMEWORTHY MENTAL STATE OR MENS REA.

NOT EVERY INDIVIDUAL WHOSE BEHAVIOUR, OR THE RESULTS OF WHOSE BEHAVIOUR, VIOLATES A LEGAL PROHIBITION SATISFIES THE ACTUS REUS AND MENS REA REQUIREMENTS, OF COURSE. WHERE THE LAW-VIOLATIVE BEHAVIOUR OCCURRED IN CIRCUMSTANCES WHICH NEGATIVE AT LEAST ONE OF THESE REQUIREMENTS, THE OFFENDER IS EXCUSED OR EXCULPATED. BY EXAMINING THE RECOGNIZED LEGAL EXCUSES WE WILL BE ABLE TO DETERMINE THE DEGREE TO WHICH MORAL FAULTLESSNESS WILL EXCULPATE FROM CRIMINAL LIABILITY. I WILL THEREFORE NOW TURN MY ATTENTION TO THOSE EXCUSES.

Excusing Conditions

INSANITY

AS A COROLLARY OF THE CONDITIONS NECESSARY FOR MORAL FAULT, AN INDIVIDUAL WHOSE BEHAVIOUR HAS CAUSED A VIOLATION OF A MORAL RULE IS NONETHELESS FREE FROM MORAL FAULT IF HE SUFFERS FROM A MENTAL DISEASE SUCH THAT EITHER A) HIS CONDUCT IS INVOLUNTARY, OR B) HE DOES NOT KNOW THE TRUE EMPIRICAL NATURE OF THOSE ASPECTS OF HIS BEHAVIOUR OR ITS CONSEQUENCES IN VIRTUE OF WHICH THEY VIOLATE A MORAL RULE, OR C) IF HE DOES KNOW THE EMPIRICAL NATURE OF THESE ASPECTS, HIS ILLNESS PRECLUDES HIM FROM KNOWING THE MORAL RULES WHICH THEY VIOLATE.

WITHIN THE ANGLO-AMERICAN CRIMINAL LAW, THE CLASSIC CRITERION FOR DISTINGUISHING BETWEEN THOSE MENTAL DEFECTS WHICH EXCULPATE AND THOSE WHICH DO NOT WERE SET FORTH IN 1843 IN THE M^rNAGHTEN RULES:

. . . TO ESTABLISH A DEFENCE ON THE GROUND OF INSANITY, IT MUST BE CLEARLY PROVED THAT, AT THE TIME OF THE COMMITTING OF THE ACT, THE PARTY ACCUSED WAS LABOURING UNDER SUCH A DEFECT OF REASON, FROM DISEASE OF THE MIND, AS NOT TO KNOW THE NATURE AND QUALITY OF THE ACT HE WAS DOING; OR, IF HE DID KNOW IT, THAT HE DID NOT

KNOW HE WAS DOING WHAT WAS WRONG.¹

THESE RULES ARE, WITH SOME (RARE) MODIFICATIONS, STILL ADHERED TO TODAY IN NEARLY EVERY ANGLO-AMERICAN JURISDICTION, ALTHOUGH THEY HAVE BEEN VIGOROUSLY ATTACKED THROUGHOUT THE YEARS. THEIR CRITICS' MAJOR OBJECTION HAS BEEN THAT THEY RECOGNIZE AS BLAMELESS ONLY THOSE WHOSE MENTAL DISEASE AFFECTS THEIR REASON AND KNOWLEDGE, I.E., THEIR COGNITIVE FACULTIES, WHILE IMPOSING LIABILITY ON THOSE WHO, WHILE THEY ARE ABLE TO KNOW THE NATURE OF THEIR ACT AND THAT IT IS WRONG, ARE NONETHELESS DRIVEN IRRESISTABLY TO COMMIT IT. IN OTHER WORDS, AN INDIVIDUAL WHOSE MENTAL DEFECT NEGATIVES THE NECESSARY CONDITION OF A VOLUNTARY ACT OR OMISSION MAY NONETHELESS FAIL TO ESCAPE LIABILITY UNDER THE M'NAGHTEN RULES.

SOME COURTS, IN RECOGNITION OF THIS CRITICISM, HAVE ABANDONED THE M'NAGHTEN TEST AND OFFERED ALTERNATIVE CONDITIONS UNDER WHICH A MENTAL DEFECT WILL EXCULPATE FROM CRIMINAL LIABILITY.

. . . THE MODERN DOCTRINE IS THAT THE DEGREE OF INSANITY WHICH WILL RELIEVE THE ACCUSED OF THE CONSEQUENCES OF A CRIMINAL ACT MUST BE SUCH AS TO CREATE IN HIS MIND AN UNCONTROLLABLE IMPULSE TO COMMIT THE OFFENSE CHARGED. THIS IMPULSE MUST BE SUCH AS TO OVERRIDE THE REASON AND JUDGMENT AND OBLITERATE THE SENSE OF RIGHT AND WRONG TO THE EXTENT THAT THE ACCUSED IS DEPRIVED OF THE POWER TO CHOOSE BETWEEN RIGHT AND WRONG. THE MERE ABILITY TO DISTINGUISH RIGHT FROM WRONG IS NO LONGER THE CORRECT TEST EITHER IN CIVIL OR CRIMINAL CASES, WHERE THE DEFENSE OF INSANITY IS INTERPOSED. THE ACCEPTED RULE IN THIS DAY AND AGE, WITH THE GREAT ADVANCEMENT IN MEDICAL SCIENCE AS AN ENLIGHTENING INFLUENCE ON THIS SUBJECT, IS THAT THE ACCUSED MUST BE CAPABLE, NOT ONLY OF DISTINGUISHING BETWEEN RIGHT AND WRONG, BUT THAT HE WAS NOT IMPELLED TO DO THE ACT BY AN IRRESISTIBLE IMPULSE, WHICH MEANS BEFORE IT WILL JUSTIFY A VERDICT OF ACQUITTAL THAT HIS REASONING POWERS WERE SO FAR DETHRONED BY HIS DISEASED MENTAL CONDITION AS TO DEPRIVE HIM OF THE WILL POWER TO RESIST THE INSANE IMPULSE TO PERPETRATE THE DEED, THOUGH KNOWING IT TO BE WRONG.

¹M'NAGHTEN'S CASE, 10 CL. & F. 200, 8 ENG. REP. 718 (HOUSE OF LORDS, 1843).

²SMITH V. UNITED STATES, 36 F.2D 549 (1929).

DEFENDERS OF THE M'NAGHTEN RULES AGREE THAT INDIVIDUALS WHO ACT FROM AN IRRESISTIBLE IMPULSE WHICH IS A PRODUCT OF MENTAL DISEASE OUGHT TO BE EXCULPATED, BUT THEY BELIEVE THAT SUCH INDIVIDUALS ARE IN FACT ENTITLED TO INTERPOSE THE DEFENSE OF INSANITY UNDER THOSE RULES. THEY MAKE THE EMPIRICAL CLAIM THAT ANY INDIVIDUAL WHOSE ABILITY TO ENGAGE IN A VOLUNTARY ACTION IS REMOVED BY MENTAL DISEASE MUST ALSO SUFFER FROM A DEFECT OF REASON SUFFICIENT TO EXCULPATE UNDER THE M'NAGHTEN RULES, I.E., IT IS NEVER THE CASE THAT AN INDIVIDUAL WHO HAS THE CAPACITY TO UNDERSTAND THE NATURE OF HIS ACTION AND TO KNOW THAT IT IS WRONG IS SO AFFECTED BY MENTAL DISEASE THAT HIS CONDUCT IS NO LONGER VOLUNTARY. THE HUMAN PERSONALITY IS SEEN AS AN INTEGRATED ENTITY SUCH THAT NO PART MAY BE SO IMPAIRED IN ITS FUNCTION AS TO SATISFY THE RULE STATED IN SMITH V. U. S. WITHOUT THE COGNITIVE FACULTIES ALSO BEING SO IMPAIRED AS TO SATISFY THE M'NAGHTEN RULES.

FOR DIDACTIC PURPOSES THE PERSONALITY MUST BE DESCRIBED PIECE-MEAL, BUT WE SHOULD NOT PICTURE IT AS A COMPARTMENTED STRUCTURE. IT IS ACTUALLY A FUNCTIONING UNIT WITH A CONSTANT FRICTIONLESS INTERCHANGE BETWEEN ITS COMPONENT PARTS. IT IS AS IF EACH COMPONENT WAS A MIRROR WHICH BY ITS REFLECTION ACTIVATES THE OTHER PARTS. AS LONG AS EACH MIRROR REFLECTS ITS PROPER DEGREE OF LIGHT IN THE RIGHT DIRECTION AND WITH PROPER INTENSITY THERE IS A NORMAL INTERCHANGE. IF SOMETHING HAPPENS TO ONE OR MORE OF THE MIRRORS, IT WILL DISTURB THE WHOLE MECHANISM. SO IT IS WITH THE COMPONENT PARTS OF THE MIND.¹

THIS VIEW OF THE MIND, WITH ITS IMPLICATIONS CONCERNING THE VALIDITY OF THE M'NAGHTEN TEST, IS BY NO MEANS UNIVERSALLY ACCEPTED. FINGARETTE, FOR EXAMPLE, WRITES THAT

IT IS TRUE THAT THIS PRINCIPLE OF THE "INTEGRATED PERSONALITY" OR "UNITY OF THE MIND" IS INDEED MENTIONED TIME AND TIME AGAIN.

¹ JOHN R. CAVANAGH, "PROBLEMS OF A PSYCHIATRIST IN OPERATING UNDER THE M'NAGHTEN, DURHAM, AND MODEL PENAL CODE RULES," MARQUETTE LAW REVIEW, XLV (1962), P. 481.

IT IS USUALLY MENTIONED AS BEING A BASIC SCIENTIFIC TRUTH OF MODERN PSYCHIATRY. HOWEVER, THE CITATION OF EVIDENCE FOR IT, AS DISTINGUISHED FROM MERE REPETITION OF THE CLAIM, IS NEGLIGIBLE. IT IS PLAIN TO ANYONE WHO EXAMINES THE LITERATURE WITH RESPECT TO EXPERIMENTAL, STATISTICAL, OR OTHER SPECIFIC EMPIRICAL SUPPORTING DATA THAT THERE EXISTS NOTHING RESEMBLING A WIDELY ACCEPTED EMPIRICAL PROOF OF ANY SUCH BASIC THESIS.¹

OF COURSE, IT IS NOT WITHIN THE SCOPE OF THIS PAPER TO EVALUATE THE MERITS OF THE VARIOUS ARGUMENTS WHICH HAVE BEEN PRESENTED ON THIS ISSUE; LET US SIMPLY NOTE THAT DEFENDERS OF THE M'NAGHTEN TEST AND DEFENDERS OF THE IRRESISTIBLE IMPULSE TEST AGREE IN PRINCIPLE ON THE CLASS OF INDIVIDUALS WHICH THE PENAL LAW OUGHT TO EXCULPATE FROM LIABILITY.

IN CERTAIN JURISDICTIONS² THE CLASS OF THOSE EXCLUDED FROM PENAL SANCTIONS HAS BEEN EXTENDED IN TWO WAYS, BOTH OF WHICH ARE SUGGESTED BY THE MODEL PENAL CODE FORMULATION OF THE INSANITY DEFENSE:

A PERSON IS NOT RESPONSIBLE FOR CRIMINAL CONDUCT IF AT THE TIME OF SUCH CONDUCT AS A RESULT OF MENTAL DISEASE OR DEFECT HE LACKS SUBSTANTIAL CAPACITY EITHER TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW.³

THIS FORMULATION DOES NOT MENTION AN "IRRESISTIBLE IMPULSE." THAT PHRASE WAS EXCLUDED IN RECOGNITION OF THE VALIDITY OF THE FOLLOWING SORT OF CRITICISM:

. . . THE TERM "IRRESISTIBLE IMPULSE," HOWEVER, CARRIES THE MISLEADING IMPLICATION THAT "DISEASED MENTAL CONDITION(S)" PRODUCE ONLY SUDDEN, MOMENTARY OR SPONTANEOUS INCLINATIONS TO COMMIT UNLAWFUL ACTS. . . . WE FIND THAT THE "IRRESISTIBLE IMPULSE" TEST IS ALSO INADEQUATE IN THAT IT GIVES NO RECOGNITION TO MENTAL ILLNESS CHARACTERIZED BY BROODING AND REFLECTION AND SO RELEGATES

¹CRIMINAL INSANITY, P. 218.

²E.G., SEE VERMONT STAT. ANN. SEC. 13-4801 (1959).

³MODEL PENAL CODE (PHILADELPHIA: THE AMERICAN LAW INSTITUTE, 1956), TENTATIVE DRAFT NO. 4, ART. 2, SEC. 4.01, P. 27.

ACTS CAUSED BY SUCH ILLNESS TO THE APPLICATION OF THE INADEQUATE RIGHT-WRONG TEST.¹

THE MODEL PENAL CODE AVOIDS SUCH CHARGES BY REQUIRING THAT THE CAPACITY TO FUNCTION VOLUNTARILY BE IMPAIRED, AND DOES NOT LIMIT SUCH IMPAIRMENT TO CASES OF "IRRESISTIBLE IMPULSES."

NOTE, TOO, THAT THE MODEL PENAL CODE DOES NOT REQUIRE THAT THE INDIVIDUALS CAPACITY TO FUNCTION VOLUNTARILY OR TO REALIZE THE CRIMINALITY OF HIS ACT BE COMPLETELY IMPAIRED BUT, RATHER, ONLY "SUBSTANTIALLY" SO. THE FOLLOWING RATIONALE IS OFFERED FOR THIS EMENDATION:²

IN THE VAST MAJORITY OF CASES WHICH SOCIETY RECOGNIZES AS CONSTITUTING MENTAL ILLNESS OF A DEGREE SUFFICIENT TO EXCULPATE FROM MORAL BLAME, THE INDIVIDUAL INVOLVED IS TO SOME DEGREE CAPABLE OF UNDERSTANDING THE NATURE OF HIS CONDUCT AND OF CONTROLLING IT. FOR EXAMPLE, WITHIN A MENTAL INSTITUTION EVEN EXTREMELY ILL INDIVIDUALS ARE GIVEN SITUATIONS OF CHOICE AND, UNDER THE WATCHFUL EYE OF AN ATTENDANT OR DOCTOR, THEY ARE ABLE TO CONFORM THEIR CHOICES TO RULES WHICH THEY HAVE BEEN MADE TO UNDERSTAND. HOWEVER, AN INDIVIDUALS ABILITY TO BEHAVE IN THIS WAY IN SUCH CIRCUMSTANCES DOES NOT DEMONSTRATE THAT HE HAS THE ABILITY TO DO SO IN LESS STRUCTURED SETTINGS, AND IT IS JUST THIS SORT OF CAPACITY WHICH IS REQUIRED BY THE CONDITIONS FOR MORAL BLAME PREVIOUSLY FORMULATED.

WE MAY CONCLUDE THAT IF, AS CRITICS SUGGEST, NEITHER THE M'NAGHTEN NOR IRRESISTIBLE IMPULSE TESTS ARE SUFFICIENTLY "ELASTIC" TO EXCLUDE FROM LIABILITY THOSE INDIVIDUALS WHOSE MENTAL DISEASE IS EITHER CHARACTERIZED BY "BROODING AND REFLECTION" OR RESULTS IN "SUBSTANTIAL" BUT

¹DURHAM V. U. S., 214 F.2d 862, 45 A.L.R.2d 1430 (1954).

²SEE MODEL PENAL CODE, TENTATIVE DRAFT No. 4, COMMENTS TO ART. 4, SEC. 4.01, PP. 156-60.

NOT "TOTAL" IMPAIRMENT OF COGNITIVE FACULTIES OR CAPACITY FOR SELF-CONTROL, THEN THE PREVAILING LEGAL EXCUSE OF INSANITY MAY IN SUCH CASES PUNISH MORALLY FAULTLESS INDIVIDUALS. WITH THESE EXCEPTIONS, HOWEVER, INDIVIDUALS RENDERED MORALLY FAULTLESS BY REASON OF INSANITY WILL BE LEGALLY EXCUSED AS WELL.

IGNORANCE OR MISTAKE OF FACT

AN INDIVIDUAL WHO BRINGS ABOUT A MORALLY PROSCRIBED STATE OF AFFAIRS BECAUSE HE IS IGNORANT OF CERTAIN FACTS OR BECAUSE HE BELIEVES THAT A CERTAIN SITUATION OBTAINS WHEN IN FACT IT DOES NOT MAY JUSTIFIABLY ESCAPE THE IMPUTATION OF MORAL FAULT PROVIDED THAT 1) HE HAS TAKEN REASONABLE CARE TO ASCERTAIN THOSE FACTS RELEVANT TO HIS CONDUCT, AND 2) IF THE FACTS WERE AS HE BELIEVES THEM TO BE, NEITHER THE INTENDED, FORESEEN NOR FORESEEABLE CONSEQUENCES OR ASPECTS OF HIS ACTION WOULD VIOLATE A MORAL RULE.

SUCH A PERSON NEITHER INTENDS, FORESEES NOR COULD HAVE FORESEEN THOSE CONSEQUENCES OR ASPECTS OF HIS ACTION WHICH VIOLATE A MORAL RULE, AS REQUIRED BY THE CONDITIONS FOR MORAL FAULT. ALSO, HIS FAILURE TO BEHAVE IN SUCH A WAY AS TO PREVENT THE RULE VIOLATION IS NOT THE RESULT OF A FAILURE TO SATISFY ANY OBLIGATION, AS IT WOULD BE IF HE HAD FAILED TO EXERCISE DUE CARE IN OBTAINING THE PROPER FACTS. IN SUCH A CASE, ALTHOUGH HE WOULD BE JUST AS IGNORANT OR MISTAKEN OF THE FACTS, HIS IGNORANCE OR MISTAKE ITSELF WOULD BE CULPABLE.

WITHIN THE CRIMINAL LAW IGNORANTIA FACTI EXCUSAT.¹ THIS DOCTRINE APPLIES AS WELL TO MISTAKE OF FACT. WHILE LEGAL THEORISTS RECOGNIZE THE DISTINCTION IN PRINCIPLE BETWEEN IGNORANCE AND MISTAKE,

¹"FACTUAL IGNORANCE EXCUSES."

IN PRACTICE THE TERMS ARE USED INTERCHANGEABLY. OF COURSE, NOT ALL IGNORANCE OR MISTAKE EXCULPATES FROM PENAL LIABILITY; IT SERVES TO DO SO ONLY IF SUCH IGNORANCE OR MISTAKE NEGATIVES SOME ELEMENT OF BELIEF, PURPOSE, KNOWLEDGE OR FORESIGHT REQUIRED BY THE LAW COVERING THE PARTICULAR OFFENSE.

THUS, GLANVILLE WILLIAMS WRITES THAT "IT IS IMPOSSIBLE TO ASSERT THAT A CRIME REQUIRING INTENTION OR RECKLESSNESS CAN BE COMMITTED ALTHOUGH THE ACCUSED LABORED UNDER A MISTAKE THAT NEGATIVED THE REQUISITE INTENTION. SUCH AN ASSERTION CARRIES ITS OWN REFUTATION."¹

UNFORTUNATELY, NOT ALL JURISTS HAVE BEEN AWARE OF THIS "SELF-REFUTATION." DIXON, J., IN THOMAS V. THE KING, WROTE:

IF AN ACTOR HONESTLY AND REASONABLY, ALTHOUGH MISTAKENLY, BELIEVED THE FACTS TO BE OTHER THAN THEY WERE, AND IF HIS CONDUCT WOULD NOT HAVE BEEN CRIMINAL HAD THE FACTS BEEN AS HE BELIEVED THEM TO BE, THEN HIS MISTAKE IS A DEFENSE IF HE IS CHARGED WITH A CRIME WHICH REQUIRES MENS REA, BUT NOT OTHERWISE.² (EMPHASIS ADDED.)

ON THIS INTERPRETATION OF THE EXCUSE AN INDIVIDUAL WHOSE MISTAKE WAS NOT REASONABLE, I.E., WAS SIMPLY NEGLIGENT, WILL STILL BE HELD LIABLE FOR AN OFFENSE REQUIRING INTENT, RECKLESSNESS OR CRIMINAL NEGLIGENCE, ALTHOUGH HIS PROSCRIBED ACTION WAS THE RESULT OF ONLY CIVIL NEGLIGENCE.

THE COURTS HAVE GENERALLY ABANDONED DIXON'S VIEW, HOWEVER, AND ADOPTED A POSITION ANALOGOUS TO WILLIAMS'. THUS BARRY, J. IN REGINA V. BONNOR:

THERE CAN, IN PRINCIPLE, BE NO JUSTIFICATION FOR REQUIRING THAT MISTAKE SHOULD BE REASONABLE IF THE CRIME, OR THE ELEMENT OF THE

¹GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART (LONDON: STEVENS AND SONS LTD., 1953), P. 137.

²59 C.L.R. 279, (HIGH COURT OF AUSTRALIA, 1937).

CRIME UNDER INQUIRY, REQUIRES KNOWLEDGE OR PURPOSEFUL ACTION FOR ITS COMMISSION. THIS WAS RECOGNIZED BY THE FULL COURT OF NEW SOUTH WALES, IN R. V. NUNDAH (1916) 16 S.R.N.S.W. 462, WHERE IT WAS HELD THAT WHERE A PRISONER CHARGED WITH LARCENY SETS UP THAT HE TOOK THE ARTICLE UNDER A CLAIM OF RIGHT, THE QUESTION FOR THE JURY IS WHETHER HE HONESTLY BELIEVED THE ARTICLE TO BE HIS, AND NOT WHETHER HE HAD REASONABLE GROUNDS FOR SO BELIEVING.¹

IGNORANCE OR MISTAKE OF FACT, WHEN NOT CULPABLE, WILL EXCUSE.

IGNORANCE OR MISTAKE OF FACT WHEN CULPABLE WILL ALSO EXCUSE SO LONG AS THE DEGREE OF CULPABILITY EVINCED BY THE OFFENDER'S MISTAKE OR IGNORANCE IS LESS THAN THE DEGREE OF CULPABILITY REQUIRED BY THE SUBSTANTIVE OFFENSE WITH WHICH HE IS CHARGED.

THESE LEGAL EXCUSES WILL, THEN, EXCULPATE ALL THOSE WHO SATISFY THE COMPARABLE MORAL EXCUSING CONDITIONS.

NECESSITY

THE TERM "NECESSITY" MAY BE APPLIED TO TWO DIFFERENT SORTS OF MORAL AND LEGAL EXCUSES. THE FIRST OF THESE IS PHYSICAL NECESSITY, I.E., WHERE A PROSCRIBED STATE OF AFFAIRS IS BROUGHT ABOUT THROUGH PHYSICAL CAUSATION OF EITHER NATURAL OR PERSONAL ORIGIN, IN WHICH THE INDIVIDUAL INVOLVED IS POWERLESS TO PREVENT THE PROSCRIBED STATE OF AFFAIRS. WHERE PHYSICAL FORCES SUFFICIENTLY DETERMINE A COURSE OF ACTION SUCH THAT NO EFFORT ON THE PART OF AN INDIVIDUAL INVOLVED CAN ALTER THAT COURSE SUFFICIENTLY TO PREVENT THAT PROSCRIBED STATE OF AFFAIRS, AND WHERE THAT INDIVIDUAL'S PRESENCE IN SUCH A STATE IS NOT ITSELF CULPABLE, THE INDIVIDUAL IS JUSTIFIABLY EXCUSED BOTH MORALLY AND LEGALLY. THE REASONING IS THE SAME IN BOTH REALMS: MORAL AND LEGAL FAULT REQUIRE A VOLUNTARY ACTION AS THE CAUSE OF THE PROSCRIBED STATE, AND A PERSON SATISFYING THE ABOVE CONDITIONS HAS ENGAGED IN NO

¹ [1957] VICT. L.R. 227, (SUP. COURT OF VICTORIA, 1957).

SUCH VOLUNTARY ACTION.

AS WITHIN THE LAW OF MISTAKE AND IGNORANCE OF FACT, IF THE INDIVIDUAL HAS PLACED HIMSELF IN THE POSITION OF NECESSITY WITH THE SAME OR GREATER DEGREE OF CULPABILITY REQUIRED FOR COMMISSION OF THE OFFENSE WHEN DONE VOLUNTARILY, HE IS STILL PENALLY LIABLE.

THIS FORM OF THE NECESSITY EXCUSE CLEARLY EXCULPATES ALL THOSE MORALLY FAULTLESS.

THE SECOND MORALLY EXCUSING CONDITION WHICH BEARS THE TITLE OF "NECESSITY", AND WHICH I SHALL CALL "TELEOLOGICAL NECESSITY", IS SATISFIED WHEN AN INDIVIDUAL WHO COMMITS AN ACT WHICH VIOLATES A MORAL RULE DOES SO 1) INTENDING BY HIS ACTION TO PREVENT CONSEQUENCES, THREATENED BY PHYSICAL FORCES, WHICH WOULD HAVE A HIGHER DEGREE OF DISVALUE, AND 2) HE EXERCISES DUE CARE IN EVALUATING THIS ASPECT OF THE SITUATION, AND 3) HE HAS NOT PLACED HIMSELF IN THIS SITUATION OF CHOICE AS A RESULT OF ANY OTHER CULPABLE CONDUCT.

IN ORDER TO UNDERSTAND THE RATIONALE FOR ADMITTING THIS EXCUSE IT IS NECESSARY TO UNDERSTAND THE CONCEPT OF A "PRIMA FACIE DUTY." THOSE ACTIONS WHICH ARE THE SUBJECT OF MORAL RULES ARE ALSO THE SUBJECT OF PRIMA FACIE DUTIES, A TERM PROPOSED BY W. D. ROSS.

I SUGGEST 'PRIMA FACIE DUTY' OR 'CONDITIONAL DUTY' AS A BRIEF WAY OF REFERRING TO THE CHARACTERISTIC (QUITE DISTINCT FROM THAT OF BEING A DUTY PROPER) WHICH AN ACT HAS, IN VIRTUE OF BEING OF A CERTAIN KIND (E.G. THE KEEPING OF A PROMISE), OF BEING AN ACT WHICH WOULD BE A DUTY PROPER IF IT WERE NOT AT THE SAME TIME OF ANOTHER KIND WHICH IS MORALLY SIGNIFICANT. WHETHER AN ACT IS A DUTY PROPER OR ACTUAL DUTY DEPENDS ON ALL THE MORALLY SIGNIFICANT KINDS IT IS AN INSTANCE OF.¹

WHEN I AM IN A SITUATION, AS PERHAPS I ALWAYS AM, IN WHICH MORE THAN ONE OF THESE PRIMA FACIE DUTIES IS INCUMBENT ON ME, WHAT I

¹W. D. ROSS, THE RIGHT AND THE GOOD (OXFORD: THE CLARENDON PRESS, 1930), PP. 19-20.

HAVE TO DO IS TO STUDY THE SITUATION AS FULLY AS I CAN UNTIL I FORM THE CONSIDERED OPINION (IT IS NEVER MORE) THAT IN THE CIRCUMSTANCES ONE OF THEM IS MORE INCUMBENT THAN ANY OTHER; THEN I AM BOUND TO THINK THAT TO DO THIS PRIMA FACIE DUTY IS MY DUTY SANS PHRASE IN THE SITUATION.¹

EVERY TIME, THEN, THAT AN ACTION IS OF A SORT PROHIBITED BY A MORAL RULE I HAVE A REASON AGAINST DOING IT. EVERY TIME THAT AN ACTION IS OF A SORT COMMENDED BY A MORAL RULE I HAVE A REASON FOR DOING IT. FOR EXAMPLE, IF I AM DRIVING ON A HIGHWAY IN ORDER TO KEEP AN APPOINTMENT AND I SEE AN ACCIDENT OCCUR, STOPPING MY VEHICLE IN ORDER TO GIVE AID IS AN ACTION OF AT LEAST TWO MORALLY SIGNIFICANT TYPES: IT IS THE BREAKING OF A PROMISE (MY APPOINTMENT), AND AN ACT OF BENEFICENCE (HELPING THE VICTIMS OF THE ACCIDENT). IN THE CIRCUMSTANCES I MUST WEIGH THE VARIOUS DUTIES AND DETERMINE WHICH IS THE STRONGEST; THIS WILL TELL ME WHICH ACTION IT IS MY ACTUAL DUTY TO PERFORM. WHEN I DO MY ACTUAL DUTY, THEN, I MAY HAVE TO VIOLATE A PRIMA FACIE DUTY OR MORAL RULE, BUT I CANNOT BE HELD MORALLY AT FAULT FOR DOING SO SINCE MY BEHAVIOUR IS IN ACCORDANCE WITH A STRONGER PRIMA FACIE DUTY, AND IT IS NOT IN MY POWER TO SATISFY BOTH RULES.

MORAL RULES ARE THUS UNDERSTOOD TO PRESCRIBE CONDUCT TO US OTHER THINGS BEING EQUAL. THEY MAY BE VIOLATED, HOWEVER, WHEN OTHER THINGS ARE NOT EQUAL. IN SITUATIONS OF NECESSITY, AS DESCRIBED ABOVE, OTHER THINGS ARE NOT EQUAL, AND THEY ARE SO UNEQUAL THAT THE CIRCUMSTANCES JUSTIFY OUR BREAKING CERTAIN RULES. SPECIFICALLY, ONE OF OUR PRIMA FACIE DUTIES IS TO MAXIMIZE THE GOOD IN THE WORLD. ANOTHER PRIMA FACIE DUTY IS TO REFRAIN FROM DOING EVIL. GENERALLY, WE RECOGNIZE THAT THE LATTER IS WEIGHTIER THAN THE FORMER. HOWEVER, WHERE THE

¹IBID., P. 19.

AMOUNT OF GOOD TO BE BROUGHT ABOUT, OR THE AMOUNT OF EVIL TO BE PREVENTED, BY SOME ACTION WHICH ITSELF INVOLVES A QUANTUM OF DISVALUE IS SIGNIFICANTLY HIGHER THAN THAT DISVALUE WE RECOGNIZE THAT IT IS PERMISSIBLE TO ENGAGE IN THAT ACTION. THIS IS THE RATIONALE OF THE EXCUSE OF NECESSITY.

NOTE THAT IT IS NOT NECESSARY THAT THE ACTION ACTUALLY HAVE THE INTENDED EFFECT OF PRESERVING A GREATER VALUE, BUT SIMPLY THAT THE AGENT HAVE EXERCISED ALL DUE CARE IN JUDGING WHETHER IT WOULD.

FINALLY, IT IS NECESSARY FOR THE ACT TO HAVE BEEN COMMITTED WITH THE PURPOSE OF PREVENTING GREATER DISVALUE, AND NOT SIMPLY THAT THE ACT HAVE SUCH AN EFFECT. FOR EXAMPLE, IF I TELL A LIE TO A PERSON FOR THE PURPOSE OF HAVING HIM LEND ME MONEY, AND AS A DIRECT RESULT OF ACTING ON THIS MISTAKEN INFORMATION HE IS FORTUITOUSLY SAVED FROM BODILY HARM, I CLEARLY REMAIN AT FAULT.

THE LEGAL FORM OF THIS EXCUSE SUGGESTED BY THE MODEL PENAL CODE IS AS FOLLOWS:

(1) CONDUCT WHICH THE ACTOR BELIEVES TO BE NECESSARY TO AVOID A HARM OR EVIL TO HIMSELF OR TO ANOTHER IS JUSTIFIABLE, PROVIDED THAT:

(A) THE HARM OR EVIL SOUGHT TO BE AVOIDED BY SUCH CONDUCT IS GREATER THAN THAT SOUGHT TO BE PREVENTED BY THE LAW DEFINING THE OFFENSE CHARGED; AND

(B) NEITHER THE CODE NOR OTHER LAW DEFINING THE OFFENSE PROVIDES EXCEPTIONS OR DEFENSES DEALING WITH THE SPECIFIC SITUATION INVOLVED; AND

(C) A LEGISLATIVE PURPOSE TO EXCLUDE THE JUSTIFICATION CLAIMED DOES NOT OTHERWISE PLAINLY APPEAR.

(2) WHEN THE ACTOR WAS RECKLESS OR NEGLIGENT IN BRINGING ABOUT THE SITUATION REQUIRING A CHOICE OF HARMS OR EVILS OR IN APPRAISING THE NECESSITY FOR HIS CONDUCT, THE JUSTIFICATION AFFORDED BY THIS SECTION IS UNAVAILABLE IN A PROSECUTION FOR ANY OFFENSE FOR WHICH RECKLESSNESS OR NEGLIGENCE, AS THE CASE MAY BE, SUFFICES TO ESTABLISH CULPABILITY.¹

¹PROPOSED FINAL DRAFT No. 1 (1961), ART. 3, SEC. 3.02, PP. 45-46.

THAT THIS EXCUSE IS LEGALLY JUSTIFIABLE FOLLOWS FROM THE VERY PURPOSE OF INSTITUTING A SYSTEM OF LAW. IF THAT PURPOSE IS TO PUNISH THE MORALLY BLAMEWORTHY THEN THE LAW CAN GENERALLY ADMIT THE EXCUSE WITHOUT DEFEATING ITS PURPOSE SINCE, AS WE HAVE SEEN, THOSE WHO VIOLATE A LAW IN A STATE OF NECESSITY ARE MORALLY FAULTLESS. THE LAW CAN ALSO GENERALLY CONSISTENTLY RECOGNIZE THE EXCUSE IF ITS PURPOSE IS TO MAXIMIZE SOCIAL WELL-BEING; INDIVIDUALS WHO SATISFY THE CONDITIONS OF THE EXCUSE HAVE ACTED AS ANY REASONABLE PERSON WOULD IN ATTEMPTING TO FURTHER THAT GOAL. I HAVE QUALIFIED THESE CONCLUSIONS BY USE OF THE TERM "GENERALLY" BECAUSE I HOPE TO SHOW IN THIS PAPER THAT THE PURPOSES OF THE LAW MAY SOMETIMES BE FURTHERED BY ELIMINATING THIS AND OTHER EXCUSES.¹ IT IS THIS SAME CONSIDERATION WHICH, I BELIEVE, LED THE FRAMERS OF THE MODEL PENAL CODE TO REALIZE THAT A LEGISLATIVE BODY MIGHT WISH TO EXCLUDE THIS JUSTIFICATION FOR CERTAIN OFFENSES (I.E., CONDITION 1c ABOVE).

SUBJECT TO THIS QUALIFICATION, IT SEEMS THAT THOSE INDIVIDUALS WHO SATISFY THE MORAL EXCUSE OF NECESSITY WILL ALSO ESCAPE PENAL LIABILITY.

COERCION

COERCION IS A MORAL EXCUSE WHICH DIFFERS ONLY SLIGHTLY FROM THAT OF TELEOLOGICAL NECESSITY. AN INDIVIDUAL WHO COMMITS AN ACT WHICH VIOLATES A MORAL RULE MAY JUSTIFIABLY CLAIM THIS EXCUSE WHEN 1) HE ACTED INTENDING BY HIS CONDUCT TO PREVENT CONSEQUENCES OF A HIGHER DISVALUE THREATENED BY AN AGENT AGAINST HIM OR ANOTHER, AND 2) HE EXERCISED DUE CARE IN EVALUATING THIS ASPECT OF THE SITUATION, AND 3) HE DID NOT PLACE

¹ INFRA, CHAP. 4.

HIMSELF IN THIS SITUATION OF CHOICE AS A RESULT OF ANY OTHER CULPABLE CONDUCT.

THE MAIN DISTINCTION BETWEEN THIS AND NECESSITY LIES IN THE FACT THAT IN THIS CASE THE HARM TO BE PREVENTED IS THREATENED BY A COERCING INDIVIDUAL, WHILE IN NECESSITY THE HARM IS "THREATENED" BY FORCES OF NATURE, I.E., NON-PERSONAL FORCES. THE RATIONALE FOR BOTH EXCUSES IS PRECISELY THE SAME AND NEED NOT BE REPEATED.

WE SHOULD NOTE, THOUGH, THAT SINCE THE THREAT WITH WHICH WE ARE HERE CONCERNED IS MADE BY A HUMAN BEING THE AGENT MUST OFTEN WEIGH MANY MORE FACTORS IN DETERMINING WHETHER A PRIMA FACIE MORAL RULE MAY JUSTIFIABLY BE VIOLATED UNDER THE CIRCUMSTANCES. FOR EXAMPLE, HE MUST WEIGH THE CERTAINTY WITH WHICH EVIL WILL OCCUR IF HE DOES NOT BREAK THAT RULE; THIS IS A MORE DIFFICULT COMPUTATION TO MAKE WITH PEOPLE THAN WITH PHYSICAL FORCES OF NATURE, WHOSE BEHAVIOUR MAY BE MORE CERTAINLY PREDICTED. SIMILARLY, THE AGENT MUST CONSIDER THE LIKELIHOOD OF AVOIDING THE EVIL CONSEQUENCES WITHOUT BREAKING A PRIMA FACIE MORAL RULE, E.G., BY ESCAPE. COMPUTATION HERE IS LIKEWISE MORE DIFFICULT THAN WITH NATURAL FORCES—ONE DEALS WITH MORE UNKNOWN FACTORS, CHIEFLY PSYCHOLOGICAL. IF, HOWEVER, ONE COULD EVALUATE THESE AND RELATED FACTORS WITH THE SAME DEGREE OF CERTAINTY WITH WHICH ONE CAN EVALUATE NON-HUMAN EMPIRICAL CONDITIONS, THE MORAL EXCUSE OF COERCION WOULD "REDUCE" TO A SPECIAL CASE OF THE EXCUSE OF NECESSITY.

SO FAR AS THE LEGAL EXCUSE OF COERCION IS CONCERNED, "IT HAS BEEN STATED GENERALLY THAT IN ORDER TO CONSTITUTE A DEFENSE TO A CRIMINAL CHARGE OTHER THAN TAKING THE LIFE OF AN INNOCENT PERSON, THE COERCION OR DURESS MUST BE PRESENT, IMMINENT, AND IMPENDING, AND OF SUCH A NATURE AS TO INDUCE A WELL-GROUNDED APPREHENSION OF

DEATH OR SERIOUS BODILY INJURY IF THE ACT IS NOT DONE."¹

IT SEEMS REASONABLE TO CONCLUDE THAT THE DEFENSE IS NOT EXTENDED TO MURDER AND, IN SOME JURISDICTIONS, TO RAPE AND ARSON². IN RECOGNITION OF THE DIFFICULTIES INHERENT IN WEIGHING THE NECESSITY OF AN ILLEGAL ACT TO PREVENT A THREATENED HARM. IN THESE CASES THE HARM PREVENTED CANNOT BE MUCH GREATER THAN THE HARM INFLICTED BY THE AGENT AND, WHEN THE UNCERTAINTY THAT THE FORMER WOULD HAVE OCCURRED IS CONSIDERED, THE ACTION IS JUDGED UNJUSTIFIABLE.

THE REQUIREMENTS THAT THE THREAT BE EITHER OF DEATH OR SERIOUS BODILY HARM AND THAT THE DANGER BE IMMINENT MAY BE SIMILARLY JUSTIFIED. WHERE THE INDIVIDUAL IS THREATENED MERELY WITH, E.G., LOSS OF JOB, THE HARM HE WILL INFLICT, IF IT IS CRIMINAL IN NATURE, MUST BE MORE SEVERE. ALSO, IF THE THREAT IS NOT IMMINENT, A HIGH DEGREE OF UNCERTAINTY IS INTRODUCED AS TO WHETHER IT WILL OCCUR AT ALL, E.G., THE INDIVIDUAL MAY ESCAPE THE THREATENED HARM. GIVEN SUCH UNCERTAINTY, ONE IS NOT JUSTIFIED IN INFLICTING A VIRTUALLY CERTAIN HARM ON ANOTHER.

OF COURSE, THE DEFENSE OF COERCION "IS UNAVAILABLE IF THE ACTOR RECKLESSLY PLACED HIMSELF IN A SITUATION IN WHICH IT WAS PROBABLE THAT HE WOULD BE SUBJECTED TO DURESS. THE DEFENSE IS ALSO UNAVAILABLE IF HE WAS NEGLIGENT IN PLACING HIMSELF IN SUCH A SITUATION, WHENEVER NEGLIGENCE SUFFICES TO ESTABLISH CULPABILITY FOR THE OFFENSE CHARGED."³

IN GENERAL, THEN, THE LEGAL EXCUSE OF COERCION WILL EXCULPATE THOSE WHO SATISFY THE CORRESPONDING MORAL EXCUSE. HOWEVER, IF WE

¹40 A.L.R.2d 910 (1955).

²E.g., SEE SEC. 20, CANADIAN PENAL CODE.

³MODEL PENAL CODE, PROPOSED FINAL DRAFT No. 1 (1961), ART. 2, SEC. 2.09, SUBSEC. (2), P. 40.

RECOGNIZE THAT THERE MAY ARISE CERTAIN SITUATIONS OF MORAL CHOICE IN WHICH ONE CAN JUSTIFIABLY CAUSE A DEATH OR COMMIT ARSON IN ORDER TO PREVENT VIRTUALLY CERTAIN THREATENED HARM OF EQUAL OR GREATER SEVERITY TO LARGE NUMBERS OF PEOPLE THEN WE MUST CONCLUDE THAT IN SUCH CIRCUMSTANCES A MORALLY FAULTLESS AGENT MIGHT BE SUBJECT TO PENAL SANCTIONS. BECAUSE SUCH CIRCUMSTANCES ARE EXTREMELY RARE, THOUGH, I WILL NOT INCLUDE A DISCUSSION OF THE PROBLEM IN THIS PAPER.

AUTOMATISM

AN INDIVIDUAL WHO BRINGS ABOUT A PROHIBITED STATE OF AFFAIRS IS EXCUSED, BOTH MORALLY AND LEGALLY, IF AT THE TIME OF THE VIOLATION THAT INDIVIDUAL WAS UNABLE TO CONSCIOUSLY CONTROL HIS MUSCULAR MOVEMENTS WHICH WERE RESPONSIBLE FOR THAT STATE OF AFFAIRS. ACCORDING TO THE MODEL PENAL CODE

(1) A PERSON IS NOT GUILTY OF AN OFFENSE UNLESS HIS LIABILITY IS BASED ON CONDUCT WHICH INCLUDES A VOLUNTARY ACT OR THE OMISSION TO PERFORM AN ACT OF WHICH HE IS PHYSICALLY CAPABLE.

(2) THE FOLLOWING ARE NOT VOLUNTARY ACTS WITHIN THE MEANING OF THIS SECTION:

- (A) A REFLEX OR CONVULSION;
- (B) A BODILY MOVEMENT DURING UNCONSCIOUSNESS OR SLEEP;
- (C) CONDUCT DURING HYPNOSIS OR RESULTING FROM HYPNOTIC SUGGESTION;
- (D) A BODILY MOVEMENT THAT OTHERWISE IS NOT A PRODUCT OF THE EFFORT OR DETERMINATION OF THE ACTOR, EITHER CONSCIOUS OR HABITUAL.

WHERE SUCH AN INCAPACITY IS NOT THE PRODUCT OF MENTAL DISEASE, AND THUS NOT COVERED BY THE EXCUSE OF INSANITY, IT EXCULPATES UNDER THE EXCUSE OF AUTOMATISM. THE RATIONALE FOR BOTH THE LEGAL AND MORAL RECOGNITION OF THIS EXCUSE IS THE SAME: BOTH SORTS OF LIABILITY RE-

¹ IBID., SEC. 2.01, P. 24.

QUIRE A VOLUNTARY ACTION OR OMISSION AS THE CAUSE OF THE PROSCRIBED STATE OF AFFAIRS. AN INDIVIDUAL WHO SATISFIES THE CONDITIONS FOR THIS EXCUSE HAS ENGAGED IN NO SUCH VOLUNTARY ACT OR OMISSION AND THUS FAILS TO SATISFY A NECESSARY REQUIREMENT OF MORAL FAULT AND PENAL LIABILITY.

THE SORTS OF CONDITIONS WHICH MAY CAUSE A STATE OF AUTOMATISM ARE, E.G., EPILEPSY, HYPOGLYCAEMIA, SOMNAMBULISM, A SHARP BLOW ON THE HEAD, OR A REFLEX ACTION.

IN HILL V. BAXTER, ONE OF THE RELATIVELY FEW CASES IN WHICH A DEFENSE OF AUTOMATISM WAS CLAIMED, PEARSON, J. OFFERED THE FOLLOWING HYPOTHETICAL INSTANCES WHICH WOULD CONSTITUTE A DEFENSE OF AUTOMATISM TO A CHARGE OF DANGEROUS DRIVING:

(1) THE MAN IN THE DRIVING SEAT IS HAVING AN EPILEPTIC FIT, SO THAT HE IS UNCONSCIOUS AND THERE ARE MERELY SPASMODIC MOVEMENTS OF HIS ARMS AND LEGS. (2) BY THE ONSET OF SOME DISEASE HE HAS BEEN REDUCED TO A STATE OF COMA, AND IS COMPLETELY UNCONSCIOUS. (3) HE IS STUNNED BY A BLOW ON THE HEAD FROM A STONE WHICH PASSING TRAFFIC HAS THROWN UP FROM THE ROADWAY. (4) HE IS ATTACKED BY A SWARM OF BEES SO THAT HE IS FOR THE TIME BEING DISABLED AND PREVENTED FROM EXERCISING ANY DIRECTIONAL CONTROL OVER THE VEHICLE AND ANY MOVEMENTS OF HIS ARMS AND LEGS ARE SOLELY CAUSED BY THE ACTION OF THE BEES.¹

IN ORDER TO JUSTIFIABLY INVOKE THIS EXCUSE IN LAW OR ETHICS AN INDIVIDUAL MUST NOT HAVE GOTTEN INTO THE STATE OF AUTOMATISM THROUGH HIS OWN RECKLESSNESS OR NEGLIGENCE. IF THAT WERE THE CASE, THE VIOLATION OF LAW WOULD BE THE RESULT OF HIS OWN CULPABLE BEHAVIOUR AND HE MIGHT INDEED BE LEGALLY LIABLE, AS WELL AS MORALLY BLAMEWORTHY.

THE LAW HERE EXCLUDES FROM LIABILITY ALL THOSE WHO WOULD ALSO BE JUDGED MORALLY BLAMELESS.

INFANCY

CHILDREN'S CONDUCT WHICH LEADS TO EVIL RESULTS IS OFTEN FAULT-

¹ 42 CRIM. APP. R. 51, [1958] 1 ALL E.R. 193.

LESS. THE GROUND FOR ITS BLAMELESSNESS IS NOT, HOWEVER, THAT THE INDIVIDUAL WHO CAUSED THE BAD RESULT IS BELOW A CERTAIN AGE. WITHIN THE MORAL REALM LACK OF AGE IS NOT A SUFFICIENT CONDITION FOR BLAMELESSNESS. RATHER, INDIVIDUALS BELOW A CERTAIN AGE OFTEN FAIL TO SATISFY PARTICULAR NECESSARY CONDITIONS FOR FAULT, E.G., THEY HAVE NOT YET DEVELOPED SUFFICIENT MENTAL OR PHYSICAL CAPACITIES TO LEARN THE RELEVANT MORAL RULE, OR THEY ARE INCAPABLE OF FORESEEING THE CONSEQUENCES OF THEIR CONDUCT, OR THEY MAY LACK THE PHYSICAL ABILITY TO CONTROL THEIR CONDUCT. IF, HOWEVER, AN INDIVIDUAL BELOW ANY SPECIFIED AGE CAN BE SHOWN TO HAVE THE REQUISITE KNOWLEDGE, CAPACITIES OR CONTROL TO SATISFY THE CONDITIONS SPECIFIED FOR MORAL FAULT, HE WILL BE HELD BLAMEWORTHY FOR HIS BEHAVIOUR.

WITHIN THE ANGLO-AMERICAN CRIMINAL LAW, HOWEVER, NO INDIVIDUAL BELOW A SPECIFIED AGE IS LIABLE TO PENAL SANCTIONS; BY COMMON LAW THAT AGE IS 7. THE RATIONALE IS THE SAME HERE AS IN THE MORAL EXCUSE, BUT AN ADDED ASSUMPTION IS MADE. THE COURTS HOLD THAT AN INDIVIDUAL WHO FAILS TO HAVE THE MENTAL CAPACITY TO FORM A CRIMINAL INTENT MUST BE EXCULPATED, FOR HE MUST FAIL TO SATISFY THE CONDITION OF MENS REA; THE COURTS THEN GO ON TO MAKE THE IRREBUTTABLE PRESUMPTION THAT ALL INDIVIDUALS BELOW THE SPECIFIED AGE FAIL TO HAVE THAT CAPACITY. THUS JOHN AUSTIN WRITES:

. . . AN INFANT OR A PERSON INSANE IS EXEMPTED FROM LIABILITY, NOT BECAUSE HE IS AN INFANT OR BECAUSE HE IS INSANE, BUT BECAUSE IT IS INFERRED FROM HIS INFANCY OR INSANITY, THAT THE ALLEGED WRONG WAS NOT THE CONSEQUENCE OF UNLAWFUL INTENTION OR INADVERTENCE. IT IS INFERRED FROM HIS INFANCY OR INSANITY, THAT, AT THE TIME OF THE ALLEGED WRONG, HE WAS IGNORANT OF THE LAW; OR (WHAT IN EFFECT IS THE SAME THING) WAS UNABLE TO REMEMBER THE LAW. OR (ASSUMING THAT HE HAD KNOWN, AND WAS UNABLE TO REMEMBER THE LAW) IT IS INFERRED THAT HE WAS UNABLE TO APPLY THE LAW, AND TO GOVERN HIS CONDUCT ACCORDINGLY: THAT HE DID NOT AND COULD NOT FORESEE THE CONSEQUENCES OF HIS CONDUCT; AND, THEREFORE, DID NOT

AND COULD NOT FORESEE, THAT HIS CONDUCT TENDED TO THE CONSEQUENCES WHICH IT WAS THE END OF THE LAW TO AVERT.¹

WHETHER OR NOT THIS ASSUMPTION IS JUSTIFIABLE, IT IS CLEAR THAT ANY INDIVIDUAL BELOW A SPECIFIED AGE, WHOSE CONDUCT IS FAULTLESS, WILL ALSO ESCAPE PENAL LIABILITY.²

ACCIDENT

WHERE SOME RULE-VIOLATIVE ASPECT OF AN AGENT'S BEHAVIOUR OR ITS CONSEQUENCES COMES ABOUT BECAUSE THE RISK OF SUCH A HARM WAS UNFORESEENABLE TO A PERSON WITH THE AGENT'S PHYSICAL AND MENTAL CAPACITIES, THE AGENT IS MORALLY BLAMELESS AND IS EXCUSED ON THE GROUNDS THAT THE RULE WAS VIOLATED BY ACCIDENT.

THE TERM "ACCIDENT" IS HERE BEING USED IN A NARROWER SENSE THAN IN ORDINARY DISCOURSE, WHERE IT CONNOTES "AN EVENT WHICH TAKES PLACE WITHOUT ONE'S FORESIGHT OR EXPECTATION."³ THE FACT THAT AN EVENT WAS AN ACCIDENT IN THE LATTER SENSE OF THE TERM DOES NOT MEAN THAT THE AGENT WHO CAUSED THE EVENT WAS BLAMELESS. IT MAKES PERFECTLY GOOD SENSE IN

¹JOHN AUSTIN, LECTURES ON JURISPRUDENCE (3 VOLS.; NEW YORK: BURT FRANKLIN, 1970), II, PP. 179-80.

²CHILDREN ABOVE THE AGE SPECIFIED BY THE EXCUSE OF INFANCY, BUT BELOW AN AGE SPECIFIED BY STATUTE (USUALLY 14-16 YEARS OF AGE) ARE PRESUMED ALSO TO BE INCAPABLE OF MENS REA; HOWEVER, IN THE CASE OF SUCH YOUTHS, THIS PRESUMPTION IS REBUTTABLE. EVIDENCE MAY BE ADDUCED TO SHOW THAT A PARTICULAR OFFENDER DOES POSSESS CAPACITIES REQUISITE FOR COMMISSION OF CRIMES, AND AN INDIVIDUAL FOUND TO HAVE SUCH CAPACITIES MAY BE CONVICTED OF A CRIME. "AN INFANT UNDER SEVEN YEARS OF AGE CANNOT BE INDICTED AND PUNISHED FOR ANY OFFENSE, BECAUSE OF THE IRREBUTTABLE PRESUMPTION THAT HE IS DOLI INCAPAX. AFTER 14 YEARS OF AGE HE IS EQUALLY LIABLE TO BE PUNISHED FOR CRIME AS ONE OF FULL AGE. HIS INNOCENCE CANNOT BE PRESUMED. BETWEEN 7 AND 14 YEARS OF AGE AN INFANT IS PRESUMED TO BE INNOCENT AND INCAPABLE OF COMMITTING A CRIME, BUT THAT PRESUMPTION IN CERTAIN CASES MAY BE REBUTTED. . . IN SUCH CASES, IF THE DEFENDANT BE FOUND DOLI CAPAX, PUBLIC JUSTICE DEMANDS THAT THE MAJESTY OF THE LAW BE VINDICATED AND THE OFFENDER PUNISHED PUBLICLY." STATE V. YEARGAN 117 N.C. 706.

³WEBSTERS UNIVERSAL DICTIONARY (1936).

SUCH A SITUATION TO ASK: "OUGHT HE TO HAVE FORESEEN THAT EVENT WHICH HE IN FACT DID NOT FORESEE?" IF THE ANSWER IS AFFIRMATIVE THEN HE IS MORALLY BLAMEWORTHY. IF, ON THE OTHER HAND, THE AGENT SO LACKED SOME PHYSICAL OR MENTAL CAPACITY NECESSARY TO FORESEE THE RISK OF THE RULE VIOLATION, THEN HE IS NOT BLAMEWORTHY. WE CANNOT JUSTIFIABLY SAY THAT HE OUGHT TO HAVE FORESEEN THAT WHICH HE COULD NOT FORESEE.

WITHIN THE CRIMINAL LAW AN INDIVIDUAL WHOSE BEHAVIOUR WOULD BE JUDGED BY A REASONABLE AND PRUDENT INDIVIDUAL IN THE SITUATION OF THE AGENT TO INVOLVE NO UNJUSTIFIABLE RISK OF VIOLATION OF LAW WILL BE EXCULPATED FROM PENAL LIABILITY EVEN IF SOME UNFORESEEN CONSEQUENCES OR ASPECTS OF HIS BEHAVIOUR IN FACT DO VIOLATE THE LAW. EVEN IF THE AGENT'S BEHAVIOUR CREATES AN UNJUSTIFIABLE RISK WHICH HE OUGHT TO HAVE FORESEEN HE WILL NOT BE HELD LIABLE UNLESS HIS FAILURE TO PERCEIVE IT EVINCES A CONSCIOUS DISREGARD FOR THE RIGHTS AND WELL-BEING OF OTHERS. IN THE ABSENCE OF SUCH A CONSCIOUS DISREGARD THE AGENT FAILS TO EXHIBIT THAT MINIMAL DEGREE OF CULPABILITY REQUIRED FOR PENAL LIABILITY, I.E., GROSS NEGLIGENCE.

IF AN INDIVIDUAL SATISFIES THE MORAL EXCUSE OF ACCIDENT HE WILL ALSO BE LEGALLY EXCUSED FOR HIS BEHAVIOUR.

IGNORANCE OR MISTAKE OF LAW

I HAVE PREVIOUSLY ARGUED THAT AN INDIVIDUAL WHO DOES NOT KNOW THE FUNDAMENTAL MORAL RULES OF HIS SOCIETY MUST BE SUFFERING FROM A MENTAL DEFECT WHICH RENDERS HIM BLAMELESS. WHEN WE TURN FROM THE MORAL LAW TO THE CRIMINAL LAW, HOWEVER, THE DOCTRINE "IGNORANTIA JURIS NEMINEM EXCUSAT"¹ HOLD SWAY. IN GENERAL, AN INDIVIDUAL'S BELIEFS OR

¹"IGNORANCE OF LAW DOES NOT EXCUSE."

KNOWLEDGE CONCERNING THE LAW ARE NOT RELEVANT TO HIS PENAL LIABILITY, WHERE THE LAW IN QUESTION IS THE ONE WHICH DEFINES HIS OFFENSE.¹ ON THE OTHER HAND, CERTAIN OFFENSES EXPLICITLY REQUIRE AN INTENT TO DO WHAT ONE KNOWS TO BE VIOLATIVE OF SOME SECOND LAW, AND FOR THESE OFFENSES IGNORANCE OF THAT SECOND LAW WILL EXCUSE; IT NEGATES THE SPECIFIC INTENT REQUIRED BY THE OFFENSE. THIS POSITION IS CLEARLY STATED IN THE MODEL PENAL CODE:

IT SHOULD BE NOTED THAT THE GENERAL PRINCIPLE THAT IGNORANCE OR MISTAKE OF LAW IS NO EXCUSE IS USUALLY GREATLY OVERSTATED; IT HAS NO APPLICATION WHEN THE CIRCUMSTANCES MADE MATERIAL BY THE DEFINITION OF THE OFFENSE INCLUDE A LEGAL ELEMENT. SO, FOR EXAMPLE, IT IS IMMATERIAL IN THEFT, WHEN CLAIM OF RIGHT IS ADDUCED IN DEFENSE, THAT THE CLAIM INVOLVES A LEGAL JUDGMENT AS TO THE RIGHT OF PROPERTY. IT IS A DEFENSE BECAUSE KNOWLEDGE THAT THE PROPERTY BELONGS TO SOMEONE ELSE IS A MATERIAL ELEMENT OF THE CRIME AND SUCH KNOWLEDGE MAY INVOLVE MATTERS OF LAW AS WELL AS FACT.²

WHERE, HOWEVER, SUCH KNOWLEDGE OF THE LAW IS NOT ITSELF A MATERIAL ELEMENT OF THE OFFENSE, A DEFENDANT CANNOT CLAIM IN EXCULPATION OF HIS ACTIONS THAT HE DID NOT KNOW THE LAW WHICH MADE THEM AN OFFENSE.

AT ONE TIME THIS PRACTICE MIGHT NOT HAVE HAD THE EFFECT OF PUNISHING FAULTLESS OFFENDERS, I.E., WHEN THE LAW MADE AN OFFENSE ONLY THOSE ACTS WHICH WERE MORALLY CENSURED BY THE COMMUNITY. ANY INDIVIDUAL OF NORMAL ABILITIES COULD BE JUSTIFIABLY PRESUMED TO KNOW THESE ETHICO-LEGAL RULES. WHILE SUCH A PRESUMPTION IS STILL JUSTIFIABLE WITH RESPECT TO OBVIOUS CASES OF OFFENSES AGAINST FUNDAMENTAL MORAL RULES SUCH AS MURDER, RAPE, ASSAULT AND ARSON, THE RETENTION OF THE PRESUMPTION WITH RESPECT TO ALL CRIMINAL LAWS INVOLVES A LE-

¹"IT IS A RULE WHICH IS DEEP IN OUR LAW, THAT IGNORANCE OF THE LAW OR MISTAKE OF LAW IS NO EXCUSE, FURNISHES NO EXEMPTION FROM CRIMINAL RESPONSIBILITY, AND IS ORDINARILY NO DEFENSE TO A CRIMINAL PROSECUTION." 22 C.J.S. SEC. 48.

²TENTATIVE DRAFT NO. 4 (1955), COMMENT 11 ON SEC. 2.02, P. 135.

GAL FICTION.

A PLETHORA OF STATUTES HAS BEEN PROMULGATED COVERING VIRTUALLY EVERY ASPECT OF HUMAN LIFE; NO INDIVIDUAL CAN REASONABLY BE PRESUMED TO KNOW ALL OF THESE RULES. OF COURSE, A PERSON NEED NOT KNOW ALL OF THEM, BUT ONLY THOSE WHICH APPLY TO ENDEAVOURS WHICH HE DOES, OR MIGHT FORESEEABLY, UNDERTAKE. HOWEVER, EVEN THUS LIMITED THE PRESUMPTION THAT AN INDIVIDUAL CAN, BY TAKING REASONABLE OR EVEN EXTREME CARE, LEARN ALL THESE RULES IS PATENTLY ABSURD.

WITHIN THE CRIMINAL LAW, THEN, IT IS CONCEIVABLE THAT A PERSON WHO HAS DONE HIS BEST TO FIND OUT THE LAWS GOVERNING HIS CONDUCT MAY NONETHELESS REMAIN IGNORANT OF SOME SUCH LAW AND, BECAUSE OF HIS IGNORANCE, COMMIT A PROSCRIBED ACT IN WHICH HE WOULD OTHERWISE NOT HAVE ENGAGED. SUCH AN INDIVIDUAL, THOUGH WITHOUT FAULT, IS NONETHELESS SUBJECT TO PENAL LIABILITY.¹

¹FOR A VERY SMALL CLASS OF OFFENSES THE LAW PROVIDES THAT IF AN INDIVIDUALS FAILURE TO BE AWARE OF A REGULATION IS DUE TO A FAILURE ON THE PART OF AUTHORITIES TO PROVIDE NOTICE OF THAT REGULATION, THE OFFENDER IS NOT LIABLE. A TYPICAL EXAMPLE IS PROVIDED BY NEW YORK STATE'S VEHICLE AND TRAFFIC LAW. "THE STATE TRAFFIC COMMISSION IS EMPOWERED TO ADOPT SPECIFICATIONS FOR A UNIFORM SYSTEM OF TRAFFIC-CONTROL DEVICES FOR USE UPON HIGHWAYS WITHIN THE STATE, AND MUST ORDER THEIR INSTALLATION UPON ALL STATE HIGHWAYS. LOCAL AUTHORITIES ARE REQUIRED TO PLACE SUCH TRAFFIC-CONTROL DEVICES AS THEY MAY DEEM NECESSARY TO INDICATE AND CARRY OUT TRAFFIC REGULATIONS, AND GENERALLY SUCH DEVICES MUST CONFORM TO STATE SPECIFICATIONS. MOREOVER, WITH CERTAIN EXCEPTIONS, LOCAL REGULATIONS MADE UNDER THE POWERS CONFERRED BY THE VEHICLE AND TRAFFIC LAW ARE NOT EFFECTIVE UNTIL SIGNS OR MARKINGS GIVING NOTICE THEREOF ARE POSTED. (EMPHASIS ADDED.)

A MORE SIGNIFICANT DEVELOPMENT CONCERNING THE DOCTRINE OF IGNORANCE OF LAW IS CLEAR IN THE DECISION IN LAMBERT V. PEOPLE OF THE STATE OF CALIFORNIA, 78 S.Ct. 240, WHERE IT WAS HELD THAT A LOS ANGELES ORDINANCE REQUIRING FELONS TO REGISTER WITH THE CHIEF OF POLICE VIOLATED DUE PROCESS WHEN APPLIED TO A PERSON WHO HAD NO ACTUAL KNOWLEDGE OF HER DUTY TO REGISTER. JUSTICE DOUGLAS ARGUED THAT DUE PROCESS REQUIRES NOTICE OF LAW WHERE A PENALTY OR FORFEITURE MAY BE IMPOSED FOR AN OMISSION TO ACT, WHERE THE AGENT IS "WHOLLY PASSIVE AND UNAWARE OF ANY WRONGDOING." FOUR JUSTICES VIGOROUSLY DISSENTED, HOWEVER, INSISTING

"THE PRESENT LAWS OF THE UNITED STATES AND OF THE FORTY-EIGHT STATES ARE THICK WITH PROVISIONS THAT COMMAND THAT SOME THINGS NOT BE DONE AND OTHERS BE DONE, ALTHOUGH PERSONS CONVICTED UNDER SUCH PROVISIONS MAY HAVE HAD NO AWARENESS OF WHAT THE LAW REQUIRED OR THAT WHAT THEY DID WAS WRONGDOING. THE BODY OF DECISIONS SUSTAINING SUCH LEGISLATION, INCLUDING INNUMERABLE REGISTRATION LAWS, IS ALMOST AS VOLUMINOUS AS THE LEGISLATION ITSELF."

I BELIEVE THAT WE MAY CONCLUDE THAT WHILE THE DECISION IN LAMBERT MAY BE A PRECURSOR OF A GENERAL CHANGE IN THE DOCTRINE, AT LEAST FOR THE PRESENT "IGNORANTIA JURIS NEMINEM EXCUSAT."

CHAPTER 2

MORAL FAULT AND GENERAL TORT LIABILITY

PROTECTION OF INTERESTS

LAW, AS A SOCIAL INSTITUTION HAS TO DO WITH HUMAN RELATIONS FROM WHICH EMERGE THE WANTS, NEEDS AND DESIRES OF LIFE. SOCIETY IS COMPOSED OF INTERESTED MEN. IT IS THESE INTERESTS THAT DEMAND AND DICTATE THE MORES, HABITS, AND LAWS OF A COMMUNITY. THUS THE PROCESS OF MAKING AND APPLYING LAW IS ONE OF CREATING LEGAL PROTECTION FOR HUMAN INTERESTS.¹

IN THE PREVIOUS CHAPTER I EXAMINED ONE WAY IN WHICH SOCIETY MAY TRY TO PROTECT CERTAIN INTERESTS OF ITS MEMBERS, I.E., BY IMPOSING PENAL SANCTIONS ON THOSE WHO INVADE SUCH INTERESTS; I CONSIDERED THE EXTENT TO WHICH AN INDIVIDUAL'S FAULTLESSNESS IN INVADING AN INTEREST WOULD GENERALLY EXCULPATE HIM FROM THOSE SANCTIONS. IN THIS CHAPTER I WISH TO CONDUCT A SIMILAR EXAMINATION WITH RESPECT TO CIVIL SANCTIONS.

THE FOLLOWING IS A LIST OF THOSE INTERESTS WHICH ARE WIDELY RECOGNIZED AS SUBJECT TO AT LEAST SOME PROTECTION WITHIN THE LAW OF TORTS: 1) INTEREST IN BODILY SECURITY; 2) INTEREST IN EMOTIONAL EQUILIBRIUM; 3) INTEREST IN EXCLUSIVE POSSESSION OF CHATTELS; 4) INTEREST IN EXCLUSIVE POSSESSION OF LAND; 5) INTEREST IN FREE DEVELOPMENT OF LAND; 6) INTEREST IN FREEDOM FROM APPREHENSION OF BODILY HARM; 7) INTEREST IN FREEDOM FROM CONFINEMENT; 8) INTEREST IN FREEDOM FROM DECEIT; 9) INTEREST IN FREEDOM FROM OFFENSIVE TOUCHING; 10) INTEREST IN

¹FOWLER V. HARPER, A TREATISE ON THE LAW OF TORTS (INDIANAPOLIS: THE BOBBS-MERRILL Co., 1938), PP. 3-4.

FREEDOM FROM UNJUSTIFIABLE LITIGATION; 11) INTEREST IN FREE ENJOYMENT OF LAND; 12) INTEREST IN THE LIFE OF ANOTHER; 13) INTEREST IN PERFORMANCE OF CONTRACTS; 14) INTEREST IN POLITICAL ACTIVITY; 15) INTEREST IN PRIVACY; 16) INTEREST IN RELATION OF HUSBAND AND WIFE; 17) INTEREST IN RELATION OF PARENT AND CHILD; 18) INTEREST IN REPUTATION AND FAIR NAME; 19) INTEREST IN RETAINING AND OBTAINING POSSESSION OF CHATTELS; 20) INTEREST IN VENDIBILITY OF PROPERTY.¹

IN ATTEMPTING TO PROTECT THESE INTERESTS, THE LAW OF TORTS IMPOSES LIABILITY TO PAY DAMAGES ON INDIVIDUALS WHO VIOLATE THESE INTERESTS UNDER CERTAIN CONDITIONS. THE DAMAGES WHICH A PERSON MAY BE MADE TO PAY ARE OF TWO SORTS--PUNITIVE AND COMPENSATORY. WITH RESPECT TO THE LATTER

. . . THE FUNDAMENTAL PRINCIPLE . . . IS TO RESTORE INJURED PARTY TO ORIGINAL POSITION OCCUPIED BY SUCH PARTY, PRIOR TO TORT, EITHER THROUGH RESTORATION OF PROPERTY, IF POSSIBLE, OR THROUGH MEASUREMENT OF DAMAGE IN MONEY VALUE.²

"COMPENSATORY DAMAGES" ARE SUCH AS WILL COMPENSATE THE INJURED PARTY FOR THE INJURY SUSTAINED.³

THE OBJECT OF COMPENSATORY DAMAGES IS TO MAKE ONE WHOLE.⁴

IN STARK CONTRAST, THE IMPOSITION OF PUNITIVE (ALSO CALLED EXEMPLARY) DAMAGES IS VIEWED FROM THE FOLLOWING PERSPECTIVE:

PUNITIVE DAMAGES ARE NOT AWARDED AS COMPENSATION, BUT ARE AWARDED ABOVE AND BEYOND ACTUAL DAMAGES, AS PUNISHMENT FOR DEFENDANT'S INTENTIONAL WRONG, AND ARE GIVEN TO PLAINTIFF IN PROPER CASE, NOT BECAUSE THEY ARE DUE, BUT BECAUSE OF OPPORTUNITY CASE AFFORDS

¹THIS LIST IS TAKEN FROM THE INDEX OF HARPER, TORTS.

²DOANE V. FARMERS CO-OP. CO., 94 N.W.2D 115, CITING 25 C.J.S. DAMAGES, SECS. 80,83.

³LOEBLICH V. GARNIER, 113 So.2D 95.

⁴McKENNEY V. BUFFELEN MFG. CO., 232 F.2D 5.

COURT TO INFLICT PUNISHMENT FOR CONDUCT INTENTIONALLY WRONGFUL.¹

EXEMPLARY DAMAGES ARE ALLOWABLE BY WAY OF PUNISHING DEFENDANT FOR MALICIOUS OR WILLFUL AND WANTON INVASION OF PLAINTIFF'S RIGHTS.²

LET US NOW CONSIDER THE EXTENT TO WHICH FAULTLESS INVASIONS OF PROTECTED INTERESTS MAY RENDER THE OFFENDER LIABLE TO EACH TYPE OF CIVIL SANCTION.

PUNITIVE DAMAGES

THE CONDITIONS UNDER WHICH A JURY MAY GIVE EXEMPLARY DAMAGES TO A PLAINTIFF VARY FROM JURISDICTION TO JURISDICTION, BUT THE MINIMUM DEGREE OF CULPABILITY REQUIRED IS THAT EVINced BY GROSS NEGLIGENCE.

WHERE A TORT IS COMMITTED WITH A BAD MOTIVE, OR SO RECKLESSLY AS TO IMPLY A DISREGARD OF SOCIAL OBLIGATIONS, AND GENERALLY WHEN THE DEFENDANT APPEARS TO HAVE DONE THE ACT WANTONLY, MALICIOUSLY, OR WICKEDLY, THE JURY MAY, IN THEIR DISCRETION, GIVE EXEMPLARY DAMAGES.³

THE CHARACTER OF NEGLIGENCE NECESSARY TO SUSTAIN AN AWARD OF PUNITIVE DAMAGES MUST BE OF A GROSS AND FLAGRANT CHARACTER, EVINCING RECKLESS DISREGARD OF HUMAN LIFE, OR OF THE SAFETY OF PERSONS EXPOSED TO ITS DANGEROUS EFFECTS, OR THERE IS THAT ENTIRE WANT OF CARE WHICH WOULD RAISE THE PRESUMPTION OF A CONSCIOUS INDIFFERENCE TO CONSEQUENCES, OR WHICH SHOWS WANTONNESS OR RECKLESSNESS, OR A GROSSLY CARELESS DISREGARD OF THE SAFETY AND WELFARE OF THE PUBLIC, OR THAT RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS WHICH IS EQUIVALENT TO AN INTENTIONAL VIOLATION OF THEM.⁴

WITHIN THE LAW OF TORTS, THEN, THERE CAN BE NO LIABILITY TO PUNI-

¹OVERNITE TRANSP. Co. v. INTERNATIONAL BROTH. OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, 125 S.E.2D 277.

²CITIES SERVICE OIL Co. v. MERRITT, 332 P.2D 677.

³DAY v. HOLLANT, 15 OR. 464, 15 P. 855.

⁴CARRAWAY v. REVELL, 116 So. 2D 16.

TIVE DAMAGES WITHOUT THAT DEGREE OF CULPABILITY EQUIVALENT TO MENS REA IN THE CRIMINAL LAW. SUCH MENS REA MUST, OF COURSE, BE COUPLED WITH A VOLUNTARY ACT OR OMISSION, I.E., AN ACTUS REUS.

CORRELATIVELY, AN INDIVIDUAL WHOSE TORTIOUS CONDUCT WAS COMMITTED WHILE IN A STATE OF AUTOMATISM OR CAUSAL NECESSITY, NOT ITSELF BROUGHT ABOUT BY SUBSTANTIALLY CULPABLE CONDUCT ON HIS PART, WILL BE EXEMPT FROM LIABILITY TO EXEMPLARY DAMAGES; IN SUCH CASES THERE HAS BEEN NO VOLUNTARY ACT OR OMISSION.

ALSO, AN INDIVIDUAL WHO SUFFERS FROM A MENTAL DISEASE OF SUCH NATURE AS TO EITHER RENDER HIS CONDUCT SUBSTANTIALLY INVOLUNTARY, OR TO PRECLUDE HIS CONDUCT BEING IN CONSCIOUS DISREGARD OF OTHERS' RIGHTS, WILL BE SIMILARLY EXCUSED.

AS IN THE CRIMINAL LAW, A DEFENDANT WHOSE CONDUCT WAS DONE IN IGNORANCE OR MISTAKE OF FACT, NOT ITSELF SUBSTANTIALLY CULPABLE, WILL BE EXCUSED IF SUCH IGNORANCE OR MISTAKE NEGATIVES THE INTENTION, RECKLESSNESS OR CONSCIOUS INDIFFERENCE REQUIRED FOR EXEMPLARY DAMAGES.

TELEOLOGICAL NECESSITY AND COERCION WILL LIKEWISE EXCUSE IN JUST THOSE CASES, AND FOR THE SAME REASONS, THAT THEY EXCUSE FROM PENAL LIABILITY.

IN FACT, THE SOLE EXCUSE WHICH WILL NOT FUNCTION IN REGARD TO PUNITIVE DAMAGES AS IT DOES WITH RESPECT TO PENAL LIABILITY IS INFANCY. RECALL THAT WITHIN THE CRIMINAL LAW AN INDIVIDUAL BELOW A SPECIFIED AGE IS IRREBUTTABLY PRESUMED TO BE INCAPABLE OF THE SORTS OF MENTAL CONDITIONS REQUIRED FOR LIABILITY. WITHIN THE LAW OF TORTS, HOWEVER, NO SUCH PRESUMPTION GENERALLY EXISTS AND A PLAINTIFF MAY OFFER EVIDENCE TO SHOW THAT A CHILD HAD THE CAPACITY TO FULFILL, AND

DID FULFILL, THE REQUIREMENTS FOR LIABILITY TO PUNITIVE DAMAGES.¹
 WHERE SUCH EVIDENCE IS ACTUALLY ADDUCED, THE IMPOSITION OF SUCH LIABILITY DOES NOT INVOLVE SANCTIONS FOR FAULTLESS CONDUCT, HOWEVER; SUCH A CHILD CLEARLY DOES SATISFY OUR CONDITIONS FOR MORAL FAULT.

AN INDIVIDUAL WHOSE CONDUCT IS MORALLY FAULTLESS WILL, THEN, BE EXCUSED FROM LIABILITY TO PUNITIVE DAMAGES. PUNITIVE DAMAGES ARE NOT IMPOSED WITHOUT FAULT.

COMPENSATORY DAMAGES

INTENDED TORTS

CERTAIN INTERESTS WHICH ARE PROTECTED FROM INVASION BY THE LAW OF TORTS ARE ONLY PROTECTED FROM INTENTIONAL INVASION. FOR EXAMPLE, A PERSON WHO INVADES ANOTHER'S INTEREST IN FREEDOM FROM OFFENSIVE BODILY CONTACT WILL ONLY BE LIABLE TO PAY COMPENSATORY DAMAGES IF

[1] (A) HE ACTS INTENDING TO CAUSE A HARMFUL OR OFFENSIVE CONTACT WITH THE PERSON OF THE OTHER OR A THIRD PERSON, OR AN IMMINENT APPREHENSION OF SUCH A CONTACT, AND

(B) AN OFFENSIVE CONTACT WITH THE PERSON OF THE OTHER DIRECTLY OR INDIRECTLY RESULTS.

(2) AN ACT WHICH IS NOT DONE WITH THE INTENTION STATED IN SUBSECTION (1,A) DOES NOT MAKE THE ACTOR LIABLE TO THE OTHER FOR A MERE OFFENSIVE CONTACT WITH THE OTHER'S PERSON ALTHOUGH THE ACT INVOLVES AN UNREASONABLE RISK OF INFLECTING IT AND, THEREFORE, WOULD BE NEGLIGENT OR RECKLESS IF THE RISK THREATENED BODILY HARM.²

OTHER TORTS WHICH INVOLVE AN INTENT TO BRING ABOUT A VIOLATION

¹"THE STATUTE PROVIDING THAT A MINOR OR PERSON OF UNSOUND MIND IS CIVILLY LIABLE FOR A WRONG DONE BY HIM BUT IS NOT LIABLE IN EXEMPLARY DAMAGES UNLESS AT THE TIME OF THE ACT HE WAS CAPABLE OF KNOWING THAT IT WAS WRONGFUL, IS A CODIFICATION OF THE COMMON-LAW RULE." MULLEN V. BRUCE, 335 P.2D 945.

²RESTATEMENT, SECOND, TORTS, SEC. 18.

OF A RIGHT OF A PERSON ARE ASSAULT,¹ FALSE IMPRISONMENT,² AND CONVERSION³ OR TRESPASS TO LAND AND CHATTELS.⁴

EACH OF THESE TORTS, THEN, INVOLVES BOTH MENS REA, THE INTENT TO DO WHAT ONE KNOWS IS WRONG, AND AN ACTUS REUS. THE SITUATION HERE IS THE SAME, WITH RESPECT TO CULPABILITY, AS IN THE IMPOSITION OF PUNITIVE DAMAGES. WE MAY CONCLUDE WITHOUT FURTHER ARGUMENT, THEREFORE, THAT LIABILITY WITHOUT FAULT TO PAY COMPENSATORY DAMAGES IS NOT IMPOSED FOR INTENTIONAL TORTS.

RECKLESS TORTS

AN INDIVIDUAL WHOSE CONDUCT IS IN RECKLESS DISREGARD OF THE SAFETY OF ANOTHER MAY BE LIABLE TO PAY COMPENSATION IN SITUATIONS IN WHICH SIMPLE NEGLIGENCE WOULD NOT RENDER HIM SO LIABLE.

THE ACTOR'S CONDUCT IS IN RECKLESS DISREGARD OF THE SAFETY OF ANOTHER IF HE DOES AN ACT OR INTENTIONALLY FAILS TO DO AN ACT WHICH IT IS HIS DUTY TO THE OTHER TO DO, KNOWING OR HAVING REASON TO KNOW OF FACTS WHICH WOULD LEAD A REASONABLE MAN TO REALIZE, NOT ONLY THAT HIS CONDUCT CREATES AN UNREASONABLE RISK OF PHYSICAL HARM TO ANOTHER, BUT ALSO THAT SUCH RISK IS SUBSTANTIALLY GREATER THAN THAT WHICH IS NECESSARY TO MAKE HIS CONDUCT NEGLIGENT.⁵

STATUTES IN CERTAIN JURISDICTIONS, E.G., MICHIGAN,⁶ SUBJECT OPERATORS OF MOTOR VEHICLES TO LIABILITY FOR HARM TO GUESTS IN THE VEHICLE ONLY WHEN THE DRIVER HAS CONDUCTED HIMSELF IN RECKLESS DISREGARD OF THAT GUEST'S SAFETY; SIMPLE NEGLIGENCE WILL NOT RENDER HIM

¹ *IBID.*, SEC. 21.

² *IBID.*, SEC. 35.

³ *IBID.*, SECS. 222-224.

⁴ *IBID.*, SECS. 158, 217.

⁵ *IBID.*, SEC. 500.

⁶ C.L.S. 1956 SEC. 257.401, (STAT. ANN. 1960 REV. SEC. 9.2101).

SO LIABLE, AS IT WILL IN NEW YORK¹.

ALSO, WHILE A DEFENDANT WILL NOT GENERALLY BE LIABLE FOR HARMS RESULTING FROM HIS NEGLIGENT CONDUCT IF THE PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT, CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF DOES NOT ABSOLVE A DEFENDANT FROM LIABILITY IF HIS CONDUCT WAS IN RECKLESS DISREGARD OF THE PLAINTIFF'S SAFETY.

THE RESTATEMENT OF TORTS, SECOND, POINTS OUT THAT SUCH RECKLESSNESS MAY CONSIST OF TWO VERY DIFFERENT SORTS OF CONDUCT.

IN ONE THE ACTOR KNOWS, OR HAS REASON TO KNOW, . . . OF FACTS WHICH CREATE A HIGH DEGREE OF RISK OF PHYSICAL HARM TO ANOTHER, AND DELIBERATELY PROCEEDS TO ACT, OR TO FAIL TO ACT, IN CONSCIOUS DISREGARD OF, OR INDIFFERENCE TO, THAT RISK. IN THE OTHER THE ACTOR HAS SUCH KNOWLEDGE, OR REASON TO KNOW, OF THE FACTS, BUT DOES NOT REALIZE OR APPRECIATE THE HIGH DEGREE OF RISK INVOLVED, ALTHOUGH A REASONABLE MAN IN HIS POSITION WOULD DO SO.²

AN AGENT WHO ACTS IN THE FORMER WAY CLEARLY SATISFIES THE ACTUS REUS AND MENS REA REQUIREMENTS AND IS CERTAINLY AT FAULT.

ALSO, AN INDIVIDUAL WHO ACTS IN THE LATTER MANNER AND POSSESSES ALL THE PHYSICAL AND MENTAL CAPACITIES OF THE "REASONABLE MAN" IS SUBJECTED TO LIABILITY ONLY FOR FAULT; HIS FAILURE TO PERCEIVE WHAT THE REASONABLE MAN WOULD HAVE PERCEIVED MUST INVOLVE A LACK OF CARE OR ATTENTION ON HIS PART.

WHAT, HOWEVER, OF THE DEFENDANT WHOSE CAPACITIES DIFFER FROM THOSE OF THE REASONABLE MAN? TO WHAT DEGREE DOES SUCH AN INDIVIDUAL RISK LIABILITY THROUGH NO FAULT OF HIS OWN? I SHALL CONSIDER THE ANSWER TO THIS QUESTION IN CONJUNCTION WITH THE DISCUSSION OF NEGLIGENT TORTS, SINCE IT IS WITHIN THIS AREA OF LAW THAT THE REASONABLE

¹4 N.Y. JUR. SEC. 388, P. 376.

²RESTATEMENT, SECOND, TORTS, COMMENT (A) TO SEC. 500.

MAN TEST IS MOST OFTEN APPLIED.

NEGLIGENT TORTS

THE RESTATEMENT OF TORTS, SECOND, DEFINES NEGLIGENT CONDUCT AS CONDUCT WHICH "FALLS BELOW THE STANDARD ESTABLISHED BY LAW FOR THE PROTECTION OF OTHERS AGAINST UNREASONABLE RISK OF HARM."¹ THAT "STANDARD ESTABLISHED BY LAW" FOR ANY ACTOR EXCEPT A CHILD, BELOW WHICH A PERSON'S CONDUCT MAY NOT FALL WITHOUT HIS RISKING LEGAL LIABILITY IS THE CONDUCT IN WHICH A "REASONABLY PRUDENT MAN" IN THE "AGENT'S CIRCUMSTANCES" WOULD ENGAGE.² THUS NEGLIGENT CONDUCT MAY BE EITHER: A) AN ACT WHICH A REASONABLY PRUDENT MAN IN THE AGENT'S SITUATION WOULD RECOGNIZE AS INVOLVING AN UNREASONABLE RISK OF CAUSING AN INVASION OF INTEREST OF ANOTHER, OR B) A FAILURE TO DO AN ACT WHICH A REASONABLY PRUDENT MAN IN THE AGENT'S SITUATION WOULD REALIZE TO BE NECESSARY FOR THE PROTECTION OR ASSISTANCE OF ANOTHER AND WHICH THE ACTOR IS UNDER A DUTY TO DO.

THE REASONABLE MAN IS A FICTITIOUS PERSON, WHO IS NEVER NEGLIGENT, AND WHOSE CONDUCT IS ALWAYS UP TO STANDARD. HE IS NOT TO BE IDENTIFIED WITH ANY REAL PERSON; AND IN PARTICULAR HE IS NOT TO BE IDENTIFIED WITH THE MEMBERS OF THE JURY, INDIVIDUALLY OR COLLECTIVELY.³

RATHER, HE IS A COMPOSITE, MADE UP OF CERTAIN ATTRIBUTES OF THE AGENT, AND CERTAIN ATTRIBUTES DETERMINED BY THE ETHICO-LEGAL JUDGMENTS OF THE COMMUNITY. TO THE DEGREE THAT THE FORMER ARE CONSIDERED, THE STANDARD OF NEGLIGENCE IS SAID TO BE "SUBJECTIVE"; TO THE DEGREE THAT THE LATTER ARE CONSIDERED, THE STANDARD IS SAID TO

¹IBID., SEC. 282.

²IBID., SEC. 283.

³IBID., COMMENT (c) TO SEC. 283; SEE ALSO LOUISVILLE & N. R. Co. v. GOWER, 85 TENN. 465, 3 S.W. 824.

BE "OBJECTIVE."¹

WITH REGARD, FOR EXAMPLE, TO THE PHYSICAL CHARACTERISTICS OF THE REASONABLY PRUDENT MAN, HE IS CONSIDERED TO BE IDENTICAL TO THE AGENT.

PHYSICAL HANDICAPS AND INFIRMITIES, SUCH AS BLINDNESS, DEAFNESS, SHORT STATURE, OR A CLUB FOOT, OR THE WEAKNESSES OF AGE OR SEX, ARE TREATED MERELY AS PART OF THE "CIRCUMSTANCES" UNDER WHICH A REASONABLE MAN MUST ACT. THUS THE STANDARD OF CONDUCT FOR A BLIND MAN BECOMES THAT OF A REASONABLE MAN WHO IS BLIND. . . . THE SAME ALLOWANCE IS MADE FOR PHYSICAL, AS DISTINGUISHED FROM MENTAL, ILLNESS.²

LIKewise, THE REASONABLY PRUDENT MAN IS CONSIDERED TO HAVE ANY PHYSICAL ADVANTAGES WHICH THE AGENT POSSESSES, E.G., ACUITY OF VISION OR EXTREME STRENGTH.³ THE STANDARD WITH RESPECT TO PHYSICAL CHARACTERISTICS IS THUS PURELY SUBJECTIVE.

WITH REGARD TO MORAL VALUES, HOWEVER, THE STANDARD IS PURELY OBJECTIVE. RECALL THAT THE REASONABLY PRUDENT MAN IS REQUIRED, WHERE HE PERCEIVES A RISK OF HARM TO THE INTERESTS OF OTHERS, TO EVALUATE THAT RISK AS "REASONABLE" OR "UNREASONABLE." IN SO DOING, HE MUST CONSIDER THE FOLLOWING FIVE FACTORS: 1) THE MAGNITUDE OF THE RISK THAT SUCH A HARM WILL BE INVOLVED IN THE BEHAVIOUR, EITHER AS AN ASPECT OR CONSEQUENCE OF IT; 2) THE TOTAL DISVALUE OF THE POSSIBLE ASPECT OR CONSEQUENCE; 3) THE VALUE OF THE END FOR THE SAKE OF WHICH THE AGENT ACTS, OR REFRAINS FROM ACTING; 4) THE PROBABILITY THAT THAT END WILL IN FACT BE REALIZED BY THE ACTION OR OMISSION; 5) THE POSSIBI-

¹E.G., THIS TERMINOLOGY IS ADOPTED BY WARREN A. SEAVEY, "NEGLIGENCE--SUBJECTIVE OR OBJECTIVE?" IN FREEDOM AND RESPONSIBILITY, ED. BY HERBERT MORRIS (STANFORD: STANFORD UNIVERSITY PRESS, 1961), PP. 251-262.

²RESTATEMENT, TORTS, SECOND, COMMENTS (A) AND (B) TO SEC. 283 C.

³SEAVEY, NEGLIGENCE, PP. 256-257.

LITY OF ATTAINING THAT END BY MEANS INVOLVING LESS SERIOUS RISK OF LESS SERIOUS HARM.

AS FACTORS 1, 2 OR 5 INCREASE, THE REASONABLENESS OF THE RISK TAKEN DECREASES; AS FACTORS 3 OR 4 INCREASE, THE REASONABLENESS OF THE RISK INCREASES.

THE REASONABLY PRUDENT MAN MUST, THEN, APPLY SOME STANDARD OF VALUE TO THE POSSIBLE CONSEQUENCES OF BEHAVING IN A CERTAIN WAY, AND MUST ALSO APPLY A STANDARD FOR DETERMINING WHAT DEGREE OF RISK IS JUSTIFIABLE. THE REASONABLY PRUDENT MAN IS, FOR THESE PURPOSES, CONSIDERED TO APPLY THE STANDARD IMPLICIT IN THE LAW, WHETHER OR NOT THESE ARE THE STANDARDS ACCEPTED BY THE AGENT. IN GENERAL THESE NORMS ARE THE SAME AS THOSE OF THE COMMUNITY BUT, WHERE THEY DIFFER, THE LEGAL NORMS PREVAIL.¹

IF, THEN, THE AGENT IS MORE ALTRUISTIC, OR EGOISTIC, THAN THE COMMUNITY OR LAW REQUIRE OR PERMIT, THE REASONABLE MAN WILL DIFFER FROM HIM. SIMILARLY, IF THE AGENT'S SYSTEM OF VALUES IS DIFFERENT FROM THAT ENSHRINED IN THE LAW, THE REASONABLE MAN WILL APPLY THE LATTER AND NOT THE FORMER. FINALLY, THE AGENT IS HELD TO THE STANDARD OF A MAN WITH THE DEGREE OF COURAGE, SELF-DISCIPLINE AND OTHER "MORAL QUALITIES" POSSESSED BY THE AVERAGE MEMBER OF SOCIETY, WHETHER OR NOT THE AGENT ACTUALLY POSSESSES THEM TO THAT DEGREE.²

¹WITH RESPECT TO INDIVIDUALS ENGAGED IN A PROFESSION OR TRADE, E.G., PHYSICIANS OR ATTORNEYS, THE SITUATION IS AS FOLLOWS: "UNLESS HE REPRESENTS THAT HE HAS GREATER OR LESS SKILL OR KNOWLEDGE, ONE WHO UNDERTAKES TO RENDER SERVICES IN THE PRACTICE OF A PROFESSION OR TRADE IS REQUIRED TO EXERCISE THE SKILL AND KNOWLEDGE NORMALLY POSSESSED BY MEMBERS OF THAT PROFESSION OR TRADE IN GOOD STANDING IN SIMILAR COMMUNITIES." RESTATEMENT, TORTS, SECOND, SEC. 299A.

²SEAVEY, NEGLIGENCE, PP. 254-55. SEE ALSO RESTATEMENT, TORTS, SECOND, SECS. 292-295.

IN EVALUATING THE DEGREE OF RISK WHICH EXISTS, THE REASONABLY PRUDENT MAN IS ATTRIBUTED WITH ANY KNOWLEDGE, MEMORIES, PERCEPTIONS OF THE CIRCUMSTANCES, INTELLIGENCE AND JUDGMENT WHICH AN ORDINARY MEMBER OF THE COMMUNITY WOULD POSSESS, WHETHER OR NOT THE AGENT IN FACT POSSESSES THEM. HE IS ALSO HELD TO HAVE ANY ADDITIONAL KNOWLEDGE, MEMORIES, PERCEPTIONS, SUPERIOR INTELLIGENCE, ATTENTION, ETC., WHICH THE AGENT IN FACT POSSESSES.¹

FINALLY, THE REASONABLY PRUDENT MAN HAS NO MENTAL DISEASE OR DEFICIENCIES, WHETHER OR NOT THE AGENT IS IN FACT INFLICTED WITH ANY. AN INSANE PERSON IS THUS HELD LIABLE FOR HARMS WHICH HE CAUSES IF A REASONABLY PRUDENT PERSON WOULD HAVE AVOIDED SUCH DAMAGE. THE SAME HOLDS TRUE FOR INDIVIDUALS WITH SUBSTANTIALLY LESS THAN AVERAGE INTELLIGENCE.²

GENERALLY, THEN, WITHIN THE LAW OF TORTS AN ACTOR IS HELD TO THE STANDARD OF CONDUCT OF A MAN WITH THE SAME PHYSICAL ATTRIBUTES, WHO APPLIES THE VALUE STANDARDS EXPRESSED IN LAW, AND EXERCISES ALL THOSE MENTAL CAPACITIES AND MORAL QUALITIES WHICH AN AVERAGE MEMBER OF SOCIETY POSSESSES, TOGETHER WITH ANY SUPERIOR MENTAL ABILITIES OR ADDITIONAL KNOWLEDGE WHICH THE AGENT ACTUALLY POSSESSES.

TO WHAT EXTENT DOES THE APPLICATION OF THE STANDARD OF THE REASONABLY PRUDENT MAN IN DETERMINING NEGLIGENCE AND RECKLESSNESS RESULT IN THE INFLICTION OF TORT LIABILITY ON FAULTLESS OFFENDERS?

RECALL THAT THE MINIMUM CONDITION FOR FAULT IS THAT AN AGENT WHO POSSESSES THE MENTAL AND PHYSICAL CAPACITIES NECESSARY TO DO SO

¹RESTATEMENT, TORTS, SECOND, SEC. 289.

²IBID., SEC. 283B.

NONETHELESS FAILS TO FORESEE SOME UNREASONABLE RISK THAT AN ASPECT OR CONSEQUENCE OF HIS BEHAVIOUR WILL VIOLATE A MORAL RULE.

WITHIN THE LAW OF TORTS, A PERSON WHO LACKS SOME PHYSICAL CAPACITY TO FORESEE AN UNREASONABLE RISK AND IS THEREFORE FAULTLESS EVEN THOUGH THAT HARM ACTUALLY OCCURS WILL ALSO BE EXCUSED FROM LIABILITY TO PAY DAMAGES; THE STANDARD OF CONDUCT TO WHICH HE IS HELD IS ESTABLISHED BY REFERENCE TO AN INDIVIDUAL WITH THE SAME PHYSICAL DEFECTS, AND THE REASONABLY PRUDENT MAN THUS "CONSTRUCTED" WILL NOT BE ABLE TO FORESEE THE RISK EITHER.

ON THE OTHER HAND, WHERE THE AGENT'S FAILURE TO FORESEE AN UNREASONABLE RISK ARISES FROM A MENTAL DEFICIENCY WHICH RENDERS HIS BEHAVIOUR FAULTLESS, THAT INDIVIDUAL WILL NOT ESCAPE TORT LIABILITY; HE IS HELD TO THE STANDARD OF A MAN WITH NORMAL MENTAL POWERS, AND IS THUS REQUIRED TO FORESEE A RISK WHICH IS, TO HIM, UNFORESEEABLE. HIS FAILURE TO DO SO, THOUGH FAULTLESS, RENDERS HIM LIABLE.

THE REQUIREMENT THAT AN INDIVIDUAL CONDUCT HIMSELF AS A PERSON OF AVERAGE COURAGE AND SELF-CONTROL WOULD, WHETHER OR NOT HE HAS SUCH COURAGE OR SELF-CONTROL, DOES NOT IMPOSE LIABILITY WITHOUT FAULT. IN THE MORAL REALM, AS WELL AS IN THE LEGAL, WE ALSO BLAME INDIVIDUALS FOR THEIR COWARDLY OR UNDISCIPLINED ACTIONS. SUCH PEOPLE ARE NOT ONLY LIABLE TO PAY DAMAGES FOR THEIR ACTIONS, THEY ARE ALSO TO BLAME FOR THEM.

NOR, IN THOSE INSTANCES IN WHICH THE ETHICAL NORMS EXPRESSED WITHIN THE LAW ARE JUSTIFIABLE, DO WE INFLICT LIABILITY WITHOUT FAULT ON AN INDIVIDUAL BY REQUIRING HIM TO APPLY THOSE NORMS IN EVALUATING CONSEQUENCES AND JUSTIFIABILITY OF RISKS. MORAL FAULT IS PREDICATED ON A FAILURE TO OBEY JUSTIFIABLE MORAL NORMS, AND NOT ON A FAILURE TO

OBEY THOSE NORMS WHICH THE AGENT ACCEPTS. IF HE ACCEPTS UNJUSTIFIABLE NORMS HE IS MORALLY BLAMEWORTHY FOR FOLLOWING THEM. FOR EXAMPLE, AN OWNER OF A DIAMOND MINE IN SOUTH AFRICA MAY CONSIDER BLACK LIVES SIGNIFICANTLY LESS VALUABLE THAN WHITE LIVES AND MIGHT THEREFORE PERMIT BLACKS TO WORK IN CONDITIONS UNDER WHICH THE RISK OF DEATH WOULD BE UNJUSTIFIABLE IF THE WORKERS WERE WHITE. SUCH A MAN IS MORALLY AT FAULT, ALTHOUGH HE MAY TRULY BELIEVE HIS STANDARDS OF VALUE TO BE JUSTIFIABLE.

WHERE LEGALLY EXPRESSED NORMS OF CONDUCT ARE NOT JUSTIFIABLE, HOWEVER, LIABILITY MAY BE IMPOSED ON FAULTLESS OFFENDERS. AN INDIVIDUAL WHO WEIGHS CONSEQUENCES AND RISKS OF CONDUCT ACCORDING TO A JUSTIFIABLE MORAL STANDARD WILL BE PUNISHED WHEN THE VALUES THUS WEIGHED DIFFER FROM THOSE ACCEPTED IN THE LEGAL SYSTEM UNDER WHICH THE AGENT OPERATES. FOR THE PURPOSE OF THIS PAPER, HOWEVER, I WILL BE CONSIDERING PRIMARILY ANGLO-AMERICAN LAW AND I WILL MAKE THE ASSUMPTION THAT THE NORMS EXPRESSED IN THAT LAW ARE FUNDAMENTALLY JUSTIFIABLE.

FINALLY, NOTE THAT THE PREVIOUS DISCUSSION APPLIES ONLY TO ADULT OFFENDERS. THE LAW OF TORTS RECOGNIZES A SEPARATE STANDARD OF CONDUCT FOR CHILDREN. "IF THE ACTOR IS A CHILD, THE STANDARD OF CONDUCT TO WHICH HE MUST CONFORM TO AVOID BEING NEGLIGENT IS THAT OF A REASONABLE PERSON OF LIKE AGE, INTELLIGENCE AND EXPERIENCE UNDER LIKE CIRCUMSTANCES."¹ THE LAW HERE REQUIRES ONLY THAT A CHILD ACT AS A PERSON OF HIS PHYSICAL AND MENTAL CAPACITIES CAN REASONABLY BE OBLIGATED TO ACT. IN THIS CASE, THEN, THE REQUIREMENTS FOR LIABILITY

¹IBID., SEC. 283A.

COINCIDE WITH THOSE FOR MORAL FAULT, AND FAULTLESS OFFENDERS BELOW
THE AGE SPECIFIED BY LAW ARE THEREFORE NOT SUBJECT TO TORT LIABILITY.

CHAPTER 3

STRICT LIABILITY

CRIMINAL LAW

YOU WILL RECALL THAT THE PRECEEDING DISCUSSION HAS CONCERNED NOT ALL CRIMES OR TORTS, BUT RATHER A LARGE CLASS OF SUCH OFFENSES. WITHIN THAT CLASS WE HAVE FOUND THAT, DESPITE THE RECOGNITION OF MORALLY EXCUSING CONDITIONS TO THE DEGREE DESCRIBED, LIABILITY WITHOUT FAULT IS NONETHELESS IMPOSED IN THE FOLLOWING CASES: 1) WHERE THE OBJECTIVE STANDARD OF NEGLIGENCE IS APPLIED TO AN INDIVIDUAL WHO DOES NOT POSSESS THE CAPACITIES NECESSARY FOR ADHERENCE TO THOSE PRESCRIPTIONS; 2) WHERE AN INDIVIDUAL WHO, BECAUSE OF A LACK OF CAPACITY TO LEARN THE LAW OR IN SPITE OF REASONABLE EFFORTS TO DO SO, IS IGNORANT OF THE LAW AND SO ENGAGES IN AN ACT WHICH HE WOULD OTHERWISE HAVE AVOIDED AND WHICH CONSTITUTES AN OFFENSE.

THERE IS, HOWEVER, A SECOND CLASS OF OFFENSES THUS FAR HERE UNEXAMINED, IN WHICH AT LEAST SOME OF THE STANDARD EXCUSING CONDITIONS PREVIOUSLY DESCRIBED ARE NOT RECOGNIZED, I.E., THEY DO NOT EXCULPATE. FOR EXAMPLE, A CAREFUL EXAMINATION OF THE RELEVANT CRIMINAL CASE LAW BRINGS AN AWARENESS THAT FOR CERTAIN OFFENSES THE EXCUSES OF MISTAKE OF FACT, IGNORANCE OF FACT, AND ACCIDENT, I.E., THOSE EXCUSES WHICH SPECIFICALLY NEGATIVE THE MENS REA REQUIREMENT, ARE NOT ACCEPTED. AN INDIVIDUAL, SOME ASPECT OF WHOSE BEHAVIOUR WAS IDENTICAL TO, OR CAUSED, ONE OF THESE PROSCRIBED STATES OF AFFAIRS WILL NOT BE EXCUSED ALTHOUGH

HE NEITHER 1) HAD THAT STATE OF AFFAIRS AS HIS CONSCIOUS OBJECT IN SO BEHAVING, NOR 2) KNEW THAT THAT STATE OF AFFAIRS WAS IDENTICAL TO SOME ASPECT OF HIS BEHAVIOUR OR WOULD NECESSARILY RESULT FROM IT, NOR 3) CONSCIOUSLY DISREGARDED A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT HIS BEHAVIOUR OR A CONSEQUENCE OF IT WOULD BE OF THE NATURE SPECIFIED BY LAW, NOR 4) DID HIS FAILURE TO PERCEIVE SUCH A RISK EVINCE, UNDER ALL THE CIRCUMSTANCES, A CONSCIOUS DISREGARD FOR THE RIGHTS AND WELL-BEING OF OTHERS.

REFERENCE HAS ALREADY BEEN MADE TO THE DOCTRINE "ACTUS NON FACIT REUM NISI MENS SIT REA." BISHOP STATED THE POSITION WITH GREATER FORCE
THUS:

THERE CAN BE NO CRIME, LARGE OR SMALL, WITHOUT AN EVIL MIND. IN OTHER WORDS, PUNISHMENT IS THE SEQUENCE OF WICKEDNESS. NEITHER IN PHILOSOPHICAL SPECULATION, NOR IN RELIGIOUS OR MORAL SENTIMENT, WOULD ANY PEOPLE IN ANY AGE ALLOW THAT A MAN SHOULD BE DEEMED GUILTY UNLESS HIS MIND WAS SO. IT IS THEREFORE A PRINCIPLE OF OUR LEGAL SYSTEM, AS PROBABLY IT IS OF EVERY OTHER, THAT THE ESSENCE OF AN OFFENSE IS THE WRONGFUL INTENT, WITHOUT WHICH IT CANNOT EXIST.¹

SIMILARLY, BLACKSTONE URGED "TO CONSTITUTE A CRIME AGAINST HUMAN LAWS THERE MUST BE FIRST A VICIOUS WILL, AND SECONDLY AN UNLAWFUL ACT CONSEQUENT UPON SUCH VICIOUS WILL."²

THAT MENS REA WAS A CORNERSTONE AND ABSOLUTELY NECESSARY CONDITION FOR CRIMINAL LIABILITY COULD HARDLY HAVE BEEN MORE EXPLICITLY OR STRONGLY EXPRESSED. AND YET, IN THE PAST CENTURY, A LARGE AND EVER-GROWING BODY OF OFFENSES HAVE BEEN FORMULATED FOR WHICH PENAL SANCTIONS ARE IMPOSED DESPITE THE OFFENDER'S LACK OF MENS REA.

¹ BISHOP, CRIMINAL LAW 192-193 (9TH ED., ZANE & ZOLLMAN, 1923).

² SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (NEW YORK: AUGUSTUS M. KELLEY, 1969), V, P. 21.

THERE IS TODAY NO QUESTION THAT THE STATUTORY CREATION OF SUCH OFFENSES IS WELL WITHIN THE POWER OF THE LAWMAKER.

"THE EXISTENCE OF A MENS REA IS THE RULE OF, RATHER THAN THE EXCEPTION TO, THE PRINCIPLES OF ANGLO-AMERICAN CRIMINAL JURISPRUDENCE." DENNIS V. UNITED STATES, 341 U.S. 494, 500, 71 S.Ct. 857, 892, 95 L.Ed. 1137. STILL, IT IS DOUBTLESS COMPETENT FOR THE STATES TO CREATE CRIMINAL LIABILITIES BY DEFINING OFFENSES WITHOUT ANY ELEMENT OF SCIENTER.¹

GENERALLY, A CRIMINAL INTENT IS ESSENTIAL BEFORE IT CAN BE SAID THAT AN OFFENSE HAS BEEN COMMITTED. WITHIN CERTAIN LIMITS, HOWEVER, THE LEGISLATURE MAY FORBID THE DOING OR REQUIRE THE DOING OF AN ACT AND MAKE ITS COMMISSION OR OMISSION CRIMINAL WITHOUT REGARD TO THE INTENT OR KNOWLEDGE OF THE DOER.²

ACCORDING TO F. B. SAYRE,³ THIS TREND AWAY FROM MENS REA AS A NECESSARY CONDITION FOR PENAL LIABILITY FOR EVERY OFFENSE CAN BE TRACED, IN ENGLAND, TO THE DECISION IN REGINA V. WOODROW IN 1846.⁴ BEFORE THAT PERIOD ENGLISH LAW, WITH ONLY EXTREMELY RARE EXCEPTIONS, KNEW NO OFFENSES FOR WHICH MENS REA WAS NOT A NECESSARY CONDITION. IN WOODROW, HOWEVER, A TRADITION WHICH HAD BEEN AFFIRMED BUT SHORTLY BEFORE OF REQUIRING SCIENTER FOR OFFENSES INVOLVING ADULTERATION OF FOODSTUFFS⁵ WAS OVERTURNED WHEN A TOBACCO DEALER WAS FINED FOR HAVING IN HIS POSSESSION ADULTERATED TOBACCO, ALTHOUGH HE HAD NO REASON TO SUSPECT THAT THE TOBACCO WHICH HE HAD PURCHASED AS GENUINE WAS NOT.

IN THE UNITED STATES IN 1849⁶ A CONNECTICUT COURT FOUND THAT

¹SMITH V. PEOPLE, 80 S.Ct. 215. THE TERM "SCIENTER" DENOTES GUILTY KNOWLEDGE.

²STATE V. SCHULTZ, 50 N.W.2D 9.

³F. B. SAYRE, "PUBLIC WELFARE OFFENSES," COLUMBIA LAW REVIEW, XXXIII (1933), PP. 55-88.

⁴15 M. & M. 404 (EXCH. 1846).

⁵REX. V. DIXON, 3 M. & S. 11 (K.B. 1814).

⁶BARNES V. STATE, 19 CONN. 398 (1849).

AN INDIVIDUAL COULD BE CONVICTED FOR SELLING LIQUOR TO A COMMON DRUNKARD, IN VIOLATION OF A STATUTE, DESPITE THE SELLER'S LACK OF KNOWLEDGE THAT THE CUSTOMER WAS IN FACT A COMMON DRUNKARD.

SHORTLY THEREAFTER FOLLOWED NUMEROUS CASES ON HIGH AUTHORITY WHICH IMPOSED LIABILITY ON INDIVIDUALS WITHOUT MENS REA FOR THE SALE OF ADULTERATED FOODSTUFFS, NOTABLY MILK, AND FOR THE SALE OF INTOXICATING LIQUORS IN VIOLATION OF PERTINENT REGULATIONS.¹ FROM THAT POINT ON, THE IMPOSITION OF LIABILITY DESPITE THE EXCUSES OF MISTAKE OR IGNORANCE OF FACT OR ACCIDENT SPREAD TO OFFENSES FALLING WITHIN THE FOLLOWING CLASSES, RECOGNIZED BY THE COURT IN CITY OF TOLEDO V. KOHLHOFFER:² (1) ILLEGAL SALES OF LIQUOR; (2) SALE OF IMPURE FOOD OR DRUGS; (3) SALE OF MISBRANDED ARTICLES; (4) VIOLATIONS OF ANTI-NARCOTIC ACTS; (5) CRIMINAL NUISANCE; (6) TRAFFIC REGULATIONS; (7) MOTOR VEHICLE LAWS; (8) VIOLATION OF GENERAL REGULATIONS, PASSED FOR THE SAFETY, HEALTH, OR WELL-BEING OF THE COMMUNITY. TO THIS LIST WE MAY ADD (9) BIGAMY;³ (10) RAPE.⁴

IN EACH OF THE PRECEEDING CRIMES THE COURTS HAVE HELD THAT WHERE SOME ASPECT OF AN AGENT'S BEHAVIOUR OR ITS CONSEQUENCES IS PROHIBITED BY STATUTE, IT IS NOT A NECESSARY CONDITION FOR LIABILITY THAT THE PROSCRIBED ASPECT OR CONSEQUENCE HAVE BEEN EITHER THE CONSCIOUS OBJECT OF THE AGENT, OR FORESEEN OR FORESEEABLE BY HIM OR A REASONABLY PRUDENT MAN IN HIS CIRCUMSTANCES. IT IS THUS IRRELEVANT IN THESE

¹FOR A COMPLETE HISTORY OF THESE OFFENSES, SEE SAYRE.

²122 N.E.2d 20.

³COMMONWEALTH V. MASH, 48 MASS. 472 (1844).

⁴PEOPLE V. GRIFFIN, 117 CAL. 583 (1897).

OFFENSES THAT THE INDIVIDUAL WHO CAUSED THE PROSCRIBED STATE OF AFFAIRS WAS NON-NEGLIGENTLY IGNORANT OR MISTAKEN ABOUT FACTS WITHOUT WHICH HE COULD NOT HAVE KNOWN THAT HIS ACTIVITY WOULD VIOLATE A STATUTE; NOR IS IT RELEVANT THAT HE TOOK ALL THE CARE WHICH A REASONABLY PRUDENT MAN UNDER THE CIRCUMSTANCES WOULD HAVE TAKEN TO PREVENT THAT STATE OF AFFAIRS OCCURRING.

WHILE ABANDONING THE MENS REA REQUIREMENT FOR CERTAIN OFFENSES, THOUGH, THE COURTS HAVE STEADFASTLY MAINTAINED THE NECESSITY FOR AN ACTUS REUS, I.E., THEY INSIST THAT LIABILITY BE BASED UPON A PROSCRIBED STATE OF AFFAIRS THAT WAS CAUSED BY, OR WAS IDENTICAL TO SOME ASPECT OF, A VOLUNTARY ACT OR OMISSION. IF THE BEHAVIOUR INVOLVED IS NOT VOLUNTARY THEN NO PENAL LIABILITY CAN ACCRUE. "SOME ACT OF COMMISSION OR OMISSION LIES AT THE FOUNDATION OF EVERY CRIME."¹

THE POSITION THAT THE LEGISLATURE MAY ELIMINATE THE REQUIREMENT OF MENS REA BUT MUST MAINTAIN THE REQUIREMENT OF AN ACTUS REUS IS CLEARLY STATED IN STATE V. AMERICAN AGR. CHEMICAL CO.,² WHERE THE COURT FOUND THAT A STATUTE

MAY FORBID THE DOING OF AN ACT, AND MAKE ITS COMMISSION A CRIME, REGARDLESS OF THE INTENT OR KNOWLEDGE OF THE DOER AND, IF SUCH LEGISLATIVE INTENT APPEARS, THE COURT MUST GIVE IT EFFECT, ALTHOUGH THE INTENT OF THE DOER MAY HAVE BEEN INNOCENT. . . . [HOWEVER] THIS PRINCIPLE MUST NOT BE CONFOUNDED WITH OR DEEMED DECISIVE OF THE VERY DISTINCT INQUIRY WHETHER OR NOT THE ACCUSED HAS IN FACT EXERCISED HIS PERSONAL VOLITION OR BEEN NEGLIGENT IN COMMITTING THE OFFENSE WITH WHICH HE MAY BE CHARGED. HIS ACT MAY IN A REMOTE SENSE BE SAID TO HAVE CAUSED, BROUGHT ABOUT, THE RESULT COMPLAINED OF, BUT IN REASON HE CANNOT BE HELD CRIMINALLY RESPONSIBLE, UNLESS HIS ACT WAS ACCOMPANIED EITHER BY POSITIVE VOLITION ON HIS PART, OR BY NEGLIGENCE EQUIVALENT IN LAW THERETO. IF . . . BOTH NEGLIGENCE AND VOLITION WERE ABSENT, THERE IS NO

¹STATE V. COOPER, 80 A.2D 617.

²110 S.E. 800.

BASIS FOR CRIMINAL RESPONSIBILITY. . . .

TO CONSTITUTE A CRIME THE PERSONAL VOLITION OR NEGLIGENCE OF THE ACTOR PRECEEDING THE ACT IS ESSENTIAL.

[SIMILARLY,] 'IN EVERY CRIME OR PUBLIC OFFENSE THERE MUST EXIST A UNION, OR JOINT OPERATION OF ACT AND INTENT.' BUT THIS DOES NOT MEAN THAT A POSITIVE, WILLFUL INTENT TO VIOLATE THE LAW IS AN ESSENTIAL INGREDIENT OF EVERY OFFENSE. SOMETIMES AN ACT IS EXPRESSLY PROHIBITED BY STATUTE, IN WHICH CASE THE INTENTIONAL DOING OF THE ACT, REGARDLESS OF GOOD MOTIVE OR IGNORANCE OF ITS CRIMINAL CHARACTER, CONSTITUTES THE OFFENSE DENOUNCED BY LAW.¹

THE DISTINCTION WHICH THE COURTS WISH TO DRAW HERE MAY BEST BE BROUGHT OUT BY CONSIDERING THE FOLLOWING HYPOTHETICAL CASE: AN OUT-OF-WORK PHILOSOPHER IS STANDING IN FRONT OF A BUTCHER SHOP WHEN HE SEES MRS. JONES ENTER THE STORE. SHORTLY THEREAFTER, HE OBSERVES THE BUTCHER'S HAND MOVE AND TIGHTEN ABOUT A ROAST BEEF. THE ARM NOW GOES UP AND MOVES IN THE DIRECTION OF MRS. JONES, WHO GRASPS THE ROAST, AT WHICH TIME THE BUTCHER'S FINGERS LOSE THEIR TENSION AND THE ROAST IS TRANSFERRED TO THE OUTSTRETCHED HANDS OF MRS. JONES. SHE NOW PROFFERS PAYMENT TO THE BUTCHER, WHOSE HAND MOVES IN THE DIRECTION OF THE MONEY. HIS HAND CONTRACTS ON THE SUM AND THEN MOVES TOWARD HIS POCKET. THE HAND ENTERS THE POCKET AND THEN COMES OUT AGAIN, WITHOUT THE MONEY. MRS. JONES HAS BY THIS TIME LEFT THE SHOP. FINALLY, THE MEAT SHE HAS JUST TAKEN HOME TURNS OUT TO BE ADULTERATED.

NOW CONSIDER THE FOLLOWING ALTERNATIVE ENDINGS TO THIS SCENARIO:

(1) THE BUTCHER'S WIFE NOW RUSHES UP TO THE STORE AND REMARKS TO THE PHILOSOPHER "POOR JOHN (THE BUTCHER'S NAME) HAS BEEN SLEEP-WALKING LATELY. I HAVEN'T TOLD HIM ABOUT THESE ACTIVITIES YET, BUT I REALLY MUST. THIS MORNING HE LEFT OUR HOME AND CAME HERE, BUT I'M

¹PEOPLE V. GORY, 170 P.2D 433.

QUITE SURE HE IS STILL IN A STATE OF SOMNAMBULISM."

IF THE WIFE'S STATEMENTS ARE CORRECT WE MAY TRULY SAY THAT, ALTHOUGH THE BUTCHER'S MOVEMENT, I.E., BEHAVIOUR, WAS THE CAUSE OF MRS. JONES GOING HOME WITH ADULTERATED ROAST BEEF, NO VOLUNTARY ACTION OF THE BUTCHER'S WAS SUCH A CAUSE. IN A VERY REAL SENSE, THE BUTCHER HAS NOT DONE ANYTHING THIS MORNING AND HENCE NOTHING THAT HE DID CAUSED MRS. JONES TO HAVE ADULTERATED MEAT IN HER POSSESSION. IF WE NOW OVERHEAR MRS. JONES SPEAKING EVIL WORDS ABOUT THE BUTCHER, WE MIGHT REASONABLY SAY "THE POOR BUTCHER, HE DIDN'T DO ANYTHING AND YET MRS. JONES IS STILL HOLDING HIM TO BLAME."

(2) WE HAVE GOOD EVIDENCE THAT THE BUTCHER'S MOVEMENTS WERE ALL VOLUNTARY; THAT HE KNEW IT WAS MRS. JONES IN HIS STORE; THAT HE DESIRED TO SELL HER THE ROAST BEEF. HOWEVER, THE BUTCHER DID NOT KNOW THAT THE ROAST WHICH HE DESIRED TO SELL HER WAS ADULTERATED. NOT ONLY DID HE FAIL TO KNOW THIS, BUT HIS FAILURE CAME IN SPITE OF THE UTMOST CARE IN EXAMINING ALL MEAT WHICH HE PURCHASES AND SELLS.

NOW, WE MIGHT SAY, TO CONTRAST THIS CASE WITH CASE (1), THAT THE BUTCHER IN (2) INTENTIONALLY, WILLFULLY OR PURPOSELY SOLD MEAT. WE MIGHT ALSO SAY THAT THE BUTCHER INTENTIONALLY, WILLFULLY OR PURPOSELY SOLD MEAT WHICH WAS IN FACT ADULTERATED. NOTE, HOWEVER, THAT IN ORDINARY LANGUAGE WE WOULD NOT SAY THAT THE BUTCHER INTENTIONALLY, WILLFULLY OR PURPOSELY SOLD ADULTERATED MEAT. SUCH A STATEMENT WOULD BE RESERVED TO DESCRIBE THE FOLLOWING SORT OF CASE:

(3) THE BUTCHER NOT ONLY VOLUNTARILY MOVES ABOUT IN THE STORE AND SELLS MEAT TO MRS. JONES, BUT HE ALSO KNOWS THAT THE MEAT IS ADULTERATED. IN THIS CASE, THEN, WE SAY THAT HE INTENTIONALLY, WILLFULLY OR PURPOSELY SOLD ADULTERATED MEAT, INDICATING OUR JUDGMENT THAT HE

ACTED WITH MENS REA.

NOW, IF SELLING OF ADULTERATED MEAT WERE AN OFFENSE WHICH REQUIRED MENS REA, THE BUTCHER IN CASES (1) AND (2) WOULD ESCAPE LIABILITY, WHILE THE BUTCHER IN CASE (3) WOULD NOT. THE COURTS HAVE, HOWEVER, CONDONED THE LEGISLATIVE IMPOSITION OF PENAL LIABILITY FOR THE SELLING OF ADULTERATED MEAT EVEN IN THE ABSENCE OF MENS REA. IN THIS CASE, THE BUTCHER IN (2), AS WELL AS IN (3), WOULD INCUR PENALTIES. HOWEVER, THE COURTS HAVE DENIED THAT STATUTES MAY BE ENACTED IN WHICH AN INDIVIDUAL SUCH AS THE BUTCHER IN (1) MAY INCUR LIABILITY. THEY HAVE INSISTED UPON A VOLUNTARY ACT OR OMISSION AS THE BASIS OF PENAL LIABILITY.

AS A COROLLARY OF THIS MINIMAL REQUIREMENT OF GENERAL CRIMINAL LIABILITY THE COURTS CONTINUE TO RECOGNIZE THE EXCUSES OF AUTOMATISM, INSANITY AND CAUSAL NECESSITY FOR ALL OFFENSES, INCLUDING THOSE IN WHICH MISTAKE AND IGNORANCE OF FACT AND DUE CARE HAVE BEEN ELIMINATED.

WITH RESPECT TO THE EXCUSE OF INSANITY, THE COURT IN STATE V. STRASBURG ASKED

CAN THE LEGISLATURE UNDER OUR CONSTITUTION SO CIRCUMSCRIBE INQUIRY TOUCHING THE QUESTION OF THE GUILT OF THE ACCUSED AS TO EXCLUDE ALL CONSIDERATION BY THE JURY OF HIS INSANITY AT THE TIME OF COMMITTING THE ACT? [THE COURT FOUND THAT] WHATEVER THE POWER MAY BE IN THE LEGISLATURE TO ELIMINATE THE ELEMENT OF INTENT FROM CRIMINAL LIABILITY, WE ARE OF THE OPINION THAT SUCH POWER CANNOT BE EXERCISED TO THE EXTENT OF PREVENTING ONE ACCUSED OF CRIME FROM INVOKING THE DEFENSE OF HIS INSANITY AT THE TIME OF COMMITTING THE ACT CHARGED, AND OFFERING EVIDENCE THEREOF BEFORE THE JURY.

WHILE RECOGNIZING THE ELIMINABILITY OF MENS REA BY STATUTORY ENACTMENT, THE COURT FOUND THAT THE REQUIREMENT OF AN ACTUS REUS IS FUNDAMENTAL AND NON-VIOLABLE WHERE PUNITIVE LIABILITY IS CONCERNED.

¹ 110 P. 1020 (1910).

WHILE THE GENERAL RULE (REQUIRING INTENT) IS SUBJECT TO SOME EXCEPTIONS, SEEMINGLY ENABLING THE LEGISLATIVE POWER TO ELIMINATE THE ELEMENT OF INTENT FROM CERTAIN CRIMES, AS INDICATED BY SOME OF OUR PREVIOUS HOLDINGS, IT DOES NOT LOGICALLY FOLLOW THEREFROM THAT AN INSANE PERSON CAN BE RENDERED AMENABLE TO THE CRIMINAL LAWS OF THE STATE AS LONG AS THOSE LAWS HAVE IN THEM THE ELEMENT OF PUNISHMENT . . .¹

THE COURT TOOK THE POSITION THAT "AN ACT DONE BY ME AGAINST MY WILL OR IN THE ABSENCE OF MY WILL, IS NOT MY ACT,"² AND THAT TO PUNISH AN INDIVIDUAL FOR A STATE OF AFFAIRS CAUSED BY NO ACT OF HIS WOULD BE A VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW.

WITH RESPECT TO AUTOMATISM AS AN EXCUSING CONDITION IN OFFENSES WHICH CONSTITUTE ABSOLUTE PROHIBITIONS, A MOST IMPORTANT CASE IS HILL V. BAXTER,³ IN WHICH THE DEFENDANT WAS CHARGED WITH VIOLATING A STATUTE BY DRIVING IN A DANGEROUS MANNER AND FAILING TO CONFORM TO A "HALT" SIGN. THE DEFENDANT CLAIMED THAT HE WAS UNCONSCIOUS AT THE TIME OF THE INCIDENT.

THE COURT RULED THAT THE PROHIBITION INVOLVED WAS INDEED ABSOLUTE:

THE FIRST THING TO BE REMEMBERED IS THAT THE STATUTE CONTAINS AN ABSOLUTE PROHIBITION AGAINST DRIVING DANGEROUSLY OR IGNORING "HALT" SIGNS. NO QUESTION OF MENS REA ENTERS INTO THE OFFENSE; IT IS NO ANSWER TO A CHARGE UNDER THOSE SECTIONS TO SAY "I DID NOT MEAN TO DRIVE DANGEROUSLY" OR "I DID NOT NOTICE THE 'HALT' SIGN."

THUS, WHETHER OR NOT THE INDIVIDUAL THOUGHT HIS DRIVING TO BE DANGEROUS, OR SAW THE "HALT" SIGN, OR INTENDED TO DRIVE THROUGH IT, ARE IMMATERIAL. HOWEVER, THE COURT ALSO SAID THAT THE INDIVIDUAL, TO BE GUILTY OF AN OFFENSE, HAD TO HAVE "DRIVEN" HIS CAR THROUGH THE

¹ IBID.

² IBID.

³ 42 CRIM. APP. R. 51, [1958] 1 ALL. E.R. 193.

SIGN AND IN A DANGEROUS MANNER. "ON THE FACTS OF THIS CASE, IF THE RESPONDENT WAS DRIVING AT ALL HE WAS UNQUESTIONABLY DRIVING DANGEROUSLY, AND THEREFORE THE QUESTION AT ISSUE IS WHETHER HE WAS DRIVING THE VAN."

TO THIS EXTENT, THEN, THE INDIVIDUAL'S MENTAL STATE IS RELEVANT, FOR IF HE WERE UNCONSCIOUS WE WOULD NOT SAY THAT HE WAS "DRIVING" AT ALL, I.E., THE ACT OF DRIVING INVOLVES CERTAIN VOLITIONS, INCLUDING THE VOLITION TO TURN THE WHEEL, ACTIVATE THE GAS PEDAL OR BRAKE, ETC. AN INDIVIDUAL IN A STATE OF AUTOMATISM HAS NO SUCH VOLITIONS AND IS, THEREFORE, NOT GUILTY OF THE ACT OF DRIVING AND, A FORTIORI, NOT GUILTY OF DRIVING DANGEROUSLY.

WE MAY SAY, THEN, THAT IN A CRIME WHICH WAS RECOGNIZED AS ONE OF ABSOLUTE PROHIBITION A DEFENSE OF AUTOMATISM WAS RECOGNIZED AS VALID. HOWEVER, THE REASONING HERE SEEMS TO BE DIFFERENT FROM THAT INVOLVED IN THE DISCUSSION OF INSANITY, WHERE A GENERAL PRINCIPLE THAT SOME ACT IS REQUIRED FOR EVERY OFFENSE WAS DEFENDED. IN HILL V. BAXTER IT SEEMS ONLY THAT A PARTICULAR STATUTE, BY ITS WORDING, REQUIRES SOME VOLITION ON THE PART OF THE ACCUSED, LEAVING OPEN THE QUESTION WHETHER A STATUTE SO WORDED AS TO REQUIRE ABSOLUTELY NO VOLITION IN VIOLATION THEREOF WOULD BE VALID.

WHILE I HAVE BEEN UNABLE TO FIND SUCH A CASE WITHIN THE CRIMINAL LAW WITH RESPECT TO THE EXCUSE OF AUTOMATISM, THERE IS A CASE WHICH SEEMS TO DEFEND THE VALIDITY OF SUCH LEGISLATION SO FAR AS THE EXCUSE OF CAUSAL NECESSITY IS CONCERNED. IN R. V. LARSONNEUR,¹ AS DISCUSSED BY R. M. JACKSON,²

¹97 J. P. 206 (1933).

²R. M. JACKSON, "ABSOLUTE PROHIBITION IN STATUTORY OFFENCES," CAMBRIDGE LAW JOURNAL, (1938), P. 92.

THE ACCUSED WAS CONVICTED ON INDICTMENT FOR THAT SHE ' . . . BE-
ING AN ALIEN TO WHOM LEAVE TO LAND IN THE UNITED KINGDOM HAD
BEEN REFUSED, WAS FOUND IN THE UNITED KINGDOM' CONTRARY TO ORDER
MADE UNDER THE ALIENS RESTRICTION ACTS, 1914 AND 1919. THE AC-
CUSED, A WOMAN, WAS DEPORTED FROM THE IRISH FREE STATE AND AR-
RIVED AT HOLYHEAD IN POLICE CUSTODY AND WAS LODGED IN A POLICE
CELL AT HOLYHEAD. SHE HAD NO PERMISSION TO LAND, AND SHE WAS
'FOUND (IN A POLICE CELL) IN THE UNITED KINGDOM' SO SHE WAS
CONVICTED, THE JURY EXPRESSING THEIR OPINION BY A VERDICT OF
"GUILTY THROUGH CIRCUMSTANCES BEYOND HER CONTROL." THE CON-
VICTION WAS UPHOLD BY THE COURT OF CRIMINAL APPEAL ON THE GROUND
THAT SHE SATISFIED ALL THE REQUIREMENTS OF THE OFFENCE. IT IS
A NICE DISTINCTION; IF BEING IN A PLACE IS ABSOLUTELY PROHIBITED
BY STATUTE, AND YOU ARE TAKEN TO THAT PLACE BY PHYSICAL COMPUL-
SION, CERTAINLY YOU DID NOT GO THERE (FOR IT WAS NOT YOUR ACT),
BUT IF YOU ARE 'FOUND' THERE IT IS NO GOOD SAYING THAT YOU DID
NOT ARRIVE THERE.

THE CONCLUSION TO BE DRAWN IS THAT IN STATUTORY OFFENSES NOTHING
MORE, AND NOTHING LESS, IS REQUIRED THAN THAT THE STATUTE SHOULD
BE CAREFULLY READ AND THE RULES OF CONSTRUCTION PROPERLY APPLIED
IN EACH CASE.

JACKSON'S CONCLUSION, AND THE APPARENT POSITION OF THE COURT,
CONTRADICTS THE DOCTRINE EXPRESSED IN STRASBURG: IT AFFIRMS THE RIGHT
OF A LEGISLATIVE BODY TO IMPOSE LIABILITY IN THE ABSENCE OF ANY IM-
PUTABLE ACT.

THIS POSITION, HOWEVER, MAY BE SEEN AS A DEPARTURE FROM, RATHER
THAN AS INDICATIVE OF, THE RULE OF LAW. THE MODEL PENAL CODE, FOR EX-
AMPLE, RECOGNIZES THAT MENS REA MAY BE ELIMINATED AS A REQUIREMENT FOR
PENAL LIABILITY,¹ BUT MAKES NO SUCH ALLOWANCE WITH RESPECT TO AN ACTUS
REUS: "A PERSON IS NOT GUILTY OF AN OFFENSE UNLESS HIS LIABILITY IS
BASED ON CONDUCT WHICH INCLUDES A VOLUNTARY ACT OR THE OMISSION TO
PERFORM AN ACT WHICH IT WAS PHYSICALLY POSSIBLE TO PERFORM."²

ALSO, SINCE MOST STRICT LIABILITY STATUTES ARE ACTUALLY PHRASED
IN TERMS WHICH IMPORT SOME VOLUNTARY ACTION, E.G., "SELLING," "DRIVING,"

¹PROPOSED FINAL DRAFT No. 1 (1961), SEC. 2.05, PP. 31-32.

²IBID., SEC. 2.01, P. 24.

AND "OPERATING," WE MAY WITH CONFIDENCE CLAIM THAT THE DEFENSES OF CAUSAL NECESSITY AND AUTOMATISM, AS WELL AS INSANITY, WILL IN FACT EXCULPATE FROM LIABILITY EVEN UNDER THE VAST MAJORITY OF STRICT LIABILITY STATUTES. SUCH EXCUSES NEGATIVE THE CLAIM THAT THE PROHIBITED ACTIVITIES WERE ENGAGED IN BY THE DEFENDANT.

WITH REGARD, FINALLY, TO THE EXCUSES OF COERCION, NECESSITY OF AVOIDING GREATER EVIL, AND INFANCY THERE IS NO RELEVANT CASE LAW SO FAR TO BE FOUND, I.E., THERE HAVE BEEN NO CASES IN WHICH THE OFFENSE CHARGED WAS ONE OF ABSOLUTE PROHIBITION AND THE DEFENDANT WAS SHOWN TO HAVE SATISFIED ONE OF THESE EXCUSING CONDITIONS. WE MAY, HOWEVER, CONJECTURE ON THE COURSE WHICH THE COURT WOULD CHART WHEN FACED WITH SUCH A SITUATION.

WE HAVE ALREADY SEEN THAT THE DEFENSES OF COERCION AND NECESSITY MAY BE ELIMINATED FROM CERTAIN OFFENSES BY LEGISLATIVE PROVISION. IT SEEMS REASONABLE, THEN, THAT WHERE A LEGISLATIVE INTENT TO DISPENSE WITH THOSE EXCUSES CLEARLY APPEARS IN A STATUTE OF STRICT PROHIBITION IT WILL BE GIVEN EFFECT BY THE COURTS. SUCH EXCUSES DO NOT INDICATE A LACK OF AN ACTUS REUS BUT RATHER A LACK OF MENS REA ACCOMPANYING AN ACT. SINCE THE COURTS HAVE EXPRESSED THE POSITION THAT THE LATTER MAY BE ELIMINATED BY THE LEGISLATURE THEY MUST, IF THEY ARE TO BE CONSISTENT, RECOGNIZE THE ELIMINABILITY OF THESE EXCUSES AS WELL.

WITH RESPECT TO THE EXCUSE OF INFANCY THE RATIONALE, IT WILL BE RECALLED, IS THAT AN INFANT CANNOT BE INDICTED FOR AN OFFENSE BECAUSE OF THE IRREBUTTABLE PRESUMPTION THAT HE IS INCAPABLE OF MENS REA. HOWEVER, IT HAS ALREADY BEEN ADMITTED THAT FOR STRICT LIABILITY OFFENSES NO SUCH CULPABILITY IS REQUIRED. A CONSISTENT COURT OUGHT, THEN, BE WILLING TO ELIMINATE THIS EXCUSE WHERE ABSOLUTE PROHIBITIONS ARE CON-

CERNED. IT MIGHT BE ARGUED, THOUGH, THAT SUCH CHILDREN ARE INCAPABLE OF THE DEGREE OF INTENT REQUIRED TO IMPUTE CERTAIN SORTS OF BEHAVIOUR TO THEM, I.E., IT MIGHT BE CLAIMED THAT INFANTS CANNOT TRULY BE SAID TO "SELL," "OPERATE," "DRIVE," ETC. IF SUCH A CLAIM WERE ACCEPTED BY THE COURT, THEN THE EXCUSE OF INFANCY MIGHT WELL BE RECOGNIZED.

BEARING IN MIND THESE TENTATIVE CONCLUSIONS, WE MAY SAY THAT THE CRITERION WHICH THE COURTS HAVE OFFERED FOR DISTINGUISHING THOSE EXCUSES WHICH MAY BE REMOVED FROM THE CRIMINAL LAW FROM THOSE WHICH MAY NOT, IS WHETHER THE PARTICULAR EXCUSE NEGATIVES THE CLAIM OF AN ACTUS REUS. IF IT DOES, THE EXCUSE MAY NOT BE ELIMINATED; IF IT DOES NOT, THE EXCUSE MAY BE REMOVED.

THE COURTS HAVE NOT ONLY CLAIMED THAT LIABILITY WITHOUT FAULT MUST BE RESTRICTED IN THIS WAY; THEY HAVE ALSO GENERALLY CLAIMED THAT EVEN SUCH LIMITED STRICT LIABILITY MAY BE IMPOSED ONLY IN A CERTAIN CLASS OF OFFENSES--THAT CLASS MADE UP OF CRIMES "MALA PROHIBITA," AS OPPOSED TO CRIMES "MALA IN SE." THE DISTINCTION IS AS FOLLOWS:

A CRIME TO WHICH WRONG IS IMPUTED ONLY BECAUSE LAWMAKING BODIES HAVE PLACED THEM IN A FORBIDDEN CATEGORY, ARE "MALA PROHIBITA," WHILE ACTS THAT ARE INHERENTLY WICKED ARE "MALA IN SE," IN WHICH CLASS ARE ROBBERY, ARSON, MURDER, MANSLAUGHTER, ASSAULT, AND RAPE.¹

CRIMES HAVE BEEN DIVIDED ACCORDING TO THEIR NATURE INTO CRIMES MALA IN SE AND CRIMES MALA PROHIBITA; THE FORMER CLASS COMPRISE THOSE ACTS WHICH ARE IMMORAL OR WRONG IN THEMSELVES, OR NATURALLY EVIL.²

[AS REGARDS THE LATTER,] THIS CLASS IS MADE UP OF A VAST NUMBER OF ACTS WHICH WOULD NOT BE WRONG WERE THEY NOT PROHIBITED BY STATUTE. AN OFFENSE "MALUM PROHIBITUM" IS NOT NATURALLY AN EVIL, BUT BECOMES SO IN CONSEQUENCE OF ITS BEING FORBIDDEN.³

¹HILDRETH V. STATE, 223 S.W.2D 757, 215 ARK. 808.

²22 C.J.S. SEC. 8.

³PEOPLE V. BOXER, 24 N.Y.S. 2D 630.

THE COURTS, HAVING DIVIDED ACTIONS INTO THOSE WHICH ARE WRONG INDEPENDENTLY OF THEIR PROHIBITION IN POSITIVE LAW, AND THOSE WHICH ARE NOT, HAVE THEN GONE ON TO CLAIM THAT STRICT LIABILITY, OF THE LIMITED TYPE DISCUSSED, MAY BE APPLIED TO THE LATTER CLASS, BUT NOT TO THE FORMER.

AT COMMON LAW, SCIENTER WAS AN ELEMENT OF EVERY CRIME. WHEN THE COMMON LAW WAS CODIFIED INTO THE CRIMINAL STATUTES, THERE WAS A MODIFICATION OF THE COMMON-LAW RULE RELATIVE TO THE ELEMENT OF INTENT, NAMELY, IN THOSE CRIMINAL OFFENSES REGARDED AS ACTS MALA PROHIBITA SCIENTER IS NOT AN ELEMENT, WHILE IN THOSE OFFENSES DESIGNATED AS ACTS MALA IN SE, INTENT IS AN ELEMENT.¹

WITH RESPECT TO INTENT AS CONSTITUTING AN ELEMENT OF AN OFFENSE, THERE IS A WELL-RECOGNIZED DISTINCTION BETWEEN STATUTES DENOUNCING AS CRIMES ACTS MALA IN SE AND STATUTES DENOUNCING AS CRIMES ACTS MALA PROHIBITA. IN THE FORMER, GENERALLY SPEAKING, INTENT IS A NECESSARY ELEMENT, WHILE IN THE LATTER IT IS NOT SO.²

AT COMMON LAW A CRIME WAS AN OFFENSE MALA IN SE, AND SPECIFIC INTENT TO DO THE PRECISE INJURY INVOLVED WAS A REQUISITE OF PROOF. CRIMES MALA PROHIBITA, WHICH STATUTORY REGULATIONS CREATE, HAVE REFERENCE TO THE ACT ALONE AND ITS CONSCIOUS, AS DISTINGUISHED FROM ITS INADVERTENT, PERFORMANCE.³

THE LAW ON THIS SUBJECT SEEMS TO BE THAT AN ACT MALUM PROHIBITUM IS NOT EXCUSED BY IGNORANCE OR A MISTAKE OF FACT WHEN A SPECIFIC ACT IS MADE BY LAW INDICTABLE, IRRESPECTIVE OF THE DEFENDANTS MOTIVE OR INTENT . . . THE GENERAL RULE THAT THE CRIMINAL INTENTION IS THE ESSENCE OF CRIME DOES NOT APPLY TO SUCH PROHIBITED ACTS.⁴

CERTAIN COURTS, HOWEVER, HAVE DENIED THAT THE MALA IN SE-MALA PROHIBITA DISTINCTION FURNISHES A JUSTIFIABLE CRITERION FOR DISTINGUISHING OFFENSES WHICH MAY BE MADE SUBJECT TO STRICT LIABILITY FROM THOSE WHICH MAY NOT; THESE COURTS HAVE GONE ON TO OFFER THE FOLLOWING ALTERNATIVE CRITERION OF DIFFERENTIATION:

¹CITY OF SEATTLE V. GORDON, 342 P.2D 604.

²STATE V. LINDBERG, 125 WASH. 51, 215 P. 41 (1923).

³PEOPLE V. ANDERSON, 205 N.Y.S. 675.

⁴PEOPLE V. WERNER, 174 N.Y. 132, 66 N.E. 667.

WHERE THE OFFENSES PROHIBITED AND MADE PUNISHABLE ARE CAPABLE OF INFLECTING WIDESPREAD INJURY, AND WHERE THE REQUIREMENT OF PROOF OF THE OFFENDER'S GUILTY KNOWLEDGE AND WRONGFUL INTENT WOULD RENDER ENFORCEMENT OF THE PROHIBITION DIFFICULT IF NOT IMPOSSIBLE (I.E., IN EFFECT TEND TO NULLIFY THE STATUTE) THE LEGISLATIVE INTENT TO DISPENSE WITH MENS REA AS AN ELEMENT OF THE OFFENSE HAS JUSTIFIABLE BASIS.¹

THESE COURTS HAVE NOT ONLY URGED THAT STRICT LIABILITY OUGHT TO BE RESTRICTED TO OFFENSES WITH POTENTIAL FOR WIDESPREAD INJURY, AND WHERE REQUIRING PROOF OF MENS REA WOULD GREATLY DECREASE THE DETERRENT, REFORMATIVE AND INCARCERATIVE EFFECTS OF SUCH STATUTES, BUT THEY HAVE GONE ON TO ARGUE EXPLICITLY THAT WHILE SUCH STATUTES MAY INDEED HARM CERTAIN INNOCENTS, THE GREAT MAJORITY OF INDIVIDUAL OFFENDERS WILL INDEED BE GUILTY OF FAULT WHICH WOULD, HOWEVER, BE UNPROVEABLE. THIS POINT IS CLEARLY MADE IN TENEMENT HOUSE DEPARTMENT V. McDEVITT,² WHERE THE PLAINTIFF WAS ACCUSED OF VIOLATING A STATUTE WHICH PROVIDED THAT "NO TENEMENT HOUSE OR ANY PART THEREOF . . . SHALL BE USED FOR THE PURPOSE OF PROSTITUTION OR ASSIGNATION OF ANY DESCRIPTION." IN FACT, THE HOUSE HAD BEEN USED FOR SUCH ILLEGAL PURPOSES ON ONLY A SINGLE DAY. CARDOZO, J. WROTE:

WE HOLD, THEREFORE, THAT AN OWNER IS NOT LIABLE FOR A PENALTY BECAUSE OF A SINGLE ACT OF VICE, UNDISCOVERED AND UNDISCOVERABLE EITHER BY HIM OR BY HIS AGENT. THE PENALTY IS IMPOSED WHERE THE BUILDING OR SOME PART OF IT HAS BEEN KEPT OR MAINTAINED BY THE OCCUPANT FOR THE PURPOSE OF PROSTITUTION. IF, HOWEVER, THERE HAS BEEN A 'USE' FOR PROSTITUTION IN THAT SENSE, WE THINK IT IS NOT A DEFENSE THAT THE USE WAS UNKNOWN TO THE OWNER. THE STATUTE DOES NOT MAKE HIS LIABILITY DEPENDENT UPON KNOWLEDGE OR EVEN UPON NEGLIGENCE. IT MAKES HIS LIABILITY DEPENDENT UPON THE PROHIBITED USE. IF USE IS INTERPRETED TO MEAN, NOT AN ISOLATED ACT, BUT A PRACTICE OR RELATION, THE STATUTE, WE THINK, CHARGES THE OWNER WITH THE DUTY TO INFORM HIMSELF OF THE CONDITIONS PREVAILING IN HIS BUILDING. IN THE LONG RUN, AND LOOKING, AS LEGISLATION MUST, TO

¹UNITED STATES OF AMERICA V. SAMUEL GREENBAUM, APPT., 138 F.2d 437.

²215 N.Y. 160, 109 N.E. 88 (1915).

THE AVERAGE RESULTS, THE LAW, AS THUS CONSTRUED, IS NOT LIKELY TO WORK INJUSTICE. IF THE OCCUPANT OF AN APARTMENT HAS USED IT FOR INDISCRIMINATE INTERCOURSE WITH MEN, HAS USED IT IN THE SENSE THAT SHE HAS KEPT OR MAINTAINED IT FOR THAT PURPOSE . . . THE DILIGENT OWNER WILL SELDOM BE BLIND TO THE OFFENSE. LOOKING, THEN TO THE AVERAGE RESULTS, THE LEGISLATURE HAS SAID THAT THE OWNER MUST PREVENT AT HIS PERIL A VICIOUS USE WHICH CAN RARELY BE CONTINUED WITHOUT HIS FAULT. IT RULES OUT INQUIRY INTO HIS EXCUSES IN THE PARTICULAR INSTANCE, BECAUSE SUCH EXCUSES, IF ACCEPTED, WOULD TEND TO NULLIFY THE LAW. IT FRAMES ITS RULES TO MEET THE NECESSITIES OF THE AVERAGE, RATHER THAN THE EXCEPTIONAL CASE, AND ADJUSTS ITS PENALTIES IN CORRESPONDENCE WITH THE COMMON EXPERIENCE OF MANKIND. (EMPHASIS ADDED.)

SOME WRITERS, WHILE ARGUING THAT ABSOLUTE LIABILITY IS NECESSARY FOR THE PROTECTION OF SOCIETY GENERALLY IN CERTAIN OFFENSES WHERE REQUIRING PROOF OF FAULT WOULD NULLIFY THE PURPOSE OF THE STATUTE HAVE INSISTED THAT SUCH LIABILITY IS ONLY JUSTIFIABLE WHERE THE POSSIBLE PENALTY IS A SLIGHT FINE, RATHER THAN A PRISON SENTENCE OR SEVERE FINE. WHERE THESE LATTER ARE IMPOSED, FAULT MUST BE PROVEN.

IF THIS (THE PENALTY) BE SERIOUS, PARTICULARLY IF THE OFFENSE BE PUNISHABLE BY IMPRISONMENT, THE INDIVIDUAL INTEREST OF THE DEFENDANT WEIGHS TOO HEAVILY TO ALLOW CONVICTION WITHOUT PROOF OF A GUILTY MIND. TO SUBJECT DEFENDANTS ENTIRELY FREE FROM MORAL BLAMEWORTHINESS TO THE POSSIBILITY OF PRISON SENTENCES IS REVOLTING TO THE COMMUNITY SENSE OF JUSTICE; AND NO LAW WHICH VIOLATES THIS FUNDAMENTAL INSTINCT CAN LONG ENDURE. CRIMES PUNISHABLE WITH PRISON SENTENCES, THEREFORE, ORDINARILY REQUIRE PROOF OF A GUILTY INTENT.¹

WE HAVE, THEN, THREE PROPOSED ALTERNATIVE TESTS FOR DETERMINING WHICH OFFENSES MAY BE MADE PUNISHABLE WITHOUT PROOF OF MENS REA ON THE PART OF THE OFFENDER: 1) IS THE ACTION MALUM PROHIBITUM, AS OPPOSED TO MALUM IN SE? 2) IS THE OFFENSE OF SUCH A NATURE THAT REQUIRING PROOF OF MENS REA WILL TEND TO "NULLIFY" THE RELEVANT STATUTE, WHICH WHEN ENFORCED GENERALLY PENALIZES INDIVIDUALS WHO WERE IN FACT AT FAULT AND WHICH PROTECTS THE PUBLIC FROM POTENTIALLY SERIOUS HARM? 3) IS THE

¹SAYRE, "PUBLIC WELFARE OFFENSES," P. 72.

PENALTY FOR THE OFFENSE NO GREATER THAN A SMALL FINE?

IF THE ANSWER TO ANY QUESTION IS AFFIRMATIVE, THEN PROPONENTS OF THAT TEST FEEL THAT THE IMPOSITION OF STRICT LIABILITY IS JUSTIFIABLE, OTHERWISE NOT.

TORT LAW

WITHIN THE LAW OF TORTS, INDIVIDUALS WHO ENGAGE IN CERTAIN SPECIFIED SORTS OF ACTIVITIES WILL BE HELD LIABLE FOR CERTAIN CONSEQUENCES OF THOSE ACTIVITIES EVEN THOUGH THEIR CONDUCT OF THE ACTIVITY WAS WITHOUT FAULT. WHILE THE ACTIVITIES FOR WHICH SUCH STRICT LIABILITY IS IMPOSED VARY FROM JURISDICTION TO JURISDICTION, ALONG WITH THE LEGAL PRECEDENTS CITED FOR THE PRACTICE, THE FOLLOWING ACTIVITIES WILL RENDER AN INDIVIDUAL SO LIABLE IN MANY JURISDICTIONS: 1) COLLECTING OR BRINGING UPON ONE'S LAND SUBSTANCES WHICH ARE NOT NATURALLY FOUND ON THE LAND AND WHICH, IF THEY SHOULD ESCAPE, ARE LIKELY TO CAUSE HARM; 2) ENGAGING IN ACTIVITIES WHICH ARE "ULTRAHAZARDOUS"; 3) KEEPING DANGEROUS ANIMALS; 4) MISREPRESENTING FACTS CONCERNING SOLD GOODS; 5) SELLING A PRODUCT IN A DEFECTIVE CONDITION UNREASONABLY DANGEROUS TO THE USER OR CONSUMER.

RYLANDS V. FLETCHER

LIABILITY FOR THE FIRST CLASS OF OFFENSES IS USUALLY BASED ON THE PRECEDENT SET IN THE CASE OF RYLANDS V. FLETCHER.¹ IN THAT CASE THE DEFENDANTS, OWNERS OF A MILL, ENGAGED AN ENGINEER AND CONTRACTORS TO CONSTRUCT A RESERVOIR ON THE DEFENDANTS' LAND. ON LAND CLOSE TO THAT OF THE DEFENDANTS, THE PLAINTIFF WAS OPERATING A COAL MINE. THE

¹ IN THE EXCHEQUER, 1865. 3 H. & C. 774; IN THE EXCHEQUER CHAMBER, 1866. L.R. 1 Ex. 265; IN THE HOUSE OF LORDS, 1868. L.R. 3 H.L. 330.

SITE WHICH WAS CHOSEN FOR THE RESERVOIR BY THE ENGINEERS, WITHOUT ANY PERSONAL FAULT ON THE PART OF THE DEFENDANT, WAS DIRECTLY OVER SOME OLD, ABANDONED AND FILLED MINE WORKINGS. WHILE EXCAVATING THE RESERVOIR BED THE CONTRACTORS CAME UPON SOME SHAFTS FROM THESE WORKINGS BUT, SINCE THEY WERE FILLED WITH SOIL OF THE SAME SORT WHICH COMPOSED THE SURROUNDING GROUND, THE CONTRACTORS DID NOT SUSPECT THAT THEY WERE MINE SHAFTS. THE PLAINTIFF, IN DIGGING HIS MINE, HAD BROUGHT HIS TUNNELS UP TO THE ABANDONED WORKINGS. WHEN THE RESERVOIR WAS FINISHED AND PARTLY FILLED ONE OF THE SHAFTS GAVE WAY BENEATH IT. THE RESERVOIR BURST DOWNWARD, SENDING WATER INTO THE ABANDONED MINE SHAFTS AND THENCE THROUGH THE WORKINGS INTO THE TUNNELS OF THE DEFENDANTS MINE, FLOODING IT. AN ARBITRATOR FOUND THAT WHILE THE DEFENDANTS WERE GUILTY OF NO PERSONAL NEGLIGENCE IN THE CASE, THE ENGINEERS AND CONTRACTORS HAD FAILED TO TAKE PROPER CARE TO PROVIDE FOR THE SUFFICIENCY OF THE RESERVOIR TO BEAR THE WEIGHT WHICH IT WAS INTENDED TO SUPPORT WHEN IN USE. THE ISSUE TO BE DECIDED BY THE COURT WAS WHETHER, ON THESE FACTS, THE PLAINTIFF WAS ENTITLED TO RECOVER DAMAGES FROM THE DEFENDANT.

THE THREE JUSTICES OF THE EXCHEQUER FOUND THAT IT HAD NOT BEEN SHOWN THAT THIS WAS A SITUATION IN WHICH THE LANDOWNER WAS RESPONSIBLE FOR THE ACTIONS OF AN INDEPENDENT CONTRACTOR. THEY FOUND NOTHING UNUSUAL, HOWEVER, IN THE NOTION THAT LIABILITY MIGHT ACCRUE TO SUCH A LANDOWNER IN THE ABSENCE OF ANY PERSONAL FAULT. THE TWO FUNDAMENTAL AREAS IN WHICH SUCH LIABILITY WAS IMPOSED WERE NUISANCE AND TRESPASS TO LAND.

WITH RESPECT TO THE FORMER, IT WAS A CLEARLY ESTABLISHED PRINCIPLE OF LAW THAT ANY INDIVIDUAL WHO CREATED OR MAINTAINED UPON HIS LAND A CONDITION WHICH, WHILE IT EXISTED, CAUSED A CONTINUOUS INJURY TO AN-

OTHER'S PROPERTY, OR TO HIS SENSES OR ENJOYMENT OF HIS PROPERTY, WAS LIABLE TO THAT OWNER FOR THOSE INJURIES WITHOUT PROOF THAT THE OFFENDING CONDITIONS WERE THE RESULT OF HIS FAULT.

THE SECOND SORT OF ABSOLUTE LIABILITY TO LANDOWNERS CAME IN THE FORM OF AN ACTION IN TRESPASS TO LAND. ANY INDIVIDUAL WHO CAUSED BY HIS USE OF HIS LAND AN IMMEDIATE PHYSICAL ENTRY UPON THE LAND OF ANOTHER WAS LIABLE TO THAT PERSON FOR DAMAGES THUS CAUSED; HE WAS ALSO LIABLE TO PAY DAMAGES THOUGH NO PHYSICAL HARM AT ALL OCCURRED FROM THE INVASION. SUCH AN INDIVIDUAL WAS LIABLE WITHOUT PROOF OF ANY FAULT ON HIS PART IN CAUSING THE INVASION.

WHILE RECOGNIZING SUCH AREAS OF STRICT LIABILITY, THE COURT RULED 2 TO 1 THAT IN THE INSTANT CASE NO SUCH LIABILITY WAS IMPOSED, THIS BEING NEITHER A CASE OF TRESPASS NOR OF NUISANCE; NOT THE FORMER BECAUSE THE DAMAGE HAD OCCURRED CONSEQUENTIALLY AND NOT DIRECTLY OR IMMEDIATELY, AND NOT THE LATTER BECAUSE THE HARM CAUSED WAS NOT CONTINUOUS. BARRING THESE ACTIONS, THE COURT RULED THAT "THERE MUST BE NEGLIGENCE ON THE PART OF THE DEFENDANT TO MAKE HIM RESPONSIBLE."

THE DECISION WAS APPEALED TO THE EXCHEQUER CHAMBER. THERE, BLACKBURN, J. AGREED WITH THE MAJORITY IN THE EXCHEQUER THAT THE CASE WAS NEITHER ONE OF TRESPASS NOR NUISANCE. HE ALSO FOUND IT UNNECESSARY TO CONSIDER THE QUESTION WHETHER THE DEFENDANTS WERE RESPONSIBLE FOR THE ACTIONS OF THE CONTRACTORS AND ENGINEERS. RATHER, HE DECIDED THE CASE ON WHAT HE INDICATED TO BE AN ESTABLISHED RULE OF LAW:

WE THINK THAT THE TRUE RULE OF LAW IS THAT THE PERSON WHO FOR HIS OWN PURPOSES BRINGS ON HIS LAND AND COLLECTS AND KEEPS THERE ANYTHING LIKELY TO DO MISCHIEF IF IT ESCAPES, MUST KEEP IT IN AT HIS PERIL, AND IF HE DOES NOT DO SO, IS PRIMA FACIE ANSWERABLE FOR ALL THE DAMAGE WHICH IS THE NATURAL CONSEQUENCE OF ITS ESCAPE. . . . IT SEEMS BUT REASONABLE AND JUST THAT THE NEIGHBOR, WHO HAS BROUGHT SOMETHING ON HIS OWN PROPERTY WHICH WAS NOT NATURALLY THERE, HARM-

LESS TO OTHERS SO LONG AS IT IS CONFINED TO HIS OWN PROPERTY, BUT WHICH HE KNOWS TO BE MISCHIEVOUS IF IT GETS ON HIS NEIGHBOR'S, SHOULD BE OBLIGED TO MAKE GOOD THE DAMAGE WHICH ENSUES IF HE DOES NOT SUCCEED IN CONFINING IT TO HIS OWN PROPERTY. BUT FOR HIS ACT IN BRINGING IT THERE NO MISCHIEF COULD HAVE ACCRUED, AND IT SEEMS BUT JUST THAT HE SHOULD AT HIS PERIL KEEP IT THERE, SO THAT NO MISCHIEF MAY ACCRUE, OR ANSWER FOR THE NATURAL AND ANTICIPATED CONSEQUENCES. AND UPON AUTHORITY, THIS WE THINK IS ESTABLISHED TO BE THE LAW, WHETHER THE THINGS SO BROUGHT BE BEASTS, OR WATER, OR FILTH, OR STENCHES.

THE DEFENDANTS BROUGHT ERROR TO THE HOUSE OF LORDS, WHERE THE LORD CHANCELLOR, LORD CAIRNS, UPHELD THE FINDINGS OF THE EXCHEQUER CHAMBER, SAYING:

. . . THE PRINCIPLES ON WHICH THIS CASE MUST BE DETERMINED APPEAR TO ME TO BE EXTREMELY SIMPLE. THE DEFENDANTS, TREATING THEM AS THE OWNER OR OCCUPIERS OF THE CLOSE ON WHICH THE RESERVOIR WAS CONSTRUCTED, MIGHT LAWFULLY HAVE USED THAT CLOSE FOR ANY PURPOSE FOR WHICH IT MIGHT IN THE ORDINARY COURSE OF THE ENJOYMENT OF LAND BE USED; AND IF, IN WHAT I MAY TERM THE NATURAL USER OF THAT LAND, THERE HAD BEEN ANY ACCUMULATION OF WATER, EITHER ON THE SURFACE OR UNDERGROUND, AND IF, BY THE OPERATION OF THE LAWS OF NATURE, THAT ACCUMULATION OF WATER HAD PASSED OFF INTO THE CLOSE OCCUPIED BY THE PLAINTIFF, THE PLAINTIFF COULD NOT HAVE COMPLAINED THAT THAT RESULT HAD TAKEN PLACE. . . .

.
ON THE OTHER HAND, IF THE DEFENDANTS, NOT STOPPING AT THE NATURAL USE OF THEIR CLOSE, HAD DESIRED TO USE IT FOR ANY PURPOSE WHICH I MAY TERM A NON-NATURAL USE, FOR THE PURPOSE OF INTRODUCING INTO THE CLOSE THAT WHICH IN ITS NATURAL CONDITION WAS NOT IN OR UPON IT, FOR THE PURPOSE OF INTRODUCING WATER EITHER ABOVE OR BELOW GROUND IN QUANTITIES AND IN A MANNER NOT THE RESULT OF ANY WORK OR OPERATION ON OR UNDER THE LAND; AND IF IN CONSEQUENCE OF THEIR DOING SO, OR IN CONSEQUENCE OF ANY IMPERFECTION IN THE MODE OF THEIR DOING SO, THE WATER CAME TO ESCAPE AND TO PASS OFF INTO THE CLOSE OF THE PLAINTIFF, THEN IT APPEARS TO ME THAT THAT WHICH THE DEFENDANTS WERE DOING THEY WERE DOING AT THEIR OWN PERIL; AND, IF IN THE COURSE OF THEIR DOING IT THE EVIL AROSE TO WHICH I HAVE REFERRED . . . THE DEFENDANTS WOULD BE LIABLE.

YOU WILL NOTICE THAT WHILE LORD CAIRNS LIMITED THE IMPOSITION OF LIABILITY WITHOUT FAULT TO "NON-NATURAL" USES OF LAND, BLACKBURN'S JUDGMENT EXTENDED SUCH LIABILITY TO "ANYTHING LIKELY TO DO MISCHIEF," INCLUDING BOTH "NATURAL" AND "NON-NATURAL" USES OF LAND. IN FACT, ALTHOUGH LORD CRANWORTH IN HIS CONCURRING OPINION AFFIRMED BLACKBURN'S

STRONGER GROUND OF LIABILITY, THOSE COURTS WHICH HAVE ACCEPTED THE DOCTRINE OF RYLANDS V. FLETCHER AT ALL HAVE ACCEPTED IT IN THE FORM EXPRESSED BY LORD CAIRNS AND THUS LIMITED ITS APPLICATION TO NON-NATURAL USES.

NATURAL USES OF LAND ARE THOSE WHICH ARE USUAL OR CUSTOMARY IN A PARTICULAR LOCALE. THEY ARE USES "TO WHICH BY FAR THE GREATEST PART OF ALL LAND COULD BE PUT, AND FOR WHICH ALL MEN REGARDED LAND AS AVAILABLE."¹ "LAND AS SUCH WAS MARKED OUT BY TRADITION AND IMMEMORIAL USAGE AS PRIMARILY FITTED FOR HOMES AND FARMING, LAND CONTAINING MINERALS WAS EQUALLY MARKED OUT BY THE MOST PRESSING NEEDS OF PRIMITIVE SOCIETY AS APPROPRIATE FOR MINING."² HOWEVER, NOT ONLY MUST LAND BE USED FOR SUCH NATURAL PURPOSES, BUT ALSO THE METHODS OF SUCH USE MUST BE THE METHODS COMMONLY OR ORDINARILY USED, IN ORDER FOR THE USE TO BE TERMED "NATURAL." IF, FOR EXAMPLE, IN THE COURSE OF MINING AN AREA RICH IN MINERALS I EMPLOY A NEW METHOD OF MINING, MY ACTIVITY MAY RENDER ME STRICTLY LIABLE; IT IS A NON-NATURAL USE OF LAND.³ THE GREAT EMPHASIS, THEN, IS PUT UPON COMMON, ORDINARY, OR TRADITIONAL USES AND METHODS OF USING LAND, AS OPPOSED TO THOSE WHICH ARE EXTRAORDINARY, UNUSUAL, UNCOMMON OR EXCEPTIONAL. "THERE MUST BE 'SOME SPECIAL USE BRINGING WITH IT INCREASED DANGER TO OTHERS, AND MUST NOT MERELY BE THE ORDINARY USE OF LAND OR SUCH AS IS PROPER FOR THE GENERAL BENEFIT OF THE COMMUNITY.' THE 'REASONABLE USE OF PROPERTY IN THE WAY MOST BENEFICIAL TO THE COM-

¹FRANCIS H. BOHLEN, "THE RULE IN RYLANDS V. FLETCHER," UNIVERSITY OF PENNSYLVANIA LAW REVIEW, LIX, No. 7 (1911), p. 321.

²IBID.

³IBID., p. 322.

MUNITY' IS NOT WITHIN THE RULE."¹

ULTRAHAZARDOUS ACTIVITIES

RYLANDS V. FLETCHER, THOUGH ACCEPTED IN ENGLISH COURTS, HAS BEEN WIDELY REJECTED IN AMERICAN JURISDICTIONS.² HOWEVER, MANY OF THE SAME JURISDICTIONS WHICH REJECT THIS GENERAL DOCTRINE NONETHELESS IMPOSE LIABILITY WITHOUT FAULT ON MANY OF THE SAME ENTERPRISES COVERED BY THAT RULE, ON THE GROUNDS THAT THEY ARE ULTRAHAZARDOUS ACTIVITIES, AND

. . . ONE WHO CARRIES ON AN ULTRAHAZARDOUS ACTIVITY IS LIABLE TO ANOTHER WHOSE PERSON, LAND OR CHATTELS THE ACTOR SHOULD RECOGNIZE AS LIKELY TO BE HARMED BY THE UNPREVENTABLE MISCARRIAGE OF THE ACTIVITY FOR HARM RESULTING THERETO FROM THAT WHICH MAKES THE ACTIVITY ULTRAHAZARDOUS, ALTHOUGH THE UTMOST CARE IS EXERCISED TO PREVENT THE HARM.³

AN ACTIVITY IS ULTRAHAZARDOUS IF IT

- (A) NECESSARILY INVOLVES A RISK OF SERIOUS HARM TO THE PERSON, LAND OR CHATTELS OF OTHERS WHICH CANNOT BE ELIMINATED BY THE EXERCISE OF THE UTMOST CARE, AND
- (B) IT IS NOT A MATTER OF COMMON USAGE.⁴

INCLUDED AMONG SUCH ACTIVITIES ARE THE USE AND STORAGE OF EXPLOSIVES,⁵ DRILLING FOR OIL,⁶ AND THE USE OF CERTAIN GASES FOR EXTERMINATING

¹WILLIAM L. PROSSER, "THE PRINCIPLE OF RYLANDS V. FLETCHER," IN SELECTED TOPICS ON THE LAW OF TORTS (MICHIGAN: UNIVERSITY OF MICHIGAN LAW SCHOOL, 1953), P. 142.

²" . . . THE GREAT MAJORITY OF COURTS IN THE UNITED STATES HAVE REJECTED RYLANDS V. FLETCHER IN SO FAR AS IT APPLIES TO ACTIVITIES NOT INHERENTLY DANGEROUS. SEE FOR EXAMPLE SHELL V. TOWN OF EVARTS (1944) 296 KY. 602, 178 S.W. 2D 32; ANDERSON V. RUCKER BROS. (1919) 107 WASH. 595, 183 P. 70; FLEMING V. LOCKWOOD (1907) 36 MONT. 383, 92 P. 962. . ." YOUNG B. SMITH AND WILLIAM L. PROSSER, CASES AND MATERIALS ON TORTS (BROOKLYN: THE FOUNDATION PRESS, INC., 1957), P. 706.

³RESTATEMENT, TORTS, SEC. 519.

⁴IBID., SEC. 520.

⁵EXNER ET. UX. V. SHERMAN POWER CONST. CO., 54 F.2D 510 (1931).

⁶GREEN V. GENERAL PETROLEUM CORP., 205 CAL. 328, 270 P. 952 (1928).

PURPOSES.¹

IT SHOULD BE NOTED HERE THAT LIABILITY FOR TRESPASS OR NUISANCE, WHICH WAS ONCE IMPOSED WITHOUT FAULT FOR ANY ACTIVITY,² IS NOW IMPOSED WITHOUT FAULT ONLY WHERE THE TRESPASS OR NUISANCE WAS CAUSED BY AN ULTRAHAZARDOUS ACTIVITY.

EXCEPT WHERE THE ACTOR IS ENGAGED IN AN ABNORMALLY DANGEROUS ACTIVITY, AN UNINTENTIONAL AND NON-NEGLIGENT ENTRY ON LAND IN THE POSSESSION OF ANOTHER, OR CAUSING A THING OR THIRD PERSON TO ENTER THE LAND, DOES NOT SUBJECT THE ACTOR TO LIABILITY TO THE POSSESSOR, EVEN THOUGH THE ENTRY CAUSES HARM TO THE POSSESSOR OR TO A THING OR THIRD PERSON IN WHOSE SECURITY THE POSSESSOR HAS A LEGALLY PROTECTED INTEREST.³

. . . ANY SUBSTANTIAL NONTRESPASSORY INVASION OF ANOTHER'S INTEREST IN THE PRIVATE USE AND ENJOYMENT OF LAND BY ANY TYPE OF LIABILITY FORMING CONDUCT IS A PRIVATE NUISANCE; . . . THE INVASION WHICH SUBJECTS A PERSON TO LIABILITY FOR PRIVATE NUISANCE MAY BE EITHER INTENTIONAL OR UNINTENTIONAL; . . . A PERSON IS SUBJECT TO LIABILITY FOR AN UNINTENTIONAL INVASION WHEN HIS CONDUCT IS NEGLIGENT, RECKLESS OR ULTRAHAZARDOUS.⁴

THE CARRYING ON OF SUCH ACTIVITIES, ALTHOUGH IT INVOLVES A RISK OF SERIOUS HARM, IS NOT MERELY FOR THAT REASON NEGLIGENT BEHAVIOUR AND IS NOT ITSELF CULPABLE. CULPABILITY DEPENDS UPON CREATION OF AN UNREASONABLE, AND NOTE MERELY A SERIOUS, RISK OF HARM. SO LONG AS THE UTILITY OF THE ENTERPRISE IS SUFFICIENTLY HIGH, AND THE LIKELIHOOD OF BRINGING ABOUT THE DESIRED RESULT BY SOME OTHER, LESS HAZARDOUS MEANS, IS SMALL, EVEN THE CREATION OF A SUBSTANTIAL RISK OF VERY SERIOUS HARM MAY BE JUSTIFIABLE AND HENCE NON-NEGLIGENT; THIS IS FELT TO BE THE CASE WITH THE ABOVE-DESCRIBED ACTIVITIES.

¹LUTHRINGER V. MOORE, 31 CAL.2D 489, 190 P.2D 1 (1948).

²RESTATEMENT, TORTS, SECOND, COMMENT (B) TO SEC. 166.

³IBID., SEC. 166.

⁴MORGAN V. HIGH PENN OIL Co., 238 N.C. 185, 77 S.E.2D 682 (1953).

KEEPING DANGEROUS ANIMALS

AN INDIVIDUAL WHO KEEPS A WILD ANIMAL IS STRICTLY LIABLE FOR HARMS CAUSED BY THAT ANIMAL. "A WILD ANIMAL . . . IS AN ANIMAL NOT BY CUSTOM DEVOTED TO THE SERVICE OF MANKIND AT THE TIME AND IN THE PLACE WHERE IT IS KEPT."¹

ALSO, AN INDIVIDUAL WHO KEEPS A DOMESTIC ANIMAL WHICH HE KNOWS, OR WHICH A REASONABLY PRUDENT MAN WOULD KNOW, TO BE DANGEROUS, IS STRICTLY LIABLE FOR HARMS CAUSED BY THAT ANIMAL. "A DOMESTIC ANIMAL . . . IS BY CUSTOM DEVOTED TO THE SERVICE OF MANKIND AT THE TIME AND IN THE PLACE WHERE IT IS KEPT."²

INCLUDED AMONG THOSE ANIMALS WHICH HAVE BEEN JUDGED WILD, HARPER AND JAMES LIST THE FOLLOWING: "LIONS, TIGERS AND BEARS, MONKEYS, ZEBRAS, WOLVES, ELEPHANTS IN WESTERN COUNTRIES, LEOPARDS AND DEER. CAT-TLE, HORSES, AND DOGS ARE DOMESTIC ANIMALS, NOT DANGEROUS BY NATURE."³

A KEEPER OF THE LATTER CLASS OF ANIMAL WILL BE HELD LIABLE FOR HARMS CAUSED BY IT IF IT HAS DANGEROUS PROPENSITIES NOT "NATURAL" TO ITS SPECIES WHEN HE EITHER ACTUALLY REALIZES THE EXISTENCE OF THESE PROPENSITIES, OR HAS POSSESSION OF KNOWLEDGE WHICH WOULD LEAD A REASONABLY PRUDENT MAN TO CONCLUDE THAT THE ANIMAL HAS SUCH PROPENSITIES, WHETHER OR NOT THE KEEPER DOES ACTUALLY SO CONCLUDE.⁴ FOR EXAMPLE, IF A DOG HAS BITTEN A PERSON AND THE KEEPER IS AWARE OF THIS FACT, SUCH KNOWLEDGE IS SUFFICIENT TO RENDER HIM STRICTLY LIABLE FOR ANY SIMILAR

¹RESTATEMENT, TORTS, SEC. 506.

²IBID.

³FOWLER V. HARPER AND FLEMING JAMES, THE LAW OF TORTS (3 VOLS.; BOSTON: LITTLE, BROWN AND COMPANY, 1956), II, P. 835.

⁴ZAREK V. FREDERICKS, 138 F.2D 689 (1943).

FUTURE HARMS CAUSED BY THE DOG, SINCE SUCH KNOWLEDGE WOULD LEAD A REASONABLY PRUDENT MAN TO ASSUME THAT THE BEAST IS INDEED DANGEROUS. THE KEEPER HIMSELF NEED NOT ACTUALLY HAVE MADE SUCH AN INFERENCE.

MISREPRESENTING FACTS
CONCERNING SOLD GOODS

ONE ENGAGED IN THE BUSINESS OF SELLING CHATTELS WHO, BY ADVERTISING, LABELS, OR OTHERWISE, MAKES TO THE PUBLIC A MISREPRESENTATION OF A MATERIAL FACT CONCERNING THE CHARACTER OR QUALITY OF A CHATTEL SOLD BY HIM IS SUBJECT TO LIABILITY FOR PHYSICAL HARM TO A CONSUMER OF THE CHATTEL CAUSED BY A JUSTIFIABLE RELIANCE UPON THE MISREPRESENTATION, EVEN THOUGH

(A) IT IS NOT MADE FRAUDELENTLY OR NEGLIGENTLY, AND

(B) THE CONSUMER HAS NOT BOUGHT THE CHATTEL FROM OR ENTERED INTO ANY CONTRACTUAL RELATION WITH THE SELLER.¹

THIS RULE, AS STATED IN THE RESTATEMENT OF TORTS, SECOND, SEEMS TO REQUIRE NO CLARIFICATION AND I WILL THEREFORE OFFER ONLY THE FOLLOWING SIMPLE ILLUSTRATION: IF A MANUFACTURER OF ROPE MISREPRESENTS THE STRENGTH OF THAT ROPE AS BEING GREATER THAN IT IS, AND AN INDIVIDUAL PURCHASES THE ROPE FOR THE PURPOSE OF USING IT IN AN ACTIVITY WHICH REQUIRES THE ADVERTISED STRENGTH, THE MANUFACTURER WILL BE LIABLE TO THE PURCHASER FOR CERTAIN DAMAGES ARISING OUT OF HIS RELIANCE ON THE ROPE AND CAUSED BY ITS FAILURE. HE WILL BE SO LIABLE EVEN THOUGH HE WAS WITHOUT FAULT IN DETERMINING THE TRUE STRENGTH OF HIS PRODUCT.

SELLING PRODUCT IN UNREASONABLY
DEFECTIVE CONDITION

(1) ONE WHO SELLS ANY PRODUCT IN A DEFECTIVE CONDITION UNREASONABLY DANGEROUS TO THE CONSUMER OR USER OR TO HIS PROPERTY IS SUBJECT TO LIABILITY FOR PHYSICAL HARM THEREBY CAUSED TO THE ULTIMATE USER OR CONSUMER, OR TO HIS PROPERTY, IF

(A) THE SELLER IS ENGAGED IN THE BUSINESS OF SELLING SUCH A PRODUCT, AND

(B) IT IS EXPECTED TO AND DOES REACH THE CONSUMER OR USER WITHOUT SUBSTANTIAL CHANGE IN THE CONDITION IN WHICH IT IS SOLD.

(2) THE RULE STATED IN SUBSECTION (1) APPLIES ALTHOUGH

¹RESTATEMENT, TORTS, SECOND, SEC. 402 B.

(A) THE SELLER HAS EXERCISED ALL POSSIBLE CARE IN THE PREPARATION AND SALE OF HIS PRODUCT, AND

(B) THE USER OR CONSUMER HAS NOT BOUGHT THE PRODUCT FROM OR ENTERED INTO ANY CONTRACTUAL RELATION WITH THE SELLER.¹

AGAIN, THE RESTATEMENT OF THIS SUBJECT SEEMS SELF-EXPLANATORY, REQUIRING PERHAPS ONLY AN ILLUSTRATIVE EXAMPLE: A MANUFACTURER OF CANNED SOUP, AFTER HAVING TAKEN ALL POSSIBLE CARE IN PRODUCING HIS PRODUCT, NONETHELESS SELLS AN ADULTERATED CAN OF SOUP TO A RETAILER, WHO IN TURN SELLS IT TO A CONSUMER. THE MANUFACTURER AND THE RETAILER ARE BOTH LIABLE TO THE CONSUMER FOR ANY HARM TO HIM AS A RESULT OF EATING SUCH ADULTERATED FOOD.

CLASS OF HARMS

I HAVE INDICATED THAT INDIVIDUALS WHO ENGAGE IN THE ACTIVITIES DISCUSSED MAY BE LIABLE FOR CERTAIN CONSEQUENCES OF THOSE ACTIVITIES; THEY ARE NOT, THOUGH, LIABLE FOR ALL CONSEQUENCES. THE KEEPING OF WILD ANIMALS OR DANGEROUS DOMESTIC BEASTS, OR ACTIVITIES WHICH ARE ULTRAHAZARDOUS OR FALL WITHIN THE RULE OF RYLANDS V. FLETCHER, WILL RENDER AN AGENT LIABLE ONLY FOR THOSE HARMS WHICH ARE OF THE SORT THAT RENDER THE ACTIVITY IN QUESTION DANGEROUS.

THE RESTATEMENT OF TORTS, FOR EXAMPLE, SPECIFICALLY LIMITS TORT LIABILITY FOR ULTRAHAZARDOUS ACTIVITIES TO "HARMS RESULTING . . . FROM THAT WHICH MAKES THE ACTIVITY ULTRAHAZARDOUS."² AN INDIVIDUAL WHO ENGAGES IN DEMOLITION WORK INVOLVING DYNAMITE WILL THUS BE LIABLE FOR HARMS CAUSED BY FLYING DEBRIS TO NEARBY PROPERTY; IT IS JUST THE RISK OF THIS SORT OF DAMAGE WHICH MAKES BLASTING ULTRAHAZARDOUS. ON THE

¹ IBID., SEC. 402 A.

² SUPRA., P. 70.

OTHER HAND, CONSIDER THE CASE OF FOSTER V. PRESTON MILL CO.¹

BLASTING OPERATIONS CONDUCTED BY PRESTON MILL COMPANY FRIGHTENED MOTHER MINK OWNED BY B. W. FOSTER, AND CAUSED THE MINK TO KILL HER KITTENS. FOSTER BROUGHT THIS ACTION AGAINST THE COMPANY TO RECOVER DAMAGES.

THE COURT FOUND THAT PRESTON MILL CO. WAS NOT STRICTLY LIABLE FOR THIS SORT OF HARM RESULTING FROM AN ULTRAHAZARDOUS ACTIVITY.

IT IS OUR CONCLUSION THAT THE RISK OF CAUSING HARM OF THE KIND HERE EXPERIENCED, AS A RESULT OF THE RELATIVELY MINOR VIBRATION, CONCUSSION, AND NOISE FROM DISTANT BLASTING, IS NOT THE KIND OF RISK WHICH MAKES THE ACTIVITY OF BLASTING ULTRAHAZARDOUS. THE DOCTRINE OF ABSOLUTE LIABILITY IS THEREFORE INAPPLICABLE UNDER THE FACTS OF THIS CASE . . .

SIMILARLY, IN RYLANDS V. FLETCHER BLACKBURN, J. FOUND THAT LIABILITY COULD ACCRUE ONLY FOR THE "NATURAL AND ANTICIPATED CONSEQUENCES"² OF ACTIVITIES WHICH FALL WITHIN THAT RULE.

WHERE A PERSON KEEPS A WILD OR DANGEROUS ANIMAL, HE IS ONLY LIABLE FOR THOSE HARMS WHICH ARE A RESULT OF THOSE PROPENSITIES WHICH MAKE THE ANIMAL DANGEROUS. THUS, IN SCRIBNER V. KELLEY,³ WHERE THE PLAINTIFF'S HORSE BOLTED AT THE SIGHT OF THE DEFENDANT'S ELEPHANT WALKING DOWN THE STREET, RECOVERY WAS DENIED; SUCH A HARM IS NOT WITHIN THE GENERAL CLASS WHICH MAKES KEEPING ELEPHANTS DANGEROUS.

MISREPRESENTING FACTS CONCERNING SOLD GOODS RENDERS THE SELLER OF THE GOODS LIABLE ONLY FOR THOSE HARMS WHICH OCCUR TO THE CONSUMER OF THAT PRODUCT; HE IS LIABLE ONLY FOR PHYSICAL HARMS; THESE HARMS MUST HAVE BEEN CAUSED BY RELIANCE ON THE MISREPRESENTED FACT(S).⁴

¹ 44 WASH.2D 440, 268 P.2D 645 (1954).

² SUPRA, P. 68.

³ 32 BARB. (N.Y.) 14 (1862).

⁴ SUPRA, P. 73.

FINALLY, THE SELLER OF AN UNREASONABLY DEFECTIVE PRODUCT IS LIABLE ONLY FOR PHYSICAL HARMS, LIMITED TO THE ULTIMATE USER OR HIS PROPERTY. THE HARM MUST BE OF THE SORT WHOSE PROBABILITY MAKES THE CONDITION OF THE PRODUCT UNREASONABLY DANGEROUS.¹

¹BAXTER V. FORD MOTOR CO., 168 WASH. 456, 12 P.2D 409 (1932).

CHAPTER 4

UTILITARIANISM AND STRICT LIABILITY

GENERAL UTILITARIAN THEORY

HAVING NOW EXAMINED THE EXTENT OF STRICT LIABILITY WITHIN THE CRIMINAL LAW AND THE LAW OF TORTS, WE MAY TURN TO A CONSIDERATION OF THE JUSTIFIABILITY OF THE PRACTICE. THE MORAL THEORY PERHAPS MOST OFTEN APPEALED TO, EITHER EXPLICITLY OR IMPLICITLY, IN DISCUSSIONS OF THE PROBLEM IS UTILITARIANISM.¹

UTILITARIAN MORAL PHILOSOPHERS OF ALL "VARIETIES," E.G., HEDONISTIC, AGATHISTIC, AND EUDAEMONISTIC, HAVE FORMULATED A CLASS OF NORMATIVE ETHICAL THEORIES EACH OF WHICH ASSERTS THAT "IT IS RIGHT FOR AN AGENT TO PERFORM AN ACT, X, IF, AND ONLY IF, OF ALL THE POSSIBLE ALTERNATIVE ACTIONS OPEN TO THE AGENT, X WILL, ACTUALLY OR PROBABLY, PRODUCE THE CONSEQUENCES HAVING THE MAXIMUM AMOUNT OF INTRINSIC VALUE." IN OTHER WORDS, ACTS ARE RIGHT OR WRONG DEPENDING UPON THEIR USEFULNESS IN PRODUCING INTRINSICALLY GOOD RESULTS.

BUT WHAT IS MEANT BY "INTRINSIC GOOD"? G.E. MOORE, IN HIS ETHICS, WRITES:

BY CALLING ONE EFFECT OR SET OF EFFECTS INTRINSICALLY BETTER THAN ANOTHER IT MEANS THAT IT IS BETTER IN ITSELF, QUITE APART FROM ANY ACCOMPANIMENTS OR FURTHER EFFECTS WHICH IT MAY HAVE.

¹ IN SETTING OUT THE GENERAL UTILITARIAN THEORY, I HAVE ADOPTED THE FORMAT USED BY PAUL W. TAYLOR IN HIS "INTRODUCTION TO CLASSICAL UTILITARIAN ETHICS," IN PROBLEMS OF MORAL PHILOSOPHY: AN INTRODUCTION TO ETHICS (CALIFORNIA: DICKENSON PUBLISHING COMPANY, INC., 1972), PP. 137-51.

THAT IS TO SAY: TO ASSERT OF ANY ONE THING, A, THAT IT IS INTRINSICALLY BETTER THAN ANOTHER, B, IS TO ASSERT THAT IF A EXISTED QUITE ALONE, WITHOUT ANY ACCOMPANIMENTS OR EFFECTS WHATEVER-- IF, IN SHORT, A CONSTITUTED THE WHOLE UNIVERSE, IT WOULD BE BETTER THAT SUCH A UNIVERSE SHOULD EXIST, THAN THAT A UNIVERSE WHICH CONSISTED SOLELY OF B SHOULD EXIST INSTEAD.¹

IN A SIMILAR PASSAGE CHARLES A. BAYLIS WRITES:

FOR AN ENTITY TO BE INTRINSICALLY GOOD IT MUST HAVE A NON-DERIVATIVE POSITIVE WORTH; IT MUST BE GOOD IN ITSELF; IT MUST HAVE A POSITIVE VALUE OVER AND ABOVE ANY EXTRINSIC VALUE IT MAY HAVE. IT MUST NOT OWE ALL ITS VALUE TO ITS RELATIONS TO OTHER THINGS. IF AN EXPERIENCE, OR ANYTHING ELSE, HAS INTRINSIC VALUE THIS VALUE BELONGS TO IT IN VIRTUE OF ITS OWN NATURE AND IS INDEPENDENT OF ANY DERIVATIVE VALUE IT MAY POSSESS.²

BUT WHAT STANDARD OR CRITERION ARE WE TO USE IN JUDGING THE INTRINSIC VALUE OF ANYTHING?

HEDONISTS CLAIM THAT A THING IS INTRINSICALLY VALUABLE IN PROPORTION AS IT IS PLEASUREABLE, AND HENCE THAT ONLY CONSCIOUS STATES OF SENTIENT ORGANISMS CAN HAVE ANY INTRINSIC VALUE AT ALL.

EUDAEMONISTS, WHILE AGREEING THAT ONLY CONSCIOUS STATES OF SENTIENT ORGANISMS CAN HAVE ANY INTRINSIC VALUE, ARGUE THAT THAT VALUE IS PROPORTIONATE TO THE HAPPINESS, RATHER THAN THE PLEASURE, OF THE EXPERIENCE.

A THIRD GROUP, THE AGATHISTIC OR IDEALISTIC VALUE THEORISTS, ARGUES THAT THE INTRINSIC VALUE OF A THING IS DETERMINED BY THE DEGREE OF ITS POSSESSION OF A SIMPLE, OBJECTIVE PROPERTY OF GOODNESS, WHICH IS NON-NATURAL, I.E., ITS PRESENCE CANNOT BE DETERMINED EMPIRICALLY.³

THESE, THEN, ARE THE THREE MAIN POSITIONS ON INTRINSIC VALUE TRADITIONALLY ASSOCIATED WITH UTILITARIANISM. BY COMBINING EACH OF THEM

¹G. E. MOORE, ETHICS (LONDON: OXFORD UNIV. PRESS, 1912), p. 37.

²C. A. BAYLIS, "GRADING, VALUES AND CHOICE," MIND, LXVII, No. 268 (1958), p. 490.

³FOR EXAMPLES OF EACH TYPE OF THEORY, SEE INFRA., PP. 81-83

WITH THE ORIGINAL ASSERTION, WE ARRIVE AT THE PRINCIPLE THAT "IT IS RIGHT FOR AN AGENT TO PERFORM AN ACT, X, IF, AND ONLY IF, OF ALL THE POSSIBLE ALTERNATIVE ACTIONS OPEN TO THE AGENT, X WILL, ACTUALLY OR PROBABLY, MAXIMIZE PLEASURE (HEDONISTIC UTILITARIANISM), OR HAPPINESS (EUDAEMONISTIC UTILITARIANISM), OR GOODNESS (AGATHISTIC UTILITARIANISM).

BUT THIS PRINCIPLE, AS IT STANDS, IS NOT SUFFICIENT FOR GUIDING CONDUCT. AN AGENT MUST KNOW, IN DECIDING UPON A COURSE OF ACTION, WHOSE PLEASURE, OR WHOSE HAPPINESS, OR WHOSE GOODNESS (I.E., GOODNESS PRESENT IN WHOSE EXPERIENCES OR IMPERSONAL STATES OF AFFAIRS) HE IS TO CONSIDER.

THE THREE ALTERNATIVE ANSWERS MOST OFTEN DISCUSSED IN PHILOSOPHICAL TEXTS ARE 1) EGOISTIC THEORIES: INTRINSIC VALUE FOR THE AGENT ALONE IS TO BE CONSIDERED IN CHOOSING A COURSE OF ACTION; 2) ALTRUISTIC THEORIES: INTRINSIC VALUE FOR EVERYONE EXCEPT THE AGENT IS TO BE CONSIDERED; 3) UNIVERSALISTIC THEORIES: INTRINSIC VALUE FOR EVERYONE IS TO BE CONSIDERED.¹

BY COMBINING EACH OF THE THEORIES OF INTRINSIC VALUE WITH EACH OF THE ABOVE ALTERNATIVES WE CAN PRODUCE NINE DIFFERENT NORMATIVE THEORIES, E.G., UNIVERSALISTIC HEDONISM, EGOISTIC EUDAEMONISM, ALTRUISTIC IDEALISM, ETC. WE MIGHT CONSIDER EACH OF THESE ALTERNATIVES A UTILITARIAN THEORY, SINCE EACH ONE HOLDS THAT THE RIGHTNESS OF AN ACT IS DETERMINED BY ITS USEFULNESS IN PRODUCING A PARTICULAR

¹AN INDIVIDUAL MIGHT, OF COURSE, PUT FORWARD ANY ONE OF A CLASS OF "RESTRICTED" THEORIES, E.G., THAT AN AGENT MUST CONSIDER INTRINSIC VALUE ONLY FOR MEMBERS OF HIS FAMILY OR COUNTRY. HOWEVER, SINCE SUCH THEORIES ARE NOT ASSOCIATED WITH THE PROBLEM BEFORE US, I WILL NOT STOP TO EXAMINE THEM MORE CLOSELY.

SORT OF CONSEQUENCE FOR A PARTICULAR CLASS OF PERSONS. HOWEVER, THE TERM "UTILITARIAN" HAS HISTORICALLY BEEN RESERVED FOR THE THREE UNIVERSALISTIC THEORIES AND, IN THE INTEREST OF TERMINOLOGICAL CONSISTENCY, I SHALL ADOPT THAT USAGE.

FURTHERMORE, IN THE FOLLOWING DISCUSSION I WILL CONCERN MYSELF SOLELY WITH THESE UNIVERSALISTIC THEORIES. I WILL DO SO MAINLY BECAUSE, OF ALL THE TELEOLOGICAL THEORIES, IT IS JUST THIS SORT WHICH IS MOST OFTEN THE SUBJECT OF LITERATURE UPON THE SUBJECT OF SANCTIONS, EXCUSES AND STRICT LIABILITY. IT IS ALSO THE ONLY VERSION SERIOUSLY ENTERTAINED WITHIN THE LAW ITSELF; WHEREVER A TELEOLOGICAL ETHICAL THEORY IS CALLED UPON TO JUSTIFY THE IMPOSITION OF LIABILITY BY A COURT, IT IS A UNIVERSALISTIC THEORY WHICH IS INVOKED.

FOR ALL SUCH UNIVERSALISTIC UTILITARIANS, THE ULTIMATE TEST OF THE RIGHTNESS OR WRONGNESS OF A PERSON'S ACTION IS THE TEST OF UTILITY. HOWEVER, SUCH THEORISTS DIFFER ON HOW THAT TEST IS TO BE APPLIED. ACCORDING TO "ACT" OR "UNRESTRICTED" UTILITARIANS, WE MUST APPLY THE TEST TO THE CONSEQUENCES OF THE PARTICULAR ACT IN QUESTION: IF THE CONSEQUENCES OF THAT ACT, AS OPPOSED TO THE CONSEQUENCES OF ANY OTHER POSSIBLE ACT, WILL PRODUCE THE GREATEST AMOUNT OF INTRINSIC GOOD, THAT ACT IS RIGHT.

ACCORDING TO "RULE" OR "RESTRICTED" UTILITARIANS, THOUGH, AN ACT IS NOT JUDGED RIGHT OR WRONG BY ITS COMPARATIVE UTILITY TO OTHER ACTS OPEN TO THE AGENT, BUT RATHER BY ITS CONFORMITY TO GENERAL RULES OR PRINCIPLES OF CONDUCT. IN TURN, THE RIGHTNESS OR WRONGNESS OF THE RULES IS DETERMINED BY ONE OF A SET OF TESTS OF UTILITY--DIFFERENT TESTS GIVING DIFFERENT VERSIONS OF RULE UTILITARIANISM.

IN THE FOLLOWING DISCUSSION, HOWEVER, I SHALL BE CONCERNED NOT

WITH ACTIONS OF PARTICULAR INDIVIDUALS, E.G., LEGISLATORS, JUDGES, SOVEREIGNS, ETC., BUT RATHER WITH LAWS AND, IN PARTICULAR, WITH THE UTILITY OF CERTAIN LAWS AS COMPARED TO OTHERS. WE MUST THEREFORE CONSIDER THE INTRINSIC VALUE OF THE CONSEQUENCES OF HAVING IN EFFECT ONE SET OF STATUTES OR COMMON LAWS AS OPPOSED TO ANOTHER POSSIBLE SET.

ONE OF THE MAJOR UTILITARIAN THINKERS TO DEVOTE HIMSELF TO MEASURES OF GOVERNMENT RATHER THAN TO ACTIONS OF INDIVIDUALS WAS JEREMY BENTHAM, WHO DEFENDED A THEORY OF HEDONISTIC UTILITARIANISM WITH RESPECT TO SUCH LAWS.

BY THE PRINCIPLE OF UTILITY IS MEANT THAT PRINCIPLE WHICH APPROVES OR DISAPPROVES OF EVERY ACTION WHATSOEVER, ACCORDING TO THE TENDENCY WHICH IT APPEARS TO HAVE TO AUGMENT OR DIMINISH THE HAPPINESS OF THE PARTY WHOSE INTEREST IS IN QUESTION: OR, WHAT IS THE SAME THING IN OTHER WORDS, TO PROMOTE OR TO OPPOSE THAT HAPPINESS. I SAY OF EVERY ACTION WHATSOEVER; AND THEREFORE NOT ONLY OF EVERY ACTION OF A PRIVATE INDIVIDUAL, BUT OF EVERY MEASURE OF GOVERNMENT.¹ (EMPHASIS ADDED.)

IN CONSIDERING WHETHER A LAW IS RIGHT OR WRONG WE THEREFORE CONSIDER THOSE OF ITS CONSEQUENCES WHICH ARE EXPERIENCES OF SENTIENT BEINGS. WITH RESPECT TO EACH OF THESE BEINGS WE

SUM UP ALL THE VALUES OF ALL THE PLEASURES ON THE ONE SIDE, AND THOSE OF ALL THE PAINS ON THE OTHER. THE BALANCE, IF IT BE ON THE SIDE OF PLEASURE, WILL GIVE THE GOOD TENDENCY OF THE ACT UPON THE WHOLE, WITH RESPECT TO THE INTERESTS OF THAT INDIVIDUAL PERSON: IF ON THE SIDE OF PAIN, THE BAD TENDENCY OF IT UPON THE WHOLE. . . . TAKE AN ACCOUNT OF THE NUMBER OF PERSONS WHOSE INTERESTS APPEAR TO BE CONCERNED; AND REPEAT THE ABOVE PROCESS WITH RESPECT TO EACH. SUM UP THE NUMBERS EXPRESSIVE OF THE DEGREES OF GOOD TENDENCY, WHICH THE ACT HAS, WITH RESPECT TO EACH INDIVIDUAL, IN REGARD TO WHOM THE TENDENCY OF IT IS GOOD UPON THE WHOLE: DO THIS AGAIN WITH RESPECT TO EACH INDIVIDUAL, IN REGARD TO WHOM THE TENDENCY OF IT IS BAD UPON THE WHOLE. TAKE THE BALANCE, WHICH, IF ON THE SIDE OF PLEASURE WILL GIVE THE GENERAL GOOD TENDENCY OF THE ACT, WITH RESPECT TO THE TOTAL NUMBER OR COMMUNITY OF INDIVIDUALS CONCERNED; IF ON THE SIDE

¹JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, IN THE UTILITARIANS (NEW YORK: DOUBLEDAY AND COMPANY, 1961), p. 17.

OF PAIN, THE GENERAL EVIL TENDENCY, WITH RESPECT TO THE SAME COMMUNITY.¹

WE THEN REPEAT THIS PROCESS FOR EACH OF THE ALTERNATIVE POSSIBLE LAWS, AND FOR THE SITUATION IN WHICH THERE IS NO LAW ON A GIVEN CLASS OF ACTS. THAT LAW (OR THE ABSENCE OF A LAW) WHICH HAS EITHER THE HIGHEST "GOOD TENDENCY" OR THE LOWEST "EVIL TENDENCY" IS THE LAW WHICH IS RIGHT.

THE VERY SAME PROCESS FOR DETERMINING THE RIGHTNESS OR WRONGNESS OF LAWS MAY BE APPLIED BY ANY UTILITARIAN, BEARING IN MIND ONLY THAT DIFFERENT THEORISTS WILL APPLY DIFFERENT STANDARDS OF INTRINSIC VALUE.

THUS, JOHN STUART MILL ACCEPTED BENTHAM'S UTILITARIAN PRINCIPLE WITH ONE IMPORTANT CHANGE: THE STANDARD BY WHICH WE ARE TO DETERMINE THE INTRINSIC VALUE OF AN EXPERIENCE IS HAPPINESS, WHICH IS NOT TO BE IDENTIFIED SOLELY WITH THOSE ASPECTS OF PLEASURE WHICH BENTHAM CONSIDERED IN HIS HEDONIC CALCULUS.²

FINALLY, A TYPICAL FORMULATION OF THE THIRD TYPE OF UNIVERSALISTIC THEORY, IDEAL UTILITARIANISM, APPEARS IN HASTINGS RASHDALL'S THE THEORY OF GOOD AND EVIL:

¹IBID., P. 39. BENTHAM OFFERED A "HEDONIC CALCULUS" FOR DETERMINING THE VALUE OF A PLEASURE OR PAIN. THE DETAILS OF THAT CALCULUS NEED NOT HERE DETAIN US, EXCEPT TO NOTE THAT HE DID NOT CONSIDER QUALITY OF A PLEASURE A FACTOR IN ESTABLISHING THE VALUE OF THAT PLEASURE.

²MILL WROTE THAT "'UTILITY' OR 'THE GREATEST HAPPINESS PRINCIPLE' HOLD THAT ACTIONS ARE RIGHT AS THEY TEND TO PROMOTE HAPPINESS, WRONG AS THEY TEND TO PRODUCE THE REVERSE OF HAPPINESS. BY 'HAPPINESS' IS INTENDED PLEASURE AND THE ABSENCE OF PAIN: BY 'UNHAPPINESS' PAIN AND THE PRIVATION OF PLEASURE." UTILITARIANISM (INDIANAPOLIS: THE BOBBS-MERRILL COMPANY, INC., 1957), P. 10. BUT WHILE BENTHAM DENIED THAT THE QUALITY OF A PLEASURE WAS A FACTOR IN DETERMINING ITS VALUE, MILL INSISTED THAT QUALITY WAS EXTREMELY IMPORTANT IN THIS REGARD. "IT WOULD BE ABSURD THAT, WHILE IN ESTIMATING ALL OTHER THINGS QUALITY IS CONSIDERED AS WELL AS QUANTITY, THE ESTIMATION OF PLEASURE SHOULD BE SUPPOSED TO DEPEND ON QUALITY ALONE." IBID., P. 12.

. . . THE WAY TO FIND OUT WHETHER AN ACTION IS RIGHT OR WRONG . . . IS TO CONSIDER WHETHER IT WILL TEND TO PRODUCE FOR SOCIETY IN GENERAL A WELL-BEING . . . OR GOOD WHICH INCLUDES MANY ELEMENTS POSSESSING DIFFERENT VALUES, WHICH VALUES ARE INTUITIVELY DISCERNED AND COMPARED WITH ONE ANOTHER BY THE MORAL OR PRACTICAL REASON. THE RIGHT ACTION IS ALWAYS THAT WHICH (SO FAR AS THE AGENT HAS THE MEANS OF KNOWING) WILL PRODUCE THE GREATEST AMOUNT OF GOOD UPON THE WHOLE . . .

.
THIS VIEW OF ETHICS, WHICH COMBINES THE UTILITARIAN PRINCIPLE THAT ETHICS MUST BE TELEOLOGICAL WITH A NON-HEDONISTIC VIEW OF THE ETHICAL END, I PROPOSE TO CALL IDEAL UTILITARIANISM. ACCORDING TO THIS VIEW, ACTIONS ARE RIGHT OR WRONG ACCORDING AS THEY TEND TO PRODUCE FOR ALL MANKIND AN IDEAL END OR GOOD, WHICH INCLUDES, BUT IS NOT LIMITED TO, PLEASURE.¹

UTILITARIANS AGREE, THEN, THAT THE END OF LAW IS TO INCREASE THE TOTAL INTRINSIC GOOD OF THE COMMUNITY, WHILE DISAGREEING ON THE STANDARD FOR DETERMINING THAT GOOD. IN THIS PAPER I SHALL BE CHIEFLY CONCERNED WITH A BENTHAMITE VIEW OF THE ISSUE, FOR THIS IS WHAT IS USUALLY MEANT BY UTILITARIANISM IN A LEGAL CONTEXT. WHERE, HOWEVER, ADDITIONAL RELEVANT ARGUMENTS MIGHT BE ADDUCED BY A SUPPORTER OF SOME OTHER VIEW, I SHALL CONSIDER THOSE SPECIFIC ADDITIONAL ARGUMENTS.

CRIMINAL LAW

WITH RESPECT TO THE RELATIONSHIP OF LAW TO PUNISHMENT, BENTHAM WRITES:

THE GENERAL OBJECT WHICH ALL LAWS HAVE, OR OUGHT TO HAVE, IN COMMON, IS TO AUGMENT THE TOTAL HAPPINESS OF THE COMMUNITY; AND THEREFORE, IN THE FIRST PLACE, TO EXCLUDE, AS FAR AS MAY BE, EVERYTHING THAT TENDS TO SUBTRACT FROM THAT HAPPINESS; IN OTHER WORDS, TO EXCLUDE MISCHIEF. . . . IT HAS BEEN SHOWN THAT THE HAPPINESS OF THE INDIVIDUALS, OF WHOM A COMMUNITY IS COMPOSED, THAT IS, THEIR PLEASURES AND THEIR SECURITY, IS THE END AND THE SOLE END WHICH THE LEGISLATOR OUGHT TO HAVE IN VIEW: THE SOLE STANDARD, IN CONFORMITY TO WHICH EACH INDIVIDUAL OUGHT, AS FAR AS DEPENDS UPON THE LEGISLATOR, TO BE 'MADE' TO FASHION HIS BEHAVIOUR. . . . THE BUSINESS OF GOVERNMENT IS TO PROMOTE THE HAPPINESS OF THE SOCIETY, BY PUNISHING AND REWARDING. THAT PART OF ITS BUSINESS WHICH CONSISTS IN PUNISHING,

¹HASTINGS RASHDALL, THE THEORY OF GOOD AND EVIL (2 vols.; OXFORD: THE CLARENDON PRESS, 1907), I, p. 184.

IS MORE PARTICULARLY THE SUBJECT OF PENAL LAW. IN PROPORTION AS AN ACT TENDS TO DISTURB THAT HAPPINESS, IN PROPORTION AS THE TENDENCY OF IT IS PERNICIOUS, WILL BE THE DEMAND IT CREATES FOR PUNISHMENT. . . . BUT ALL PUNISHMENT IS MISCHIEF: ALL PUNISHMENT IN ITSELF IS EVIL. UPON THE PRINCIPLE OF UTILITY, IF IT OUGHT AT ALL TO BE ADMITTED, IT OUGHT ONLY TO BE ADMITTED IN AS FAR AS IT PROMISES TO EXCLUDE SOME GREATER EVIL.¹

IN GENERAL UTILITARIAN TERMS, THEN, THE CRIMINAL LAW ACCOMPLISHES ITS AIM BY EXCLUDING THOSE TYPES OF CONDUCT WHICH RESULT IN CONSEQUENCES WHICH DETRACT FROM THE GENERAL INTRINSIC GOOD. HOWEVER, PUNISHING BY IMPRISONMENT OR FINES THOSE WHO VIOLATE THE LAW INVOLVES THE INFLICTION OF SUFFERING AND IS THEREFORE A PRIMA FACIE EVIL. IT CAN ONLY BE JUSTIFIED IF IT WILL IN SOME WAY PREVENT STILL GREATER EVIL FROM OCCURRING, AND IF THE TOTAL UTILITY OF SUCH A SYSTEM IS GREATER THAN THE TOTAL UTILITY OF ANY OTHER POSSIBLE SYSTEM WHICH ALSO SERVES TO GAIN CONFORMITY TO LAW.

A CONSISTENT UTILITARIAN MIGHT ARGUE THAT IN FACT NO SYSTEM OF RULES ATTENDED WITH PENALTIES CAN PROVIDE MORE TOTAL INTRINSIC GOOD THAN, E.G., A SYSTEM OF RULES UNDER WHICH THOSE WHO ENGAGE IN DISUTILE ACTS ARE MADE TO UNDERGO NO MORE THAN PSYCHOLOGICAL THERAPY. SUCH A THEORIST MIGHT WELL BASE HIS ASSERTION ON THE EMPIRICAL CLAIM THAT THE DETERRENT AND REFORMATIVE VALUE OF PUNISHMENT IS CONSIDERABLY LESS THAN PROPONENTS OF SUCH SYSTEMS ASSUME. THE DISAGREEMENT BETWEEN SUPPORTERS OF PUNISHMENT AND SUPPORTERS OF TREATMENT WOULD NOT, IN THIS CASE, BE ONE OF PRINCIPLE BUT RATHER ONE OF FACTUAL BELIEF.

I WILL HERE CONSIDER, HOWEVER, THE MORE COMMON AND AT LEAST PRIMA FACIE PLAUSIBLE VIEW THAT "HAVING LAWS FORBIDDING CERTAIN KINDS OF BEHAVIOUR ON PAIN OF PUNISHMENT, AND HAVING MACHINERY FOR THE FAIR EN-

¹BENTHAM, PRINCIPLES, P. 162.

FORCEMENT OF THESE LAWS, IS JUSTIFIED BY THE FACT THAT IT MAXIMIZES EXPECTABLE UTILITY."¹

THE PENALTY OF IMPRISONMENT CONTRIBUTES TO THE MAXIMIZATION OF INTRINSIC VALUE BY PREVENTING DISUTILE CONDUCT, PRIMARILY IN THE FOLLOWING THREE WAYS:

1) INCARCERATION-BY PHYSICALLY PREVENTING AN INDIVIDUAL WHO MAY BE SO INCLINED FROM VIOLATING RULES OF CONDUCT BASED ON UTILITY.

2) REFORM-BY ALTERING THE PSYCHOLOGICAL MAKE-UP OF THE OFFENDER IN SUCH A WAY THAT HE NO LONGER IS INCLINED TO COMMIT DISUTILE ACTS.

3) DETERRENCE-BY INTIMIDATING POTENTIAL OFFENDERS THROUGH THE THREAT OF PUNISHMENT, AND THE CORRESPONDING DESIRE ON THE PART OF POTENTIAL OFFENDERS TO AVOID SUCH PUNISHMENT.

FINES FOR CRIMINAL BEHAVIOUR CONTRIBUTE TO THE MAXIMIZATION OF INTRINSIC VALUE BY THEIR DETERRENT EFFECT; THEY HAVE VIRTUALLY NO REFORMATIVE OR INCARCERATIVE FUNCTION.

IN THE FOLLOWING DISCUSSION I SHALL USE THE TERM "PUNISHMENT" TO INCLUDE SUCH FINES, AS WELL AS IMPRISONMENT.

THE QUESTION TO BE INVESTIGATED HERE IS WHETHER THE UTILITARIAN PRINCIPLE REQUIRES THAT SUCH PUNISHMENT ALWAYS BE LIMITED TO THOSE WHOSE VIOLATIONS OF LAW ARE BLAMEWORTHY, OR WHETHER THE EXTENSION OF SUCH PUNISHMENT IN SOME INSTANCES TO THOSE OFFENDERS WHO ARE NOT AT FAULT MAY SERVE TO MAXIMIZE EXPECTABLE UTILITY.

IN FACT, MOST UTILITARIANS HAVE ARGUED THAT THAT SYSTEM OF RULES WHICH, WHEN ENACTED INTO LAW, WOULD HAVE CONSEQUENCES OF MAXIMUM INTRINSIC VALUE WOULD INDEED ALWAYS RECOGNIZE EXCULPATING EXCUSES. THEY

¹RICHARD B. BRANDT, ETHICAL THEORY (NEW JERSEY: PRENTICE-HALL, INC., 1959), p. 490.

REMINDE US THAT THE UTILITARIAN RATIONALE FOR A PARTICULAR ACT OF PUNISHMENT IS THAT THE PUNISHMENT IN QUESTION IS A) REQUIRED BY A SYSTEM OF RULES AND PENALTIES CONFORMITY TO WHICH WILL PREVENT SOME PERSONS FROM COMMITTING ACTS OF A DISUTILE KIND WITHOUT CAUSING MORE HARM THAN IS PREVENTED, AND B) THAT IT IS NOT THE CASE THAT THE HARM RESULTING FROM OFFENSES AND PUNISHMENT WHEN THE LAW IS ENFORCED WITH THIS PENALTY IS GREATER THAN WOULD RESULT FROM OFFENSES AND PUNISHMENTS WHEN THE LAW IS ENFORCED WITH A LESSER PENALTY.¹

EXCUSES ARE ADMITTED INTO THE LAW AS A COROLLARY OF A AND B. THAT IS, AN EXCUSE IS A FACT WHICH SHOWS THAT PUNISHMENT IN THE PARTICULAR CASE WILL CAUSE MORE HARM TO THE INDIVIDUAL PUNISHED THAN WILL BE PREVENTED IN THE COMMUNITY, E.G., WHEN THE PUNISHMENT WILL NOT HAVE A DETERRENT EFFECT.

IN ORDER, THEN, TO SHOW THAT STRICT LIABILITY IS IN FACT JUSTIFIABLE IN A UTILITARIAN SYSTEM IT IS NECESSARY TO SHOW THAT IN AT LEAST SOME CASES 1) PUNISHING THOSE IN EXCULPATING CIRCUMSTANCES CAN HAVE CERTAIN INTRINSICALLY GOOD CONSEQUENCES AND 2) THE TOTAL INTRINSIC VALUE OF THOSE CONSEQUENCES IS GREATER THAN THE INTRINSIC DISVALUE OF THE HARM INFLICTED ON THE FAULTLESS OFFENDER ADDED TO THE INTRINSIC DISVALUE OF ANY OTHER HARMFUL CONSEQUENCES OF SUCH A PRACTICE.

CERTAIN UTILITARIANS, NOTABLY BENTHAM, HAVE CHOSEN TO FOCUS THEIR ARGUMENTS AGAINST STRICT LIABILITY IN A DENIAL OF 1. THUS, IN CHAPTER XIII OF HIS PRINCIPLES OF MORALS AND LEGISLATION BENTHAM WRITES IN DETAIL TO SHOW THAT INDIVIDUALS IN THE EXCUSING CONDITIONS ARE IN SUCH STATES THAT THE THREAT OF PUNISHMENT CANNOT SERVE TO DETER THEM FROM

¹SEE LAURENCE STERN, "DESERVED PUNISHMENT, DESERVED HARM, DESERVED BLAME," PHILOSOPHY, XLV, No. 174 (1970), p. 319.

THOSE ACTIONS PROSCRIBED BY LAW.¹ "BUT THERE IS A NON-SEQUITUR IN BENTHAM'S ARGUMENT. HE CLAIMS TO SHOW THAT PUNISHMENT OF SUCH PERSONS AS WE EXCUSE ON SUCH GROUNDS WOULD BE WRONG BECAUSE IT WOULD BE SOCIALLY USELESS ('INEFFICACIOUS'), WHEREAS HE ONLY SHOWS THAT THE THREAT OF PUNISHMENT WOULD BE INEFFECTIVE SO FAR AS SUCH PERSONS ARE CONCERNED."² IN ORDER, THEN, TO SHOW THAT STRICT LIABILITY IS "INEFFICACIOUS" A UTILITARIAN MUST DEMONSTRATE THAT THE ACTUAL INFLICTION OF PUNISHMENT UPON THESE SAME PEOPLE WILL NOT MINIMIZE HARM.

SUCH A POSITION IS MOST EMPHATICALLY DEFENDED BY R. B. BRANDT, WHO WRITES THAT

. . . IN FACT THE UTILITARIAN CAN PROPERLY CLAIM THAT WE DO HAVE EXCELLENT REASON FOR BELIEVING THAT THE GENERAL PUBLIC WOULD BE NO BETTER MOTIVATED TO AVOID CRIMINAL OFFENSES THAN IT NOW IS, IF THE INSANE AND OTHERS WERE ALSO PUNISHED ALONG WITH INTENTIONAL WRONGDOERS. INDEED, WE MAY REASONABLY CLAIM THAT THE EXAMPLE OF

¹BENTHAM ARGUES THAT INSANE INDIVIDUALS OR INFANTS CANNOT BE DETERRED FROM ANY ACT; THE LATTER BECAUSE HE "HAS NOT YET ATTAINED THAT STATE OR DISPOSITION OF MIND IN WHICH THE PROSPECT OF EVILS SO DISTANT AS THOSE WHICH ARE HELD FORTH BY THE LAW, HAS THE EFFECT OF INFLUENCING HIS CONDUCT"—THE FORMER BECAUSE "IF HE HAS ATTAINED TO THAT DISPOSITION, [HE] HAS SINCE BEEN DEPRIVED OF IT THROUGH THE INFLUENCE OF SOME PERMANENT THOUGH UNSEEN CAUSE." ALSO, "WHERE THE PENAL PROVISION (ALTHOUGH, BEING CONVEYED TO THE PARTY'S NOTICE, IT MIGHT VERY WELL PREVENT HIS ENGAGING IN ACTS OF THE SORT IN QUESTION, PROVIDED HE KNEW THAT IT RELATED TO THOSE ACTS) COULD NOT HAVE THIS EFFECT, WITH REGARD TO THE INDIVIDUAL ACT HE IS ABOUT TO ENGAGE IN: TO WIT, BECAUSE HE KNOWS NOT THAT IT IS OF THE NUMBER OF THOSE TO WHICH THE PENAL PROVISION RELATES," AN INDIVIDUAL IS EXCUSED. THESE ARE SITUATIONS OF IGNORANCE OR MISTAKE OF FACT. "IN THE CASE OF PHYSICAL DANGER; WHERE THE EVIL IS SUCH AS APPEARS LIKELY TO BE BROUGHT ABOUT BY THE UNASSISTED POWERS OF NATURE," OR "IN THE CASE OF A THREATENED MISCHIEF; WHERE IT IS SUCH AS APPEARS LIKELY TO BE BROUGHT ABOUT THROUGH THE INTENTIONAL AND CONSCIOUS AGENCY OF MAN" AN INDIVIDUAL IS EXCUSED (UNDETTERRABLE) BECAUSE THE EVIL HE SEEKS TO AVOID IS GREATER THAN THE HARM THREATENED BY THE PENAL SANCTION COVERING HIS OFFENSE. THESE ARE CASES OF NECESSITY AND DURESS OR COERCION. FINALLY, WHERE "HIS PHYSICAL FACULTIES . . . ARE NOT IN A CONDITION TO FOLLOW THE DETERMINATION OF THE WILL" A PERSON IS UNDETTERRABLE AND EXCUSED; HE IS IN A STATE OF AUTOMATISM OR CAUSAL NECESSITY. PRINCIPLES, PP. 164-65.

²H. L. A. HART, "MURDER AND THE PRINCIPLES OF PUNISHMENT: ENGLAND AND THE UNITED STATES," IN PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (OXFORD: OXFORD UNIV. PRESS, 1968), P. 77.

PUNISHMENT OF THESE INDIVIDUALS COULD ONLY HAVE A HARDENING EFFECT-- LIKE PUBLIC EXECUTIONS. FURTHERMORE, THE UTILITARIAN CAN POINT OUT THAT ABOLITION OF THE STANDARD EXCULPATING EXCUSES WOULD LEAD TO SERIOUS INSECURITY. IMAGINE THE PLEASURE OF DRIVING AN AUTOMOBILE IF ONE KNEW THAT ONE COULD BE EXECUTED FOR RUNNING DOWN A CHILD WHOM IT WAS ABSOLUTELY IMPOSSIBLE TO AVOID STRIKING! ONE CERTAINLY DOES NOT MAXIMIZE EXPECTABLE UTILITY BY ELIMINATING THE TRADITIONAL EXCUSES.¹

BRANDT HERE EXPRESSES THREE STRONG CLAIMS AGAINST LIABILITY WITHOUT FAULT:

1) ELIMINATION OF EXCUSES FROM THE LAW CAN NEVER SERVE TO INCREASE ADHERENCE TO THE LAW BY THOSE MEMBERS OF THE GENERAL PUBLIC NOT IN EXCUSING CONDITIONS.

2) STRICT LIABILITY MAY HAVE THE DISUTILE EFFECT OF DECREASING THE DETERRENT EFFECT OF LAW.

3) STRICT LIABILITY MAY HAVE THE INTRINSICALLY BAD CONSEQUENCE OF MAKING INNOCENT PEOPLE INSECURE.

A UTILITARIAN MIGHT EXPAND POINT NUMBER THREE AND ARGUE THAT NOT ONLY IS THE PSYCHOLOGICAL FEELING OF INSECURITY INTRINSICALLY BAD, BUT THAT ONE EFFECT OF SUCH INSECURITY MIGHT BE THAT

4) INDIVIDUALS WILL BE DETERRED FROM ENGAGING IN SOCIALLY UTILE ENDEAVOURS, WITH CONSEQUENT HARMFUL RESULTS, E.G., TRUCK DRIVERS WILL REFUSE TO WORK, KNOWING THAT THEY MAY BE EXECUTED IF THEY CAUSE THE DEATH OF A CHILD THROUGH ABSOLUTELY NO FAULT OF THEIR OWN. IF IT IS AGREED THAT TRANSPORTING MATERIALS BY TRUCK IS DESIRABLE FROM A UTILITARIAN POINT OF VIEW, THEN SUCH A "CHILLING EFFECT" UPON THE PRACTICE WOULD TEND TO RENDER STRICT LIABILITY UNACCEPTABLE TO A UTILITARIAN.

I WISH TO BEGIN MY DEFENSE OF ABSOLUTE LIABILITY ON UTILITARIAN GROUNDS BY DENYING THE VALIDITY OF CLAIM NUMBER ONE. I WISH TO ARGUE

¹BRANDT, ETHICAL THEORY, P. 493.

THAT, IN FACT, PUNISHING THOSE IN EXCUSING CONDITIONS CAN HAVE UTILE CONSEQUENCES; THAT WHILE THE THREAT OF PUNISHMENT MAY INDEED BE INEFFICACIOUS IN DETERRING CRIMES BY THOSE IN EXCUSING CONDITIONS, THE ACTUAL INFLICTION OF SUCH PUNISHMENT ON BLAMELESS OFFENDERS MAY WELL SERVE TO INCREASE ADHERENCE TO THE LAW BY MEMBERS OF THE GENERAL PUBLIC NOT IN EXCUSING CONDITIONS. PRIMARILY, SUCH DETERRENCE WILL BE OF THOSE POTENTIAL OFFENDERS WHO BELIEVE (INCORRECTLY OR CORRECTLY) THAT THEIR FAULT IN COMMITTING A CRIME IS PROBABLY UNPROVEABLE IN A COURT OF LAW.

WE HAVE SEEN THAT THE LAW DIVIDES OFFENSES INVOLVING FAULT INTO FOUR CATEGORIES: ACTS DONE 1) PURPOSELY, 2) KNOWINGLY, 3) RECKLESSLY, 4) NEGLIGENTLY. I WOULD LIKE TO CONSIDER EXAMPLES OF THESE VARIOUS SORTS OF OFFENSES WHICH SHOW THAT PUNISHMENT OF THOSE IN EXCULPATING CONDITIONS CAN INDEED DETER POTENTIAL OFFENDERS.

FIRST, CONSIDER THE CASE OF A MAN WHO WISHES TO KILL HIS WIFE, WHOM HE KNOWS TO BE UNFAITHFUL. HE DOES NOT DESIRE HER DEATH SO GREATLY, HOWEVER, THAT HE IS WILLING TO PAY THE PRICE OF A PRISON TERM TO ACCOMPLISH HIS END. HE BELIEVES THAT THE POLICE DEPARTMENT IN HIS COMMUNITY IS SO EFFICIENT THAT HE IS VIRTUALLY CERTAIN TO BE DETECTED IN ANY PLOT TO TAKE HER LIFE. HE IS AWARE, THOUGH, THAT THE LAW RECOGNIZES AS AN EXCULPATING CONDITION THE FACT THAT AN ACT WAS DONE WHILE IN A STATE OF INSANITY. THIS KNOWLEDGE MOVES HIM TO HATCH A PLOT INVOLVING HIS WIFE'S MURDER IN WHICH HE KILLS HER BEFORE WITNESSES, WHILE ACTING DERANGED. HE SURREPTITIOUSLY READS MANY BOOKS ON PSYCHIATRY AND LAW IN PREPARATION FOR HIS PERFORMANCE, AND BELIEVES THAT HE WILL BE ABLE, WITH THE AID OF WITNESSES TO HIS BEHAVIOUR AT THE TIME OF THE MURDER, TO CONVINCE A JURY OF HIS INSANITY AT THE TIME OF THE CRIME. WHETHER OR NOT HIS BELIEF IS JUSTIFIABLE IS OF NO IMPORTANCE HERE, SINCE THE

MAN ACTS ON HIS BELIEF ABOUT, AND NOT THE TRUE FACTS OF, HIS ABILITY TO DECEIVE AUTHORITIES. HE FINALLY DOES MURDER HIS SPOUSE.

WE HAVE HERE A CASE OF AN ACTION DONE BOTH PURPOSELY AND KNOWINGLY. IT IS CLEAR THAT SUCH AN INDIVIDUAL WOULD HAVE BEEN DETERRED FROM HIS CRIME IF THE LAW CONCERNING MURDER DID NOT RECOGNIZE EXCUSES, I.E., IF IT DID NOT REQUIRE FAULT ON THE PART OF THE PERPETRATOR. BELIEVING THAT HE WOULD BE DETECTED IN ANY SCHEME TO MURDER HIS WIFE, AND REALIZING THIS HIS MENTAL STATE WAS IRRELEVANT TO ANY PUNISHMENT AND THAT HE THEREFORE WOULD NOT HAVE A CHANCE TO DECEIVE THE AUTHORITIES WITH RESPECT TO SUCH MENTAL STATES, HE WOULD HAVE NO REASON TO BELIEVE THAT HE COULD, WITH IMPUNITY, COMMIT HIS WIFE'S MURDER.

IT IS THUS CONCEIVABLE THAT THE PRACTICE OF PUNISHING THOSE WITHOUT FAULT MAY SERVE TO DETER THOSE WHO PURPOSELY OR KNOWINGLY COMMIT ACTS WHICH VIOLATE THE UTILITARIAN PRINCIPLE.

IMAGINE NEXT A SITUATION IN WHICH THE CONDITIONS FOR RECKLESS CONDUCT ARE SATISFIED BY AN OFFENDER. A DRUGGIST, WORKING ALONE IN HIS STORE AFTER CLOSING IN THE EVENING, IS PREPARING A GREAT NUMBER OF PRESCRIPTIONS. HE IS IN A RUSH TO COMPLETE THE WORK, IN ORDER TO ATTEND A DINNER PARTY. IN HIS HASTE HE FAILS TO TAKE THE PROPER PRECAUTIONS FOR REDUCING THE LIKELIHOOD OF MISLABELLING AN ORDER, E.G., HE KEEPS MANY DIFFERENT PILLS ON HIS WORKTABLE AT ONE TIME, ALTHOUGH MANY OF THESE ARE SIMILAR IN SHAPE AND SIZE. HE IS AWARE THAT IN TAKING THESE SHORT-CUTS HE IS TAKING AN UNJUSTIFIABLE RISK THAT MISLABELLING WILL OCCUR. CLEARLY, THE POSSIBLE INTRINSIC DISVALUE OF THE CONSEQUENCES COULD BE GREAT, SINCE TAKING AN IMPROPER DRUG MAY CAUSE DEATH, OR LEAVE THE PATIENT IN MISERY FROM AN AILMENT WHICH PROPER MEDICATION WOULD CURE. HE IS ALSO AWARE THAT RECKLESSLY SELLING A MISLABELLED DRUG

IS A CRIMINAL OFFENSE. HOWEVER, HE BELIEVES THAT IT IS IMPOSSIBLE TO PROVE THAT HE WAS IN FACT RECKLESS, SINCE THERE ARE NO WITNESSES TO HIS ACTIONS AND, BEFORE LEAVING THE PREMISES, HE RESTORES ALL HIS MATERIALS TO THEIR PROPER PLACE. SINCE HE FEELS THAT HIS FAULT IS UNPROVEABLE THE DETERRENT THREAT OF PUNISHMENT FAILS TO PREVENT HIS CRIMINAL ACTS.

CONSIDER, NOW, THE EFFECT UPON THE SAME INDIVIDUAL OF THE KNOWLEDGE THAT SELLING A MISLABELLED DRUG IS A STRICT LIABILITY OFFENSE. HE WOULD REALIZE THAT THE SIMPLE DETECTION OF AN ERROR IN HIS LABELLING OF A PRESCRIPTION WOULD BE SUFFICIENT TO IMPOSE CRIMINAL PENALTIES UPON HIM; THE STATE NEED NO LONGER PROVE THAT HE HAD ENGAGED IN HIS WORK RECKLESSLY. THE CERTAINTY THAT PUNISHMENT WILL ACCRUE TO HIM IF HE CONTINUES IN HIS RECKLESS PREPARATION OF PRESCRIPTIONS IS INCREASED, AND WITH IT THE DETERRENT EFFICACY OF THE THREAT OF PUNISHMENT.

IT SEEMS, THEN, THAT PUNISHING THOSE WITHOUT FAULT CAN SERVE TO DETER THOSE WHO WOULD BE RECKLESSLY AT FAULT.

BEFORE EXAMINING AN EXAMPLE OF CONDUCT WHICH WOULD SATISFY BOTH OBJECTIVE AND SUBJECTIVE STANDARDS OF NEGLIGENCE,¹ AND IN WHICH THE AGENT MIGHT HAVE BEEN DETERRED BY ABSOLUTE LIABILITY LAWS, WE MUST CONSIDER A CLAIM MADE BY SOME WRITERS THAT NO INDIVIDUAL WHO IS NEGLIGENT CAN BE DETERRED AT ALL BY THE THREAT OF PUNISHMENT FOR HIS CONDUCT. IT IS ARGUED THAT SINCE THE ACTOR IS INADVERTENT BY HYPOTHESIS, THE THREAT OF PUNISHMENT IS NOT, SO TO SPEAK, "BEFORE HIS MIND" AND CANNOT SERVE TO DETER HIM. SINCE HE IS NOT, AT THE TIME HE COMMITS HIS ACT, AWARE THAT HE IS COMMITTING A PROHIBITED ACT, THE PENALTIES ATTACHED

¹FOR A DISCUSSION OF THE DISTINCTION, SEE SUPRA, PP. 42-43.

TO SUCH CONDUCT CANNOT BE EFFECTIVE AS DETERRENTS.

THIS CLAIM IS MADE BY JEROME HALL:

THE DETERRENT THEORY MUST JUSTIFY PUNISHMENT FOR INADVERTENCE QUITE APART FROM, AND IN ADDITION TO, ITS JUSTIFICATION OF PUNISHMENT FOR RECKLESSNESS. BUT DETERRENCE RESTS ON RATIONALIST TENETS, I.E., THAT A POTENTIAL OFFENDER WEIGHS THE ADVANTAGE OF HIS COURSE OF CONDUCT AGAINST THE EVIL OF THE SANCTION, AND REFRAINS ON GROUNDS OF SELF-INTEREST. NEITHER THAT PREMISE NOR THE FACTS APPLY TO NEGLIGENT HARM-DOERS. YET THE ADVOCATES OF THE DETERRENT THEORY SEEM TO BELIEVE THAT THE PUNISHMENT OF INADVERTENT HARM-DOERS WILL SOMEHOW CONDITION POTENTIALLY INADVERTENT HARM-DOERS BEYOND AND IN ADDITION TO THE INFLUENCE EFFECTED BY THE PUNISHMENT OF RECKLESS OFFENDERS. BUT WHAT REASON IS THERE TO BELIEVE THAT THERE IS ANY SUCH "CARRY-OVER"?

NOW, IT IS PERFECTLY TRUE THAT AT THE TIME THAT HE COMMITS HIS INADVERTENT ACT THE THREAT OF PUNISHMENT CANNOT DETER THE OFFENDER. BUT THIS FACT IS PERFECTLY CONSISTENT WITH THE ADDITIONAL FACT THAT KNOWLEDGE THAT CERTAIN NEGLIGENT ACTS ARE PUNISHED CAN DETER NEGLIGENT CONDUCT.

AN INDIVIDUAL WHO KNOWS THAT CERTAIN FUTURE CONDUCT, IF ENGAGED IN INADVERTENTLY, WILL BE PUNISHED IS GIVEN A MOTIVE FOR TAKING STEPS NOW TO INSURE THAT HE IS NOT INADVERTENT IN THE FUTURE. FOR EXAMPLE, HE MAY ESTABLISH AN ENFORCED DAILY REGIMEN OF ATTENTION TO CERTAIN DETAILS OF HIS CONDUCT, PREVIOUSLY IGNORED. IN TIME, SUCH ATTENTION MAY BECOME HABITUAL, THEREBY DECREASING THE LIKELIHOOD OF INADVERTENTLY VIOLATING RULES PERTAINING TO THAT AREA OF CONDUCT AND CONSEQUENTLY MINIMIZING INTRINSICALLY DISVALUABLE CONSEQUENCES. THE AGENT'S MOTIVATION FOR ACTING IN SUCH A WAY AS TO MORE NEARLY INSURE HIS CONFORMITY TO LAW IS HIS DESIRE TO AVOID THE PUNISHMENT WHICH HE KNOWS WILL BE INFLICTED IF HE INADVERTENTLY BREAKS THE LAW.

¹ JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2ND ED; INDIANAPOLIS: THE BOBBS-MERRILL COMPANY, INC., 1960), P. 137.

CERTAIN NEGLIGENT ACTS ARE, THEN, POSSIBLY DETERRABLE BY THE THREAT OF PUNISHMENT. CAN PUNISHING THOSE IN EXCUSING CONDITIONS EVER SERVE TO DETER THOSE WHO ACT NEGLIGENTLY?

CONSIDER THE CASE OF AN AUTOMOBILE DRIVER WHO OCCASIONALLY "DAY-DREAMS" WHILE OPERATING HIS VEHICLE. AT THE TIME THAT HE ENGAGES IN THESE LAPSES OF PROPER ATTENTION HE IS UNAWARE OF THE NATURE OF HIS ACT. SUCH CONDUCT IS CLEARLY NEGLIGENT. FURTHERMORE, THE DRIVER AT ALL OTHER TIMES REALIZES THAT HE DOES OCCASIONALLY ENGAGE IN THIS BEHAVIOUR. HOWEVER, HE KNOWS THAT IN ORDER TO BE PUNISHED FOR ANY HARM RESULTING FROM HIS NEGLIGENT DRIVING HIS NEGLIGENCE MUST BE ESTABLISHED AND HE BELIEVES, PROBABLY CORRECTLY, THAT IT IS USUALLY EXTREMELY DIFFICULT TO PROVE THAT A DRIVER'S MIND WAS "WANDERING" AT THE TIME OF ANY ACCIDENT. THE DETERRENT THREAT OF PUNISHMENT IS THUS RENDERED INEFFECTUAL.

IF, HOWEVER, ALL DRIVERS OF AUTOMOBILES WHICH WERE INVOLVED IN ACCIDENTS WERE SUBJECT TO CRIMINAL SANCTIONS UNDER LIABILITY WITHOUT FAULT STATUTES AND IT WAS THEREFORE UNNECESSARY TO PROVE NEGLIGENCE ON THE PART OF A DRIVER BEFORE IMPOSING LIABILITY, THE ACTOR IN OUR EXAMPLE MIGHT VERY WELL BE DETERRED. HE NOW KNOWS THAT IF HE IS INVOLVED IN AN ACCIDENT HE WILL BE PUNISHED, AND THAT HIS PRESENT MANNER OF DRIVING IS LIKELY TO INVOLVE HIM IN A COLLISION. IN ORDER TO AVOID PUNISHMENT HE DECIDES TO TAKE STEPS TO INSURE THAT HE WILL NOT BE INADVERTENT IN THE FUTURE. FOR EXAMPLE, HE KEEPS HIS RADIO TURNED ON WITH HIGH VOLUME AND MAKES A HABIT OF CHANGING HIS ROUTE TO AND FROM WORK EVERY FEW DAYS TO AVOID BOREDOM AND CONSEQUENT DAYDREAMING. AS A RESULT, HIS NEGLIGENT DRIVING MAY VERY WELL CEASE.

PUNISHING INDIVIDUALS IN EXCUSING CONDITIONS MAY, THEN, PREVENT

NEGLIGENT CONDUCT.

THE POINTS ILLUSTRATED IN THE PRECEEDING EXAMPLES MAY BE SUMMARIZED AS FOLLOWS: PUNISHMENT OF INDIVIDUALS IN EXCUSING CONDITIONS MAY SERVE TO DETER INDIVIDUALS WHO ARE NOT IN EXCUSING CONDITIONS BUT WHO WOULD NOT BE DETERRED BY A SYSTEM OF PUNISHMENT WHICH RECOGNIZED EXCULPATING CONDITIONS SINCE THEY BELIEVE THAT THE PUBLICLY PROVEABLE ASPECTS OF THEIR BEHAVIOUR ARE CONSISTENT WITH THE (FALSE) CLAIM THAT THEY WERE IN AT LEAST ONE OF THOSE CONDITIONS WHEN THE CONDUCT OCCURRED.

As H. L. A. HART WRITES:

ANY INCREASE IN THE NUMBER OF CONDITIONS REQUIRED TO ESTABLISH CRIMINAL LIABILITY INCREASES THE OPPORTUNITY FOR DECEIVING COURTS OR JURIES BY THE PRETENCE THAT SOME CONDITION IS NOT SATISFIED. WHEN THE CONDITION IS A PSYCHOLOGICAL FACTOR THE CHANCES OF SUCH PRETENCE SUCCEEDING ARE CONSIDERABLE. QUITE APART FROM THE PROVISION MADE FOR MENTAL DISEASE, THE CASES WHERE AN ACCUSED PERSON PLEADS THAT HE KILLED IN HIS SLEEP OR ACCIDENTALLY OR IN SOME TEMPORARY ABNORMAL STATE OR UNCONSCIOUSNESS SHOW THAT DECEPTION IS CERTAINLY FEASIBLE.¹

SIMILARLY, BENTHAM REALIZED THAT AMONG THE FACTORS WHICH DETERMINE THE DETERRENT EFFECT OF A THREATENED PUNISHMENT ARE NOT ONLY THE SEVERITY OF THE PUNISHMENT, BUT THE CERTITUDE THAT IT WILL BE INCURRED.² TO THE DEGREE, THEN, THAT LEGAL EXCUSES REDUCE THE CERTITUDE OF PUNISHMENT ACCRUING TO AN INDIVIDUAL, TO THAT DEGREE WILL THE DETERRENT EFFICACY OF THE THREAT OF PUNISHMENT DECLINE.

WITH RESPECT TO THE PARTICULAR EXCUSE OF INSANITY, THE UTILITARIAN REJOINDER TO THIS CLAIM IS TYPICALLY EXPRESSED BY T. L. S. SPRIGGE:

¹"PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT," IN PUNISHMENT AND RESPONSIBILITY, P. 19.

²BENTHAM, PRINCIPLES, PP. 172-74.

IF WORKABLE CRITERIA ARE AVAILABLE FOR DISTINGUISHING THE SANE AND THE INSANE, NON-PUNISHMENT OF THE INSANE WILL NOT ENCOURAGE THE SANE TO THINK THAT THEY CAN GET AWAY WITH THINGS, BECAUSE THEY WILL KNOW THAT THEY WILL NOT MEET THOSE CRITERIA. THIS DEMANDS THAT THE WORKINGS OF THE LAW BE WIDELY KNOWN, BUT THAT WOULD ANYWAY SEEM TO BE A DEMAND OF JUSTICE. THUS DETERRENCE OF THE SANE NEED NOT BE JEOPARDIZED, WHILE DETERRENCE OF THE INSANE IS PROBABLY OUT OF THE QUESTION ANYWAY. IF, ON THE OTHER HAND, SUCH CRITERIA OF INSANITY ARE NOT AVAILABLE, THERE WILL BE NO MEANS OF EXEMPTING THE INSANE FROM PUNISHMENT, AND THE QUESTION WILL NOT ARISE.¹

IT SEEMS, HOWEVER, THAT SPRIGGE HAS FAILED TO RECOGNIZE THE SIGNIFICANT DISTINCTION BETWEEN "WORKABLE" AND "PRACTICALLY INFALLIBLE" CRITERIA FOR ESTABLISHING AN EXCUSE. WE MAY CERTAINLY HAVE THE FORMER WITHOUT THE LATTER, I.E., IN MANY OR MOST INSTANCES WE MAY BE ABLE TO CORRECTLY ESTABLISH WHETHER A PERSON IS INSANE, ALTHOUGH OUR CRITERIA ARE IN PRACTICE FALLIBLE. AS LONG AS THIS IS THE CASE SOME CRIMINAL MAY FIND THAT POSSIBILITY OF DECEIVING THE AUTHORITIES SUFFICIENTLY INVITING SO THAT THE DETERRENT THREAT OF PUNISHMENT IS OUTWEIGHED BY THE PROSPECTIVE GAINS OF HIS CRIME, WITH THE CONSEQUENT OCCURRENCE OF AN OFFENSE WHICH WOULD HAVE BEEN DETERRED HAD THE EXCUSE OF INSANITY BEEN OMITTED FROM THE LAW.

WE MUST ALSO DISTINGUISH BETWEEN THE AVAILABILITY OF (PERHAPS INFALLIBLE) CRITERIA TO THE CRIMINOLOGIST, AND THE BELIEF BY MEMBERS OF SOCIETY IN SUCH AVAILABILITY. SO LONG AS POTENTIAL OFFENDERS BELIEVE, ALBEIT INCORRECTLY, THAT RESPONSIBLE AGENTS HAVE SUCCEEDED IN ESCAPING PUNISHMENT BY DECEIVING AUTHORITIES CONCERNING THEIR MENTAL STATES, THE DETERRENT THREAT OF PUNISHMENT IS WEAKENED.

¹T. L. S. SPRIGGE, "A UTILITARIAN REPLY TO DR. McCLOSKEY," CONTEMPORARY UTILITARIANISM (ED. BY MICHAEL BAYLES; NEW YORK: DOUBLEDAY AND COMPANY, INC., 1968), PP. 290-91.

SPRIGGE DOES, OF COURSE, SUGGEST THAT SOCIETY OUGHT TO EDUCATE INDIVIDUALS CONCERNING THE IMPOSSIBILITY OF SUCH DECEPTION. IF HE IS BEING A CONSISTENT UTILITARIAN WE MAY CONSTRUE THIS SUGGESTION AS A CLAIM THAT SUCH EDUCATION IS A LESS DISUTILE WAY OF DETERRING THE SANE THAN IS PUNISHMENT OF THE INSANE. THIS IS, OF COURSE, AN EMPIRICAL CLAIM AND MAY BE TRUE IN SOME SOCIETIES. HOWEVER, THE GREATER THE NUMBER OF PEOPLE WHO ARE ILL-EDUCATED (EITHER WITH RESPECT TO MENTAL DISEASE IN PARTICULAR, OR TO FACTUAL MATTERS GENERALLY), AND THE GREATER THE DEPTH OF THEIR IGNORANCE, THE CORRESPONDINGLY GREATER THE COST OF SUCH EDUCATION. IS IT NOT PROBABLE THAT IN ANY SOCIETY IN WHICH LESS THAN GENERAL ENLIGHTENMENT PREVAILS THE COST OF EDUCATING PEOPLE TO THE EXISTENCE OF INFALLIBLE CRITERIA FOR DETERMINING INSANITY WOULD BE GREATER THAN THE DISUTILITY OF PUNISHING PERHAPS ONLY ONE INDIVIDUAL BELIEVED TO BE INSANE? SUCH PUNISHMENT WOULD BRING HOME TO SOCIETY IN GENERAL, WITHOUT THE NEED OF VAST EDUCATIONAL ENLIGHTENMENT, THE FUTILITY OF COMMITTING AN OFFENSE IN THE HOPE OF ESCAPING PUNISHMENT BY FEIGNING INSANITY.

EVEN IN THOSE CIRCUMSTANCES WHERE OTHER INTRINSICALLY GOOD CONSEQUENCES OF EDUCATION WOULD BE SUFFICIENTLY GREAT SO THAT SUCH EDUCATION, RATHER THAN PUNISHMENT OF THE INSANE, WOULD BE COMMENDED BY THE UTILITARIAN PRINCIPLE, SUCH PUNISHMENT WOULD STILL SERVE A UTILITARIAN END: IT WOULD DETER POTENTIAL OFFENDERS DURING THE PERIOD (PERHAPS PROLONGED) NECESSARY FOR THE EDUCATIONAL PROCESS TO BE COMPLETED.

IF WE EXAMINE THE EXCUSES OF MISTAKE OR IGNORANCE OF FACT, NECESSITY AND COMPULSION, AND ACCIDENT WE FIND THAT SIMILAR CONSIDERATIONS POINT TO THE UTILITY OF PUNISHING INDIVIDUALS WHO COMMIT PROSCRIBED ACTS IN SUCH STATES. THE LACK OF CLEAR AND RARELY FALLIBLE

CRITERIA FOR ESTABLISHING WHERE EACH OF THESE EXCUSING CONDITIONS WAS SATISFIED; THE NECESSITY FOR JUDGMENTS OF "REASONABLENESS," "IMMINENCE," ETC. BY A JURY; ALL THIS PRESENTS A POTENTIAL OFFENDER WITH THE POSSIBILITY OF ESCAPING PUNISHMENT BY CONVINCING AUTHORITIES THAT HIS ACTIONS FALL WITHIN THE SCOPE OF ONE OF THE EXCUSES.

THERE REMAIN, HOWEVER, TWO ADDITIONAL EXCUSING CONDITIONS THAT HAVE NOT YET BEEN EXAMINED: AUTOMATISM AND INFANCY.

WITH RESPECT TO THE FORMER, MOST OF THE PREVIOUS CONSIDERATIONS ALSO APPLY, E.G., AN INDIVIDUAL WHO PLANS TO DO AN ACT PROHIBITED BY LAW AND THEN TO CLAIM THE EXCUSE OF HAVING BEEN SLEEPWALKING AT THE TIME MAY BE DETERRED FROM HIS CRIME IF THAT EXCUSE IS REMOVED FROM THE LAW.

THERE IS, THOUGH, ANOTHER CONSIDERATION WHICH APPLIES MOST FORCEFULLY TO THIS EXCUSE. ACTS OF AUTOMATISM ARE VERY OFTEN CAUSED BY PERSISTENT PHYSICAL DISABILITIES, E.G., EPILEPSY OR BRAIN TUMORS. IT IS QUITE CONCEIVABLE THAT AN INDIVIDUAL WHO COMMITS AN ACT IN A STATE OF AUTOMATISM KNEW OR SUSPECTED BEFOREHAND OF THE EXISTENCE OF THE DISABILITY WHICH CAUSED HIS CONDUCT. HIS FAILURE TO REFRAIN FROM ACTIVITIES IN WHICH SUCH AUTOMATISM COULD LEAD TO HARM CONSTITUTES EITHER NEGLIGENCE OR RECKLESSNESS, AND COULD IN PRINCIPLE THEREFORE BE DETERRED BY THE THREAT OF PUNISHMENT. HOWEVER, IN MANY SUCH CASES THE DIFFICULTY OF PROVING SUCH PREVIOUS SUSPICIONS OR KNOWLEDGE MAY CORRECTLY BE BELIEVED BY THE AGENT TO BE INSURMOUNTABLE, WITH THE RESULT THAT THE THREAT OF PUNISHMENT LOSES ITS DETERRENT EFFECT.

IN SUCH CASES THE IMPOSITION OF LIABILITY ON INDIVIDUALS WHO FIND THEMSELVES COMMITTING PROSCRIBED ACTS IN STATES OF AUTOMATISM THAT COULD NOT HAVE BEEN PREVENTED BY REASONABLE CARE MAY VERY WELL SERVE

TO DETER THOSE WHOSE STATES OF AUTOMATISM AND RESULTANT OFFENSES COULD HAVE BEEN SO PREVENTED.

SIMILAR CONSIDERATIONS APPLY, OF COURSE, TO INDIVIDUALS WHO FIND THEMSELVES IN IGNORANCE OR MISTAKE OF FACT, OR IN STATES OF NECESSITY OR COERCION, THROUGH UNPROVEABLE RECKLESSNESS OR NEGLIGENCE.

WE COME, FINALLY, TO THE EXCUSE OF INFANCY. NOW, WITH REGARD TO THE OTHER EXCUSES THUS FAR CONSIDERED, I HAVE MADE THE GENERAL CLAIM THAT REMOVAL OF SUCH EXCUSES FROM THE LAW WOULD SERVE THE UTILITARIAN END OF DETERRING POTENTIAL OFFENDERS WHO WOULD OTHERWISE HOPE TO DECEIVE AUTHORITIES ABOUT THE PRESENCE OF EXCULPATING CONDITIONS WHEN THEY ACTED. THIS CLAIM CAN OBVIOUSLY NOT BE MADE WITH RESPECT TO INFANCY: A SANE OFFENDER MAY HOPE TO FEIGN INSANITY, OR A MAN POSSESSED OF ALL THE TRUE FACTS CONCERNING HIS ACTIONS MAY HOPE TO CLAIM MISTAKE, BUT NO PERSON OVER THE AGE SPECIFIED BY THE EXCUSE OF INFANCY COMMITS AN OFFENSE INTENDING TO CLAIM HE IS BELOW THAT AGE. SUCH AN IDEA IS SURELY LAUGHABLE.

DOES ALL THIS MEAN, THEN, THAT NO DETERRENT END CAN BE SERVED BY PUNISHING INFANTS? IT DOES NOT. CONSIDER THAT THE EXCUSE OF INFANCY AS FOUND IN THE CRIMINAL LAW RESTS ON A PRESUMPTION OF FACT, I.E., THAT NO INDIVIDUAL BELOW A CERTAIN SPECIFIED AGE IS CAPABLE OF FORMING CERTAIN INTENTS OR GUIDING HIS CONDUCT IN CERTAIN WAYS. WHERE THIS AGE IS AS HIGH AS TEN OR EVEN SEVEN YEARS IT SEEMS THAT THE PRESUMPTION MUST BE FALSE; AT LEAST SOME SEVEN-TEN YEAR OLDS ARE CAPABLE OF FULLY INTENDED, VOLUNTARY, FORESEEN HARMS. MIGHT NOT SUCH INDIVIDUALS BE DETERRED BY THE THREAT OF PUNISHMENT, WHICH PRESENTLY "PASSES THEM BY"?

HOWEVER, EVEN IF WE CONSIDER THAT THE AGE SPECIFIED BY THIS EX-

CUSE IS LOWERED TO A POINT WHERE WE CAN, WITH VIRTUAL CERTAINTY, PRESUME THAT SUCH CHILDREN ARE RELEVANTLY INCAPABLE, WE MAY STILL OPT, ON UTILITARIAN GROUNDS, FOR THE REMOVAL OF SUCH AN EXCUSE.

CONSIDER THE FOLLOWING EXAMPLE: IN A LARGE AND CONGESTED MODERN CITY THERE ARE A LARGE NUMBER OF FALSE ALARMS BEING TURNED IN TO THE FIRE DEPARTMENT. SOME OF THESE ALARMS ARE BEING TURNED IN BY VERY YOUNG CHILDREN, WHO ENJOY THE SPECTACLE OF FIRE ENGINES RACING THROUGH THE STREETS, WITH ALL THE ATTENDANT EXCITEMENT. THE POTENTIAL HARM OF SUCH BEHAVIOUR CAN SCARCELY BE OVER-ESTIMATED. IN SPITE OF EXHORTATIONS BY PUBLIC OFFICIALS AND FIREMEN, AND OF CLEVER ADVERTISING CAMPAIGNS, THE ATTITUDE OF THE GENERAL PUBLIC TOWARD SUCH ACTIONS IS THAT THEY ARE HARMLESS PRANKS. WHEN ADULTS ARE CAUGHT AND PUNISHED THERE IS THEREFORE LITTLE DISGRACE ASSOCIATED WITH THEIR PENALTIES. CHILDREN ARE NEVER PUNISHED FOR THESE OFFENSES, SINCE THE EXCUSE OF INFANCY IS RECOGNIZED BY THE LAW CONCERNING THE SENDING OF FALSE ALARMS.

NOW, IMAGINE THE EFFECT OF REMOVING THAT EXCUSE FROM THE LAW. AN INFANT, WITHIN THE MEANING OF THE PREVIOUSLY RECOGNIZED EXCUSE, IS FOUND SENDING A FALSE ALARM AND SUBSEQUENTLY PUNISHED.¹ PUNISHMENT VERY OFTEN

¹ NOW, THE QUESTION MAY BE RAISED "HOW ARE WE TO HUMANELY PUNISH AN INFANT?" IT IS IMPORTANT IN ANSWERING SUCH A QUESTION TO REMEMBER THAT WE ARE NOT GOING TO BE CALLED UPON TO PENALIZE EXTREMELY YOUNG CHILDREN, E.G., THOSE WHO ARE 6 MONTHS OF AGE. WITH REGARD TO SUCH INDIVIDUALS THE PROBLEM DOES NOT ARISE SINCE SUCH CHILDREN ARE NOT CAPABLE OF ENGAGING IN THE SORT OF ACTIVITIES THAT MIGHT CONCEIVABLY BE THE SUBJECT OF STRICT LIABILITY STATUTES, I.E., THEY CANNOT DRIVE AUTOMOBILES, SELL PRODUCTS, SEND FALSE ALARMS, ETC. WE ARE ONLY CONCERNED WITH PUNISHING THOSE "INFANTS" WITHIN THE MEANING OF THE LAW (WHO MAY BE AS OLD AS 10) WHO ARE CAPABLE OF SUCH ACTIVITIES. IT SEEMS THAT SUCH AN INDIVIDUAL MAY BE PUNISHED IN MUCH THE SAME WAY AS PARENTS INFLICT NON-CORPORAL PUNISHMENT ON THEIR OWN CHILDREN, I.E., BY RESTRICTING THEIR FREEDOM AND INDICATING THAT SUCH RESTRICTION IS AN EXPRESSION OF DISAPPROVAL. SIMILARLY, CHILDREN CONVICTED OF CRIMINAL VIOLATIONS MAY BE PLACED IN SPECIAL "DISCIPLINARY SCHOOLS" WHERE ALL EDUCATIONAL TRAINING CONTINUES, BUT WHERE FREEDOMS AND ENJOYMENTS ARE LIMITED.

SERVES TO EXPRESS ATTITUDES OF RESENTMENT AND INDIGNATION AND JUDGEMENTS OF DISAPPROVAL AND REPROBATION. IT IS CLEAR TO THE COMMUNITY THAT THE INDIVIDUAL HERE PUNISHED IS NOT AT ALL MORALLY TO BLAME, AND IT IS THEREFORE NOT ASSUMED, AS IT OFTEN IS WHEN AN ADULT IS PUNISHED, THAT THE OBJECT OF REPROBATION IS THE INDIVIDUAL OFFENDER. RATHER, THE COMMUNITY MUST REALIZE THAT IT IS THE CONSEQUENCE OF THE BEHAVIOUR, I.E., THE DIVERSION OF FIRE-FIGHTING APPARATUS FROM THOSE AREAS IN WHICH THEY CAN BEST GUARANTEE THE SAFETY OF THE COMMUNITY, WHICH IS THE FOCUS OF CONDEMNATION.

THE REALIZATION BY INDIVIDUALS THAT AUTHORITIES HAVE ENGAGED IN THIS MANNER OF DENUNCIATION OF SUCH CONSEQUENCES, AT THE COST OF PUNISHING A MORALLY BLAMELESS CHILD, MAY WELL IMPRESS UPON SUCH INDIVIDUALS THE EXTREME EVIL OF THESE RESULTS. THIS MAY, IN TURN, BRING ABOUT NEW MORAL INHIBITIONS AGAINST CONDUCT LEADING TO THESE CONSEQUENCES.

PARENTS MAY NOW TAKE ADDITIONAL STEPS TO PREVENT THEIR CHILDREN FROM ENGAGING IN SUCH ACTIVITIES, E.G., THEY WILL BE CAREFUL TO EXPLAIN THE DANGERS TO THEIR CHILDREN, TO WATCH THEIR OUTSIDE PLAY MORE CLOSELY, ETC. WHILE A SIMILAR RESULT MIGHT BE BROUGHT ABOUT BY MAKING THE PARENTS LIABLE FOR THE OFFENSE OF THE CHILD, PUNISHING THE CHILD HIMSELF MIGHT BE YET MORE EFFECTIVE; MANY PARENTS WILL DISREGARD THREATS OF HARM TO THEMSELVES WHILE TAKING VERY SERIOUSLY SUCH THREATS TO THEIR CHILDREN.

ALSO, INCREASED DETERRENCE MAY BE BROUGHT ABOUT BY THE FEAR OF SOCIAL DISAPPROVAL NEWLY ASSOCIATED WITH PUNISHMENT FOR SUCH OFFENSES.

FINALLY, THE PSYCHOLOGICAL FORCE OF THE IRON-CLAD RULE "NO EXCUSES! NOT EVEN CHILDREN WILL BE EXCUSED!" OUGHT NOT TO BE UNDERESTIMATED. SUCH A RULE SERVES TO EXPRESS THE DETERMINATION OF THE AUTHORITIES

TIES TO END THE DANGEROUS ACTIVITIES DESCRIBED. KNOWLEDGE OF SUCH DETERMINATION WILL PROBABLY INCREASE THE DETERRENT EFFECT OF THE THREATENED PUNISHMENT.

THE FOREGOING DISCUSSION HAS FOCUSED ON THE DETERRENT EFFECT CAUSED BY THE IMPOSITION OF PUNISHMENT UPON FAULTLESS OFFENDERS. IT WILL BE RECALLED, HOWEVER, THAT THE UTILITARIAN ALSO LOOKS TO OTHER EFFECTS OF PUNISHMENT WHICH JUSTIFY ITS IMPOSITION, I.E., INCARCERATION AND REFORMATION. ARE THESE ENDS ALSO FURTHERED BY THE REMOVAL OF EXCUSES FROM THE LAW? IT MAY SEEM THAT THEY ARE NOT. AFTER ALL, WHEN WE PUNISH A FAULTLESS OFFENDER WE ARE NOT PREVENTING AN INDIVIDUAL WHO IS INCLINED TO COMMIT DISUTILE ACTS FROM COMMITTING THEM. NOR DO SUCH FAULTLESS OFFENDERS REQUIRE REFORM. HOWEVER, IT MUST ALSO BE REMEMBERED THAT HAVING A SYSTEM OF LAWS WHICH PUNISHES CERTAIN FAULTLESS INDIVIDUALS REDUCES THE LIKELIHOOD OF BLAMEWORTHY OFFENDERS ESCAPING PUNISHMENT. WHEN THOSE OFFENDERS WHO WOULD HAVE ESCAPED PUNISHMENT UNDER A SYSTEM OF LAWS WITH EXCULPATING CONDITIONS ARE THUS CAUGHT AND PUNISHED, THE ADDITIONAL CONSEQUENCES OF INCARCERATION AND REFORMATION ARE FURTHERED.

ABSOLUTE LIABILITY THUS HAS THE EFFECT NOT ONLY OF INCREASED DETERRENCE OF POTENTIAL OFFENDERS, BUT ALSO OF INCREASING THE NUMBER OF BLAMEWORTHY OFFENDERS WHO ARE INCARCERATED AND REFORMED.

WE HAVE THUS FAR CONSIDERED THE CONSEQUENCES, DESIRABLE FROM A UTILITARIAN POINT OF VIEW, OF REMOVING THE STANDARD EXCULPATING CONDITIONS FROM THE LAW; BUT THAT IS NOT THE ONLY WAY IN WHICH LIABILITY WITHOUT FAULT MAY BE INFLICTED. AS PREVIOUSLY DISCUSSED, SUCH LIABILITY MAY BE IMPOSED EITHER 1) WHERE AN "OBJECTIVE" STANDARD OF NEGLIGENCE IS IMPOSED, OR 2) WHERE IGNORANCE OF LAW WHICH IS THE RESULT OF INCAPACITY

TO LEARN THAT LAW DOES NOT EXCUSE.

DO SUCH PRACTICES LIKEWISE HAVE INTRINSICALLY GOOD CONSEQUENCES? CAN THE "OBJECTIVE" STANDARD AND THE DOCTRINE "IGNORANTIA JURIS NEMINEM EXCUSAT" BE DEFENDED BY A UTILITARIAN? OUGHT A UTILITARIAN EVER PUNISH AN INDIVIDUAL WHO LACKED THE CAPACITY TO LEARN THE RULES OR MAINTAIN THE CONDUCT REQUIRED OF HIM? THE ANSWER TO ALL THESE QUESTION IS "YES."

TAILORING STANDARDS OF CONDUCT OR KNOWLEDGE TO THE CAPACITIES OF AN INDIVIDUAL IS A DIFFICULT TASK INDEED. ESTABLISHING, E.G., THE EXACT LEVEL OF HIS INTELLIGENCE, STRENGTH OF MEMORY, ABILITY TO DO ABSTRACT REASONING QUICKLY, OR TO HEAR SOUNDS OF A CERTAIN FREQUENCY IS MOST DIFFICULT, AND IS FURTHER COMPLICATED BY THE NEED TO RELY HEAVILY ON THE TESTIMONY OF THE DEFENDANT HIMSELF IN ESTABLISHING PRECISELY HIS CAPACITIES. SUCH DIFFICULTIES, WITH THE CONSEQUENT POSSIBILITY OF DECEIVING OFFICIALS ABOUT THESE FACTORS, SERVES TO LOWER THE DETERRENT THREAT OF PUNISHMENT IN WAYS PREVIOUSLY DISCUSSED. WE MAY SUMMARIZE THE ARGUMENT HERE IN THE FOLLOWING WAY: PUNISHMENT OF INDIVIDUALS WHOSE CONDUCT WAS NOT AT FAULT BUT WHICH FAILED, BECAUSE OF A LACK OF CERTAIN CAPACITIES, TO CONFORM TO STANDARDS OF CONDUCT ESTABLISHED BY LAW MAY SERVE TO DETER INDIVIDUALS FROM SUCH DISUTILE CONDUCT WHO ARE CAPABLE OF SO CONFORMING, BUT WHO WOULD NOT DO SO WHERE THE SYSTEM OF LAW RECOGNIZED SUCH INCAPACITIES AS EXCULPATING FACTORS.

ALSO, SINCE FEWER BLAMEWORTHY INDIVIDUALS WILL ESCAPE PUNISHMENT BY ESTABLISHING FALSE DATA ABOUT THEIR MENTAL AND PHYSICAL CAPACITIES, MORE OF THESE PEOPLE WILL BE INCARCERATED AND REFORMED, FURTHERING THE UTILITARIAN END.

THESE CONSIDERATIONS, THEN, MILITATE AGAINST A STANDARD OF COM-

PLETE SUBJECTIVITY IN NEGLIGENCE OR IGNORANCE OF LAW AS AN EXCUSING CONDITION. BUT THAT IS NOT TO SAY THAT THEY NECESSARILY INDICATE THE JUSTIFIABILITY OF COMPLETE OBJECTIVITY EITHER.

WE MAY MAKE THE STANDARD OF NEGLIGENCE, BOTH IN CONDUCT AND IN IGNORANCE OF LAW, MORE AND MORE OBJECTIVE UNTIL THE GAINS IN GOOD CONSEQUENCES BROUGHT ABOUT BY INCREASED OBJECTIVITY NO LONGER OUTWEIGH THE INCREASED HARMS INFLICTED ON FAULTLESS OFFENDERS, I.E., WHEN THE "COST" OF INCREASED GOOD EFFECTS IS GREATER THAN THE "VALUE" OF THOSE EFFECTS. THE PRECISE LIMIT TO BE REACHED IS A MATTER OF EMPIRICAL INVESTIGATION. IF IT IS THE CASE, FOR EXAMPLE, THAT WHEN THE STANDARD OF NEGLIGENCE DOES NOT INCLUDE INTELLIGENCE AS A FACTOR THE NUMBER OF PEOPLE PUNISHED WHO ARE NOT AT FAULT, MULTIPLIED BY THE DEGREE OF THE HARM INFLICTED ON THEM, IS LESS THAN THE NUMBER OF POTENTIAL OFFENDERS DETERRED, MULTIPLIED BY THE HARM WHICH THEY WOULD HAVE INFLICTED, SUCH OBJECTIVITY IS ACCEPTABLE ON UTILITARIAN GROUNDS.

IF, ON THE OTHER HAND, WHEN CERTAIN OF THE CHARACTERISTICS OF THE DEFENDANT ARE CONSIDERED, THE NUMBER OF PEOPLE WHO ARE NOT DETERRED, MULTIPLIED BY THE HARM THEY INFLICT, IS LESS THAN THE HARM PREVENTED BY NOT PUNISHING FAULTLESS OFFENDERS, SUCH SUBJECTIVITY IS PERMISSIBLE ON UTILITARIAN GROUNDS.

AS POTENTIAL OFFENDERS HAVE REASON TO BELIEVE THAT HIGHLY RELIABLE CRITERIA ARE AVAILABLE TO AUTHORITIES FOR DETERMINING A PARTICULAR INCAPACITY, THESE INDIVIDUALS WILL NOT COUNT ON FEIGNING THAT INCAPACITY; EXCUSING INDIVIDUALS WITH THE INCAPACITY WILL NOT ENCOURAGE THOSE WITHOUT THE INCAPACITY TO THINK THAT THEY CAN GET AWAY WITH THINGS, FOR THEY NOW KNOW THAT THEY WILL NOT MEET THOSE CRITERIA. IN OTHER WORDS, REMOVAL OF CONSIDERATION OF THAT INCAPACITY FROM THE STANDARD OF NEGLIGENCE

GENCE WILL NOT SERVE TO BRING ABOUT ADDITIONAL DETERRENCE, INCARCERATION OR REFORM--OR AT LEAST NOT SUFFICIENT DETERRENCE, ETC., TO OUTWEIGH THE INCREASED HARM WROUGHT ON FAULTLESS OFFENDERS.

FOR THIS REASON, BLINDNESS, DEAFNESS, LOSS OF LIMBS, AND OTHER PHYSICAL DISABILITIES ARE GENERALLY CONSIDERED RELEVANT IN ESTABLISHING A STANDARD OF NEGLIGENCE FOR CONDUCT; THEY ARE EASILY PROVED, WHILE MENTAL ABILITIES ARE NOT. THE RESTATEMENT OF TORTS, SECOND, IN EXPLAINING THE REASON FOR ADMITTING PHYSICAL DEFECTS, BUT NOT MENTAL DEFICIENCIES, IN THE STANDARD OF NEGLIGENCE IN TORTS, ASSERTS THAT

THE EXPLANATION FOR THE DISTINCTION BETWEEN SUCH PHYSICAL ILLNESS AND . . . MENTAL ILLNESS . . . PROBABLY LIES IN THE GREATER PUBLIC FAMILIARITY WITH THE FORMER, AND THE COMPARATIVE EASE AND CERTAINTY WITH WHICH IT CAN BE PROVED.¹

[THE RESTATEMENT ALSO MENTIONS IN THIS CONTEXT] THE UNSATISFACTORY CHARACTER OF THE EVIDENCE OF MENTAL DEFICIENCY IN MANY CASES, TOGETHER WITH THE EASE WITH WHICH IT CAN BE FEIGNED, THE DIFFICULTIES WHICH THE TRIERS OF FACT MUST ENCOUNTER IN DETERMINING ITS EXISTENCE, NATURE, DEGREE AND EFFECT . . . ALTHOUGH THIS FACTOR MAY BE OF DECREASING IMPORTANCE WITH THE CONTINUED DEVELOPMENT OF MEDICAL AND PSYCHIATRIC SCIENCE, IT REMAINS AT THE PRESENT TIME A MAJOR OBSTACLE TO ANY ALLOWANCE FOR MENTAL DEFICIENCY.²

THAT IS NOT TO SAY THAT IT MIGHT NOT BE THE CASE THAT CERTAIN PHYSICAL DISABILITIES OUGHT NOT BE CONSIDERED RELEVANT EITHER. IT MIGHT BE THE CASE THAT IT IS VERY DIFFICULT FOR A JURY TO ESTABLISH EXACTLY HOW MUCH A PHYSICAL DISABILITY REMOVES ONE'S CAPACITY FOR CERTAIN TYPES OF ACTION AND, HENCE, THAT CERTAIN INDIVIDUALS JUDGED TO HAVE AN INCAPACITY TO PERFORM A CERTAIN SORT OF CONDUCT MIGHT IN FACT BE CAPABLE OF IT. FOR EXAMPLE, A MAN WHO HAS POOR EYESIGHT MIGHT VERY WELL MAKE UP FOR HIS LACK OF VISION BY USE OF HIS INCREASED AUDITORY ABILI-

¹RESTATEMENT, TORTS, SECOND, COMMENT (B) TO SEC. 283 C.

²IBID., COMMENT (B3) TO SEC. 283 B.

TIES. BUT SUCH A COMPENSATORY CONDITION MIGHT VERY WELL BE DIFFICULT FOR A NORMAL, SIGHTED JURY TO IMAGINE. CERTAIN INDIVIDUALS WITH POOR EYESIGHT MIGHT THEN NOT BE MOTIVATED TO TAKE THE INCREASED CARE OF WHICH THEY ARE CAPABLE BECAUSE THEY REALIZE THAT THEIR CAPACITY FOR SUCH CARE CANNOT GENERALLY BE ESTABLISHED.

IT IS NOT POSSIBLE HERE TO PASS JUDGMENT ON WHETHER A PARTICULAR CAPACITY OR CONDITION OUGHT TO BE ADMITTED IN ESTABLISHING A STANDARD OF NEGLIGENCE OR IGNORANCE OF LAW. WHETHER OR NOT SUCH A CAPACITY OUGHT TO BE CONSIDERED MUST BE DECIDED BY EMPIRICAL INVESTIGATION OF THE DETERRENT EFFECT OF SUCH PUNISHMENT, WEIGHED AGAINST THE SEVERITY AND NUMBER OF BLAMELESS PEOPLE PUNISHED. IT OUGHT TO BE CLEAR, HOWEVER, THAT AT LEAST CERTAIN CHARACTERISTICS MAY, WITH UTILITY, BE OMITTED FROM CONSIDERATION IN ESTABLISHING LIABILITY, WHILE OTHERS MAY, WITH UTILITY, BE INCLUDED.

THE ARGUMENTS THUS FAR OFFERED HAVE ESTABLISHED THAT PUNISHMENT OF CERTAIN FAULTLESS OFFENDERS MAY HAVE CONSEQUENCES OF INTRINSIC VALUE. THIS IS A NECESSARY, BUT NOT A SUFFICIENT, CONDITION FOR THE JUSTIFICATION OF SUCH PUNISHMENT UNDER UTILITARIANISM. IT MUST FURTHER BE SHOWN THAT THE TOTAL VALUE OF THESE CONSEQUENCES IS GREATER THAN THE DISVALUE OF THE HARM INFLICTED ON THE FAULTLESS OFFENDER, PLUS THE DISVALUE OF ANY OTHER HARMFUL CONSEQUENCES OF SUCH A PRACTICE.

ONE OF THESE ADDITIONAL DISUTILE CONSEQUENCES, MENTIONED BY BRANDT, IS THE "HARDENING EFFECT" OF THE PUNISHMENT OF MORALLY INNOCENT PEOPLE. PRESUMABLY BRANDT HAS IN MIND THE FOLLOWING SORT OF ARGUMENT: THE DETERRENT EFFECT OF PUNISHMENT IS PARTIALLY BROUGHT ABOUT THROUGH THE POTENTIAL OFFENDER'S FEAR OF THE INTRINSICALLY BAD EX-

PERIENCE OF BEING INCARCERATED, OR OF THE INABILITY TO PURSUE CERTAIN INTRINSICALLY GOOD EXPERIENCES BECAUSE THE MEANS TO SUCH ENDS, E.G., MONEY, PHYSICAL FREEDOM, OR PROPERTY, HAVE BEEN FORFEITED IN MAKING RECOMPENSE FOR ONE'S ACTIONS.

THESE ARE NOT, HOWEVER, THE ONLY CONSEQUENCES OF PUNISHMENT WHICH HAVE A DETERRENT EFFECT. THERE IS ALSO THE INTRINSICALLY BAD EXPERIENCE BY THE PUNISHED INDIVIDUAL OF THE SCORN AND CONDEMNATION IMPOSED UPON HIM BY SOME OF THE OTHER MEMBERS OF SOCIETY. PRESUMABLY SUCH SCORN AND CONDEMNATION IS EXPERIENCED BY MANY OFFENDERS AS HAVING SOME INTRINSIC DISVALUE.

BUT SOCIAL CONDEMNATION OF THIS SORT ONLY ACCRUES TO ONE WHO HAS BEEN PUNISHED IF THE SOCIETY AT LARGE RESPECTS AND RECOGNIZES THE MORAL QUALITIES OF THE INSTITUTION WHICH INFLECTS SUCH PUNISHMENT. IF A PRACTICE IS MADE OF PUNISHING MORALLY INNOCENT PEOPLE, THOUGH, AS IS THE CASE EACH TIME A PERSON WITH A VALID EXCUSE IS PUNISHED, GENERAL RESPECT FOR LEGAL INSTITUTIONS WILL PROBABLY DECLINE, AS WILL THE REPROBATION HEAPED BY SOCIETY ON THOSE WHO HAVE BEEN PUNISHED BY SUCH A SYSTEM.

ALSO, THE GENERAL DISGRACE AND CONDEMNATION ASSOCIATED WITH PUNISHMENT ORIGINATES IN THE BELIEF THAT THE PENALIZED PERSON IS MORALLY BLAMEWORTHY. HOWEVER, AS THE CORRELATION BETWEEN BEING PUNISHED AND BEING BLAMEWORTHY DIMINISHES, SO TOO DOES THE DISGRACE ASSOCIATED WITH BEING PUNISHED DECREASE, AND WITH THIS THE DETERRENT EFFECT UPON BLAMEWORTHY PEOPLE DECLINES.

THESE ARGUMENTS, IF SOUND, SHOW THAT WHEN EITHER A) A SUFFICIENT NUMBER OF OFFENSES ARE MADE PUNISHABLE UNDER STRICT LIABILITY LAWS (ON GROUNDS OF UTILITY) SO THAT THE GENERAL PUBLIC'S MORAL OPINION OF AUTHORI-

TY DECLINES, OR B) WHEN UNDER ANY PARTICULAR LAW LARGE NUMBERS OF MORALLY INNOCENT PEOPLE ARE PUNISHED SO THAT THE CORRELATION BETWEEN THE PUNISHMENT AND THE MORAL BLAMEWORTHINESS OF A PARTICULAR OFFENDER DECLINE, THE DISUTILE CONSEQUENCE OCCURS THAT THE DETERRENT EFFECT OF PUNISHMENT IS REDUCED.

THIS DOES NOT SHOW, HOWEVER, THAT STRICT LIABILITY CANNOT BE INSTITUTED FOR CERTAIN OFFENSES WITHOUT BRINGING ABOUT A SIGNIFICANT REDUCTION IN THE DETERRENT EFFICACY OF PUNISHMENT. IF, FOR EXAMPLE, THE STRICT LIABILITY STATUTES IN A GIVEN SYSTEM OF LAW COVER A VERY SMALL PROPORTION OF THE TOTAL NUMBER OF ACTIONS MADE PUNISHABLE UNDER THAT SYSTEM--ALL OTHER LAWS BEING BASED ON FAULT--IT SEEMS UNLIKELY THAT GENERAL PUBLIC RESPECT FOR LEGAL INSTITUTIONS WOULD SUFFER MORE THAN A VERY INSIGNIFICANT AMOUNT.¹

ALSO, IF LIABILITY WITHOUT FAULT STATUTES WERE PROMULGATED FOR OFFENSES IN WHICH THE VAST NUMBER OF VIOLATIONS WERE IN FACT COMMITTED BY PEOPLE WHO WERE AT FAULT, THE GENERAL CORRELATION BETWEEN PUNISHMENT AND BLAMEWORTHINESS ON WHICH THE DISGRACE OF PUNISHMENT IS BASED WOULD BE RETAINED.

THIS CALLS ATTENTION TO THE FACT THAT THERE ARE CERTAIN SORTS OF HARMS WHICH ARE MORE LIKELY THAN OTHERS TO RESULT WITH NO FAULT ON THE PART OF THE AGENT. FOR EXAMPLE, IT IS MORE LIKELY THAT THROUGH NO FAULT OF ONE'S OWN ONE MAY BE LATE FOR AN APPOINTMENT THAN THAT A PHARMACIST, THROUGH NO FAULT OF HIS OWN, MAY SELL HEROINE WITHOUT A PRESCRIPTION. SO LONG AS STRICT LIABILITY LAWS ARE FORMULATED FOR A SMALL PROPORTION

¹ IT IS INTERESTING TO NOTE THAT IF THE SOCIETY WERE ITSELF UTILITARIAN IN ITS ETHICAL OUTLOOK, AS IT WOULD IDEALLY BE FOR BRANDT, THEN THE MORE UTILITARIAN THE LEGAL SYSTEM (WITH LIABILITY FOR FAULTLESS OFFENDERS), THE MORE IT WOULD BE HELD IN RESPECT BY THE PUBLIC!

OF THE ACTIONS MADE CRIMINAL BY A SYSTEM OF LAW, AND ARE FORMULATED FOR OFFENSES IN WHICH THE LIKELIHOOD OF HARM BEING CAUSED BY AN INDIVIDUAL TAKING REASONABLE CARE IS SMALL, THE SORTS OF DISUTILE CONSEQUENCES OF STRICT LIABILITY LAWS WHICH WE HAVE BEEN DISCUSSING ARE UNLIKELY TO OCCUR.¹

BRANDT SUGGESTS THAT A SECOND DISUTILE RESULT OF THE ESTABLISHMENT OF LIABILITY WITHOUT FAULT IN THE LAW IS THE INSECURITY WHICH SUCH STATUTES GENERATE AMONG THE MEMBERS OF SOCIETY. THIS INSECURITY IS CAUSED BY THE KNOWLEDGE THAT, HAVING ENTERED INTO CERTAIN ACTIVITIES, AN AGENT IS UNABLE TO PREDICT OR PREVENT BY DUE CARE AND PLANNING HIS LIABILITY TO PUNISHMENT.

NOW SUCH KNOWLEDGE MAY HAVE TWO VERY DIFFERENT SORTS OF RESULTS. ONE IS TO GENERATE SUCH FEAR AMONG AGENTS WHO MIGHT OTHERWISE ENGAGE IN THE ACTIVITIES COVERED BY ABSOLUTE LIABILITY THAT THEY CHOOSE TO AVOID THOSE ACTIVITIES COMPLETELY. I HAVE PREVIOUSLY REFERRED TO THIS RESULT AS A "CHILLING EFFECT" UPON SUCH AN ENTERPRISE, AND I WILL SHORTLY CONSIDER THIS PROBLEM.

AT PRESENT I WISH TO EXAMINE A DIFFERENT RESULT, IN WHICH THE THREATENED PUNISHMENT IS NOT SO SEVERE AS TO CAUSE INDIVIDUALS TO REFRAIN FROM THE COVERED ACTIVITY, BUT IS SUFFICIENTLY SEVERE TO ADD A SENSE OF INSECURITY NOT PREVIOUSLY ASSOCIATED WITH THAT ENTERPRISE.

¹SOME EMPIRICAL EVIDENCE FOR THIS CONCLUSION IS FURNISHED BY CONSIDERATION OF OUR OWN SYSTEM OF CRIMINAL LAW. PUNISHMENT FOR THOSE OFFENSES WHICH HAVE BEEN MADE SUBJECT TO STRICT LIABILITY, E.G., SELLING ADULTERATED FOOD OR NARCOTICS, CERTAINLY STILL SEEMS TO CARRY THE STIGMA ASSOCIATED WITH PUNISHMENT FOR CRIMES REQUIRING FAULT. ALSO, THE GENERAL PUBLIC'S RESPECT FOR LAW DOES NOT SEEM TO HAVE BEEN SIGNIFICANTLY DECREASED BY THE ENACTMENT OF SUCH LIABILITY WITHOUT FAULT CRIMINAL STATUTES.

THE ARGUMENT THAT SUCH INSECURITY IS IN FACT PROMOTED BY LIABILITY WITHOUT FAULT AND, CONVERSELY, THAT IT IS LESSENER BY ADMITTING EXCUSING CONDITIONS INTO THE LAW, IS PRESENTED EXPLICITLY BY H. L. A. HART, WHO WRITES WITH REGARD TO THE CRIMINAL LAW AND ITS EXCUSING CONDITIONS THAT

WE CAN REGARD THEIR FUNCTION AS A MECHANISM FOR . . . MAXIMIZING WITHIN THE FRAMEWORK OF COERCIVE CRIMINAL LAW THE EFFICACY OF THE INDIVIDUAL'S INFORMED AND CONSIDERED CHOICE IN DETERMINING THE FUTURE AND ALSO HIS POWER TO PREDICT THAT FUTURE.¹

. . . WE CAN SEE THAT BY ATTACHING EXCUSING CONDITIONS TO CRIMINAL RESPONSIBILITY, WE PROVIDE EACH INDIVIDUAL WITH BENEFITS HE WOULD NOT HAVE IF WE MADE THE SYSTEM OF CRIMINAL LAW OPERATE ON A BASIS OF TOTAL 'STRICT LIABILITY'. FIRST, WE MAXIMIZE THE INDIVIDUAL'S POWER AT ANY TIME TO PREDICT THE LIKELIHOOD THAT THE SANCTIONS OF THE CRIMINAL LAW WILL BE APPLIED TO HIM.²

WHERE PUNISHMENT IS NOT SO RESTRICTED INDIVIDUALS WILL BE LIABLE TO HAVE THEIR PLANS FRUSTRATED BY PUNISHMENTS FOR WHAT THEY DO UNINTENTIONALLY, IN IGNORANCE, BY ACCIDENT OR MISTAKE.³

WHILE IT IS UNDOUBTEDLY TRUE THAT, AS HART ARGUES, RECOGNITION OF EXCUSES ELIMINATES CERTAIN TYPES OF INSECURITY, I WISH TO SHOW THAT SUCH RECOGNITION ALSO INCREASES CERTAIN TYPES OF INSECURITY, RELATIVE TO SYSTEMS OF ABSOLUTE LIABILITY.

IT HAS PREVIOUSLY BEEN ARGUED THAT INCREASED DETERRENCE, INCARCERATION AND REFORM CAN BE BROUGHT ABOUT BY STRICT LIABILITY. ONE OF THE RESULTS, THEN, OF THE RECOGNITION OF EXCUSES IS AN INCREASED NUMBER OF OFFENSES. ONE OF THE HARMFUL EFFECTS OF SUCH OFFENSES IS THE APPREHENSION WHICH THEY GENERATE, I.E., THE FEAR THAT ONE MAY BE A VIC-

¹H. L. A. HART, "LEGAL RESPONSIBILITY AND EXCUSES," IN PUNISHMENT AND RESPONSIBILITY, P. 46.

²IBID., P. 47.

³"PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT," IBID., P. 23.

TIM OF A FUTURE OFFENSE ALSO INCREASES.

A RESULT, THEN, OF RECOGNITION OF EXCUSES IS AN INCREASE IN APPREHENSION, OR INSECURITY. INFLICTION OF LIABILITY WITHOUT FAULT THUS REDUCES ONE SORT OF INSECURITY AT THE COST OF ANOTHER: AN INDIVIDUAL NOW KNOWS, AND IS INSECURE BECAUSE, HE MAY BE PUNISHED FOR AN ACT WHICH REASONABLE CARE COULD NOT HAVE PREVENTED; BUT HE ALSO KNOWS, AND IS LESS INSECURE BECAUSE, HE IS LESS LIKELY TO SUFFER HARM FROM OFFENSES BY OTHERS.

SIMILARLY, WHILE HART ARGUES THAT UNRESTRICTED PUNISHMENT FOR OFFENSES MAY FRUSTRATE THE PLANS OF INNOCENT PEOPLE, HE FORGETS THAT INCREASED CRIMES (BROUGHT ABOUT BY RECOGNITION OF EXCUSES)¹ ALSO FRUSTRATES THE PLANS OF ITS VICTIMS. ARE NOT THE POTENTIAL VICTIMS OF THESE ADDITIONAL CRIMES HAMPERED IN THEIR ABILITY TO PREDICT AND PREVENT FUTURE HARM BEING INFLICTED ON THEM? IS NOT THE EFFICACY OF THEIR INFORMED CHOICE IN DETERMINING THEIR FUTURE LESSENERED?

HART'S ARGUMENT MAY BE CONCLUSIVE AGAINST TOTAL STRICT LIABILITY FOR ALL OFFENSES. PERHAPS THE INSECURITY OF SUCH A DRACONIC SYSTEM OF LAW COULD NOT BE OUTWEIGHED BY THE INCREASED SECURITY OF DETERRENCE, INCARCERATION AND REFORM WHICH IT MAY BRING. HOWEVER, IN A SYSTEM OF LAWS WHERE LIABILITY WITHOUT FAULT STATUTES COVER RELATIVELY FEW ACTIVITIES AND ARE PROMULGATED FOR OFFENSES WHICH ARE GENERALLY COMMITTED

¹ IT IS IMPORTANT TO BEAR IN MIND THAT THE NUMBER OF CRIMES WILL INCREASE NOT ONLY IN VIRTUE OF PERSONS COMMITTING OFFENSES BECAUSE THEY BELIEVE THAT THEY CAN AVERT CONVICTION; IN ADDITION, SOME GUILTY AND BLAMEWORTHY PEOPLE WILL IN FACT AVERT CONVICTION BY FEIGNING EXCUSES AND WILL THEN BE FREE TO COMMIT PERHAPS NUMEROUS ADDITIONAL CRIMES BEFORE AGAIN BEING APPREHENDED. ALL TOLD, THE NUMBER OF SUCH ADDITIONAL CRIMES AND THE ATTENDANT DEGREE OF INSECURITY, ETC., ON THE PART OF THE PUBLIC MAY BE SIGNIFICANT.

BY BLAMEWORTHY PEOPLE, THIS PARTICULAR HARMFUL CONSEQUENCE OF STRICT LIABILITY IS APPROXIMATELY COUNTERBALANCED BY SIMILAR DISUTILE CONSEQUENCES OF LAWS WHICH RECOGNIZE EXCUSES, AND IS THEREFORE NOT DECISIVE AGAINST ABSOLUTE LIABILITY.

LET US NOW EXAMINE THE CLAIM THAT LIABILITY WITHOUT FAULT HAS THE DISUTILE CONSEQUENCE OF DETERRING INDIVIDUALS FROM ENGAGING IN ACTIVITIES WHOSE TOTAL CONSEQUENCES HAVE POSITIVE UTILITY. WE MAY BEGIN BY DIVIDING SUCH ENDEAVOURS INTO TWO CATEGORIES: "NORMALLY HAZARDOUS ACTIVITIES" (N.H.A.), AND "ULTRAHAZARDOUS ACTIVITIES" (U.H.A.). IT IS MOST DIFFICULT AND, FOR THE PURPOSES OF THIS PAPER, UNNECESSARY TO OFFER RIGOROUS CRITERIA FOR DIFFERENTIATING ACTIVITIES WITH REGARD TO THESE CATEGORIES. ONE NEED HERE ONLY IMAGINE THAT A STUDY IS MADE WHICH ORDERS VARIOUS ACTIVITIES ACCORDING TO THE PROBABILITY THAT ENGAGING IN EACH ACTIVITY WITHIN A SPECIFIC SOCIETY, AND WITH ALL CARE POSSIBLE WITHIN THAT SOCIETY, WILL LEAD TO HARMFUL CONSEQUENCES. IT IS NECESSARY TO SPECIFY THAT THIS STUDY IS MADE RELATIVE TO SOME SPECIFIC GROUP, SINCE THE PROBABILITY THAT ANY ACTIVITY WILL LEAD TO HARM DEPENDS UPON THE TECHNICAL EXPERTISE AND SCIENTIFIC KNOWLEDGE AVAILABLE TO AN AGENT, AS WELL AS UPON OTHER EMPIRICAL CONDITIONS WHICH MAY VARY GREATLY FROM SOCIETY TO SOCIETY, E.G., POPULATION DENSITY OR AMOUNT OF AIR POLLUTION. THOSE ACTIVITIES WHICH HAVE THE GREATEST PROBABILITY OF LEADING TO HARM DESPITE EXTREME CARE CONSTITUTE THE CORE EXAMPLES OF U.H.A. THOSE ACTIVITIES ASSOCIATED WITH VERY LOW PROBABILITIES ARE THE CORE EXAMPLES OF N.H.A.

CONSIDER AS A CLEAR EXAMPLE OF THE LATTER, WITHIN OUR OWN SOCIETY, THE SELLING OF MEAT BY A BUTCHER; AS AN EXAMPLE OF THE FORMER, DEMOLITION WORK INVOLVING EXPLOSIVES.

Now, IT IS CLEAR THAT SUBJECTING CERTAIN N.H.A. TO ABSOLUTE LIABILITY HAS NOT HAD ANY APPRECIABLE CHILLING EFFECT. ONE WOULD HAVE TO SEARCH LONG AND HARD TO FIND AN INDIVIDUAL WHO HAD GIVEN UP AMBITIONS OF BECOMING A BUTCHER BECAUSE HE KNEW THAT IF, EVEN AFTER TAKING EXTREME PRECAUTIONS AGAINST SUCH AN OCCURRENCE, HE HAD SOLD ADULTERATED MEAT HE WOULD HAVE BEEN LIABLE TO PUNISHMENT. OTHER ENTERPRISES SIMILARLY REGULATED BY STRICT LIABILITY INCLUDE BANKING AND PHARMACY; A SIMILAR LACK OF ANY CHILLING EFFECT MAY BE OBSERVED IN THESE FIELDS.

SUBJECTION OF SUCH ACTIVITIES TO REGULATION UNDER ABSOLUTE LIABILITY STATUTES HAS NOT DETERRED CAREFUL INDIVIDUALS FROM PARTICIPATING BECAUSE THE PROSPECTIVE BENEFITS TO THE AGENT FROM SUCH ENDEAVOURS IS SUFFICIENT TO OUTWEIGH THE RISK (WHICH IS SMALL IN N.H.A.) THAT, THROUGH NO FAULT OF HIS OWN, HE MAY CAUSE A PROHIBITED STATE OF AFFAIRS AND INCUR PENAL LIABILITY.

THIS SHOULD NOT BE CONSTRUED AS A CLAIM THAT LIABILITY WITHOUT FAULT CAN NEVER HAVE SUCH AN EFFECT. IF, FOR EXAMPLE, THE PUNISHMENT ASSOCIATED WITH VIOLATION OF A STRICT LIABILITY STATUTE IS EXTREMELY SEVERE, EVEN THE SLIGHT RISK OF INCURRING SUCH A PENALTY MAY BE SUFFICIENT TO OVERSHADOW, IN THE AGENT'S MIND, THE GOOD CONSEQUENCES TO BE GAINED BY SUCCESSFULLY ENGAGING IN THE ACTIVITY.

THIS DEMONSTRATES ONLY THAT STRICT LIABILITY OF A VERY SEVERE KIND MAY HAVE THE EFFECT OF DETERRING POTENTIAL AGENTS FROM ACTIVITIES WHICH ARE DESIRABLE FROM A UTILITARIAN POINT OF VIEW. IT DOES NOT SHOW THAT EVERY PENALTY ASSOCIATED WITH AN ABSOLUTE PROHIBITION AND WHICH IS SUFFICIENT TO BRING ABOUT INCREASED DETERRENCE OF FAULTY OFFENDERS HAS A CHILLING EFFECT AS WELL. AS WE SAW ABOVE, ACTUAL INSTANCES OF REGULATION OF ACTIVITIES WHICH ARE NORMALLY HAZARDOUS HAVE

SHOWN THAT SUCH A CLAIM WOULD BE UNTENABLE.

IN GENERAL, THEN, N.H.A. MAY BE SUBJECTED TO STRICT LIABILITY WITHOUT ANY APPRECIABLE CHILLING EFFECT. WHAT OF U.H.A?

IS IT TRUE THAT APPLYING STRICT LIABILITY TO AN U.H.A. WHOSE TOTAL CONSEQUENCES, WHEN PERFORMED WITH DUE CARE, HAVE POSITIVE UTILITY, WOULD HAVE THE EFFECT OF DETERRING THAT U.H.A?

I HAVE PREVIOUSLY OFFERED AS AN EXAMPLE OF SUCH AN U.H.A. DEMOLITION WORK INVOLVING EXPLOSIVES. HERE, THERE ARE OBVIOUSLY GOOD CONSEQUENCES TO BE BROUGHT ABOUT BY SUCH AN ENDEAVOUR, E.G., QUICKLY CLEARING LAND WITH LITTLE PHYSICAL LABOR AND AT SMALL COMPARATIVE COST. OF COURSE, AS WITH ALL U.H.A. THERE IS A RELATIVELY GREAT RISK THAT HARM WILL OCCUR FROM SUCH AN OPERATION ALTHOUGH ALL REASONABLE CARE HAS BEEN TAKEN. HOWEVER, THE TECHNICAL EXPERTISE OF DEMOLITION WORKERS IS SUCH THAT THEY ARE SUFFICIENTLY ABLE TO REDUCE THE NUMBER AND SEVERITY OF SUCH HARMS SO THAT THE OVERALL UTILITY OF THE PRACTICE, I.E., ITS GOOD CONSEQUENCES MINUS HARMS, REMAINS SIGNIFICANTLY POSITIVE.

IT REMAINS POSSIBLE, HOWEVER, TO FURTHER MINIMIZE SUCH HARMS BY SUBJECTING THIS ENTERPRISE TO STRICT LIABILITY. SUCH A RESULT IS ACCOMPLISHED BY THE DETERRENT EFFECT, IN WAYS PREVIOUSLY DISCUSSED, UPON CERTAIN OFFENDERS WHO ARE AT FAULT. DOES SUCH LIABILITY HAVE THE DISUTILE EFFECT OF DETERRING CAREFUL, PRUDENT AGENTS FROM SUCH ACTIVITIES AS WELL?

IT CERTAINLY SEEMS THAT AN INDIVIDUAL WHO KNEW THAT THERE WAS A SUBSTANTIAL RISK THAT THROUGH NO FAULT OF HIS OWN, AFTER TAKING EVERY POSSIBLE PRECAUTION, HE WOULD CAUSE A HARM PUNISHABLE BY IMPRISONMENT MIGHT WELL CEASE ENGAGING IN ACTIVITIES ATTENDED WITH SUCH LIABILITY.

WE MAY IMAGINE, HOWEVER, A SITUATION IN WHICH CRIMINAL PENALTIES IN THE FORM OF FINES RATHER THAN IMPRISONMENT FOR HARMS RESULTING FROM U.H.A. WOULD NOT HAVE AN UNREASONABLE CHILLING EFFECT. REMEMBER THAT BOTH FAULTLESS BLASTERS WHO ALWAYS TAKE REASONABLE CARE, AND THE LESS CAREFUL BLASTER, WHO WOULD NOT BE DETERRED BY CRIMINAL LIABILITY BASED ON FAULT, KNOW THAT THE FORMER IS LESS LIKELY TO CAUSE HARM THAN IS THE LATTER. REMEMBER, TOO, THAT THE DETERRENT EFFECT OF ANY THREATENED PUNISHMENT IS PROPORTIONAL TO BOTH THE SEVERITY OF THE PENALTY AND THE PROBABILITY OF INCURRING IT. THUS, THE DETERRENT THREAT OF ANY SET PENALTY FOR HARMS CAUSED BY BLASTING WILL BE GREATER FOR THE BLAMEWORTHY AGENT THAN THE FAULTLESS AGENT. THERE MAY, THEN, BE A FINE OF SUCH AN AMOUNT THAT ITS DETERRENT THREAT TO THE FAULTLESS BLASTER IS NOT SUFFICIENTLY GREAT TO CAUSE HIM TO CEASE HIS BLASTING OPERATIONS, BUT WHOSE GREATER DETERRENT THREAT TO THE FAULTY BLASTER IS SUFFICIENT TO DETER HIS NEGLIGENT ACTIVITIES.

SUCH CONSIDERATIONS APPLY ONLY TO FINES, AND NOT IMPRISONMENT, FOR U.H.A. SINCE EVEN THE SHORTEST PRISON TERM IS PROBABLY VIEWED WITH SUCH APPREHENSION THAT EVEN GIVEN THE SMALLER LIKELIHOOD OF INCURRING IT, THE FAULTLESS BLASTER WOULD NONETHELESS BE DETERRED FROM HIS DEMOLITION WORK.

FINALLY, IT OUGHT NOT BE ASSUMED THAT SUCH FINES WILL FAIL TO SERVE A DETERRENT EFFECT BECAUSE THE OFFENDER WILL SIMPLY PASS THE COSTS ON TO THE CONSUMER. IF HE IN FACT DOES SO, RATHER THAN ABSORBING THE COST HIMSELF, HIS COSTS WILL BE GREATER THAN THOSE OF THE FAULTLESS AGENT WHO HAS FEWER, IF ANY, FINES. IN THIS CASE, THE HIGHER CHARGES WILL RESULT IN A LOSS OF BUSINESS, WITH CONSEQUENTLY LOWER PROFITS AND A DETERRENT EFFECT.

I CONCLUDE, THEN, THAT IF THERE IS ANY SIGNIFICANT CHILLING EFFECT CAUSED BY THE IMPOSITION OF STRICT LIABILITY IN THE LAW IT ONLY OCCURS WHEN VERY SEVERE PENALTIES ARE ATTACHED TO N.H.A., OR WHERE IMPRISONMENT OR SEVERE FINES MAY BE INCURRED IN THE COURSE OF U.H.A.

THERE REMAINS TO BE EXAMINED AS AN INTRINSICALLY BAD CONSEQUENCE OF THE ADMISSION OF STRICT LIABILITY INTO THE LAW THE HARM ASSOCIATED WITH THE INFLICTION OF PUNISHMENT ON A FAULTLESS INDIVIDUAL. TO THE HEDONIST AND EUDAEMONIST, OF COURSE, THE INTRINSIC DISVALUE CONSISTS IN THE DISPLEASURE OR UNHAPPINESS WITH WHICH THAT INDIVIDUAL EXPERIENCES THE PUNISHMENT, AS WELL AS THE UNHAPPINESS OR DISPLEASURE WITH WHICH OTHERS "INVOLVED" WITH HIM, E.G., HIS FAMILY, FRIENDS, BUSINESS ASSOCIATES, ETC., EXPERIENCE HIS PUNISHMENT AND ITS IMMEDIATE EFFECTS UPON THEM, E.G., LOSS OF LIVELIHOOD, COMPANIONSHIP, ETC.

THESE INTRINSIC DISVALUES MAY VERY LIKELY BE GREATER IN THE CASE OF A FAULTLESS MAN PUNISHED THAN WHERE A MAN WHO IS AT FAULT IS PUNISHED; THE FORMER MAY EXPERIENCE A GREATER DEGREE OF RAGE, HURT, A SENSE OF INJUSTICE, ETC. SIMILARLY, HIS FAMILY, FRIENDS AND ASSOCIATES MAY BE HURT AND OUTRAGED AT WHAT THEY FEEL IS UNJUST PUNISHMENT. THIS IS, OF COURSE, NOT NECESSARILY TRUE. FOR EXAMPLE, A FAULTY OFFENDER MAY, BECAUSE OF HIS PSYCHOLOGICAL MAKE-UP OR FUTURE PLANS, EXPERIENCE GREATER UNHAPPINESS OR DISPLEASURE IN BEING INCARCERATED THAN MIGHT A FAULTLESS OFFENDER WHO HAS NO FUTURE PLANS OR IS NOT PSYCHOLOGICALLY PREDISPOSED TO INTENSE FEELINGS OF PAIN OR UNHAPPINESS.

NOW, FOR THE HEDONIST AND EUDAEMONIST, THE TOTAL DISVALUE OF THE SITUATION IN WHICH A FAULTLESS MAN IS PUNISHED EQUALS THE INTRINSIC DISVALUE OF THE EXPERIENCE OF SUCH PUNISHMENT, AND THE EXPERIENCE OF ITS CONSEQUENCES, BY ALL EFFECTED.

WHILE SUCH INTRINSIC DISVALUE MAY BE GREATER IN THE CASE OF A FAULTLESS OFFENDER, IT SEEMS CLEAR THAT THE DISVALUE WILL NOT IN GENERAL BE SO MUCH GREATER AS TO OUTWEIGH THE INTRINSIC VALUE OF ALL THE ADDITIONAL DESIRABLE CONSEQUENCES PREVIOUSLY DISCUSSED.

FOR THE IDEAL UTILITARIAN SUCH EXPERIENCES WILL LIKEWISE HAVE INTRINSIC DISVALUE, BUT ACCORDING TO CERTAIN OF THESE PHILOSOPHERS, NOTABLY G. E. MOORE, THE TOTAL DISVALUE OF THE SITUATION IS NOT EQUAL TO THE SUM OF THESE DISVALUES.

MOORE HOLDS A POSITION WHICH IMPLIES THAT THE TOTAL INTRINSIC DISVALUE OF THE SITUATION MAY BE GREATER THAN THE TOTAL OF THE INTRINSIC DISVALUE OF THE EXPERIENCES OF ALL CONCERNED. MOORE WRITES:

THE VALUE OF A WHOLE MUST NOT BE ASSUMED TO BE THE SAME AS THE SUM OF THE VALUE OF ITS PARTS.¹

. . . THE FACT THAT A AND B BOTH EXIST TOGETHER, TOGETHER WITH THE FACT THAT THEY HAVE TO ONE ANOTHER ANY RELATION WHICH THEY DO HAPPEN TO HAVE (WHEN THEY EXIST TOGETHER, THEY ALWAYS MUST HAVE SOME RELATION TO ONE ANOTHER; AND THE PRECISE NATURE OF THE RELATION CERTAINLY MAY IN SOME CASES MAKE A GREAT DIFFERENCE TO THE VALUE OF THE WHOLE STATE OF THINGS, THOUGH, PERHAPS, IT NEED NOT IN ALL CASES)--THAT THESE TWO FACTS TOGETHER MUST HAVE A CERTAIN AMOUNT OF INTRINSIC VALUE, THAT IS TO SAY MUST BE EITHER INTRINSICALLY GOOD OR INTRINSICALLY BAD, OR INTRINSICALLY INDIFFERENT, AND THAT THE AMOUNT BY WHICH THIS VALUE EXCEEDS THE VALUE WHICH THE EXISTENCE OF A WOULD HAVE, IF A EXISTED QUITE ALONE, NEED NOT BE EQUAL TO THE VALUE WHICH THE EXISTENCE OF B WOULD HAVE IF B EXISTED QUITE ALONE.²

WITH RESPECT SPECIFICALLY TO THE PUNISHMENT OF EVILDOERS:

. . . QUITE APART FROM THE CONSEQUENCES OR ANY VALUE WHICH AN EVIL MAY HAVE AS A MERE MEANS, IT MAY, SUPPOSING ONE EVIL ALREADY EXISTS, BE WORTH WHILE TO CREATE ANOTHER, SINCE, BY THE MERE CREATION OF THIS SECOND, THERE MAY BE CONSTITUTED A WHOLE LESS BAD THAN IF THE ORIGINAL HAD BEEN LEFT TO EXIST BY ITSELF.³

¹G. E. MOORE, PRINCIPIA ETHICA (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 1966), p. 28.

²MOORE, ETHICS, p. 151.

³MOORE, PRINCIPIA ETHICA, p. 216.

NOW, WHILE MOORE DOES NOT SPEAK OF THE VALUE OF PUNISHING A FAULTLESS OFFENDER, WE MAY FOLLOW HIS REASONING TO THIS CONCLUSION: WHERE A GOOD STATE OF AFFAIRS EXISTS (I.E., A STATE OF AFFAIRS IN WHICH A MORALLY GOOD MAN IS NOT BEING PUNISHED), THE CREATION OF AN EVIL (I.E., HIS PUNISHMENT) MAY CONSTITUTE A WHOLE OF GREATER DISVALUE THAN THE SUM OF THE DISVALUE OF THE EVIL AND THE VALUE OF THE GOOD.

DOES THIS ADDITIONAL DISVALUE WHICH AN IDEALIST MAY CLAIM EXISTS IN VIRTUE OF THE FACT THAT A GOOD INDIVIDUAL HAS BEEN PUNISHED RENDER STRICT LIABILITY UNACCEPTABLE TO SUCH A THEORIST? IT DOES NOT, FOR THE IDEALIST MUST NOT ONLY CONSIDER THIS ADDITIONAL INTRINSIC DISVALUE WHEN COMPUTING THE VALUE OF PUNISHING A FAULTLESS OFFENDER, BUT HE MUST ALSO CONSIDER IT WHEN COMPUTING THE VALUE OF THE ADDITIONAL GOOD CONSEQUENCES OF ABSOLUTE LIABILITY. THAT IS, FOR EACH INDIVIDUAL WHO IS NOT HARMED UNDER A SYSTEM OF LIABILITY WITHOUT FAULT (WITH ITS ADDITIONAL DETERRENT, INCARCERATIVE AND REFORMATIVE EFFECTS), BUT WHO WOULD BE HARMED UNDER A SYSTEM WHICH RECOGNIZED FAULTLESSNESS AS EXCULPATING, THE IDEAL UTILITARIAN MUST CONSIDER NOT ONLY THE DISVALUE OF THE EXPERIENCE OF THE HARM BY THAT PERSON, BUT ALSO THE FACT THAT THAT INDIVIDUAL DID NOT DESERVE TO BE HARMED. LIKE THE INNOCENT MAN PUNISHED, THEN, THE EVIL OF THE SITUATION HERE IS GREATER THAN THE HARM TO THE PERSON, BECAUSE THE HARM IS UNDESERVED. THE IDEALIST ARGUMENT "CUTS BOTH WAYS" AND IS THUS NOT DECISIVE.

IN FACT, MOORE'S THEORY IS NOT ACCEPTED BY ALL IDEAL UTILITARIANS. HASTINGS RASHDALL, FOR EXAMPLE, WRITES:

I COULD ACCEPT MR. MOORE'S VIEW THAT 'THE INFLICTION OF PAIN ON A PERSON WHOSE STATE OF MIND IS BAD MAY, IF THE PAIN BE NOT TOO INTENSE, CREATE A STATE OF THINGS THAT IS BETTER ON THE WHOLE THAN IF THE EVIL STATE OF MIND HAD EXISTED UNPUNISHED,' . . . ONLY I SHOULD SUBMIT THAT THE GROUND OF OUR APPROVAL IS NOT THE

MERE FACT 'THAT THE COMBINED EXISTENCE OF TWO EVILS MAY YET CONSTITUTE A LESS EVIL THAN WOULD BE CONSTITUTED BY THE EXISTENCE OF EITHER SINGLY' . . . BUT THE TENDENCY OF THE PAIN TO MAKE THE STATE OF MIND LESS OPPOSED TO OUR IDEAL OF WHAT IT OUGHT TO BE.¹

RASHDALL IS, IN FACT, QUITE EXPLICIT IN HIS POSITION THAT THE INFLICTION OF SUFFERING ON AN INNOCENT PERSON MAY BE JUSTIFIED BY PRECISELY THE SORT OF CONSIDERATIONS WE HAVE PREVIOUSLY MADE.

WHEN A MAN IS PUNISHED IN THE INTEREST OF SOCIETY, HE IS INDEED TREATED AS A MEANS, BUT HIS RIGHT TO BE TREATED AS AN END IS NOT THEREBY VIOLATED IF HIS GOOD IS TREATED AS OF EQUAL IMPORTANCE WITH THE END OF OTHER HUMAN BEINGS. SOCIAL LIFE WOULD NOT BE POSSIBLE WITHOUT THE CONSTANT SUBORDINATION OF THE CLAIMS OF INDIVIDUALS TO THE LIKE CLAIMS OF A GREATER NUMBER OF INDIVIDUALS; AND THERE MAY BE OCCASIONS WHEN IN PUNISHING A CRIMINAL WE HAVE TO THINK MORE OF THE GOOD OF SOCIETY GENERALLY THAN OF THE INDIVIDUAL WHO IS PUNISHED. NO DOUBT IT IS A DUTY TO THINK ALSO OF THE GOOD OF THE INDIVIDUAL, SO FAR AS THAT CAN BE DONE CONSISTENTLY WITH JUSTICE TO OTHER INDIVIDUALS.²

CONSIDERATION, THEN, OF THE PLIGHT OF THE FAULTLESS OFFENDER PUNISHED DOES NOT LEAD TO A CONCLUSIVE UTILITARIAN ARGUMENT AGAINST STRICT LIABILITY.

IT SEEMS, THEN, THAT FOR CERTAIN OFFENSES 1) PUNISHING THOSE IN EXCULPATING CIRCUMSTANCES CAN HAVE CERTAIN INTRINSICALLY GOOD CONSEQUENCES AND 2) THE TOTAL INTRINSIC VALUE OF THOSE CONSEQUENCES IS GREATER THAN THE INTRINSIC DISVALUE OF THE HARM INFLICTED ON THE FAULTLESS OFFENDER ADDED TO THE INTRINSIC DISVALUE OF ANY OTHER HARMFUL CONSEQUENCES OF SUCH A PRACTICE. CERTAIN WRITERS HAVE, HOWEVER, SUGGESTED THAT WE MAY PREVENT MANY OF THE SAME CRIMES PREVENTED BY THE IMPOSITION OF STRICT LIABILITY AND THAT WE MAY DO SO BY MEANS WHICH DO NOT HAVE CONSEQUENCES OF AS MUCH INTRINSIC DISVALUE AS DOES PUNISHING THE FAULTLESS. I WILL THEREFORE NOW CONSIDER THREE PRIMA

¹HASTINGS RASHDALL, THE THEORY OF GOOD AND EVIL, I, P. 294 N. 1.

²IBID., P. 303.

FACILE PLAUSIBLE ALTERNATIVES TO THE INSTITUTION OF LIABILITY WITHOUT FAULT, AND ATTEMPT TO DETERMINE WHETHER ANY ONE OF THESE IS PREFERABLE ON UTILITARIAN GROUNDS TO STRICT LIABILITY.

ACCORDING TO BENTHAM:

. . . A LOT OF PUNISHMENT IS A LOT OF PAIN; ON THE OTHER HAND, THE PROFIT OF AN OFFENSE IS A LOT OF PLEASURE, OR WHAT IS EQUIVALENT TO IT. BUT THE PROFIT OF THE OFFENCE IS COMMONLY MORE CERTAIN THAN THE PUNISHMENT, OR WHAT COMES TO THE SAME THING, APPEARS SO AT LEAST TO THE OFFENDER. IT IS AT ANY RATE COMMONLY MORE IMMEDIATE. IT FOLLOWS, THEREFORE, THAT, IN ORDER TO MAINTAIN ITS SUPERIORITY OVER THE PROFIT OF THE OFFENCE, THE PUNISHMENT MUST HAVE ITS VALUE MADE UP IN SOME OTHER WAY, IN PROPORTION TO THAT WHEREBY IT FALLS SHORT IN THE TWO POINTS OF CERTAINTY AND PROXIMITY. NOW, THERE IS NO OTHER WAY IN WHICH IT CAN RECEIVE ANY ADDITION TO ITS VALUE, BUT BY RECEIVING AN ADDITION IN POINT OF MAGNITUDE. WHEREVER, THEN, THE VALUE OF THE PUNISHMENT FALLS SHORT, EITHER IN POINT OF CERTAINTY, OR OF PROXIMITY, OF THAT OF THE PROFIT OF THE OFFENSE, IT MUST RECEIVE A PROPORTIONABLE ADDITION IN POINT OF MAGNITUDE.¹

THIS SUGGESTS THAT WE MAY GAIN CONFORMITY TO LAW BY THOSE WHO WOULD BE DETERRED BY STRICT LIABILITY BY INCREASING THE PENALTIES ASSOCIATED WITH CRIMES, I.E., SINCE THE DETERRENT EFFECT OF A PUNISHMENT IS A FUNCTION OF THE SEVERITY OF THE THREATENED PUNISHMENT AND THE PROBABILITY OF INCURRING IT, IN THOSE CASES IN WHICH THE LATTER IS LOW, WE MAY INCREASE THE FORMER TO GAIN A SUBSTANTIAL DETERRENT EFFECT.

I WISH TO ARGUE THAT SUCH A SYSTEM, ALTHOUGH IT MAY HAVE CERTAIN OF THE INTRINSICALLY GOOD CONSEQUENCES OF STRICT LIABILITY, DOES NOT SERVE TO BRING THEM ALL ABOUT, AND HAS ADDITIONAL INTRINSICALLY BAD CONSEQUENCES WHICH RENDER IT LESS DESIRABLE ON A UTILITARIAN VIEW THAN STRICT LIABILITY.

CONSIDER THE FOLLOWING THREE PROPOSED SYSTEMS:

¹PRINCIPLES, PP. 172-73.

1) THE LAW RECOGNIZES EXCUSES FOR ALL OFFENSES AND PUNISHES CRIMES WITH PENALTIES OF SEVERITY S_1 . UNDER THIS SYSTEM, THERE WILL BE A) SOME POTENTIAL OFFENDERS WHO BELIEVE THAT THEIR FAULT IS PROVEABLE AND SO ARE DETERRED; B) OTHERS WHO BELIEVE THAT THEY ARE CERTAIN TO ESCAPE PUNISHMENT BECAUSE THEIR FAULT IS UNPROVEABLE AND ARE THEREFORE NOT DETERRED; C) SOME WHO ARE NOT CERTAIN, BUT NONETHELESS BELIEVE THAT, WITH A HIGH DEGREE OF PROBABILITY, THEIR FAULT IS UNPROVEABLE AND ARE ALSO NOT DETERRED, I.E., THE COMBINATION OF HIGH PROBABILITY OF ESCAPING PUNISHMENT TOGETHER WITH THE SEVERITY OF PROSPECTIVE PUNISHMENT S_1 IS LESS THAN THAT NECESSARY TO DETER; D) FINALLY, THERE ARE THOSE WHO ARE NOT DETERRED BY ANY PENALTY, EITHER ACTUAL OR POSSIBLE. THIS IS SO NOT BECAUSE OF THEIR BELIEF THAT THEY CAN CERTAINLY OR PROBABLY ESCAPE PUNISHMENT, BUT E.G., SIMPLY BECAUSE THEY DO NOT OR CANNOT RATIONALLY WEIGH ALL UTILITIES INVOLVED, OR WEIGH THEM INCORRECTLY. THAT THERE ARE SUCH INDIVIDUALS SEEMS AMPLY DOCUMENTED BY THE FACT THAT THROUGHOUT HISTORY HORRENDOUS PROSPECTIVE PUNISHMENTS HAVE NOT SERVED TO TOTALLY DETER PARTICULAR CRIMES.

2) A SYSTEM OF RULES WHICH PUNISHES A CERTAIN CLASS OF OFFENSES, X , WITHOUT RECOGNITION OF EXCUSES. OFFENSES IN CLASS X ARE DETERMINED BY THE CRITERIA PREVIOUSLY FORMULATED IN DISCUSSING THOSE CIRCUMSTANCES IN WHICH THE INTRINSICALLY GOOD CONSEQUENCES OF STRICT LIABILITY OUTWEIGH THE INTRINSICALLY EVIL CONSEQUENCES OF THE PRACTICE. THIS SYSTEM PUNISHES OFFENSES OF CLASS X , AND ALL OTHERS AS WELL, WITH SEVERITY S_1 . UNDER THIS SYSTEM, THOSE IN A ARE STILL DETERRED. THOSE IN B WILL ALSO BE DETERRED, SINCE THEIR SUBJECTIVE CERTAINTY OF ESCAPING PUNISHMENT EVEN IF THEIR VIOLATION OF LAW IS ESTABLISHED IS NOW REDUCED TO CERTAINTY OF PUNISHMENT. THOSE IN C WILL BE DETERRED FOR SIMILAR REASONS. THOSE

IN D WILL NOT BE DETERRED, BUT THE HARM INFLICTED ON THEM WILL BE THE SAME AS IN SITUATION 1.

3) THIS SYSTEM IS THE PROPOSED SUBSTITUTE FOR STRICT LIABILITY, I.E., A SYSTEM WHICH ALWAYS RECOGNIZES EXCULPATING CONDITIONS, BUT WHICH PUNISHES OFFENSES IN CLASS X WITH SEVERITY S_2 , SIGNIFICANTLY HIGHER THAN S_1 , AND PUNISHES ALL OTHER OFFENSES WITH SEVERITY S_1 . UNDER THIS SYSTEM, THOSE IN A ARE DETERRED. THOSE IN B, HOWEVER, ARE NOT DETERRED, EVEN BY THE PROSPECTIVE PUNISHMENT OF SEVERITY S_2 , SINCE THEIR CERTAINTY THAT THEY WILL NOT BE PUNISHED VITIATES THE DETERRENT THREAT OF EVEN THE MOST SEVERE PROSPECTIVE PUNISHMENT. WITH RESPECT TO THOSE IN C, SYSTEM 3 IS AS SUCCESSFUL AS SYSTEM 2 IN DETERRING OFFENSES; THE HIGH DEGREE OF PROBABILITY OF ESCAPING PUNISHMENT IS OUTWEIGHED BY THE SEVERITY OF THE POSSIBLE PUNISHMENT. INDIVIDUALS IN D ARE BY HYPOTHESIS "UNDETERRABLE." CERTAIN OF THESE OFFENDERS WILL BE CAUGHT; SOME FOR VIOLATIONS OF OFFENSES IN CLASS X. ALSO, CERTAIN OFFENDERS IN CLASS B WILL BE IN ERROR CONCERNING THE CERTAINTY THAT THEIR FAULT IS UNPROVEABLE. BOTH OF THESE GROUPS OF PEOPLE WILL BE PUNISHED, AS THEY WOULD UNDER SYSTEMS 1 AND 2. HOWEVER, UNDER SYSTEM 3 THE DEGREE OF HARM INFLICTED ON THEM WILL BE SIGNIFICANTLY HIGHER, AND THIS IS A CONSEQUENCE OF THE SYSTEM HAVING INCREASED INTRINSIC DISVALUE.

IN SUMMARY, THEN, SITUATION 2, WHICH REPRESENTS THE IMPOSITION OF STRICT LIABILITY, SERVES TO DETER B AND C AT THE COST OF PUNISHING CERTAIN FAULTLESS INDIVIDUALS. SYSTEM 3, WHICH DOES NOT PUNISH THESE INDIVIDUALS, FAILS TO DETER B AND ONLY MANAGES TO DETER C AT THE COST OF INFLICTING INCREASED SUFFERING ON ALL IN D WHOSE OFFENSES ARE OF CLASS X, AND THOSE IN B WHOSE FAULT IS PROVEABLE. IT CERTAINLY SEEMS PLAUSIBLE, THEN, THAT WHERE THESE LAST GROUPS OF PEOPLE ARE SIGNIFICANT

IN NUMBER, THE INCREASED HARM INFLICTED UNDER SYSTEM 3 IS GREATER THAN THE SUM OF THE HARM INFLICTED UNDER SYSTEM 2 ON SOME FEW INNOCENT PEOPLE, PLUS THE ADDITIONAL POSITIVE UTILITY OF DETERRING THOSE IN CLASS B.

IF, THEN, THE PROPOSED ALTERNATIVE TO STRICT LIABILITY IS ONLY ABLE TO SAVE SOME FAULTLESS INDIVIDUALS FROM PUNISHMENT AT THE COST OF MORE SEVERELY PUNISHING NUMEROUS OFFENDERS, AND FAILING TO DETER OTHERS, IT IS NOT TO BE PREFERRED ON UTILITARIAN GROUNDS.

A SECOND PRIMA FACIE PLAUSIBLE ALTERNATIVE TO STRICT LIABILITY IN THE CRIMINAL LAW IS SUGGESTED BY F. B. SAYRE:

IT IS FUNDAMENTALLY UNSOUND TO CONVICT A DEFENDANT FOR A CRIME INVOLVING A SUBSTANTIAL TERM OF IMPRISONMENT WITHOUT GIVING HIM THE OPPORTUNITY TO PROVE THAT HIS ACTION WAS DUE TO AN HONEST AND REASONABLE MISTAKE OF FACT OR THAT HE ACTED WITHOUT GUILTY INTENT. IF THE PUBLIC DANGER IS WIDESPREAD AND SERIOUS, THE PRACTICAL SITUATION CAN BE MET BY SHIFTING TO THE SHOULDERS OF THE DEFENDANT THE BURDEN OF PROVING A LACK OF GUILTY INTENT.¹

AS AN ALTERNATIVE TO STRICT LIABILITY, THEN, WE MIGHT SHIFT THE BURDEN OF PROOF, IN JUST THOSE CASES WHICH SATISFY OUR UTILITARIAN CRITERIA FOR IMPOSING ABSOLUTE LIABILITY, FROM THE PLAINTIFF TO THE DEFENDANT. THAT IS, IN THESE CASES ANY INDIVIDUAL CAUSING A PROSCRIBED STATE OF AFFAIRS MUST PERSUADE THE JURY, BY A PREPONDERANCE OF THE EVIDENCE, THAT IT IS MORE LIKELY THAT THE PROSCRIBED STATE OCCURED WITHOUT HIS FAULT THAN WITH IT. WE MIGHT EVEN GO A STEP FURTHER AND ESTABLISH A PRESUMPTION THAT THE DEFENDANT WAS AT FAULT. IN SUCH A CASE FAILURE OF THE DEFENDANT TO BRING FORWARD CLEAR AND CONVINCING EVIDENCE THAT HE WAS IN FACT NOT AT FAULT WILL RENDER THE PRESUMPTION OF HIS CULPABILITY CONCLUSIVE.

¹PUBLIC WELFARE OFFENSES, P. 82.

IT MIGHT BE ARGUED THAT EITHER ALTERNATIVE WILL DETER INDIVIDUALS WHO WOULD OTHERWISE BELIEVE THAT THEY COULD ESCAPE PUNISHMENT BECAUSE THE PUBLICLY PROVEABLE ASPECTS OF THEIR BEHAVIOUR WERE INSUFFICIENT TO PROVE FAULT. SINCE THE PROSECUTION NEED NO LONGER PROVE FAULT, BUT RATHER ONLY CAUSATION, IN ORDER TO GAIN A CONVICTION IN THE ABSENCE OF COUNTERVAILING EVIDENCE, SUCH OFFENDERS WOULD BE DETERRED.

WHILE THIS MIGHT INDEED BE TRUE IN CERTAIN CASES, IT IS NOT A SUFFICIENT REASON FOR PREFERRING EITHER ALTERNATIVE TO STRICT LIABILITY.

FIRST, NEITHER SYSTEM WILL DETER ALL THOSE DETERRED BY STRICT LIABILITY; THERE WILL REMAIN SOME POTENTIAL OFFENDERS WHO BELIEVE THAT THEY CAN FEIGN AN EXCUSE SUFFICIENTLY WELL TO REBUT THE PRESUMPTION OF FAULT OR TO SHIFT THE BURDEN OF PROOF BACK TO THE PROSECUTION. ALSO, THE PSYCHOLOGICAL FORCE OF THE IRONCLAD RULE "NO EXCUSES!" WILL BE LOST, WITH CONCOMITANT LOSS OF DETERRENCE.

SECONDLY, SUCH A SYSTEM HAS THE DISADVANTAGE OF PUNISHING INNOCENT INDIVIDUALS AS WELL. RECALL THAT BY HYPOTHESIS STRICT LIABILITY AND, CONSEQUENTLY, THIS ALTERNATIVE TO IT, CAN JUSTIFIABLY BE IMPOSED ON UTILITARIAN GROUNDS ONLY IN CIRCUMSTANCES WHICH MAKE IT DIFFICULT TO ESTABLISH FAULT. THOSE SAME FACTORS WHICH MAKE FAULT DIFFICULT TO PROVE, E.G., LACK OF WITNESSES OR LACK OF EXTERNAL CRITERIA FOR ESTABLISHING MENTAL STATES, ALSO MAKE THE LIKELIHOOD OF FAULTLESSNESS DIFFICULT TO PROVE. JUST AS MANY BLAMEWORTHY OFFENDERS WOULD ESCAPE PUNISHMENT UNDER A SYSTEM OF EXCULPATING EXCUSES WITH THE BURDEN OF PROOF ON THE PROSECUTION, SO TOO WILL SOME FAULTLESS OFFENDERS INCUR LIABILITY THROUGH LACK OF EVIDENCE TO PROVE, OR AT LEAST TO ESTABLISH

SOME PROBABILITY OF, THEIR BLAMELESSNESS.

WE WILL STILL PUNISH CERTAIN FAULTLESS OFFENDERS UNDER THESE ALTERNATIVE SYSTEMS, ALTHOUGH FEWER THAN UNDER A SYSTEM OF STRICT LIABILITY. ON THE OTHER HAND, SUCH SYSTEMS SAVE THESE ADDITIONAL INNOCENT PEOPLE PUNISHMENT AT THE COST OF FAILING TO DETER CERTAIN OTHER BLAMEWORTHY OFFENDERS WHO WREAK HARM ON INNOCENT VICTIMS. WHERE THE NUMBER OF INNOCENT 'VICTIMS' OF STRICT LIABILITY IS SMALL, THEN, IT SEEMS POSSIBLE THAT THE ADDITIONAL DETERRENCE OF POTENTIAL OFFENDERS NOT DETERRED BY THESE ALTERNATIVE SYSTEMS WILL OUTWEIGH THE HARM INFLICTED ON THE ADDITIONAL PEOPLE PUNISHED UNDER STRICT LIABILITY. IF SUCH IS THE CASE, LIABILITY WITHOUT FAULT IS THE SYSTEM TO BE PREFERRED ON UTILITARIAN GROUNDS. HOWEVER, EVEN IF THIS IS NOT THE CASE, WE MUST REALIZE THAT WE HAVE MERELY GIVEN UP A SYSTEM OF EXPLICIT STRICT LIABILITY FOR OFFENSES FOR A SYSTEM WHICH, THROUGH A PROCEDURAL DEVICE, IMPOSES THAT SAME LIABILITY WITHOUT FAULT.

A THIRD ALTERNATIVE TO STRICT LIABILITY IS DESCRIBED AND DEFENDED BY G. O. W. MUELLER:

. . . IN A NUMBER OF OTHER STATES THE OFFENSE OF DRIVING WITHOUT ANY OF THE REQUIRED LIGHTS ON AN AUTOMOBILE IS ONE OF ABSOLUTE LIABILITY. BUT THE WEST VIRGINIA LEGISLATURE . . . PROVIDED THAT: THE PROPER STATE PERSONNEL MAY STOP VEHICLES SUSPECTED TO BE IMPROPERLY EQUIPPED. AN INSPECTION WILL FOLLOW. IF THE VEHICLE IS FOUND TO BE IMPROPERLY EQUIPPED, AN ORDER WILL BE GIVEN TO REPAIR THE VEHICLE, OR TO CURE THE DEFECT WITHIN FIVE DAYS, AND THEN TO SUBMIT TO RENEWED INSPECTION. IN BRIEF, WHILE EVERYBODY IS REQUIRED TO HAVE HIS AUTOMOBILE EQUIPPED WITH LIGHTS, PUNISHMENT FOR VIOLATION WILL NOT BE IMPOSED ON THE GUILTY AND INNOCENT ALIKE, BUT ONLY ON THE STUBBORN OFFENDER, WHO FAILS TO COMPLY AFTER WARNING.¹

SUCH A PROCEDURE IS TERMED BY MUELLER THE "PRIOR WARNING METHOD." THERE CAN BE NO DOUBT THAT SUCH A PROCEDURE AVOIDS PUNISHING FAULTLESS

¹"MENS REA AND THE LAW WITHOUT IT," P. 62.

OFFENDERS. HOWEVER, IT ALSO REMOVES THE DETERRENT FORCE OF SUCH LIABILITY. AN INDIVIDUAL WHO KNOWS THAT HIS AUTOMOBILE IS DEFECTIVE HAS NO MOTIVE FOR CORRECTING THE PROBLEM BEFORE IT IS DETECTED BY THE AUTHORITIES. WHETHER HE REPAIRS HIS AUTOMOBILE NOW, OR WAITS TO BE APPREHENDED, THE COST TO HIM IS THE SAME. ON THE OTHER HAND, IF HE KNEW THAT ONCE CAUGHT NO FEIGNED EXCUSE WOULD EXCULPATE HIM FROM CRIMINAL PENALTIES, HE WOULD INDEED BE MOTIVATED TO CORRECT THE ILLEGAL CONDITION BEFORE HE WAS DETECTED. IN THIS CASE, A DANGEROUS CONDITION WOULD BE AVOIDED OR TEMPORALLY SHORTENED.

SUPPOSE THAT SUCH A PRACTICE OR PRIOR WARNING METHOD WERE EXTENDED TO OTHER AREAS IN WHICH STRICT LIABILITY IS NOW IMPOSED, E.G., SELLING ADULTERATED FOODS. WE MAY PRESUME THAT WHERE SUCH SALE CAN BE PROVED TO HAVE BEEN ACCOMPANIED BY MENS REA, CRIMINAL PENALTIES WILL REMAIN. WHERE SUCH CULPABILITY IS NOT PROVEABLE, THE INDIVIDUAL INVOLVED WILL BE WARNED THAT ANY REPETITION OF SUCH SALE WILL BRING PENALTIES WITHOUT PROOF OF FAULT. WE MAY ALSO REASONABLY PRESUME THAT THE LIKELIHOOD OF A FAULTLESS MERCHANT TWICE SELLING ADULTERATED FOOD IS SMALL, SO THAT SUCH A SYSTEM WILL ONLY RARELY PUNISH THE BLAMELESS OFFENDER. IS SUCH A SYSTEM PREFERABLE TO STRICT LIABILITY? IT IS NOT. UNDER SUCH A PRACTICE, THOSE MERCHANTS WHO BELIEVE THAT THEIR FAULT IN SELLING SUCH FOOD IS UNPROVEABLE, AND WHO WOULD BE DETERRED BY ABSOLUTE LIABILITY STATUTES, WILL NOT BE DETERRED. THEY MAY FEEL FREE TO SELL ADULTERATED FOODS UNTIL THEY ARE ONCE CAUGHT. AT THAT TIME THEY MAY WELL END THEIR CRIMINAL ACTIVITIES, BUT UNTIL SUCH TIME HOW MUCH HARM MAY HAVE BEEN WROUGHT BY THEIR UNDETERRED EVILDOING? SUCH A SYSTEM OF PRIOR WARNING THEREFORE PRESERVES FAULTLESS INDIVIDUALS FROM PUNISHMENT AT THE COST OF INCREASED HARM TO VIC-

TIMS OF UNDETERRED, BUT DETERRABLE, CRIMES. SUCH COST MAY WELL OUTWEIGH THE BENEFITS DERIVED, IN WHICH CASE THE IMPOSITION OF STRICT LIABILITY IS PREFERABLE, ON UTILITARIAN GROUNDS, TO A SYSTEM OF PRIOR WARNING.

IF, AS I HAVE ARGUED, THE INTRINSICALLY GOOD CONSEQUENCES OF STRICT LIABILITY OUTWEIGH ANY INTRINSICALLY BAD CONSEQUENCES OF THE PRACTICE, AND A GREATER BALANCE OF UTILITY CANNOT BE OBTAINED BY POSSIBLE ALTERNATIVE SYSTEMS, THEN WE MAY CONCLUDE THAT STRICT LIABILITY IS JUSTIFIABLE FROM A UTILITARIAN POINT OF VIEW.

IN LIGHT OF THIS CONCLUSION, AND THE PRECEEDING DISCUSSION, I WISH NOW TO EXAMINE THE COGENCY OF THE DOCTRINE THAT, WITHIN THE CRIMINAL LAW, SUCH LIABILITY MUST BE LIMITED TO THE REMOVAL OF THE REQUIREMENT OF MENS REA.

AS WE HAVE ALREADY SEEN, THE ARGUMENT OFFERED BY THE COURTS FOR REMOVING THE MENS REA REQUIREMENT IS ONLY A UTILITARIAN ONE; SUCH ABSOLUTE LIABILITY IS FELT TO REDOUND TO THE PUBLIC GOOD. WHY CAN A SIMILAR ARGUMENT NOT BE MADE IN FAVOR OF REMOVING THE ACTUS REUS REQUIREMENT? IS IT BECAUSE, AS THE MODEL PENAL CODE SUGGESTS; "THE LAW CANNOT HOPE TO DETER INVOLUNTARY MOVEMENT OR TO STIMULATE ACTION THAT CANNOT PHYSICALLY BE PERFORMED?" OR BECAUSE "THE SENSE OF PERSONAL SECURITY WOULD BE SHORT LIVED IN A SOCIETY WHERE SUCH MOVEMENT OR INACTIVITY COULD LEAD TO FORMAL SOCIETAL CONDEMNATION OF THE SORT A CONVICTION NECESSARILY ENTAILS?"¹

AS I ARGUED EARLIER AT FAIRLY GREAT LENGTH, THESE TWO ARGUMENTS, I.E., THAT INDIVIDUALS IN RELEVANT EXCUSING CONDITIONS CANNOT BE DETERRERED BY THE THREAT OF PUNISHMENT, AND THAT SUCH A SYSTEM OF PENALTIES

¹ TENTATIVE DRAFT No. 4, COMMENTS TO ART. 2, SEC. 2.01, P. 119.

IRRESPECTIVE OF FAULT INCREASES THE INSECURITY OF THE COMMUNITY GENERALLY, FAIL TO SHOW THAT PUNISHING IN THE ABSENCE OF AN ACTUS REUS IS UNACCEPTABLE FROM A UTILITARIAN PERSPECTIVE. THE FIRST ARGUMENT IS A NON-SEQUITUR, AND IGNORES THE FACT THAT SUCH PUNISHMENT MAY WELL DETER OTHERS NOT THEMSELVES IN AN EXCUSING CONDITION; THE SECOND CONSIDERATION IS "CANCELLED OUT" BY THE INCREASED SENSE OF SECURITY IN THE COMMUNITY CAUSED BY THE GREATER DETERRENT, INCARCERATIVE AND REFORMATIVE EFFECTS OF STRICT LIABILITY.

A CONSISTENT UTILITARIAN COULD ONLY DEFEND THIS LIMITATION OF STRICT LIABILITY IF HE COULD SHOW THAT THOSE EXCUSES WHICH NEGATIVE THE MENS REA REQUIREMENT ARE MUCH MORE DIFFICULT TO VALIDATE THAN THOSE WHICH NEGATIVE THE ACTUS REUS REQUIREMENT, E.G., CAUSAL NECESSITY AND AUTOMATISM. AS THE LATTER EXCUSES BECOME MORE AND MORE DIFFICULT TO FEIGN, THE NUMBERS OF INDIVIDUALS LIKELY TO ENGAGE IN ANY OFFENSE IN THE BELIEF THAT THEY WILL ESCAPE PUNISHMENT (OR WHO IN FACT ESCAPE PUNISHMENT) BY FEIGNING THOSE EXCUSES WILL DECREASE; AT THE SAME TIME, THE ADDITIONAL DETERRENT, INCARCERATIVE AND REFORMATIVE VALUE OF STRICT LIABILITY COVERING THOSE EXCUSES WILL DECLINE. IF, FOR EXAMPLE, WE HAD A VIRTUALLY INFALLIBLE TEST FOR INSANITY, AND EVERYONE KNEW THIS, WE MIGHT JUSTIFIABLY RECOGNIZE INSANITY AS AN EXCUSING CONDITION FOR ALL OFFENSES. HOWEVER, SINCE THERE SEEMS TO BE NO REASON TO BELIEVE THAT OUR ABILITY TO DETERMINE THE VERACITY OF CLAIMS OF EXCUSES NEGATING THE ACTUS REUS REQUIREMENT IS SIGNIFICANTLY HIGHER THAN OUR ABILITY WITH RESPECT TO EXCUSES NEGATING THE MENS REA REQUIREMENT, THE LIMITATION OF STRICT LIABILITY TO THE LATTER TYPE OF EXCUSE APPEARS TO BE INDEFENSIBLE ON UTILITARIAN GROUNDS.

YOU WILL RECALL THAT THE COURTS HAVE NOT ONLY LIMITED STRICT LIABILITY AS DISCUSSED ABOVE; THEY HAVE ALSO LIMITED ITS APPLICATION TO A CERTAIN CLASS OF OFFENSES. AS WE HAVE SEEN, THAT CLASS IS OFTEN COMPOSED OF ACTS MALA PROHIBITA, WHILE ACTS MALA IN SE ARE HELD ALWAYS TO REQUIRE BOTH MENS REA AND AN ACTUS REUS AS GROUNDS OF LIABILITY. BEFORE EXAMINING THE JUSTIFIABILITY OF SUCH A LIMITATION, LET US EXAMINE THE ESSENCE OF THE DISTINCTION THAT IS BEING MADE.

AN ACT HAS BEEN SAID TO BE MALA IN SE IF IT IS WRONG IN THE ABSENCE OF PROHIBITION IN POSITIVE LAW; AN ACT IS SAID TO BE MALA PROHIBITA IF IT IS NOT WRONG IN THE ABSENCE OF SUCH PROHIBITION. TRANSLATED INTO UTILITARIAN TERMS, AN ACT IS MALA IN SE IF, IN THE ABSENCE OF POSITIVE LEGAL PROHIBITION, THE DOING OF THAT ACT GENERALLY HAS CONSEQUENCES OF MORE INTRINSIC DISVALUE THAN THE DOING OF SOME ALTERNATIVE ACTION OPEN TO THE AGENT. AN ACT IS MALA PROHIBITA IF DOING THAT ACT, IN THE ABSENCE OF A POSITIVE LEGAL PROHIBITION, GENERALLY HAS CONSEQUENCES AT LEAST AS INTRINSICALLY VALUABLE AS THE DOING OF ANY OTHER ACT OPEN TO THE AGENT.¹

THE FIRST CONCLUSION TO BE DRAWN HERE IS THAT VERY MANY OF THOSE ACTIONS WHICH ARE CLASSIFIED IN LAW AS MALA PROHIBITA ARE IN FACT MALA IN SE. FOR EXAMPLE, THE SELLING OF ADULTERATED MEAT IS HELD TO FALL IN THE FORMER CATEGORY, AND YET THERE CAN BE LITTLE DOUBT THAT SUCH ACTIONS GENERALLY HAVE CONSEQUENCES OF LESS INTRINSIC VALUE THAN WOULD ANY ALTERNATIVE ACT OPEN TO THE SELLER, (MOST OBVIOUSLY, REFRAINING FROM SUCH SALES).

¹CF., JOHN C. MAISANO, "THE MORALITY BEHIND THE ENFORCEMENT OF MORALS" (UNPUBLISHED M.A. DISSERTATION, HERBERT H. LEHMAN COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, 1971), PP. 7-9.

SELLING ADULTERATED MEAT IS THUS MALA IN SE. SIMILARLY, THE CLASS OF ACTS MALA PROHIBITA IS SAID TO INCLUDE DRIVING AT EXCESSIVE SPEEDS, SALE OF ALCOHOL TO MINORS AND SALE OF MISBRANDED DRUGS. IS IT NOT PLAIN THAT EACH OF THESE ACTIVITIES WILL GENERALLY BE WRONG ON UTILITARIAN GROUNDS, WHETHER OR NOT PROHIBITED BY LAW?

IF, THEN, THE INTENTION OF THE PHRASE "MALA PROHIBITA" IS TO BE MAINTAINED UNDER A UTILITARIAN LEGAL SYSTEM IT MUST BE REALIZED THAT ITS EXTENSION OR DENOTATION IS MUCH LESS EXTENSIVE THAN PREVIOUSLY SUPPOSED.

CONSIDER NOW THE FOLLOWING HYPOTHETICAL CIRCUMSTANCES UNDER WHICH AN ACT WOULD BE PROPERLY CLASSIFIED MALA PROHIBITA:

JOHN FINDS HIMSELF IN A CITY WHICH, DESPITE THE FACT THAT THERE IS A GREAT DEAL OF MOTOR VEHICLE TRAFFIC, HAS NO LAWS WHICH ESTABLISH CONVENTIONS CONCERNING THE SIDE OF THE ROAD ON WHICH AN AUTOMOBILE MUST BE DRIVEN. FURTHERMORE, THERE IS NO CUSTOMARY RULE CONCERNING THE PRACTICE. TRAFFIC HERE IS RATHER LIKE THE FOOT TRAFFIC IN A SUBWAY STATION-- GREATLY CONFUSED AND DISORDERLY; PEOPLE DRIVE INDISCRIMINATELY ON EITHER SIDE OF THE ROAD.

JOHN NOW GETS INTO AN AUTOMOBILE AND MUST DECIDE WHETHER TO DRIVE ON THE RIGHT OR LEFT SIDE OF THE STREET. AS A GOOD UTILITARIAN, HE COMPUTES THE VALUE OF THE CONSEQUENCES OF DOING EACH ALTERNATIVE, AND FINDS THAT THEY ARE PRACTICALLY IDENTICAL IN TOTAL INTRINSIC VALUE; DRIVING ON THE LEFT IS NO BETTER OR WORSE THAN DRIVING ON THE RIGHT. INDEPENDENTLY OF ITS PROHIBITION BY LAW, THEN, DRIVING ON A PARTICULAR SIDE OF THE ROAD IS NOT CALCULABLY WRONG.

IT IS OBVIOUS, THOUGH, THAT GENERAL CONFORMITY TO SOME CONVENTION OF TRAFFIC FLOW WOULD SERVE TO INCREASE UTILITY OVER ITS PRESENT LEVEL.

THE LEGISLATURE MAY INSTITUTE SUCH A CONVENTION BY STATUTORY ENACTMENT, AND IN FACT CHOOSES TO DO SO DURING JOHN'S STAY IN THE COUNTRY. THE STATUTE PROHIBITS DRIVING ON THE LEFT HAND SIDE OF THE ROAD.

SHORTLY THEREAFTER, JOHN HAS CAUSE TO GO FOR A RIDE IN HIS CAR. HE AGAIN COMPUTES THE UTILITIES INVOLVED IN DRIVING ON THE RIGHT AS OPPOSED TO THE LEFT. THIS TIME, HE FINDS THAT THE UTILITY OF THE FORMER FAR OUTWEIGHS THAT OF THE LATTER, FOR OBVIOUS REASONS.

HERE, AN ACT WHICH WAS NOT WRONG INDEPENDENTLY OF ITS PROHIBITION IN POSITIVE LAW IS NOW WRONG "BECAUSE OF" ITS LEGAL PROHIBITION. THIS IS AN ACT MALA PROHIBITA.

ACTS MALA PROHIBITA, ON A UTILITARIAN INTERPRETATION, ARE THOSE WHOSE DISUTILITIES ARE ONLY MANIFESTED IN CIRCUMSTANCES WHERE THERE IS A GENERAL PRACTICE, INSPIRED BY RULE OF LAW OR CUSTOM, OF REFRAINING FROM THOSE ACTIVITIES.

TO THIS CLASS WE MAY OPPOSE ACTS MALA IN SE, WHOSE DISUTILITIES ARE GENERALLY MANIFESTED REGARDLESS OF THE GENERAL PRACTICE WITH RESPECT TO THEIR COMMISSION. THUS MURDER WILL GENERALLY BE WRONG ON UTILITARIAN GROUNDS WHETHER MANY PEOPLE OR VERY FEW IN A SOCIETY ENGAGE IN SUCH KILLINGS. SIMILARLY WITH MANSLAUGHTER, RAPE, ARSON, FRAUD, ETC. (IT IS NECESSARY TO RESTRICT THESE CONCLUSIONS BY USE OF THE TERM "GENERALLY" SINCE A PARTICULAR MURDER OR ACT OF FRAUD OR ARSON MAY, UNDER CERTAIN CIRCUMSTANCES, HAVE CONSEQUENCES OF MAXIMUM INTRINSIC VALUE.)

WILL THE RESTRICTION OF STRICT LIABILITY TO ACTS WHICH ARE IN THIS SENSE MALA PROHIBITA MAXIMIZE UTILITY? RECALL THAT WHERE WE HAVE A SYSTEM FORMULATED ON UTILITARIAN PRINCIPLES, GENERAL CONFORMITY TO THE STANDARDS OF CONDUCT THUS EXPRESSED WILL HAVE MAXIMUM UTILITY.

PUNISHMENT SERVES TO MAINTAIN SUCH CONFORMITY. RESTRICTION OF STRICT LIABILITY TO THOSE OFFENSES MALA PROHIBITA WOULD ONLY BE JUSTIFIABLE IF IT COULD BE SHOWN THAT IN THOSE OFFENSES, AND NOT IN OFFENSES MALA IN SE, THE INCREASED INTRINSIC VALUE OF THE CONSEQUENCES OF GREATER CONFORMITY TO LAW BROUGHT ABOUT BY STRICT LIABILITY OUTWEIGH THE EVILS OF PUNISHING THE BLAMELESS. IN SHORT, THE CLASS OF OFFENSES MALA PROHIBITA MUST EXACTLY COINCIDE WITH THE CLASS OF OFFENSES WHICH SATISFY UTILITARIAN STANDARDS PREVIOUSLY DISCUSSED FOR THE ADMISSION OF ABSOLUTE LIABILITY.

IS IT NOT REASONABLE, HOWEVER, TO CLAIM THAT THE GOOD BROUGHT ABOUT BY IMPOSING STRICT LIABILITY IN CASES OF SELLING MISLABELLED DRUGS, ADULTERATED FOODS, OR NARCOTICS, MIGHT JUST AS LIKELY OUTWEIGH THE EVIL DONE SOME FEW BLAMELESS OFFENDERS, AS TO CLAIM THAT THE GOOD CONSEQUENCES OF IMPOSING STRICT LIABILITY FOR MOTOR VEHICLE VIOLATIONS WHICH ARE MALA PROHIBITA WILL OUTWEIGH THE HARM DONE BLAMELESS MOTORISTS? IF THERE IS EVEN ONE SUCH CASE OF POSITIVE UTILITY, THEN THE MALA IN SE-MALA PROHIBITA DISTINCTION FAILS AS A JUSTIFIABLE CRITERIA FOR DETERMINING WHICH OFFENSES MAY BE SUBJECTED TO ABSOLUTE PROHIBITIONS.

AS AN ALTERNATIVE TO SUCH A CRITERIA, CERTAIN COURTS HAVE HELD THAT STRICT LIABILITY MAY BE IMPOSED ONLY WHERE THE POSSIBLE PENALTY IS A NOMINAL FINE. IS THIS A JUSTIFIABLE ALTERNATIVE? IN ANSWER TO THIS QUESTION, CONSIDER THE FOLLOWING BY JEROME HALL:

THERE IS, FIRST, THE OPINION OF HIGHLY QUALIFIED EXPERTS THAT THE PRESENT RULES ARE REGARDED BY UNSCRUPULOUS PERSONS MERELY 'AS A LICENSE FEE FOR DOING AN ILLEGITIMATE BUSINESS'. SUCH PERSONS ARE NOT TO BE DETERRED BY THE IMPOSITION OF NOMINAL FINES. TO LET OFF WITH A PETTY FINE THOSE WHO INTENTIONALLY OR RECKLESSLY VIOLATE SUCH LAWS AS THE PURE FOOD ACT IS TO

ENCOURAGE THEM TO PERSIST IN THEIR MALEVOLENCE; AS SUGGESTED,
IT IS MERELY TO IMPOSE A NOMINAL TAX ON AN ILLEGAL ENTERPRISE.¹

REMEMBER THAT, ACCORDING TO BENTHAM, THE DETERRENT EFFECT OF A THREATENED PUNISHMENT DEPENDS UPON ITS SEVERITY WHEN COMPARED TO THE ANTICIPATED GAIN BY THE POTENTIAL OFFENDER FROM HIS CRIME. IN THE CASE OF SELLING ADULTERATED FOODS, DRUGS, ETC., THE POSSIBLE FINANCIAL GAINS ARE QUITE HIGH. FOR THAT REASON, A COMMENSURABLY HIGH PUNISHMENT IS NECESSARY TO OUTWEIGH THE LURE OF THE ENVISAGED PROFITS. SUCH A PUNISHMENT NEED NOT BE RESTRICTED TO SEVERE FINES, PARTICULARLY WHERE THE POTENTIAL HARM OF THE OFFENSE IS SEVERE AND WIDESPREAD. IN FACT, TO SOME INDIVIDUALS THE HARM INFLICTED BY, E.G., A FINE OF \$10,000 WOULD BE MORE SEVERE THAN E.G., A 6 MONTH PRISON SENTENCE. THE LOSS OF THAT SUM OF MONEY MIGHT MEAN THE LOSS OF HIS HOME, BUSINESS, ETC., WITH SUCH ATTENDANT INTRINSICALLY BAD CONSEQUENCES THAT A PRISON SENTENCE MIGHT, FROM THE DEFENDANT'S POINT OF VIEW, BE PREFERABLE.

THE RESTRICTION OF STRICT LIABILITY, THEN, TO OFFENSES ATTENDED WITH ONLY SLIGHT PENALTIES IS NEITHER JUSTIFIABLE ON PHILOSOPHICAL GROUNDS, NOR IS IT DESIRABLE ON PRACTICAL GROUNDS, SINCE IT DEFEATS THE PURPOSE OF SUCH STATUTES.

A SIMILAR ARGUMENT IS SOMETIMES MADE THAT THE IMPOSITION OF STRICT LIABILITY IS JUSTIFIABLE BECAUSE, IN PRACTICE, ITS ADMITTEDLY EVIL ASPECTS ARE MITIGATED BY THE COURTS.

WHERE A DEFENDANT WAS BELIEVED BY THE COURT TO HAVE ACTED WITHOUT KNOWLEDGE, "THE JUSTICES WOULD IMPOSE EITHER A REASONABLE FINE OR NO FINE AT ALL," AND THE MAGISTRATE WOULD ONLY INFLICT "A MERELY NOMINAL FINE," INDEED, "UNDER MODERN

¹ JEROME HALL, CRIMINAL LAW, p. 345. HALL IS OPPOSED TO STRICT LIABILITY, AND DOES NOT USE THIS ARGUMENT IN FAVOR OF STRICTER PENALTIES, AS I DO.

LEGISLATION . . . HE NEED NOT EVEN CONVICT AT ALL IF THERE IS ONLY A TRIFLING BREACH OF THE LAW.¹

SUCH AN ARGUMENT DOES NOT, FIRST OF ALL, JUSTIFY STRICT LIABILITY. RATHER, IT DENIES THAT STRICT LIABILITY IS IMPOSED, I.E., IT DENIES THAT BLAMELESS OFFENDERS ARE EVER "REALLY" PUNISHED. SECONDLY, SUCH A PRACTICE DEFEATS THE ADVANTAGES TO BE GAINED BY STRICT LIABILITY. AN INDIVIDUAL WHO WOULD NOT BE DETERRED UNDER A SYSTEM OF LIABILITY FOR FAULT BECAUSE HE BELIEVED THAT HE COULD FEIGN AN EXCUSE, BUT WHO WOULD BE DETERRED UNDER A SYSTEM OF STRICT LIABILITY ATTENDED WITH PROPORTIONATELY SEVERE PENALTIES, WOULD NOT BE DETERRED WHERE SUCH A PRACTICE AS DESCRIBED ABOVE WAS ENGAGED IN. HE WOULD BELIEVE THAT HIS FEIGNED EXCUSE WOULD SERVE TO GAIN HIM A MERELY NOMINAL FINE AT MOST, AND PERHAPS NONE AT ALL, AND THIS SURELY WOULD NOT DETER HIM FROM A CRIME WITH POTENTIALLY LUCRATIVE GAINS.

NONE OF THESE PROPOSED, AND IN FACT FOLLOWED, STANDARDS FOR DETERMINING THE CLASS OF OFFENSES WHICH MAY RENDER AN INDIVIDUAL LIABLE WITHOUT FAULT IS JUSTIFIABLE ON UTILITARIAN GROUNDS. THE STANDARD WHICH MOST CLOSELY PARALLELS THE CRITERIA WHICH I HAVE DEFENDED AS JUSTIFIABLE TO A UTILITARIAN IS THAT WHICH RECOGNIZES THAT SUCH LIABILITY MUST BE IMPOSED WHERE AN OFFENSE THREATENS WIDESPREAD AND SERIOUS HARM, AND WHERE THE REQUIREMENT OF PROOF OF FAULT WOULD SERVE TO ROB THE STATUTE AND ATTENDANT PENALTIES OF THEIR DETERRENT FORCE. WHERE SUCH A STANDARD IS FOLLOWED, IT SEEMS THAT LIABILITY WITHOUT FAULT WILL BE IMPOSED ONLY WHERE IT IS JUSTIFIABLE ON UTILITARIAN GROUNDS.

¹HALL, CRIMINAL LAW, P. 343, QUOTING HOBBS V. WINCHESTER CORP. (1910) 2 K. B. 471.

TORT LAW

JUST AS THE IMPOSITION OF A FINE OR IMPRISONMENT WITHIN THE CRIMINAL LAW IS A PRIMA FACIE EVIL AND MUST BE JUSTIFIED BY ITS ADDITIONAL GOOD CONSEQUENCES, SO TOO IS THE PAYMENT OF DAMAGES, WHETHER PUNITIVE OR COMPENSATORY, A PRIMA FACIE EVIL TO THE INDIVIDUAL MADE SO LIABLE, AND THE IMPOSITION OF SUCH LIABILITY MUST ALSO BE JUSTIFIED BY ITS ADDITIONAL GOOD CONSEQUENCES.

AS WE HAVE SEEN, THE PURPOSE OF IMPOSING PUNITIVE DAMAGES ON A DEFENDANT IS (AS THE TERM "PUNITIVE" SUGGESTS) TO PUNISH HIM. THE UTILITARIAN JUSTIFICATION FOR THE PRACTICE WILL, THEN, LIE IN THE DETERRENT FORCE OF SUCH PUNISHMENT. PUNITIVE DAMAGES FUNCTION, AND ARE JUSTIFIED, WITHIN THE LAW OF TORTS JUST AS FINES FUNCTION AND ARE JUSTIFIED WITHIN THE CRIMINAL LAW.

IF WE TURN OUR ATTENTION TO THE IMPOSITION OF COMPENSATORY DAMAGES WE SEE THAT ONE JUSTIFYING CONSEQUENCE OF SUCH A PRACTICE IS THE REPARATION OF THE LOSS OF THE VICTIM OF HARM. IT IS OFTEN URGED THAT "THE OBJECT OF THIS BRANCH OF LAW IS TO REPAIR INJURY, USUALLY BY MEANS OF MONEY."¹

HOWEVER, THE MERE FACT THAT SUCH LIABILITY SERVES TO SHIFT THE BURDEN OF LOSS FROM THE ORIGINAL VICTIM TO THE INDIVIDUAL WHO CAUSED THE HARM DOES NOT, OTHER THINGS BEING EQUAL, FURNISH A UTILITARIAN WITH A SUFFICIENT REASON FOR IMPOSING SUCH LIABILITY. A LOSS HAS ALREADY OCCURRED--B HAS CAUSED HARM TO C. CETERIS PARIBUS, THE TOTAL INTRINSIC EVIL IN THE WORLD IS PRECISELY THE SAME WHETHER B OR C BEARS

¹PATRICK DEVLIN, "MORALS AND THE QUASI-CRIMINAL LAW AND THE LAW OF TORTS," THE ENFORCEMENT OF MORALS, (OXFORD UNIVERSITY PRESS, 1965), P. 38.

THAT LOSS. FOR EXAMPLE, IF THE HARM HAS BEEN DONE TO C'S AUTOMOBILE AND WILL COST \$100 TO REPAIR, AND B AND C HAVE EQUAL ABILITY TO PAY FOR THE DAMAGES, THE INTRINSIC DISVALUE OF THE LOSS OF THAT AMOUNT OF MONEY WILL BE THE SAME WHETHER B OR C BEARS THE BURDEN.

FURTHERMORE, A UTILITARIAN HAS A REASON FOR NOT SHIFTING THE BURDEN OF HARM; THE IMPOSITION OF SUCH LIABILITY ON THE INDIVIDUAL CAUSING THE LOSS CARRIES WITH IT THE STIGMA OF SOCIAL DISAPPROVAL ASSOCIATED WITH PUNISHMENT. OF COURSE, CERTAIN AUTHORS HAVE DENIED THAT PUNISHMENT OF THE MORALLY GUILTY IS A PURPOSE OF THE LAW OF TORTS. THUS, JEROME HALL WRITES THAT ". . . PUNISHMENT IMPLIES THE CRIMINAL'S MORAL CULPABILITY AND IS APT (FITTING, CORRECT) IN LIGHT OF THAT, WHILE CIVIL SANCTIONS DO NOT CARRY THIS SIGNIFICANCE BUT SERVE INSTEAD TO DISCHARGE CERTAIN ECONOMIC FUNCTIONS."¹

AS A DESCRIPTION OF THE SIGNIFICANCE WHICH CIVIL SANCTIONS BEAR, SUCH A VIEW IS INACCURATE. TO BEGIN WITH, MANY JURISTS DO IN FACT SEE THEMSELVES IN IMPOSING TORT LIABILITY AS PUNISHING AN OFFENDER. FOR EXAMPLE, SALMOND WRITES THAT

THE ULTIMATE PURPOSE OF THE LAW IN IMPOSING LIABILITY ON THOSE WHO DO HARM TO OTHERS IS TO PREVENT SUCH HARM BY PUNISHING THE DOER OF IT . . . PECUNIARY COMPENSATION IS NOT IN ITSELF AN ULTIMATE OBJECT OR A SUFFICIENT JUSTIFICATION OF LEGAL LIABILITY. IT IS SIMPLY THE INSTRUMENT BY WHICH THE LAW FULFILLS ITS PURPOSE OF PENAL COERCION.²

SIMILARLY, IN DISCUSSING THE DISTINCTION BETWEEN PENAL AND CIVIL LAW, BENTHAM ASKED:

BETWEEN THESE TWO BRANCHES WHICH ARE SO OFTEN SET IN OPPOSITION TO ONE ANOTHER WHERE THEN LIES THE DISTINCTION? NOWHERE. THEY

¹HALL, CRIMINAL LAW, P. 317.

²SALMOND, TORTS 21 (11TH ED. 1953) QUOTED IN HARPER AND JAMES, TORTS, P. 746 N. 9.

ARE INEXTRICABLY INTERWOVEN. WHAT INDIVIDUAL LAW IS CIVIL AND NOT PENAL? THERE IS NO SUCH THING. WHAT LAW IS PENAL AND NOT CIVIL? THERE IS NO SUCH THING. IN EVERY LAW MUST BE COMPRISED TWO THINGS: 1. A SPECIFICATION OF THE CASES IN WHICH THE PUNISHMENT IS TO ATTACH; 2. A SPECIFICATION OF THE PUNISHMENT ITSELF; WITHOUT PUNISHMENT, NO SUCH THING AS A LAW: WITHOUT A MOTIVE NO SUCH THING AS ACTION.¹

ALSO, THERE CAN BE NO QUESTION THAT NOT ONLY DO SOME OF THOSE PEOPLE WHO IMPOSE TORT LIABILITY LOOK UPON IT AS A FORM OF PUNISHMENT, BUT ALSO THAT INDIVIDUALS MADE SO LIABLE FEEL THAT THEIR LIABILITY CARRIES WITH IT SOME BURDEN OF CONDEMNATION AND SHAME, ALTHOUGH THE BURDEN MAY BE LESS THAN THAT ASSOCIATED WITH IMPRISONMENT.

TO THE EXTENT THAT THIS IS TRUE, IT MILITATES AGAINST SHIFTING THE BURDEN OF LOSSES IN TORT FROM THE INDIVIDUALS ORIGINALLY AFFLICTED TO THE PERSONS WHO CAUSED THE LOSS. SUCH A LOSS-SHIFTING MAY BE JUSTIFIED, HOWEVER, BY OTHER GOOD CONSEQUENCES WHICH OUTWEIGH THIS EVIL. ONE SUCH GOOD CONSEQUENCE, AS SUGGESTED BY SALMOND, IS THE DETERRENT FORCE OF SUCH LIABILITY. IT NOT ONLY SERVES TO COMPENSATE VICTIMS OF HARM; IT ALSO SERVES TO DETER FUTURE HARMDOERS.

A SECOND MAJOR GOOD CONSEQUENCE OF SUCH LOSS-SHIFTING IS REALIZED WHEN THE SHIFTING OF BURDENS SERVES TO MINIMIZE THE TOTAL INTRINSIC DISVALUE OF A LOSS. THIS SORT OF CONSEQUENCE OCCURS WHEN THE SHIFTING OF THE LOSS INVOLVES ITS DISTRIBUTION AMONG A LARGE NUMBER OF INDIVIDUALS. THIS IS, OF COURSE, THE UTILITARIAN RATIONALE FOR THE GENERAL PRACTICE OF INSURANCE: THE INTRINSIC DISVALUE TO A SINGLE OR FEW INDIVIDUALS OF A DETERMINATE FINANCIAL LOSS IS GREATER THAN THE TOTAL INTRINSIC DISVALUE SUFFERED BY A LARGE NUMBER OF INDIVIDUALS EACH OF WHOM SUFFERS AN EQUAL PORTION OF AN IDENTICAL DETERMINATE LOSS. A SIMILAR WIDE DISTRIBUTION

¹JEREMY BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED (NEW YORK: COLUMBIA UNIVERSITY PRESS, 1945), P. 53.

OF LOSS WITH CONSEQUENT MINIMIZATION OF TOTAL INTRINSIC DISVALUE MAY BE AFFECTED BY A BUSINESSMAN WHO SPREADS OVER ALL HIS CONSUMERS, IN THE FORM OF HIGHER PRICES, THE COST OF THE HARMS CAUSED BY HIS ENTERPRISE.

IF, THEN, SOME SYSTEM OF LIABILITY FOR HARMS CAUSED IS JUSTIFIABLE ON UTILITARIAN GROUNDS BECAUSE IT SERVES TO DETER FUTURE HARMS AND TO MINIMIZE THE TOTAL INTRINSIC DISVALUE OF THOSE HARMS WHICH DO OCCUR, WE MAY INVESTIGATE THE QUESTION WHETHER SUCH A SYSTEM WILL INCORPORATE LIABILITY WITHOUT FAULT FOR AT LEAST SOME HARMS. IN ORDER TO SHOW THAT SUCH LIABILITY WITHOUT FAULT IS JUSTIFIABLE WE MUST SHOW THAT MAKING THOSE IN EXCULPATING CONDITIONS LIABLE TO PAY COMPENSATORY OR PUNITIVE DAMAGES WILL EITHER INCREASE DETERRENCE OVER A SYSTEM OF LIABILITY FOR FAULT, OR WILL SERVE TO LESSEN TOTAL INTRINSIC DISVALUE OF HARMS BY SPREADING SUCH LOSSES OVER A WIDE CLASS OF INDIVIDUALS. ALSO, SUCH A SYSTEM MUST NOT HAVE ADDITIONAL EVIL CONSEQUENCES WHICH OUTWEIGHT THESE DESIRABLE ENDS.

WITH RESPECT TO THE INCREASED DETERRENCE OF SUCH LIABILITY, ALL THE CONSIDERATIONS PREVIOUSLY ADDUCED IN DEFENSE OF STRICT LIABILITY WITHIN THE CRIMINAL LAW APPLY HERE AS WELL. THE INCREASED CERTITUDE OF SUCH LIABILITY UPON THOSE INDIVIDUALS WHO BELIEVE THAT THEIR FAULT IN CAUSING A HARM IS UNPROVEABLE MAY WELL OUTWEIGH THE HARM TO THE OCCASIONAL FAULTLESS OFFENDER MADE SO LIABLE. CONSIDER, FOR EXAMPLE, THAT WE MAY DETER THE SALE OF ADULTERATED FOODSTUFFS NOT ONLY BY SUBJECTING SELLERS OF THESE PRODUCTS TO CRIMINAL SANCTIONS, BUT ALSO BY MAKING THEM PAY DAMAGES TO INDIVIDUALS HARMED BY CONSUMING SUCH PRODUCTS. IF THIS LATTER FORM OF LIABILITY IS MADE TO DEPEND UPON PROOF OF FAULT, HOWEVER, AND FAULT IS PARTICULARLY DIFFICULT TO PROVE IN THESE CASES, THEN THE DETERRENT EFFECT OF THE THREATENED LIABILITY

IS SEVERELY LESSENER. ON THE OTHER HAND, A SELLER OF FOOD WHO KNOWS THAT SALE OF ADULTERATED FOODSTUFFS, WITH SUBSEQUENT HARM TO THE PURCHASER, IS SUFFICIENT TO RENDER HIM LIABLE TO PAY DAMAGES, MAY WELL BE DETERRED FROM SUCH SALES, EVEN IF HE BELIEVES HIS FAULT TO BE UNPROVEABLE. FURTHERMORE, THERE IS NO REASON WHY SUCH STRICT LIABILITY MAY NOT BE IMPOSED FOR PUNITIVE, AS WELL AS COMPENSATORY, DAMAGES. IF WE ASSUME, FOR EXAMPLE, THAT VERY OFTEN ADULTERATED FOODSTUFFS CAUSE MINOR ILLNESSES, OR EVEN MAJOR SICKNESS, WHICH THE CONSUMER DOES NOT REALIZE HAS BEEN BROUGHT ON BY THAT PRODUCT, IT SEEMS THAT A SELLER OF SUCH PRODUCTS MAY VERY WELL NOT BE CALLED UPON TO ANSWER FOR MANY OF THE HARMS CAUSED BY HIM. HE MAY, THEN, FEEL THAT THE PROFIT INVOLVED IN SUCH EVILDOING OUTWEIGHS THE AMOUNT OF DAMAGES HE MAY BE MADE TO ACTUALLY PAY IN COMPENSATION. HOWEVER, IF SUCH AN AGENT WERE MADE TO PAY, E.G., DOUBLE OR TRIPLE DAMAGES, RATHER THAN SIMPLY THE ACTUAL COST OF THE HARM WHICH HAS BEEN TRACED TO HIM, HE MIGHT BE DETERRED FROM THE GENERAL PRACTICE OF SUCH SALES.

STRICT LIABILITY TO PAY COMPENSATORY OR PUNITIVE DAMAGES MAY BE JUSTIFIED, THEN, BY ITS INCREASED DETERRENT EFFECT. SINCE I HAVE OFFERED A SIMILAR JUSTIFICATION FOR ABSOLUTE LIABILITY WITHIN THE CRIMINAL LAW, I WILL NOT HERE REPEAT IN DETAIL ALL THE ARGUMENTS CONSIDERED.

IT IS INTERESTING TO NOTE, HOWEVER, THAT WHILE STRICT LIABILITY IS IN FACT IMPOSED FOR A LARGE NUMBER OF ACTIVITIES WITHIN THE LAW OF TORTS, IT IS NEVER IMPOSED FOR PUNITIVE DAMAGES, AND DEFENDERS OF ITS IMPOSITION FOR COMPENSATORY DAMAGES RARELY CITE THE INCREASED DETERRENCE OF SUCH LIABILITY IN JUSTIFICATION. RATHER, THEY CONCERN THEMSELVES MAINLY WITH THE WIDE DISTRIBUTION OF LOSSES WHICH SUCH LIABILITY BRINGS ABOUT. HARPER AND JAMES, FOR EXAMPLE, IN DISCUSSING THE JUSTI-

FIABILITY OF IMPOSING LIABILITY WITHOUT FAULT FOR TORTS, WRITE THAT

"THE PROBLEM BASICALLY MAY BE REGARDED AS ONE OF ALLOCATING A PROBABLE LOSS IN SUCH MANNER AS TO ENTAIL THE LEAST HARDSHIP UPON ANY INDIVIDUAL AND THUS TO PRESERVE THE SOCIAL AND ECONOMIC RESOURCES OF THE COMMUNITY."

"THE LAW . . . SOMETIMES IMPOSES THE RISK OF SUCH LOSSES UPON THE PERSON WHOSE ACTIVITY CAUSES THEM, IRRESPECTIVE OF ANY FAULT ON HIS PART."

IT MAY DO SO BECAUSE "THE ACTOR MAY BE IN A PECULIARLY ADVANTAGEOUS POSITION TO ADMINISTER THE RISK BY DISTRIBUTING THE LOSS OR PASSING IT ON TO LARGE GROUPS OR TO THE PUBLIC."¹

IMPOSITION OF STRICT LIABILITY IS JUSTIFIED, THEREFORE, WHEN THE ACTIVITY FOR WHICH IT IS IMPOSED IS CARRIED ON AS AN ENTERPRISE CAPABLE OF PASSING ON SUCH LOSSES TO A LARGE BODY OF CONSUMERS, OR ELSE CAPABLE OF OBTAINING LIABILITY INSURANCE. IN EITHER CASE, THE LOSSES CAUSED BY THE ENTERPRISE ARE DISTRIBUTED IN SUCH A WAY AS TO MINIMIZE THEIR TOTAL INTRINSIC DISVALUE. HOWEVER, NOT EVERY ULTRAHAZARDOUS ACT OR INSTANCE OF KEEPING A WILD ANIMAL IS CARRIED ON AS A BUSINESS ENTERPRISE. OFTEN SUCH ACTIVITIES ARE FOR THE PURPOSE OF A SINGLE INDIVIDUAL AND ARE NOT CONDUCTED IN THE COURSE OF PRODUCING SOME ITEM OR SERVICE FOR LARGE NUMBERS OF CONSUMERS. NONETHELESS, AS WE HAVE SEEN, SUCH INDIVIDUALS ARE JUST AS STRICTLY LIABLE FOR HARMS THUS CAUSED AS ARE ENTREPRENEURS ENGAGED IN THESE ACTIVITIES. IN SUCH CASES THE UTILITY OF IMPOSING STRICT LIABILITY RESTS NOT ON THE ABILITY OF THE AGENT TO DISTRIBUTE THE LOSS TO CONSUMERS, BUT SOLELY ON HIS ABILITY TO INSURE AGAINST POTENTIAL HARMS OF THE ACTIVITY.

WHETHER THE ACTIVITY IS CARRIED ON AS A BUSINESS OR FOR PER-

¹TORTS, P. 787.

SONAL ENDS, THOUGH, THE STRICT LIABILITY OF THE AGENT MUST BE LIMITED TO THOSE CONSEQUENCES WHICH ARE OF THE SORT THAT MAKE THE ACTIVITY DANGEROUS.¹

BECAUSE SOCIETY WISHES TO USE ENTERPRISE MERELY AS A CONVENIENT MEDIUM FOR SPREADING OR SOCIALIZING THE LOSSES CAUSED BY ENTERPRISE, LIABILITY ON THIS BASIS CAN BE JUSTIFIED ONLY FOR SUCH LOSSES AS ENTERPRISE IS ABLE TO SPREAD--THAT IS, FOR LOSSES WHICH IT CAN CALCULATE AND INSURE AGAINST.²

NO LESS THAN IN THE CASE OF ENTERPRISES, SINGLE AGENTS CAN ONLY INSURE AGAINST THOSE HARMS WHICH ARE IN THE GENERAL CLASS OF CONSEQUENCES WHICH MAKE THE ACTIVITY DANGEROUS AND ARE, IN THIS SENSE, FORESEEABLE.

THUS, AN INDIVIDUAL WHO CARRIES ON BLASTING AS PART OF HIS BUSINESS CAN BE EXPECTED TO INSURE AGAINST THOSE HARMS WHICH ARE TYPICAL OF BLASTING AND MAKE IT ULTRAHAZARDOUS, E.G., DAMAGE TO PROPERTY BY FLYING DEBRIS. ALTERNATIVELY, HE MAY INCLUDE THE COST OF SUCH HARMS IN THE PRICE OF HIS PRODUCT. AN INDIVIDUAL WHO DOES SUCH BLASTING FOR HIS OWN PURPOSES MAY LIKEWISE INSURE AGAINST TYPICAL HARMS OF THE ACTIVITY.

SIMILARLY, THE RESTATEMENT OF TORTS, SECOND, URGES AS JUSTIFICATION FOR THE IMPOSITION OF STRICT LIABILITY ON THE SUPPLIERS OF

¹WITHIN THE LAW OF TORTS GENERALLY, THOUGH, THE LIABILITY OF AN AGENT IS NOT SO LIMITED. "IF THE ACTOR'S CONDUCT IS A SUBSTANTIAL FACTOR IN BRINGING ABOUT HARM TO ANOTHER, THE FACT THAT THE ACTOR NEITHER FORESAW NOR SHOULD HAVE FORESEEN THE EXTENT OF THE HARM OR THE MANNER IN WHICH IT OCCURRED DOES NOT PREVENT HIM FROM BEING LIABLE." OF COURSE, HIS LIABILITY IS NOT UNLIMITED. "THE ACTOR'S CONDUCT MAY BE HELD NOT TO BE A LEGAL CAUSE OF HARM TO ANOTHER WHERE AFTER THE EVENT AND LOOKING BACK FROM THE HARM TO THE ACTOR'S NEGLIGENT CONDUCT, IT APPEARS TO THE COURT HIGHLY EXTRAORDINARY THAT IT SHOULD HAVE BROUGHT ABOUT THE HARM." RESTATEMENT, TORTS, SECOND, SEC. 435.

²ALBERT LEVITT, "LOSS-SHIFTING AND QUASI-NEGLIGENCE: A NEW INTERPRETATION OF THE PALSGRAF CASE," UNIVERSITY OF CHICAGO LAW REVIEW, VIII (1941), P. 736.

CHATTELS "THAT PUBLIC POLICY DEMANDS THAT THE BURDEN OF ACCIDENTAL INJURIES CAUSED BY PRODUCTS INTENDED FOR CONSUMPTION BE PLACED UPON THOSE WHO MARKET THEM, AND BE TREATED AS A COST OF PRODUCTION AGAINST WHICH LIABILITY INSURANCE CAN BE OBTAINED."¹

ALSO, WHERE AN INDIVIDUAL BUILDS A RESERVOIR, AS IN RYLANDS V. FLETCHER, HE KNOWS THAT THERE IS A RISK THAT SUCH A RESERVOIR WILL BREAK, AND THE SORT OF HARM WHICH THIS WILL CAUSE AND THE INDIVIDUALS LIKELY TO BE SO HARMED ARE SUFFICIENTLY CALCULABLE TO MAKE THE IMPOSITION OF STRICT LIABILITY ON THE ENTERPRISE JUSTIFIABLE.

WHERE A HARM IS NOT WITHIN THE RISK OF AN ACTIVITY, THOUGH, AND IS THEREFORE NOT CALCULABLE, LIABILITY WILL PUT SUCH A BURDEN ON THOSE CARRYING OUT THE ACTIVITY THAT IT WILL BE DETERRED, AND THIS IS DIS-UTILE. HERE, THE AGENT CANNOT CALCULATE THE COST OF HARMS HE IS LIKELY TO CAUSE, AND CAN THEREFORE NOT INCLUDE SUCH COSTS IN THE PRICES OF HIS SERVICES AND PRODUCTS. THE TREMENDOUS BURDEN OF INSURING AGAINST ANY HARM OF THE ACTIVITY, HOWEVER REMOTE A POSSIBILITY, WILL LIKEWISE SERVE TO DETER. IN SUCH CASES STRICT LIABILITY HAS INTRINSICALLY BAD CONSEQUENCES WHICH OUTWEIGH THE POSSIBLE GOOD ENDS SERVED BY ITS IMPOSITION.

CONSIDERATIONS OF INSURANCE ALSO FURNISH A UTILITARIAN JUSTIFICATION FOR LIMITING ABSOLUTE LIABILITY TO "UNCOMMON" OR "NON-NATURAL" USES OF LAND OR ACTIVITIES. WHERE ACTIVITIES OR USES OF LAND ARE COMMON, ANY INDIVIDUAL IS AS LIKELY TO BE THE VICTIM OF A GIVEN SORT OF HARM AS TO BE CAUSE OF SUCH A HARM. FOR EXAMPLE, WHERE FARMING IS A "COMMON" OR "NATURAL" ACTIVITY, AN INDIVIDUAL IS AS LIKELY TO

¹RESTATEMENT, TORTS, SECOND, COMMENT (c) TO SEC. 402A.

COLLECT WATER ON HIS LAND BY CHANGING THE SHAPE OF THE LAND THROUGH PLOWING, AS HE IS TO BE THE VICTIM OF SUCH WATER RUNNING ONTO HIS LAND FROM A NEIGHBOR'S SIMILAR USE. IT IS THEREFORE AS EASY AND REASONABLE FOR EVERY INDIVIDUAL TO VOLUNTARILY INSURE HIMSELF AGAINST SUCH HARMS BY OTHERS AS TO INSURE HIMSELF AGAINST CAUSING HARMS TO OTHERS. SINCE SUCH A RESULT CAN BE ACHIEVED VOLUNTARILY, WITHOUT THE CUMBERSOME MACHINERY OF THE LAW OF TORTS AND THE ADDITIONAL STIGMA WHICH A JUDGMENT IN TORT CARRIES, THERE IS NO UTILITARIAN JUSTIFICATION FOR IMPOSING STRICT LIABILITY ON SUCH COMMON ENTERPRISES.

FINALLY, LET US CONSIDER THE ARGUMENT AGAINST ABSOLUTE LIABILITY THAT, SINCE THE BURDEN IS ULTIMATELY BORN BY THE CONSUMER, OR PAID FOR BY THE INSURANCE COMPANY, THE DETERRENT VALUE OF TORT LIABILITY IS LESSENER. UPON INVESTIGATING THE MANNER IN WHICH LIABILITY INSURANCE HAS IN FACT FUNCTIONED IN RELATION TO HARM PREVENTION, HARPER AND JAMES CONCLUDE THAT THIS POSITION IS UNTENABLE.

(1) IN MANY FIELDS THE PRACTICAL OPERATION OF LIABILITY INSURANCE HAS BEEN DEFINITELY TO PROMOTE SAFETY RATHER THAN FOSTER CARELESSNESS, (2) IN FIELDS SUCH AS AUTOMOBILE AND PERSONAL LIABILITY INSURANCE THE INSURANCE COMPANIES HAVE LESS EFFECTIVE MEANS AT THEIR DISPOSAL TO PROMOTE SAFETY AND THEIR SUCCESS IN DOING SO IS LESS READILY DEMONSTRABLE. ON THE OTHER HAND, THERE IS NO SIGNIFICANT EVIDENCE TO SHOW THAT INSURANCE PROTECTION LEADS TO INCREASED CARELESSNESS. AND THE INSURANCE COMPANIES ARE ENGAGING IN THESE FIELDS TOO IN EFFORTS TO PROMOTE SAFETY WHICH IN THE LONG RUN WILL PROBABLY HAVE MATERIAL EFFECT. ALL IN ALL, THEREFORE, IT IS SAFE TO CONCLUDE THAT THE BENEFITS OF SOCIAL INSURANCE WHICH COME EVEN UNDER THE PRESENT LAW THROUGH THE OPERATION OF LIABILITY INSURANCE ARE NOT OFFSET BY ANY ENCOURAGEMENT OF IRRESPONSIBILITY.¹

ALSO, IF AN INDIVIDUAL CHOOSES TO PASS ON TO CONSUMERS THOSE COSTS OF HARMS CAUSED BY HIS ACTIVITY FOR WHICH HE IS LIABLE, RATHER THAN IN-

¹TORTS, P. 777.

SURING AGAINST THEM, THE DETERRENT FORCE OF SUCH LIABILITY WILL BE MAINTAINED. AS AN INDIVIDUAL'S COSTS INCREASE HE TENDS TO LOSE CUSTOMERS, AND THE LOSS WHICH HE SOUGHT TO DISTRIBUTE AMONG HIS CUSTOMERS IS IN EFFECT "THROWN BACK" UPON HIM. INsofar, THEREFORE, AS HE CAN REDUCE THESE COSTS AND MAINTAIN CUSTOMERS BY TAKING REASONABLE CARE IN THE OPERATION OF HIS BUSINESS, HE WILL HAVE A FINANCIAL MOTIVATION FOR DOING SO, AND HARM PREVENTION WILL NOT SIGNIFICANTLY SUFFER.

WE MAY CONCLUDE THAT STRICT LIABILITY IN TORTS MAY BE IMPOSED EITHER WHERE PROOF OF FAULT IS DIFFICULT TO OBTAIN, ALTHOUGH THE GREAT MAJORITY OF HARMS ARE IN FACT CAUSED BY CULPABLE INDIVIDUALS; OR WHERE SUCH LIABILITY LEADS TO WIDE DISTRIBUTION OF LOSSES AMONG CONSUMERS OR THROUGH INSURANCE; OR WHERE A COMBINATION OF THESE FACTORS OBTAIN. IN SUCH INSTANCES ABSOLUTE LIABILITY SERVES TO MAXIMIZE UTILITY.

UNACCEPTABILITY OF A UTILITARIAN

THEORY OF SANCTIONS

WE HAVE NOW SEEN THAT THE LEGAL IMPOSITION OF PENAL AND CIVIL SANCTIONS ON FAULTLESS OFFENDERS MAY BE JUSTIFIED ON GROUNDS OF UTILITY. UNLESS, HOWEVER, WE CAN FURTHER SHOW THAT UTILITARIANISM FURNISHES AN ACCEPTABLE PHILOSOPHICAL PERSPECTIVE ON THE IMPOSITION OF SANCTIONS GENERALLY, WE OUGHT NOT CONCLUDE THAT SUCH LIABILITY WITHOUT FAULT IS JUSTIFIABLE, SIMPLICITER.

IN FACT, THOUGH, IT SEEMS THAT UNLESS WE ARE PREPARED TO ABANDON A FUNDAMENTAL AND COMMON-SENSE MORAL BELIEF WE MUST REJECT UTILITARIANISM AS THE ULTIMATE STANDARD BY REFERENCE TO WHICH SUCH MATTERS ARE TO BE DECIDED. IT MUST BE REJECTED BECAUSE IT FAILS TO ACCOUNT FOR OUR DUTY TO REQUITE DESERT. AS MILL HIMSELF WROTE:

. . . IT IS UNIVERSALLY CONSIDERED JUST THAT EACH PERSON SHOULD OBTAIN THAT (WHETHER GOOD OR EVIL) WHICH HE DESERVES, AND UNJUST THAT HE SHOULD OBTAIN A GOOD OR BE MADE TO UNDERGO AN EVIL WHICH HE DOES NOT DESERVE. THIS IS, PERHAPS, THE CLEAREST AND MOST EMPHATIC FORM IN WHICH THE IDEA OF JUSTICE IS CONCEIVED BY THE GENERAL MIND.¹

ONE NEED SEARCH NEITHER LONG NOR HARD IN THE PHILOSOPHICAL LITERATURE, THOUGH, TO FIND NUMEROUS HYPOTHETICAL CASES IN WHICH IT IS CLAIMED THAT AN ACTION WHICH SERVES TO MAXIMIZE UTILITY FAILS TO RE-
 QUITE DESERT AND IS HENCE UNJUST AND MORALLY WRONG. WITHIN THE REALM OF LAWS AND THEIR SANCTIONS SUCH CRITICISMS TAKE THE FORM OF EXAMPLES WHICH PURPORT TO SHOW THAT THE IMPOSITION OF UNDESERVED SANCTIONS MAY SERVE TO MINIMIZE FUTURE HARM. TYPICALLY, THESE EXAMPLES FOCUS ON INSTANCES OF "ILLEGAL" PUNISHMENT OF THE MORALLY INNOCENT. THUS, E. F. CARRITT WRITES:

. . . THE UTILITARIAN MUST HOLD THAT WE ARE JUSTIFIED IN INFLICTING PAIN ALWAYS AND ONLY TO PREVENT WORSE PAIN OR BRING ABOUT GREATER HAPPINESS. THIS, THEN, IS ALL WE NEED TO CONSIDER IN SO-CALLED PUNISHMENT, WHICH MUST BE PURELY PREVENTIVE. BUT IF SOME KIND OF VERY CRUEL CRIME BECOMES COMMON, AND NONE OF THE CRIMINALS CAN BE CAUGHT, IT MIGHT BE HIGHLY EXPEDIENT, AS AN EXAMPLE, TO HANG AN INNOCENT MAN, IF A CHARGE AGAINST HIM COULD BE SO FRAMED THAT HE WERE UNIVERSALLY THOUGHT GUILTY; INDEED THIS WOULD ONLY FAIL TO BE AN IDEAL INSTANCE OF UTILITARIAN "PUNISHMENT" BECAUSE THE VICTIM HIMSELF WOULD NOT HAVE BEEN SO LIKELY AS A REAL FELON TO COMMIT SUCH A CRIME IN THE FUTURE; IN ALL OTHER RESPECTS IT WOULD BE PERFECTLY DETERRENT AND THEREFORE FELICIFIC.²

IN FACT, THOUGH, NOT ALL INSTANCES OF UNDESERVED IMPOSITION OF SANCTIONS INVOLVE "ILLEGAL" PUNISHMENT OF MORALLY BLAMELESS INDIVIDUALS. AS WE HAVE SEEN, THE PERFECTLY LEGAL IMPOSITION OF SANCTIONS ON SUCH INDIVIDUALS IN ACCORDANCE WITH LAWS IMPOSING LIABILITY WITHOUT FAULT MAY LIKEWISE BE IN CONFORMITY WITH THE PRINCIPLE OF UTILITY.

¹UTILITARIANISM, P. 55

²E. F. CARRITT, ETHICAL AND POLITICAL THINKING (LONDON: OXFORD UNIVERSITY PRESS, 1947), P. 65.

UTILITARIANS HAVE NOT, OF COURSE, BEEN DEAF TO THESE CRITICISMS. OF THEIR THEORY, AND THEY HAVE MADE SERIOUS EFFORTS TO "ACCOMODATE" DESERT AND FUTURE HARM MINIMIZATION. A UTILITARIAN MAY PUT FORWARD ANY ONE OF THREE THESES IN AN ATTEMPT TO AFFECT THIS ACCOMODATION: 1) THE STRONG THESIS (S) THAT "DESERT" AND "FUTURE HARM MINIMIZATION" ARE CONCEPTUALLY IDENTICAL; 2) THE WEAK THESIS (W) THAT "DESERT" AND "FUTURE HARM MINIMIZATION" ARE FACTUALLY COEXTENSIVE; 3) THE FEEBLE THESIS (F) THAT "VERY OFTEN" THOSE ACTIONS WHICH MINIMIZE FUTURE HARM ALSO REQUIRE DESERT.

THAT BOTH (S) AND (W) ARE FALSE IS CLEAR FROM THE PRECEEDING DISCUSSION OF STRICT LIABILITY. EVEN IF, IN FACT, NO STRICT LIABILITY LAW CAN BE FORMULATED WHICH SATISFIES THE UTILITARIAN PRINCIPLE, (S) REMAINS FALSE, FOR TO UTTER THE STATEMENT "P DOES NOT DESERVE TO BE IMPRISONED FOR ACCIDENTALLY SELLING ADULTERATED MEAT, ALTHOUGH SUCH PUNISHMENT WILL MINIMIZE FUTURE HARM" IS NOT TO UTTER A SELF-CONTRADICTION, AS WOULD BE THE CASE IF THE TWO CONCEPTS WERE INDEED IDENTICAL.

ANYONE CLAIMING SUCH IDENTITY WOULD BE IGNORING A FUNDAMENTAL ASPECT OF THE NOTION OF DESERT: "DESERT", AS CONTRASTED WITH "UTILITY," IS A PAST-ORIENTED CONCEPT. TO SAY THAT A MAN DESERVES A PARTICULAR PUNISHMENT IS PARTIALLY TO CLAIM THAT THERE IS A PROPRIETY IN HIS BEING GIVEN IT. THIS PROPRIETY EXISTS BECAUSE OF A PROPORTION OR BALANCE, NOT BETWEEN THE HARM OF THE PENALTY AND THE HARM PREVENTED BY DETERRENCE (A FUTURE FACT), BUT RATHER BETWEEN THE HARM OF THE PENALTY AND THE CULPABILITY OF THE OFFENDER (PAST FACT).

DESERT, AS A CONCEPTUALLY BACKWARD-LOOKING NOTION, EXAMINES THE PROPERTIES OF THE ACTION COMMITTED, RATHER THAN PROPERTIES OF THE FUTURE ACTIONS DETERRED. DESERT AND FUTURE HARM MINIMIZATION ARE CLEARLY

NOT CONCEPTUALLY IDENTICAL.

FURTHERMORE, ON THE STRENGTH OF ARGUMENTS ALREADY PRESENTED, I BELIEVE THAT IT CAN REASONABLY BE CLAIMED THAT AT LEAST ONE STRICT LIABILITY LAW CAN BE FRAMED WHICH WILL IN FACT MINIMIZE SUCH HARM, AND THIS IS ALL THAT IS REQUIRED TO FALSIFY THE CLAIM OF COEXTENSIVITY REPRESENTED BY (W).

THE UTILITARIAN IS LEFT, THEN, TO DEFEND (F), THE FEEBLE THESIS THAT "VERY OFTEN" THOSE ACTIONS WHICH MINIMIZE FUTURE HARM WILL RE- QUITE DESERT AS WELL. PERHAPS IN FACT THERE IS SUCH A CORRELATION, BUT A UTILITARIAN CAN ONLY USE THAT FACT TO JUSTIFY HIS THEORY IF HE CAN ALSO ARGUE CONVINCINGLY THAT WHERE DESERT AND FUTURE HARM MINIMIZATION ARE NOT COEXTENSIVE, IT IS MORALLY RIGHT TO FOLLOW THE COURSE OF UTILITY AT THE EXPENSE OF THE SATISFACTION OF DESERT.

NOW, IT MAY OF COURSE BE THE CASE THAT IN CERTAIN INSTANCES WE DO JUDGE IT MORALLY PERMISSIBLE TO SACRIFICE DESERT IN FAVOR OF UTILITY.

SUPPOSE THAT D, THE SOVEREIGN OF A POWERFUL NATION, HAS A GRIEVANCE AGAINST SMITH, A CITIZEN OF A SMALL NATION. D DEMANDS THAT E, THE SOVEREIGN OF SMITH'S COUNTRY, ENSURE THAT SMITH BE CONVICTED AND IMPRISONED FOR SOME PARTICULARLY DISGRACEFUL OFFENSE OF WHICH SMITH IS INNOCENT, E.G., SEXUAL ASSAULT ON A CHILD. UNLESS INNOCENT SMITH IS CONVICTED AND PUNISHED, D WILL LAUNCH AN ATTACK ON E'S COUNTRY AND MASSACRE THE WHOLE POPULATION. E CAN WITH THE AID OF A FEW TRUSTED SECURITY POLICE MANUFACTURE EVIDENCE WHICH WOULD CONVICT SMITH IN A COURT OF LAW. THE MASSACRE OF A WHOLE NATION WOULD SURELY HAVE MORE DISUTILITY THAN THE HARMFUL EFFECT OF SMITH'S ILLEGAL PUNISHMENT.¹

IN SUCH A CASE SOME MIGHT WELL JUDGE THAT IT IS PERMISSIBLE TO INFLICT UNDESERVED SUFFERING IN ORDER TO MINIMIZE DISUTILITY. IN SUCH

¹ GERTRUDE EZORSKY, "THE ETHICS OF PUNISHMENT," PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT (ALBANY: STATE UNIVERSITY OF NEW YORK PRESS, 1972), PP. XVI-XVII.

A CASE THE DICTATES OF THE UTILITARIAN THEORY DO INDEED SEEM TO COINCIDE WITH SOME NORMAL MORAL NOTIONS OF RIGHT AND WRONG.

BUT THE UTILITARIAN IS NOT ONLY COMMITTED TO INFLECTING UNDESERVED PUNISHMENT WHERE THE HARM TO BE THEREBY AVERTED IS SO GREAT. HE IS ALSO COMMITTED TO ANY ACTION WHICH WILL INCREASE UTILITY BY THE SMALLEST CONCEIVABLE AMOUNT. HE MUST NOT ONLY IMPOSE ABSOLUTE LIABILITY WHERE THE HARM TO BE PREVENTED IS VERY GREAT IN COMPARISON TO THE PENALTY INFLECTED ON THE INNOCENT OFFENDER; HE MUST ALSO IMPOSE SUCH LIABILITY WHERE THIS UNDESERVED HARM WILL BRING ABOUT THE PREVENTION OF A HARM OF JUST ENOUGH SEVERITY TO SLIGHTLY OUTWEIGH IT, TOGETHER WITH ANY PERIPHERAL BAD EFFECTS.

BUT IS THIS WHAT WE REALLY THINK ABOUT OUR DUTY TO PUNISH JUSTLY? DO WE TRULY BELIEVE THAT SUCH A DUTY MAY BE OVERRIDDEN FOR THE SLIGHTEST INCREASE IN GOOD CONSEQUENCES? I BELIEVE THAT ON COMMON SENSE GROUNDS THE ANSWER MUST CLEARLY BE IN THE NEGATIVE. WE ARE NOT WILLING TO ADMIT THAT IN EVERY INSTANCE WHERE UTILITY CAN BE SLIGHTLY ENHANCED WE MAY, IN FACT MUST, INFLECT UNDESERVED PUNISHMENT.

ALSO, WHEN WE DO JUSTIFY SUCH A VIOLATION OF THE DUTY TO REQUITE DESERT, WE DO SO WITH A FEELING OF HAVING SACRIFICED AN IMPORTANT PRINCIPLE.

GIVEN ENOUGH MISERY TO BE AVOIDED BY THE SACRIFICE OF AN INNOCENT PERSON, THERE MAY BE SITUATIONS IN WHICH IT MIGHT BE THOUGHT MORALLY PERMISSIBLE TO TAKE THIS STEP. BUT, AGAIN, IF WE TOOK THE STEP, WE WOULD HAVE TO FACE A CLASH BETWEEN TWO PRINCIPLES. WE WOULD THEN SACRIFICE THE PRINCIPLE OF FAIRNESS DESIGNED TO PROTECT THE INDIVIDUAL FROM SOCIETY TO THE PRINCIPLE THAT AN OVERWHELMING ADVANTAGE TO SOCIETY SHOULD BE SECURED AT ANY PRICE; BUT A CLASH BETWEEN TWO PRINCIPLES IS DIFFERENT FROM THE SIMPLE APPLICATION OF A SINGLE PRINCIPLE THAT ANYTHING WHICH BENEFITS SOCIETY IS PERMISSIBLE.¹

¹H. L. A. HART, "MURDER AND THE PRINCIPLES OF PUNISHMENT," PUNISHMENT AND RESPONSIBILITY, p. 81.

THE UTILITARIAN SACRIFICES NO PRINCIPLE IN SUCH CASES. HIS ACTION IS PERFECTLY IN ACCORD WITH THE ONLY PRINCIPLE WHICH HE RECOGNIZES AS VALID.

UNLESS ONE IS WILLING TO ABANDON THE NOTION OF DESERT REQUITAL AS A "TOUCHSTONE" OF THE VALIDITY OF ANY PROPOSED ETHICAL PRINCIPLE, THE UTILITARIAN'S FAILURE TO SATISFACTORILY ACCOUNT FOR OUR DUTY TO REQUITE DESERT RENDERS HIS THEORY UNACCEPTABLE AS THE ULTIMATE MORAL RULE BY WHICH QUESTIONS OF THE JUSTIFIABILITY OF IMPOSING SANCTIONS MUST BE DECIDED.

CHAPTER 5

RETRIBUTIVE JUSTICE

CRIMINAL LAW

IN STARK CONTRAST TO THE UTILITARIAN THEORY, WHICH I HAVE CRITICIZED ON THE GROUND THAT IT FAILS TO ACCOMODATE OUR NOTION OF MORAL DESERT AND THE PLACE WHICH THIS CONCEPT PLAYS IN OUR MORAL JUDGMENTS, STANDS THE RETRIBUTIVE THEORY OF JUSTICE, IN WHICH THIS SAME NOTION OF DESERT IS FUNDAMENTAL.

RETRIBUTIVISTS HOLD THAT A STATE OF AFFAIRS IN WHICH THE GOOD ARE HAPPY AND THE WICKED SUFFER, EACH IN PROPORTION TO HIS MORAL DESERT, IS BETTER, ASIDE FROM ANY FURTHER CONSEQUENCES, THAN A STATE OF AFFAIRS IN WHICH HAPPINESS IS NOT APPORTIONED TO MORAL VIRTUE. "VIRTUE AND HAPPINESS TOGETHER CONSTITUTE THE POSSESSION OF THE HIGHEST GOOD FOR ONE PERSON, AND HAPPINESS IN EXACT PROPORTION TO MORALITY (AS THE WORTH OF A PERSON AND HIS WORTHINESS TO BE HAPPY) CONSTITUTES THAT OF A POSSIBLE WORLD . . ."¹

FROM THE PERSPECTIVE OF SUCH A THEORY, DESERVED PUNISHMENT OF CRIMINALS IS ALWAYS EITHER JUST OR OF SOME POSITIVE MORAL WORTH; IT SERVES TO RESTORE THE BALANCE BETWEEN THE OFFENDER'S MORAL CULPABILITY AND HIS SUFFERING. UNDESERVED PUNISHMENT IS ALWAYS EITHER UNJUST OR OF SOME NEGATIVE MORAL WORTH; IT UPSETS THE BALANCE BETWEEN THE FAULT-

¹ IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON, TRANS. BY LEWIS WHITE BECK (CHICAGO: UNIVERSITY OF CHICAGO PRESS, 1950), P. 215.

LESS INDIVIDUAL'S VIRTUE AND HIS HAPPINESS.

JUST AS THE UTILITARIAN JUSTIFICATION FOR IMPOSING SANCTIONS IS DERIVED FROM THE GENERAL UTILITARIAN THEORY OF OBLIGATION, SO, TOO, IS THE MOST FAMOUS OF ALL RETRIBUTIVE THEORIES OF PUNISHMENT, THAT OF IMMANUEL KANT, DERIVED FROM HIS GENERAL THEORY OF DUTY OR OBLIGATION. A MAJOR FEATURE OF THAT ETHICAL THEORY WAS, OF COURSE, THE PROPOSED SUPREME PRINCIPLE OF MORALITY, THE CATEGORICAL IMPERATIVE. KANT SEEMS TO HAVE OFFERED THE FOLLOWING FIVE VERSIONS OF THE PRINCIPLE, ALL OF WHICH HE APPARENTLY THOUGHT TO BE EQUIVALENT:

1) ACT ONLY ON THAT MAXIM THROUGH WHICH YOU CAN AT THE SAME TIME WILL THAT IT SHOULD BECOME A UNIVERSAL LAW.¹

2) ACT AS IF THE MAXIM OF YOUR ACTION WERE TO BECOME THROUGH YOUR WILL A UNIVERSAL LAW OF NATURE.²

3) SO ACT AS TO USE HUMANITY, BOTH IN YOUR OWN PERSON AND IN THE PERSON OF EVERY OTHER, ALWAYS AT THE SAME TIME AS AN END, NEVER SIMPLY AS A MEANS.³

4) SO ACT THAT YOUR WILL CAN REGARD ITSELF AT THE SAME TIME AS MAKING UNIVERSAL LAW THROUGH ITS MAXIM.⁴

5) SO ACT AS IF YOU WERE ALWAYS THROUGH YOUR MAXIMS A LAW-MAKING MEMBER IN A UNIVERSAL KINGDOM OF ENDS.⁵

¹ IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, TRANS. BY LEWIS WHITE BECK (INDIANAPOLIS: THE BOBBS-MERRILL COMPANY, INC., 1959), P. 39.

² IBID.

³ IBID., P. 47.

⁴ IBID., P. 52.

⁵ IBID., P. 57.

WHETHER IN FACT THERE IS AN EQUIVALENCE BETWEEN THESE VERSIONS, AND THE METHOD OF APPLYING EACH PRINCIPLE, HAS OCCUPIED A GREAT PLACE IN THE THOUGHT OF PHILOSOPHERS. HOWEVER, THIS PAPER IS CONCERNED PRIMARILY WITH ETHICAL QUESTIONS CONCERNING PUNISHMENT, AND SINCE THE DISCUSSION BY KANT AND OTHERS OF THIS PROBLEM IS VIRTUALLY ALWAYS IN TERMS OF FORMULATION 3, THE SO-CALLED "PRINCIPLE OF HUMANITY," THESE PROBLEMS ARE IN THIS CONTEXT PERIPHERAL. FOR THIS REASON I WILL CONCERN MYSELF IN WHAT FOLLOWS WITH FORMULATION 3 ALONE.

THE FOLLOWING IS PERHAPS THE MOST WELL-KNOWN STATEMENT OF THE RETRIBUTIVIST POSITION, AND WILL SERVE AS A BRIDGE BETWEEN THE PRINCIPLE OF HUMANITY IN GENERAL AND THE PARTICULAR PROBLEM WHICH CONCERNS US:

JUDICIAL PUNISHMENT CAN NEVER BE USED MERELY AS A MEANS TO PROMOTE SOME OTHER GOOD FOR THE CRIMINAL HIMSELF OR FOR CIVIL SOCIETY, BUT INSTEAD IT MUST IN ALL CASES BE IMPOSED ON HIM ONLY ON THE GROUND THAT HE HAS COMMITTED A CRIME; FOR A HUMAN BEING CAN NEVER BE MANIPULATED MERELY AS A MEANS TO THE PURPOSES OF SOMEONE ELSE AND CAN NEVER BE CONFUSED WITH THE OBJECTS OF THE LAW OF THINGS. HIS INNATE PERSONALITY (THAT IS, HIS RIGHT AS A PERSON) PROTECTS HIM AGAINST SUCH TREATMENT, EVEN THOUGH HE MAY INDEED BE CONDEMNED TO LOSE HIS CIVIL PERSONALITY. HE MUST FIRST BE FOUND DESERVING OF PUNISHMENT BEFORE ANY CONSIDERATION IS GIVEN TO THE UTILITY OF THIS PUNISHMENT FOR HIMSELF OR FOR HIS FELLOW CITIZENS. THE LAW CONCERNING PUNISHMENT IS A CATEGORICAL IMPERATIVE, AND WOE TO HIM WHO RUMMAGES AROUND IN THE WINDING PATHS OF A THEORY OF HAPPINESS LOOKING FOR SOME ADVANTAGE TO BE GAINED BY RELEASING THE CRIMINAL FROM PUNISHMENT OR BY REDUCING THE AMOUNT OF IT.¹

¹IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, TRANS. BY JOHN LADD (INDIANAPOLIS: THE BOBBS-MERRILL COMPANY, INC., 1965), p. 100. SIMILARLY, F. H. BRADLEY WROTE: "WE PAY THE PENALTY, BECAUSE WE OWE IT, AND FOR NO OTHER REASON; AND IF PUNISHMENT IS INFLICTED FOR ANY OTHER REASON WHATEVER, THAN BECAUSE IT IS MERITED BY WRONG, IT IS A GROSS IMMORALITY, A CRYING INJUSTICE, AN ABOMINABLE CRIME, AND NOT WHAT IT PRETENDS TO BE. WE MAY HAVE REGARD FOR WHATEVER CONSIDERATIONS WE PLEASE—OUR OWN CONVENIENCE, THE GOOD OF SOCIETY, THE BENEFIT OF THE OFFENDER; WE ARE FOOLS, AND WORSE, IF WE FAIL TO DO SO. HAVING ONCE THE RIGHT TO PUNISH, WE MAY MODIFY THE PUNISHMENT ACCORDING TO THE USEFUL AND THE PLEASANT, BUT THESE ARE EXTERNAL TO THE MATTER; THEY CAN NOT GIVE US A

WE MUST, THEN, ACCORDING TO THE RETRIBUTIVE THEORY IMPOSE ALL AND ONLY THOSE PUNISHMENTS WHICH ARE DESERVED. IT IS THIS PRINCIPLE WHICH IS OFTEN CITED AS THE JUSTIFICATION FOR THE REQUIREMENTS OF AN ACTUS REUS AND MENS REA WITHIN THE CRIMINAL LAW. RECALL BISHOP'S STATEMENT THAT "THERE CAN BE NO CRIME, LARGE OR SMALL, WITHOUT AN EVIL MIND. IN OTHER WORDS, PUNISHMENT IS THE SEQUENCE OF WICKEDNESS."¹ WICKEDNESS CONSISTS IN AN EVIL MIND OR MENS REA. IN THE ABSENCE OF SUCH A STATE, NO INDIVIDUAL DESERVES TO BE PUNISHED.

WITH RESPECT TO THE ACTUS REUS REQUIREMENT, BLACKSTONE WROTE:

INDEED, TO MAKE A COMPLETE CRIME, COGNIZABLE BY HUMAN LAWS, THERE MUST BE BOTH A WILL AND AN ACT. FOR THOUGH, IN FORO CONSCIENTIAE, A FIXED DESIGN OR WILL TO DO AN UNLAWFUL ACT IS ALMOST AS HEINOUS AS THE COMMISSION OF IT, YET, AS NO TEMPORAL TRIBUNAL CAN SEARCH THE HEART, OR FATHOM THE INTENTIONS OF THE MIND, OTHERWISE THAN AS THEY ARE DEMONSTRATED BY OUTWARD ACTIONS, IT THEREFORE CANNOT PUNISH FOR WHAT IT CANNOT KNOW. FOR WHICH REASON IN ALL TEMPORAL JURISDICTIONS AN OVERT ACT, OR SOME OPEN EVIDENCE OF AN INTENDED CRIME, IS NECESSARY, IN ORDER TO DEMONSTRATE THE DEPRAVITY OF THE WILL, BEFORE THE MAN IS LIABLE TO PUNISHMENT.²

THE JUSTIFICATION FOR PUNISHMENT IS THE DESERT OF THE PUNISHED, BUT WE CANNOT KNOW THAT AN INDIVIDUAL DESERVES TO BE PUNISHED UNLESS HE ENGAGES IN A VOLUNTARY ACT, A "SIGN" OF HIS BLAMEWORTHINESS. WHERE THERE IS NO SUCH SIGN, WE MUST NOT PUNISH.

THE CONCEPT OF DESERT BEING THUS FUNDAMENTAL TO THE RETRIBUTIVE PRINCIPLE AND THE CRIMINAL LAW, AN EXAMINATION OF THAT NOTION SEEMS CALLED FOR. I BELIEVE THAT IF WE CONSIDER THE WAY IN WHICH THE NOTION OF DESERT IS EMPLOYED IN ORDINARY LANGUAGE, WE WILL SEE THAT TO CLAIM

RIGHT TO PUNISH, AND NOTHING CAN DO THAT BUT CRIMINAL DESERT. . . ." ETHICAL STUDIES, 1876, PP. 25-26.

¹SUPRA, P. 50.

²BLACKSTONE, COMMENTARIES, V, PP. 20-21.

THAT AGENT A DESERVES PUNISHMENT P IS TO CLAIM THAT 1) A IS MORALLY BLAMEWORTHY FOR SOME ACTION OR OMISSION, AND 2) PUNISHMENT P IS "EQUIVALENT" TO A'S MORAL FAULT.

IMAGINE, FOR EXAMPLE, THAT AN INDIVIDUAL HAS COMMITTED A VIOLATION OF LAW WHILE IN A STATE OF AUTOMATISM. THERE IS, HOWEVER, A STATUTE MAKING THE VIOLATION OF THAT LAW PUNISHABLE EVEN WHEN THE VIOLATOR IS NOT AT FAULT. ALTHOUGH THE COURT IS ENTITLED, THEN, TO IMPOSE SOME PUNISHMENT ON THE OFFENDER, WE WOULD ORDINARILY DENY THAT HE DESERVED TO BE PUNISHED; WE WOULD MAKE OUR DENIAL ON THE GROUND THAT THE OFFENDER WAS NOT TO BLAME.

CONSIDER, TOO, THE CASE OF AN INDIVIDUAL WHO HAS VIOLATED A STATUTE MAKING LOITERING A CRIME PUNISHABLE BY 10 YEARS IMPRISONMENT. WHILE A COURT MAY, UPON CONVICTION, IMPOSE SUCH PUNISHMENT, WE WOULD NORMALLY SAY THAT SUCH PUNISHMENT WAS UNDESERVED--THE OFFENDER'S CONDUCT IS NOT SUFFICIENTLY BLAMEWORTHY FOR SUCH A SEVERE PENALTY. "THE PUNISHMENT DOES NOT FIT THE CRIME."

WE HAVE ALREADY EXAMINED THE CONDITIONS UNDER WHICH A PERSON MAY JUSTIFIABLY BE SAID TO BE BLAMEWORTHY. LET US NOW CONSIDER THE QUESTION: WHEN IS A PUNISHMENT "EQUIVALENT" TO AN INDIVIDUAL'S BLAMEWORTHINESS?

ONE ANSWER TO THIS QUESTION IS SUGGESTED BY THE LEX TALIONIS, "AN EYE FOR AN EYE." THE EQUIVALENCE WHICH WE SEEK IS REALIZED WHEN THE OFFENDER IS TREATED EXACTLY AS HE HAS TREATED OTHERS. THUS, IF HE HAS TAKEN A LIFE, HIS LIFE WILL BE TAKEN; IF HE HAS CAUSED ANOTHER TO LOSE HIS RIGHT ARM, THEN HIS OWN RIGHT ARM MUST BE FORFEITED. THIS FORMULATION, THOUGH, MEETS WITH DIFFICULTIES. FIRST, THERE ARE CERTAIN OFFENSES FOR WHICH SUCH AN EQUIVALENT PENALTY IS HARD TO IMAGINE. WHAT

IS TO BE DONE TO A TRAITOR? WHAT IS THE PENALTY TO BE FOR CHILD MOLESTATION? SECOND, REALIZE THAT THIS SOLUTION IS WORKABLE, IF AT ALL, FOR CRIMES INTENTIONALLY COMMITTED, I.E., KNOWINGLY OR PURPOSELY. IF I PURPOSELY TAKE A LIFE, PERHAPS THE FITTING PENALTY IS FOR MY OWN LIFE TO BE TAKEN. BUT WHAT OF THE PERSON WHO NEGLIGENTLY CAUSES A DEATH? IS HIS LIFE TO BE TAKEN? IS HE TO SUFFER THE SAME PENALTY AS THE INTENTIONAL MURDERER? IF WE ARE TO TREAT HIM EXACTLY AS HE HAS TREATED OTHERS, MUST WE NOT TAKE HIS LIFE NEGLIGENTLY, RATHER THAN INTENTIONALLY? SUCH ABSURDITIES LEAD TO AN ABANDONMENT OF THIS NOTION OF EQUIVALENCE.

PERHAPS IT WILL BE SUGGESTED INSTEAD THAT THE AMOUNT OF SUFFERING WHICH THE INDIVIDUAL HAS CAUSED MUST EQUAL THE AMOUNT WHICH IS INFLICTED ON HIM. IF SUCH A POSITION IS ACCEPTED, THOUGH, WHAT PENALTY WILL WE IMPOSE ON INDIVIDUALS WHO FAIL IN THEIR ATTEMPTS AT CRIME? IF THEIR BLUNDERING LEADS TO NO SUFFERING, OR IF THEY MERELY CONSPIRE TO CRIMINAL ACTIVITIES AND ARE CAUGHT BEFORE THEY CAN CARRY OUT THEIR PLANS, ARE THEY THEN TO RECEIVE NO PUNISHMENT? OR PERHAPS IT WILL BE ANSWERED THAT THEY SHOULD BE PUNISHED IN AN AMOUNT EQUAL TO THE SUFFERING WHICH THEIR INTENDED CRIME WOULD HAVE CAUSED. BUT WHAT, THEN, WILL WE DO WITH THE NEGLIGENT WRONGDOER? HE INTENDS NO HARM. DOES HE THEREFORE GO FREE, OR DO WE INFLICT THE AMOUNT OF SUFFERING ON HIM WHICH HE OUGHT TO HAVE FORESEEN HIS CONDUCT AS CAUSING? THEN THE NEGLIGENT KILLER WILL BE PUNISHED EQUALLY WITH THE INTENTIONAL MURDERER. THIS FORMULATION, THEN, IS AS UNACCEPTABLE AS THE FIRST.

CONSIDER A THIRD POSSIBLE SUGGESTION: AN INDIVIDUAL'S SUFFERING BY PUNISHMENT MUST EQUAL HIS CULPABILITY. AN AGENT'S CULPABILITY INCREASES AS THE HARM HE CAUSES INCREASES, AND ALSO AS HIS "DEGREE OF RESPONSIBILITY" FOR THAT HARM INCREASES. THUS, AN INDIVIDUAL WHO CAUSES

SOME AMOUNT OF HARM RECKLESSLY IS LESS CULPABLE THAN AN INDIVIDUAL WHO CAUSES THAT SAME AMOUNT OF HARM INTENTIONALLY. ALSO, IF TWO INDIVIDUALS EACH INTENTIONALLY COMMIT HARMS, THE INDIVIDUAL CAUSING THE GREATER AMOUNT OF HARM IS MORE CULPABLE. IN RESPONSE TO SUCH A PROPOSAL, TED HONDERICH WRITES:

GIVEN SOME SUCH UNDERSTANDING OF CULPABILITY, IT IS CLEAR THAT NO PENALTY CAN BE REGARDED AS EITHER EQUIVALENT OR NOT EQUIVALENT, IN ANY FACTUAL SENSE, TO A MAN'S CULPABILITY IN HIS OFFENCE. THIS IS SO BECAUSE THE DISTRESS OF A PENALTY AND THE CULPABILITY OF AN OFFENDER ARE NOT COMMENSURABLE. THERE ARE NO COMMON UNITS OF MEASUREMENT.¹

THE RETRIBUTIVIST MIGHT ACCOMODATE SUCH A CRITICISM BY MODIFYING HIS POSITION SO THAT AN INDIVIDUAL'S SUFFERING NEED NOT BE EQUIVALENT TO HIS CULPABILITY, BUT MERELY PROPORTIONAL, IN THE FOLLOWING SENSE: WE RANK OFFENSES BY THE COMPARATIVE DEGREE OF CULPABILITY OF THOSE WHO COMMIT THEM. IN SUCH A LIST INTENTIONALLY BREAKING A WINDOW WILL RANK HIGHER THAN RECKLESSLY DOING SO, AND INTENTIONALLY HARMING A PERSON WILL RANK HIGHER THAN BOTH, ETC. SUCH A RANKING IS, I BELIEVE, THEORETICALLY FEASIBLE. NEXT, WE RANK PUNISHMENTS IN COMPARATIVE ORDER OF SEVERITY, I.E., AMOUNT OF SUFFERING IMPOSED. WE MAY THEN CLAIM THAT A SYSTEM OF PUNISHMENTS IS PROPORTIONATE TO THE CULPABILITY OF THE OFFENDER WHERE THE PENALTY FOR EVERY OFFENSE IS MORE SEVERE THAN THE PENALTY FOR ANY OFFENSE OF LESS CULPABILITY.²

IS THIS AN ACCEPTABLE SOLUTION TO THE PROBLEM BEFORE US? I THINK NOT. CONSIDER THAT A SYSTEM OF PENALTIES WHICH INFLICTED 10 YEARS AT HARD LABOR ON A PERSON FOUND GUILTY OF LOITERING WOULD BE ACCEPTABLE

¹ TED HONDERICH, PUNISHMENT--THE SUPPOSED JUSTIFICATIONS (ENGLAND: PENGUIN BOOKS, INC., 1971), P. 28.

² SUCH A PROPOSAL IS MADE BY C. W. K. MUNDLE IN "PUNISHMENT AND DESERT," PHILOSOPHICAL QUARTERLY, IV (1954), P. 222.

UNDER THIS THEORY, SO LONG AS MORE SERIOUS OFFENSES WERE DEALT WITH YET MORE SEVERELY, E.G., THE PENALTY FOR MURDER MIGHT BE HIDEOUS, UNRELENTING TORTURE PROLONGED AS MUCH AS POSSIBLE BEFORE DEATH RESULTS. HERE PENALTIES ARE PROPORTIONATE, IN THE RELEVANT SENSE, TO MORAL CULPABILITY, BUT CLEARLY SUCH A SYSTEM CANNOT BE SAID TO JUSTLY REQUITE DESERT.

IT IS DIFFICULT TO IMAGINE A SATISFACTORY RETRIBUTIVIST SOLUTION TO THE PROBLEM OF APPORTIONMENT OF PUNISHMENT TO MORAL DESERT. SUCH A DIFFICULTY MAY INDEED PROVE AN INSURMOUNTABLE OBSTACLE TO ACCEPTANCE OF THE THEORY. LET US ASSUME, HOWEVER, THAT THERE IS IN FACT AT LEAST ONE DESERVED PENALTY FOR EVERY CULPABLE OFFENDER, SO THAT AT LEAST IN PRINCIPLE THE RETRIBUTIVIST STANDARD MAY BE ACCEPTED. HAVING FIRST THANKED US FOR OUR METAPHYSICAL GENEROSITY, THE RETRIBUTIVIST MAY NOW GO ON TO CRITICIZE THE IMPOSITION OF PUNISHMENT ON FAULTLESS OFFENDERS UNDER STRICT LIABILITY LAWS.

THE RETRIBUTIVIST REMINDS US THAT A STATE OF AFFAIRS IN WHICH UNDESERVED PUNISHMENT IS IMPOSED IS WORSE THAN ONE IN WHICH IT IS NOT IMPOSED, AND THAT SINCE THE INSTITUTION OF A SYSTEM OF STRICT LIABILITY LEADS WITH VIRTUAL CERTAINTY TO SUCH UNDESERVED PUNISHMENT, IT IS UNACCEPTABLE.

THE RETRIBUTIVIST HAS, HOWEVER, FAILED TO CONSIDER THE TOTAL SITUATION IN WHICH STRICT LIABILITY HAS BEEN DEFENDED. RECALL THAT NOT ONLY IS UNDESERVED PUNISHMENT AN EVIL, BUT ANY UNDESERVED SUFFERING IS ALSO AN EVIL. WE MUST THEREFORE NOT ONLY CONSIDER THE INNOCENT VICTIM OF STRICT LIABILITY SANCTIONS, BUT ALSO THE POTENTIAL VICTIMS OF CRIMES DETERRED BY SUCH A PRACTICE. NOW I HAVE SHOWN IN DETAIL IN CHAPTER 4 THAT STRICT LIABILITY MAY WELL PREVENT UNDESERVED SUFFERING

BY VICTIMS OF CRIME; WHERE SOME FEW INDIVIDUALS SUFFER UNDESERVED PUNISHMENT UNDER A SYSTEM WHICH THEREBY DETERS MANY HARMFUL OFFENSES AGAINST INDIVIDUALS EQUALLY UNDESERVING OF HARM, MAY NOT THE TOTAL DEGREE OF DESERT REQUITAL BE GREATER THAN UNDER A SYSTEM WHICH DOES NOT IMPOSE LIABILITY WITHOUT FAULT?

AT THIS POINT THE RETRIBUTIVIST MAY WISH TO ARGUE THAT WHILE ABSOLUTE LIABILITY MAY PREVENT UNDESERVED SUFFERING, NO DEGREE OF SUCH SUFFERING CAN OUTWEIGH THE EVIL OF UNDESERVED PUNISHMENT, I.E., UNDESERVED PUNISHMENT IS INCOMMENSURABLE WITH UNDESERVED SUFFERING. BECAUSE OF THE DISGRACE, STIGMA AND IGNOMINY OF PUNISHMENT THE VIOLATION OF AN INDIVIDUAL'S DESERTS BY UNDESERVED PENALTIES IS NECESSARILY ALWAYS MORE SEVERE THAN ANY VIOLATION OF DESERT CAUSED BY "MERE" SUFFERING.

I BELIEVE, THOUGH, THAT A CAREFUL EXAMINATION OF THE IMPLICATIONS OF SUCH A VIEW WILL SHOW THAT IT IS UNTENABLE.

ANY RETRIBUTIVIST WHO ARGUES THAT UNDESERVED PUNISHMENT IS IN FACT INCOMMENSURABLY EVIL MUST ALSO ARGUE THAT, AS ACTUALLY ENFORCED, NO SYSTEM OF LAWS ATTENDED WITH PENALTIES IS JUSTIFIABLE. WE MAY SAY WITH VIRTUAL CERTAINTY THAT ANY SUCH SYSTEM WILL PUNISH SOME INNOCENT OR BLAMELESS INDIVIDUALS; GIVEN THE PRESENT EMPIRICAL INABILITY TO DETERMINE CERTAIN FACTS, THE MANY AREAS IN WHICH HUMAN FALLIBILITY ON THE PART OF LAWYERS, PROSECUTORS, JURIES AND JUDGES MAY MANIFEST ITSELF, SUCH UNDESERVED PUNISHMENT IS, IN GENERAL, UNAVOIDABLE. IF, THEN, THIS PUNISHMENT IS INCOMMENSURABLE WITH ANY DEGREE OF PROTECTION OF RIGHTS SECURED, OR JUSTICE DONE BY PUNISHMENT OF THE BLAMEWORTHY, THEN ALL PUNISHMENT MUST STOP. WE CAN ONLY PUNISH WHEN WE CAN BE SURE THAT NO INNOCENT PERSON WILL EVER BE PUNISHED, I.E., WE CAN

NEVER PUNISH. SURELY NO RETRIBUTIVIST WOULD WISH TO DEFEND SUCH A POSITION.

PERHAPS THE RETRIBUTIVIST WILL MODIFY HIS ORIGINAL ASSERTION, AND NOW CLAIM THAT UNDESERVED PUNISHMENT IS COMMENSURABLE ONLY WITH DESERVED PUNISHMENT, I.E., THAT WE MAY OCCASIONALLY PUNISH THE INNOCENT WHERE THIS IS NECESSARY IN ORDER TO SERVE JUSTICE BY PUNISHING THE MORALLY BLAMEWORTHY. WE MUST THEN WEIGH THE NUMBERS OF INNOCENT LIKELY TO BE UNINTENTIONALLY PUNISHED AGAINST THE NUMBERS OF GUILTY WHOSE DESERT IS REQUITED. WE HAVE THUS GONE FROM THE POSITION "BETTER ANY NUMBER OF GUILTY GO FREE THAN ONE INNOCENT BE PUNISHED" TO THE POSITION "BETTER 1000 (OR SOME DETERMINATE NUMBER) GO FREE, THAN ONE INNOCENT BE PUNISHED, BUT BETTER THAT ONE INNOCENT BE PUNISHED THAN, E.G., 1001 GUILTY GO FREE."

SUCH A POSITION MAY INDEED JUSTIFY SOME ACTUAL SYSTEM OF LAW, I.E., ONE IN WHICH THE VAST MAJORITY OF THOSE PUNISHED ARE MORALLY AT FAULT. IT WILL ALSO, HOWEVER, JUSTIFY THE IMPOSITION OF STRICT LIABILITY.

WE MUST REMEMBER THAT ABSOLUTE LIABILITY NOT ONLY RESULTS IN INCREASED DETERRENCE OF CRIME, BUT ALSO THAT IT RESULTS IN INCREASED NUMBERS OF BLAMEWORTHY PEOPLE BEING PUNISHED. IT SERVES TO PUNISH THOSE WHO, THOUGH AT FAULT, WOULD ESCAPE PUNISHMENT UNDER A SYSTEM WHICH RECOGNIZED EXCUSES BY FEIGNING THOSE EXCUSES. IF, THEN, LIABILITY WITHOUT FAULT IS IMPOSED ONLY FOR THOSE OFFENSES WHICH ARE GENERALLY COMMITTED BY BLAMEWORTHY INDIVIDUALS, SUCH A SYSTEM WILL GENERALLY PUNISH LARGE NUMBERS OF CULPABLE OFFENDERS AND RELATIVELY FEW UNDESERVING INDIVIDUALS. SUCH A SYSTEM MAY VERY WELL SATISFY THE WEAKER RETRIBUTIVIST REQUIREMENTS.

OF COURSE, THE RETRIBUTIVIST MAY DENY THAT THERE EXIST EMPIRICAL CONDITIONS IN WHICH SUCH LARGE NUMBERS OF WRONGDOERS WOULD BE PUNISHED

AND SO FEW INNOCENT SUFFER, BUT HE IS THEN NO LONGER OBJECTING TO STRICT LIABILITY ON PRINCIPLE, I.E., HE IS NO LONGER DENYING THAT STRICT LIABILITY IS JUSTIFIABLE IN ANY POSSIBLE WORLD, BUT ONLY THAT IT IS UNJUSTIFIABLE IN OUR OWN PARTICULAR CIRCUMSTANCES. HIS CLAIM IS NOW EMPIRICAL, AND IT CERTAINLY SEEMS AT LEAST PRIMA FACIE PLAUSIBLE THAT, E.G., LAWS WHICH PUNISH THE SELLING OF ADULTERATED DRUGS WITHOUT RECOGNITION OF EXCUSES SERVE TO PUNISH NO MORE INNOCENT INDIVIDUALS THAN ARE PUNISHED GENERALLY BY A SYSTEM OF JUSTICE WHICH IS APPROVED OF BY RETRIBUTIVISTS.

NOTE THAT THERE IS AT LEAST THIS MUCH TRUTH IN THE RETRIBUTIVIST CLAIM: A PARTICULAR LOSS INFLICTED AS PUNISHMENT MAY BE A GREATER EVIL THAN THAT SAME LOSS SUFFERED BY AN INDIVIDUAL NON-PUNITIVELY, WHERE BOTH LOSSES ARE UNDESERVED. FOR EXAMPLE, CONSIDER AN INDIVIDUAL FINED \$1,000 FOR AN OFFENSE WHICH HE DID NOT IN FACT COMMIT. SUCH AN INDIVIDUAL NOT ONLY SUFFERS THE LOSS OF THE MONEY AND THE ATTENDANT INABILITY TO PURSUE CERTAIN ENDS, BUT ALSO SUFFERS THE SCORN OF HIS NEIGHBORS AND THE ATTENDANT DISGRACE OF BEING PUNISHED. NOW, IF THAT SAME INDIVIDUAL HAD HAD THE SAME AMOUNT OF MONEY STOLEN FROM HIM, THE EVIL WOULD HAVE BEEN LESS. HE WOULD STILL HAVE LOST THE ABILITY TO PURSUE SATISFACTION OF CERTAIN OF HIS DESIRES, BUT HE WOULD NOT HAVE SUFFERED THE IGNOMINY AND HUMILIATION OF THE PUNISHMENT. IN FACT, HE MIGHT HAVE HAD THE COMMISERATION AND CONSOLATION OF HIS FRIENDS AND NEIGHBORS TO "LESSEN THE BURDEN" OF HIS LOSS.

WE MAY SAY, THEN, THAT THE NON-PUNITIVE INFLICTION OF AN UNDESERVED LOSS IS LESS EVIL THAN THE INFLICTION OF THAT SAME LOSS AS UNDESERVED PUNISHMENT. THIS DOES NOT MEAN, HOWEVER, THAT THE INFLICTION OF ANY UNDESERVED NON-PUNITIVE LOSS IS LESS EVIL THAN THE INFLICTION OF ANY OTHER

LOSS INFLICTED AS UNDESERVED PUNISHMENT.

TO SEE THIS, WE NEED SIMPLY IMAGINE SOME RATIONAL INDIVIDUAL ASKED TO CHOOSE BETWEEN SOME AFFLICTIVE PUNISHMENT AND SOME NON-PUNITIVE HARM, E.G., BETWEEN DEATH OR SERIOUS BODILY DISFIGUREMENT AND PAIN, AND A PRISON SENTENCE OF ONE YEAR. SURELY A RATIONAL AGENT CAN CHOOSE TO SACRIFICE ONE YEAR OF FREEDOM, AND EVEN THE ATTENDANT DISGRACE OF THE PENALTY, IN ORDER TO AVOID ENDLESS LIMITATIONS ON THOSE FREEDOMS AS A RESULT OF BEING VICTIMIZED BY SOME DETERRABLE CRIME.

OF COURSE, NO HARD AND FAST RULE CAN BE OFFERED TO JUDGE WHEN SUCH A BALANCE IS OBTAINED; THERE WILL BE SOME CASES IN WHICH NO DECISION IS CLEARLY CORRECT, E.G., IS ONE YEAR OF IMPRISONMENT WORSE THAN THE LOSS OF AN ARM? LOSS OF AN EYE?, ETC. HOWEVER, IN MANY INSTANCES THE ANSWER IS QUITE CLEAR, E.G., ONE YEAR OF IMPRISONMENT IS LESS EVIL THAN LOSS OF LIFE, OR TOTAL PARALYSIS.

IF, THEN, THE OBJECT OF A SYSTEM OF LAWS AND PENALTIES IS TO MAXIMIZE DESERT REQUITAL, THE RETRIBUTIVIST MUST ACCEPT A SYSTEM WHICH INCORPORATES STRICT LIABILITY.

IT MAY BE ARGUED, THOUGH, THAT THIS CANNOT IN FACT BE THE FUNCTION OF THE CRIMINAL LAW. IN OTHER WORDS, WHILE IT MAY BE TRUE THAT IT IS A BETTER WORLD IN WHICH THE INNOCENT ARE HAPPY AND THE VICIOUS SUFFER, IT CANNOT BE THE FUNCTION OF JUDICIAL PUNISHMENT TO AFFECT THIS DISTRIBUTION. W. D. ROSS STATES THIS POSITION MOST FORCEFULLY IN THE RIGHT AND THE GOOD:

WHAT WE PERCEIVE TO BE GOOD IS A CONDITION OF THINGS IN WHICH THE TOTAL PLEASURE ENJOYED BY EACH PERSON IN HIS LIFE AS A WHOLE IS PROPORTIONAL TO HIS VIRTUE SIMILARLY TAKEN AS A WHOLE. NOW IT IS BY NO MEANS CLEAR THAT WE SHOULD HELP TO BRING ABOUT THIS END BY PUNISHING PARTICULAR OFFENCES IN PROPORTION TO THEIR MORAL BADNESS. ANY

ATTEMPT TO BRING ABOUT SUCH A STATE OF AFFAIRS SHOULD TAKE ACCOUNT OF THE WHOLE CHARACTER OF THE PERSONS INVOLVED, AS MANIFESTED IN THEIR LIFE TAKEN AS A WHOLE, AND OF THE HAPPINESS ENJOYED BY THEM THROUGHOUT THEIR LIFE TAKEN AS A WHOLE, AND IT SHOULD SIMILARLY TAKE ACCOUNT OF THE VIRTUE TAKEN AS A WHOLE, AND OF THE HAPPINESS TAKEN AS A WHOLE, OF EACH OF THE OTHER MEMBERS OF THE COMMUNITY, AND SHOULD SEEK TO BRING ABOUT THE REQUIRED ADJUSTMENTS. IN THE ABSENCE OF SUCH A VIEW OF THE WHOLE FACTS, THE CRIMINALS THAT A RETRIBUTIVE THEORY OF STATE PUNISHMENT WOULD CALL ON US TO PUNISH FOR THE SAKE OF DOING SO MAY WELL BE PERSONS WHO ARE MORE SINNED AGAINST THAN SINNING, AND MAY BE, QUITE APART FROM OUR INTERVENTION, ALREADY ENJOYING LESS HAPPINESS THAN A PERFECTLY FAIR DISTRIBUTION WOULD ALLOW THEM. THE OFFENCES WHICH THE STATE LEGISLATES AGAINST ARE ONLY A SMALL PART OF THE WRONG ACTS WHICH ARE BEING DONE EVERY DAY, AND A SYSTEM WHICH PUNISHES NOT ALL WRONG ACTS, BUT ONLY THOSE WHICH HAVE BEEN FORBIDDEN BY LAW, AND DOES NOT ATTEMPT TO REWARD ALL GOOD ACTS--SUCH AN OCCASIONAL AND ALMOST HAPHAZARD SYSTEM OF INTERVENTION DOES NOT HOLD OUT ANY GOOD HOPE OF PROMOTING THE PERFECT PROPORTIONMENT OF HAPPINESS TO VIRTUE. NOR WOULD IT BE IN THE LEAST PRACTICABLE FOR THE STATE TO ATTEMPT THE THOROUGH REVIEW OF THE MERIT AND THE HAPPINESS OF ALL ITS MEMBERS, WHICH ALONE WOULD AFFORD A GOOD HOPE OF SECURING THIS END.¹

ROSS ARGUES THAT PROPORTIONING SUFFERING TO DESERT REQUIRES A REVIEW OF THE TOTAL LIFE HISTORY OF AN OFFENDER, AND SUCH A REVIEW IS NOT POSSIBLE FOR MOTAL JURISTS. PUNISHMENT OUGHT ONLY BE IMPOSED, THEN, BY AN OMNISCIENT DEITY, AND THE CONSISTENT RETRIBUTIVIST MUST CONDEMN NOT ONLY SYSTEMS OF STRICT LIABILITY, BUT ALL ACTUAL LEGAL SYSTEMS ATTENDED WITH PENALTIES.

FURTHERMORE, ANY TIME THAT AN INDIVIDUAL WHO HAD LED A DEPRIVED LIFE CONTAINING LITTLE HAPPINESS, BUT WHO HAD BEEN PERFECTLY MORAL, COMMITTED HIS FIRST MORAL TRESPASS, HE COULD NOT BE JUSTIFIABLY PUNISHED. THE BALANCE OF MORAL DESERT AND HAPPINESS IN HIS LIFE HAD BEEN "IN THE RED" UNTIL THAT POINT, AND THE MORAL TRANSGRESSION MERELY BROUGHT IT MORE NEARLY IN BALANCE. ADDITIONAL PUNISHMENT MIGHT AGAIN DESTROY THAT BALANCE.

IT SEEMS, THEN, THAT NO ACTUAL SYSTEM OF LEGAL JUSTICE CAN BE GOV-

¹Ross, pp. 58-59.

ERNED BY THE PRINCIPLE THAT DESERT REQUITAL OUGHT TO BE MAXIMIZED. LET US NOW TURN OUR ATTENTION TO THE OTHER BASTION OF THE RETRIBUTIVIST POSITION, KANT'S PRINCIPLE OF HUMANITY, AND EXAMINE WHETHER IT PROHIBITS THE IMPOSITION OF STRICT LIABILITY.

WE MAY BEGIN BY NOTING THAT, MOST OBVIOUSLY, THE FACT THAT SOME INDIVIDUAL HAS BEEN USED AS A MEANS TO AN END IS NOT SUFFICIENT TO ESTABLISH THAT USE AS PROHIBITED BY THE CATEGORICAL IMPERATIVE. IF SUCH WERE THE CASE, WE WOULD BE PROHIBITED FROM CALLING A DOCTOR TO TREAT OUR ILLNESS, FOR IN SUCH CASES WE DO INDEED USE THE DOCTOR AS A MEANS TO THE SATISFACTION OF OUR OWN ENDS. IN FACT, IN VIRTUALLY EVERY INTERPERSONAL ACTIVITY IN WHICH WE ENGAGE, WE USE SOME PERSON AS A MEANS TO SOME END; CLEARLY KANT DID NOT WISH TO PROHIBIT, NOR DOES THE CATEGORICAL IMPERATIVE PROHIBIT, SUCH ACTIVITIES. RATHER, IT EXPLICITLY CONDEMNS THOSE ACTIONS WHICH USE INDIVIDUALS SOLELY AS MEANS, I.E., WHERE THEY ARE NOT, AT THE SAME TIME, CONSIDERED ALSO AS "ENDS IN THEMSELVES."

HOW CAN WE TREAT AN INDIVIDUAL AS AN "END IN HIMSELF"? WE MAY DO SO IN AT LEAST TWO WAYS: NEGATIVELY, BY REFRAINING FROM INTERFERING WITH THOSE OF HIS ACTIONS WHICH ARE IN PURSUIT OF SOME SUBJECTIVE END, E.G., HAPPINESS, AND WHICH ARE NOT THEMSELVES IMMORAL, AND POSITIVELY BY ACTING IN SUCH A WAY AS TO FURTHER THE SATISFACTION OF AN INDIVIDUALS ENDS. ". . . THE ENDS OF A SUBJECT WHO IS AN END IN HIMSELF MUST, IF THIS CONCEPTION IS TO HAVE ITS FULL EFFECT IN ME, BE ALSO, AS FAR AS POSSIBLE, MY END."¹

WITH RESPECT TO THE EXAMPLE OF AN INDIVIDUAL WHO CALLS FOR A

¹KANT, FOUNDATIONS, P. 49.

DOCTOR TO CURE AN ILLNESS, BOTH OF THESE PRACTICES ARE FOLLOWED. WE CLEARLY DO NOT INTERFERE WITH THE DOCTOR'S PURSUIT OF HIS OWN CHOSEN ENDS, WHICH OF COURSE INCLUDE THE PRACTICE OF MEDICINE ITSELF, AS WELL AS THE HAPPINESS WHICH THE REMUNERATION THUS OBTAINED SERVES TO BRING ABOUT; IN FACT, WE FURTHER THESE ENDS BY REQUESTING HIS SERVICES.

THE PROHIBITION TO REFRAIN FROM ACTIVITIES WHICH INTERFERE WITH AN AGENT'S PURSUIT OF SUBJECTIVELY CHOSEN ENDS IN ACCORDANCE WITH THE CATEGORICAL IMPERATIVE GIVES RISE TO A CLASS OF PERFECT, AS OPPOSED TO IMPERFECT, DUTIES. THE FORMER INCLUDE THE DUTY NOT TO MURDER, STEAL OR LIE. THE LATTER ARE PRIMARILY THE DUTIES OF BENEFICENCE AND KINDNESS.¹ THESE ARE BINDING, ACCORDING TO KANT, EXCEPT WHERE 1) MY ACTION IN SATISFYING THEM WOULD VIOLATE A PERFECT DUTY, OR 2) WHERE SOME OTHER POSSIBLE ACTION WHICH I MAY DO WOULD ALSO SATISFY AN IMPERFECT DUTY, AND MY INCLINATION IS TO DO THIS OTHER ACT.

WE MAY SAY THAT PERFECT DUTIES ARE DUTIES TO A SPECIFIC PERSON, TO DO A SPECIFIC ACT, IN SPECIFIC CIRCUMSTANCES. IMPERFECT DUTIES ARE DUTIES TO DO A CERTAIN SORT OR CLASS OF ACTION, ALTHOUGH IT IS LEFT TO OUR INCLINATIONS TO WHAT DEGREE AND TO WHOM AND UNDER WHAT CIRCUMSTANCES WE WILL SO ACT.²

THIS NOTION MAY MOST CLEARLY BE EXPRESSED BY CLAIMING THAT FOR EACH PERFECT DUTY THERE EXISTS A CORRESPONDING RIGHT OF AN INDIVIDUAL, WHILE FOR IMPERFECT DUTIES THERE EXIST NO SUCH RIGHTS.

THUS, I HAVE NOT ONLY A DUTY NOT TO MURDER YOU, BUT YOU HAVE A CORRESPONDING RIGHT NOT TO BE MURDERED BY ME; THE DUTY OF REFRAINING

¹H. J. PATON, THE CATEGORICAL IMPERATIVE (NEW YORK: HARPER AND ROW, 1965), P. 147.

²IBID., PP. 171-72

FROM MURDER IS A PERFECT DUTY. ON THE OTHER HAND, WHILE I HAVE A DUTY TO GIVE CHARITY, NO INDIVIDUAL PERSON CAN CLAIM FROM ME, AS HIS MORAL RIGHT, MY BENEFICENCE; THE DUTY TO GIVE CHARITY IS AN IMPERFECT DUTY.

THE PRINCIPLE OF HUMANITY MAY THUS BE UNDERSTOOD AS PROHIBITING US FROM INCREASING UTILITY AT THE COST OF A VIOLATION OF ANYONE'S RIGHTS.

WHEN APPLIED TO THE INFLICTION OF PUNISHMENT, THE RULE MILITATES AGAINST THE IMPOSITION OF PUNISHMENT ON THE UNDESERVING IN ORDER TO FURTHER THE SATISFACTION OF DESIRES, E.G., PLEASURE AND HAPPINESS. THE DUTY TO PUNISH ALL AND ONLY THOSE DESERVING OF PUNISHMENT IS A PERFECT DUTY, I.E., EVERY INDIVIDUAL HAS A RIGHT NOT TO BE PUNISHED UNDESERVEDLY, AND THIS RIGHT MAY NOT BE VIOLATED IN THE PURSUIT OF UTILITY MAXIMIZATION.

THE CATEGORICAL IMPERATIVE THEREFORE PROHIBITS THE PRACTICE OF STRICT LIABILITY. HOWEVER, I WILL ARGUE THAT THIS "TRIUMPH" BY THE RETRIBUTIVIST IS IN FACT A PYRRHIC VICTORY; THE CATEGORICAL IMPERATIVE THUS UNDERSTOOD NOT ONLY PROHIBITS THIS FORM OF UNDESERVED PUNISHMENT, BUT ALSO DENIES THE JUSTIFIABILITY OF ANY ACTUAL SYSTEM OF LEGAL PENALTIES (INCLUDING THOSE BASED SOLELY ON FAULT), AS WELL AS MANY OF THOSE FUNCTIONS OF GOVERNMENT WHICH EVEN RETRIBUTIVISTS WOULD WISH TO DEFEND, E.G., QUARANTINE, CONSCRIPTION AND TAXATION.

EACH SUCH PRACTICE INVOLVES THE SACRIFICE BY SOME INDIVIDUALS OF THOSE THINGS TO WHICH THEY HAVE RIGHTS, E.G., FREEDOM, THEIR LIVES AND THEIR PROPERTY; AND IN EACH CASE THE END SERVED MAY NOT BE SHARED IN BY THE INDIVIDUAL WHOSE RIGHTS ARE VIOLATED. THE SOLDIER CONSCRIPTED INTO THE ARMY IN WARTIME MAY NOT LIVE TO SHARE IN THOSE FREEDOMS WHICH HIS SERVICE HAS HELPED TO PROTECT. THE CARRIER OF A CONTAGIOUS DISEASE SACRIFICES HIS FREEDOM TO PROTECT THE WELFARE OF OTHERS, BUT DOES NOT

HIMSELF GAIN FROM HIS SACRIFICE. THE USES TO WHICH TAX MONEY IS PUT MAY NOT BENEFIT THE INDIVIDUAL WHOSE RIGHT TO PROPERTY HAS BEEN INFRINGED BY TAXATION. FINALLY, AS WE HAVE ALREADY SEEN, ANY ACTUAL SYSTEM OF PUNISHMENT WILL INFLICT PENALTIES ON SOME INNOCENT INDIVIDUALS, AND THESE INDIVIDUALS HAVE THUS SACRIFICED THEIR RIGHT TO FREEDOM FOR ENDS IN WHICH THEY DO NOT SHARE.

IN EACH OF THESE CASES AN INDIVIDUAL HAS BEEN USED AS A MEANS TO AN END, AND NOT ALSO AS AN END IN HIMSELF. UNDESERVED SUFFERING HAS BEEN INFLICTED ON A PERSON IN ORDER TO MAXIMIZE UTILITY, AND THIS IS CONDEMNED BY THE PRINCIPLE OF HUMANITY. FURTHERMORE, ANY ATTEMPT TO UNDERSTAND OR MODIFY THE PRINCIPLE IN SUCH A WAY AS TO PERMIT THESE ADMITTEDLY JUSTIFIABLE ACTIVITIES ALSO "OPENS THE DOOR" FOR STRICT LIABILITY.

THE RETRIBUTIVIST MAY, FOR EXAMPLE, URGE THAT WHEN WE ENGAGE IN ANY OF THESE PRACTICES WE ARE NOT VIOLATING THE CATEGORICAL IMPERATIVE BECAUSE WE ARE CONSIDERING THE RIGHTS OF THE VICTIMS OF SUCH ACTIVITIES, AND GIVING THEM EQUAL WEIGHT WITH THE VALUE OF EVERY OTHER PERSON'S RIGHTS. WE ARE THUS "CONSIDERING EACH PERSON AS AN END IN HIMSELF."

HE MAY ASSENT TO C. D. BROAD'S CLAIM THAT

. . . EVERY RATIONAL BEING HAS AS SUCH CERTAIN CLAIMS TO CONSIDERATION WHICH IT IS ALWAYS WRONG TO IGNORE. BUT ALTHOUGH SUCH CLAIMS MUST ALWAYS BE CONSIDERED, THEY NEED NOT, AND INDEED CANNOT, ALL BE SATISFIED IN FULL. FOR THEY MAY CONFLICT WITH EACH OTHER, AND THEN SOME COMPROMISE MUST BE STRUCK BETWEEN THEM.¹

FOR EXAMPLE, IN TIME OF WAR WE MUST CONSIDER THAT EACH PERSON HAS A RIGHT TO FREEDOM AND LIFE. IF SOME INDIVIDUALS ARE CONSCRIPTED INTO

¹C. D. BROAD, FIVE TYPES OF ETHICAL THEORY (NEW YORK: HUMANITIES PRESS INC., 1951), p. 132.

THE ARMY, THEIR RIGHTS WILL BE VIOLATED. HOWEVER, IF NONE ARE CONSCRIPTED, THEN THE RIGHTS OF OTHERS WILL BE VIOLATED BY THE CONQUERING POWER. IF NO ONE IS SENT TO FIGHT, THEN MANY INDIVIDUAL FREEDOMS WILL BE SACRIFICED IN DEFEAT. IF THESE FREEDOMS ARE PRESERVED, IT MUST BE AT THE COST OF INFRINGING ON THE RIGHTS OF THOSE WHO ARE CONSCRIPTED. HOWEVER, SO LONG AS EACH INDIVIDUAL'S RIGHTS ARE CONSIDERED EQUALLY, I.E., SO LONG AS THE POSSIBLE VIOLATION OF EACH RIGHT IS WEIGHED AS OF EQUAL CONCERN WITH THE VIOLATION OF EVERY OTHER PERSON'S RIGHTS IN DECIDING WHETHER AND WHOM TO CONSCRIPT, THEN THE PRACTICE FINALLY ENGAGED IN IS IN CONFORMITY WITH MORALITY. SIMILAR ARGUMENTS CAN BE FORMULATED IN DEFENSE OF THE OTHER PRACTICES UNDER DISCUSSION.

THIS CERTAINLY SEEMS A REASONABLE POSITION AND BY ADOPTING IT THE RETRIBUTIVIST MAY ACCOMODATE THE PRINCIPLE OF HUMANITY AND THOSE PRACTICES WHICH HE WISHES TO DEFEND. HOWEVER, THE SAME ARGUMENT MAY THEN BE TURNED AGAINST HIM IN DEFENSE OF STRICT LIABILITY. IN THE PREVIOUS CHAPTER MUCH SPACE WAS DEVOTED TO ARGUMENTS THAT STRICT LIABILITY CAN INCREASE PLEASURE AND INTRINSIC VALUE GENERALLY BY DETERRING POTENTIAL OFFENDERS AGAINST THE LAW. SINCE, HOWEVER, THE VAST MAJORITY OF CRIMES INVOLVE VIOLATIONS OF RIGHTS AS WELL AS THE IMPOSITION OF UNHAPPINESS, DISPLEASURE, ETC., STRICT LIABILITY HAS THE CONSEQUENCE OF PROTECTING INDIVIDUALS FROM VIOLATION OF THEIR RIGHTS AS WELL AS FROM SIMPLY DIS-UTILE ACTIVITIES.

IF, THEN, WE ASSUME THE TRUTH OF THE PRIMA FACIE PLAUSIBLE CLAIM THAT THE VIOLATION OF RIGHTS PREVENTED BY STRICT LIABILITY IS IN SOME CIRCUMSTANCES GREATER THAN THE VIOLATION OF THE RIGHTS OF THE FAULTLESS OFFENDER PUNISHED UNDER SUCH A SYSTEM (WHERE THE RIGHTS OF ALL ARE CON-

SIDERED EQUALLY}), THEN THE IMPOSITION OF STRICT LIABILITY IS AS MUCH IN CONFORMITY WITH MORALITY IN THESE CIRCUMSTANCES AS QUARANTINE, CONSCRIPTION, ETC.

AT THIS POINT THE RETRIBUTIVIST MAY WISH TO URGE THAT THERE IS A RELEVANT DISTINCTION BETWEEN THOSE CASES WHICH HE WISHES TO DEFEND AND STRICT LIABILITY, WHICH HE WISHES TO CONDEMN. IN THE FORMER, THE SUFFERING IMPOSED ON VICTIMS IS NOT INTENDED, BUT MERELY FORESEEN AS A CONSEQUENCE OF THE PRACTICE, WHILE IN THE LATTER THE SUFFERING IMPOSED ON THE FAULTLESS OFFENDER IS INTENDED AND NOT MERELY FORESEEN.

THE RETRIBUTIVIST MAY CLAIM THAT A LEGISLATOR CONSIDERING THE JUSTIFIABILITY OF STRICT LIABILITY IS FACED WITH THE ALTERNATIVES OF INTENDING AN EVIL TO PREVENT AN EVIL, OR OF MERELY FORESEEING THE POSSIBILITY OF AN EVIL. IN OTHER WORDS, HE ACTS INTENDING THE PUNISHMENT OF INDIVIDUALS WHO ARE BLAMELESS IN ORDER TO PREVENT THE VIOLATION OF SOME RIGHTS OF OTHER CITIZENS WHEN HE IMPOSES STRICT LIABILITY. IF HE REFUSES TO MAKE SUCH AN ENACTMENT, HOWEVER, HE MERELY FORESEES, AND DOES NOT INTEND, THE RESULTANT VIOLATION OF RIGHTS OF VICTIMS OF CRIME.

IF THIS IS THE CASE, THEN ACCORDING TO THE SO-CALLED "DOCTRINE OF THE DOUBLE EFFECT" THE LEGISLATOR MAY CHOOSE THE SECOND, BUT NOT THE FIRST, ALTERNATIVE. THAT DOCTRINE ASSERTS THAT WE MAY SOMETIMES JUSTIFIABLY ENGAGE IN ACTIONS WHICH WILL HAVE EVIL CONSEQUENCES WHICH WE FORESEE, BUT DO NOT INTEND, ALTHOUGH TO ENGAGE IN AN ACTION INTENDING THOSE CONSEQUENCES WOULD BE MORALLY WRONG.

CONSEQUENCES OF OUR ACTION WHICH WE FORESEE BUT DO NOT INTEND ARE SOMETIMES SAID TO BE THE RESULT OF "OBLIQUE INTENTIONS," AS CONTRASTED WITH "DIRECT INTENTIONS." PHILIPPA FOOT, USING THIS TERMINOLOGY, WRITES: "BY THE DOCTRINE OF THE DOUBLE EFFECT I MEAN THE THESIS THAT IT IS SOME-

TIMES PERMISSIBLE TO BRING ABOUT BY OBLIQUE INTENTION WHAT ONE MAY NOT DIRECTLY INTEND."¹

APPLYING THIS TO THE CASE BEFORE US, THE LEGISLATOR MAY ACT IN SUCH A WAY, I.E., REFUSING TO IMPLEMENT LIABILITY WITHOUT FAULT, THAT CERTAIN FORESEEN BUT, OF COURSE, UNINTENDED EVIL CONSEQUENCES (CRIMES) OCCUR. HE MAY DO SO BECAUSE THE ONLY ALTERNATIVE OPEN TO HIM INVOLVES HIM IN AN ACTION WITH FORESEEN AND INTENDED EVIL CONSEQUENCES--THE PUNISHMENT OF THE MORALLY FAULTLESS.

THE RETRIBUTIVIST MAY THEN WISH TO CONTRAST THIS WITH THE INSTITUTION OF A SYSTEM OF LAWS AND PENALTIES BASED SOLELY ON MORAL FAULT. ALTHOUGH SUCH A SYSTEM WILL ALSO PUNISH CERTAIN INNOCENT INDIVIDUALS IN THE COURSE OF PROTECTING THE RIGHTS OF OTHER CITIZENS, SUCH PUNISHMENT IS SURELY NOT INTENDED BUT RATHER MERELY FORESEEN AND THEREFORE PERMISSIBLE.

NOW, THIS PRINCIPLE OF THE DOUBLE EFFECT IS CERTAINLY NOT SELF-EVIDENTLY TRUE, AND MUCH DOUBT HAS BEEN CAST ON ITS VALIDITY.² HOWEVER, EVEN IF WE ACCEPT IS AS AN INVALID RULE, IT DOES NOT IN FACT APPLY TO THE CASE BEFORE US. THE RATIONAL LEGISLATOR WHO CHOOSES TO IMPLEMENT STRICT LIABILITY DOES NOT INTEND FOR INNOCENT INDIVIDUALS TO BE PUNISHED. THIS IS CLEARLY NOT HIS PURPOSE IN ACTING. IN FACT, HE HOPES THAT SUCH PUNISHMENT WILL NOT OCCUR, I.E., HE HOPES THAT IN FACT ALL THOSE PUNISHED UNDER THE SYSTEM OF STRICT LIABILITY WILL BE MORALLY BLAMEWORTHY. IF WE ASK THE LEGISLATOR WHAT HIS INTENTION OR PURPOSE IN

¹PHILIPPA FOOT, "THE PROBLEM OF ABORTION AND THE DOCTRINE OF THE DOUBLE EFFECT," THE OXFORD REVIEW, No. 3 (1968), p. 6.

²E.G., SEE J. BENNETT, "WHATEVER THE CONSEQUENCES," ANALYSIS, XXVI (1966), PP. 83-102.

PASSING SUCH A LAW IS, HIS ANSWER WILL CERTAINLY BE "TO PREVENT VIOLATION OF THE RIGHTS OF INNOCENT VICTIMS OF CRIME." IT WOULD BE PREPOSTEROUS TO INSIST THAT HIS INTENTION WAS REALLY TO PUNISH THE BLAMELESS. HE NO MORE INTENDS THE WRONG VISITED ON FAULTLESS OFFENDERS THAN HE WOULD INTEND THE HARM TO THE VICTIMS OF CRIME WHICH WOULD RESULT FROM HIS FAILURE TO INSTITUTE STRICT LIABILITY, OR THE WRONG IMPOSED ON AN INNOCENT VICTIM OF PUNISHMENT UNDER A SYSTEM OF LIABILITY FOR FAULT.

NO MORE VALID OR RELEVANT IS THE CLAIM THAT IN THE FORMER CASE THE WRONG IS MORE CERTAIN TO FOLLOW THAN IN THE LATTER. THE RETRIBUTIVIST CANNOT CONSISTENTLY CLAIM THAT ALTHOUGH THE LEGISLATOR DOES NOT INTEND THE WRONG DONE TO A FAULTLESS OFFENDER HE DOES KNOW THAT IT WILL NECESSARILY FOLLOW FROM HIS ACTIONS, AND HAS THUS KNOWINGLY AND CULPABLY CAUSED IT. IT MAY, OF COURSE, BE VIRTUALLY CERTAIN THAT SOME INDIVIDUAL WHO IS MORALLY BLAMELESS WILL BE PUNISHED UNDER A SYSTEM OF ABSOLUTE LIABILITY, BUT IT IS JUST AS CERTAIN THAT SOME ADDITIONAL INNOCENT INDIVIDUALS WILL SUFFER AT THE HANDS OF CRIMINALS IF STRICT LIABILITY IS NOT IMPOSED. CERTAINTY OF HARM IS NOT A RELEVANT CRITERIA FOR DISTINGUISHING BETWEEN THOSE ACTIONS WHICH THE RETRIBUTIVIST LAUDS AND THOSE WHICH HE CONDEMNS. IT IS JUST AS CERTAIN THAT CONSCRIPTED WILL DIE IN WARTIME AND THAT INNOCENT PEOPLE WILL BE PUNISHED UNDER ANY SYSTEM OF LAW AS IT IS THAT INNOCENTS WILL BE PUNISHED UNDER STRICT LIABILITY. ONE CANNOT CONDEMN THE LATTER CONSISTENTLY UNLESS ONE ALSO REFRAINS FROM THE FORMER.

THE RETRIBUTIVIST MIGHT NOW PUT FORWARD THE FOLLOWING ARGUMENT AGAINST ABSOLUTE LIABILITY, AGAIN FOCUSING ON THE LEGISLATOR WHO MUST CHOOSE TO IMPLEMENT THIS SYSTEM AND THUS PROTECT THE RIGHTS OF INNOCENT

POTENTIAL VICTIMS OF CRIME, OR ELSE TO DENY THEM SUCH PROTECTION FOR THE SAKE OF SAVING BLAMELESS OFFENDERS FROM PUNISHMENT:

IT IS TRUE THAT THE GOVERNMENT HAS A DUTY TO PROTECT INDIVIDUALS FROM HARM AND WRONG, BUT IT IS EQUALLY TRUE THAT THE GOVERNMENT HAS A DUTY TO REFRAIN FROM ITSELF WRONGING INDIVIDUALS, AND THE LATTER DUTY OF "NON-INFLICTION" IS STRONGER THAN THE FORMER DUTY OF "PROTECTION." THIS SHOULD BE CLEAR FROM THE FOLLOWING EXAMPLE: B IS AT WORK ROBBING A STORE. C, A PASSERBY, SEES HIM AND FAILS TO CALL THE AUTHORITIES, ALTHOUGH SUCH A CALL WOULD LIKELY PREVENT THE CULMINATION OF THE CRIME. NOW B IS CLEARLY UNDER AN OBLIGATION NOT TO INFLICT A WRONG ON THE STORE OWNER. AT THE SAME TIME, C IS UNDER A MORAL DUTY TO TAKE REASONABLE ACTIONS TO PREVENT SUCH WRONGS. BOTH INDIVIDUALS ARE THUS AT FAULT FOR THEIR BEHAVIOUR, BUT CLEARLY B IS MORE BLAMEWORTHY THAN C, I.E., B HAS VIOLATED A STRONGER DUTY THAN C. WE MIGHT JUSTIFIABLY CONDEMN BOTH ON MORAL GROUNDS, BUT THE CONDEMNATION OF THE FIRST WOULD BE STRONGER THAN THE CONDEMNATION OF THE SECOND.

WE HAVE THUS SEEN THAT IN SOME CASES THE DUTY TO REFRAIN FROM INFLICTING WRONG IS STRONGER THAN THE DUTY TO PREVENT SUCH WRONG. THEREFORE, THE LEGISLATOR'S DUTY TO REFRAIN FROM THE WRONG OF PUNISHING THE FAULTLESS IS STRONGER THAN HIS DUTY TO PREVENT THE WRONG SUFFERED BY VICTIMS OF CRIME. TO CHOOSE TO INSTITUTE LIABILITY WITHOUT FAULT IS THUS TO VIOLATE THE STRONGER DUTY TO COMPLY WITH THE WEAKER. THIS HE MUST NOT DO.

THERE WOULD BE, OF COURSE, MUCH TRUTH IN SUCH A CLAIM BY THE RETRIBUTIVIST. THE POSITIVE DUTY OF PROTECTION IS INDEED LESS STRONG THAN THE NEGATIVE DUTY OF NON-INFLICTION, BUT THIS IS TRUE ONLY WHEN THE WRONG WHICH IS THE SUBJECT OF EACH DUTY IS THE SAME IN BOTH CASES.

THAT IS, THE DUTY TO PREVENT THE WRONG OF THEFT OF SOME PROPERTY IS LESS STRONG THAN THE DUTY TO REFRAIN FROM STEALING THAT PROPERTY; THE DUTY TO PREVENT THE MURDER OF AN INDIVIDUAL IS LESS STRONG THAN THE DUTY TO REFRAIN FROM MURDERING HIM, ETC. IS IT TRUE, HOWEVER, THAT THE DUTY TO REFRAIN FROM ANY VIOLATION OF RIGHTS IS ALWAYS STRONGER THAN THE DUTY TO PREVENT ANY VIOLATION OF RIGHT?

IF WE CONSULT WHAT KANT CALLED "OUR COMMON RATIONAL KNOWLEDGE OF MORALS"¹ WE WILL SEE THAT IT IS NOT TRUE. CONSIDER AN INSTANCE IN WHICH CERTAIN OF OUR RIGHTS ARE "INTERFERED WITH" BY LAW IN ORDER TO PROTECT OTHER RIGHTS, E.G., CONSIDER INVOLUNTARY QUARANTINE. THIS IS AN INFLECTION OF A VIOLATION OF RIGHT OF FREE MOVEMENT. IT IS IMPOSED BY LAW IN ORDER TO PROTECT OTHER CITIZENS. SUCH A PRACTICE CANNOT, THOUGH, REASONABLY BE CLAIMED TO BE IMMORAL.

NO ONE, LEAST OF ALL KANT, WOULD OBJECT TO THE MANY INFRINGEMENTS OF RIGHT BY GOVERNMENT FOR THE SAKE OF PROTECTION OF RIGHTS. FOR KANT, THE VERY PURPOSE AND END OF LAW AND POLITICS IS SUCH PROTECTION OF AN INDIVIDUAL'S FREEDOM FROM CONSTRAINT. IF RETRIBUTIVISTS WISH TO DEFEND THESE PRACTICES, THEY MUST DO SO ON THE GROUNDS THAT WHERE POTENTIAL VIOLATIONS OF THE RIGHT OF FREEDOM, AND OF ALL OTHER RIGHTS, ARE MUCH MORE SEVERE THAN THE VIOLATIONS WHICH MUST BE INFLICTED ON SOME INDIVIDUALS TO PROTECT THE FORMER, THE DUTY OF PROTECTION TAKES PRECEDENCE OVER THE DUTY OF NON INFLICTION. WHERE THE VIOLATIONS PREVENTED ARE NOT MUCH GREATER, THE DUTY OF NON-INFLICTION PREVAILS.

IF, THOUGH, IT IS ADMITTED BY RETRIBUTIVISTS THAT ACTIONS ARE JUSTIFIABLE EVEN WHERE THEY VIOLATE SOME RIGHTS, SO LONG AS THEY PRO-

¹KANT, FOUNDATIONS, P. 9.

TECT OTHER RIGHTS FROM MUCH GREATER VIOLATION, THEN THE RETRIBUTIVIST MUST ALSO PERMIT STRICT LIABILITY. AS WE HAVE SEEN, SUCH LIABILITY MAY PREVENT VERY SERIOUS HARMS AND VIOLATIONS OF RIGHT TO INDIVIDUALS AT THE COST OF MUCH LESS SEVERE SUFFERING BY MANY FEWER PERSONS PUNISHED FOR FAULTLESS VIOLATIONS OF THE LAW.

PERHAPS THE RETRIBUTIVIST WILL NOW REMIND US OF KANT'S WARNING:

ANY UNDESERVED EVIL THAT YOU INFLICT ON SOMEONE ELSE AMONG THE PEOPLE IS ONE THAT YOU DO TO YOURSELF. IF YOU VILLIFY HIM, YOU VILLIFY YOURSELF; IF YOU KILL HIM, YOU KILL YOURSELF. . . . BUT WHAT IS MEANT BY THE STATEMENT: "IF YOU STEAL FROM HIM, YOU STEAL FROM YOURSELF?" INASMUCH AS SOMEONE STEALS, HE MAKES THE OWNERSHIP OF EVERYONE ELSE INSECURE, AND HENCE HE ROBS HIMSELF . . . OF THE SECURITY OF ANY POSSIBLE OWNERSHIP.¹

EXTENDING THIS ARGUMENT TO THE IMPOSITION OF STRICT LIABILITY, WE MAY ARGUE THAT BY MAKING INSECURE THE RIGHT OF ANY INDIVIDUAL TO BE PUNISHED ONLY WHEN SUCH TREATMENT IS DESERVED, WE MAKE OUR OWN SIMILAR RIGHT INSECURE. CAN A RATIONAL INDIVIDUAL CHOOSE TO HAVE HIS OWN RIGHTS MADE THUS INSECURE? THE RETRIBUTIVIST MUST ANSWER IN THE NEGATIVE IF HE WISHES TO PROHIBIT STRICT LIABILITY. YET IT SEEMS PERFECTLY REASONABLE TO ASSUME THAT A PERSON MIGHT WELL CHOOSE TO INSTITUTE LEGISLATION WHICH WOULD MAKE INSECURE HIS OWN RIGHT TO BE PUNISHED ONLY FOR BLAMEWORTHY TRANSGRESSIONS OF LAW, WHERE SUCH A LAW PROMISED TO PROTECT HIM FROM MUCH MORE SERIOUS VIOLATIONS OF HIS RIGHTS. SUCH A POSITION COULD ONLY BE DENIED IF THE RETRIBUTIVIST WERE WILLING TO CLAIM THAT UNDESERVED PUNISHMENT IS INCOMMENSURABLE WITH ANY DEGREE OF UNDESERVED SUFFERING AND THIS, AS WE HAVE SEEN, IS UNTENABLE.

I CONCLUDE THAT THE RETRIBUTIVIST POSITION, AS TRADITIONALLY UNDERSTOOD, DOES INDEED PROHIBIT STRICT LIABILITY, BUT AT THE "COST" OF

¹ METAPHYSICAL ELEMENTS OF JUSTICE, P. 101.

PROHIBITING MANY OTHER PRACTICES OF GOVERNMENT THAT ARE ADMITTED BY EVEN RETRIBUTIVISTS AS BEING JUSTIFIABLE. ANY ATTEMPT TO MODIFY THE RETRIBUTIVIST POSITION SO AS TO BRING IT INTO ACCORD WITH THESE LATTER INSTITUTIONS MUST ALSO BRING IT INTO ACCORD WITH THE FORMER, IF INCONSISTENCY IS TO BE AVOIDED.

IT IS INTERESTING AND INSTRUCTIVE TO NOTE AT THIS POINT THAT ALTHOUGH THE PRINCIPLE OF HUMANITY, STRICTLY CONSTRUED, DOES INDEED PROHIBIT STRICT LIABILITY, ANOTHER A PRIORI PRINCIPLE OF DUTY EXPLICITLY DEFENDED BY KANT DOES NOT PROHIBIT SUCH LIABILITY. KANT WRITES:

. . . I PROPOSE ANOTHER AFFIRMATIVE AND TRANSCENDENTAL PRINCIPLE OF PUBLIC LAW, THE FORMULA OF WHICH IS:

"ALL MAXIMS WHICH STAND IN NEED OF PUBLICITY IN ORDER NOT TO FAIL THEIR END AGREE WITH POLITICS AND RIGHT COMBINED."

FOR IF THEY CAN ATTAIN THEIR END ONLY THROUGH PUBLICITY, THEY MUST ACCORD WITH THE PUBLIC'S UNIVERSAL END, HAPPINESS; AND THE PROPER TASK OF POLITICS IS TO PROMOTE THIS, I.E., TO MAKE THE PUBLIC SATISFIED WITH ITS CONDITION. IF, HOWEVER, THIS END IS ATTAINABLE ONLY BY MEANS OF PUBLICITY, I.E., BY REMOVING ALL DISTRUST IN THE MAXIMS OF POLITICS, THE LATTER MUST CONFORM TO THE RIGHTS OF THE PUBLIC, FOR ONLY IN THIS IS THE UNION OF THE GOALS OF ALL POSSIBLE.¹

NOW, THE MAXIMS INVOLVING STRICT LIABILITY REQUIRE PUBLICITY TO SUCCEED. THE MAJOR FORCE OF SUCH PUNISHMENT IS THAT INDIVIDUALS WHO WOULD ORDINARILY ENGAGE IN THE PROHIBITED ACTIVITIES IN THE HOPE OR BELIEF THAT THEY WILL ESCAPE PUNISHMENT BECAUSE THEY ARE BELIEVED TO SATISFY SOME EXCUSING CONDITION WILL NOW BE DETERRED BECAUSE THEY KNOW THAT SUCH EXCUSES NO LONGER EXCULPATE. SUCH KNOWLEDGE OF COURSE REQUIRES PUBLICITY OF THE PRINCIPLE OF STRICT LIABILITY AS APPLIED TO THOSE MAXIMS. IF THE FACT THAT INDIVIDUALS IN EXCUSING CONDITIONS WERE NOT BEING EXCULPATED WAS KEPT SECRET, THE DETERRENT EFFECT OF STRICT LIABILITY WOULD NOT OCCUR AND THE ENDS OF THE PRACTICE WOULD

¹CRITIQUE OF PRACTICAL REASON, P. 345.

NOT BE SERVED. STRICT LIABILITY THEREFORE SATISFIES KANT'S "TRANSCENDENTAL PRINCIPLE OF PUBLIC LAW."

MUST WE, THOUGH, FINALLY ABANDON STRICT LIABILITY BECAUSE IT IS PROHIBITED BY THE RETRIBUTIVIST POSITION? THIS WOULD ONLY BE SO IF THE RETRIBUTIVE THEORY OF JUSTICE WERE A TENABLE THEORY AND, IN FACT, WE HAVE SEEN THAT BECAUSE IT "PROHIBITS TOO MUCH" IT DOES NOT FURNISH AN ACCEPTABLE PERSPECTIVE ON PUNISHMENT.

TORT LAW

HOW CAN A SYSTEM OF TORT LIABILITY BE JUSTIFIED FROM THE PERSPECTIVE OF THE RETRIBUTIVE THEORY OF JUSTICE? THE ANSWER TO THIS QUESTION IS BEST ILLUSTRATED BY THE FOLLOWING EXAMPLE: AN INDIVIDUAL, B, CULPABLY CAUSES HARM IN THE AMOUNT OF X DOLLARS TO PERSON C, WHO DOES NOT DESERVE TO SUFFER ANY HARM. IF THE AMOUNT OF SUFFERING WHICH B NOW DESERVES TO HAVE INFLICTED ON HIM IS EQUAL TO THE SUFFERING WHICH PAYMENT OF X DOLLARS TO C WILL CAUSE HIM, THEN SUCH LIABILITY IN TORT IS JUSTIFIABLE. LIABILITY IN THIS SITUATION SERVES TO RESTORE THE PROPORTION BETWEEN WELL-BEING AND WELL-DOING FOR ALL CONCERNED; B IS MADE TO SUFFER IN AN AMOUNT EQUAL TO HIS MORAL WICKEDNESS, AND C, WHOSE MORAL BALANCE HAS BEEN UPSET BY THE UNDESERVED HARM, IS RESTORED TO A CORRECT MORAL PROPORTION BY COMPENSATION FOR HIS LOSS.

IF WE IMAGINE A WORLD IN WHICH ALL TORTS ARE COMMITTED IN SIMILAR CIRCUMSTANCES, WE CAN SEE THAT A SYSTEM OF TORT LIABILITY WOULD SATISFY THE RETRIBUTIVE PRINCIPLE. IN SUCH A WORLD, THOUGH, STRICT LIABILITY IN TORTS WOULD ALSO BE JUSTIFIABLE. CONSIDER AN ENTREPRENEUR IN SUCH A WORLD WHO BLAMELESSLY CAUSES A HARM TO ONE OF HIS CONSUMERS. THE CONSUMER DOES NOT DESERVE TO SUFFER THIS HARM, BUT NEITHER DOES THE

BUSINESSMAN DESERVE TO SUFFER THE BURDEN OF MAKING COMPENSATION. AS WE SAW IN THE DISCUSSION OF STRICT LIABILITY AND UTILITARIANISM, THOUGH, HOLDING THE BUSINESSMAN RESPONSIBLE FOR SUCH HARMS WILL HAVE THE EFFECT OF SHIFTING THE LOSS FROM THE ORIGINAL VICTIM TO A LARGE CLASS OF CONSUMERS OR INSURERS. SUCH A LOSS-SHIFTING SERVES TO MINIMIZE THE TOTAL SUFFERING CAUSED BY THE LOSS. THE INDIVIDUALS WHO NOW BEAR THE BURDEN OF THE HARM DO NOT, OF COURSE, DESERVE TO BEAR THAT BURDEN; BUT BECAUSE THE AMOUNT OF TOTAL SUFFERING HAS BEEN MINIMIZED BY THE SHIFT, THE AMOUNT OF UNDESERVED SUFFERING HAS ALSO BEEN MINIMIZED. THE EFFECT, THEN, OF IMPOSING STRICT LIABILITY IN SUCH A WORLD IS TO MORE NEARLY ESTABLISH AN IDEAL PROPORTION BETWEEN VIRTUE AND HAPPINESS, AND THIS FACT SERVES TO JUSTIFY THE PRACTICE FROM A RETRIBUTIVE PERSPECTIVE.

BUT THIS HYPOTHETICAL WORLD IS NOT OUR OWN WORLD, AND I BELIEVE THAT HERE NO ACTUAL SYSTEM OF TORT LIABILITY CAN BE JUSTIFIED ON GROUNDS OF DESERT REQUITAL.

CONSIDER FIRST THAT WHERE COMPENSATORY DAMAGES ARE PAID, THEIR AMOUNT IS EQUAL TO THE HARM CAUSED. BUT PAYMENT OF SUCH AN AMOUNT MAY BEAR NO RELATIONSHIP TO THE SUFFERING DESERVED BY THE DEFENDANT. FOR EXAMPLE, IF TWO DRIVERS ARE EACH EQUALLY NEGLIGENT BUT THE FIRST HITS AND KILLS ONE INNOCENT PEDESTRIAN, WHILE THE SECOND HITS AND KILLS 3 INNOCENT PEDESTRIANS, THE SECOND WILL HAVE TO PAY THREE TIMES AS MUCH IN COMPENSATION AS THE FIRST, ALTHOUGH THEIR CULPABILITY IS EQUAL. AT LEAST ONE, THEN, AND PERHAPS BOTH HAVE BEEN MADE TO SUFFER IN AMOUNTS UNEQUAL TO THE PAIN DESERVED.

ALSO, IF EACH OF TWO INDIVIDUALS CAUSES AN IDENTICAL HARM THROUGH EQUAL CARELESSNESS, BUT THE FIRST IS SIGNIFICANTLY RICHER THAN THE SECOND,

THE SUFFERING WHICH THE FIRST WILL ENDURE AS A RESULT OF HIS LIABILITY TO COMPENSATORY DAMAGES WILL BE SIGNIFICANTLY LESS THAN THE SUFFERING ENDURED BY THE SECOND. OF COURSE, A SIMILAR PROBLEM ARISES IN THE CRIMINAL LAW, WHERE A DETERMINATE PRISON SENTENCE OR FINE WILL EFFECT ONE OFFENDER MORE ADVERSELY THAN ANOTHER. BUT IN THE CRIMINAL LAW THIS DISPARITY IS THEORETICALLY CORRECTABLE; WE MAY ALTER A SENTENCE OR FINE SO THAT THE SUFFERING ENDURED BY EQUALLY CULPABLE OFFENDERS IS EQUAL, ALTHOUGH THE AMOUNT OF THE FINE OR TIME IN PRISON IS NOT. WITHIN THE LAW OF TORTS, HOWEVER, NO SUCH ADJUSTMENT IS THEORETICALLY POSSIBLE IF THE DEFENDANT'S PENALTY MUST EQUAL THE LOSS CAUSED THE PLAINTIFF. IT MAY APPEAR THAT THE ANSWER TO THIS PROBLEM LIES IN THE INFLICTION OF PUNITIVE DAMAGES, I.E., WHERE AN OFFENDER'S CULPABILITY IS GREATER THAN THE SUFFERING WHICH HE WILL ENDURE AS A RESULT OF COMPENSATING THE PLAINTIFF, WE WILL INCREASE THE SUFFERING BY IMPOSING EXEMPLARY DAMAGES. THIS STRATAGEM MAY WORK WITH RESPECT TO THE DESERTS OF THE AGENT CAUSING A HARM, BUT IT MUST FAIL WITH RESPECT TO THE VICTIM OF HARM. THAT PERSON HAS ALREADY HAD THE PROPER PROPORTION BETWEEN VIRTUE AND HAPPINESS EXACTLY RESTORED IN THE FORM OF COMPENSATORY DAMAGES. NOW TO AWARD HIM ADDITIONAL VALUE IS TO UPSET THE MORAL BALANCE.

IN PRINCIPLE THERE IS NO GOOD MORAL REASON WHY AN INJURED PERSON SHOULD MAKE A PROFIT OUT OF ANOTHER'S VICE. SOMETIMES THE PROFIT IS ENORMOUS. A SUM LARGE ENOUGH TO PUNISH A WEALTHY NEWSPAPER MAY BE A SMALL FORTUNE (FREE OF TAX) FOR A LIBELLED PERSON.¹

FINALLY, CONSIDER THAT ROSS'S ARGUMENT AGAINST DESERT REQUITAL AS THE OBJECT OF THE CRIMINAL LAW APPLIES AS WELL TO THE LAW OF TORTS. IN ORDER TO ASSESS THE AMOUNT WHICH ANY INDIVIDUAL OUGHT TO BE MADE TO SUFFER, OR OUGHT TO BE COMPENSATED, WE MUST KNOW ALL THE FACTS OF THAT

¹DEVLIN, MORALS, PP. 37-38.

PERSON'S LIFE THAT INVOLVE EITHER HIS HAPPINESS OR VIRTUE; SUCH A WHOLE-LIFE VIEW IS, OF COURSE, IMPOSSIBLE TO OBTAIN. IN THE ABSENCE OF IT, HOWEVER, WE CANNOT JUSTIFIABLY IMPOSE LIABILITY. IMAGINE, FOR EXAMPLE, THAT B HAS CULPABLY HARMED C. OUGHT B BE MADE TO PAY COMPENSATION? SUPPOSE THAT B'S LIFE HAD BEEN MISERABLY DEPRIVED OF ANY HAPPINESS, ALTHOUGH HE HAD ALWAYS BEEN PERFECTLY MORAL; C'S LIFE HAS BEEN COMPLETELY EVIL, BUT HE HAD ALWAYS BEEN PERFECTLY HAPPY. IN SUCH A CASE, DESERT REQUITAL IS BEST SERVED BY "LEAVING THE LOSS WHERE IT LIES"—B SHOULD NOT PAY COMPENSATION.

WE CANNOT HAVE, THEN, A SYSTEM OF TORT LIABILITY WHOSE OBJECT IS PERFECTLY TO REQUITE DESERT.

CHAPTER 6

TELEOLOGICAL RETRIBUTIVISM

WE COME, FINALLY, TO CONSIDER TELEOLOGICAL RETRIBUTIVISM OR PLURALISM--THAT THEORY OF SANCTIONS WHICH REPRESENTS AN ATTEMPT TO MEDIATE BETWEEN UTILITARIANISM AND RETRIBUTIVISM. PLURALISTS AGREE WITH UTILITIARIANS THAT THE PRACTICE OF PUNISHMENT IS JUSTIFIED BY CERTAIN ENDS OR CONSEQUENCES OF THAT PRACTICE, I.E., DETERRENCE, REFORMATION AND INCARCERATION. HOWEVER, WHILE A UTILITARIAN IS COMMITTED TO ENDORSING ANY ACTION WHICH WILL BRING ABOUT THE SLIGHTEST INCREASE IN UTILITY OVER OTHER ALTERNATIVES, IN VIOLATION OF THE PRINCIPLE OF HUMANITY, THE TELEOLOGICAL RETRIBUTIVIST BELIEVES THAT THE PURSUIT OF THE GENERAL END OF PUNISHMENT MUST BE RESTRICTED IN DEFERENCE TO THAT PRINCIPLE.

THE PLURALIST THUS FINDS MUCH TO HIS LIKING IN EACH OF THE TWO PRINCIPLES: "PUNISH INDIVIDUALS WHENEVER, AND ONLY WHEN, SUCH PUNISHMENT WILL INCREASE UTILITY," AND "PUNISH ALL AND ONLY THOSE INDIVIDUALS WHO ARE DESERVING OF SUCH TREATMENT."¹ HOWEVER, HE REALIZES THAT THESE TWO PRINCIPLES MAY CONFLICT. WE MAY HAVE A SITUATION IN WHICH PUNISHMENT OF A BLAMELESS INDIVIDUAL MAY INCREASE UTILITY, E.G., WHERE A DES-

¹D. D. RAPHAEL, FOR EXAMPLE, WRITES: "I AGREE WITH THE UTILITARIAN THEORY OF PUNISHMENT TO THE EXTENT OF THINKING THAT WHERE THERE IS AN OBLIGATION TO PUNISH, THE OBLIGATION ARISES FROM UTILITY. THE STRENGTH OF THE SO-CALLED RETRIBUTIVE (OR, AS I PREFER TO CALL IT, THE DESERT) THEORY OF PUNISHMENT LIES, NOT IN THE JUSTIFICATION OF A POSITIVE OBLIGATION TO PUNISH THE GUILTY, BUT IN THE PROTECTION OF INNOCENCE." MORAL JUDGMENT (LONDON: GEORGE ALLEN & UNWIN LTD., 1955), P. 70.

POT HOLDS AN ENTIRE CITY HOSTAGE AND DEMANDS THE PUNISHMENT OF SOME INNOCENT PERSON AS RANSOM. ALSO, IT MAY BE THE CASE THAT IMPOSITION OF A DESERVED PUNISHMENT MAY BE DISUTILE, AS WHERE SOME PENALTY LESS SEVERE THAN THAT DESERVED BY AN OFFENDER WILL SERVE EQUALLY WELL TO DETER AND REFORM POTENTIAL CRIMINALS.

THE TELEOLOGICAL RETRIBUTIVIST MUST THUS CHOOSE A "SECOND ORDER" PRINCIPLE, WHICH DETERMINES IN AREAS OF CONFLICT WHICH OF THE TWO "FIRST ORDER" PRINCIPLES IS TO BE SATISFIED. THE PLURALIST WILL, OF COURSE, WISH TO DEFEND A SECOND ORDER PRINCIPLE WHICH WILL PERMIT THOSE ACTIVITIES, DISCUSSED IN THE PREVIOUS CHAPTER AND CONDEMNED ON RETRIBUTIVIST PRINCIPLES, WHICH WE GENERALLY BELIEVE TO BE JUSTIFIABLE, E.G., QUARANTINE, CONSCRIPTION, TAXATION, PENALTIES ATTENDANT UPON AN ACTUAL SYSTEM OF LAW. HE WILL ALSO WISH TO FORMULATE THE PRINCIPLE IN SUCH A WAY AS TO PRECLUDE MANY OF THOSE UNFAIR BUT UTILE PRACTICES WHICH THE UTILITARIAN IS COMMITTED TO DEFENDING, BUT WHICH WE ALL RECOGNIZE TO BE WRONG. LET US HERE EXAMINE TWO SUCH PLURALISTIC THEORIES AND DETERMINE THE JUSTIFIABILITY OF STRICT LIABILITY LAWS UNDER THEM.

FIRST, CONSIDER THE POSITION OF W. D. ROSS. ROSS CLAIMS THAT EACH INDIVIDUAL IS UNDER A PRIMA FACIE DUTY TO REWARD THE VIRTUOUS AND PUNISH THE VICIOUS.¹ HIS POSITION DIFFERS, THEN, FROM THE RETRIBUTIVIST, WHO BELIEVES THIS TO BE AN ABSOLUTE DUTY. SUCH A PRIMA FACIE OBLIGATION MAY BE DERIVED FROM THE FOLLOWING TWO PREMISES, ACCEPTED BY ROSS: 1) ". . . A STATE OF AFFAIRS IN WHICH THE GOOD ARE HAPPY AND THE BAD UNHAPPY IS BETTER THAN ONE IN WHICH THE GOOD ARE UNHAPPY AND THE BAD HAPPY," AND 2) ". . . IF A STATE OF AFFAIRS IS

¹THE RIGHT AND THE GOOD, P. 58.

BETTER THAN ITS ALTERNATIVE THERE IS A PRIMA FACIE DUTY TO PRODUCE IT IF WE CAN."¹

HOWEVER, WHILE IT MAY BE A PRIMA FACIE DUTY TO REWARD THE VIRTUOUS AND PUNISH THE VICIOUS, WE HAVE ALREADY NOTED THAT ROSS DOES NOT BELIEVE THAT THIS CAN EVER BE THE AIM OF THE STATE. SATISFACTION OF SUCH AN AIM WOULD REQUIRE KNOWLEDGE BY THE STATE OF EVERY GOOD ACT AND EVERY BAD ACT IN THE LIFE OF EVERY CITIZEN. FURTHERMORE, IT WOULD REQUIRE KNOWLEDGE OF ALL THE GOOD, AND ALL THE EVIL, WHICH HAD BEFALLEN EACH CITIZEN. SUCH DATA IS, OF COURSE, UNAVAILABLE TO EARTHLY COURTS AND IN ITS ABSENCE THE PUNISHMENT OF ANY OFFENDER MAY WELL SERVE TO INCREASE, RATHER THAN DECREASE, THE DISPROPORTION OF HAPPINESS TO VIRTUE IN THE WORLD. WE MUST RATHER CONSIDER THAT THE END OF THE STATE IS THE PROTECTION OF THE RIGHTS OF INDIVIDUALS, AND IN PARTICULAR THE MOST IMPORTANT OF THESE, "THOSE WITHOUT WHICH A REASONABLY SECURE AND COMFORTABLE LIFE IS IMPOSSIBLE."²

SUCH AN END JUSTIFIES THE IMPOSITION OF SANCTIONS ON INDIVIDUALS, FOR THE DETERRENT, INCARCERATIVE AND REFORMATIVE EFFECTS OF SUCH TREATMENT SERVE TO REDUCE CRIMES, WHICH INVOLVE THE VIOLATION OF MANY OF THOSE RIGHTS WHICH IT IS THE AIM OF THE STATE TO SAFEGUARD. BUT TO WHOM IS THIS PUNISHMENT, NECESSARY FOR THE PROTECTION OF THE RIGHTS OF CITIZENS, TO BE DISTRIBUTED?

THE STATE IS UNDER A PRIMA FACIE OBLIGATION NOT TO VIOLATE THE RIGHTS OF ITS INNOCENT CITIZENS. HOWEVER, THE BLAMEWORTHY OFFENDER, BY

¹ IBID.

² IBID., P. 59.

VIOLATING THE LIFE OR LIBERTY OR PROPERTY OF ANOTHER, HAS LOST HIS OWN RIGHT TO HAVE HIS LIFE, LIBERTY, OR PROPERTY RESPECTED, SO THAT THE STATE HAS NO PRIMA FACIE DUTY TO SPARE HIM, AS IT HAS A PRIMA FACIE DUTY TO SPARE THE INNOCENT. IT IS MORALLY AT LIBERTY TO INJURE HIM AS HE HAS INJURED OTHERS, OR TO INFLICT ANY LESSER INJURY ON HIM, OR TO SPARE HIM, EXACTLY AS CONSIDERATION BOTH OF THE GOOD OF THE COMMUNITY AND OF HIS OWN GOOD REQUIRES.¹

EACH OF THESE DUTIES, HOWEVER, IS A PRIMA FACIE DUTY, AND NOT A DUTY "SANS PHRASE"—THEY MAY BE VIOLATED WHERE THEY CONFLICT WITH A YET STRONGER PRIMA FACIE DUTY. AS ROSS WRITES, IF

A MAN HAS RESPECTED THE RIGHTS OF OTHERS, THERE IS A STRONG AND DISTINCTIVE OBJECTION TO THE STATE'S INFLICTING ANY PENALTY ON HIM WITH A VIEW TO THE GOOD OF THE COMMUNITY OR EVEN TO HIS OWN GOOD. THE INTERESTS OF THE SOCIETY MAY SOMETIMES BE SO DEEPLY INVOLVED AS TO MAKE IT RIGHT TO PUNISH AN INNOCENT MAN 'THAT THE WHOLE NATION PERISH NOT'. BUT THEN THE PRIMA FACIE DUTY OF CONSULTING THE GENERAL INTEREST HAS PROVED MORE OBLIGATORY THAN THE PERFECTLY DISTINCT PRIMA FACIE DUTY OF RESPECTING THE RIGHTS OF THOSE WHO HAVE RESPECTED THE RIGHTS OF OTHERS.²

WE MAY, THEN, WEIGH THE RIGHTS OF SOCIETY, OR OF A LARGE PART OF THAT SOCIETY, AGAINST THE RIGHTS OF THE INDIVIDUAL. WHERE THE RIGHTS OF THE FORMER STAND TO BE SEVERELY VIOLATED, WE MAY PROTECT THEM BY A VIOLATION OF THE RIGHTS OF BLAMELESS INDIVIDUALS. WE ARE DEALING IN THIS PROPOSITION WITH A SECOND ORDER PRINCIPLE FOR DECIDING CONFLICTS BETWEEN FAIRNESS AND UTILITY.

AN ARGUMENT SIMILAR TO ROSS'S IS PUT FORWARD BY D. D. RAPHAEL. HE URGES THAT WHERE "A PERSON IS GUILTY OF HAVING WILFULLY DONE WRONG, HE HAS THEREBY FORFEITED PART OF HIS CLAIM TO BE TREATED AS AN END-IN-HIMSELF; IN ACTING AS A NON-MORAL BEING HE LEAVES IT OPEN TO HIS FELLOWS TO USE HIM AS SUCH."³ A BLAMEWORTHY INDIVIDUAL MAY, BUT NEED NOT

¹ IBID., PP. 60-61.

² IBID., P. 61.

³ MORAL JUDGMENT, P. 71.

NECESSARILY, BE PUNISHED: ". . . WHERE THERE IS AN OBLIGATION TO PUNISH, THE OBLIGATION ARISES FROM UTILITY."¹

THE STATE, FURTHERMORE, HAS "AN OBLIGATION TO THE PUBLIC AT LARGE TO SAFEGUARD THEIR SECURITY, AND THE CORRESPONDING CLAIM IS THE CLAIM OF THE PUBLIC TO HAVE THEIR SECURITY SAFEGUARDED."² WE MAY PUNISH, AND IN FACT ARE UNDER A DUTY TO PUNISH, THOSE BLAMEWORTHY INDIVIDUALS WHOSE PUNISHMENT WILL, BY ITS DETERRENT, INCARCERATIVE OR REFORMATIVE CONSEQUENCES, SATISFY THE CLAIM OF THE PUBLIC TO BE PROTECTED.

WHAT, THOUGH, OF BLAMELESS OFFENDERS?

WHERE THERE IS NO GUILT, THE INFLICTION OF PAIN ON A PARTICULAR PERSON MAY STILL BE SOCIALLY USEFUL, BUT THE CLAIM OF SOCIAL UTILITY IS OPPOSED BY THE CLAIM OF THE INDIVIDUAL TO BE TREATED AS AN 'END-IN-HIMSELF' AND NOT MERELY AS A MEANS TO THE ENDS OF SOCIETY. [HOWEVER, THE PUBLIC STILL HAS ITS CLAIM TO BE SAFEGUARDED, AND] . . . THIS OBLIGATION TO, OR CLAIM OF, THE PUBLIC AT LARGE EXISTS OF COURSE AT ALL TIMES, AND IF THE FULFILMENT OF IT INVOLVES PAIN FOR AN INNOCENT INDIVIDUAL IT STILL HAS ITS FORCE. BUT THE CLAIM OF THE PUBLIC IN SUCH CIRCUMSTANCES CONFLICTS WITH THE CLAIM OF THE INDIVIDUAL NOT TO BE PAINED, TO BE TREATED AS AN END, AND SOMETIMES THE ONE CLAIM, SOMETIMES THE OTHER, IS THOUGHT TO BE PARAMOUNT IN THE CIRCUMSTANCES. IF IT SHOULD BE THOUGHT NECESSARY TO OVERRIDE THE CLAIM OF THE INDIVIDUAL FOR THE SAKE OF THE CLAIM OF SOCIETY, OUR DECISION IS COLOURED BY COMPUNCTION, WHICH WE EXPRESS BY SAYING THAT THE CLAIM OF JUSTICE HAS TO GIVE WAY TO THAT OF UTILITY.³

THE SYSTEM OF LAW IS UNDER A DOUBLE OBLIGATION--TO SOCIETY AT LARGE, AND TO EACH INDIVIDUAL WITHIN SOCIETY. WE MAY SEE THIS ASPECT OF THE JUDICIAL SYSTEM IN TERMS OF PROMISE-KEEPING. ROSS WRITES THAT THE LAW IS

A PROMISE TO THE INJURED PERSON AND HIS FRIENDS, AND TO SOCIETY. IT PROMISES TO THE FORMER, IN CERTAIN CASES, COMPENSATION, AND AL-

¹IBID., P. 70.

²IBID., P. 71.

³IBID., PP. 71-72.

WAYS THE SATISFACTION OF KNOWING THAT THE OFFENDER HAS NOT GONE SCOT-FREE, AND IT PROMISES TO THE LATTER THIS SATISFACTION AND THE DEGREE OF PROTECTION AGAINST FURTHER OFFENSES WHICH PUNISHMENT GIVES. AT THE SAME TIME THE WHOLE SYSTEM OF LAW IS A PROMISE TO THE MEMBERS OF THE COMMUNITY THAT IF THEY DO NOT COMMIT ANY OF THE PROHIBITED ACTS THEY WILL NOT BE PUNISHED.¹

BUT IT IS NOT ALWAYS POSSIBLE TO KEEP THIS PROMISE TO BOTH GROUPS. PROTECTING THE RIGHTS OF INDIVIDUALS FROM CRIME, AND GIVING COMPENSATION AND SATISFACTION TO VICTIMS OF CRIME, MAY REQUIRE VIOLATING THE RIGHTS OF BLAMELESS OFFENDERS OR INNOCENT INDIVIDUALS. IN SUCH A CASE, WHICH PROMISE IS TO BE KEPT. WHAT SECOND ORDER PRINCIPLE WILL BE ADOPTED?

WE HAVE ALREADY NOTED THAT RATIONAL INDIVIDUALS WILL WISH TO ACCEPT A PRINCIPLE WHICH JUSTIFIES THE VIOLATION OF INNOCENTS' RIGHTS WHICH NECESSARILY ACCOMPANIES ANY ACTUAL SYSTEM OF PENALTIES AND LAWS, OR THE PRACTICES OF QUARANTINE, CONSCRIPTION, TAXATION, ETC.

WHAT MAKES SUCH A SYSTEM OR PRACTICE JUSTIFIABLE IS THAT THE SUFFERING INFLICTED ON BLAMELESS INDIVIDUALS IS SIGNIFICANTLY LESS THAN THE EVIL WHICH SUCH PRACTICES PREVENT (OR THE GOOD WHICH THEY BRING ABOUT).

NOTE THAT THE GAIN IN UTILITY OR PROTECTION OF RIGHTS MUST BE SIGNIFICANTLY HIGHER THAN THE HARM OR VIOLATION OF RIGHTS INFLICTED ON THE INNOCENT. IT IS IN THIS WAY THAT PLURALISM DIFFERS FROM UTILITARIANISM, WHICH REQUIRES THE SMALLEST GAINS TO JUSTIFY SUCH A PRACTICE. PLURALISM THUS ACCOUNTS FOR OUR ORDINARY MORAL NOTION THAT FOR ANY GIVEN HARM, THE DUTY OF NON-INFLICTION IS STRONGER THAN THE DUTY OF PROTECTION.

¹THE RIGHT AND THE GOOD, PP. 63-64.

EVEN WHEN WE HAVE COME TO RECOGNIZE THE DUTY OF BENEFICENCE, IT APPEARS TO ME THAT THE DUTY OF NON-MALEFICENCE IS RECOGNIZED AS A DISTINCT ONE, AND AS PRIMA FACIE MORE BINDING. WE SHOULD NOT IN GENERAL CONSIDER IT JUSTIFIABLE TO KILL ONE PERSON IN ORDER TO KEEP ANOTHER ALIVE, OR TO STEAL FROM ONE IN ORDER TO GIVE ALMS TO ANOTHER.¹

HOWEVER, THE PLURALIST ALSO DIFFERS FROM THE RETRIBUTIVIST IN THAT THE FORMER RECOGNIZES, WHILE THE LATTER DOES NOT, THAT THERE ARE CERTAIN CASES IN WHICH WE MAY VIOLATE A RIGHT OR HARM A PERSON IN ORDER TO PROTECT INDIVIDUALS FROM YET GREATER HARM. AS ROSS WRITES:

IF I HAVE PROMISED TO MEET A FRIEND AT A PARTICULAR TIME FOR SOME TRIVIAL PURPOSE, I SHOULD CERTAINLY THINK MYSELF JUSTIFIED IN BREAKING MY ENGAGEMENT IF BY DOING SO I COULD PREVENT A SERIOUS ACCIDENT OR BRING RELIEF TO THE VICTIMS OF ONE.²

OF COURSE, IT IS DIFFICULT TO OFFER A SPECIFIC RULE FOR DETERMINING PRECISELY WHAT AMOUNT OF EVIL MUST BE PREVENTED IN ORDER TO JUSTIFY THE INFLICTION OF SOME OTHER EVIL. BUT AT LEAST PLURALISTS ARE NOT PRECLUDED BY THEIR THEORY FROM DEFENDING SOME SUCH JUDGMENT. PRESUMABLY THEY WILL DEFEND SOME STANDARD WHICH WILL PERMIT JUST THE SORT OF "PROTECTIVE INTERFERENCE" WITH RIGHTS WHICH IS CONDUCTED AND DEFENDED IN OUR OWN SOCIETY IN THE FORM OF QUARANTINE, CONSCRIPTION, TAXATION, ETC.

IF, THEN, WE CONCLUDE THAT WE MAY INTERFERE WITH AN INDIVIDUAL'S RIGHTS IN ORDER TO PROTECT OTHERS FROM MUCH MORE SERIOUS VIOLATION OF RIGHT OR FROM VERY DISUTILE ACTS, WHAT FOLLOWS WITH RESPECT TO THE IMPOSITION OF STRICT LIABILITY?

WE HAVE SEEN THAT SUCH LIABILITY CAN BOTH PROTECT RIGHTS FROM

¹IBID., P. 22.

²IBID., P. 18. BUT CF. KANT, "ON A SUPPOSED RIGHT TO LIE FROM ALTRUISTIC MOTIVES," IN CRITIQUE OF PRACTICAL REASON, P. 346-50.

SERIOUS VIOLATIONS AND ALSO PREVENT GREATLY DISUTILE ACTS FROM OCCURRING. THIS MAY BE DONE AT THE COST OF PUNISHING RELATIVELY FEW INNOCENT INDIVIDUALS, AND OFTEN BY INFLICTING SIGNIFICANTLY LESS SUFFERING ON THEM THAN WOULD OCCUR TO OTHERS IN THE ABSENCE OF SUCH STRICT LIABILITY. IT THEREFORE SEEMS THAT A PLURALIST MAY WELL DEFEND STRICT LIABILITY LAWS FOR AT LEAST SOME OFFENSES.

IT IS, IN FACT, JUST THE PLURALIST VIEW WHICH (UNHERALDED) PERMEATES MUCH OF THE LITERATURE DEFENDING STRICT LIABILITY, AND ALSO MANY OF THE ARGUMENTS WHICH SEEK TO LIMIT ITS SCOPE.

F. B. SAYRE, FOR EXAMPLE, TAKES A PLURALIST POSITION IN ARGUING THAT WE MAY IMPOSE STRICT LIABILITY, BUT ONLY WHERE THE PENALTIES INVOLVED ARE RELATIVELY SLIGHT FINES.

IF THE PENALTY IS REALLY SLIGHT, INVOLVING, FOR INSTANCE, A MAXIMUM FINE OF TWENTY-FIVE DOLLARS, PARTICULARLY IF ADEQUATE ENFORCEMENT DEPENDS UPON WHOLESALE PROSECUTIONS OR IF THE SOCIAL DANGER ARISING FROM VIOLATION IS SERIOUS, THE PRESENT DOCTRINE OF STRICT LIABILITY SEEMS ENTIRELY SOUND. THE SLIGHTNESS OF THE PENALTY PREVENTS INDIVIDUAL INTERESTS FROM BEING SERIOUSLY JEOPARDIZED; AND IT WOULD BE PRACTICALLY IMPOSSIBLE FOR COURTS TO INVESTIGATE INDIVIDUAL STATES OF MIND WHERE ADEQUATE ENFORCEMENT DEPENDS UPON PROSECUTION BY THE THOUSAND. IF VIOLATION THREATENS SERIOUS AND WIDESPREAD PUBLIC INJURY, COURTS HAVE NO OTHER COURSE OPEN TO THEM. THE ORTHODOX FUNDAMENTAL PRINCIPLES OF CRIMINALITY MUST BE SACRIFICED IN SUCH CASES IN THE INTEREST OF ENFORCEMENT.¹

IN OTHER WORDS, OUR DUTY TO PROTECT SOCIETY MAY TAKE PRECEDENCE OVER OUR DUTY NOT TO PUNISH THE BLAMELESS, BUT ONLY WHERE THE VIOLATION OF THE RIGHTS OF THE BLAMELESS IS SLIGHT. SAYRE SPECIFICALLY URGES THAT WHERE THE PENALTY IS MORE SEVERE THAN A MINIMAL FINE THE VIOLATION OF THE RIGHTS OF THE PUNISHED CANNOT BE OUTWEIGHED BY THE GOOD BROUGHT TO SOCIETY.²

¹PUBLIC WELFARE OFFENSES, P. 78.

²IBID., P. 72.

IS THIS POSITION TENABLE? I THINK NOT. CONSIDER, FOR EXAMPLE, THAT ONE OF THE OFFENSES FOR WHICH STRICT LIABILITY MAY BE IMPOSED IS THE SALE OF ADULTERATED DRUGS. IF WE REALIZE THE IMMENSE POTENTIAL HARM OF THE SALE OF ONE "BATCH" OF AN ADULTERATED DRUG, I.E., WIDESPREAD DEATH, ILLNESS, DEFORMITY, ETC., CAN WE THEN DOUBT THAT WE ARE JUSTIFIED IN IMPOSING SEVERE FINES AND EVEN PRISON SENTENCES ON SOME FEW FAULTLESS MANUFACTURERS IN ORDER TO PREVENT SUCH WIDESPREAD EVIL? I BELIEVE THAT REASONABLE REFLECTION MUST LEAD US TO CONCLUDE, IF RELUCTANTLY, THAT SUCH PENALTIES ARE INDEED JUSTIFIABLE WHERE THEY SERVE TO PREVENT MANY MORE INNOCENT INDIVIDUALS FROM EACH SUFFERING SIGNIFICANTLY MORE HARM.

FURTHERMORE, THE PLURALIST IS NOT COMMITTED BY HIS PRINCIPLES TO THE RESTRICTING OF LIABILITY WITHOUT FAULT TO THE REMOVAL OF THE MENS REA REQUIREMENT (AND MAINTENANCE OF THE ACTUS REUS REQUIREMENT) OR TO OFFENSES MALA PROHIBITA. WE HAVE ALREADY SEEN THAT IMPOSITION OF STRICT LIABILITY ON INDIVIDUALS IN EXCUSING CONDITIONS WHICH NEGATIVE THE ACTUS REUS REQUIREMENT MAY WELL SERVE TO DETER FUTURE HARM. ALSO, IT IS CLEAR THAT ACTS MALA IN SE ARE QUITE AS SUSCEPTIBLE TO DETERRENCE BY ABSOLUTE LIABILITY AS ARE THOSE MALA PROHIBITA. SO LONG AS THE IMPOSITION OF LIABILITY WITHOUT FAULT IN THESE AREAS DETERS SIGNIFICANTLY LARGE NUMBERS OF SERIOUS CRIMES AT THE COST OF A FEW INNOCENTS PUNISHED, THE PLURALIST MAY CONSISTENTLY DEFEND THE PRACTICE; THERE IS NO REASON TO ASSUME THAT THIS CONDITION CAN NEVER BE MET IN FACT.

NOR IS THE PLURALIST POSITION MERELY APPARENT IN DISCUSSIONS OF STRICT LIABILITY WITHIN THE CRIMINAL LAW. THE VIEW ALSO SURFACES IN DEFENSE OF THE PRACTICE WITHIN THE LAW OF TORTS. HARPER AND JAMES,

FOR EXAMPLE, WRITE THAT

ACCIDENTS AND THEIR CONSEQUENCES TODAY POSE A SERIOUS SOCIAL PROBLEM. ITS SOLUTION CALLS FOR TWO THINGS: (1) MEASURES WHICH WILL CUT DOWN ACCIDENTS; (2) MEASURES WHICH WILL MINIMIZE THE BAD EFFECTS OF THOSE ACCIDENTS WHICH DO HAPPEN. THESE MEASURES MUST NOT, HOWEVER, COST SOCIETY TOO MUCH IN OTHER DIRECTIONS; THEY MUST NOT, FOR EXAMPLE, UNDULY INHIBIT VALUABLE BUT DANGEROUS ACTIVITY. MOREOVER, THEY MUST ON THE WHOLE SATISFY THE ETHICAL OR MORAL SENSE OF THE COMMUNITY, ITS FEELING OF WHAT IS FAIR AND JUST. THUS THE POSSIBLE OBJECTIVES OF TORT LAW IN ACCIDENT CASES MAY BE CLASSIFIED AS THE MORAL OBJECTIVE, THE COMPENSATION OBJECTIVE, THE ADMONITORY OBJECTIVE, AND THE OBJECTIVES OF AVOIDING DISCOURAGEMENT OF DESIRABLE ACTIVITY AND A DISPROPORTIONATE BURDEN ON ANY MEMBERS OR GROUPS IN SOCIETY.¹

WE ARE TOLD THEN THAT WE MUST PURSUE UTILITARIAN ENDS, BUT THAT OUR PURSUIT OF THESE ENDS MUST NOT UNDULY VIOLATE PRINCIPLES OF JUSTICE OR FAIRNESS. THIS IS CLEARLY A PLURALIST POSITION.

HARPER AND JAMES THEN GO ON TO DEFEND THE IMPOSITION OF STRICT LIABILITY IN THOSE CASES WHERE SUCH LIABILITY GREATLY LESSENS THE DISUTILITY OF THOSE HARMS WHICH DO OCCUR.² THIS SUBSTANTIAL LESSENING OF THE DISVALUE OF AN ACCIDENT OCCURS, AS WE HAVE DISCUSSED IN DETAIL, THROUGH THE DISTRIBUTION OF LOSSES OVER A LARGE NUMBER OF INDIVIDUALS EITHER BY INSURANCE OR INCREASED COSTS OF PRODUCTS AND SERVICES. IN THESE CASES HARPER AND JAMES CLEARLY BELIEVE THAT THE VIOLATION OF THE RIGHTS OF THE INDIVIDUAL MADE SO LIABLE IS FAR OUTWEIGHED BY THE GOOD WHICH ACCRUES TO THE COMMUNITY. AND WE MAY FURTHER NOTE, ALTHOUGH HARPER AND JAMES DO NOT STRESS THIS POINT, THAT SUCH LIABILITY ALSO SERVES TO DETER BLAMEWORTHY WRONGDOERS, FURNISHING AN ADDITIONAL CONSIDERATION IN FAVOR OF THE PRACTICE.

I CONCLUDE, THEN, THAT STRICT LIABILITY, BOTH IN CRIMINAL LAW

¹TORTS, P. 742.

²IBID., CHAP. XII, PASSIM.

AND IN THE LAW OF TORTS, MAY BE JUSTIFIED BY A PLURALIST THEORY OF SANCTIONS. FURTHERMORE, IT SEEMS THAT TELEOLOGICAL RETRIBUTIVISM AVOIDS THE PITFALLS OF BOTH RETRIBUTIVISM AND UTILITARIANISM AND OFFERS A PERSPECTIVE ON THE IMPOSITION OF SANCTIONS WHICH IS IN ACCORD WITH OUR NORMAL REFLECTIVE CONSIDERATIONS ON THE SUBJECT. IF THIS IS TRUE, THEN WE MAY SAY THAT STRICT LIABILITY IS NOT ONLY JUSTIFIABLE TO A PLURALIST, BUT THAT IT IS JUSTIFIABLE, SANS PHRASE.

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