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"The Devil May Care"—Or Should We? A Re-examination of Criminal Negligence

BY GERHARD O. W. MUELLER*

Editor's Note: Professor Mueller focuses on the standard of conduct to be imposed in cases involving the criminal negligence of experts or professionals and criticizes the retributive foundations of traditional theories. He suggests that, in our "world of experts," a preventive regulatory approach would be more effective. As for possible solutions to the problem of criminal negligence, the author concludes that criminologists must develop new techniques and methods, such as trial by a tribunal of experts.

The road to hell
is paved with
good intentions.

An anonymous traveler.

I. POSING THE ISSUES—HELL FIRE:
THE COCONUT GROVE DISASTER

A little after ten o'clock on the evening of Saturday, November 28, 1942, the [Cocoanut Grove] nightclub was well filled with a crowd of patrons. It was during the busiest season of the year. An important football game in the afternoon had attracted many visitors to Boston. . . . [T]he dance floor had from eighty to one hundred persons on it and . . . was 'very crowded'. . . . [T]here were from two hundred fifty to four hundred persons in the Melody Lounge, from four hundred to five hundred in the main dining room and the Caricature Bar, and two hundred fifty in the Cocktail Lounge.

* Professor of Law and Director of Comparative Criminal Law Project, New York University. This paper, orally presented at the Seventh International Congress of Comparative Law at Uppsala, Sweden, in August, 1966, is specially dedicated to Professor Roy Moreland, friend and revered colleague, and pioneer in the analysis of the concept of criminal negligence.

1 The expression was used in People v. Brancato, 32 N.Y.S.2d 689, 691 (Sup. Ct. 1942). See text at note 13 infra.

There were about seventy tables in the dining room, each seating from two to eight persons... all but two were taken. Many persons were standing in various rooms. ...

A bartender in the Melody Lounge noticed that an electric light bulb which was in or near the cocoanut husks of an artificial palm tree in the corner had been turned off and that the corner was dark. He directed a sixteen year old bar boy who was waiting on customers at the tables to cause the bulb to be lighted. A soldier sitting with other persons near the light told the bar boy to leave it unlighted. But the bar boy got a stool, lighted a match in order to see the bulb, turned the bulb in its socket, and thus lighted it. The bar boy blew the match out, and started to walk away. Apparently the flame of the match had ignited the palm tree and that had speedily ignited the low cloth ceiling near it, for both flamed up almost instantly. The fire spread with great rapidity across the upper part of the room, causing much heat. The crowd in the Melody Lounge rushed up the stairs, but the fire preceded them. People got on fire while on the stairway. The fire spread with great speed across the foyer and into the Caricature Bar and the main dining room, and thence into the Cocktail Lounge. Soon after the fire started the lights in the night club went out. The smoke had a peculiar odor. The crowd were panic stricken, and rushed and pushed in every direction through the night club, screaming, and overturning tables and chairs in their attempts to escape. 

The emergency doors did not open—they had been kept locked by the proprietor. 491 people were trampled and burned to death; the corpses were subsequently found in piles, at locked doors.

Very few American cases lend themselves as well to an analysis of the law of criminal negligence as the Cocoanut Grove cases, both from a factual and a legal point of view. The factual part is much the more significant; indeed, a proper fact analysis of these cases may well be dispositive of the issue of negligence in criminal cases.

To begin with, in rather typical fashion, for many months preceding the disaster the restaurateur-proprietor of the Cocoanut Grove had permitted an unsafe condition to prevail in his nightclub. He had, as it were, endangered his patrons. He had kept them in objective danger of death, though neither they nor

\[ \text{Id.}, 55 \text{ N.E.2d at 906-07.} \]
he were aware of that peril, from all that appears. But should not a good restaurateur be constantly concerned about the welfare and safety of his patrons?

Again, in typical fashion, the ensuing disaster brought instant howls from the public and the authorities, clamoring for the punishment of the guilty. Consequently, the hapless restaurateur, Barnett Welansky, was indicted on several dozen counts of involuntary manslaughter and convicted and sentenced on sixteen counts to as many concurrent prison terms at hard labor, for not less than twelve nor more than fifteen years, on each count—all that despite the fact that on the night of the disaster and for several days thereafter, Welansky had been ill in the hospital.

II. An Analysis of Criminal Negligence

The trial judge who had to instruct twelve Bostonians, good and true, but ignorant of matters legal, faced a formidable task in explaining the concept of criminal negligence to them. He began by making it clear that the charges in question were involuntary manslaughter, a crime for which the requisite disapprovable frame of mind (mens rea, Schuld, element morale) is criminal negligence, rather than an evil intention to kill (dolus). But criminal negligence, in American law, is gross negligence, culpa lata, which has customarily been described as wanton or reckless conduct, or, to be more particular, intentional conduct which wantonly or recklessly produces a grave risk of the prohibited result.

In the Welansky case the Supreme Judicial Court of Massachusetts said:

The words “wanton” and “reckless” are . . . not merely rhetorical or vituperative expressions used instead of negligent or grossly negligent. They express a difference in the degree of risk and in the voluntary taking of risk so marked, as
compared with negligence, as to amount substantially and in
the eyes of the law to a difference in kind.\(^8\)

This type of a definition raises some very troublesome issues—
troublesome to the scholar, that is, though perhaps not so trouble-
some to the somewhat more naive ordinary layman who has been
placed in judgment as a juror.

\(\textbf{A. The Degree of Risk}\)

Quite correctly the instruction circumscribes that high degree
of criminal negligence which deserves the appellation “wanton or
reckless” in terms of “grave danger to others.” This makes it clear
that on a purely objective plane, there is an appreciable difference
between ordinary negligence, which suffices for civil liability, and
gross negligence, or recklessness, which must be proven for cri-

mens rea for criminal liability. That, of course, is plainly the case
under the definition of crimes like involuntary manslaughter. In
his treatise, \textit{A Rationale of Criminal Negligence}, Moreland ob-

served properly that “The risk which such conduct entails must
be greater for criminal liability than is required for civil.”\(^9\) Any
attempts explanation of the degree of negligence would be in
vain. There is no thermometer of negligence, and no compass can
measure its degrees. The difference between the criminal and the
civil measure of negligence is that between an undifferentiated
plus and minus.

\(\textbf{B. Risk Detection: Objectivity vs. Subjectivity}\)

The grave danger must be apparent. Presumably, if it is not
apparent, no criminal liability can ever result. But must it have
been apparent to the detached observer as well as the defendant
himself? The judge in \textit{Welansky} said that an activity amounts to
wanton or reckless conduct “if the grave danger was in fact
realized by the defendant . . . no matter whether the ordinary man
would have realized the gravity of the danger or not.”\(^10\) That
much has certainly been established law in the United States, for

\(^8\) 55 N.E.2d 902, 910.
\(^9\) \textit{Moreland, op. cit. supra} note 7, at 41-42.
\(^10\) 55 N.E.2d 902, 910.
no proposition seemed more firmly entrenched than that criminal negligence, or recklessness, of the conscious variety will lead to criminal liability. But a split of opinion prevails as regards that degree of criminal negligence which, while apparent as such to the ordinarily prudent man in the defendant's position, was not recognized as such by the defendant himself. According to one line of authority, "at common law there is no criminal liability for harm thus caused by inadvertence." "Criminal negligence necessarily implies, not only knowledge of probable consequences which may result from the use of a given instrumentality, but also willful or wanton disregard of the probable effects of such instrumentality upon others likely to be affected thereby." Summing up American law in point, the colorful New York Criminal Court judge, Samuel Leibowitz, gave the following explanation:

Criminal negligence is synonymous with culpable negligence. Such negligence encompasses a reckless and wanton disregard for the safety of life and limb. It is not sufficient to establish merely ordinary negligence. The law requires more than that. The facts and circumstances . . . must indicate such a recklessness and wanton devil may care attitude on the part of the accused as to evince a contemptuous disregard for consequence to life and limb of others. In sum, the evidence must disclose what would almost be tantamount to a wilfulness to do harm.

American teachers of law, or for that matter American lawyers in general, are prone to assert broadly that for criminal liability, the criminal negligence must be of the conscious variety. Indeed, if it is a common law proposition that a mens rea is required for each crime—and it is—and if it is a common law proposition that mens rea requires awareness of the possible harm and a decision to create (or risk creating) that harm nevertheless—and that is indeed a common law proposition—it must surely follow that no negligence or recklessness of the unconscious variety can suffice for criminal liability in the United States. This is, essentially,

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14 Mueller, supra note 4.
15 Ibid.
Jerome Hall's conclusion, and several other American scholars would agree. If pressed for elucidation and explanation, most American courts would have to reach the same conclusion. But they have generally avoided committing themselves about the precise standard. Sears and Weihofen wrote: "In dealing with negligence many decisions can be explained satisfactorily only on the basis of an objective standard. But the courts generally refuse to accept fully the logic of their position." An easy way out of the dilemma is an emphasis on the evidentiary significance of the facts. Hall wrote:

"The jury . . . must find that his conduct fell below the standard of "due care" and that the defendant knew he was increasing the risk of harm; and . . . they are warranted in so finding if they find that a reasonable man in the given situation would have been aware of it."

Honig criticized Hall for expressing this frequently resorted to procedural device of solving the otherwise well-nigh impossible task of fathoming a defendant's past deep psychic recesses: "that awareness becomes fictitious if it can be presumed and imputed to the defendant, subject to the application of the reasonable man standard."

It is indeed important to differentiate between the fact of conscious recklessness, on the one hand, and proof of that fact on the other. If a perpetrator has acted with recklessness, objectively judged, it is one thing to say: "we do not believe you if you tell us you were not conscious of the possible detrimental consequences as they in fact subsequently occurred." It is another thing to say: "we can convict you of the crime, i.e., we shall impute gross recklessness to you, even absent any proof of your consciousness of the possible consequences."

Few American courts have been able to appreciate this distinction between fact and evidence regarding recklessness, though many courts have unconsciously or intuitively sought refuge in this evidentiary method of solving the dilemma, with the con-

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16 Hall, Criminal Law ch. 4 (2d ed. 1960); Hall, Negligent Behavior Should Be Excluded from Penal Liability, 63 Col. L. Rev. 692 (1963).
18 Hall, Criminal Law 121 (2d ed. 1960).
sequence that, over the years, there have been more and more compromises with the ancient requirement of *mens rea* as conscious awareness.

The Cocoanut Grove disaster case demonstrates the point. There the trial court instructed the jury:

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\text{[E]ven if a particular defendant is so stupid \[or\] so heedless \* \* \* that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct in his dangerous act or omission, if an ordinary normal man under the same circumstances would have realized the gravity of the danger. A man may be reckless within the meaning of the law although he himself thought he was careful.}\]

The Supreme Judicial Court of Massachusetts approved this jury instruction, and its inherent switch from conscious to unconscious recklessness has been endorsed by several American scholars. Professor Moreland employed the standard of unconscious criminal negligence in his model jury instructions. Professor Perkins specifically approved of the test developed by the Massachusetts court in its Cocoanut Grove decision.

C. Contemporary American Legislative Indecision Regarding Criminal Negligence

Contemporary American legislation has not freed itself from the indecisive attitude of case law in regard to the objectivity or subjectivity of standards. On the one hand modern American codes document the existence of an objective criminal negligence; on the other hand they are extremely reluctant to base any liability on the objective form of negligence. Thus, section 3 of the current New York Penal Law presents a definition of criminal negligence in objective terms, as importing "a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." But the body of the very same code does not define any offenses for which such unconscious negligence is a

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21 Moreland, *op. cit. supra* note 7, at 141-47.
23 This section is about to be replaced by the N. Y. *Penal Law* of 1967.
24 N. Y. *Penal Law* § 3 (1881).
sufficient degree of culpability, recklessness or culpable negligence being usually required. The several other states which in their own penal legislation have adopted the New York formula likewise do not seem to actually punish one who acted with mere unconscious negligence.

This state of affairs, as it were, has recently been codified by the Model Penal Code of the American Law Institute. It recognizes both conscious recklessness and unconscious negligence as forms of culpability, but applies unconscious negligence only in a few isolated cases.

In the Model Penal Code recklessness is defined in terms of conscious disregard of a substantial and unjustifiable risk. As to unconscious negligence the Code provides: "A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk...." But this standard of unconscious negligence is then employed only in three situations:

(1) There is a crime of negligent homicide, for which, under the Model Penal Code, unconscious negligence suffices. This is a felony of the third degree, for which the ordinary punishment is not in excess of five years imprisonment.

(2) A new crime of negligent assault by the negligent causing of bodily injury to another with a deadly weapon, has been created. This crime is a misdemeanor, the ordinary maximum punishment for which is one year imprisonment.

(3) A new type of criminal mischief has been recognized. It consists, among others, of the damaging of the tangible property of another by negligence in the employment of fire or explosives.

The recently adopted Illinois Penal Code has adopted the general definition of unconscious negligence, but has not used the

27 Model Penal Code § 2.02(c) (Proposed Official Draft 1962).
concept in the special part.\textsuperscript{33} Similarly the New York Penal Law (Code), which is to take effect in 1967, embraced the \textit{Model Penal Code}'s conception of unconscious negligence, in terms of failure to perceive a substantial and unjustifiable risk.\textsuperscript{34} But here, too, the actual use of unconscious negligence is minimal. As in the \textit{Model Penal Code}, it is to be found in the crime of criminally negligent homicide,\textsuperscript{35} as well as in third degree assault.\textsuperscript{36}

It can be concluded that, at last, the concept of unconscious criminal negligence has been officially recognized in American criminal law, though its use is, as yet, very minimal. The Coconut Grove decision, which approved of unconscious negligence, was merely a forerunner in the use of this concept.

D. The Purpose of Imposing Criminal Liability for Unconscious Negligence

Arguments in support of unconscious criminal negligence are extremely sparse, both in decisional law and in the writings of the scholars. The draftsmen of the \textit{Model Penal Code} simply argued as follows:

Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional notice to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this notice may promote awareness and thus be effective as a measure of control.\textsuperscript{37}

Unfortunately, the statement is not supported by any reference to either legal or behavioral study in point. Whether this statement is supported even in terms of basic principles of psychology is debatable; however, the belief in the validity of the assumption may have some sort of a positive effect. Continental writers generally have supported criminal liability for unconscious negligence by the same reasoning sometimes referring to it as the "alarm clock function." Some day it might be possible to conduct a psychological experiment for testing the effect of potential

\textsuperscript{33} \textit{ILL. Penal Code} §§ 4-7.
\textsuperscript{34} \textit{N. Y. Penal Law of 1967} § 15.05(4).
\textsuperscript{35} \textit{N. Y. Penal Law of 1967} § 125.10.
\textsuperscript{36} \textit{N. Y. Penal Law of 1967} § 120.00.
objective negligence liability on the psyche of an unaware actor. For the time being, one can only guess. The long-range, educational effect, viz., the general-preventive effect, of this type of liability may well be more easily demonstrable than the short-term specially-preventive effect on the particular action of a particular actor.

The crime-preventive efficacy of unconscious negligence liability has been roundly denied by Professor Hall, who says: "[T]he legal apparatus cannot assure such a close association between negligence and pain as to provide any support for the use of punishment on this ground." Insofar as the specially-deterrent (or preventive) policy of the law is concerned, Hall is probably on fairly safe ground, but it may well be otherwise in regard to the long-range educational value of the penal law. We must remember that criminal law is also—and perhaps prominently—an instrument useful in creating, preserving and protecting socially desirable attitudes. The negligent person probably is an ethically insensitive person and is, thus, possessed of a socially disapprovable attitude, frame of mind, or character. Cannot the law, by expressing criminal disapproval of that attitude, discourage its continued existence? "[T]he causes of negligence may be so deeply rooted in the personality structure of the inadvertent harm-doer as to require a great deal of punishment to alter his habits—assuming that punishment has any such effect," writes Hall.

Whether punishment has to be greater the more deep-seated the basic cause for the commission of prohibited acts is a matter on which we have no research data. Consequently, the issue which can be reasonably debated at this point is solely the question of whether on psychological and ethical grounds any punishment of a person who has not resolved to do wrong is proper and desirable. To put the question differently, we must ask ourselves whether an evil may be inflicted with good correctional motives and in justifiable expectation of socially desirable results, when the object of the infliction is "dangerous" but not "bad." Hall and the American traditionalists would draw the line before this limit and would refuse to use the criminal sanction in such a case. They would be perfectly willing, however, to embrace the broader

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38 Hall, op. cit. supra note 18, at 138-39.
39 Id. at 139.
policies of social defense by using all kinds of restraints—short of criminal sanctions—upon the dangerous, but not bad, negligent actor.

The issue I have just sketched is a highly theoretical one for four reasons: (1) The courts have not concerned themselves with it and have acted purely on intuition. Thus, the theoretical argument is at best de lege ferenda, but not de lege lata. (2) The arguments are entirely devoid of any factual, i.e., behavioral science, data, one way or the other. (3) In the final analysis, the debaters would probably agree to the extent that each would employ measures against the dangerous negligent actor, felt to be detrimental by him, except that one school would call these measures punishments, and the other would call them measures of social defense. (4) Every indication I have is to the effect that when our American courts violated the principle of mens rea and imposed criminal liability for unconscious negligence, they did so for purely retributive reasons. After each disaster or calamity, the public clamors for the punishment of those “responsible.” In a democracy of common law traditions, the courts are highly sensitive to such public demands and, under public pressure, are more likely to pay attention to public demands than to the niceties of theory and tradition. The Cocoanut Grove case demonstrates the point vividly: 491 victims were clamoring for retaliation; this retaliation found its expression in the retributive punishment of one of only a handful of persons who could possibly be blamed for anything—anything at all—even if only carelessness of which they themselves may not have been aware.

Thus, when we argue about the theoretical foundations of unconscious criminal negligence, we should keep in mind that, more than anything else, it has been and is one instance of the most ancient and perhaps most discredited classical penal aims of all: retribution. Whether, as such, it should have a place in the penal-correctional policy of the late twentieth century is a point much more worthy of debate than is any of the other suggested justifications for its use.

For an introduction to the general theories of social defense see ANCEL, SOCIAL DEFENCE (1966).

Hall, op. cit. supra note 18, at 139.

Compare Moreland, op. cit. supra note 7, at 52.
III. LEGAL ALTERNATIVES TO CRIMINAL NEGLIGENCE

A. The Regulatory Offense

If, in the past and to this day American criminal law theory has operated virtually without a concept of unconscious criminal negligence, what other forces did the law employ in fact to enforce public compliance with a myriad of statutory regulations enacted to protect against the hazards of life in a modern industrialized society? This question contains a part of its own answer. Rather than to punish citizens for criminal harms produced through unconscious negligence, e.g., human death, the legislatures of the United States have sought to prevent certain underlying dangerous activities capable of producing greater harm. By way of example, in lieu of a policy of punishing pharmacists for negligent homicide arising out of certain risky drug concoctions, the law favors a policy of prohibiting or regulating those drug concoctions. One could call this approach the "preventive law" approach. But now the question arises: what standard of mens rea is to be applied for punishing those who have violated the regulatory statute? Criminal intent? Recklessness? Unconscious criminal negligence? Or what? The American law has answered this question in the most paradoxical fashion possible. Unconscious criminal negligence was generally regarded as too immoral, too unethical a standard. Blame; so it was thought, should not attach where action was not accompanied by a consciously blameworthy attitude toward the protected interest in question. Yet, that very same moralistic law accepted without question a morally much less acceptable solution: liability without any fault whatsoever.43

The Cocoanut Grove disaster may again serve as an illustration. A Massachusetts statute requires that all construction changes in certain buildings may be made only with a governmental permit, in accordance with approved drawings, and providing for fire-doors. After the disaster it turned out that Welansky, the owner of the Cocoanut Grove, had hired a builder (Rudnick) to make alterations. Rudnick acted in violation of the statute. Since the greater the harm, the greater the demand for scapegoats, Rudnick

was indicted. Had the indictment been for a straight violation of the alteration statute, he could unquestionably have been convicted without any proof that he was aware of wrongdoing. In many states, statutory violations of the regulatory type carry penalties regardless of mens rea, i.e., it is not necessary for the prosecution to prove dolus (the intention to commit a wrong) or even criminal recklessness. The mere doing of the act—whether known to be wrong or not—suffices. Unfortunately, American legislatures, if they cannot deal with any regulatory problem in an urbane, civil, administrative manner, frequently resort to the device of absolute liability (usually in the nature of malum prohibitum) as last resort. The defendant is convicted—since proof of guilt is not required—and that ends the matter. But in the Cocoanut Grove disaster case the government was more ambitious. The prosecution was ambitious enough to prosecute Rudnick for a conspiracy to violate the alteration statute, rather than for a simple violation. This charge required proof of an agreement on the part of Rudnick with another (Welansky) to violate the statute in question. While a conspiracy charge has many procedural advantages over a prosecution for the substantive crime in question, it also has one singular disadvantage: the prosecution must prove criminal guilt, i.e., mens rea. “The indictment being for conspiracy to commit an offense which is malum prohibitum only, there must have been an intent to do wrong . . . and knowledge of the existence of the law and knowledge of its actual or intended violation.” And how can one prove such an evil intent, and such a knowledge? The Massachusetts court said:

[T]he jury could have inferred that the defendant . . . and Welansky . . . were aware of the statute and by concerted action planned its violation. The Commonwealth did not have to prove that either knew the number of the chapter or the year of its passage. It is enough if they knew that a law required an approved plan for alterations to which they had to conform but with which by united action they did not comply. The defendant was a builder of many years' experience. He knew that the law required permits for the alterations, and that he “had to go according to the plan.”

44 See Pinkerton v. United States, 328 U.S. 640 (1946), especially the dissenting opinion of Rutledge, J.
46 Id., 60 N.E.2d at 357.
It seems we have gone full circle and once again reached the point at which the proof of an attitude is at stake. Should we be objective and convict when a reasonably prudent builder would have known of the existence of the regulation (whether the defendant did or not), or should we insist on proof that this builder knew of the regulation and intended to violate it? The former would amount to a violation of tradition and would be obnoxious on moral grounds. The latter is a virtual impossibility. The court chose a middle ground, by again making the question a purely evidentiary one, which answers itself rhetorically: “The defendant was a builder of many years’ experience.” How could he believably argue—if he were to do that—that he did not know of the existence of the regulation? Would it not be laughable for him to say that he was unaware of the regulation? Hence, he must have known of the regulation. “He knew that the law required permits for the alterations and that he ‘had to go according to the plan.’”47 And thus, the public had another scapegoat for its disaster.

Disasters aside, regulatory legislation is unquestionably the single most significant alternative to the imposition of unconscious negligence liability. And if such regulatory legislation operates sensibly in the general framework of human experience and human expectation, it is surely contributing more to the prevention of disaster than any unconscious negligence liability. Unfortunately, by operating with criminal liability without fault, much of our regulatory legislation presents a fruitless effort at social engineering.48

B. Licensing Provisions

Prominent among regulatory statutes—each one governing a different profession, activity, or calling—are the licensing statutes. Certain potentially dangerous activities may be carried out only under license. They range anywhere from operating a motor vehicle to selling real estate, from performing in a nightclub to performing brain surgery, from selling shoelaces door to door to carrying a firearm. Again, there is no empirical evidence whatsoever in the United States which would attest to the social use-

47 Ibid.
Tutness of these licensing statutes, though it can hardly be subject to doubt that most have some socially useful effect. That others have deteriorated into patronage prerogatives or revenue measures is hardly open to doubt.

To the extent that the internal regulation and supervision of a profession is left to an internal disciplinary machinery, the problems of harm through a lack of skill in the exercise of a profession are likely to be removed from the public eye. The extent to which the problems themselves are actually minimized is completely unknown. Thus, if the American medical profession enjoys a high prestige for the exercise of medical skill and the prevention of negligence, it is entirely uncertain whether this may be due to: (1) a high degree of professional skill as a result of excellent training; (2) prevention of dangerous operations by negligent doctors, through internal policing of the profession; or (3) professional-organizational success in internally suppressing publicity of negligence by American physicians. Few would doubt that the key probably lies in an excellent standard of training, cultivation of high skills prior to licensing for practice, and strict examination standards for licensing.

If experience with the training and licensing of American motorists can serve as any clue to the problem, the key to success does indeed lie in training, even more than in licensing, since standards for the licensing of drivers are generally lax. But training for driving, in the sense which includes the conditioning of the future driver for command of an automobile, is very intense in the United States, as compared with the rest of the world. An American youngster grows up with the automobile, and he even goes to school with an automobile. Here, rather than in the difference of laws regarding criminal negligence, may lie the reason that the American automobile death toll amounts to only a quarter of that of the most motorized European countries.40

IV. PROFESSION AND EXPERIENCE

We should now focus on the judge of the facts, be he one of twelve laymen-jurors, or a professional judge, who is confronted

with the task of fathoming the past frame of mind of a defendant charged with having produced a criminal harm through [conscious] criminal negligence. The task is not a difficult one. By the very nature of things, criminal negligence entails the violation of a legally imposed duty or expected standard of care. The aggregate of legal duties in a given society may theoretically befall all members thereof, but it does so unequally. All drivers are subject to one set of duties; all architects, to another; all dog-owners, to another; and all members of voluntary fire departments, to still another. It is entirely conceivable that one citizen is subject to all of these duties, if he is a dog-owning architect with a driver's license and a membership in the voluntary fire department. However, it is unlikely that in any given activity, or at any given moment, he is subject to more than one specialized bundle of duties to care, or responsibilities of awareness.

American law, generally, requires the judge of the fact to judge by "the standard of care expected to be maintained by a reasonably careful man under like circumstances." Surely the most significant circumstance is the defendant's calling, profession, trade, occupation or, indeed, hobby, if that is at all relevant to the offense charged. Professor Moreland singled out the physician or surgeon, whom we encounter more frequently than any other professional in the law of criminal negligence, in demonstrating the significance of referring to the particular professional skill of the defendant: "Physicians and surgeons are not judged by the standard of the ordinary prudent man. Their special training and experience qualify them as persons who, in their fields, possess a type of judgment and knowledge so superior . . . that the law is justified in creating a separate standard to be used in judging their professional acts." This, indeed, is true of professions of any sort—only, however, as regards acts related to their profession. While Professor Moreland did, unfortunately, use an objective standard, he was careful to point out that even a professional could be held only to standards of an ordinary professional practicing in the same or similar locality as the defendant.

51 MORELAND, op. cit. supra note 7, at 80.
52 Id. at 82.
This amounts to a specification and individualization of objectivity which approaches subjectivity very nearly.

It is rare for any criminal court to be confronted with a charge of any crime requiring negligence which does not require reference to a very special skill or to a set of propositions governing a distinct calling. Most frequently, nowadays, the skill in question pertains to the operation of motor vehicles. Here, as in nearly all other crimes of criminal negligence, the standard has not yet become one of unconscious negligence, or at least not fully. The standard of culpability for motor vehicle offenses still is largely one of recklessness, requiring proof of consciousness of the risk which led to the harm. But in these prosecutions the ideal has been achieved: the court (or jury) is composed of fellow specialists who—while trying to fathom the defendant's past frame of mind—will obviously refer to their own experience when it comes to imputing conscious recklessness to the defendant. In many other types of cases it may become necessary to let the jury listen to the expert opinion of a fellow specialist of the defendant's, in order to ascertain what a professional of the defendant's calling would have done under the circumstances, so as to ascertain what the defendant probably did contemplate at the time of the critical action.

English judges have been swift to conclude that the requisite [conscious?] criminal negligence was constituted when the harmful consequence was due to an act or omission of the defendant's which seemed obviously improper. Thus, where a workman in a mine is charged with the duty of putting a stage over the mouth of the shaft, and the omission so to do causes the death of a human being, he is guilty of homicide. So where a person charged with the duty of hoisting persons from a mine leaves the engine in charge of a boy known to be incompetent, or a railroad employee neglects to flag a train, or put on brakes, or turn a switch, he is responsible for the injuries resulting therefrom.

53 Regina v. Hughes, 7 Cox Crim. Cas. 286 (1857).
54 Regina v. Lowe, 3 C. & K. 129 (1850).
55 Rex v. Pargeter, 3 Cox Crim. Cas. 191 (1848).
56 Regina v. Elliott, 16 Cox Crim. Cas. 710 (1889).
American law has created a few offenses that can be committed only by narrowly-defined groups of specialists of one type or another. By way of example, the existing New York Penal Law knows a group of involuntary manslaughter (second degree) offenses, committable, among others, through negligence on the part of hunters,\(^6^9\) of machine operators, seamen, steamboat captains and engineers, and physicians,\(^6^0\) as well as gunpowder manufacturers and animal keepers.\(^6^1\) There have been few convictions under these statutory provisions, but nearly all of these make it clear that the criminal negligence required was of the conscious type,\(^6^2\) ordinarily ascertained by reference to prudent professional action under like circumstances.\(^6^3\)

V. SUMMARY AND CONCLUSION: CRIMINAL NEGLIGENCE IN A WORLD OF EXPERTS

For Germany, Jescheck has concluded properly that the morphology of action through criminal negligence, as a problem of criminal theory, has been brought nearer to a solution in recent years, while \textit{per contra}, as a criminological problem, a solution is as yet far distant.\(^6^4\) Particularly important is the discovery of German theoreticians that criminal negligence is to be regarded as a criterion of both the unlawfulness of an action—thus, as an objective ingredient of the crime concept—and as a criterion of the \textit{mens rea}, and thus as a subjective element of the crime concept.\(^6^5\)

American law has had no difficulty with the first characteristic of criminal negligence, namely that of an objectively unlawful action—however difficult it may be in an individual case to decide whether a defendant's action has exceeded the bounds of the permissible. But American law has had difficulty in regarding

\(^{6^9}\) N. Y. Penal Law \$ 1053-c (1953).
\(^{6^0}\) N. Y. Penal Law \$\$ 1052, 1053-e (1953).
\(^{6^1}\) N. Y. Penal Law \$\$ 1052, 1053-e (1953). But in this case the statute seems to impose absolute liability whenever there was the slightest violation of regulatory statutes in the case of the gunpowder manufacturer, or the slightest knowledge of the animal's ferociousness in the case of the animal keeper. See People v. Sandgren, 302 N.Y. 331, 98 N.E.2d 460 (1951).
\(^{6^4}\) JESCHECK, \textit{AUFBAU UND BEHANDLUNG DER FAHRLASSIG KEIT IM MODERNEN STRAFRECHT} 7 (Freiburger Universitätsreden, Neue Folge, Heft 39, 1965).
\(^{6^5}\) Id. at 8 \textit{et seq.}
criminal negligence as a form or a type of *mens rea*. Much more than in continental law, the "moral element," or "guilt element" of a crime, at common law, is understood to be personal conscious wrongdoing or, as stated by this author elsewhere: "Precisely speaking, guilt is not merely objective attribution, but, rather, is a societal finding of a frame of mind, or an attitude, with which the perpetrator created the criminal harm. As such it is not the mere psychic relation between act and actor—participation of conscious psychic forces in the interdicted conduct—but rather it is the awareness, existing at the time of the act and going into its very composition, that the act contravenes the law or expectations of the community. Guilt, or *mens rea*, then, is the known or felt ethico-legal negative value known to the perpetrator at the time of the deed. To this must be added the perpetrator's wish and decision to act nevertheless."\(^{66}\)

Consequently, in American law unconsciously negligent action may well be unlawful, but it is not criminal, for want of a *mens rea*, while consciously negligent (reckless) action is both unlawful and guilty action. The maxim that unconsciously negligent action should not lead to criminal liability has been breached only when severe disasters did retroactively arouse the public clamor for revenge and retribution. The criminal liability of unconscious negligence, however, should not be justified solely by catering to such primeval psychic forces which, hopefully, our society is shedding in turning to a more modern, prevention-oriented law. Nevertheless, we have noted that the trend of American law is probably toward a greater objectification of the standard of criminal negligence, thus, a trend from criminal negligence as a criterion of guilt to one of criminal negligence as a criterion of unlawfulness.\(^{67}\)

This development is the result of permitting the jurors to refer to their own—or a reasonable man's—life experience when determining *what must have been going on in the defendant's mind*.\(^{68}\) But there have been few outright commitments by Ameri-

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\(^{67}\) In this connection see also Perkins, *Alignment of Sanction with Culpable Conduct*, 49 Iowa L. Rev. 325, 360 (1964).

\(^{68}\) Several colleagues of the Benelux countries have likewise recognized the problem of unconscious criminal negligence to be primarily an evidentiary one. See Cornil, *Die Fahrlässigkeit im französisch-belgischen Recht*, 1962 Z.F. Rechtsvergleichung 30, 37 (1965).
can courts—though there have been some by legislatures—accepting unconscious or inadvertent negligence directly as a basis of liability.

This development does not solve the problem. Nor is the problem one which can be solved by criminal law theory. It ultimately is of no consequence whether, from a theoretical point of view, one were to expand the concept of *mens rea* so as to include unconscious negligence within its scope, or whether one were to admit of the punishability of offenders who have caused criminal harm through criminal negligence absent *mens rea*. Nor is it possible to decide at this point whether the problem of harm caused by inadvertently negligent persons is a problem of the criminal law. We know that it is a social problem. We do not know whether the traditional sanctions of the *criminal law* can reduce the number of harms produced through inadvertent negligence. But we would seem to be justified in taking every decently acceptable prophylactic and incapacitative measure to isolate potential or proven human danger sources. If we want criminal law to be understood in this broadest possible sense of danger-preventive law, which sometimes operates with punishments meant to hurt and at other times with preventive measures not meant to hurt, then the problem of inadvertent negligence is properly a question which belongs before a criminal court.

However, it is not going to be easy for the traditional criminal court, composed of judge and jury, to decide those cases which will call for superior knowledge of a multitude of technical specialties, except in traffic cases in which virtually every American claims expertise. Perhaps a new type of tribunal is called for, a tribunal to consist of the defendant's fellow professionals, fellow experts, a tribunal of quasi-official, quasi-administrative character, existing within the defendant's profession and outside the ambit of the regular criminal courts. We should, perhaps, permit our experts at least to run themselves—reluctant though we are to permit them to run our world. But whether we like it or not, we do have a world run by experts—though it may not always seem that way. In any event, we are at the mercy of experts, and in this world of specialized skills every fellow human being is an expert

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69 This is probably true only when *mens rea* is established.

70 This is true regardless of the presence of a *mens rea* in the traditional sense.
of some sort on whose skill we all depend, or whose lack of skill may spell disaster for many. Space catastrophies may be caused by the slightest sloppiness of an insignificant electrician. Nuclear catastrophe could be triggered by the want of care of a plumber. Are we at the mercy of each other's expertise? Are we to be run by experts, or are we to run the experts? The evasive, yet correct, answer to this real question is, of course, that we are permitting the experts to run us, but that we force them to stay within certain limits. We have drawn boundaries, and if an expert oversteps them, we subject him to the penalties of a myriad of regulatory laws. But our present laws have gone a step beyond that, by threatening to impose penalties on experts who *nolens-volens* have inflicted harm. Let us not forget, however, that, when inflicting this type of a punishment, we are acting out of ancient retributive feelings. We are not engaged in wise social engineering—at least, we lack scientific evidence to that effect. Our law governing the protection of society against the negligence of experts urgently needs reexamination and experimentation. Ancient concepts, accepted only because of their antiquity, may no longer be good enough when disasters lurk around all corners and may flow from the hands of good-hearted and kindly fellow human beings. Today's criminally negligent offender is not the same human being against whom the classical concepts and the classical sanctions of traditional criminal law have been created. For criminalists to postpone studies and reform of this problem of criminal negligence of professionals, does indeed amount to professional criminal negligence. It is we who can open or close the emergency doors to purgatory on earth.