

THE ELEMENT OF *MENS REA* IN RECKLESSNESS AND "CRIMINAL NEGLIGENCE"

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A fundamental principle of Anglo-American criminal law is that for conduct to be punishable criminally, there must be a concurrence of criminal intent, the *mens rea*, and of a forbidden act, resulting in a proscribed harm. Based on the premise that criminal sanctions should not be imposed on those who act involuntarily, or without the required criminal intent, the converse of this rule is that criminal sanctions should fall only on those who knowingly violate those rights of others which the state protects. The desirability of requiring *mens rea* represents an ideal, as shown by the fact that the element of criminal intent has been abrogated in the strict liability offenses.

One accepting the desirability of continuing *mens rea* as an element of criminal offenses is hard put to find a rational basis for the concept that homicide resulting from negligent conduct alone suffices for criminal liability, and thus for the concept of involuntary manslaughter. The difficulty stems from a clash between the desire to continue the requirement of criminal intent, with the definitional inconsistencies flowing in the wake of the terms "negligence" and "involuntary," which imply an absence of intent or of even a mental awareness that a risk has been incurred.

Harms caused intentionally and negligently are directly at odds with each other. At one extreme lies intentional harm, properly and traditionally the subject of criminal sanctions. Here the actor adverts to the possibility of harm, and then acts or fails to act either with the express purpose of achieving the harm, or with knowledge that the proscribed harm must inevitably follow his act or omission, however much he may not desire the consequences. At the other extreme lies the negligent conduct sufficient to support civil liability. Here there is an entire absence of intent. The actor neither desires the consequences nor deems them in-

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evitable, if he adverts to them at all. In the language of tort law he creates an unreasonable risk of harm to another. On the basis of an objective standard by which his conduct is later tested, he has failed to act as a reasonably prudent man under the circumstances would have acted. Such harms are to be vindicated in civil courts.

Between these extremes of conduct lies an ill-defined mid-ground, reckless conduct. In brief, reckless conduct is compounded of the elements of the actor's having (1) actual knowledge that a course of conduct he is about to embark upon involves a high degree of risk of causing death or substantial harm to another, and (2) a conscious decision to risk occurrence of the harm. Where these strict requirements are met, the reckless conduct is properly the subject of criminal punishment. While the actor cannot be said to have intended the harm (indeed, he does not wish the harm to occur; he is only indifferent or reckless as to whether it occurs), he has intended at least to risk occurrence of the harm. Where actual knowledge of the extent of danger is required, the conduct lies closer to the pole of intentional harm, but where a court decides it suffices that a reasonable man would have known the danger, the conduct approaches the opposite extreme of negligence.

Two Kentucky cases which point out neatly the essential distinctions between negligence and recklessness are *Commonwealth v. Tackett*¹ and *Largent v. Commonwealth*.²

In the *Tackett* case, the defendant was indicted for voluntary manslaughter. The evidence tended to show he had purchased a truck the day before, and had no knowledge of any defects therein. While rounding a curve at about 35 to 40 m. p. h., he applied his brakes to avoid hitting some children who had run into his path. In so doing, the wheels of the truck locked, causing the truck to run into a group of persons standing at the roadside, killing two. The court, on appeal, affirmed the defendant's acquittal. Whatever the possibility of his civil liability, he was not criminally liable.

¹ 299 Ky. 731, 187 S.W.2d 297 (1945).

² 265 Ky. 598, 97 S.W.2d 538 (1936).

With this case, compare the *Largent* case. There the defendant had known for some time that his car had a defective steering gear. While intoxicated he drove the car at a speed of 50 to 60 m.p.h. In driving, he had at one point deliberately forced another driver off the road by pretending he meant to run into him, and when he succeeded in forcing him off the road, merely looked back and laughed. He persisted in this conduct, and while attempting to pass a car at the crest of a hill, caused a collision which killed another. The defendant was convicted of voluntary manslaughter, despite his contentions the death was "accidental."

In affirming the conviction, the appellate court said, apropos of recklessness:

"Yet appellant, *despite his knowledge . . . , continued to daringly drive his car in reckless disregard of the safety of other users of the road. Such conduct in itself clearly . . . conduced to establish the charged offense of reckless driving, when it was thus so wantonly done with full realization of the danger to which it exposed other users of the highway.*" (emphasis added)

It is apparent here the defendant did not cause the harm inadvertently, as was true in the *Tackett* case. Having chosen to run the risk of causing death or substantial harm to another and having lost, the defendant is criminally liable. It is equally clear that to punish the defendant in the *Tackett* case would be to fly in the very teeth of the fundamental principle that it is only voluntary conduct which should be punished criminally.

In the fields of "criminal negligence" and "involuntary manslaughter," the main problem is a terminological one. The problem stems from the failure of courts adequately and logically to rationalize the desirability of continuing *mens rea* as a fundamental of criminal law in terms which do not carry the non-criminal connotations of the words "negligence" and "involuntary." The cases make it clear that while the courts generally require more than that type of negligence sufficient to support civil liability, they fail expressly to state that criminal liability ought to attach only to voluntary conduct, i.e., reckless conduct, where reckless-

ness is defined to include *actual* knowledge of the danger of harm risked by the defendant.

Hall, in his *Principles of Criminal Law*,³ has accurately stated the problem as follows:

"What rises to prominence in the case-law is not any serious doubt regarding the relevant doctrine, but the inability of the judges to express the difference between recklessness and negligence clearly and their slowness in adopting apt terms even after the essential differences had been articulated. For many years they relied on adjectives qualifying negligence to carry their meaning; they continued to do this long after the adjectives were regarded as mere 'vituperative epithets'."

Variations exist among the courts as to what type of conduct suffices to warrant criminal sanctions. Some courts, usually aided by statute, hold that ordinary negligence suffices; we are not here concerned with such statutes, which either expressly or by judicial construction show a legislative intent to abrogate the need for *mens rea*.⁴ The bulk of the courts, despite difficulties raised by talking "negligence"

³ HALL, PRINCIPLES OF CRIMINAL LAW, 227 (1947). For judicial expositions of the confusion caused by talking in degrees of negligence, see *Andrews v. Director of Public Prosecutions*, 26 Cr. App. R. 34 (House of Lords, 1937), where the court, quoting from an earlier case, says: ". . . to determine whether the negligence . . . amounted or did not amount to a crime, judges have used many epithets such as 'culpable,' 'criminal,' 'gross,' 'wicked,' 'clear,' 'complete.'" Here the court, while it sees the problem, fails to provide any better concept, though conceding that "reckless most" nearly meets the terminological problem. After finding the ideas of *mens rea* and crime and punishment did not clarify the problem, the court went on to say, that for negligence to be criminal, it must be shown ". . . the negligence of the accused went beyond a mere matter of compensation between the subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." Obviously the vice of such a vague test is that it makes for unevenness in the application of criminal laws instead of providing for a fairly definite standard. *But cf.* *State v. Bates*, 65 S.D. 105, 271 N.W. 765 (1937), where the court stated the same terminological confusion and found mere epithets useless, but apparently found the concept of *mens rea* more useful. The South Dakota court required "intentional" conduct such as would show the defendant "consciously realized that his conduct would in all probability (as distinguished from possibility) produce the precise result which it did produce."

⁴ For judicial interpretations of these statutes, concluding that under

and the proper degree needed for criminal liability, make it clear that ordinary negligence is not enough, and that what is needed for criminal liability is recklessness.

The rule that ordinary negligence is not enough for criminal liability has been ably stated in *People v. Wells*,⁵ where the court said:

“. . . the defendant can be held criminally responsible only if his acts under the circumstances constituted a reckless disregard of the consequences of his act, and an indifference as to the rights of others. ‘Mere lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be, do not constitute culpable negligence. There must exist in the mind of the accused, at the time of the act or omission, a consciousness of the probable consequences of the act, and a wanton disregard of them.’ *People v. Carlson*, 187 Misc. 230, 26 N.Y. S.2d 1003 (1941).”

Under this approach, which either expressly refers to recklessness, or inarticulately gropes toward a standard of recklessness though phrased in varying degrees or types of negligence, it has been held one could not be convicted of manslaughter for starting a fire by smoking in bed and then failing in his confusion upon discovering it to give the alarm to others in the house;⁶ where he carelessly shot another hunter believing him to be a deer;⁷ where he caused the death of another when the wheels of his truck locked;⁸ or

them ordinary negligence suffices for a criminal conviction, see *State v. Hedges*, 8 Wash.2d 652, 113 P.2d 530 (1941); *State v. Ramser*, 17 Wash.2d 581, 136 P.2d 1013 (1943); *People v. Carmen*, 36 Cal.2d 768, 228 P.2d 281 (1951); *Wilson v. State*, 70 Okla.Cr. 262, 105 P.2d 789 (1940). For judicial doubts as to the wisdom of such legislation, see the *Hedges* case, which leaves the problem to legislative solution. Note also the highly moralistic tone of the opinion in the *Wilson* case; the validity of this case is doubtful in the light of *Deberry v. State*, ___ Okla.Cr. ___, 219 P.2d 253 (1950), which requires a higher degree of negligence than does the *Wilson* case.

⁵ 186 Misc. 979, 66 N.Y.S.2d 161 (1946).

⁶ *People v. Hoffman*, 162 Misc. 677, 294 N.Y.S. 444 (1937).

⁷ *People v. Joyce*, 192 Misc. 107, 84 N.Y.S.2d 238 (1948). “The killing must be the result of culpable negligence.”

⁸ *Commonwealth v. Tackett*, *supra*, note 1.

where his failure to check an airplane caused the death of a passenger, when a check would have revealed structural defects in the plane.⁹ Similarly, more than the ordinary negligence needed for tort law has been held necessary to support a conviction of manslaughter where the defendant failed to use due care to see that a hawser cleared the deceased's fishing boat, causing the deceased's drowning by knocking him into the water;¹⁰ where he accidentally killed a passenger by driving into a ditch to avoid a collision with an oncoming vehicle;¹¹ or where the defendant killed a pedestrian by failing to observe the full width of a pedestrian crosswalk.¹²

Where the test is phrased in terms of a high degree of negligence, it has been held reversible error to fail to charge a jury as to the higher degree of "negligence" needed for criminal sanctions, as compared to the lower degree sufficient for tort liability.¹³

While it has been held that moral reprehensibility alone is not sufficient to justify a conviction for manslaughter,¹⁴

⁹ French v. State, 235 Ala. 570, 180 So. 592 (1932). "Criminal negligence may not be predicated upon mere negligence or carelessness, but only upon that degree of negligence or carelessness which is denominated 'gross'".

¹⁰ State v. Arnold, 3 Terry 47, 27 A.2d 81 (Del. O. & T. 1942). It must be shown beyond a reasonable doubt that the defendant's "omission or negligence amounted to a reckless disregard for the safety" of others.

¹¹ State v. Bast, 116 Mont. 329, 151 P.2d 1009 (1944). Conviction of manslaughter reversed for failure to show the required criminal intent. The record did not show any evidence of the "evil design, intention, or culpable negligence" necessary to sustain a conviction.

¹² State v. Powell, 114 Mont. 571, 138 P.2d 949 (1943). "The negligence must be aggravated, culpable, gross, or reckless."

¹³ State v. Wright, 128 Me. 404, 148 A. 141 (1929); Shows v. State, 175 Miss. 604, 168 So. 862 (1936). Trial court charged in the Shows case that ". . . culpable negligence is the want of that usual and ordinary care and caution in the performance of an act, usually and ordinarily exercised by a reasonable and prudent person under similar circumstances and conditions." Said the court in reversing a conviction had under this instruction: "Criminality cannot be predicated upon mere negligence or carelessness . . . the instructions given for the state made a conviction on simple negligence, and were improper in a criminal prosecution."

¹⁴ People v. Pace, 220 App.Div. 495, 221 N.Y.S. 778 (1927). Reversible error to charge "culpable negligence" must be "culpable, or blameworthy, or criminal," as under such a charge "the jury might well

courts are quick to affirm convictions based on either some epithetic type of negligence or recklessness, where the facts justify an inference of such conduct. Thus, manslaughter convictions have been upheld where the defendant, knowing the deceased was a diabetic, advised him to forego the use of insulin in favor of a carbohydrate-rich diet and sought to defend his action on the grounds that "insulin is not human—it is not fit for a dog";¹⁵ where he carelessly drove in the wrong lane of traffic;¹⁶ or attempted to pass a car ahead at a very high rate of speed and ran into another car which had pulled almost completely off the highway to avoid the impending collision.¹⁷

Standard By Which the Recklessness Is Measured

While it is clear more than ordinary negligence is needed for criminal liability, the courts disagree as to the proper test of recklessness. Some follow the rule properly applicable to criminal law, as it emphasizes voluntary conduct, i.e., the defendant must be *consciously aware* of the fact that he is creating a situation likely to result in death or substantial harm to another, and he must then risk occurrence of the

have obtained the impression that negligence to the extent of blameworthiness only, failure to use ordinary care (as well as reckless indifference) met the test as to criminal culpability."

¹⁵ *State v. Karunsky*, 197 Wash. 87, 84 P.2d 390 (1938). For a similar case holding a chiropractor criminally liable where he advised a diabetic to forego the use of insulin, knowing the patient to be diabetic, see *State v. Heines*, 144 Fla. 272, 197 So. 787 (1940).

¹⁶ *Zirkle v. Commonwealth*, 189 Va. 862, 55 S.E.2d 24 (1949) (reversed on other grounds).

¹⁷ *Collins v. State*, 66 Ga. App. 325, 18 S.E.2d 24 (1941). While the conduct in this case suggests recklessness, and while the court specifies that more than ordinary negligence is needed for criminal liability, the court continues in a vein disturbingly reminiscent of the misdemeanor manslaughter rule: "But the mere fact that an accident happened through an honest apprehension of the surrounding circumstances, or by reason of a mistake in judgment, will not excuse the person whose act caused it, where such misapprehension or omission resulted from negligence in failing to observe and obey any rule or precaution which it is his duty to observe." For another suggestion that a killing occurring while the defendant is in breach of a statute may be judged by a laxer standard, see *State v. Miller*, 220 N.C. 660, 18 S.E.2d 143 (1942).

harm.¹⁸ Others take the position that while a highly dangerous situation must be created, the defendant need not be aware of the extent or gravity of the danger. These courts hold it is sufficient that a reasonable man in the defendant's shoes *would have* realized the danger in light of the circumstances.¹⁹ This latter position is substantially the position of the *Restatement of Torts*, which, it goes without saying, should apply only to civil liability.²⁰

¹⁸ ". . . The act must be done with the consciousness that injury will probably result, in order to constitute wanton negligence, and such knowledge cannot be implied." *Barnett v. State*, 27 Ala. App. 277, 171 So. 293, *rehearing denied*, 171 So. 296 (1936), *aff'd* 184 So. 702 (1938). "To constitute this offense . . . there must be apparent danger of causing the death of the person killed." *Johnson v. State*, ____ Tex. ____, 238 S.W.2d 766 (1951). Note that the "apparent danger" test, a statutory requirement, is nullified by application of a reasonable man test. ". . . The act was thus wantonly done with full realization of the danger to which it exposed" others. *Largent v. Commonwealth*, *supra*, note 1. The record discloses no evidence of "the evil design, intention, or culpable negligence" required for a conviction of manslaughter. *State v. Bast*, *supra*, note 10, "There must be some action from which the jury might reasonably infer *mens rea* . . . [T]he jury must find . . . the defendant intentionally did something . . . or intentionally failed to do something which he should have done under the circumstances that it can be said he consciously realized that his conduct would in all probability (as distinguished from possibility)" produce the harm. *State v. Bates*, *supra*, note 2. ". . . the fundamental . . . is knowledge, actual or implied, that the act of the slayer tended to endanger life." *Commonwealth v. Aurick*, 342 Pa. 282, 19 A.2d 920 (1941). If "implied" here means actual knowledge is to be inferred from the evidence, then actual knowledge is an element of the crime; however, if it means knowledge imputed on the basis of a reasonable man test, none is needed. See note 23, *infra*. "There must exist in the mind of the accused, at the time of the act or omission, a consciousness of the probable consequences of the act, and a wanton disregard of them." *People v. Carlson*, 176 Misc. 230, 26 N.Y.S.2d 1003 (1941).

¹⁹ "Knowing facts that would cause a reasonable man to know danger is equivalent to knowing the danger." *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944); *Commonwealth v. Bouvier*, 316 Mass. 489, 55 N.E.2d 913 (1944). ". . . the accused must have known, or should have known, that his manner of driving the vehicle created an unreasonable risk of harm." *State v. Bolsinger*, 221 Minn. 154, 21 N.W.2d 480 (1946). In the *Bolsinger* case, though a death had resulted, prosecution was under the Minnesota reckless driving statute, and not under the homicide statutes.

²⁰ For purposes of civil liability, it suffices that a reasonable man in the defendant's shoes would have realized the danger inherent in his conduct, even if in fact the defendant did not realize the danger. Thus,

A third group of states, while not expressly requiring actual knowledge, leaves it unclear whether actual knowledge is needed. Where recklessness is defined in some phrase such as a "callous disregard of human life,"²¹ or a "thoughtless disregard of consequences or a heedless indifference" to the rights of others,²² it is arguable the negative implication of words such as "callous," "heedless," or "thoughtless" is that the defendant must first have knowledge of the rights of others to be free from the infliction of death or bodily harm before he can be callously, heedlessly, or thoughtlessly indifferent to them. But where the test is framed in some specified degree of "departure from what would be the conduct of an ordinary careful and prudent man under the circumstances," as to furnish evidence of "indifference to consequences" or "as to be incompatible with a proper regard for human life,"²³ it is difficult to decide whether actual knowledge is needed. If emphasis be placed on the reasonable man part of this departure test, then any specified degree of departure from the conduct of a reasonable man (unless the departure is so great as to amount to intentional conduct) must be measured against a reasonable man standard, and hence, would require no actual knowledge, since the reasonable man test for purposes of tort liability requires no actual knowledge of the danger created. Perhaps the clue to these cases is to be found in the suggestion that the departure must be such as to import or furnish

in the RESTATEMENT, TORTS, § 500, comment c, (1938), *Appreciation of Extent and Gravity of Risk*, it is pointed out that the defendant's failure to apprehend danger may be "due to his own reckless temperament or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct." It should be noted in this connection, however, that if we accept the premise that it is only voluntary conduct which should be criminally punished—and the premise is a highly desirable one—then obviously the RESTATEMENT position has validity in criminal law only in so far as it requires actual knowledge on the part of the actor as to the gravity of the risk created.

²¹ Zirkle v. Commonwealth, *supra*, note 15.

²² State v. Miller, *supra*, note 16.

²³ French v. State, *supra*, note 8; Shows v. State, *supra*, note 12.

evidence of recklessness, raising the questions of proof to be discussed later.

There is no serious judicial doubt about the liability of a defendant where his conduct meets the strict test of recklessness, i.e., where he knows the danger and risks its occurrence. But accepting the premise that *mens rea* is a desirable element to continue in criminal law inasmuch as it emphasizes the voluntary aspects of conduct, cases applying a reasonable man test in determining criminal liability are wrong on principle. They err in making criminal liability turn on an objective test of intent, whereas traditionally a subjective test is to be applied in criminal law.

In analyzing the cases, it is important to bear in mind the distinction between a state of mind and how that state of mind is proved. Where *mens rea* is required, the state of mind of the accused at the time of his act is determined by a subjective test of liability, one taking into consideration the individual traits of the defendant. On the other hand, the mental test applied in tort cases of negligence is an objective test of liability—the reasonable man test. This test ignores any individual mental traits or defects of the defendant and it makes no difference a defendant was in fact unaware of the unreasonable risk of harm he created; it suffices that a reasonable man under the circumstances, who represents the *community ideal* of behavior, would have realized the risk created.

Since in both civil and criminal cases it is rare that we can know the state of a man's mind, absent an open admission of guilt or testimony to that effect as part of the *res gestae*, proof of the state of mind must necessarily be by *objective* means. Here it is crucial to note that "objective" takes on a meaning different from that which it has in the phrase "objective test of liability." In this context, objective means proof by facts and data which are external in the sense they are physically observable to the trier of fact. It is on the basis of the externally observable aspects of the defendant's conduct that his state of mind must be determined. Only in this sense of external proof can the test of liability in recklessness in criminal cases be called "object-

ive." Hence, it is improper to say that because of the practical necessity of proving a *subjective state of mind by objective means*, the standard in criminal law is an objective one.²⁴

Judicial confusion as to this distinction is seen in *Commonwealth v. Welansky*,²⁵ where the defendant, owner of a nightclub, was convicted for manslaughter for his failure to observe that due care was used in providing proper egress from the club in case of fire. The evidence showed somebody had been remarkably careless in attending to this matter. False doors obscured exits; some exits were locked and others equipped with defective anti-panic hardware. The stairs leading from a basement cocktail lounge were very narrow in light of the many patrons. In the ensuing Coconut Grove fire, scores were burned to death. In affirming a conviction of involuntary manslaughter, the court said, as to recklessness:

"The standard of wanton or reckless conduct is at once subjective and objective . . . Knowing facts that would cause a reasonable man to know danger is equivalent to knowing danger . . . The judge charged the jury properly when he said, 'to constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm.' If the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary

²⁴ The failure of courts to observe this distinction between the *subjective* test as to the state of mind and the *objective means* whereby it is proved is undoubtedly the reason why the Texas courts have nullified the requirement of actual knowledge in the Texas manslaughter statute, which requires there be "apparent danger" on the part of the defendant. This statutory requirement has been done away with by judicial interpretation in *Vasquez v. State*, 121 Tex.Cr.R. 478, 52 S.W.2d 1056 (1932), where it was held the trial court committed no error in refusing to charge that "apparent danger" required conscious awareness of danger. And in *Johnson v. State*, *supra*, note 17, the court stated that whether apparent danger in fact existed "is not to be determined from the viewpoint of the accused alone, but rather from the facts as a whole."

²⁵ 316 Mass. 383, 55 N.E.2d 902 (1944).

man would have realized the gravity of the danger or not . . . But even 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 man under the same circumstances would have realized the gravity of danger. A man may be reckless within the meaning of the law although he himself thought he was careful."

Note that the appellate court's approval of the latter portion of the trial court's charge, which in effect makes ordinary negligence enough for criminal liability, is in conflict with a later portion of the opinion which denies there is any such thing as "criminal negligence" at Massachusetts common law. Further, the conviction in the *Welansky* case was under a statute apparently meant for voluntary harms, inasmuch as the court made a point of approving the statutory form of indictment even though used here for involuntary manslaughter.

"Notwithstanding language used commonly in earlier cases, and occasionally in later cases, it is now clear . . . that at common law conduct does not become criminal until it passes the borders of negligence and gross negligence and enters into the domain of wanton or reckless conduct. There is in Massachusetts at common law no such things as criminal negligence."

To state, as does the court, that the test of wanton or reckless conduct is at once subjective and objective is to state a test which means nothing. The court has confused the subjective state of mind with the objective means whereby it is proved. Properly phrased, the charge to the jury ought to make it clear that whether the defendant had actual knowledge is to be determined from his viewpoint, by a subjective test. But proof of that state of mind must be by means which is objective only in the sense the jury must draw inferences from the evidence presented.

Undoubtedly the *Welansky* case when judged in light of the ensuing holocaust, makes it tempting to relax the strictness of criminal law so as to permit prosecution of those

responsible.²⁶ But such a relaxation also makes possible a conviction on the basis of an objective test of liability. The better rule is to require actual knowledge of the extent and gravity of danger at the time the defendant risked its occurrence, thus preserving to the defendant an additional safeguard against the possibility of a capricious verdict by jurors who, in a fit of moral indignation, might find him guilty when in fact he had no criminal intent.

Where the facts of a case are so strong that it would seem impossible the defendant did not have actual knowledge of the harm, the jury could readily infer such knowledge. Obviously the jury's duty is a difficult one, but one no more difficult than many other conclusions juries are asked to reach. It is equally obvious the rule is not a perfect one, for unquestionably there will be times when actual knowledge is inferred from circumstantial evidence when as a matter of fact (if we could somehow plumb the depths of the defendant's mind) there was no actual knowledge. This is because inevitably a juror in deciding the unfathomable state of another's mind must adjudge that fact in terms of his own experience; thus bringing in the possibility of error in human judgment. But given the limits on human infalli-

²⁶ For a suggestion that particularly outrageous conduct may have caused a relaxation of the strictness of criminal law and a corresponding growth in the law of criminal negligence, see HALL, PRINCIPLES OF CRIMINAL LAW, 225-6 (1947). ". . . one cannot be certain that occasionally, where the negligent behavior clearly violated all standards of decent performance, the grievous consequences did not cause the penal bounds to be extended." An analysis of the cases does not permit, however, any clear cut assertion that the requirement for *mens rea* is correspondingly relaxed as the defendant's conduct increases in moral reprehensibility. The most that can be said on this point is that the more reprehensible the defendant's conduct, in terms of carelessness, the more readily juries can infer he acted with actual knowledge of the danger.

The ethical difficulty posed by requiring actual knowledge of danger is that, carried to its logical limits, it permits those totally insensitive to the rights of others to escape liability, and penalizes those who are aware of others rights, but momentarily forget to heed them. This problem in turn raises questions as to the proper function of criminal law in our society, whether criminal sanctions deter future criminal conduct by sharpening the conscience, and many others. But even conceding validity to the ethical difficulty posed, the fact one may be insensitive to the rights of others is no reason in law why he should not have to pay in civil damages for the consequences of his gross conduct.

bility, the most we can hope for is an approximation of ideals.

Adoption of a test of recklessness requiring actual knowledge of the danger risked would limit criminal liability to voluntary harm. It would necessarily do away with the concept of involuntary manslaughter, and would limit involuntary manslaughter to instances where the legislature has provided for such a crime or where judicial construction of a manslaughter statute is construed so as to permit conviction on the basis of a reasonable man test.

Perhaps the solution to the problem of proof lies in providing for reasonable presumptions which cast upon the defendant, after proof of certain facts, the burden of coming forward to disprove actual knowledge. But whatever the solution, it does not lie in any such statement as "a man may be reckless within the meaning of the law although he himself thought he was careful." Such a brilliant aphorism flows smoothly from the tongue, but at the same time makes possible the conviction of the stupid, the dull, the heedless, and the momentarily careless. Where a man's liberty is at stake and where, even more, he must suffer the stigma of a criminal record, the better approach is to limit criminal liability to voluntary harms, leaving involuntary conduct to be vindicated in the civil courts.

Conclusions

(1) The main problem in the law of "criminal negligence" is a terminological one, which involves reconciling the continuance of *mens rea* as a fundamental of criminal law with the non-criminal connotations of "negligence." These connotations may not be effectively dispelled even though the type of negligence required is some type implying voluntary conduct. It would be better to phrase the test explicitly in terms of recklessness in order to dispel connotations of ordinary carelessness implicit in the use of the term "negligence."

(2) While a few courts, aided by statute, permit ordinary negligence to suffice for criminal sanctions, the bulk of the courts either expressly require recklessness before criminal

liability attaches, or grope toward a standard of recklessness while talking in terms of negligence. As to recklessness, the better rule to apply is that requiring a strict test, i.e., the defendant must (a) actually know the course of conduct he is about to embark upon involves the probability of death or great harm to another, and (b) choose to risk occurrence of harm. This latter test comports favorably with fundamental tenets of criminal law, i.e., that criminal liability should attach only to voluntary harms. This limitation of criminal liability to voluntary harms would in turn dispense with the term "involuntary manslaughter", except where the legislature chose to retain such a term.

(3) Much of the confusion as to the proper test of recklessness stems from a failure to distinguish the *subjective* test used to determine the defendant's state of mind from the *objective* means of proving such state of mind. Objective here means objective in the sense of externally observable conduct which permits an inference as to the state of mind, at the time of the act.