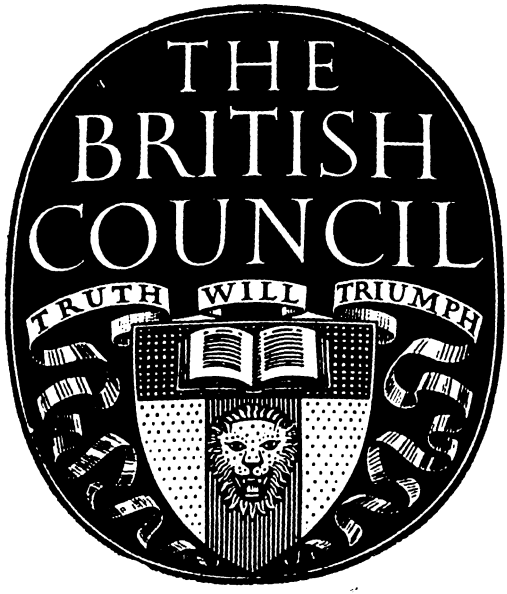
P. J. FITZGERALD

CRIME, SIN AND NEGLIGENCE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CRIME, SIN AND NEGLIGENCE

AN INAUGURAL LECTURE

BY

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THE title of this lecture might seem to open up an area of formidable dimensions. I wish, however, merely to explore the comparatively restricted borderland where these three concepts of crime, sin and negligence converge. My aim is first to examine the theory once very popular among criminal lawyers, according to which crimes may be divided into acts intrinsically wrong, *mala in se*, and acts wrongful only by reason of their illegality, *mala prohibita*. Secondly, I shall try to locate the position of crimes of negligence within this framework.

I

Natural wrongs and moral wrongs, it has been said, are intersecting circles. Many acts of course fall within the common area, being both crimes and offences against current morality—and it is only with current morality that I am here concerned. On the other hand there are many wrongs within the circumference of each circle that fall outside this common area. To take a non-controversial example, lying, generally regarded as wrong, remains outside the ambit of our criminal law. Add certain other factors, such as that the lie was told by a witness before a court and that it relates to a material particular, and the crime of perjury is committed. That the boundary between the illegal and the merely immoral has been at times strangely drawn has been highlighted by nothing so much as by the recent investigation into the treatment of homosexuality. In England (though not in certain States of the United States) adultery and lesbianism are beyond the reach of the criminal law; homosexual conduct between males is not.

My concern, however, is with the other boundary, the line which divides those offences that are *mala in se* from those which are merely *mala prohibita*.[1] The idea of classifying crimes in this

way would seem at first sight perfectly natural. Murder, rape, burglary and most of the major crimes on our calendar are, most people would agree, wrongful quite apart from the fact that they are offences in English law. Gaming in the street or in a public house, however, and shooting game on a Sunday are not now, whatever our ancestors may have thought, generally regarded as in any way immoral. It is interesting to notice that this latter type of crime is invariably the creature of the legislature, which has made, unmade and altered such offences as it has thought fit. Compare this with the former type of offence, which is for the most part the creature of the common law, being defined by judges who thought of themselves as declaring rather than creating law.

Now the idea of differentiating crimes in this way has an ancient pedigree. It is not of course unconnected with the wider and more important distinction drawn between natural and conventional justice. In his *Nicomachean Ethics*[2] Aristotle distinguished that part of justice which is natural and has the same force everywhere from that part which is originally indifferent but which, by being laid down by law, ceases to be indifferent. (Aristotle's example here is the amount of ransom to be paid for a prisoner.) This was but one of the strands from which was woven the theory of natural law, a corollary of which would seem to be the doctrine now under consideration.

The common law history of the doctrine, however, is a curious one. Emerging at the end of the fifteenth century, it was accepted unquestioned by the great legal writers. Coke, and after him Hale and Hawkins, incorporated it in their works, the final seal of approval being set by Blackstone, who, in his *Commentaries*, discusses at length the difference between *mala in se* and *mala prohibita*.[3] The former, he tells us, are prohibited by superior laws and contract no additional turpitude from being declared unlawful by the inferior legislature; the

latter are in themselves indifferent and become right or wrong according as the municipal legislator thinks proper for promoting the welfare of society. This led him to conclude that whereas there is a moral duty not to commit *mala in se* even before they are forbidden by law, so far as concerns *mala prohibita*, one is morally entitled to choose to disobey the law and pay the penalty for disobedience. Laws creating *mala prohibita* according to Blackstone do not bind us in conscience to obey them. Indeed it would be wicked and impolitic if they did, for there are far too many of them.

Reaction soon set in. Blackstone's sternest critic, Bentham, by the scorn which he heaped upon the ancient doctrine seemed to have demolished it, so that in 1822 Best, C.J.,[4] was heard to declare that the distinction between *mala in se* and *mala prohibita* was exploded. When we reach the present century, we find that most current writers on the criminal law have little time for it. Today's textbooks, if they resurrect the doctrine at all, do so only to re-inter it with disrespectful haste.

Yet notwithstanding all that Bentham had to say and despite the views of Best, C.J., and of our modern writers, some traces of the older view remained. Both in this century and the last, important decisions, not all within the criminal law, have incorporated references to it. Indeed in recent years there have not been wanting champions to advocate a resuscitation of the distinction. Sir Carleton Allen has tentatively suggested that it is entitled to more respect than it has received.[5] Foremost, however, in stressing the importance of distinguishing between real crimes (which he terms sins with legal definitions) and mere quasi-criminal offences has been Lord Devlin.[6]

How is it then, we may ask, that the same theory seemed self-evident to the eighteenth-century lawyer, was rejected and derided by nineteenth-century lawyers, and is now being

welcomed in some quarters once again? To answer this let us look first at the arguments levelled against it.

Objections to the theory have sometimes been based on the relativity of morals, at other times on the relativity of law. Men's views of right and wrong, it is argued, vary from place to place, and from time to time. Would heresy and witchcraft, which Blackstone considered *mala in se*, find a place today in this category?

Exposing sickly babies to die was no crime in ancient Sparta. Killing off the aged members of the community has at certain times achieved the status of a moral duty among certain Eskimo tribes. How then can we be so presumptuous as to claim that certain acts are wrong in themselves absolutely merely because they are contrary to the accepted canons of our own society?[7]

This, however, is to overlook the residue of truth enshrined in the ancient classification. Even if we admit that our own moral views, or those of our society, may not be beyond question, even if we allow that different standards have prevailed in different societies, this does not alter the fact that in any society possibly—and in our own society certainly—law and morals on some questions are at one. This means that some crimes are also offences against current morality, but that in the case of others law may have outstripped morality and forbidden conduct for which there is no moral proscription. In other words, against the commission of certain acts, such as stealing, moral as well as legal reasons may be advanced; against the commission of certain other offences such as gaming in the street only legal reasons can be urged. Adherence to the view that crimes can be distinguished in this way does not necessarily commit us to any doctrine of absolute values in morals.

A more subtle attack is mounted on the basis of what I term the relativity of law itself. A prime example offered of a

crime *malum in se* is murder. Yet the offence of murder in English law is by no means the same in all respects as the corresponding offence in certain other legal systems.

In England to kill a person is not murder, or indeed homicide at all, if the victim dies more than a year and a day after the infliction of the fatal injury. Can we really say that killing people is wrong in itself, but only if the victim dies within the prescribed period? Again, stealing is often put forward as an obvious case of an offence *malum in se*. Now in English law a finder of lost property commits larceny if, knowing that by taking reasonable steps he can discover the owner, he nevertheless dishonestly decides to keep the article. If on the other hand he is at first unable to trace the owner and only later discovers the owner's identity, he commits no crime by dishonestly persisting in retaining the property. Is this distinction so obvious that all would agree in holding the first finder guilty of an act unlawful in itself and the second guilty of no offence at all?[8]

This argument too, however, tends to obscure the foundation of truth in the theory. Historical and other factors have shaped the edges of the concept of murder and larceny in English law to produce crimes that differ in detail from their counterparts in other legal systems, but the fact that the definitions have been drawn in curious ways does not alter the fact that the courts and the legislature have been engaged in building on and refining what were in the first place accepted moral concepts of society. The law of murder may change slightly as one crosses from England into Scotland, but underlying both sets of rules is the basic notion of the wrongfulness of killing. Blackstone indeed was aware of this, as is shown by his assertion that it must be left to our own law to decide in what cases the seizing of another's cattle shall amount to a trespass or a theft. It is partly the need for certainty in law that forces legal definitions to proceed beyond the point where

common sense and common morality have halted. The crime of burglary gives us an excellent illustration. Breaking into people's houses with felonious intent is considered more reprehensible if done at night than if done during the day—no doubt because the added factor of night time makes the invasion more alarming. Accordingly, if done at night, the offence is burglary for which the maximum penalty is life imprisonment. If done by day, it constitutes the lesser offence of housebreaking carrying a maximum penalty of fourteen years—a maximum of seven years if no felony is committed. But when does day end and night begin? To this common sense provides no exact answer. In law, on the other hand, precision is necessary and night time has been defined as the time between 9 p.m. and 6 a.m. This arbitrary definition in no way alters the fact that both burglary and housebreaking are considered basically wrongful quite apart from their illegality.

Perhaps the most powerful criticism of the theory was that of Bentham.[9] No act, says Bentham, is wrong in itself. Its rightness or wrongfulness must be judged according to its consequences. If it is likely to produce pernicious consequences, then its prohibition is justified; otherwise its prohibition is improper. Murder, theft and burglary are rightly prohibited, not because they are wrong in themselves but because they produce consequences harmful to others. In this, however, they are no different from the offences claimed as *mala prohibita*, such as betting in public houses, which the legislature has seen fit to prohibit on account of the evil results likely to ensue. Indeed the consequence of some *mala prohibita* may far outweigh in injurious tendency those of certain *mala in se*. Non-payment of taxes[10] may cause more harm than simple larceny. Austin, who followed Bentham in so many matters, declined to go with him on this.[11] To Austin the old distinction seemed eminently reasonable. Some laws, he held, were so obviously

suggested by utility that any person would naturally surmise or guess at their existence. This they could not be expected to do where the utility of the law was not so obvious. Without committing ourselves to any brand of utilitarianism we can surely agree with Austin here. Some actions—whether because of their consequences or for some other reasons—strike us as so immoral that we should condemn them even though they were not illegal. Indeed we should consider a legal system defective that contained no prohibition of such things as murder and theft. In other cases the consequences may not be so obviously harmful, but the legislature in its wisdom after consideration may conclude that it is better for society if certain actions are not done. In some cases the legislature may be mistaken, as was probably the case with the American laws on prohibition. Here we may say that the prohibition is improper, but while the prohibition remains on the statute book, we have a *malum prohibitum*.

Without trespassing too far into moral philosophy, we may object that Bentham too is disregarding the fact—and it is a fact of everyday life—that in our society at any rate some conduct is regarded not only as illegal but as immoral, while certain other behaviour, forbidden by the law-makers sometimes with, and sometimes without, good reason, is reckoned simply illegal. Whether people are right in taking this view I do not here inquire. What I emphasize is that so long as they hold this view, law-makers, administrators and judges remain oblivious to this at their peril.

The arguments, then, that are raised against the doctrine are far from wholly conclusive, and, in some respects, run counter to the facts of everyday life. But the most interesting feature about the criticisms of the doctrine is not what is said but what is left unstated. For there is indeed one vital objection to the classification of crimes as *mala in se* and *mala prohibita*, though

this objection is not to the classification itself but to its employment. The justification for nineteenth-century hostility was surely not the content of the doctrine but the practice of deducing legal conclusions from the doctrine.

Consider some of the uses to which the doctrine has been put. Its appearance on the legal scene in 1496 was made for the purpose of limiting the royal dispensing power. Fineux, C.J., held that while the King could license the subject to commit a *malum prohibitum*, for example, an offence against the law relating to the coinage, he could not license the subject to commit an offence *malum in se*, for example, murder or an act of lechery.[12] The celebrated cases of *Godden* v. *Hales*[13] and *Thomas* v. *Sorrell*[14] in the seventeenth century show lawyers still invoking this distinction to restrict the royal prerogative. In his *Pleas of the Crown*, written in 1746, Hawkins lays down that the King can by no previous licence, pardon or dispensation make an offence 'dispunishable' which is a *malum in se*. He can, however, make dispunishable an offence in its own nature lawful but made unlawful by Parliament. Carrying bell-metal out of the realm and selling wines beyond a certain price are the examples which he gives.

Far more important to the subject, however—if perhaps less interesting to the Crown—was the part played by the doctrine within the criminal law itself. Here it is plain that the doctrine has been influential in helping to mould the law of homicide, the law relating to the defence of ignorance and mistake, and the rules regarding the operation of consent as a defence. In his discussion of homicide Hale[15] declares that causing death accidentally by a lawful act amounts to no offence, while causing it by an unlawful act constitutes manslaughter. What, he asks, if the act is unlawful merely by reason of statutory prohibition? For example, a statute of Henry VIII made it an offence for anyone not possessed of land of an annual value of

£100 to 'keep or shoot in a gun upon pain of forfeiture of ten pounds'. If such a person, in contravention of the statute, shoots at a bird and by mischance kills a bystander, this is not manslaughter, says Hale, for 'though the statute prohibit him to keep or use a gun, yet the same was but *malum prohibitum*'. Here we can see the crucial importance of the distinction. In cases of unintentional killing by means of an unlawful act the defendant's guilt or innocence depended not on whether the act was unlawful, but on whether it was unlawful in itself, *malum in se*. As late as 1792 we find Sir Michael Foster[16] in his *Crown Law* declaring that if a man beats another with fatal results, he is responsible for all the harm he does: 'What he did was *malum in se* and he must be answerable for the consequence of it.'

In homicide the employment of the distinction benefited the accused by restricting the scope of constructive manslaughter and so limiting his criminal liability. More pernicious was its use in other contexts to narrow the application of certain defences. In English law it has long been established that ignorance of law is no excuse, and there is little doubt that the courts were assisted in coming to this view by the fact that the major crimes in our calendar are also forbidden by morality. Even if the accused had not read the latest refinement of the Court of Crown Cases Reserved on the law of larceny, still he knew that stealing was dishonest. Today, however, when we are bombarded by rules and regulations creating new offences, only good fortune helps most of us to avoid breaking the law. And even where the defendant has the good fortune to have the statute or other instrument brought to his notice, such is its phraseology that its meaning may well remain a mystery until a Court gives an authoritative interpretation. Comparison with certain other legal systems, notably in Scandinavia, where non-culpable ignorance of law operates as a good defence,

makes English law in this respect look harsh, archaic and defective.[17]

A more explicit role was played by the doctrine in restricting the operation of the defence of ignorance of fact. Mistake of fact, as contrasted with mistake of law, has always been a good defence. While the citizen is expected to find out the law, the law does not demand that he should ever be misled by his senses, never make an error of miscalculation, and never be mistaken as to the surrounding circumstances. On this beneficial rule a severe limitation was placed by the creation of crimes of strict liability, that is, crimes whose commission requires no criminal intent on the part of the accused.

In 1875 there fell to be decided the case of *Prince*.[18] Parliament in its wisdom had provided, in the Offences against the Person Act 1861, that it should be a criminal offence unlawfully to take an unmarried girl under 16 out of her father's possession against his will. This is exactly what Prince did, except that Prince did not realize, and had no reason to realize, that the girl was under 16. In fact he thought she was 18. Consequently, even if he had been confronted with the relevant section of the statute, on Prince's view of the situation there was nothing to suggest that he was contravening it. This, however, proved no defence. His mistake of fact relating to the girl's age the Court considered irrelevant and immaterial. The ground for this was partly that what Prince did was unlawful in itself, so that if the girl turned out to be under 16 he acted at his peril. Note the language of Baron Bramwell, whose judgment was concurred in by no less than six of the other members of the court: 'The act forbidden is wrong in itself.... I do not say illegal, but wrong.... I say that done without lawful cause [it] is wrong and that the legislature meant that it should be at the risk of the taker whether or no she was under sixteen.' That the judges have not always approached the criminal law

in such an illiberal spirit can be seen from the celebrated case of *Tolson*[19] which followed Prince fourteen years later. Mrs Tolson, having good reason to believe her husband dead, remarried and was charged with bigamy. Now the Offences against the Person Act 1861 provided a special defence to the effect that a person should not be guilty of bigamy if her husband had been continually absent for seven years and was not known to her to be still living. Unfortunately, Mrs Tolson had not waited seven years because she already firmly believed her husband was dead. It was contended by the prosecution that this statutory defence by implication excluded any defence of mistake in a case like Mrs Tolson's, where the defendant had not waited the full period. The court held however that the defence was good. Of the judges who had convicted Prince, three sat in this case and were for convicting Mrs Tolson. Once again it is instructive to observe the language used by the members of the court. Tolson differed from Prince, said Cave, J., 'because had the facts been as Tolson thought, her conduct would have been not only not criminal but also not immoral'. 'Both legally and morally', asserted Hawkins, J., 'there was an absence of that *mens rea* which is an essential element in every charge of felony.' 'The conduct of the woman', declared Stephen, J., greatest of our criminal lawyers, 'was not in the smallest degree immoral, it was perfectly natural and legitimate.' Wills, J., considered that the guilty intent required by the offence was 'not necessarily that of intending the very act or thing done as prohibited by statute or common law, but it must at least be the intention to do something wrong. It may be to do a thing wrong in itself. . .'; and as examples he suggests fornication and seduction.

If I have lingered unduly on these two cases, it is to stress by their comparison the fact that fifty odd years after the death of Bentham the courts were still using the discredited distinction

to decide whether or not to allow the defence of ignorance of fact to apply to these statutory offences.

We may find the same considerations operating with regard to the defence of consent. In English law one may consent to the application of a certain degree of force and by such consent render what would otherwise constitute a battery a lawful act. Were this not so, every handshake would amount to battery, no one could submit to an operation and no one could take part in a boxing match with impunity. In the case of *R.* v. *Donovan*[20] the accused was charged with common assault and indecent assault. Though his appeal was allowed on another point, it is interesting to see as late as 1934 a court laying down that if an act is *malum in se*, that is in itself unlawful, consent cannot convert it into an innocent act.

In cases not concerned with the substantive provisions of the criminal law the distinction has been referred to and brought into play. *R.* v. *Martin*[21] in 1956 raised a problem of jurisdiction. The Civil Aviation Act 1949 contained a provision that our courts should have jurisdiction to try offences committed on British aircraft. The question was whether this provision applied to the carrying of drugs, an offence contrary to the Dangerous Drugs Act 1951 and the Dangerous Drugs Regulations 1953. In quashing the indictment and holding that the provision had no application to this sort of case, Devlin, J. (as he then was), observed that 'a distinction may be drawn between offences which are offences against the moral law, to be regarded as wrong wherever committed, and offences which are merely breaches of regulations that are made for the better order and government of a particular place, such as a public house, or a particular area or a particular country'.

Outside the criminal law the distinction is obviously less important. It has some significance, however, in the law relating to wills. Testators often annex curious conditions to the

legacies they bequeath, sometimes even requiring the fulfilment of unlawful conditions. The law here is that if the condition is merely *malum prohibitum*, the condition is void and the gift valid; if it is *malum in se*, the gift too is void and fails. A gift to 'such of D's children as live to be 30 and do not reside with their father D' was held to involve a condition which was *malum prohibitum* so that the children took the gift free of the condition.[22]

The distinction is also relevant to the rules regarding the equitable remedy of injunction. A leading writer on equity asserts[23] that this remedy is wholly inappropriate to prevent the commission of a crime *malum in se*.

Consideration of the uses made of the doctrine in these cases then begins to make clear the objection to the doctrine. The very idea of law is that, within certain important fields of conduct, rules laid down in black and white should be substituted for the vaguer norms of current morality, fair dealing, courtesy and so on. Indeed the development of the common law is very largely the supersession of moral by legal rules. The advantage of this of course is that vagueness gives place to certainty; and this in its turn means, first, that the individual knows beforehand how to arrange his activities so as to keep within the confines of the law, and secondly, that the citizen will be governed by rules and not by men. No wonder, then, that the sort of judicial reasoning exemplified above should have encountered such hostility. Would not most of us agree with the critics of the doctrine on this, that if the law is to be such that important decisions will turn on whether a particular offence is wrong in itself or merely prohibited by law, then the law should lay down explicitly the criteria by which offences come to fall within these two categories; or else it should at least specify an exhaustive list of *mala in se*? What should not happen is that it should fall to be decided by courts relying solely on their own individual feelings on the matter.

As a legal distinction, then, there is everything to be said against it. This once admitted, let us not forget that as an extra-legal distinction its significance is tremendous. It would be folly to forget that, as Stephen long ago pointed out, to the ordinary man a criminal is not just someone liable to be punished, but someone who ought to be punished;[24] or to overlook the fact that there is a moral, as well as a legal, classification of crimes. Blackstone spoke truly when he said that in common usage the word 'crimes' is made to denote such offences as are of a deeper and more atrocious dye.[25] Though this distinction should have no place within the law, the fact that it is made outside the law is of great importance. That this is so can be seen from a consideration of the position of crimes of negligence.

II

If one had asked Blackstone whether crimes of negligence were *mala in se* or *mala prohibita*, no doubt he would have answered, 'Neither'. For, with one important exception, our criminal law knew nothing of negligence. While the slightest assault was an offence, serious injuries caused by carelessness were not. To steal a halfpenny was a crime; to burn down a house through negligence was not. In such cases our law took the view that punishment did not apply, and left the victims to look for compensation in the civil courts.

The one important exception concerned the case where negligence resulted in the victim's death. Here, provided the negligence was of a very high degree, the offence of manslaughter was committed. So, at the one stage where the civil law stopped short—it having long been a rule that it was no civil wrong to cause the death of a human being[26]—at this one stage the criminal law took note of negligence.

In the course of time Parliament made inroads on the

reluctance of our criminal law to penalize carelessness. The Submarine Telegraph Act 1885 made it an offence to destroy a submarine cable by negligence. By the Merchant Shipping Act 1894 it was provided that it should be an offence for a seaman through drunkenness to commit an act tending to the destruction of his ship. These, however, were but isolated instances, and as yet there was nothing in the shape of a general offence of causing harm by carelessness, or of behaving so carelessly as to be likely to cause harm. It was the arrival of the motor-car that gave negligence its real entry into the criminal law.

Although we generally conceive of the criminal as a thief or a thug, today's criminal is most likely to be a motorist. Today more than half the convictions recorded in our courts are for driving offences. In 1960 motorists accounted for 60 per cent of the total number of convictions. The vast majority of these convictions were of course due to negligence; for the offences contained in the Road Traffic legislation, ranging from speeding to causing death by dangerous driving, are for the most part essentially crimes of negligence.

Yet while the ancient distinction between *mala in se* and *mala prohibita* has fallen out of favour, ordinary people outside the law commonly differentiate *real* crimes from mere *technical* offences. In ordinary speech the word 'criminal' is reserved for those who commit crimes of violence and dishonesty. No matter how many convictions a man has for dangerous or careless driving, these will not earn him the title 'criminal'. Again, people who form limited companies frequently provide in the Articles of Association which regulate the companies that directors convicted of indictable offences shall automatically cease to be members of the board; but frequently a rider is added to prevent this provision from applying to directors convicted of driving offences. This favourable attitude to

motor crimes can be seen in the working of the law itself. In some courts special days are set aside for trying motor offences. Convictions for such offences are often placed in a separate category when a defendant's previous convictions are listed. Perhaps most noticeable of all is the unwillingness of juries to bring in verdicts of 'guilty' in prosecutions under the Road Traffic Acts, so much so that judges have been heard to lament that juries are so untrue to their jurors' oaths that it has become impossible to procure a conviction for dangerous driving. Were such critics to reflect on the history of the criminal law, they would realize what seems in effect to have escaped them, namely, that the public today, and the juries drawn from the public, are merely evincing the self-same reluctance to punish carelessness as was formerly felt by the courts. This being so, let us examine why it is that lawyers have felt unwilling to penalize negligence.

Various reasons suggest themselves for the failure of negligence to find a place in the criminal law. Negligence is in essence a failure or omission to take care, and our law, both of crime and of tort, has leaned heavily against penalizing omissions. Secondly, the view has been advanced that, since the man who behaves negligently is not in general adverting to the consequences of his action, punishment will be pointless because he will no more have the idea of the penalty before his mind than the thought of any of the other possible results of his behaviour.[27] Though this theory has been shown in some respects to be erroneous, its popularity among lawyers may well have contributed to the barring of the gates of the citadel against negligence. Then again, the plain man's reaction to one guilty of carelessness, particularly a motorist, is 'There but for the grace of God go I'. For unlike the thief, the erring motorist is not a professional criminal. 'A juryman', it has been remarked, 'still hesitates to convict a motorist of manslaughter,

even in the most flagrant cases, because he unconsciously feels there is no broad gulf between himself and the motorist in the dock. There is thus a conflict between the theory of the law and its application by juries, which causes much confusion.'[28]

Now while it is true that carelessness has only recently gained entry into the criminal law, for some time it has played a prominent role in the civil law of tort. Accordingly, it is in this context that are to be found most of the observations that shed light on this problem.

Negligence consists in failing to take due care. The standard of care that is demanded is an objective standard, varying from situation to situation. One is required to be more careful, for instance, when handling a loaded firearm than when handling a hosepipe. The way lawyers put it is that one is expected to take the care that a reasonable man would take. Though it is not always made clear that the reasonable man is not just the average man, but that the concept of the reasonable man imports a value judgment, this does emerge from time to time when courts hold in certain cases that the general practice of the community falls short of the reasonable standard of care.[29]

Here there is a curious discrepancy in legal thinking. Or rather there is a curious failure to think the problem through to a conclusion. Negligence is perennially contrasted with torts of strict liability, such as the rule of *Rylands* v. *Fletcher*,[30] and the rule relating to liability for damage caused by dangerous animals. In strict liability torts a defendant may find himself liable to pay damages to the injured party without any fault or wrongdoing on his own part. Suppose the defendant has a savage dog, which, unknown to him and against his express instructions, is let loose by some third party and injures the plaintiff. Here English law holds the defendant liable.[31] By making the defendant compensate the plaintiff in this sort of case our law is in reality putting the defendant in the position

of an insurer. 'If you do keep a savage animal', says the law, '—and there's nothing wrong in that—you must be prepared to foot the bill for any mischief it causes if it escapes, quite regardless of whether its escape is due to your fault or not.' Contrast the case of negligence, where the defendant is held liable to the plaintiff because he has been at fault, because he has failed to take the course which he *ought* to have taken.

Closer inspection, however, of the tort of negligence reveals that it is not just simply a case of liability for fault. Negligence consists in failing to take due care, but the failure may be due to a variety of circumstances. Quite possibly the defendant saw that his behaviour entailed a certain risk but chose to disregard the risk. If the risk was not one which a reasonable man would have disregarded, then the defendant is blamed for running an unjustifiable risk. On the other hand it may well be—and this is by far the commonest type of negligence—that the defendant acted inadvertently or absent-mindedly and failed to pay attention to the danger. Yet again, the cause of the accident may be some error or miscalculation on the defendant's part: he may have misjudged the speed or distance of an oncoming vehicle, making a mistake which the reasonable man would not have made. Or finally, the cause may lie in the defendant's own innate clumsiness, awkwardness, or 'ham-handedness'. To the first of these four cases, that of deliberately running an unjustifiable risk, moral blame will attach in the eyes of most people. Equally clearly it will be withheld from the last case, that of congenital clumsiness. The two intermediate cases are far from clear. We are of course inclined to blame people for not paying attention to what they are doing or for misjudging and making mistakes. At the same time we temper our reproof with the reflection that all of us make mistakes from time to time and every mind has been known to wander.

But if the moral answer is uncertain, the legal position is quite clear. The standard of care demanded is an objective one. This means that the clumsy and the absent-minded, the mistaken and the reckless pay alike for their carelessness. For this reason some writers have contended that negligence and moral fault do not coincide. 'The fault', said a leading American authority on torts, 'upon which liability may rest is social fault, which may but does not necessarily coincide with personal immorality. The law finds "fault" in a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual.'[32]

'To do the best he could have done', says another writer,[33] 'is not necessarily enough for a defendant to an action for negligence.' Again, one final citation, 'if for instance', says Holmes, 'a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect. His neighbours accordingly require him, at his proper peril, to come up to their standard and the courts which they establish decline to take his personal equation into account.'[34]

For all the importance, then, that negligence has gained in the civil law, its comparative failure to find a place within the criminal law would seem to be symptomatic of a hesitation on the part of lawyers to stigmatize carelessness as a moral failing. This being so, a brief glance at the observations of moralists outside the law may prove instructive. The professional moralist is a relatively rare breed. A cursory look at one or two of the older philosophers and at some standard works on moral theology is all that can be undertaken here.

Aristotle certainly took the view that carelessness involved moral culpability. In treating of involuntary actions he

asserts that some are excusable but others not. Ignorance will prevent an action from being voluntary, but when the agent is himself the cause of his own ignorance and he does something in accordance with the ignorance of which he is himself the cause, then he is guilty of injustice and such a person will justly be called unjust.[35] He goes on to contrast ignorance due to drunkenness with ignorance due to nature, for example, the ignorance of children. Elsewhere,[36] dealing with mistake as an exculpating factor, he argues that it is not ignorance of the universal (for that men are blamed) but ignorance of particulars which causes involuntary action, thus anticipating Holmes in his *Common Law* and the House of Lords in *D.P.P.* v. *Smith*.[37] Holmes (*Common Law*, 56), in discussing the defence of mistake of fact, points out a difference between the case where a man is ignorant of some particular circumstance, and the case where he fails to foresee the consequence of his act. His contention is that a genuine mistake as to particular circumstances will always avail the accused, but that a mistake as to the consequences of his act will only avail him if it is a mistake which an ordinary prudent man would make. 'The law requires [men] at their peril to know the teachings of common experience' (p. 57), that is, Aristotle's 'the universal'. This view was accepted by the House of Lords in Smith's case, where the respondent's conviction for the capital murder of a policeman was restored. Their Lordships held that the right test to apply in that case, where the respondent threw a police officer off his car into the path of an oncoming vehicle with fatal results, was the test of what a reasonable man would contemplate as the probable result of Smith's acts, and not what the respondent himself actually contemplated. In this, then, the House of Lords was adopting an idea adumbrated by Aristotle.

According to Aristotle actions could be graded in order

of culpability. Where harm results from misadventure, that is, the result is contrary to reasonable expectation, no blame attaches. When the result is not contrary to reasonable expectation, we have cases of accident and mistake—mistake where the fault originates in the agent, accident where the fault is outside—and here the action may be culpable, but does not imply vice. Acts done with knowledge but without deliberation (for example, from anger) are acts of injustice, but the doer is not unjust. Finally, harm done from choice renders the doer an unjust man.[38]

To Aristotle, then, carelessness, though less culpable than deliberate wrongdoing, nevertheless might merit blame. The same attitude is to be found in Aquinas. 'Negligence', claims Aquinas, 'denotes a lack of due solicitude. Now every lack of a due act is sinful; wherefore it is evident that negligence is a sin.'[39] Later he argues that 'he who does not remove something whence homicide results, whereas he ought to remove it, is in a sense guilty of voluntary homicide', for example, where a man causes another's death through occupying himself with unlawful things which he ought to avoid, or where he does not take sufficient care.[40] Like Aristotle, Aquinas too considered negligence less culpable than deliberate wrongdoing, on the ground that transgression is contrary to a virtue, while omission is merely the negation thereof, transgression being a graver sin than omission.[41]

The illustration given by Aquinas of homicide suggests that his concern was only with negligent behaviour resulting in harm. Little or no account seems to be taken of carelessness that is only potentially harmful, but dangerous nevertheless. But then, of course, all this was written long before the internal-combustion engine had increased man's power to inflict injury on his fellow-men. To discover the attitude of the moralist to carelessness in this modern context, let

us examine the remarks of some modern writers on moral theology.

A glance at a typical modern handbook on moral theology is strangely revealing.[42] First of all one finds that the treatment of negligence is extremely scanty. Secondly, and most interesting for the lawyer, the pages of such a manual read as the lawyer's textbooks on tort must have read a century ago. Today perhaps the central seat in the English law of tort is occupied by the tort of negligence. A hundred years ago, however, no such general tort existed. There was instead a multiplicity of situations in which it was held that one man was under a duty to take care not to injure another. Innkeepers, common carriers and surgeons, for example, were held to owe such a duty or care.[43] If the case fell outside the limits of these duty-situations, careless infliction of damage did not constitute a tort.

It was not indeed until 1932 that a general duty to take care for the safety of others could be said to have been established.[44] Likewise with some of the moral theologians of today. The reader will search in vain for any principle to the effect that one is always under an obligation to take reasonable care for the safety of others. All that is generally to be found is a catalogue of professions and callings where there is a moral duty to exercise due care. Doctors, lawyers, parents, teachers and so on must exercise care in their callings. Any general principle is conspicuous by its absence.

There is a further similarity between the lawyer's and the moral theologian's treatment of negligence. In English law negligence is largely a matter for civil law and compensation, rather than for criminal law and punishment. Now in textbooks of moral theology it is common to find negligence treated within the sections devoted to Justice and Injustice. But when the moralist deals with acts of injustice, his prime

concern is with compensation or restitution. He, too, then appears to regard carelessness as a matter for compensation between the parties rather than for punishment. Moreover, since compensation is his main interest, little attention is devoted to carelessness not resulting in damage or injury.

Both lawyers and moralists alike have shown themselves disinclined to regard negligent behaviour as seriously culpable morally. Small wonder, then, that the plain man is equally hesitant, and that where Parliament has stepped in to prohibit negligence by the criminal law—notably in the field of road traffic—the plain man has refused to look on such crimes as *real* crimes. Nor is it any use bewailing the fact that juries will not convict. This is but one symptom of a general attitude to the problem of the moral culpability of carelessness.

If the objects of the Road Traffic legislation are to be achieved, that is if bad drivers are to be kept off the roads, then there would appear to be two alternatives. On the one hand we could accept the fact that people do not regard carelessness as seriously immoral, and that in those circumstances the criminal law will be a comparatively ineffective instrument in this context. This would suggest that a more successful approach to the problem of the motorist would be to remove the entire matter from the criminal courts. Instead, the accent might be put on accident prevention. Perhaps here the legislature could learn from the system of accident prevention in the case of aircraft. Here pilot error is not generally penalized as criminal, but a pilot who proves accident-prone may be temporarily suspended or relieved of flying duties altogether. Similarly, temporary or permanent disqualification from driving, not as a punishment but as a preventive measure for the safety of others, could entirely take the place of our present category of penalties. Moreover, just as flying accidents are normally investigated by panels of officers, all or most of whom are themselves

experienced pilots, so it might be more satisfactory if inquiries into road accidents took place before boards of motoring experts rather than before magistrates' courts or juries. Nor need it be imagined that such boards would be unduly lenient to the careless driver. Similar panels of aircrew officers have not proved unduly tenderhearted. In this event the criminal law would be reserved for dealing only with those who deliberately disobeyed the law, that is, those who persisted in driving after being disqualified.

Alternatively, if the present law is to be retained, but become effective, people must be persuaded to look at carelessness in a more serious moral light. If the idea gained ground that negligence on the roads is immoral, then the public would accept the infliction of penalties for bad driving, and the juror would begin to feel a gulf separating him from the motorist in the dock and would accordingly be more ready to convict. Offences against the rules of the road would then be regarded not as mere technical offences but as real crimes, *mala in se*.

In recent years evidence is to be found of a move towards this attitude in the writings of certain moral theologians. It is now fairly widely contended that traffic laws are not mere penal laws, that is, laws which, as Blackstone would have said, one is entitled morally to break provided one pays the penalty laid down by law; traffic laws, it is urged, are laws which oblige in conscience. Prominent among this school is Janssen of Louvain[45] who argues that voluntary disregard for these rules involves disrespect for one's own life and for the lives and property of others, and is therefore sinful. Nor does it matter, he asserts, that in a given case no actual injury follows. As for the claim that such laws are merely penal laws, as has been said to be the case with customs and excise legislation, he writes 'Il n'y a pas lieu d'en appeler à la théorie des lois purement pénales. Ces règles ne sont qu'une détermination ou une application de la

loi naturelle dans une matière de la plus haute importance pour le bien de tous.' In the same vein another leading writer, Häring,[46] asserts that the citizens of a state have the moral duty to respect laws laid down for the security of the citizen body and this includes the duty to conform to rules laid down regarding road traffic. Nor can any road user disregard such laws on the basis that they are merely penal laws.

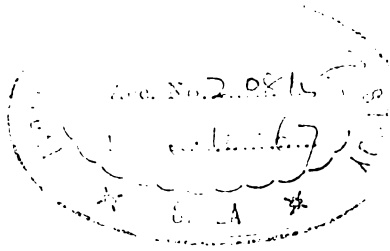
Whether or not this view gains widespread acceptance, and whether or not the average man in England ends by taking the view that there is a moral duty to abstain, not only from deliberately injuring others, but also from endangering by negligence the safety of others—whether or not this happens, this much is clear, that the ancient distinction between *mala in se* and *mala prohibita* may deserve to be expelled from the inner citadel of the criminal law itself, but its influence is still powerful in the world outside. Legislators who blind themselves to this invite disregard of, and contempt for, their laws. While the pernicious implications of the distinction as a doctrine of law amply justify its being discredited as a doctrine, the underlying truth it enshrines is as valid today as it was in the time of Blackstone.

NOTES

1. See 30 Col. L.R. 74 (1930) on the history of this distinction.
2. *Nicomachean Ethics*, 1134*b*–1135*a*.
3. 1 Blackstone's *Commentaries*, 54-8, 4 Blackstone's *Commentaries*, 42.
4. In *Bensley* v. *Bignold* (1822), 10 E.R. 1216.
5. *Legal Duties*, 238.
6. Presidential Address to Holdsworth Club, Birmingham, 17 March 1961.
7. J. W. C. Turner in *Modern Approach to the Criminal Law*, 220.
8. See (1956) 74 L.Q.R. 318–19.
9. Bentham's *Works*, 1 (Bowring), 193.

10. Tax laws, many moralists have contended, are only penal and merely oblige the citizen to accept the penalty inflicted for their transgression. See Jone, *Moral Theology* (15th ed.), 132.
11. Austin's *Lectures* (5th ed.), XXV, 484; XXXII, 572.
12. YB Mich 11 Hen. VII f 11 pl. 35 (1496).
13. 6 St.T. 1165.
14. Vau. 330.
15. 1 Hale P.C. 475.
16. *Crown Law* (3rd ed.), 259.
17. Mueller, *Essays in Criminal Science*, 217–35.
18. (1875) L.R. 2 C.C.R. 150.
19. (1889) L.R. 23 Q.B. 168.
20. [1934] 2 K.B. 498.
21. [1956] 2 Q.B. 272.
22. *Re Piper* [1946] 2 All E.R. 505.
23. Hanbury, *Modern Equity* (7th ed.), 572–3.
24. Stephen H. C. L. ii, 75–6.
25. 4 Bl. Com. 5.
26. *Baker* v. *Bolton* (1808) 1 Camp. 493.
27. Hall, *Principles of Criminal Law* (2nd ed.), 137.
28. Paton, *Jurisprudence* (2nd ed.), 310.
29. *Barkway* v. *South Wales Transport Co. Ltd.* [1950] A.C. 185.
30. (1868) L.R. 3 H.L. 330.
31. *Baker* v. *Snell* [1908] 2 K.B. 825, followed in *Behrens* v. *Bertram Mills* [1957] 2 Q.B. 1.
32. W.L. Prosser, *Handbook of the Law of Torts* (2nd ed.), 15.
33. Seavey, 41 H.L.R. 1.
34. Holmes, *The Common Law*, 108.
35. *Magna Moralia*, 1195*a* 27; cf. *Nic. Eth.* III, 5, 1113*b* 30.
36. *Nic. Eth.* III, 1, 1110*b*.
37. [1961] A.C. 290.
38. *Nic. Eth.* V, 8, 1135*b*.
39. S.T. II II Q. 54 1.
40. S.T. II II Q. 64 Art. 8.
41. S.T. II II Q. 79 4.
42. Davis, H., *Moral and Pastoral Theology* (7th ed.), II, 327; *Moral and Pastoral Theology, A Summary*, 179.

43. Winfield 34 Col. L.R. 41 (1934).
44. In *Donoghue* v. *Stevenson* [1932] A.C. 562.
45. *Ephemerides Theologicae Lovanienses*, XXXIV, 3, p. 522 (1958); and see the literature there cited.
46. Häring, *La Loi du Christ*, III, 377. I am indebted for this reference and for the reference in note 45 above to the Rev. M. L. Fitzgerald, W.F.



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