

## *The Possibility of Pure Negligence\**

Gary Watson

The culpability of negligence is not the culpability of choice, but rather of failing to bring to bear one's faculties to perceive the risks that one is taking.

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### 5.1 Negligent Inadvertence

This chapter defends the existence of negligence, understood as a form of inadvertent moral wrongdoing for which the wrongdoer is presumptively and non-derivatively responsible and blameworthy.<sup>2</sup> The wrong in question is failure of "due care." This formulation is not meant as a full and exact definition of negligence but as a characterization of the phenomenon under consideration here, namely, negligent inadvertence. Perhaps not all negligence involves inadvertence, and not all wrongful inadvertence is negligent. I'll leave these questions open.

Here's an example, close to home. As I often do, because he finds it thrilling, I am raising my two-year-old grandson high above my head. This time I come too close to the ceiling fan, and one of its blades strikes his head. He is stunned and in pain. Fortunately, he is not significantly injured. After a hard cry, he is comforted and becomes happily engaged in other games. Apparently, he doesn't hold the incident against me,

\* I am grateful for valuable discussion with several audiences, but especially for comments by Marcia Baron, David Copp, and Jeff Helmreich. This chapter develops some views that I first entertained in Watson, "Raz on Responsibility"; I lean on that article here, as well as on the two chapters in Raz, *From Normativity to Responsibility*, on which the article was a commentary.

<sup>1</sup> Fletcher, "Toward a Theory," p. 415.

<sup>2</sup> I understand (moral) negligence as a category of (moral) fault and hence as conceptually tied to "responsibility." On this understanding, the issue is not whether someone who acts negligently can be responsible or at fault – that is conceptually true – but whether negligence can occur. For this understanding, see also Baron, "Culpability, Excuse"; Clarke, *Omissions*; and Hart, "Negligence, *Mens Rea*," p. 137.

though he would have cause for doing so. Everyone on the scene is alarmed and concerned by the accident. But I feel responsible, and rightly so. I was careless – insufficiently mindful of our surroundings. I put him in danger when I should and could have protected him.

## 5.2 Skepticism about Pure Negligence

As commonsensical as this assessment seems to me to be, skepticism about negligence, as understood here, is widespread. Skepticism asserts that all blameworthy wrongdoing must ultimately derive from intentional or knowing violation of moral requirements. A major root of this conviction, I think, is an idea about attributability, an idea that is vividly captured by Peter Abelard: “Nothing taints the soul but what belongs to it, namely the consent that . . . is alone the sin.”<sup>3</sup> Thought and behavior that originate independently of “consent” merely “belong” to the body or in any case to something other than oneself. Only consent implicates one in unexcused wrongdoing. It follows that inadvertent action or omission is not attributable to someone unless it is derivable from that person’s “consent.”<sup>4</sup> Since I didn’t mean to thrust my grandson into harm’s way, I can be blamed for doing so only if that can be traced in the right way to something I wrongly meant to do, only if my blameworthiness is derived. (I’ll comment on the derivability qualification shortly.)

The worry about inadvertent behavior is ultimately a worry about attributability or ownership. Non-skeptics about negligence face a challenge. If a mishap is due merely to stumbling or fumbling or forgetting on my part, then how is this particular outcome to be distinguished from everything else that causally emanates from my movements or physical position and location?<sup>5</sup> The imputation of what is merely inadvertent would be completely indiscriminate.<sup>6</sup> In contrast, when I recklessly or purposely create a substantial risk of harm, my advertence normatively “connects” me to the risk and its materializations because it amounts to an

<sup>3</sup> Abelard, *Ethical Writings*, p. 10.

<sup>4</sup> Rosen, “Skepticism,” p. 307, writes: “Responsibility for action done from ignorance is invariably a matter of derivative responsibility: One is responsible for the act done from ignorance only if one is independently responsible for something else.”

<sup>5</sup> For simplicity of exposition, I assume here that we can include omissions in the causal order. Certainly, they figure centrally in our ordinary explanations.

<sup>6</sup> In a discussion of the criminal law of negligence, Hart, “Negligence, *Mens Rea*,” puts the worry nicely: the offense rests on the “repugnant doctrine that a man may be criminally liable for mere inadvertence when, through no failure of his to which the criminal law could attach importance, his mind is a mere blank,” p. 147. According to Hart, this worry is wrongheaded.

acceptance of (or consent to) their possibility, even when I regard them as highly regrettable. In that case, I cannot simply disown them, as though they had no bearing on me as an agent – I have “authorized” or consented to what I have done. That’s the significance of advertence.

If this were the only ground of ownership, then non-derivative or (as I will sometimes call it) pure negligence<sup>7</sup> could not occur. Non-skeptics (such as myself) must say that “consent” doesn’t get to the bottom of things. Importantly, everyone (except skeptics about responsibility in general)<sup>8</sup> agrees that acting with purpose, foresight or intention *suffices*, typically, for responsibility. And we can learn from this point of agreement. If we can identify more exactly what it is that grounds responsibility in advertent cases, we might discover that the same basis can obtain without advertence.

To anticipate, what we learn from this investigation is that what we own goes beyond what we authorize. We cannot restrict our responsible agency to the ambit of conduct guided by foresight, intention, or concern, without dissociating ourselves from the fundamental agential capacities exercised in such conduct. That’s how I propose to meet the skeptical challenge.<sup>9</sup>

In my view, morally responsible agency is constituted by our powers of reflective self-governance. Advertent conduct is only one way in which those powers are exercised. Agential control is not (and could not be) solely a matter of volitional or voluntary control; it should instead be understood in terms of our reason-sensitive capacities in general. Those who act negligently fail to respond to considerations to which they should and could have responded. Negligent inadvertence, even in its pure (underived) form, is not “mere” inadvertence or mishap; it is inadvertence that is related in a special way to our reason-responsive competences and responsibilities. Advertence-based and negligence-based responsibility thus have a common root.

<sup>7</sup> This phrase is used in more or less this sense in Sverdlik, “Pure Negligence,” a paper with which I am very largely in agreement. See too Gideon Rosen’s contribution to this volume, “The Problem of Pure Negligence” (Chapter 1), an essay that came to my attention too late for me to respond to it fully.

<sup>8</sup> It is crucial to the dialectic of this chapter that its target is skepticism specifically about negligence and not about responsibility in general. My skeptic affirms responsibility and blameworthiness for much advertent conduct.

<sup>9</sup> My opposition in this chapter is primarily to skepticism about *moral* negligence. Many writers claim that pure negligence should not be criminalized. My argument is consistent with that conclusion, unless it is premised on the denial of moral negligence, as it often is.

### 5.3 Derivative Negligence

As I've said, skeptics are often happy to allow for "derivative negligence," and they are apt to analyze my mishap with my grandson in this way. It was due somehow to my careless ways, say, or to inebriation. This might of course be so. What I resist is the insistence that it must be so, that without a tracing explanation, to blame me would be exactly like blaming me for an unforeseeable mini-stroke that thrust me uncontrollably into the orbit of the fan blades. On the view I oppose, the question is all about the antecedents – whether or not I should have been playing around in that way given my awareness of the relevant risks.

This tracing strategy misses the mark.<sup>10</sup> What is morally problematic in my handling of my grandson, we would ordinarily think, is my misconduct at the time. I am responsible for putting my grandson in harm's way because, without justification or excuse, I failed to protect him, as I was morally required to do. Inadvertence is not in itself an excuse.<sup>11</sup> My behavior was negligent because it involved an unexcused failure to "bring to bear one's faculties to perceive the risks that one is taking."<sup>12</sup> My failure was unexcused because I was at the moment morally and physically competent to have avoided it by attending to my environment. That is the view I will develop and defend as we go along.

On the view I oppose, the plea that "It didn't occur to me," "I didn't think of it," or "I didn't remember it," should be *prima facie* exculpatory. To regard forgetting to keep a promise or to set one's alarm clock as defeasible defenses would be to make nonsense out of duties of care, or indeed of any substantive duty to perform or refrain. A duty to perform entails a duty to attend to what it takes to fulfill the duty. Adverting to risks to my grandchild is precisely what I am required to do by my duty to protect him. On the culpable choice theory, failure to satisfy the (subsidiary) requirement to be mindful of the occasions for and circumstances of action would have to be its own excuse.

<sup>10</sup> Here I agree with King, "The Problem."

<sup>11</sup> Perhaps the tendency to think so is exacerbated by the practice of offering "He didn't mean to," or "It was an accident," in defense of someone's behavior. In my view, the force of these defenses is not exculpatory but mitigatory. They defend the agent against the charge of intentional wrongdoing, but not against the charge of negligence. (The term "accidentally" contrasts with "knowingly" or "on purpose," but obviously to call something an accident hardly settles whether any of the parties was morally at fault.)

<sup>12</sup> As Fletcher, "Toward a Theory" puts it in the epigraph to this chapter.

#### 5.4 Blame and Quality of Will

The tracing analysis is just one strategy for reducing the clash between skepticism and ordinary beliefs about negligent inadvertence. In Sections 5.6 and 5.7, I will consider others. But first I want to note another range of moral appraisals that challenge the advertence requirement.<sup>13</sup>

According to a prevalent view, what matters for blameworthiness is the “quality of an agent’s will.” One way to resist skepticism is to argue that its treatment of this notion is too narrow. The requirement of inadvertence results from construing the will as what one means (or at least is willing) to do. But broader measures of quality of will – and hence of the locus of blameworthiness – are more plausible. Quality of will in the relevant sense is not just a matter of volition but comprises what a person cares about or values. On this wider understanding, insufficient concern can be displayed not only in choice but in unchosen emotional responses and in inadvertence.

On a broader view, your blameworthiness and responsibility have to do with your “attitudes about what matters,” and these go beyond intentions and choices.<sup>14</sup> If someone very seldom thinks about his sister, wonders how she is doing, or tries to keep track of the significant things in her life, then his lack of attention isn’t “mere,” but rather says something about what’s important to him. It reflects upon him as a brother or as a person, quite aside from whether his thoughtlessness is traceable back to incidents of recklessness or intent.<sup>15</sup> The point is that we can be responsible for inadvertence not only when it stems from antecedent foresight or purpose, but when it expresses some attitude or emotion for which the actor is assessable.<sup>16</sup> To invoke once again the idea of “ownership,” it is not just consent and its derivatives that belong to us morally.

<sup>13</sup> I shall use the phrases “advertence-requirement” and “consent-requirement” as roughly equivalent, even though “consent” implies advertence and not conversely. Similarly for the phrases “consent-based” and “advertence-based.”

<sup>14</sup> This paragraph closely follows a passage in Watson, “Raz on Responsibility.”

<sup>15</sup> Smith, “Responsibility for Attitudes,” p. 237, writes that “what makes an attitude ‘ours’ in the sense relevant to questions of responsibility and moral assessment is not that we have voluntarily chosen it or that we have voluntary control over it, but that it reflects our own evaluative judgments or appraisals.” And a wide variety of attitudes can do this, she thinks, including insensitivity and thoughtlessness. King, “The Problem”; Rosen, “The Problem of Pure Negligence” (Chapter 1); Scanlon, *What We Owe*; and Smith, “Non-tracing Cases” consider the significance of quality of will in this broader sense.

<sup>16</sup> Pettigrove and Collins, “Apologizing” point out the assessability of “body language” that is expressive but unintentional.

John Edgar Wideman's recollections of an incident from the financially troubled early days of his married life make this point forcefully. Wideman's father-in-law, Mort, had given him and his wife Judy a present of a television set. The set was subsequently stolen during a robbery at the couple's apartment.

When we told him about the ... robbery... [Mort] bought us another Sony. Later we discovered the stolen TV was covered by our homeowner's policy .... A claim was filed and eventually we collected around a hundred bucks .... Pennies from heaven. One hundred dollars free and clear .... About a year later one of us ... was telling the story of the robbery and how well we came out of it. Not until that very moment when I caught a glimpse of Mort's face out of the corner of my eye did I realize what we'd done .... But when I saw the look of surprise and hurt flash across Mort's face, I knew the insurance check should have gone directly to him .... By ... the time I saw ... Mort's face and understood how selfishly, thoughtlessly, even corruptly I'd behaved, it was too late .... I'd injured someone who'd been nothing but kind and generous to me. Not intentionally, consciously, but ... I'd failed him instinctively. The failure was a measure of who I was.<sup>17</sup>

As he sees it, Wideman acted ungratefully and selfishly, even dishonestly, in a way that he took to disclose something objectionable about "who he was." But his "thoughtless" wrongdoing was clearly inadvertent.

### 5.5 Some Shortcomings of Broad Quality-of-Will Theories

There is much to say about this example and about wider conceptions of quality of will that it portrays. They promise to provide a more satisfactory treatment of the moral significance of thoughtlessness (including negligence) than consent-based theories can deliver.<sup>18</sup> Still, the broader conception of quality of will provides an inadequate explanation of the cases with which we are mainly concerned.

My negligent interaction with my grandson may well manifest self-absorption or a tendency to show off. But that doesn't seem to me necessary to our assessment of the case. We have considerable testimony about parents who forget their babies in parked cars. One such father had the intention to deliver his daughter to the day-care center, but the drop-off was not part of an established routine; it was the first time he had taken

<sup>17</sup> Wideman, *Brothers and Keepers*, p. 99.

<sup>18</sup> Importantly, like the anti-skeptical position I defend, broad quality-of-will views reject "the control principle." See 5.8.

her with him on his way to campus. She had slept quietly in the back seat the entire drive, while as usual he pondered his morning seminar.<sup>19</sup>

It is not plausible in many cases of this kind to attribute the accident to deficient concern for the child on the part of the parents. That would be appropriate if they had hastily assumed or hoped that the child could safely be left for a while. But in many actual mishaps of this type, the love and devotion of the parents are beyond reproach.<sup>20</sup> Nor does their failure appear to reflect faulty judgment or priorities. In our example, the father did nothing *else* that he shouldn't have done – he “simply” forgot the baby in the car, with lethal results. To be sure, he failed to *take care* of his baby, he failed to enact his love, but that isn't necessarily explained by any deficient attitudes on his part about what matters and how much. He just failed in his capacity as caretaker.

While broad quality-of-will views can affirm responsibility for inadvertent behavior without resorting to ad hoc tracing conjectures, they remain derivative in a different and troubling way. Just as we needn't look for antecedent advertent misconduct in order to find someone's inadvertence blameworthy, we needn't try to locate some further objectionable attitude that is disclosed by their conduct.<sup>21</sup>

## 5.6 Non-culpable Blameworthiness

Let's consider some further attempts by skepticism to cast itself in a less counterintuitive light, by explaining away or reinterpreting our ordinary judgments about pure negligence.

One tempting strategy is to appeal to distinctions among different sorts of negative moral assessments. What skeptics mean to deny, perhaps, is

<sup>19</sup> For cases of this sort, see Weingarten, “Fatal Distraction,” and very recently, Otterman and Salcedo. “Investigation Continuing.”

<sup>20</sup> Contrast what Wideman, *Brothers and Keepers*, feels is a failure on his part to properly value his father-in-law's generosity.

<sup>21</sup> It is worth noting that we are sometimes criticizable for *patterns* of voluntary behavior when none of the instances of those patterns is (by itself) objectionable, and the patterns are themselves inadvertent. I might have knowingly passed up a number of opportunities to spend time with you, none of which in isolation is unfriendly but taken together add up to my not having been an attentive friend, something I by no means sought or even realized. This sort of procrastination is another example of objectionable inadvertence that doesn't necessarily reflect any independently objectionable attitude or choice on my simply failed to prevent the realization of this pattern. Scanlon, “Reasons and Passions,” notes that “we can be open to moral criticism for failing to take due care even when this reflects no conscious decisions on our part.” What he goes on to say suggests that he may be sympathetic to my objection to broad quality-of-will views. “What negligence often consists in is just this: failure even to consider whether we were in a situation in which care needed to be taken,” p. 171.

that negligent inadvertence is blameworthy in the particular sense that is standard in philosophy, according to which blaming consists of a range of hostile responses (resentment, anger, punishment) that are distinctly warranted by what they call culpability. The skeptical thesis is that such responses are fitting, ultimately, only if the advertence-condition is met.

We are liable to confusion on this point, this story goes, because other sorts or senses of blame might well apply to the cases under consideration. With respect to culpability, pure negligence is indeed morally like physical breakdowns or glitches. But in other respects, these cases are supposedly significantly different. Negligent inadvertence is open to moral appraisal in a way in which epileptic flailing cannot be, inasmuch as it involves a morally faulty performance on one's part, not merely a passive mishap. The skeptic's point is that whatever the moral significance of someone's (underived) carelessness may be, it does not warrant retributive responses.<sup>22</sup> To think that the denial of pure negligence conflicts with everyday experience is to conflate different sorts of negative moral assessment.

This strategy would forge a kind of reconciliation of skepticism with common sense (as I've characterized it). The mistake of unrefined skepticism is to assimilate pure negligence to mere inadvertence and to breakdowns of agency such as epileptic seizure, thereby obscuring the way in which careless inadvertence involves morally faulty behavior. In contrast, the mistake of naïve common sense is to conflate blameworthiness with culpability.

It is surely true that we cannot felicitously speak of "culpability" in the case of all morally criticizable attitudes, and not only because many moral shortcomings are too slight to merit this description. It seems inapt, for example, to speak of someone as "culpable" for her self-conceit or sadistic daydreams. This brings out the heterogeneity among the attitudes comprised by the broad account of quality of will. Sadistic fantasies are of course morally objectionable (and hence blameworthy in a familiar sense) but skeptics maintain that unless they are enacted, they do not call for the distinctive range of responses at issue here.

<sup>22</sup> In several essays, Gideon Rosen has forcefully defended a view along these lines. Responsibility, in the sense that concerns advertence-based accounts, is in Rosen's view simply liability to blame, understood as a category of retributive responses (including unfriendly sentiments as well as punishment). Rosen contends that it is blame, so understood, which is in question in traditional disputes about responsibility. See especially Rosen, "The Alethic Conception." In Chapter 1 of this volume, however, Rosen is friendlier to a broader understanding of quality of will.



I find myself rather uneasy about the language of culpability outside the sphere of criminal law. But for our purposes, we can understand this term as stipulated by the skeptics, simply as that which warrants blaming reactions such as anger, indignation, and punishment. The skeptics' claim is that reactions of this kind require *wrongful deeds* or at least intentions; that's why sadistic fantasies or dispositions are not themselves culpable (as distinct from despicable or abhorrent).

This definition is in the spirit of consent-based views. However, is it correct to say that sadistic delight in thoughts of human suffering do not appropriately elicit indignation? Abelard considered a similar challenge to his contention that mere "desire" (no matter its object) is never sinful because it involves no consent; "sin isn't said to be . . . the desire to do what isn't allowed, but rather the consent."<sup>23</sup> (I take it that sin is the theological counterpart of culpability.) But in lust, according to scripture, one commits adultery in one's heart. Abelard's reply is that consent is to be understood as a *readiness* to act as desired "should the opportunity arise." In short, "we consent to what is not allowed when we don't draw back from committing it and are wholly ready to carry it out should the opportunity arise."<sup>24</sup> Morally speaking, committing to the deed is committing the deed.

This is an insightful and subtle point. The content of consent is frequently conditional, and imagination and desire often do modulate into consent. In this way, advertence-based views might capture a good many of the moral assessments to which broad quality-of-will views call our attention. Nonetheless, I remain doubtful that only consent and the like can be "culpable" in the specified sense.<sup>25</sup> Certainly, the self-assessments of agents of pure negligence are typically strongly incriminating – the father who leaves his baby in the car takes himself to have done something unforgivable, something that he was after all bound by love and duty to prevent. Skepticism must regard these assessments as misguided.<sup>26</sup>

<sup>23</sup> Abelard, *Ethical Writings*, pp. 6–7. <sup>24</sup> Ibid.

<sup>25</sup> Yaffe, *The Age*, characterizes culpability as "responsibility for wrongful action," p. 68. More fully, "To be morally culpable for a wrongful act is for the act to manifest modes of recognition, weighing, or response to reasons that fall short of what morality demands," p. 71. I take this to be complementary to the "reactive-attitude" analysis emphasized by skeptics. It characterizes what reactive attitudes are reactions *to*. If a failure to attend to the reasons one has to do X can fall short of what morality demands, as I think, then pure negligence can be morally culpable on Yaffe's formulation.

<sup>26</sup> It is no part of my intention in this chapter to defend a practice of retributive responses to negligent wrongdoing, or to any other behavior. Rather, my thesis parallels Hart's on criminal responsibility for negligence – if the careless actors we have been discussing do not merit indignation and the like,

The standard rejoinder is that the tendency of these actors to castigate themselves is understandable, even admirable, but these reactions are strictly speaking unwarranted. This seems a plausible analysis of the crushing guilt that many drivers would feel for running over a pedestrian who unforeseeably darts into the path of their vehicle. We should try to console these hapless actors with the assurance that it wasn't their fault, that there was nothing they could have done. But this consolation is clearly unavailable to negligently inadvertent agents. The endangerment of their children *was*, after all, their fault; there *was* something they could and should have done, namely, to have adverted to what was required for the safety of those in their care.<sup>27</sup>

### 5.7 Outcome-Responsibility

A second way in which advertence-based theorists might try to explain away the appearance of moral negligence is by treating it as an instance of what some tort-law theorists call "outcome-responsibility."<sup>28</sup> This maneuver may be appealing to the skeptic because outcome-responsibility is not thought to entail culpability, as in the text-book example of the hiker who breaks into a cabin to escape a dangerous storm. The hiker can rightly be held responsible for trespassing and for damaging the property, but she has not acted wrongfully. This is not a case of inadvertence, but it shows that culpability can come apart from one significant form of responsibility and that this might be what is going on in cases of inadvertence.

But it is hard to see how this proposal works. In the first place, the hiker will not be open to any negative moral assessment whatever unless she fails to answer for entering and damaging the cabin. So it doesn't capture blameworthiness (of any kind) for negligence. Second, careless actors tend to feel responsible (and at fault) not only for the outcome of their inadvertence but primarily for the carelessness of which the outcome was the materialization. Imagine a happier scenario in which the father's lapse

it is not because the inadvertence of their conduct cannot be morally faulty in the way that advertent conduct can be.

<sup>27</sup> This is more or less the principle underlying the (conditional) defense of criminal negligence in Hart, "Negligence, *Mens Rea*." It is also espoused by Clarke, *Omissions*, in his defense of responsibility for negligent inadvertence.

<sup>28</sup> As I understand it, outcome-responsibility is a species of what Scanlon, *What We Owe*, calls "substantive responsibility" – namely, "the way in which a person's obligations to others and his claims against them depend upon the opportunities to choose that he has had and the decisions that he has made," p. 249. For a powerful argument for the importance of this concept to tort theory, see Perry, "Outcomes, Risk." Here Perry builds on the work of Honoré, "Responsibility and Luck."

had no ill effects. Passersby intervene before the child is harmed. It takes some hours to locate the father, and when he is notified, he realizes with horror what he did (or failed to do). There is no reason to doubt that what he is in part horrified by is his primary culpability for endangering his child. No doubt the fatal outcome makes his culpability even more horrifying,<sup>29</sup> since it is the risk of that sort of outcome that makes the behavior wrongful.

### 5.8 Control and Moral Luck

So far, I have ignored the familiar position that responsibility requires control (“the control principle”). If control requires advertence, then we would have sufficiently compelling grounds to set aside common judgments about negligence. The control principle is certainly at the basis of Alexander and Ferzan’s critique of moral negligence.<sup>30</sup> “There is no moral difference,” they say, “between punishing for inadvertent negligence and punishing for strict liability.” For “we cannot control how we perceive, what we infer, and what we believe.”<sup>31</sup>

To defend the negligent parents in our examples by asserting that they lacked “control” is to insinuate that their capacities to advert to or to keep track of their responsibilities were somehow impaired. Nothing in the examples supports that insinuation. For this reason, speaking of “strict liability” in these cases is misguided. As Hart rightly says (speaking of criminal responsibility), “There seems a world of difference between punishing people for the harm they unintentionally but carelessly cause and punishing them for the harm which no exercise of reasonable care on their part could have avoided.”<sup>32</sup>

<sup>29</sup> It would be unreasonable for the cabin owner to blame the hiker for damaging the cabin (because she was justified in doing so), but it would be unreasonable for the hiker to expect the cabin owner to bear the loss. That’s why the hiker thereby incurs a duty to compensate. If she had negligently caused the damage, say by carelessly causing a boulder to hit the cabin, the hiker’s carelessness would figure in the moral explanation of why she owed damages (she shouldn’t have created the risk). See Perry, “Outcomes, Risk,” p. 118, for a discussion of this difference.

<sup>30</sup> Alexander and Ferzan’s target here in “Against Negligence Liability,” and in Alexander, Ferzan, and Morse, *Crime and Culpability*, is explicitly *criminal* negligence, which again is not my primary focus. But at least some of their arguments rest on the denial of moral “culpability” for negligence. They hold, for example, that “we are not morally culpable for taking risks of which we are unaware” (*Crime and Culpability*, p. 71).

<sup>31</sup> Alexander and Ferzan, “Against Negligence Liability,” p. 273.

<sup>32</sup> Hart, “Negligence, *Mens Rea*,” p. 136.

Alexander and Ferzan's confidence about the connection between control and advertence assumes that control must be *volitional* or *voluntary*.<sup>33</sup> Volitional control is exercised, roughly, when (or at least only when) there is an awareness of options and a choice among them. The appeal to that sort of control is too obviously question-begging, however, to provide the support for the advertence requirement that skepticism needs.

The worry about control is closely related to familiar worries about "moral luck," a notion that is commonly defined in terms of control. According to Dana Nelkin, "moral luck occurs when an agent can be *correctly* treated as an object of moral judgment, despite the fact that a significant aspect of what he is assessed for depends on factors beyond his control."<sup>34</sup> The "problem of moral luck" is said to be that it is inconsistent with our commitment to "the control principle," but here again, it is crucial to distinguish volitional from other forms of control. Since the defense of pure negligence is a rejection of the control principle, volitionally construed, worries about moral luck do not themselves provide a foothold for skepticism about pure negligence.

### 5.9 Two Comments on Consequential Moral Luck

Worries about moral luck often focus on the comparative question "whether those whose acts actually lead to serious harm deserve the same treatment and the same judgments as those who, but for fortune, would have caused as much damage."<sup>35</sup> Are the parents whose negligence leads to great harm more blameworthy than the negligent parents who luck out?

I have two comments to make about this complex question. My first comment is that the issue of consequential luck presents no specific challenge to the defenders of pure negligence. It is an instance of a general issue about the relation between culpable conduct and its consequences. Consider the controversy about differential blame and punishment for crimes and attempted crimes. Just as we might disagree about what

<sup>33</sup> Smith, "Responsibility for Attitudes" emphasizes the commitment of advertence-based views to a requirement of "voluntary" control.

<sup>34</sup> Nelkin, "Moral Luck."

<sup>35</sup> Wolf, "The Moral," p. 2. Enoch, "Being Responsible," rejects "any kind of moral luck" because he takes it be necessarily true that, "if two agents are alike in what is under their control, they are also alike in the extent to which they are praise- or blameworthy, and indeed morally responsible (for the relevant thing)," p. 119.

difference the completion of wrongful attempts makes to moral blame (and legal punishment), we might disagree about what difference if any is made by the realization of negligently created risks. The reason why defenders of pure negligence might deny consequential luck is that the basic moral failure to take due care remains the same in the lucky and unlucky cases. Unless the materialization of the harm increased the faultiness of creating it, it is plausible to say, one's conduct cannot be morally more reprehensible on account of those consequences.

My second comment is that the rejection of consequential luck leaves one in a somewhat puzzling position. The undeniable insight in this position is that blameworthiness for negligent risk creation (or for wrongful attempts) is explanatorily prior to blameworthiness for harming someone. I am blameworthy for hurting my grandchild *because* I am blameworthy for putting him in jeopardy. But that insight presumes that there *is* blameworthiness for outcomes. It is not clear to me, however, that the rejection of consequential luck can properly accommodate this proposition. If there is no consequential luck, the judgment that I am blameworthy for harming my grandson looks to be just a misleading way of saying that the harm was the result of my wrongfully creating the risk, which is consistent with denying that I am therefore and *also* blameworthy for injuring him. But the implication that I am not strictly speaking blameworthy for harming my grandson is deeply implausible.

To avoid this implication, we need to think that the blameworthiness of my risk-creating conduct somehow *transfers* to the outcome. The realization of the risk doesn't amplify the blameworthiness of creating it, but it stands as a further reproach to its agent. But now it is unclear to me how we deny that when I am in this way blameworthy for more – for both creating the risk of harm and for harming my grandchild – I am in more moral trouble and in this way more blameworthy. There are now victims of my wrongful risk-taking, who are entitled not only to demand compensation, but to hard feelings toward me for wrongfully victimizing them. Thus, without an explanation of how the primary blameworthiness of my handling of my grandson “transfers” to the harming, the denier of consequential moral luck may be forced either to deny that harming is also blameworthy, or to admit that the agent is after all more blameworthy.

I am not confident that these inchoate thoughts point in a fruitful direction. Fortunately, we can set this issue to one side, since, as I stressed in my first comment, there is no reason why defenders of pure negligence can't find themselves on different sides of this controversy about outcomes.

### 5.10 “It Might Have Happened to Anyone”

To forget one's child in the car, with fatal results, is to be doubly unlucky, morally speaking. First, the parent's failure might well have had a happier outcome, if someone had happened along to notice the child. Secondly, he would not have failed at all if he had been reminded of the child's presence by her cry or by a well-timed call from his wife, just as he was parking the car. Or finally, he might just have remembered, as he was supposed to, and typically would have done.

This experience of fortuity in the very heart of agency prompted one of the fatally neglectful parents to exclaim that he had both “wronged God” and “been wronged by God.”<sup>36</sup> This powerful sentiment perfectly captures the puzzling character of much bad moral luck: these agents are at once wrongdoers and victims. Others, similarly situated and no more conscientious and caring than they are, managed to remember, while others, equally neglectful, were spared the horrible fate. Their misfortune is not only to have lost a child but to have been responsible for her death. In theological terms, they wronged God (they sinned) by failing in their fundamental moral commitments. And yet God wronged them both by permitting them to forget and by allowing their failures to be so calamitous.

I hasten to add that the responsibility of such negligent actors doesn't entail that they deserve to be *condemned* by the rest of us.<sup>37</sup> It would badly misconstrue the meaning of their misbehavior to make such actors liable to criminal sanction, for example. They do not exhibit a disregard for the security of others (unless we are construing “disregard” in a strictly behavioral sense), let alone the “gross” disregard that is thought to be required by the criminal law. They have done nothing that damages their relation to the legal community in the way conviction and punishment are meant to signify.

We can regard purely negligent actors as morally blameworthy without actually blaming them; insofar as they fully accept responsibility for what

<sup>36</sup> Weingarten, “Fatal Attraction.”

<sup>37</sup> Yet an ugly retributive bent in human nature is persistent and powerful. Weingarten, “Fatal Attraction,” reports these incidents often attract the wrathful judgment of many commentators. In response to one newspaper report, a judgmental reader commented that “This is a case of pure evil negligence of the worst kind. He deserves the death sentence.” Another response (to a different incident) is even more vitriolic. “If she had too many things on her mind then she should have kept her legs closed and not had any kids. They should lock her in a car during a hot day and see what happens,” p. 15. (One wonders whether mothers tend to attract even harsher judgments in such cases than fathers do.).

they've done, blaming responses lose a lot of their point.<sup>38</sup> Furthermore, the failures involved in these cases are by their nature something to which we are all susceptible. Hence, there is a strong case for mercy and perhaps forgiveness by all those concerned. But this case presumes that there *is* something to forgive.<sup>39</sup>

The import of the phrase, "it might happen to anyone," is that lapses of this sort are liable to happen even to admirably loving and conscientious parents. This striking and unsettling point does not entail that these agents are not blameworthy. Rather, it brings out that virtue is no sure shield against blameworthy lapses. Being (otherwise) good and conscientious parents is not an excuse for what they've done, but it has implications for how it is appropriate to respond to their wrongdoing. We cannot honestly console them with the assurance that what happened wasn't their fault, for it was. But that it could have happened to anyone provides a measure of consolation; they are not open to the further charge that they are less than loving or devoted. This consideration corresponds not to an excusing condition in morality or in law, but to something like mercy or clemency or pardon. As I have noted, it creates a strong case for forgiveness.

### 5.11 Quality of Will and Quality of Self-governance

Despite all I've said, we may continue to have nagging doubts that we can successfully distinguish the category of pure negligence from "mere advertence." If pure negligence doesn't reflect my values or aims, we might ask, how can the criticism really say anything about *me* morally? The charge of negligence may seem to touch us as moral agents only in the shallowest way.

Let me say why I don't believe this is true. The moral fault manifest in pure negligence is not poor quality of will but faulty self-governance.<sup>40</sup> It is faulty responsiveness to considerations and requirements to which we are subject. The quality of our self-governance is an important feature of us as agents, though it may disclose nothing about our ends, substantive

<sup>38</sup> See Baron, "Culpability, Excuse," for this point.

<sup>39</sup> Since the wrong to the child is also a wrong to its significant others (if any), blame may still be an open possibility among them. The fact that the wrong remains in the family shapes our responses significantly, I suspect. If the negligent actor were transporting the child for a friend, or as a hired caretaker, that would be importantly different, morally and perhaps legally. The driver would certainly have different amends to make, and the law might have a different interest in the case.

<sup>40</sup> For this phrase, see Scanlon, *What We Owe*, p. 269.

commitments, or “characters” (how we characteristically act and feel). But objectionable advertent conduct is often “thin” in some of the same respects. We commonly blame individuals for uncharacteristic acts (or even, as in the case of a child, for pre-characteristic acts). I can take pride in my child’s standing up (if only this once) to the bully or admire the rare but genuine act of kindness of my normally unfriendly neighbor. Similarly, mean-spirited or jealous acts seem contemptible, whether or not they are part of the general character of those who perform them. Some of these choices are weak-willed, condemned by the agents’ own values. These are like negligence in being failures to guide one’s action by the relevant reasons.

The agents in these cases respond as kind or mean or courageous persons would act in the circumstances, and hence act well or badly. Similarly, my pure negligence bears on how well or badly I behave. My conduct exemplified carelessness, not in the sense of general traits of mine, but in the sense that I acted as a careless person acts. The fact that I’m not a careless person makes a moral difference, but it doesn’t render my act or omission morally tantamount to seizure or paralysis. At the very least I fail (if only this once), in a way that wouldn’t be true if my failure was a merely neurological mishap.

On this account, faulty self-governance remains closely connected to the kind of disregard that is a mark of bad quality of will. Both are failures of regard. Blameworthy inadvertence isn’t a poor quality of *attitude*, but either an objectionable absence of appreciation (as Wideman reports about himself) or a poor quality of self-governance, as in the father’s case. Either way, one fails in one’s regard for others and one’s relation to others.

Moreover, contrary to the skeptics, “reactive attitudes” seem as much in place here as in advertent conduct, even on the Strawsonian rationale. Recall the influential formulation of the idea in Strawson: “If someone treads on my hand accidentally, while trying to help me, the pain may be no less acute than if he treads on it in contemptuous disregard of my existence or with a malevolent wish to injure me. But I shall generally feel in the second case a kind and degree of resentment that I shall not feel in the first.”<sup>41</sup> This pronouncement is consistent with the advertence-requirement, but note that the following extension of Strawson’s point seems perfectly in order: “The pain may be no less acute than if he treads on it in contemptuous disregard of my existence or with a malevolent wish to injure me *or without due care for my safety*.” The naturalness of this

<sup>41</sup> Strawson, “Freedom and Resentment” (2003), p. 76.



extension seems to me to reinforce the kinship between quality of self-governance and quality of will as dimensions of assessment. “Contemptuous disregard” and “malevolent wish” convey their moral significance on their own, whereas the phrase, “inadvertently causing someone pain,” leaves open the question whether there was a failure of regard of the sort required by due care. Attributing the inadvertence to negligence closes that question. Again, “*disregard*” may connote contempt or dismissal, in which case negligent inadvertence is not exactly disregard – but it is surely faulty regard.

### 5.12 An Epistemic Worry?

Can we discriminate pure negligence in a principled way from “mere inadvertence?” On reflection, our confidence here may seem to rest on shaky ground. For we might doubt our competence to rule out explanations that would entail excusing conditions. When things inadvertently go wrong, why do we suppose that nothing relevantly like what goes wrong in responsibility-defeating circumstances obtains? The answer cannot simply be that what goes wrong in those circumstances is episodic or statistically abnormal, because the responsibility-defeating conditions might be one-off (a one time “mini-stroke” causing confusion, motor disruption, blockage of “memory”). Our normal practices seem in this way quite opaque and somewhat hasty.

The suspicion is that in holding the father responsible for not remembering his child, or me for not noticing the ceiling fan, we are in effect holding people responsible for being in psychological/physiological conditions that explain their failures. If they are innocent with respect to the conditions that explain this lapse, as they are for all we know in the case of pure negligence, they are surely innocent of the lapse itself.<sup>42</sup>

This argument proves too much, for the problem arises with equal force for advertent wrongdoing. Non-skeptics about responsibility in general will be in the same position as non-skeptics about negligence; they too have to show how we can discern when the failure to exercise the capacity to respond well is not explained by some responsibility-defeating condition.<sup>43</sup> Advertence-based theorists will also have to explain how it is that

<sup>42</sup> This question is forcefully pursued in several of Rosen’s essays, cited above, including his contribution to this volume (Chapter 1).

<sup>43</sup> Abstractly put: the general problem is to provide a normatively relevant characterization of the distinction between an incapacity and an unexercised capacity. This more general worry is in effect

we can be blamed for a performance or omission that is explained by conditions for which we are not to blame. Perhaps these challenges can be met. But it is not at all obvious that we are on firmer ground here than we are in the case of attributed negligence. Here again I agree with Hart. "In some cases at least we may say 'he could have thought about what he was doing' with just as much rational confidence as one can say of any intentional wrongdoing 'he could have done otherwise.'"<sup>44</sup>

### 5.13 Authorship and Ownership

The case in which one relies on nature to play along (even though aware that it may not) is crucial to one's ability to act (with a modicum of success) at all. Unless I can trust the chair to carry my weight, the ground not to give way when I walk, the plate to maintain rigidity when I hold it, etc., I cannot perform even the simplest act.<sup>45</sup>

Pure negligence is an unexcused and underived failure of our powers of advertence. As faulty self-governance, it is attributable to us in more than a superficial sense. The privileging of reflective choice leads to trouble in our understanding even of humdrum deliberate, purposeful, or foresightful agency. The exercise of our attentional and recognitional faculties is necessary for the exercise of volitional control. To choose to do  $\omega$  or not- $\omega$  requires an awareness of options and an awareness that the (or an) occasion for choice is present. The exercise of those faculties cannot, without vicious regress, require the exercise of volitional control.<sup>46</sup> This is a point of the first importance.

As Peter Railton<sup>47</sup> and (following him) Joseph Raz<sup>48</sup> have observed, our conception of ourselves as natural agents must acknowledge the deep ways in which the exercise of our reflective agential capacities (including consent

what McGeer and Pettit, "The Hard Problem," identify as the "hard problem of responsibility." On this problem, see also Hieronymi, "Rational Capacities"; Smith, "Rational Capacities."

<sup>44</sup> Hart, "Negligence, *Mens Rea*," p. 152. This observation from Hart highlights the conditional nature of my defense of the existence of negligence and explains the title of this chapter. There is room for doubts and diffidence about our attributions of moral fault. My claim is that blameworthiness for negligent inadvertence is no more problematic than blameworthiness of much advertent behavior. Skepticism about negligence threatens the possibility of responsible agency altogether. To put it another way, our strong commitment to responsibility for advertent agency commits us to the possibility of pure negligence as well.

<sup>45</sup> Raz, *From Normativity to Responsibility*, p. 238.

<sup>46</sup> As Sher in *Who Knew?* says, "No agent could function at all if he did not have confidence that his mind will, just of its own accord, dip into his memory bank to deliver up just the information he needs at just the time he needs it," p. 127.

<sup>47</sup> Railton, "Practical Competence." <sup>48</sup> Raz, *From Normativity to Responsibility*.

and the like) are inescapably bound up with the non-reflective exercise of a repertoire of competences that are engaged in virtually all action, including deliberation itself. Our morally responsible agency depends upon and to a large extent consists of systems of responsiveness that are “automatic” or second nature, processes and habits upon which we necessarily rely in our negotiations with the world, interactions that largely proceed in the absence of conscious agency, but which are, in Railton’s words, “acquired, intelligent, and reason responsive.”<sup>49</sup> Their success is our success. By the same token, their failure is our failure. A corollary of this presupposition is that we must be responsible for much of what we do and omit unintentionally if we are responsible for reflective activity at all.

This is the important truth that is brought out by an investigation of the possibility of pure negligence: we own more than we author, and we cannot author everything that we own.

<sup>49</sup> Railton, “Practical Competence,” p. 83. Railton’s concern is with autonomous agency. I do not know whether he would endorse my application of his points to responsibility.