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The Concept of Negligence

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ABSTRACT

Debates about negligence, and its relation to criminal law, normally broach two types of issues. One type comprises questions about what we mean by 'negligence.' The second type focuses on the principled reasons for which criminal liability should (or should not) be imposed for negligent conduct.

Three general propositions have been advanced about the nature of negligence: (1) that it is a state of mind; (2) that it is a type of conduct; and (3) that it is a form of culpable behavior. Only the third of these, however, supplies an intuitively satisfying account of the concept of negligence. The third proposition also suggests a fuller defense of negligence as a ground of criminal liability. Critical questions about such a defense should ultimately be addressed either to the responsibility of negligent harm-doers, or to the rationale for the *mens rea* requirement in Anglo-American systems of criminal justice.

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TABLE OF CONTENTS

CHAPTER ONE – THE CONCEPT OF NEGLIGENCE: INTRODUCTION

In philosophical and legal literature, discussion of the concept of negligence seems to generate an inordinate amount of controversy and confusion. The problems tend to arise along two distinct axes. On one axis, there are debates about the concept itself: about to what sort of case or property 'negligence' refers; about how we should define 'negligence'; or about what it means to predicate negligence of a particular agent or event. A separate, though related, axis is composed of more substantive concerns about the relation between negligence and legal liability. In particular, many of the latter concerns are about negligence operating as a general category or ground of *criminal* fault.

In the discussion and chapters that follow, my primary aim will be to get a handle on the debate which appears in theoretical treatments of negligence and the general part of criminal law. In chapters two, three, and four, I will examine different analyses of the concept of negligence. Throughout, I will assume, and attempt to provide evidence for the view, that negligence is a largely unitary concept. Various specialized legal meanings have been prescribed for our use of the term 'negligence.' However, if we characterize the content of 'negligence' too narrowly or without sufficient distinctions, such that its legal meaning is largely incongruent with our ordinary understanding of negligence, the result likely is an understandable scepticism about negligence operating as a ground of criminal fault and liability. A richer account of what we mean by 'negligence' helps to

remove many of the sceptical obstacles; it provides a fuller account of what is blameworthy about negligent conduct.

I will *not* be concerned to give an interpretation of how the concept of negligence has actually been applied in legal practice. About this there seems to be ample confusion as well;[1] theoretical differences about the definition of negligence seem to reflect, and perhaps to originate partly in, confusion about how practical applications of the concept of negligence should be interpreted. As well, I will *not* say anything about the important difference between civil and criminal liability for negligence. Where liability is concerned, the focus will be on *criminal liability*.

In the final chapter, chapter five, I will attempt to sort out a number of substantive concerns about the relation between negligence and criminal liability. A number of reservations have been expressed about the *fairness* of imposing liability for negligence. The central question I will address in the final chapter is: are there conceptual or principled reasons for thinking that negligence should not operate as a ground of criminal fault and liability?

Intuitively and very generally, negligence is often taken to be a kind of non-performance of duty. If we add to this the idea that the non-performance is usually unintentional or unwitting, and that it has potentially deleterious effects on others, we approximate the sense that is frequently given to 'negligence' in legal terms. The basic

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[1] See for example the discussion of negligence as it relates to Canadian criminal law in Anne Stalker's article "Can George Fletcher Help Solve The Problem Of Criminal Negligence?" *Queen's Law Journal*, Vol.7 (1981-82).

contours of the kind of case that generates controversy in the literature are easily grasped: it is one in which an agent unwittingly but carelessly endangers others, or actually harms them, with his conduct. Cases like these seem to be controversial because it is not exactly clear what grounds there are for imposing criminal liability on agents who *inadvertently* cause harm to others. There is substantive disagreement about whether (or why or when) such cases might deserve to be subject to criminal liability.

There is also confusion about which features of such a case are covered by the concept of negligence. It has been variously suggested that 'negligence' captures only the unthinking, careless mental aspects of the situation; that it refers to the risky conduct of the agent alone; or that it characterizes the entire event in terms of its inherent culpability. I will examine three general propositions about the meaning of negligence which unfold along each of these lines, in chapters two, three, and four, respectively. The general propositions are that:

(P1) Negligence is a state of mind.

(P2) Negligence is a type of conduct.

(P3) Negligence is a type or form of culpability.

Considerations about meaning and liability are frequently exacerbated, and merge together, when negligence is considered in relation to a traditional maxim of criminal law. The Latin maxim suggests that '*actus non facit reum nisi mens sit rea,*' which translates roughly as: 'an act does not make a person guilty unless his mind is also

guilty.'[2] I will refer to this maxim and its rationale simply as the *mens rea* doctrine or the *mens rea* requirement.

The *mens rea* doctrine is commonly understood to stand for a basic operating principle in most Anglo-American systems of criminal justice. The principle for which the requirement stands has been variously interpreted as a mental state, culpability, fault, or responsibility requirement. In any case, that for which *mens rea* stands is taken to be the *sine qua non* ingredient for criminal liability: it speaks to something in the absence of which criminal liability cannot be justly imposed upon an agent. With the exception of 'strict liability' offenses, it is not sufficient that an agent simply be implicated in causing harm or performing a criminal act (an *actus reus*).[3] Normally, something else has to be present in (and proven about) the relation an agent bears to her actions and their consequences in order to warrant a fair attribution of criminal fault. What is often contested is the precise nature of the requisite 'inculpating' or 'fault-making' conditions for which *mens rea* is supposed to stand. There is also disagreement about whether cases of negligence ever exemplify the necessary criminal traits.

One 'orthodox' way of thinking about *mens rea* suggests that it indicates various ways of being at criminal fault, where these are captured in terms of the states of an

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[2] This is the translation offered by R.A. Duff in his *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990), 7.

[3] Liability is 'strict' where there is no need to prove *mens rea* in relation to a criminal act, in order to be found guilty of a criminal offense. This is one main reason why some critics find offenses of strict liability to be morally and legally odious: they make no reference to 'fault,' 'guilt,' or moral wrongdoing on the part of the agent. Some critics of negligence liability consider it to be a form of strict liability.

agent's mind. This is what we might call an orthodox 'subjective' or 'mental state' interpretation of the *mens rea* requirement. Different categories of *mens rea* describe the different mental conditions that are sufficient for incurring criminal fault in the performance of an *actus reus*. To say that a criminal agent acted *intentionally, recklessly, or negligently* is, then, to convey information about the state of her mind while engaging in some criminal act.

In chapter two, I will explore several traditional 'subjective' or 'mental state' analyses of the concept of negligence. The accounts are unified by adherence to the general proposition (P1) that negligence is a state of mind. Where they differ is in their respective accounts of the mental *definiens* for 'negligence'. Some traditional 'subjectivists' (as I will call them) think that negligence can be reduced to an inadvertent state of mind; others argue that mental carelessness or indifference is the essential criterion of negligent behavior.

Different lines of dissent can be traced in response to traditional mental state analyses of negligence. One type of response, which I will examine in chapter three, occurs along the lines of P2. Advocates of P2 offer what I will call a 'traditional objective' theory of negligence. They explicitly reject the idea that negligence takes a mental form. Instead, they view negligence as a type of conduct, the essence of which is that it is unreasonably risky in the harm it threatens. Negligence is supposed to set an objective standard for liability in the sense that it does not refer to subjective agent conditions which must be present in order for an agent to be liable.

The debate between traditional subjectivists and objectivists seems to be motivated by different, specialized concerns on either side, and it likely occurs at cross-purposes in a number of ways. Traditional subjectivists want to show that 'negligence' is the kind of subjective thing which will (or will not) support fair attributions of criminal fault. Objectivists are not concerned to analyze the concept of negligence only within the context of criminal law and an orthodox conception of *mens rea*. Their main project, it seems, is to define 'negligence' in a way that makes sense of it as general ground of *legal* liability, including *civil* and criminal forms. Their definition keys on aspects of negligent conduct that are apparently the same no matter what sort of liability is imposed for it: negligent agents are those who put others *substantially* and *unjustifiably* at risk, regardless of the mental state(s) which might accompany or cause their conduct.

The debate between adherents of P1 and P2 can be characterized as 'traditional' in several respects. Both sides accept the premise that subjective sources of legal fault can be sharply distinguished from 'objective' ones. Where the two sides differ is in their respective accounts of what 'negligence' denotes: a state of mind or a type of conduct. A number of 'contemporary theories' of negligence (as I will call them) dissent not only from P1, but also from the tenor of the debate between adherents of P1 and P2. I will explore H.L.A Hart's seminal analysis of negligence, and other contemporary views relating to it, in chapter four.

Hart argues that 'negligence' does not refer (narrowly) to a state of mind, but (broadly) to the fact that an agent failed to meet a standard of care with which a

reasonable person would have complied. The 'faulty' elements in such a failure do not simply reside in the agent's mind or her conduct alone. There are faulty aspects in both, but they are identified as 'faults' only in relation to what the agent had the *capacity* to do, on that occasion, and in relation to what certain *standards of care* directed her to do as well. The idea that there are inherently blameworthy aspects about such a failure lends currency to the general proposition (P3) that negligence is a type of culpability, or a form of culpable behavior. It is this proposition which unites several strands of contemporary thought about negligence.

Hart's general dissent from the traditional debate about negligence invokes what I will call the 'capacities thesis.' The thesis organizes our analysis of negligence around a different set of distinctions. The important questions are not so directly about 'subjective' and 'objective' bases for criminal liability. Rather, they are about an agent's general capacities as they relate to the demands imposed by reasonable standards of care. The capacities thesis makes questions about the *responsibility* of inadvertent harm-doers (or those who engage in unreasonably risky conduct) more explicit in an analysis of negligence. It also makes the concept of responsibility more focal to discussions of criminal law and the *mens rea* requirement.

Together, P1, P2, and P3 raise a number of important issues pertaining to the concept of negligence. Specifically, there are questions about (1) the mind, (2) the risky conduct, and (3) the culpability of agents who inadvertently endanger or harm others. There are also persistent, underlying questions about whether negligent agents are genuinely

responsible for what they do, and about whether they ever meet the requisite *mens rea* conditions for being fairly subject to criminal liability.

Chapters two and three are geared toward exploring questions about the mind and risky conduct in the context of the 'traditional debate.' Chapters four and five will focus more directly on issues of responsibility, culpability, and liability, as they arise in contemporary discussions of negligence and the general part of criminal law.

I will argue that the type of case about which there is significant interest and controversy (all or some of which the concept of negligence is supposed to cover) is best captured along the lines of P3. Defining negligence as a type of culpability yields a richer, more intuitively satisfying account of the concept. The analysis can subsume traditional concerns about an agent's mind and conduct, and is more explicit about including certain relational and evaluative properties as components of negligent behavior.

Identifying negligence as a form of culpable behavior should not, though, preclude substantive debate about the nature and limits of punishment for negligence. It seems that substantive issues pertaining to liability are often treated as ones of definition, particularly as they arise in relation to the topic of negligence. In the final chapter, I will attempt to locate some of the main substantive issues, and suggest how they should be identified and addressed, amidst the conceptual battles which frequently surround a discussion of negligence. I will argue that there are neither good conceptual nor principled reasons for thinking that negligence should not operate as a ground of criminal liability.

CHAPTER TWO — NEGLIGENCE AND THE MIND: TRADITIONAL SUBJECTIVE THEORIES

2.1 *Introduction*

One of the main concerns that animates traditional writing about negligence is whether it comprises a subjective or an objective basis for liability. In section 2.2, I will give some introductory remarks about what is usually meant by the categories of 'subjective' and 'objective.' I will then take up the 'subjective' side of the traditional debate in the remainder of chapter two, before looking at its objective counterpart in chapter three. The subjective side of the debate is unified by its adherence to the general proposition (P1) that negligence is a state of mind. I will explore and critique several accounts of how a definition of negligence might be achieved from different analyses of P1.

2.2 *Subjective and Objective*

The kind of distinction which is most often at the heart of the traditional debate about negligence is one that posits a sharp line between events that are mental in nature (that is, 'subjective' and 'internal') and those which are physical (that is, 'objective' and 'external').[1] In other words, dualism shapes a number of key premises which are shared

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[1] There are a number of ways in which to construe the split between 'subjective' and 'objective.' George Fletcher discusses four possibilities in his *Rethinking Criminal Law* (Toronto: Little, Brown and Company, 1978), section 6.8.1. Another useful distinction is drawn by Henry Edgerton (whose work I discuss in chapter three). He puts the matter this way. "The question (1) whether negligence consists of (or requires) an indifferent state of mind or dangerous conduct, is not the same as the question (2) whether the measure of negligence, the standard to which one must conform, is fixed by the individual capacities of the actor or by the capacities of a normal or standard person; though the words subjective and objective are applicable in connection with each question. About the second question... there seems to be little or no dispute.... But the general agreement on the second question does not foreclose the first"

by both subjectivists and objectivists alike. They are in basic metaphysical agreement about separating the mental from the physical, or about separating the mind from conduct. They also share similar notions of causality between the mental and the physical. One way of encapsulating their disagreement would be to say that subjectivists emphasize certain mental *causes* in analyzing the essence of negligent agency. Objectivists usually make the strong claim that the concept of negligence refers only to the unreasonably risky *effects* of which any mental state may be the cause.

A simple statement of the problem around which the first several chapters are organized might be given by asking this: is what makes for an instance of negligence something 'mental' (subjective), or is it an (objective) aspect of the agent's conduct which is at the heart of negligence? In other words: does an agent become negligent just in *thinking* or *feeling* a certain way, or does he do so by *conducting* himself in a certain fashion?

Subjectivists argue that the concept identifies a mental phenomenon. The mental phenomenon which 'negligence' identifies might secondly (along with its effects) be the object of moral and legal scrutiny, but the primary role of the concept is to pick out a mental state or event. By 'subjective' what is usually meant, then, in the traditional debate is 'mental', the idea being that phenomena which are 'subjective' are part of an agent's mental life or experience. Objectivists will argue that negligence is 'objective' in

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(Henry Edgerton, "Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence," *Harvard Law Review* XXXIX (1926), 849). As Edgerton describes it, my concern in chapters two and three would be with question (1), and not with question (2).

the sense that it is located primarily in what an agent *does*, and not in what she thinks, feels, notices, or is motivated by.

In the rest of the present chapter and in the next, I will take a look a several 'strong' claims about the meaning of negligence. The claims are 'strong' in the sense that each purports to identify negligence with something that is firmly rooted on one side of a line which divides the subjective from the objective realm; negligence is taken to be the kind of thing which is either found exclusively in the mind or in aspects of an agent's conduct. As well, the strong theses are frequently supposed to define negligence in terms of phenomena which stand on opposite sides of a causal 'coin.' Subjectivists think that negligence identifies, and is contained to, certain mental *causes*. Objectivists will argue that it is the harmful or risky *effects* (of any mental cause) which the concept of negligence covers.

The problem on either side of the debate is that negligence does not seem to be the *kind of thing* that might stay cleanly on one side of the subjective-objective line and act as a cause or effect of something on the other. Subjectivists cater almost exclusively to our thoughts about some of the mental connotations which might be part of the concept of negligence. Their theories tend to ignore the possibility of a *conceptual relation* between negligence (as a state of mind) and the production of risk or harm. This kind of problem is exhibited in each of the subjective theories of negligence proposed by J.W.C. Turner, John Austin, and Sir John Salmond.

2.3 *Subjective Theories of Negligence*

There are two principal candidates for fixing the meaning of negligence in essentially subjective – that is, mental – terms. One is the claim that negligence is inadvertence; the other is the claim that negligence is a careless or indifferent state of mind. Turner and Austin argue in a way that may be taken to exemplify the claim that negligence is inadvertence. Salmond is the most likely proponent of the thesis that negligence is a careless (indifferent) state of mind.

2.3.1 *Turner and Austin: Negligence is Inadvertence*

The thesis that negligence is an inadvertent state of mind is primarily spelled out along the following lines. 'Negligence' is taken to act as a name for a state of mind. More precisely, the term 'negligence' acts as a label for a state of mind which is identified under the terms of a certain description. Turner argues that negligence "...is the state of mind of a man who pursues a course of conduct *without adverting at all* to the consequences of that conduct: he does not foresee those consequences, much less desire them."[2]

We could say, then, that the real semantic content of 'negligence' is unpacked with the description which Turner intends as the 'sense' of the term. The description ('the state of mind of a man who pursues a course of conduct...') yields the conditions which must obtain in order for 'negligence' to name, refer to, or denote an instance of its kind.

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[2] J.W.C Turner, "The Mental Element in Crimes at Common Law," in *The Modern Approach to Criminal Law* (London: MacMillan and Co., 1948), ed. by L. Radzinowicz and J.W.C. Turner, 207.

The important thing for *any* strong subjective thesis about the meaning of negligence is that the principal semantic content of 'negligence' is a mental or psychological description.

From the start, some themes might be highlighted which are common to Turner's theory and those yet to be explored. One dominant theme is that 'negligence' and 'intention' refer to distinct states of mind. Note that they are supposed to be the same kind of thing in general: a mental state. What distinguishes them is that they have different mental contents. In Turner's analysis, the fact that certain consequences are neither foreseen nor desired by an agent means that they are not intended.[3] The absence of those same mental elements is what makes an agent's state of mind 'inadvertent.'[4]

A second theme worth noting is this. Subjective theorists claim that 'negligence' identifies a state of mind. That identification is usually made under the terms of a description that fixes what it means to be 'negligent' or 'inadvertent.' Note, though, that what satisfies the descriptive conditions is not really anything that is felt or conscious to an agent in being 'inadvertent.' An agent might *actually* be thinking about many different

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[3] Turner analyzes intention in the following way. He says that: " 'Intention' denotes the state of mind of the man who not only foresees, but also desires the possible consequences of his conduct. For example, I shoot at you, foreseeing and desiring that I may kill you" (Turner, "The Mental Element in Crimes at Common Law," 206).

[4] The term 'inadvertently' is often treated in the literature as one that has a particularly strong and unique connotation: it is not just that an agent does something 'unintentionally,' or without meaning or aiming to do it. His lack of intentional or purposeful agency also has, as a constituent element, an absence of any awareness (knowledge or foresight) of certain consequences or implications. He is neither aware of nor intentionally aiming at the results for which he is possibly to blame. For more discussion of this point and some of its difficulties, see chapter five, section 5.2.

things, or going through any number of emotions or feelings, in satisfying the conditions which go along with being inadvertent.

It is difficult, then, to think that 'inadvertence' identifies any one particular type of occurrent state of mind or set of mental properties. For the time being though, let us suppose that there is a unique state of mind, or a set of them, which answers to the terms of Turner's description. His claim can then be put in terms of the following proposition:

(P1.1) Negligence is inadvertence.

From the truth of P1.1 Turner is able to infer (with the assistance of additional premises) several things. The first is that it is apparently absurd to talk, as we commonly do, in terms of *degrees* of negligence. It makes no sense to qualify negligence as being 'gross', 'slight', or 'criminal.'[5] An inadvertent state of mind is essentially a 'blank' one (that is, with respect to certain consequences). Turner argues that 'blankness' is obviously not the kind of thing which will admit degrees. As he says:

> There can be no different degrees of inadvertence as indicating a state of mind. The man's mind is a blank as to the consequences in question; his realization of their possibility is nothing and there are no different degrees of nothing.[6]

The second conclusion worth noting is that negligence identifies the kind of mental state which cannot be considered as a *bona fide* species of *mens rea*.[7] For Turner, some element of foresight is an essential constituent of a guilty mind. Without such an element,

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[5] Turner, "The Mental Element in Crimes at Common Law," 209.

[6] Ibid., 211.

[7] Ibid., 205-211. See also Turner's discussion of negligence in *Russell on Crime*, Twelfth Edition, Volume 1 (London: Stevens & Sons, 1964), 43-52.

one cannot be held criminally liable for one's conduct, and so *a fortiori* one cannot be held criminally responsible for negligence.

Austin's analysis of negligence is similar in many ways to Turner's. He analyzes negligence in terms of a mental state which can be sharply differentiated from an intentional one. Intentions are explained by Austin as conscious elements of explicit thought, foresight, and belief. In short, it is sufficient for the existence of an intention that an agent have certain occurrent beliefs about the efficacy of her own acts of will, or about the likely consequences of her own actions in general. "To intend," says Austin, "is to believe that a given act will follow from a given volition, or that a given consequence will follow a given act....the party *conceives* the future event, and believes that there *is* a chance of its following his volition or act. Intention, therefore, is a state of consciousness."[8]

By contrast, the common thread of negligence and 'heedlessness' is that they are the kind of thing which presupposes a sort of 'unconsciousness' on the part of the agent. As Austin explains: "...negligence and heedlessness suppose *un*consciousness. In the first case, the party does *not* think of a given act. In the second case, the party does *not* think of a given consequence."[9] Note that this way of analyzing negligence allows Austin to

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[8] John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, Fifth Edition, Volume 1, Edited by Robert Campbell (London: John Murray, 1885), 428.

[9] Ibid., 428. Austin's use of 'unconscious' here obviously strikes us as incorrect. An agent's 'not thinking' of p of might lead us to describe him as being 'not conscious' of p. But not being conscious of a particular matter does not in the least seem to amount to being unconscious *per se*, or even 'unconscious' with respect to that particular matter.

envision a sharp *conceptual* divide between intentions and negligence. The sharp split originates in the fact that the concepts identify two distinct states of the mind. Austin therefore concludes as follows:

> ...a state of mind between consciousness and unconsciousness—between intention on the one side and negligence or heedlessness on the other—seems to be impossible. The party thinks, or the party does *not* think, of the act or consequence. If he think of it, he *intends*. If he do not think of it, he is *negligent* or *heedless*. To say that negligence or heedlessness may run into intention, is to say that a thought may be *absent* from the mind, and yet (after a fashion) present to the mind.[10]

Austin's analysis suggests that 'negligence' refers to a state of mind that is inadvertent or not presently conscious of certain things.[11] Unlike Turner, Austin proceeds to argue that inadvertence can operate as a legitimate ground of criminal liability. While Turner thinks that actual foresight is necessary for *mens rea* (and *mens rea* is necessary for criminal liability), Austin maintains that inadvertence can constitute a form of *mens rea*. An inadvertent state of mind can give rise to liability only if several conditions are met. For one, the inadvertence must be the *cause* of an omission, as Austin explains:

> Intention, negligence, heedlessness, or rashness, is not *of itself* wrong, or breach of duty or obligation; nor does it *of itself* place the party in the predicament of guilt or imputability. In order that the party may be placed in that predicament, his intention,

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[10] Ibid., 428-429

[11] A second tendency in Austin's work is to treat inadvertence as just one 'main ingredient' in the more 'complex notion' which is suggested by the concept of negligence. As he says: "Absence of a thought which one's duty would naturally suggest, is the main ingredient in each of the complex notions which are styled 'negligence' and 'heedlessness'" (427). Even so, it is fair to say that the narrow, mental sense predominates. Austin argues that to make a culpable omission is to be *negligent* or to *neglect* one's duty. In his account, an omission is something that is inadvertently not done (an intentional 'not doing' or omission is a 'forbearance'). To be *negligent* or *neglectful* seems, then, to require a blend of mental and behavioral components, but the *negligence* itself is restricted to the mental domain—that is, to the unconscious or inadvertent mind.

> negligence, heedlessness, or rashness must be referred to an act, forbearance, or omission, of which it was the *cause*.[12]

Secondly, an agent may be subject to liability for an omission only if he had a duty not to make the omission in the first place. Even though the agent is not actually conscious of the duty while acting, Austin maintains that he is *generally aware* of it. Thus an agent can be liable for inadvertence because it (together with the omission it causes) constitutes a breach of legal duty.

Several things follow from the analyses of negligence given by Turner and Austin. Both endorse a proposition such as P1.1. Thus to say that an agent acted negligently is the same as to say that she acted 'without adverting at all to the consequences of her conduct.' It would also be that the following statements mean the same thing.

(1) She acted negligently.

(2) She acted inadvertently.

However, we are inclined to think that statements such as (1) and (2) do not express the same proposition. It seems quite possible that (1) can be false while (2) is true: there might be cases in which an agent is inadvertent but is not negligent in his behavior. For that matter, the statements do not even seem to convey the same *kind* of information.

H.L.A. Hart argues that a statement such as (1) refers to the fact that an agent *failed to meet a certain standard of conduct.*[13] Both (1) and (2) might be taken to imply that

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[12] Austin, *Lectures on Jurisprudence*, 461.

[13] H.L.A. Hart, "Negligence, *Mens Rea*, and Criminal Responsibility," in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), 147-148. I will

the agent, in some sense, 'missed something,' or failed to notice something, but only (1) seems to imply that it was of sufficient importance that the agent *ought not* to have missed it. In other words, (2) does not imply that the agent failed to notice something which was of central importance in what he was doing.

It might be the case that an agent's unawareness or general failure to notice such-and-such suggests a common denominator among concepts such as inadvertence, carelessness, and negligence. The cognitive 'failure' would be a common denominator only if each term connotes some kind of unawareness or inattention on the part of the agent. A.R. White argues that this is true of all three, and especially of inadvertence:

> Inadvertence is the failure to pay such attention to the fine details of one's actions as may on occasion be necessary if an untoward result is to be avoided.... Inadvertence is a failure to look *at* the details of our action, to keep our eyes on what we are doing.[14]

White also maintains that despite their similarities, there is a conceptual difference between inadvertence and carelessness, just as there is between inadvertence and negligence. To describe an action as careless or negligent would seem to suggest a more serious 'breach' on the part of the agent. White argues that 'inadvertence' applies more to 'slips' with the 'fine details' of a certain activity. If the inattention is manifested with respect to things which comprise a central and important part of the main activity in

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discuss the substance of Hart's position, and the context in which it is developed, at greater length in chapter four.

[14] A. R. White, *Grounds of Liability: An Introduction to the Philosophy of Law* (Oxford: Clarendon Press, 1985), 99.

which one is engaged, the proper description would be put in terms of carelessness or perhaps negligence—but not inadvertence.[15]

The general suggestion is that the conditions for applying the concept of negligence are more restrictive and *of a different sort* than they are for saying that an agent acted 'without adverting at all' to the details or consequences of what she was doing. It seems that the truth of (1) might require a more complex fact or a more complex set of conditions than would the truth of (2). The inattention that accompanies careless and negligent acts has more serious implications, likely because of *what* is missed, and not just because of a general failure to notice something.

Hart also suggests that the difference in the logical character of the statements is indicated by the fact that (2), but not (1), might in some cases be offered as an *excuse* for what one does.[16] The point of offering one's inadvertence as an excuse is to suggest that certain (bad) effects were not intended, desired, willed, or within one's control in the relevant sense. Thus one is not truly responsible for the effects, or is responsible for them in only a weak, causal sense.

The kind of excusing work which 'inadvertence' occasionally does helps to show why it might be problematic to identify it with negligence. Suppose for the moment that Hart is right and that the truth of a statement such as (1) implies several things: first, that an agent failed to comply with a certain standard of conduct; and second, that one effect of

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[15] Ibid., 97-99.

[16] Hart, "Negligence, *Mens Rea* and Criminal Responsibility," 148.

this was that others were harmed or put at risk (albeit inadvertently). If our intuitions about negligence incline us in this direction at all, it is difficult to see how an analysis of negligence can be confined to the state of an agent's mind alone. We use the term to refer to the fact that others were put at risk or harmed by an agent's conduct. Thus if we are using 'negligence' to describe an event, it is not possible to present the harms or potential risks as the 'effects' of a mental state *to which they are only causally and not conceptually related.* Thus it does not seem that a statement such as (1) could ever excuse an agent in the same way that (2) might. In part, this is because (1) is not capable of putting the same sort of conceptual distance between the agent and the harm from which he hopes to be excused.

In other words, 'negligence' does not refer to a mental cause that could in principle be conceptually detached from the undesirable harms or risks which it produces. What is pinpointed is not a mental state which might have caused favorable results. On the other hand, an agent's inadvertence might be the cause of many different things. The effects might be good, bad, or rather neutral ones in themselves. (Think, for example, of the way in which an actor's inadvertence might be used to generate comedy in a play or movie). But note that we do not, it seems, speak about negligence as being the kind of thing which produces good or neutral results. If an agent's negligence does not actually result in harm (but only threatens it), we might consider him lucky in many cases.

2.3.2 *Salmond: Negligence is Culpable Carelessness*

A second subjective thesis is put forward by Salmond. He argues that we use the term 'negligence' to denote a *culpably careless* mind. [17] Part of his analysis of negligence contains a familiar argument in favor of the idea that negligence identifies a mental phenomenon. Consider the passage with which he concludes his discussion of negligence:

> A ship captain may willfully cast away his ship by the neglect of the ordinary rules of good seamanship. A father who neglects to provide medicine for his sick child may be guilty of willful murder, rather than of mere negligence. In none of these cases ... can we distinguish between intentional and negligent wrongdoing, save by looking into the mind of the offender and observing his subjective attitude toward his act and its consequences. Externally and objectively, the two classes of offenses are indistinguishable. Negligence is the opposite of wrongful intention, and since the latter is a subjective fact the former must be *such* also.[18]

Salmond argues that there is a difference between an intentional doing and something which is done negligently. The difference is not supposed to be one that resides in any perceptually distinguishable (that is, 'external' or 'objective') properties. The presence or absence of certain mental conditions makes a crucial difference in determining which concept covers the case (as well as what amount of fault and blame the agent might incur).

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[17] Sir John Salmond, *Jurisprudence*, Seventh Edition (London: Sweet & Maxwell Limited, 1924), 408-423. Salmond also suggests that we might use 'negligence' in a broader sense, to refer to conduct that is produced by a careless state of mind. 'Negligence' is therefore supposed to be ambiguous in the same way that a term like 'cruelty' is: each can be used to indicate either a subjective state or disposition, or the (objective) results of such a disposition (Salmond, *Jurisprudence*, 408).

[18] Ibid., 422.

Before looking at the finer details of Salmond's analysis, a problem with the general thrust of his case might be noted. In short, it is a mistake to conclude that the concepts of intention and negligence identify *only* those mental facts or properties which 'make the conceptual difference' in the sort of cases mentioned by Salmond. Imagine two cases which for all intents and purposes are perceptually identical. Say that on two occasions John strikes a pedestrian with his car, and that each case is composed of like physical events, the set of x, y, and z. Only in one case, John acts intentionally; in the other, he acts negligently. Suppose also that in the intentional case a certain mental property I, or set of them, is present. In the negligent one, there is a different mental property or set, signified by N.

It might be true that what differentiates the two events is the presence of a distinguishing mental feature(s) in each case. But even so, it would be a mistake to conclude – as some subjectivists like Salmond and Austin apparently want to – that each concept identifies *only the mental property*, or set of them, signified by I or N. *Conceptually*, negligence might also depend on x, y, or z, or on some relation which obtains between the various elements and N, for example; there are different relational properties in each case. Even if the conceptual difference in the example is decided based on the presence of I in one, and N in the other, it does not follow that the concept of negligence *identifies* only N, to the exclusion of other things. The error is to mistake what might be a necessary condition – the presence of some mental condition(s) – for

one that is both necessary and sufficient. Salmond's argument will not by itself show that the meaning of negligence can be confined to the mental domain.

As with Austin, it is clear that Salmond is concerned to argue for some clear conceptual distance between the traditional *mens rea* categories of intention and negligence. Their main way of doing this, it seems, is to posit a sharp *subjective* divide in what the concepts identify. The result is that different levels of criminal fault are grounded in distinct kinds of mental states.

Contrary to Turner and Austin though, Salmond argues that negligence identifies a careless state of mind. What it means to be careless is fixed by Salmond in terms of indifference: he claims that negligence, or carelessness, "...essentially consists in the *mental attitude of undue indifference with respect to one's conduct and its consequences.*"[19] One of the principal mental elements which divides a negligent state of mind from an intentional one is supposed to be desire. Salmond analyzes intention in terms of a conjunctive state of foresight and desire. He identifies negligence with a lack of positive desire for a certain outcome or consequence. In this way, the role that desire plays is supposed to distinguish between the two states in a sharp fashion.[20]

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[19] Ibid., 410.

[20] An agent's desire -- or lack of it -- also operates as one of the primary conditions of criminal liability. Salmond suggests that intentional law-breakers desire to break the law, or at least to perform some prohibited act. That is why they are liable: they desire to do wrong (or to do something that is in fact wrong). Apparently, one of the reasons for which negligent agents are liable is that they lack the desire to avoid doing something which might be harmful or wrong. Salmond also suggests that it is not necessary for the indifference (lack of desire) which makes an agent liable to be present at the point in time at which he harms others or puts them at risk. For example, an incompetent surgeon might care very much about the welfare of his patient while she is operating (Salmond, *Jurisprudence*, 413). Yet she may have been careless in making the decision to operate, or perhaps even in forming beliefs about

Salmond also distinguishes among two main forms which indifference may take.[21] The first is one in which the agent is aware of the interests of others (and perhaps knows that he is indifferent to them). Salmond elects to call this 'advertent negligence.' Negligence that is inadvertent is just 'simple negligence.' In either case, the common denominator is the 'not caring,' or an absence of care, on the part of the agent. In the first case, the agent notices the risk he poses to others, yet he does not care about it. In the second case, we might say that he does not care enough to know or to notice how others might be affected by his actions. The carelessness (indifference) is supposedly what *explains* the inadvertence in the latter case, that of 'simple negligence.'

At the crux of Salmond's thesis about negligence is, then, a series of related claims. One is that the term 'negligence' has a distinct mental sense; a second is that this mental sense is one that operates as a proper category of *mens rea*; and a third is that this category identifies an indifferent state of mind which is distinct from mental states that are intentional. Negligence is essentially a mental phenomenon because carelessness is the kind of thing that takes a mental form. More precisely, the carelessness or 'not caring' which is tantamount to negligence is a matter of the agent's 'indifference' to certain things. Thus we arrive at a second type of subjective thesis, which may be expressed like this:

(P1.2) Negligence is carelessness.

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her own skills. Salmond distinguishes between 'remote' and 'immediate' carelessness, at least one of which is necessary for negligence.

[21] Ibid., 411.

There are, however, numerous problems in thinking that carelessness is the same thing as negligence, and that each term identifies a state of mind (or a set of them). There very well may be an important conceptual relation between negligence and care, and perhaps it is roughly this: every negligent agent is careless *in some sense*. Salmond argues that 'carelessness' is synonymous with 'not caring' and that each term denotes an agent's indifference. Thus the real content of P1.2 is more aptly expressed by the claim that:

(P1.21) Negligence is indifference

One initial problem with Salmond's analysis is in the move from P1.2 to P1.21. Salmond analyzes 'care' in a way that shows it to be a largely mental phenomenon. 'Carelessness' denotes a mental state of indifference. The problem is that a purely mental conception of 'care' and 'carelessness' ignores some of the potential ambiguity which surrounds the meaning of care. Oftentimes, we do take care to be the kind of (mental) thing that is evident in how one *thinks* or *feels* about something. We also think, though, that care is the kind of thing which may take a more active form, in which case 'caring' connotes the *doing* of a some things or the *active pursuit* of certain ends. One who cares might feel a certain way about something, but she might equally pursue what is good for another, or be disposed to give a certain priority to things in her planning and actions (regardless of her feelings about them). The two forms of care might only be contingently related: for example, the way a doctor cares for her patients might be devoid of the mental feelings which one sense of the term suggests.[22]

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[22] White's discussion of the concept of care notes and discusses this sort of ambiguity (White, *Grounds of Liability*, 93-97). Traditional Objective theories of negligence (discussed in Chapter Three) also tend

We might, then, want to express some initial reservation about the idea that 'carelessness' can be reduced to a mental term. It is not clear that P1.21 gives an accurate picture of what is—or might—really be expressed by P1.2. For the moment then, we can ignore the fact that Salmond identifies carelessness with indifference, and place indifference at the crux of negligence. Perhaps what Salmond really wants to express is the idea that negligence is indifference, in which case his thesis does not have to be mediated so directly by concerns about the meaning of care.

Recall that Salmond suggests that indifference may take one of two main forms. In one, the agent may be conscious of the fact that he does not care about something. In the other, the agent generally lacks a desire to be concerned with the interests of others, and this triggers a failure to notice some of the pertinent effects of his actions. These are supposed to be the two forms which negligence may take: the first is advertent, while the second is inadvertent or just 'simple' negligence.

There are, however, some problems with each form of putative negligence. Salmond is working primarily with two basic criminal categories, one being 'intention' and the other being 'negligence.' We commonly think that a third criminal category, 'recklessness,' interposes between the two. The fact that an agent has some awareness of, and possible control over, an unjustifiable outcome or harm is normally sufficient to say that he was *reckless* in not avoiding it. In general, the idea that negligence can be fully advertent—and still *be* negligence—is one that might pose a challenge to some of

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to see 'due care' as a type of (non-negligent) conduct that is essentially non-mental. See for example the article by Henry Terry, "Negligence," *Harvard Law Review* XXIX (1915).

our main intuitions about what differentiates negligence from other important legal concepts.

We could suggest that 'advertent negligence' just is recklessness, and thereby refuse to treat inadvertent and advertent negligence as two different forms in which *the same kind of thing* may appear. We could then restrict our attention to Salmond's claims about 'simple negligence' (indifference which manifests itself in inadvertence). One problem with this is that we usually take indifference to be the kind of thing which is advertent: that is, it seems to require that we have some actual awareness of those things about which we feel indifferent. The idea that indifference could be entirely unknowing or unwitting seems to be conceptually confused from the start.[23]

Perhaps what Salmond has is mind is more general, and might be articulated as follows. The basic idea in a case of negligence is that *if* one had cared enough about the interests of others, one would have consciously attended to matters differently: namely, with more attention to the way in which one's actions impinged on the interests of others. The suggestion is that one can be indifferent to the interests of others in a more fundamental way that need not be so immediately felt by an agent. The character and

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[23] It is also difficult to think that desire alone can be used to differentiate among the mental states which are supposed to be identified by 'intention' and 'negligence.' Salmond takes intentions to be made of elements of foresight and desire. Yet it seems that the relation between intentions and desire is at best only contingent: one might intend to do things which one does not desire; one might desire and think about things which one has no intention of doing; one might even contemplate, foresee, and desire a certain outcome but yet it may not be one's intention to produce it {possibilities such as these are suggested by R.A Duff's discussion of intention in chapter three of his *Intention, Agency, and Criminal Law* (Oxford: Basil Blackwell, 1990)}. If possibilities such as these are real ones, as they seem to be, it is not clear that the absence of desire alone can be used to make distinctions in the way that Salmond wants. At the very least, other conscious elements would need to be included in the analysis.

beliefs of an agent might structure her field of 'vision' in a way that impacts on what she notices about her actions. A deep insensitivity to the interests of others might translate into a failure to notice how an agent affects others, and an instance of this deep, 'structural' indifference is what Salmond means by 'negligence.'

Even if we let this sort of deep absence of concern go by the name of 'indifference,' there are still problems with the thesis. It is difficult to connect indifference (at any level) with inadvertence in a firm way that will account for what we think negligence might imply. It is not really clear what it could mean for indifference to 'translate into' inadvertence. The phrase could hardly suggest a logical relation between the two concepts alone. For example, one could easily notice things to which one was utterly indifferent (much as one could act in the service of interests for which one had no real concern). On the other hand, it is not hard to think that agents can, and often do, fail to notice things about which they do care in either an immediate or long-term sense. Noticing something and caring about it are two distinct and only contingently related things. Their connection seems to be one that is more psychological than it is logical.

More generally, it is not clear that this kind of fundamental or deeply-set indifference could be used to give a compelling account of negligence. Suppose that an agent does miss 'seeing' a lot of things because he simply does not care enough to be aware of them. The question is: is this (mental) fact alone sufficient to make him negligent?

There are many things which could serve as objects of indifference. But it seems that it might be quite reasonable *not* to care about and *not* to notice many things. In itself, the

fact that an agent's life and conscious attention are structured around concerns for some things, and not others, says nothing about whether the care and attention are focused in good, bad, or morally neutral ways. It might be a matter of virtue, of vice, or of no import whatsoever that an agent does not care about, and attend to, some things.

It does not seem very likely that the same things can be said about negligence. The idea that in certain circumstances 'negligence' indicates a virtuous or appropriate disposition is counterintuitive: it runs against some of our basic thoughts about the kind of circumstances in which we would normally apply the predicate 'was negligent.' The concept of negligence seems to incorporate some combined notion of the *importance* and *inappropriateness* of what an agent failed to notice or to do.

One last modification to the thesis might be considered. As Salmond originally expresses it, his thesis is that negligence is *culpable* carelessness.[24] We might, then, modify P1.21 by adding some mention of culpability, to get:

(P1.22) Negligence is *culpable* indifference.

There are, though, still intractable difficulties in thinking that culpable indifference is identical with negligence. The basic problem now is to give an analysis of what makes indifference *culpable* in a way that would *only* be suggestive of negligence in a mental form. There are two difficulties in particular which might be noted.

First, indifference might be culpable for moral reasons that have little to do with negligence. An attitude (or general state) of indifference might be associated with such

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[24] Salmond, *Jurisprudence*, 408.

vices as sloth or a callous disregard for others. One reason that indifference in this form would not usually be taken for negligence is that it is directed at interests of a certain (perhaps less fundamental) kind. It might be callous of me not to care about, and not to notice, the way I hurt your feelings, but it does not seem that this qualifies as negligence—even in a sense which might be moral and not legal. Negligence seems to 'orbit' around interests, risks, or harms of a more serious nature.

Secondly, even if one fails to care about and notice some harm which is of a serious nature, the picture is still not complete. What is missing is the idea that the agent is *implicated in causing*, or in *failing to avoid*, a certain course of events in which those harms arise. For example, one might be utterly blind to the fate which befalls many people in the Third World, and such an attitude may indeed be culpable. But the culpable relation is still too passive to cover what we mean by 'negligence.'

An indifferent attitude, state of mind, or state of character generally might have aspects that are both mental and culpable. But if what makes a case of negligence culpable is that it involves *the production of* certain harms or risks, it ceases to be a purely mental phenomenon which is identified by 'negligence.' To the extent that 'culpable' is analyzed in P1.22 in a way that starts to satisfy us, it does so only by deflating the idea that negligence might be conceptually restricted to what an agent thinks or feels.

2.4 *Conclusion*

Despite their general differences, Turner, Austin, and Salmond propose theories of negligence which are united at the core: the theories suggest that negligence identifies or characterizes a state of mind; and they picture the mind as a cause of physical acts. The end result is a notion of negligent criminal agency that is heavily indebted to dualism, one in which the mind (or some of its *actual* contents) is supposed to stand in a causal relation with certain harmful (or potentially harmful) states of affairs. A concept like 'negligence' apparently allows us to focus on those aspects of an agent's mental life that are essential for determining such things as criminal blame, guilt, liability, and responsibility.

The problems encountered by each theory are similar. It is not clear that the defining terms can, in every case, be convincingly reduced to mental ones, or to ones that would necessarily convey the negative connotations that 'negligence' tends to have. Even if the *definiens* were reducible to a mental predicate, it is unlikely that the result would be an intuitively satisfying definition of negligence. A strong subjective theory would sever any direct, *conceptual* relation between negligence and the production of actual harm or risk. This would imply that negligence bears only a *contingent relation* to externally culpable behavior, and to being to blame for the way in which one has actually related oneself to others. The latter possibility is one that provides a main critical inroad for objective theories of negligence, to which I will turn in the next chapter.

CHAPTER THREE – NEGLIGENCE AND RISKY CONDUCT: THE TRADITIONAL OBJECTIVE THEORY

3.1 *Introduction*

Two main proponents of a traditional objective theory of negligence are Henry Terry and Henry Edgerton. Each adheres to the general proposition (P2) that negligence is a type of conduct. I will focus on the common aspects of their theories in the present chapter. Some of these aspects are quite plausible. Objectivists tend to envisage a conceptual link between negligence and the creation of risk. This appeases some of our intuitions about the meaning of negligence and our use of the term to capture a certain type of event. However, objectivists still want to place negligent acts within a causal nexus of mental and physical events, and there is a push to reduce the meaning of 'negligence' to the *effects* alone of any mental state. This does damage to some of our other main thoughts about negligence and the mind (and also about how the relation between these things might bear on the *degree* of an agent's culpability). In section 3.2, I will give a brief outline of the objective position, before moving to consider its specific claims in more detail.

It should be noted that Terry and Edgerton are not concerned to give an analysis of the concept of negligence *only as* it applies to criminal law. Their general concern is to explicate the meaning of negligence in a way that accounts for it being a general ground of legal liability, including civil cases. As a result, at least some of the debate between subjectivists and objectivists seems to occur at cross-purposes. Subjectivists want to

make our use of the term 'negligence' fit within a traditional *mens rea* classification, where it should indicate a subjective basis for imputing criminal fault. Objectivists think that 'negligence' refers to a general type of conduct, for which different types of legal liability might be imposed. They conclude that no specific mental state or property is relevant to negligence as a type.

In assessing the objective thesis, I will leave aside questions about the relation between civil liability and negligence. There are important issues here, but they are ones that we can attempt to distinguish from the main points of criminal concern. There are more basic conceptual questions about how 'negligence' should be understood. There are also doubts as to whether a broad, 'objective' account of the concept can satisfy either our intuitions about negligence or the specific legal concerns that seem to motivate the analysis.

3.2 *An Outline of the Objective Position*

As it is articulated in the works of Terry and Edgerton, there are two main components in the objective theory of negligence. The first component comprises an attack on the 'subjectivism' of theorists like Turner, Austin, and Salmond. The second element is an attempt to elucidate the meaning of negligence in a way that makes an agent's conduct, and not his state of mind, the focal point. Frequently, the two sides sit in a very close relation. Consider for example what Terry says at the start of his article:

> Negligence is conduct which involves an unreasonably great risk of causing damage....Negligence is conduct, not a state of mind....Whatever the state of

> mind be that leads to negligent conduct, the state of mind, which is the cause, must be distinguished from the actual negligence, which is the effect.[1]

Edgerton follows a similar line of argument in his article:

> Negligence neither is nor involves ("presupposes") either indifference, or inadvertence, or any other mental characteristic, quality, state, or process. Negligence is unreasonably dangerous conduct—*i.e.*, conduct abnormally likely to cause harm. Freedom from negligence... does not require care, or any other mental phenomenon, but requires only that one's conduct be reasonably safe—as little likely to cause harm as the conduct of a normal person would be.[2]

As the remarks suggest, an attack on subjectivism – on the idea that 'negligence' identifies mental phenomena – gives the objective thesis its initial shape. I will refer to the claims about what negligence *is not* as the 'negative thesis' and look at them in the following section, 3.3. The negative thesis is also mixed with positive claims about the meaning of negligence. I will explore the positive thesis in section 3.4. The usual claim made by objectivists is that 'negligence' refers to, or characterizes, a type of conduct which is unreasonably risky or dangerous in the harm that it threatens. The focus is meant to be on actions or conduct – on what an agent *does*, and not on what she *thinks, notices,* or *feels;* hence we can know that an agent is negligent without knowing anything about her particular state of mind.

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[1] Henry Terry, "Negligence," *Harvard Law Review*, XXIX (1915), 41.

[2] Henry Edgerton, "Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence," *Harvard Law Review*, XXXIX (1926), 852.

3.3 *The Negative Thesis: Negligence is not a State of Mind*

Primarily, what Terry and Edgerton reject about subjective theories is the claim that negligent acts are sharply distinguishable from intentional ones *on the basis of some characteristic mental properties which 'negligence' identifies.* The traditional objectivists want to convince us of two things in particular: that a proper conceptual analysis of negligence will in fact show that it identifies a type of conduct, and not a mental state; and that this account of the concept gives us a more satisfying picture of why we impose liability for negligence than will a subjective thesis.

Subjective theories are supposed to be flawed in two main ways. First, there are conceptual concerns about what it would take to prove the existence of negligence if the strong subjective theses were true. Second, there are related concerns about the kinds of conditions which might exempt an agent from liability for his negligent conduct. The conceptual concerns are the simplest and most satisfying. The arguments that invoke considerations about liability are more convoluted and fail to score decisive points against subjective theories.

3.3.1 *Concerns about Meaning*

At the core of the subjective theories examined in chapter two is the claim that negligence is a state of mind. The theories are perhaps most plausible if we imagine an agent *actually causing* harm to others, or endangering them, as a result of being in a 'negligent frame of mind.' Terry and Edgerton frequently point out that this need not be the case. If 'negligence' just refers to a state of mind, the presence of certain mental

conditions would entail or identify the presence of negligence. Any measure of indifference or inadvertence should be sufficient to show that an agent is negligent. Other conditions would be sufficient to show that negligence is absent. For example, Edgerton claims that 'anxious consideration' and 'concerned attention' are the antitheses of inadvertence and indifference. Therefore, if it is true that an agent is anxious or attentive, this would seem to imply that she cannot be negligent, *in virtue of the meaning of the term 'negligence' alone.*

In principle, then, negligence (*qua* state of mind or mental event) could exist in isolation from any objective facts about what sort of conduct an agent engaged in. She might conduct herself in a harmful or threatening way, but not have an indifferent or inadvertent mind at the same time (she might be attentive or anxious). On the other hand, she might have a fully 'negligent mind' without harming anyone or putting others at risk. As chapter two suggested, the subjective theses imply only a contingent relation between the concept of negligence and the production by an agent of harm or risk.

Objectivists point out these entailments in an effort to score direct, intuitive points against the subjective theories. No matter what an agent might think or feel (even if this is blameworthy in its own right), it seems likely that we do not blame him *for negligence* until such time as he *actually fails to do something that he ought to do.* In discussions of negligence, this failure is normally supposed to result in the harm or endangerment of others. If our intuitions about the concept can be motivated in this direction, the result would be that *no* purely mental account of negligence can ever sufficient. If we think that

it is part of the very meaning or logic of the term 'negligence' that it says something about the way in which an agent *actually* relates himself to others, the objectivist will have gained a foothold in his initial criticism of the subjective position.

3.3.2 *Concerns about Liability*

Often, the concerns which objectivists have about the actual meaning of 'negligence' are mixed with other ones about the conditions in which legal liability is – or ought to be – imposed. Consider one of the ways in which Edgerton clarifies his own position on the concept of negligence, while linking it with concerns about liability:

> ...the proposition that negligence is conduct means that there is negligence if there are unreasonably dangerous motions, and not otherwise; consequently, that no particular mental shortcoming proves negligence or is necessary to negligence, and no particular mental attainment precludes negligence. Non-negligent conduct, and consequent freedom from liability, may coexist with a mental state that is dangerous, as involving inadvertence, lack of normal anxiety to avoid harm, or any other unsafe mental fact; negligent conduct, and consequent liability, may coexist with normal and proper advertence and anxiety.[3]

There is also, then, a tendency to use concerns about liability to apply leverage against a subjective account of negligence. Elsewhere, Edgerton outlines some of the apparent problems that would arise from imposing criminal liability for negligence, given that we understand negligence to be a state of mind:

> ...either the theory that negligence is, or ... that it necessarily involves or "presupposes," a particular mental condition, would protect the attentive and anxious man from liability for his dangerous conduct....The mental theory in either of its chief form—that negligence is, or that it necessarily involves, inadvertence or indifference—would leave the general security unprotected against that vast amount of dangerous and harmful conduct which results not from inadvertence or indifference but from deficiencies in knowledge, memory,

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[3] Ibid., 854.

> observation, imagination, foresight, intelligence, judgment, quickness of reaction, deliberation, coolness, self-control, determination, courage, or the like. This is the great vice of the theory.[4]

The 'great vice' of the subjective theories is that they would identify a class of negligent acts on the basis of an inappropriate list of exclusively mental criteria. Several types of objections are made in response to such a list. For example, to the extent that a subjective thesis provides necessary conditions for negligence, it would apparently not allow us to predicate 'negligence' in some cases where actual harm ensues from unreasonably dangerous conduct. If an agent's mental conditions do not match the mental 'list', she is simply not negligent (and so liability could not be imposed *for negligence*), regardless of how we would characterize her (external) conduct.

There are other concerns about the list being sufficient. An agent's conduct might, by all accounts, be undertaken in a 'normally safe' manner, though perhaps through bad luck or no fault of his own harm results. For example, someone driving in a safe manner (that is, in an 'externally' and 'objectively' safe manner, according to the standard 'rules of the road') might be temporarily 'lost in thought' or momentarily inattentive and be implicated in causing harm at that very point time. Edgerton refers to cases such as these, in which the agent's state of mind is not supposed to be the actual cause of harm, as ones of 'pure coincidence.'[5] The central point here is that mental state accounts of negligence might lead to the imposition of liability in cases where nothing unsafe or

unreasonable about an agent's (external) conduct was the real cause of harm. The relation between causing harm and being in an inadvertent or indifferent frame of mind (the former of which is supposed to be fairly common) might be a purely contingent one.

There are, however, a number of problems with mixing a conceptual argument with one that is organized around concerns about liability. Some of these problems are quite general, and involve the connection between negligence and liability; others are more specific. It is not clear that each of the cases to which Edgerton refers (in the above quote) must be one of negligence, or one for which the agent is not liable. It also seems that the subjective position might be clarified or reformulated in a way that makes at least some of the cases compatible with findings of negligence.

It is not clear that being legally liable for something is essential to being negligent. This is one general reason as to why it is problematic to bring – in any direct fashion – concerns about liability into a discussion of the concept of negligence. Neither the subjectivists nor the objectivists make an argument for a conceptual relation between negligence and liability, and it is doubtful that such a case could plausibly be made. There are obvious cases in which negligence is not necessary for liability; many in the legal domain should fall easily outside the scope of whatever we mean by 'negligence.' It is also possible to imagine cases in which negligence is not sufficient for liability. Perhaps one's inadvertence or unreasonably risky conduct does not result in actual harm, or it results in actual harm that is of no legal (criminal or civil) concern; the interest which the harm affects might sit outside the domain of legal 'objects' with which the law is

concerned. If negligence is the kind of concept which has extra-legal applications, there will be cases in which it is true that an agent is negligent and false that he is legally liable for something.

It is not clear, then, that subjective claims about the concept of negligence must *entail* any particular conclusions about liability at all. The entailment could not simply be conceptual or analytic. It is also unlikely to follow from simple, agreed upon premises about liability which tell us precisely how to identify a case that ought to be subject to criminal liability. There is disagreement at both ends: about what negligence is, and about the conditions that must obtain in order for a case to be fairly subject to criminal liability. This makes it especially hard to motivate our intuitions about the concept of negligence with substantive claims about liability.

Salmond and Austin do not argue that negligence is a state of mind *and* that such a state is sufficient by itself for being held liable. Their primary concern is to show how the concept identifies something that fits but one requirement (the *mens rea* one) among others in a traditional scheme for imposing criminal liability. Salmond might reasonably claim that one is liable for indifference *only if* it is causally related to an *actus reus*. A class of indifferent or inadvertent minds would compose the extension of the concept of negligence, but not every member of that class would also be subject to criminal sanctions.

The point about mental states coinciding with, but not causing, an incidence of harm is a separate issue. If it creates problems, they are not specific to a mental state analysis

of negligence. An agent B might intend to kill C, and form the most elaborate plans to do so. But if he runs C down *accidentally* with his car, it seems clear that he is not liable for murder.[6] What is more, we would not excuse such a case from liability by adjusting our analysis of the concept of intention. We would likely adopt different premises about liability and the relation between agents and criminally-relevant harms.

Bringing concerns about liability into the conceptual debate about negligence is also problematic for more specific reasons as well. Edgerton is concerned to present some possible cases of 'real' negligence (involving unreasonably risky behavior) that have a wide variety of mental causes or constituents, not all of which could be accounted for along subjective lines. These are also supposed to be cases in which we think it is fairly obvious that an agent should not be excused from liability, or that the type of (mental or character) 'defect' in question is not one that should excuse the agent. The end result is supposed to be a general incompatibility between the cases mentioned by Edgerton and being liable for negligence (as the subjective theses would explicate the notion of negligence). The cases are thus supposed to represent counterexamples to a subjective thesis.

It is not clear, though, that agents would escape liability in every type of case to which Edgerton refers, even if some of them might not fall within the (subjective) extension of negligence. For example, an agent might lack self-control *and* act

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[6] Duff discusses this sort of problem, though he does so specifically in relation to problems that arise in discussing the notion of intentional action. See R.A Duff, *Intention, Agency and Criminal Liability*, chapter three.

intentionally *and* be liable for what he does. Thus, some of the cases need not suggest clear counterexamples to the subjective thesis. Not all of them represent clear-cut cases in which substantive concerns about liability (or being excused from liability) can be used to motivate our intuitions about what the concept of negligence should or should not cover.

It also seems possible that an agent could be temporarily deficient in a number of mental respects (in memory, observation, foresight, or judgment, for example) *and* be inadvertent or indifferent at the same time. A general distinction might be invoked between terms that *refer directly* to states of mind (i.e. 'pain' and 'pleasure' might be taken be taken as labels for a distinct types of mental states), and those which *say something about or describe* an agent's mind. If the distinction holds, it is possible that 'inadvertence' could behave as the kind of term which expresses something about an agent's mind, without also thinking that it refers to a state of mind. It can be true that 'X acted inadvertently' in virtue of her state of mind (i.e., she is *not paying attention* to some things), without this entailing that inadvertence just is a state of mind, or that 'inadvertence' refers to a mental state.

A similar analysis might be offered of many terms or statements that are supposed to indicate mental deficiencies. The statement 'he forgot or failed to notice P' might be taken to identify a mind that is, on some occasion, deficient in memory or observation. Yet it seems to indicate this more by giving a *description* of a mind or event than by identifying the literal contents of an agent's state of mind. I can only forget or fail to

observe P (or be deficient in memory or observation with respect to P) if I am *actually* thinking about or noticing other things, say Q. In this way, it seems that an agent's *actual* states of mind might be compatible with her exhibiting a number of mental deficiencies. This would mean that exhibiting some deficiencies is fully compatible with being liable for negligence in some of the cases to which Edgerton refers. Again, there is no straightforward counterexample to the subjective view of negligence.

One clear point of disagreement, *stated in terms of liability*, between Terry and Edgerton on one hand, and the subjectivists on the other, could be drawn out by asking this: if an agent endangers others substantially and unjustifiably, *because he intends or desires to do so*, is this a case in which he might, if harm results, be liable for negligence? Subjectivists would say 'no': given the way in which the agent is mentally related to his own actions, the case would not be one in which liability for negligence is possible. Objectivists argue that facts about the agent's state of mind, or about the mental relation that obtains between the agent and his own conduct, are not relevant in deciding if he is liable for negligence. No particular mental 'attainment' or state is supposed to preclude liability for negligence. Objectivists include such a claim in the negative formulation of their position, and their positive thesis, to which I will turn in the next section, seems to encompass it – if only halfheartedly – as well.

3.4 *The Positive Thesis: Negligence is Unreasonably Risky Conduct*

The negative thesis comprises attempts to spell out why negligence is not a state of mind. In short, the positive thesis says that negligence is a type of conduct, the essence

of which is that it is 'unreasonably risky or dangerous.' The positions that Terry and Edgerton adopt hinge on claims of the following sort:

> (P2.1) "Negligence is conduct which involves an unreasonably great risk of causing damage."[7]
>
> (P2.2) "Negligence is unreasonably dangerous conduct – *i.e.*, conduct abnormally likely to cause harm."[8]

In the context of the traditional debate, a 'type of conduct' is taken to be an objective phenomenon in several respects. For one, it does not exist in the private mental life of an agent. It consists in what the agent *does*, in how he *actually relates* himself to others and the world through his actions. Even if the relation must be a type of 'unreasonable' one for it to qualify as negligence, this is not supposed to be a result of how the agent thinks or feels about his conduct.

Second, unreasonably risky conduct is taken to be the kind of thing that issues from mental causes; it represents the (objective) *effects* of those causes. Another way of formulating the objective position is, then, to say that we can identify and assess what an agent *does* apart from any knowledge about his actual reasons, motives, desires, etc., in doing it. The central tenet of a strong objective position would be that no mental state, occurrence, property, capacity, or 'shortcoming' is relevant to the definition of negligence.

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[7] Terry, "Negligence," 40.

[8] Edgerton , "Negligence, Inadvertence, and Indifference," 852.

There are, however, a number of difficulties with the positive objective thesis as it is expressed in such a strong form. It is not clear that a claim such as P2.1 or P2.2 is narrow or refined enough to give us a proper handle on negligence; it is unlikely that either proposition could be used to identify a class of events that composed *only* the extension of negligence. The objective thesis also implies that negligence is not logically incompatible with forms of action that are, for example, willful, intentional, knowing, purposeful, or chosen. Although objectivists think that mental 'shortcomings' or 'deficiencies' are likely the cause of negligent behavior, they are not included as part of the definition of negligence. This makes it difficult to say that negligence can be associated with a particular *kind* or *level* of blame. I will explore these critical avenues in the following sections, and then give a summary of the main virtues and drawbacks of the strong objective theory.

3.4.1 *Unreasonable Risks and Dangers*

Each of P2.1 and P2.2 tries to give a more specific account of the general proposition (P2) that negligence is a type of conduct. The key notion by which negligence is positively defined is that of conduct being 'unreasonably risky'. Together, the concepts of 'risk' and 'unreasonableness' add in several ways to the sense in which negligence is supposed to be objective.

'Risk' is generally taken to connote potential or actual danger to interests of some kind. An agent need not be aware of the fact that his conduct is risky, or that he is putting certain interests in danger, in order for the concept of risk to have application.

Similarly, he need not know that the risks are 'unreasonable' for them to be so.[9] The notion of conduct being 'unreasonably risky' suggests, then, that negligent conduct can be identified apart from considerations about the particular consciousness of an agent whose conduct it is. This might be one of the intuitive benefits of defining negligence in terms of concepts like 'risk' and 'unreasonable': they underscore the extent to which *at least some* of the faulty or blameworthy aspects of negligent conduct are not ones that originate in how an agent thinks or feels about what he is doing.

There is, however, some question as to whether objectivists speak narrowly enough about the type of risks and interests that might be essential to negligence. As well, their characterization of what makes risky conduct 'unreasonable' might not be strong enough to capture what we intuitively think negligence involves.

Without further qualification, it is likely that either version of P2 would identify too large and disparate a class of cases to represent a convincing analysis of negligence. It would at least be necessary to give a more detailed account of the *sort* of risks and interests that are central to negligence. Otherwise, the properties which are allegedly essential might be instantiated in a form which, by all accounts, would not count as an example of negligence.

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[9] The standard interpretation of what it is for risks to be 'unreasonable' is that they are not ones that a 'reasonable person' would have taken or created in the same situation. The latter notion is admittedly a rather vague if substantial one. Legal references to the 'reasonable person' generally stand proxy for some sense of what is appropriate in a certain situation, based on a rather minimal grasp of the overriding prudential, moral, or legal reasons for following one course of action and not another.

Consider a trivial example. Imagine that during a game of high-stakes blackjack one player elects to receive another card with a score of twenty already in his hand. By any standards, this would be unreasonably risky. The player would certainly be in danger of incurring some financial loss. Although the conduct is both unreasonable and risky, the interests and dangers which are at stake *in such a context* do not seem to be ones that are essential to negligence. It seems that a narrower domain of risks and interests is likely what the objective theorists have in mind, and this would have to be drawn out in greater detail in order to make more explicit the nature of negligence.

There are also concerns about the range of considerations that might be relevant in determining if risky conduct is 'unreasonable' or not. One way in which Edgerton attempts to clarify the meaning of the phrase 'unreasonably dangerous conduct' is by suggesting that it is "...i.e., conduct abnormally likely to cause harm."[10] Yet surely such a proposal is neither sufficient for understanding negligence nor for grasping what it means for risky conduct to be 'unreasonable.' What is unreasonable about a particular course of risky conduct cannot just be the size of the risks alone, or the likelihood that actual, grave harm will ensue. The unreasonableness must pertain more to the absence of *good reasons* or *justifying aims* than to the size of risks or to the probability that certain harms will occur.

Consider for example the difference between heroic and foolhardy conduct. (Perhaps cases of negligence and foolhardiness could overlap, but we can assume that no case of

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[10] Ibid., 852.

heroism – even if it fails and no matter what the risks are – is one of negligence.) Either form of conduct might include actions that are 'abnormally likely to cause harm,' in the sense that it is likely to fail and to result in serious harm. But a hero has good reasons for doing what she does, even if she fails to appreciate both the reasons and the risks while acting. Even if a mother loses her own life and fails to save that of her drowning child, her actions do not become unreasonable or foolhardy because of the great risks involved or the actual harm that results. Evidently, her conduct was 'abnormally likely to cause harm' (i.e. her own death). Nonetheless, even *failed* heroic attempts are not cases of negligence or instances of risky conduct that is unreasonable.

Just as the objective theorist would have to give a more specific account of the type of risks involved in negligent activity, he would also have to give a fuller picture of what makes negligent conduct 'unreasonable.'[11] It is not simply that negligent behavior is abnormally likely to cause harm; other considerations seem relevant to predications of negligence. They include: the type and 'weight' of interests involved; whether or not the agent bears any special (dutiful) relation to others and the interests at stake in a particular matter; and the likelihood of alternative (non- or less-harmful) courses of action. For example, what constitutes negligence in the context of a parent-child relation would not usually be the same in a more impersonal setting. In order to account for the difference, an explanation of what makes risks 'unreasonable' would have to encompass

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[11] Terry does note a number of important factors and relations in determining if a particular risk is unreasonable (Terry, "Negligence," 42-44). Yet he gives a rather narrow account of what sort of things might be relevant in assessing the 'utility' of a risk.

a fairly substantial (or substantive) understanding of the practical reasoning of agents, and go beyond a simple calculus of the probability of harm in a particular course of events.

3.4.2 *Intentional Risking and Endangering*

A number of concerns about P2.1 or P2.2 might, then, arise in response to how the notion of 'unreasonably risky conduct' is characterized. If the characterization is too broad, it may not yield an intuitively plausible account of negligence. A second type of concern would bear more directly on the debate between subjectivists and objectivists. It would involve asking whether even a narrow construal of the objective thesis would yield an adequate conception of negligence.

The question that most clearly divides objectivists from subjectivists is perhaps this: can considerations about an agent's state of mind be absent from a definition of negligence altogether? Objectivists convincingly argue that engaging in 'unreasonably risky conduct' is not something that requires, or says, anything about the particular state of an agent's mind. Their argument is supported by general considerations about what is required to predicate 'unreasonable riskiness' of an agent's conduct. It would not require that we attend to what the agent himself thought or felt about his conduct. The most important questions are about whether substantial risks are created by the conduct, and if there are possible justifying reasons for them.

The claim about an agent's actual states of mind being irrelevant to predications of negligence should be distinguished from any more general ones about the mental

capacity of an agent to assess his own conduct in certain terms. It seems almost trivial that having the general mental capacity to identify and assess one's actions in certain terms is a prerequisite for being negligent. It is likely that it must be *generally possible* for an agent *explicitly* to grasp a proposition to the effect that his or her conduct is unreasonable risky, for him or her to be guilty of negligence.

Mental facts do play a role in telling us what an appropriate subject would look like for predicates such as 'was negligent' or 'was unreasonably risky'; this explains why only certain subjects are open to having negligence predicated of them or their actions. We do not, for example, usually think that cats or computers are suitable candidates. If one's cat happens across an inherently dangerous situation, there is no way for it to respond in a way that is either negligent or non-negligent. Computers and cats lack the requisite mental capacity for appreciating what might be at stake in a particular matter, and for responding appropriately on the basis of such an appreciation. In a broad sense, mental facts about an agent are relevant in predicating negligence, even given a traditional objective account of the concept.

The main thread of the objective position is the more narrow claim that engaging in unreasonably risky conduct is not something that requires that an agent's mental capacities be *explicitly used* in any one way, or instantiated in any particular type of mental state, on a particular occasion. Given that negligence is fixed in terms of 'unreasonably risky conduct,' the definition of negligence is not one that entitles us to any inferences about the state of mind of agent whose conduct is negligent. This might

be problematic for several reasons: it likely poses a direct challenge to some of our basic thought about what negligence involves; it might also disrupt the work that the concept of negligence is supposed to do in marking some important distinctions in culpability.

Despite their apparent hostility to the idea that mental states are relevant to negligence, objectivists like Edgerton are perhaps at best ambivalent about the prospect of negligence being fully intended, willful, or desired. On one hand, the strong objective position seems to be that no true statement about an agent's mental states is either necessary or sufficient to warrant or *to defeat* an ascription of negligence. Yet, on the other hand, the mental 'cause' of negligence is quite frequently pictured as a 'shortcoming' on the part of the agent. Consider for example the following passage from Edgerton's article:

> While negligence does not involve always the same mental shortcoming, it probably always involves *some* mental shortcoming....But, though some mental shortcoming or other, of desire or capacity, must be present or a negligent act would not occur, to prove the shortcoming does not prove the plaintiff's case. If A is a good lawyer, he must have studied law; but proving the study does not conclusively prove the skill, and the skill may be proved without proving the study. Just so, if A has acted negligently, he must have fallen below normal in some mental respect; but proving his mental shortcoming does not prove the negligence, and the negligence may be proved without proving the mental shortcoming.[12]

Edgerton apparently tempers the strength of his position by positing a relation between acting negligently and falling 'below normal in some mental respect.' There might, however, be some general confusion about the kind of thing that a mental shortcoming is. Edgerton seems to have a very broad notion in mind, the basic import of

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[12] Edgerton, "Negligence, Inadvertence, and Indifference," 858.

which is perhaps this: the notion of a mental shortcoming is not reducible to any *specific* criteria about *particular* states of mind. Even if mental shortcomings are – in some sense – important for negligence, there are no specific criteria for occurrent states of mind that are relevant to the meaning of negligence. The sense in which a mental shortcoming is important is largely *causal* and not conceptual. Terry wants mental causes to be sharply distinguished from their negligent effects;[13] Edgerton proposes that mental shortcomings are what *produce* negligent acts.[14] In any case, 'negligence' is supposed to characterize a type of conduct and its effects in isolation from whatever their cause may be.

In short, a number of ideas or claims keep considerations about an agent's state of mind out of the definition of negligence offered by objectivists. They might be expressed as follows: (i) no type of occurrent mental state is either necessary or sufficient to warrant or to defeat an ascription of negligence; (ii) it is generally true that mental shortcomings are what cause or produce negligence; (iii) the negligence, however, is conceptually confined to the effects of mental shortcomings; (iv) such that negligence exists just in case those effects are unreasonably risky or dangerous.

Some conceptual reservations about the strength of the objective thesis might be derived from the sort of intuitions to which the subjectivists originally catered. These are about the kind of mental relation in which a negligent agent should stand to his conduct in order to qualify as 'negligent' in the first place. The objective thesis implies that there

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[13] Terry, "Negligence," 41.

[14] Edgerton, "Negligence, Inadvertence, and Indifference," 856.

is nothing conceptual about the relation between inadvertence or indifference (or any other putative mental state) on one hand, and negligence on the other. There is nothing in the concept of negligence itself which says anything about what an agent can or cannot 'have in mind' while engaging in unreasonably risky conduct.

Suppose, though, that an agent sets out with the explicit intention or aim in mind of bringing about risks that he knows to be unreasonably risky, and that he knows will likely result in serious harm to others. The main question is: are all instances of unreasonably risky conduct ones of negligence, given that the conduct can arise from, or coexist with, many different types of agency? If there is any intuitive support for the idea that certain forms of agency cannot be ones of negligence, this will be enough to cast doubt on the proposition that unreasonably risky conduct is always negligent conduct.

If some of our intuitions about the possible mental connotations of negligence are correct, a definition of the concept should likely support inferences that would (given any true predication of negligence) rule out certain states of mind as possibilities. This need not imply any positive claims about which type of mental state would have to be present for negligence to exist. The inferences would be ones of a negative sort, to the effect that if an agent conducts herself negligently, we know that it is not part of her explicit mental intent to put others at risk; endangering others is not something that she sets out or 'has in mind' to do.

A true predication of negligence would, then, at least express something about the mental relation in which an agent *does not stand* to the conduct for which she is to

blame. Moreover, if the logic of a term like 'inadvertently' is taken to be more descriptive (i.e. it does not refer to one distinct type of mental state, as sections 2.3.1 and 3.3.2 argued), it could operate as part of the *definiens* of negligence by ruling out certain forms of explicitly intentional agency.

Without making considerations about an agent's state of mind relevant at all, it would also be difficult to think that the meaning of negligence is capable of marking some important distinctions in culpability. It is not hard to imagine two fairly similar cases which are equally 'risky' and 'unreasonable.' One of the two scenarios might be entirely the result of what an agent deliberately set out to do, that is, to create a situation in which others were likely to be harmed. The other one might involve *bona fide* inadvertence or some carelessness or inattention on the part of the agent. If these differences are important in sorting out the type or degree of an agent's culpability, they are not ones to which we will have access with an objective account of the concept of negligence.

In focusing on the production of actual harm or risk (and its 'unreasonableness'), objectivists do make it considerably easier to entertain the idea of a conceptual relation between negligence and culpability. It might be treated as part of the meaning of 'negligence' that negligent conduct is a species of blameworthy conduct, precisely because it is, by definition, unreasonably risky or dangerous. What the objectivists would, though, have trouble making good sense of is the possibility that negligence might suggest a unique *kind* or *category* of blame. Again, if there is a culpable difference

between putting others at risk inadvertently and doing it intentionally, it is *not* one that can be expressed with the concept of negligence, given that the objective thesis is true.[15] Some important distinctions will thus remain outside the purview of the concept of negligence.

3.5 *Conclusion*

The virtues of an objective theory of negligence are simple and several. In effect, Terry and Edgerton point out a number of problems that arise from seeing only a contingent relation between the concept of negligence and the production of actual harm or risk. The alternative they present is to locate the essence of negligence quite squarely in the risky or harmful actions through which a negligent agent actually relates himself to others. 'Negligence' identifies a type of conduct, the main ingredients of which can be recognized and evaluated apart from considerations about the precise nature of an agent's conscious relation to them. This also suggests that there are culpable aspects about negligent conduct which exist outside of the contents of the agent's own mind.

The objective thesis encounters difficulties to the extent that it divests the actual relations and conduct of a negligent agent of some important mental qualities. The objective definition does not allow us to conclude that any instance of negligence is not deliberately pursued by an agent. This might create some conceptual discomfort. It may

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[15] It is not that *any* bit of negligent conduct would be less culpable than all other forms of culpable conduct. Rather, it is that, *ceteris paribus*, if the 'same' criminal act can be done negligently as well as intentionally, it will always be less blameworthy if done negligently than if it were done intentionally. The qualification is important because a negligent homicide, for example, would normally be far more culpable than would, say, any intentional theft.

also remove the means with which to express important distinctions in culpability, based on the mental relation an agent bears to his own risky conduct.

In chapter 4, I will focus on contemporary theories of negligence which attempt to combine the most salient and convincing aspects of the traditional accounts, while overcoming the difficulties of each. They attempt to do this primarily by claiming that negligence is type of culpability, one which includes traditional 'subjective' and 'objective' elements as well as more relational properties between them.

CHAPTER FOUR – CONTEMPORARY THEORIES OF NEGLIGENCE: HART AND THE 'CAPACITIES THESIS'

4.1 *Introduction*

The previous chapters examined two basic sorts of claims about the nature of negligence. The first claim (P1) said that negligence is a subjective, mental phenomenon, along the lines of an occurrent mental state. The other (P2) suggested that negligence is a purely objective aspect of an agent's conduct, and that it in no way implies anything about the agent's mental states.

The mental theories offer a rather 'narrow' account of the concept of negligence. They seem to be motivated largely by orthodox beliefs about what it takes to bring a particular type of case within the ambit of criminal concern. The main emphasis is on locating a subjective, mental basis for the attribution of criminal fault. The negligent, mental elements in the type of case with which we are concerned are thus identified as subjective states of inadvertence or indifference.

An analysis of negligence along the lines of P1 often encourages a sceptical response of the sort suggested by Turner, and elsewhere by Jerome Hall.[1] Their main question is: if by 'negligence' we simply mean inadvertence, how is *that* the kind of mental thing on which we can predicate criminal fault? The problem seems particularly acute if we consider inadvertence in relation to less controversial, paradigm cases of criminal fault, where wrong-doing is clearly intended or foreseen by an agent. The difference is not

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[1] Jerome Hall, "Negligent Behavior Should Be Excluded From Penal Liability," *Columbia Law Review* Vol. LXIII (1963), 632-644.

simply one of degree: in itself, inadvertence or indifference does not seem to be *of the same culpably mental kind* as is explicitly intending to do wrong, or being conscious of the fact that one might unjustifiably harm others. Something in the *actual content* of the latter mental experiences seems more amenable to finding that a 'guilty mind' has authored a criminal act.

One way of countering Turner's brand of scepticism is to opt for a different account of what 'negligence' means, along the lines of P2. Advocates of the view that negligence is a type of conduct reduce negligence to the (objective) fact that unjustifiable risks are created by an agent, regardless of his state of mind while doing so. This is supposed to provide a firm culpable basis on which to predicate legal fault, even if it fails to mark fine-grained distinctions in the exact type or degree of fault incurred.

In the present chapter, I will explore another line of dissent from traditional subjective theories of negligence in general, and from scepticism about negligence being a reasonable thing on which to predicate criminal fault in particular. I will focus specifically on some of H.L.A. Hart's work.[2] He not only offers a different, more complex analysis of negligence; he also suggests a new set of questions and distinctions around which to organize our thinking about negligence and its relation to *mens rea*, criminal liability, and responsible agency.

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[2] The discussion will center primarily on Hart's seminal article "Negligence, *Mens Rea*, and Criminal Responsibility," *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), 136-157. Other themes and ideas related to the topic of criminal responsibility appear throughout *Punishment and Responsibility*, and also in the Postcript, 210-230. I will also relate Hart's ideas to the work of other theorists who would be in sympathy with Hart's work. Roughly, these would likely include George Fletcher, Hyman Gross, R.A. Duff, Anthony Kenny, Alan White, Brenda Baker, Christine Sistare, and others.

A general way of encapsulating a shift in theorizing about negligence is to say that most contemporary theorists consciously avoid organizing their work around the question: is negligence a subjective or an objective basis for liability? More predominant is the idea that negligence is constituted by an agent's failure to meet a standard of conduct or care, and that such a failure is inherently blameworthy. Many contemporary theorists thus subscribe to the general proposition (P3) that negligence is a type or form of culpable behavior. The important analytical questions are more like these: What is it that is culpable about an agent's failure to meet a standard of care? How is it reasonable to blame an agent and hold him responsible for such a failure, if it is unwitting or inadvertent?

I will first explore Hart's response to the second question, focusing on two things in particular: on Hart's analysis of the concept of negligence; and on some of the general ideas about criminal responsibility and *mens rea* in which his analysis of negligence is situated. The two points are closely related. Hart rejects traditional subjective accounts of negligence largely because he rejects the underlying picture of criminal agency and criminal responsibility to which those traditional analyses are supposed to be suited. He argues that an analysis of the concept of negligence should include a basic place for the notion of an agent's *capacities*, as well as some understanding of how they are normally related to responsibility, control, and compliance with standards of conduct.

In section 4.2, I will introduce some of the broad shifts initiated by Hart in theorizing about control and responsibility in criminal law. I will then look more closely at some of

the key concepts and distinctions that are part of that shift, and show how they help to make questions about responsibility and culpability more explicit in an analysis of negligence.

4.2 *Responsibility and Control*

Implicit in Hart's analysis of negligence are the grounds for a much wider rejection of traditional, 'orthodox' models of criminal responsibility and interpretations of the *mens rea* doctrine. What Hart and other contemporary theorists reject is an overly mental picture of the nature of responsibility, specifically as it pertains to criminal fault and liability. Their main point of dissent is from the general idea that *only* certain aware types of occurrent mental states (states of knowledge or foresight) are relevant in determining the things over which an agent has fair control, and for which he is responsible. Hart rejects the paradigm on the grounds that it rests on false conclusions about the way in which the mind is relevant to determinations of responsibility. He also denies that the only or the main function of the *mens rea* requirement is to pick out certain aware states of mind on which to predicate criminal fault.

The kind of 'subjectivism' that is frequently targeted by Hart and other contemporary theorists is exemplified in one of Turner's arguments. Recall that Turner makes the following sort of argument about negligence. First, he argues (or presupposes) that *mens rea* requires a subjective element *of a certain kind*, and that imposing criminal liability requires *mens rea*. He then argues that, although negligence is subjective in nature (a state of mind), it is not the right kind of subjective thing (a state of knowledge or

foresight) to count as *mens rea*. Therefore, negligence is not the kind of thing in virtue of which it is appropriate to hold an agent criminally responsible and impose liability. The argument takes premises about the nature of criminal liability, *mens rea*, and negligence, and from them generates conclusions that show why negligence should be excluded from the domain of criminal liability. Turner argues that an agent must have had 'the idea of harm in mind' to be guilty of certain offenses.[3] In principle, negligence will neither suffice as a legitimate form of *mens rea* nor, then, as a proper ground of criminal liability.

The main idea – or set of ideas – that Hart and other theorists want to reject might be summarized with a series of claims. Turner's argument suggests the following picture of criminal responsibility:

> An agent is *responsible* for an act deemed 'criminal' only if: (1) the right kind of relation obtains between his mental state(s) and his actions; (2) the relation is 'of the right kind' just in case it is one of *control*; (3) control is possible only if the agent has *knowledge* or *foresight* of the criminally-relevant aspects of his actions and/or their consequences.

The claim explicates responsibility in terms of control, and control in terms of actual states of knowledge or foresight. An agent is responsible only in those cases in which he knows or foresees certain things about his actions and/or their consequences. A paradigm instance of such a 'mentally controlling relation' is normally one in which an agent's actions are preceded by conscious choices, intentions, desires, or foresight: these

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[3] J.W.C. Turner, "The Mental Element in Crimes at Common Law," in *The Modern Approach to Criminal Law* (London: MacMillan and Co. 1948) ed. by L Radzinowicz and J.W.C. Turner, 228; Hart, "Negligence, *Mens Rea*, and Criminal Responsibility," 145.

are the kinds of self-conscious mental states that are most pertinent to responsible agency.[4]

Hart and others do not deny that highly explicit forms of thought and action – signified by the presence of conscious choices, intentions, self-conscious desires, or clear foresight – represent an accepted paradigm for the exercise of responsible agency. They resist the idea that *only* such (and *every* such) explicit forms of action are instances of responsible agency.[5] In other words, they object to setting inherent *conceptual limits* on the concept of responsibility by making knowledge or foresight an essential criterion of responsible agency. As Hart puts it in plain terms:

> ...there is nothing to compel us to say 'He could not have helped it' in *all* cases where a man omits to think about or examine the situation in which he acts and harm results which he has not foreseen....Only a theory that mental operations like attending to, or thinking about, or examining a situation are somehow 'either there or not there,' and so utterly outside our control, can lead to the theory that we are *never* responsible if, like the signalman who forgets to pull the signal, we fail to think or remember.[6]

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[4] Christine Sistare characterizes the model of responsibility which forms the 'target' for many dissenting claims as a 'choice' or 'cognitive' one:

> The cognitive model embodies the traditional or orthodox view of criminal responsibility, i.e., of responsibility as requisite for criminal liability. The perspective stresses the centrality of subjective mental states, typically focusing on intentions and foresight of consequences. The agent's actual knowledge of pertinent matters is also an important element of individual responsibility as conceived by the cognitivists. These theorists hold that criminal liability is acceptable only where there is a personal commitment to conduct, as evidenced by the presence of the relevant mental states. Conscious choice serves as the paradigm of such commitment for the cognitivist view, and 'choice' is a key concept in the model. Liability for negligence, in particular, is eschewed by the cognitivists because the negligent agent's lack of awareness precludes choice of wrongful conduct. [Sistare, *Responsibility and Criminal Liability* (Boston: Kluwer Academic Publishers, 1989), 19].

[5] In the first several chapters of *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), Hyman Gross develops a number of similar objections in response to traditional 'mentalism' in criminal law. For example, see in particular the objections which are developed at p. 90-98.

[6] Hart, "Negligence, *Mens Rea*, and Criminal Responsibility," 150-51.

Hart argues that the general *capacities* and *opportunities* of an agent are central to the concept of responsibility. What an agent had a fair opportunity to do and was capable of doing are important matters in determining responsibility on a particular occasion.

Bringing into the open questions about an agent's general capacities and opportunities is part of the general shift in criminal theory that Hart, among others, might be credited with helping to effect.[7] It also helps to suggest a measure of continuity in the reasons for which we might blame intentional wrong-doers and negligent ones. Each is responsible and to blame for failing to use certain capacities and exercise control – albeit perhaps in importantly different ways – over his behavior. Some traditional critics of negligence liability, like Turner and Hall, see only discontinuity among the two kinds of cases: there is nothing appropriately 'subjective' (meaning: 'present in the actual mental states') about the fault exhibited by a negligent agent.[8] He should therefore not be subject to criminal liability.

In contrast, Hart argues that it is counterintuitive to think that we should excuse every instance of inadvertent, careless, or unthinking behavior simply because an agent does not explicitly 'mean' or intend to cause harm. In many everyday cases, we simply do not

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[7] George Fletcher develops a 'theory of attribution' in relation to criminal responsibility that is, roughly, sensitive to the same sorts conditions and criteria that Hart's emphasis on the 'capacities' of an agent suggests. See in particular Fletcher, *Rethinking Criminal Law* (Toronto: Little, Brown and Company, 1978), chapter six.

[8] Note that even the traditional objective theorists, discussed in chapter three, would see this kind of *subjective discontinuity* in the kinds or sources of 'mental fault' exhibited by intentional and negligent wrong-doers, even if they might see continuity in the fact that criminal conduct normally requires some kind of objective harm or risk.

accept such things as 'blanket' excuses.[9] We think that agents do have some control not just over what they do, but also over what they are careful about, notice, are sensitive to, or might think about or realize.

Hart also argues that there is a *subjective* element in an agent's failure to exhibit certain kinds of mental focus (like thinking about, noticing, attending to, or realizing some things). It is just that the term 'subjective' has to be understood in relation to an enhanced, richer picture of an agent's mental composition. The picture must include some notion of what an agent is mentally capable of doing, or has the potential to do, in virtue of possessing certain general capacities and being availed of fair opportunities to use them. An agent's failure to notice or realize certain things about her conduct can be considered 'subjective' in the sense that it involves a failure to use her mental capacities in a particular way.

A broader picture of what a subjective failure might involve informs Hart's analysis of negligence in several ways. Some of his initial remarks about negligence are formulated along these lines:

> (P3.1) An instance of negligence is one in which an agent 'fails to comply with a standard of conduct with which any reasonable man could and would have complied.'[10]

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[9] Hart, "Negligence, *Mens Rea*, and Criminal Responsibility," 136.

[10] Ibid., 147-148. Note that as a claim about what negligence consists in, the claim is likely too weak in at least two key ways. First, it needs some mention of harm or risk that is created, or not avoided, in failing to meet the standard (the failure to meet the standard will be identified as causally relevant to some important harm or risk). As Hart formulates the example, it is fixed in terms of an agent *actually breaking* something negligently. Second, the claim would likely need to be supplemented by a restriction that would ensure that *deliberate failures* to meet the standard fall outside the scope of negligence. Hart himself suggests this in the appended notes to *Punishment and Responsibility*, 259.

In giving an analysis of what an agent 'could have done,' Hart argues that we must make reference to the fact that an agent possesses general capacities which might have been used differently on some occasion. The shift is toward explicating the concept of negligence in terms of *capacities* and possible forms of control, and not simply in terms of actual states of mind or conduct. There is also a central place for *standards of conduct or care* in giving a definition of negligence. The concept of negligence is not simply taken to pick out certain aspects of an agent's conduct or mental states, that is, *apart from* concerns about how they are related to an agent's failure to meet a certain standard.

In the following sections, I will explore in more detail the main concepts and distinctions that Hart wants to inject into the debate about negligence. The primary focus will be on the place that *capacities* (4.3.1) and *standards of conduct* (4.4) have in an analysis of the concept of negligence. In section 4.3.2, I will discuss the relation between negligence, responsibility, and *mens rea*; in section 4.4, I will examine the link between culpability and standards of conduct.

4.3 *Negligence and The Capacities Thesis*

4.3.1 *The Capacities Thesis*

The topic of 'agent capacities' is broached by Hart from different angles. He relates the concept of capacity to *mens rea*, to responsibility, to control, to concerns about what is 'subjective,' and to the meaning of negligence. Perhaps the main thrust of Hart's proposal about capacities develops along the following lines:

> There is, I think, much to be said in mid-twentieth century in favor of extending the notion of '*mens*' beyond the 'cognitive' element of knowledge or foresight, so as to include the capacities and power of normal persons to think about and control their conduct: I would therefore ... include negligence in '*mens rea*' because ... it is essentially a failure to exercise such capacities.[11]

Hart goes on to link negligence more specifically with considerations about responsibility and justice by saying this:

> ... the substantial issue is not whether negligence should be called '*mens rea*'; the real issue is whether it is true that to admit negligence as a basis of criminal responsibility is *eo ipso* to eliminate from the conditions of criminal responsibility the subjective element which, according to modern conceptions of justice, the law should require.[12]

Defining 'negligence' in terms of an agent's failure to use certain capacities, and extending the scope of *mens rea* to include concerns about an agent's capacities (themselves taken to be 'subjective' elements), is one way of retaining negligence as a traditional (subjective) category of *mens rea*.

One principal justification for analyzing *mens rea* in this way, and broadening the scope of what we take to be 'subjective,' is the underlying idea that *mens rea* is essentially concerned with criteria for responsible agency.[13] The main function of the

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[11] Ibid., 140.

[12] Ibid., 140.

[13] George Fletcher suggests that we use *mens rea* categories *normatively* when we use them to *ascribe responsibility*. The contrast is supposed to be between a *normative* and a *descriptive* use of *mens rea*. The *descriptive* use is one in which we outline a set of descriptive conditions or propositions regarding an agent's actual conditions of mind or agency; if those conditions are met, *mens rea* is present. The *normative* function is to ascribe responsibility in keeping with the underlying values or rationale of a set of legal norms. (Fletcher, *Rethinking Criminal Law*, 396-401). By and large, many contemporary theorists are more self-conscious about the application of standards and norms in singling out instances of responsibility and culpability. Yet presumably these standards reflect a concern for certain specifiable types of conditions: i.e. what an agent might have done, or how she might have used her capacities and exercised control, is relevant to whether or not we ascribe responsibility to her. But I'm not sure that we have to treat these as *normative* issues, and not ones that can be descriptively spelled out, in terms of counterfactual states of affairs. Underlying the (normative) use of a concept to ascribe responsibility still seems to be a concern for certain types of conditions or criteria which we think the agent must meet. So

mens rea requirement is to ensure that an agent is genuinely responsible for a criminal act; and for Hart, this does not simply reduce to picking out certain aware states of mind (states of knowledge or foresight) on which responsibility and criminal fault can only be predicated. Hart analyzes responsibility primarily in terms of an agent's ability to exercise different forms of control over several things: over her actions in particular, but also over at least some of her states of mind and mental processes. The important point is that he makes an agent's *normal capacities* relevant to the possible forms of control that are available to an agent.[14]

By 'normal capacities,' Hart has in mind things like: an agent's ability or potential to understand, to reason, to exercise self-control, as well as the "... ability to understand what conduct legal rules or morality requires, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made."[15] Examples of incapacity (albeit of different kinds) are suggested by insane persons, infants, agents who are physically unable to do certain things, as well as those "... who are clearly unable to detect, or extricate themselves, from situations in which their disability may work harm."[16]

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the difference is more likely one about *which types of conditions* are relevant to criminal responsibility, and in virtue of which it is fair to impose liability.

[14] Specifically, Hart argues that a statement of the sort 'He is responsible for X' will imply, in virtue of the meaning of responsibility, that an agent is in possession of certain 'normal capacities,' (Hart, "Negligence, *Mens Rea*, and Criminal Responsibility," 227).

[15] Ibid., 227.

[16] Ibid., 155.

Following Hart, Christine Sistare argues that 'capacities' refer, broadly, to the background abilities and faculties which allow agents to originate 'meaningful agency' and control their conduct.

> These are the basic mental and physical capacities which normal adults enjoy and which are necessary to the meaningful control of conduct. Specifically these central elements include the abilities to control bodily movements, to reason, to intend, to know and understand crucial facts, and to foresee consequences.[17]

The key distinction that results from introducing the notion of 'capacities' is perhaps one between (a) the way in which an agent uses his capacities on a particular occasion, and (b) the fact that he possesses capacities of a general sort in the first place. A similar distinction might be expressed in terms of the difference between (a) what an agent actually does or thinks, and (b) what it is possible for him to do or think in virtue of the kind of potential and options he possesses. We might think, roughly, in terms of the difference between having the capacity to read and actually reading a book one evening.[18] A related distinction also finds expression in temporal terms. The way an agent put his capacities to use at any *one point in time* is a different (though related)

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[17] Sistare, *Responsibility and Criminal Liability*, 20.

[18] The example is a simple one, and likely obscures some of the potential complexity, if not ambiguity, which surrounds the notion of 'capacities' and the distinctions which are carved around it. The main point is just that what an agent actually does is not identical with what he is capable of doing: actual reading is not the same thing as being able to read, though the former does presuppose the latter. Capacities are the kind of thing that may, as it were, lie 'dormant' and persist through time, even when they are not actually being used. Complications arise, however, when we begin to think about an agent's character and the relations between different capacities and how they might be developed over time. Some capacities seem to be more fundamental than others: the ability to read is acquired, and develops out of more basic potential. The relation between capacities and responsibility is likely complicated in a number of ways that I will not take up here.

matter from the fact that the agent has abilities, capacities, and potential that *persist through time.*

These distinctions – primarily the one between what an agent actually does and what he is capable of doing – are important in several respects. For one, they are used to explicate the concept of responsibility in a way that makes the notion of *possible* forms of control more central. They do so, secondly, in a way that is meant to challenge the place that occurrent mental states have in some traditional conceptions of criminal responsibility. Hart argues that if a psychological conception of things like desire, intention, and choice is to be used in explicating the meaning of responsibility, the analysis must include some understanding of what underlies an agent's *actual* instantiation of mental and behavioral phenomena; invoking capacities is supposed to illuminate this dimension of agency. This is what we might call the standard capacities thesis:

> (CT) : The capacities that an agent has for thought and action in general, and, in particular, for things like reasoning, reflection, moral and legal understanding, self-control, and for making evaluations and decisions and acting upon them, are relevant to the agent's being classed as a 'responsible' one in the first place, and to his being responsible for such-and-such on a particular occasion.

Sistare characterizes the difference between being a responsible agent, and being responsible *on a particular occasion*, in terms of the difference between *primary* and *imputative* responsibility. An agent is potentially responsible for X just in case he possesses certain basic abilities and attributes; this is the sense in which he is capable of

primary or 'potency' responsibility.[19] Given the possession (and perhaps minimal development of) certain capacities, an agent is, generally speaking, capable of responsible agency.

Being *imputatively* responsible concerns the way in which an agent's general abilities are possibly used on a particular occasion. Sistare suggests that we think of imputative responsibility in terms of the metaphors of 'being an author of conduct,' or 'owning' our actions. The main idea behind imputative responsibility is that an agent is able to utilize his underlying potential or capacities in a way that constitutes actual 'ownership' or 'authorship' of his conduct, on a particular occasion.[20]

Several types of considerations are relevant in determining if an agent is imputatively responsible (that is, actually responsible for something on a particular occasion). It is not just that one must be (1) causally responsible for an occurrence, and perhaps (2) be mentally related to that occurrence in some relevant way (where the 'relevant way' might be conceived in terms of the actual mental states of an agent). It must also be the case that (3) one had the relevant capacities and abilities "at the time of the conduct," as well as (4) a reasonable opportunity to exercise them. As Sistare suggests:

> ...to be imputatively responsible the agent must have had the normal capacities for understanding the circumstances and the nature of his conduct and for foreseeing relevant consequences. And, finally, he must have had a reasonable opportunity to exercise all his capacities and abilities in an appropriate manner.[21]

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[19] Sistare, *Responsibility and Criminal Liability*, 15, 156-159.

[20] "Authorship or ownership of conduct is the actualization of that underlying potentiality. This is the sense in which one is responsible for events or states of affairs" (Ibid., 15).

[21] Ibid., 21.

Those like Hart and Sistare who adhere to the capacities thesis will commonly add conditions (3) and (4) to what it means to exercise meaningful control, and to be responsible, on a particular occasion. Traditional conceptions of responsible criminal agency are supposed to be wrong only insofar as they represent incomplete pictures. Conditions (1) and (2) are not irrelevant to what it means to be responsible; they simply do not suggest a set of necessary and sufficient conditions for the concept of responsible agency. The logical space occupied by the concept of responsibility is more aptly characterized by conditions (1) through (4).

Capacities theorists would characterize the relation between conditions (2), (3), and (4) in a way that encompasses the following possibilities. Actual knowledge or foresight of the consequences of one's actions – in general, grasping the significance of one's actions in explicit, correct terms or propositions – would neither be a sufficient nor a necessary condition of responsible agency.[22] It would not be sufficient in cases where agents act under duress, out of necessity, or from various types of compulsion. An agent might foresee certain results, intend to produce them, and even succeed in doing so without being responsible for them. If he lacks meaningful choice or the opportunity to do otherwise, capacities theorists will commonly argue that he is excused from responsibility.

At the other end of the spectrum, it is possible for agents who unthinkingly or inadvertently cause harm to be responsible, even though they may have had no clear

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[22] An extended discussion of these points is given in Brenda M. Baker, "Mens Rea, Negligence, and Criminal Law Reform, *Law and Philosophy* 6 (1987), 70-79.

knowledge or foresight of the consequences (or significance) of their actions in causing the harm. Their responsibility would originate in the fact that they had the capacity and fair opportunity to do otherwise. The general point is that this is supposed to be a different point along *the same spectrum of responsibility*. We do not have to invoke a special sense of 'responsibility,' or of the phrase 'is responsible for,' in order to place at least some negligent harm-doers within the scope of what we mean by 'responsible.'

4.3.2 *Negligence, Responsibility, and Mens Rea*

Hart argues that a different set of questions and distinctions is relevant in framing the problems which surround our theorizing about negligence and responsibility. Considerations about an agent's capacities and opportunities are meant to supplement, and to situate, the attention we give to an agent's actual conduct and psychological states.

The concept of agent capacities provides a common, binding thread among a number of key issues. It underpins Hart's general analysis of responsibility; it figures centrally in an account of the responsibility of agents who inadvertently cause harm or fail to meet a reasonable standard of care; and it is relevant to predications of criminal fault, insofar as these turn on questions about responsible agency. The concept of negligence seems to bridge a number of these concerns as well: it is defined by a (subjective) failure to use certain capacities in compliance with a reasonable standard of care, a failure for which the agent might be responsible and perhaps also criminally liable.

To reiterate, then, Hart argues for a number of interrelated claims. First, the concepts of responsibility and control must be explicated partly in terms of the concept of an agent's capacities. Second, *mens rea* is concerned with those capacities because they are genuinely subjective features that are relevant to criteria of responsibility. Third, negligence is included as a general category of *mens rea* because it involves a failure to utilize the kind of capacities which are relevant to determinations of responsibility.[23] The subjective element involved in negligence "...is in fact a failure to exercise the capacity to advert to, and to think about and control, conduct and its risks."[24]

There are, though, some more precise questions to be asked about the kind of relation that Hart posits between negligent conduct on one hand, and responsible agency on the other. At times, Hart seems committed only to the weaker, relatively uncontroversial claim that negligence defines a standard of liability in relation to a reasonable standard of care. At other times, Hart is inclined toward a stronger position, which suggests that with the term 'negligence,' we mean to capture something essential about the responsibility of *particular agents* who fail to meet the standard of care.

A 'strong' relation between the concepts of negligence and responsibility would make being responsible for one's failure to meet a standard of care, or for one's inadvertent harm-doing, a necessary condition of being negligent. In predicating negligence of an agent or event, we are, then, expressing a proposition to the effect that a *particular*

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[23] Hart, "Negligence, *Mens Rea*, and Criminal Responsibility," 140.

[24] Ibid., 157.

agent could have met the standard of care with which he failed to comply. The extension of the concept of negligence will be more narrowly defined, because the conditions for being negligent are more restrictive: they encompass concerns about a *particular agent's* own capacities in relation to the standard of care which he fails to meet.

A 'weaker' relation would suggest that negligence is the kind of thing for which agent *might not be responsible*. The weaker thesis detaches questions about negligence, and how it is defined, from ones about how a particular agent's capacities relate to the demands imposed by a standard of care. Asking if a particular agent could have complied with a standard of care is *not* something we do in order to predicate negligence.

One way of testing for the kind of relation that we think is involved between the concepts of negligence and responsibility is to ask this: at what point do we turn our attention to what an agent could have done, in terms of meeting a reasonable standard of care? Do we consider this: (a) in deciding if he is negligent in the first place, or (b) in determining if an agent is responsible, and perhaps liable, for an instance of negligent behavior?

Several things in Hart's argument suggest a weaker thesis about the relation between negligence and responsibility. In saying that an agent did X negligently, Hart suggests that we are

> ...referring to the fact that the agent failed to comply with a standard of conduct with which any ordinary reasonable man *could* and *would* have complied: a standard requiring him to take precautions against harm. The word 'negligently', both in legal

> and non-legal contexts, makes an essential reference to an omission to do what is thus required....[25]

It is clear that the appropriate standard of conduct is defined according to the capacities of a reasonable person, and that this standard is addressed to some agent in question. But this does not imply that the agent is necessarily responsible for his failure to comply with a standard of care. Hart also suggests that questions about a particular agent's capacities and opportunities are ones that we ask in fixing an appropriate test *for liability*. They are not ones that we need to ask in determining if a concept like negligence covers a certain type of event.[26]

At the same time, a stronger claim about the relation between negligence and responsible agency seems necessary to support the third of Hart's proposals outlined above: that is, that negligence is included in the *mens rea* classification precisely because it contains a subjective element and captures something about the way in which a particular agent can be responsible for inadvertent, careless, or unintended harm. We use the term 'negligence' to express a proposition to the effect that a *particular agent* had the requisite capacity and opportunity to meet a standard of care on some occasion in question.

If Hart is not making a claim of the stronger sort, it does not really make sense for him to argue, without further qualification, that negligence is included in *mens rea*. 'Negligence' would simply indicate failures to meet a reasonable standard of care. But

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[25] Ibid., 147-148.

[26] Ibid., 154.

this might not pick out anything that is appropriately subjective, or that has to do with a *particular agent's* capacities and responsibility, in the failure to comply with a reasonable standard of care. An agent might be negligent, without also being responsible for her failure to meet a certain standard, in which case negligence is not a reliable indicator or index of what is needed in order to predicate criminal fault. This would complicate Hart's initial suggestion about how negligence is related to *mens rea*.

Arguably, there is a tendency in Hart's analysis of negligence towards a strong, perhaps overly-rich characterization of the concept of negligence. This likely means that a persistent issue of substance, regarding the criminal relevance of a certain type of case, is again disguised in the form of a conceptual problem. Hart's (strong) suggestion is that our use of the term 'negligence' does not simply invoke a standard of care set by a reasonable person; it also expresses something about an agent's responsibility in failing to comply with such a standard. The concept provides a way of speaking about the responsibility of agents who inadvertently fail to use their capacities in compliance with a reasonable standard of care. Given that the concept is essentially concerned with an agent's responsibility, there are no conceptual obstacles to thinking that it can operate as a *bona fide* category of *mens rea*.

Whether or not the 'strong' characterization of negligence is too rich, some of the main substantive issues can be distinguished from the conceptual ones. The substance of Hart's position suggests two things in particular: that criminal liability should be predicated on genuine responsibility for a criminal act; and that there are grounds (in the

capacities thesis) for thinking that at least some instances of inadvertent carelessness or harm-doing are ones of responsible agency. We might think that criteria for identifying responsible agents are either extrinsic or intrinsic to the concept of negligence. But whether premises in an argument *about liability* are admitted as part of the meaning of negligence, or elsewhere, substantive issues will likely remain about the justification and fairness of imposing liability for unintended harms. I will postpone discussion of some of the main concerns until chapter five.

4.4 *Culpability and Standards of Conduct/Care*

Contemporary analyses of negligence, like Hart's, usually broaden the scope of considerations that are relevant in thinking about negligence and criminal fault in two main ways. One side of Hart's argument delves deeper into our concepts of agency and responsibility. He draws in the notion of 'agent capacities' and argues for its relevance to the *mens rea* requirement, to responsible agency in general, and to the forms of 'subjective fault' on which criminal liability might be predicated. In general, this extends the range of 'subjective' agent conditions that are relevant in analyzing the responsibility and fault of negligent harm-doers.

Another strand of Hart's analysis stresses the relation between agents and standards of conduct or care. This shifts the analysis in the direction of a traditional 'objective' account, by defining negligence in terms of 'reasonable' standards that are used to characterize an agent's conduct. The notion of a 'standard of care' enriches the analysis

of negligence in several ways; principally, it introduces a more complex apparatus for qualifying the relations in an event styled 'negligent.'

What unifies negligence as a form of culpable behavior is supposed to be a substantial failure to take reasonable care, or a failure to comply with a 'reasonable standard of care.' At least three general properties would have to be ascribed to a reasonable standard of care in order to achieve a plausible definition of negligence. The standards are normally understood to define a minimum level of practical care that an agent ought to achieve with his conduct; they would need to have a somewhat restricted range in their application; and they would have to be context-sensitive in the prescriptions they make.

Theorists who adhere to the general view that negligence is a form of culpable behavior usually argue that negligence is defined in terms of a breach in a reasonable standard of care. A standard of care is not construed as something that suggests only a 'standard way of doing things,' or that suggests a 'rule of thumb' to be followed if an agent wants to succeed at what he is doing.[27] The standards are supposed to indicate the minimally acceptable level of care that an agent can achieve with his conduct, in the

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[27] White offers a different account of the way in which failures to 'take care' might be related to unsuccessful activity and negligent behavior. He argues that "carelessness ... is a failure to pay attention to certain risk and their insurances to which one ought to pay attention in order to manage successfully what one is doing" (White, *Grounds of Liability*, 98). In White's account of negligence and carelessness, it seems as though meeting a standard of care is somehow essential for success at, and non-negligent conduct in, the practice in which one is engaged. But this seems far too strong a claim. Surely we can be careless and so fail at an activity, but not cause or expose others to the kind of harm that is central to negligence. Also, we can perhaps succeed in spite of our carelessness, and either cause or fail to cause harm in doing so. In short, even if carelessness is at the heart of negligence, it is doubtful that it helps to suggest either that 'taking care' is necessary for success, or that unsuccessful activity is of a piece with carelessness or negligence.

context of a particular practice, on a specific occasion. The main idea in the literature could be expressed something like this:

> It is incumbent upon agents who engage in certain practices that are, or that can be, dangerous to be aware of the potential dangers and to take reasonable steps to guard actively against them, or to ensure that they do not needlessly arise; in such practices, agents should, or are required to, exercise due care and regard for certain interests in *what* they do, and/or in *how* they do it.[28]

Standards of care are generally taken to imply or presuppose that *if* an agent engages in certain practices, he *should* do whatever it takes to ensure that what he does (or fails to do) does not unnecessarily and unjustifiably endanger or harm certain interests. Although this is a rough characterization, something like this is essential to support the view that failures to meet a reasonable standard of care constitute a form of culpable behavior that is definitive of negligence.

If breaching a reasonable standard of care is supposed to constitute negligence, it is also likely that either the range of application for the standard itself, or the interests to which it applies, would have to be restricted. For example, if standards of care are widely applicable, it might be possible to depart from them in, say, how we look after our gardens, houses, or vehicles. It would then be necessary to say more about which of the wide variety of cases, or which kinds of failures to take reasonable care, would count as instances of negligence. Our aim would likely be to distinguish negligence, as a type,

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[28] Both Hart and White distinguish between taking care *by doing* something (i.e. by engaging in a certain practice as a whole), and taking care *when doing* something (i.e. in how we perform the tasks involved in a larger practice or activity). See White, *Grounds of Liability*, 94-96, and Hart, *Punishment and Responsibility*, 260.

from more general forms of neglect.[29] An amended proposal about negligence might suggest that only interests of a basic sort, or grouping, are relevant to the concept of negligence. Alternatively, we might suggest that a 'standard of care' applies only to a limited range of interests in the first place. In any event, getting an accurate picture of negligence would likely involve restricting one of two things: either the range of interests and practices that we have in mind, or the meaning and application of a 'standard of care' itself.

A reasonable standard of care would also have to incorporate a fairly substantial assessment of the competing interests and possible justification for risk, *in the context of the situation in which it is defined, or to which it applies*. For example, although it might be generally unsafe to travel at high speed through a school zone at noon hour, we might, given the right set of circumstances, have good reason to do so. Perhaps we are rushing a critically injured person to hospital. Such an event does involve substantial risks for pedestrians and other drivers, and would suggest a marked deviation from a general standard of reasonably careful driving. But it would not be an *unreasonable* or *unjustifiable* departure, on that occasion. For the purposes of defining negligence, though, it would not be helpful to think about the scenario in terms of a '*reasonable departure*' from a reasonable standard of care. This would imply that the event represents a form of 'justified' negligence.

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[29]White argues that neglect is distinct from negligence: neglect does not indicate a kind of negligence, but negligence is, according to White, a kind of neglect. (White, *Grounds of Liability*, 103).

Intuitively, it seems that negligence is not the kind of thing that is justifiable, or that possibly represents a 'right' response to any situation. Given proper justification, the driver's conduct simply ceases to be an instance of negligent behavior. If so, this indicates something about the work that a reasonable standard of care would have to do for us, if departures from it are supposed to be definitive of negligent conduct. It would have to establish an outer perimeter of care and justified risk-creation, *on particular occasions*. Stepping outside the boundaries established by the standard would not be justifiable: the reasonable standard would not be subject to reasonable 'trumps' or to justified deviations from it.

Given that reasonable standards of care have these sorts of general properties, they can enrich an analysis of negligence in several ways. For one, they make it possible to give a more discriminating account of the culpability of inadvertent harm-doers, or of those who fail to meet a reasonable standard of care. Their culpability can be analyzed in relation to what agents are (or were) *reasonably and minimally expected to do* when engaging in certain practices. This would suggest a source of culpability that does not depend upon the actual content of an agent's mental states, or on the actual consequences of her conduct. That there are reasonable standards of conduct, or expectations of this sort, implies neither that a particular agent is aware of them when she breaches them, nor that harmful results must obtain.

There might be additional sources of culpability that are unique to cases of negligence. For example, that negligent agents fail *inadvertently* or *unwittingly* to meet a

reasonable standard of care might suggest a kind of (internal) failure that we think is also worthy of blame. Negligent agents fail to notice or to grasp some important facts about the conduct in which they are engaged. (As earlier sections suggested, though, the failure to comply with a standard of care would likely not be construed as deliberate or intentional, if the end result is to be an adequate treatment of negligence. This is a point that fairly common interpretations of what it means to 'fail to comply with' a standard of care might have trouble reflecting.) There might also be additional sources of (external) culpability if the agent's failure to take care results in actual harm to others. The main point is that the standards make certain (minimal) claims on how agents are to conduct themselves, in the specific contexts of some of the practices in which they engage.

The fact that an agent is expected to guard against certain risks in her pursuits might also help to explain a relevant asymmetry in how we administer praise and blame for results that are inadvertently achieved. It seems that only infrequently, if ever, do we praise agents for inadvertently causing positive results or side-effects. It is more likely that we consider such agents to be lucky or fortunate, than to be truly responsible and worthy of much praise. On the other hand, if an agent unintentionally but carelessly produces ill effects, this seems more readily to be something for which the agent is possibly responsible and to blame.

Again, the presupposition seems to be that *if* agents engage in certain practices, they should be 'on the look out for,' or should actively take care against, harmful results or undesirable side-effects. We also think that agents generally do have the ability to

recognize dangers inherent in the pursuit of some goods (for example, those associated with driving an automobile); thus they are able to guard actively against the dangers, by forming certain habits or being consciously sensitive to them. There seem to be fewer, or no, similar presuppositions to the effect that agents should be on the look out for unintended benefits in order to capitalize on them more directly. (By and large, the beneficial results would be ones at which agents *directly* aimed). If there is this difference in what we expect of agents, and if agents do have the capacity to recognize the expectations, the result will be a plausible account of the praise/blame asymmetry. It is relatively easier, all things considered, to be responsible and to blame for inadvertent harm-doing in light of some of the standards by which our actions and practices are appraised.

Finally, the claim that negligence indicates a (non-compliance) relation between agents and standards of care helps to salvage the intuition that it can exist in a variety of culpable degrees. A reasonable standard of care might call for elementary precautions against harm, or for more advanced ones; they might be addressed to agents whose job or duty it is to be well acquainted with the potential harms and precautions that go along with some activity; the standards could be directed at harms of a serious, basic sort, or at others that are less grave and caused by more specific means. In short, the notion of a

'standard of care' suggests more complexity in the variables surrounding negligence that might be qualified in terms of 'degrees.'[30]

4.5 *Conclusion*

There are, then, several different themes at work in contemporary theorizing about criminal law in general, and about negligence in particular. Hart's approach suggests that the kinds of facts that are relevant in predicating negligence are ones that lead us directly into issues of responsibility and culpability. In cases of negligence, we are concerned with what an agent *could* and *should* have done; in particular, we are interested in whether an agent could and should have used his capacities to comply with a reasonable standard of care. In this way, conceptual criteria for negligence are supposed to be intimately connected with questions about responsible agency and culpability.

If a definition of the concept of negligence is assembled in this way, it might seem as though negligence were a natural ground for criminal liability and punishment. Yet even if the result of accepting some of the contemporary analysis is a richer, more satisfactory picture of negligence, conclusions about liability are still not entailed by the meaning of the term alone. Even if negligence is a form of culpable behavior, it may not be sufficiently culpable, or of the right responsible or culpable sort, to meet with the purposes and constraints on our punishing activities. In the final chapter, I will attempt to

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[30] Hart argues that, all things being equal, the more simple that precautions are to be taken against harm, the greater an agent's culpability will be in failing to take them (Hart, "Negligence, *Mens Rea*, and Criminal Responsibility," 149). On this point, see also Gross, *A Theory of Criminal Justice*, 420.

articulate and discuss some of the principal concerns about the fairness of imposing liability for negligence.

CHAPTER FIVE – CONCEPTUAL AND SUBSTANTIVE ISSUES IN THE DEBATE ABOUT CRIMINAL LIABILITY FOR NEGLIGENCE

5.1 *Introduction*

There is a lot of controversy about the legitimacy of holding agents criminally liable for negligence. As the discussion so far suggests, the controversy invariably gets wrapped up in several types of issues, including ones of a *conceptual* nature, and many others of a *substantive* sort. By 'conceptual' I mean concerns about the meaning or definition of key terms, like 'negligence.' By 'substantive' I mean, very broadly, concerns about which kinds of cases ought to be subject to criminal law. Given a grasp of the sort of cases covered by a concept, we want to know if (and why, and when) that sort of case might be of criminal relevance. With respect to negligence in particular, we want to know whether any instance of a particular kind is ever properly subject to liability.[1]

Drawing conclusions about liability requires a number of premises about the kinds of cases that ought to be of criminal concern; and this, of course, has the potential to inflate quickly into a larger debate about the aims of, and restrictions upon, the whole practice of punishment. All together, an argument about criminal liability for negligence might cover a lot of terrain.

In the final chapter, I will follow a much more limited agenda and do two things in particular. First, I will introduce a more generic way of unpacking the general

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[1] In speaking of liability in the present chapter, I have in mind criminal liability, except where indicated.

proposition (P3) that negligence is a type of culpability. In doing so, I will combine different strands of the analyses examined so far. This will be useful in exploring some of the relations between conceptual and substantive issues. Secondly, I will attempt to locate, amidst the conceptual battles, some of the main substantive issues which surround negligence liability. I will focus narrowly and only on concerns about whether it is *fair* to impose criminal liability for negligence. There might be many other broad concerns about whether general aims of punishment, such as retribution or deterrence, are served. Yet, many of the broader concerns are not specific to the problems created by negligence liability, and there do seem to be special concerns about the *fairness* of imposing criminal liability on agents who unthinkingly cause harm to others.

I will explore two different ways of thinking about fairness and the *mens rea* doctrine as they relate to problems about liability for negligence. Each line of criticism suggests that it would be unfair or unjust to punish for negligence insofar as negligent agents lack *mens rea*. In the first case, this means that they are not responsible; in the second, they lack *mens rea* because they are not responsible *in the right way* for causing harm. I will look at each of these defensive postures in relation to some of Hart's ideas about liability for negligence.

5.2 *A Generic Account of Negligence as a Type of Culpability*

One conventional way of understanding the general proposition (P3) that negligence is a type of culpability includes three main ideas or elements. First, there is the idea that negligent agents create risks with their conduct, or at least endanger others as a result of

an omission. In any case, there are (a) *risks* that the agent's action/non-action causes or instantiates. There is also an assessment of those risks as being (b) *substantial and unjustifiable*. There is admittedly some indeterminacy about the second element. Suppose simply that, given the circumstances, no good reasons that would justify the potentially harmful consequences for others could be given for the agent's conduct. Let us also suppose that (a) and (b) together comprise something that is blameworthy about the agent's conduct, regardless of whether the agent is entirely responsible (and so properly *to blame*) for it. The fact that the risks are large and unjustifiable is a matter that is separate from questions about whether an agent is entirely 'at fault' or responsible for bringing them about.

The third idea that is often used to clarify a thesis along the lines of P3 is this: there is something unique about the relation between negligent agents and the risks they create. Let (c) or the '(c)-relation' in the example we are considering represent the kind of relation in which negligent agents stand to the risks they create. The third element is often supposed to be distinct in a way that is both definitive of negligence and that accounts for the lesser culpability of negligent agents. For example, the usual way of characterizing (c) is in terms of states of knowledge: what distinguishes negligent agents from reckless and intentional wrong-doers is that they are unaware of the risks they create. In much of the literature, the expression 'is inadvertent' is frequently treated as a synonym for something like 'is totally unaware of,' and the inadvertence is taken as one

of the key distinguishing mark of negligence.[2] I will assume, for the most part, that the (c)-relation simply is an inadvertent one, with the connotation that inadvertence stands for a *lack of knowledge and intent* with respect to certain outcomes. Let K stand for the class that is formed by agents who inadvertently create substantial and unjustifiable risks [they meet conditions (a), (b), and (c)].

Now, one conceptual or terminological point about negligence could be raised simply by asking this: is K the extension of the concept of negligence, does it adequately capture what we mean by 'negligence'? A generic reading of P3 would suggest that the correct answer is 'yes': with 'negligence,' we simply mean to point to agents who inadvertently create substantial and unjustifiable risks. Hart's answer might be that only *some* agents or events within K are truly negligent. One (strong) way of interpreting Hart (discussed in section 4.3.2 of chapter four) suggests that 'negligence' picks out only those agents who are *responsible*, and it is certainly not the case that every inadvertent agent meeting conditions (a) and (b) must be responsible for that type of risking. If we opt for the strong interpretation of Hart's thesis (which I will do for the remainder of the chapter), the (c)-relation is not simply an inadvertent one. It needs to be more richly characterized, as, say, a 'inadvertent-but-responsible' one.

An independent worry about the conventional way of depicting (c) in terms of aware/unaware states of mind might also be mentioned. Again, 'inadvertently' is often treated in the literature as a synonym for an expression like 'without knowing and

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[2] See footnote 4 in chapter two, p. 13.

intending.' This provides one common way of telling negligent criminal agents apart from the others: reckless and intentional wrong-doers are aware of (advert to) the possibility of harm, whereas negligent agents are – by definition it seems – not aware of any risk. Because reckless agents know about the risks they create, they are more culpable; negligent agents are unaware, and so they are less blameworthy. In both cases, an important premise seems to be that different states of awareness bear direct relations to the level of control an agent has over the risks about which he may, or may not, have knowledge.

When characterized in these terms alone, the distinction is likely too crude either to capture what we actually mean by 'negligence,' or to give a rich enough account of the distinction in culpability. Negligence is often taken to be a distinct and lesser type of culpability precisely because negligent agents are *inadvertent* harm-doers. However, this might mistake one condition in the set of normally and jointly sufficient ones for a necessary one. The picture is a simple one: once the agent realizes that she might cause harm, she is automatically moved into a different realm of potential culpability. Yet it is not hard to imagine fairly standard cases in which 'pure inadvertence' is not the distinguishing mark of negligence.

Drunk drivers might be aware that they do pose a risk to others, while making impaired judgments about their own skills and the situations in which they act.[3] In

[3] Perhaps drunk drivers could possess several sorts of beliefs at once. One might be that 'one ought not to drive while drunk: it is wrong because it is potentially dangerous to others.' Another might be: 'I am drunk.' But the agent also has other (say, impaired or false) beliefs about his own special ability to manage the situation and its risks while drunk. The idea is that he has beliefs which seem, to him, to

general, some agents might identify risks as 'risks,' but have false beliefs about their own abilities to manage them, or about what would justify taking the risks. In other cases still, perhaps ones of criminal negligence involving certain professions, agents might even be aware that risks are substantial and unjustified. They might, however, make decisions under duress (their 'job is on the line'), or with elements of wishful thinking (with the hope that harm will not ensue), or thinking that there are other good reasons to gamble which might complicate the justification structure (to provide for one's family, to help a friend). Some of these cases may move outside the realm of negligence. But it seems likely that the type of culpability for which negligence stands is unified more by a kind of 'faulty practical rationality' – in which agents fail for a variety of reasons to think and act appropriately with respect to what is at stake – than by pure inadvertence to risk.

5.3 *Substantive Issues*

5.3.1 Liability, Responsibility, and Mens Rea

In order to expose more substantive concerns about liability, we can set aside for the moment any doubts about the precise characterization of (c). In much of the debate about negligence liability, an account of negligence along the lines of K, and conditions (a), (b), and (c), is relatively uncontroversial. Likewise, depicting the (c)-relation as an inadvertent one is not usually contested. What is controversial is whether any instance of K should ever be subject to criminal liability, given that the agent does not knowingly or freely choose to cause harm.

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change the justification structure by overriding or creating an exception to the underlying rationale of laws against drunk driving.

In order to bring out some of the main concerns, we can ask: what would disqualify all, or some, of the events in K from ever being appropriately subject to criminal liability? How might the notion of a free, conscious choice or the presence of aware agent states be relevant in making this disqualification? The critic might argue that that it is *unfair* to punish agents who have not voluntarily and consciously chosen to cause harm in the way that reckless and intentional wrong-doers usually do.

The appeal to an agent's aware states or free choices might be interpreted in several ways. On one reading, the presence or absence of certain states of mind makes the difference between being responsible for a harm and not being responsible, with negligent agents falling on the latter side of the line. A second reading would suggest that what differentiates negligent agents from others is that they do not exhibit the right *mode* of responsible agency for it to be fair to subject them to criminal liability. The first reading would suggest that it is only fair to punish responsible agents; that it is the function of *mens rea* to pick out responsible agents; and that negligent agents lack *mens rea* because they are not responsible. The second reading would suggest that it is fair to subject to criminal liability only those who have freely and consciously chosen to do wrong; that it is the function of *mens rea* to pick out only such agents; and that negligent agents are not of that kind (even if some are genuinely responsible for what they do).

Together, the two different interpretations of what makes negligence liability unfair point to substantive concerns about agent responsibility, on one hand, and to the *mens rea* doctrine, on the other. Additional concerns are sometimes expressed in terms of

'culpability' or 'fault,' with the main idea being that negligent agents are not properly culpable or at fault. In order to approach these issues, I will first revisit Hart's way of cutting off a 'conceptual argument' against the possibility of negligence liability.

5.3.2 Hart and the Conceptual Argument against Negligence Liability

One simple way to respond to the suggestion that all K agents are not responsible is to pursue a line of analysis suggested by Hart and others. Hart would argue that *some* instances of K would be examples of negligence. They would be examples of negligence precisely where the (c)-relation is not just an inadvertent one, but an 'inadvertent-but-responsible' one. We might say that a concept such as negligence allows us to frame an event in terms of an agent's responsibility for its intrinsically culpable features. If an agent can be truly responsible for aspects of an event of which he is not aware (but which are in his control), and if those aspects are blameworthy or wrongful, we can say that he is both responsible and to blame. He is culpable because he is actually responsible for the wrongful or blameworthy aspects of the event [for (a) and (b)]. This is, of course, a very rich characterization of the concept: the term 'negligence' allows us to express propositions about relations that constitute a specific type of culpable agency.

It might be argued, then, that we possess a concept like negligence precisely because we also possess the intuition that some agents truly are responsible – in some meaningful sense of 'responsible' – for what they inadvertently do. The argument might stop here, with two claims in particular: the first is that we do, in fact, possess a concept of negligence; the second is that Hart's analysis of it gives the substantially correct account.

Perhaps no attempt is made to anchor our analysis of the concept in additional claims about the metaphysics of responsibility.

The capacities thesis (examined in section 4.3.1) does, though, go further. It offers some account of why we should think that some instances of inadvertent agency are also ones of responsible agency. The thesis makes several claims about responsibility: one about responsible agency in general, and a second about what it means to be responsible on a particular occasion. One desired effect of the thesis is to challenge the belief that aware states of mind are the only, or the principal, mechanisms of responsible agency.

With respect to negligence liability, one significant result that follows from Hart's analysis of negligence and responsibility is this. A version of a *conceptual argument* against imposing criminal liability for negligence is, in effect, cut off. Recall Turner's argument against negligence liability (discussed in sections 2.3 and 4.2). It suggests that the function of *mens rea* is to pick out the aware states of mind on which criminal fault can be predicated. It is also supposed to be an analytic truth that negligent agents are simply unaware of the harm they might cause. Negligence is thus *by definition* something for which liability cannot be imposed, because negligent agents can never possess *mens rea*.

Hart launches a three-part attack on this line of argument. The first two parts involve analyzing negligence and responsibility in the terms given above. 'Negligence' does not simply pick out a 'blank' state of mind, nor is it the case that all instances of inadvertent behavior are also ones of non-responsible agency.

The third part of Hart's argument is also crucial in blocking the conceptual argument against negligence liability. The third component consists in the claim that the main function of the *mens rea* requirement is to ensure that agents are genuinely *responsible* for what they do. Given that we think about responsibility in terms suggested by the capacities thesis, the effect of Hart's claim about *mens rea* is to underscore a *symmetry* in the forms of responsible agency that might be sufficient to support impositions of criminal liability. Both negligent and intentional agents possess capacities which, in situations where they are genuinely responsible for wrong-doing, would have enabled them to do otherwise. This is a symmetry that goes largely unnoticed, or at least under-emphasized, if our only concern is with aware states of mind. Indeed, if our focus is exclusively aimed at the latter, the result is a fundamental *asymmetry* in the kinds of conditions that might suffice to generate criminal liability.

Hart thus wants to reconfigure the criminal map – or at least our thinking about that map – in a way that exposes an underlying symmetry in the forms of responsible agency that might bring agents within the ambit of the criminal law. This is accomplished by treating the *mens rea* requirement as one that is addressed primarily to *criteria of responsibility*, and only secondarily to certain aware states of mind. There are two distinct steps here: claims about responsibility generate the symmetry; others about *mens rea* make that symmetry of potential relevance to criminal law. Note how the second step might be justified. Hart suggests that our 'foreground' interest in aware states of mind emerges out of background concerns about responsibility and control. An interest in

responsibility explains the traditional concern with what an agent knows and foresees. Hart thinks, however, that properties of knowledge and foresight might be the normal – but are by no means the necessary – indicators of responsible agency. Some agents who inadvertently cause harm might be responsible, on those occasions, for what they cause. And given the rationale for the *mens rea* doctrine suggested by Hart, their negligence might also, as a form of *mens rea*, be properly subject to criminal liability.

Critics of negligence liability have several options at this point. If their wish is to exclude the possibility of liability for negligence *altogether*, they will have to deny or re-work at least some of Hart's ideas. Suppose that we are still talking primarily about the set K (the set of agents who inadvertently create unjustified risks). Hart thinks that some of these agents – the truly 'negligent' ones – might be fairly subject to criminal liability. There is, at any rate, no *conceptual or principled* basis for arguing that they cannot be. They are genuinely responsible, and nothing in the rationale of *mens rea* suggests that they must be excluded from punishment. What options does the critic have?

Two types of argument might be of interest to the critic. The first type of argument (type A) accepts that Hart is essentially correct about *mens rea*, but maintains that he is wrong about the about the meaning of responsibility or culpability. The point will be to argue for a kind of asymmetry which excludes negligent agents from criminal liability, precisely because they are not responsible or culpable. A cruder version of the argument (A1) keys directly on responsibility: it denies that any instance of K is something for which the agent is ever responsible. A milder, more sophisticated version of the

argument (A2) suggests that there is nothing, *in itself*, about an instance of K that is sufficient to invite criminal liability. Some agents in K might, however, be fairly subject to criminal liability because of their prior (that is, pre-negligent or pre-K) culpability or advertence to serious risk. A2 invokes what we might call a 'prior advertence' (PA) thesis.

The second type of argument (type B) would suggest the opposite: Hart is essentially correct about responsibility, but is wrong about *mens rea*. The symmetry is right, and coheres with our ordinary conception of responsibility, but it is simply not relevant to criminal law. The rationale of the *mens rea* requirement and its traditional concern with aware states of mind should be interpreted differently. A critic of type B will thus focus directly on *mens rea*, and only secondly, if at all, on the determinants of responsibility and culpability.

Both types of arguments, A and B, are threaded by concerns about the extent to which an agent should freely and consciously choose the harmful conduct in virtue of which he might be subject to criminal liability. A-type arguments use these concerns to make a frontal assault on the meaning of responsibility and culpability; they argue that it is unfair to punish agents who are not properly responsible or to blame. They tend, then, to raise substantive concerns about responsibility and blame. B-type arguments take a more indirect route in arguing that the purpose of *mens rea* is to pick out only voluntary and knowing forms of responsible or culpable agency. It is unfair to punish negligent behavior because it does not exhibit the right *mode* of responsible or culpable agency. At

this level, the substantive concerns tend to be more about how we should interpret the *mens rea* requirement. Arguably, the A-type arguments are less plausible and more easily defeated. The B ones are stronger, and are harder for Hart and others to defend against.

5.4 *Critical Options*

5.4.1 *Some Preliminary Remarks about Culpability*

Most objections to negligence liability seem to turn on doubts about whether the relation a negligent agent bears to his own risky conduct is sufficient to support a fair imposition of criminal liability, or to support a true ascription of responsible agency. Some objections, though, are expressed directly in terms of culpability or moral culpability.

Suppose we think that it is fair only to impose criminal liability on agents who are culpable or morally culpable. It is a necessary *fair* condition of being liable to punishment that one be culpable or morally culpable. This, then, is how the *mens rea* doctrine should be interpreted: it exists to insure that agents are culpable. If it can be shown that no agent or event in K is ever culpable in the requisite sense, this will be sufficient to conclude that agents in K can never, in any case, be fairly subject to criminal liability.

Yet, *given that we are talking about events like those in K*, the concerns about culpability and fault are likely misplaced, or aim too high. If we inject a number of distinctions into our discussion of cases in K, and accept a number of relatively uncontroversial claims about blame and fault, it seems that the real substantive issues ought to be articulated in terms of responsibility and the *mens rea* doctrine.

First, we might attempt to distinguish between an agent being to blame, where this means that he is *responsible for some wrongdoing,* and there being generally blameworthy or wrongful elements about his conduct. The critic would have to rely on an extremely narrow and rigid thesis about blame in order to generate the claim that there is *nothing* culpable about any instance of K. The narrow thesis limits the possible objects of blame to the contents of an agent's mind (or 'will,' or 'heart') alone. Nothing outside the agent's mind – no relational properties or external facts – have any bearing on predications of blame, wrong, fault, etc. The narrow thesis thus generates a kind of asymmetry between negligent agents and other reckless or intentional harm-doers. In the latter cases, there is something in the contents of the agent's mind itself about which we might say: '*that* is wrong,' or '*that* is worthy of blame.' Perhaps we are talking about an agent's intent to kill, or about his knowledge of the fact that others might be harmed by what he does.

Yet, it also seems that we want to say *of the killing itself* that it is wrong or evil too, and not simply because it has been chosen or intended by the agent. Often, it seems too that we want to predicate 'blameworthiness' or 'wrongfulness' of the relations between agents and other persons or objects. A wider thesis about blame in particular (or about value in general) would multiply the possible objects of blame, to include some place for relational properties and things that are external to the agent himself. Consider, for example, the value or worth of feelings of indifference, or an indifferent state of mind. Considered *only in itself,* we might think that indifference is neither all that valuable nor

all that valueless; it is neither worthy of much blame, nor does it merit much praise. Yet, other sources of value or disvalue might be located once the objects of an agent's indifference are brought into view. In some cases, an agent might merit praise for indifference to his own suffering or fate, while in others his indifference might be blameworthy if it is directed at the suffering of others.

The wider thesis about blame and value would no doubt appease many of our intuitions about some instances of K. The set is composed to suggest that we can form independent assessments of some of the elements and the relations between them. We want to say that there is something wrong or blameworthy about the fact that others are put substantially and unjustifiably at risk by an agent. There also seems to be something faulty or blameworthy about the (relational) fact that some agents are inadvertent with respect to the grave danger in which they might place others. If there are standards of care which the agent fails to meet with his conduct, it is certainly not the case that the normative force of those standards is *constituted* only by the agent's awareness of them. His breach of them, or of certain duties, is wrong, whether or not he knows it.

Given that the wider thesis about value is in play, and that some of the added distinctions and relations are important, the real question is: can we pin the wrongful, blameworthy, evil, or disvaluable elements on the agent with our concept of responsibility? The claim that 'all culpability requires awareness or choice' – if intended as a general claim about what it *means* for something to be worthy of blame – seems to be simply too narrow. It should likely be read as a claim or suggestion about what it

takes to establish *personal responsibility* for wrongdoing. If a lack of conscious awareness of wrongdoing is supposed to defeat the culpability of agents in K, it must be because it makes them *not responsible* for what is wrong, blameworthy, or faulty about their actions. It is not because the wrongful elements would cease to exist just in case the agent is unaware of them. Doubts about culpability in K should be based more squarely on concerns about the (c)-relation, that is, on concerns about whether it is ever sufficient to support ascriptions of responsibility.

Concerns about culpable, aware choosing can thus be used in an attempt to undercut criminal liability for negligence only in several special ways. From within the confines of a type A argument, one way is to make aware choices an essential part of responsibility. A second possibility, to which I will turn later, is to favor a B-type argument. Choice is not made into an essential property of responsible agency; rather, it is made central to the concept and rationale of *mens rea*.

5.4.2 *Concerns about Responsibility [A1]*

One strong way in which to reject the possibility of negligence liability is to argue that only voluntary, conscious choices are determinants of responsibility. Call this critical option 'A1.' The critic accepts the idea that *mens rea* is essentially concerned with questions of responsibility. He then argues against the idea that inadvertent agents are *ever* responsible for the harm they might cause. Certainly negligent agents make conscious choices, and are responsible for what issues from the *content* of those choices; but the thought of possibly harming others is not part of that content, and so the harm or

risk itself is not something at which the agent has explicitly aimed herself by choice. Disagreements about liability are thus generated from a base-level disagreement about what it means, or takes, to be responsible for something. On one side of the disagreement, the critical side, every member of K would be excluded as an instance of non-responsible agency from the possible range of criminal liability.

Some mention of the 'content' of the agent's choices is necessary because it is not true that negligent agents normally make no choices. Likely, they do make choices and act voluntarily, at *precisely the same time at which they are inadvertently creating risks for others*. The problem is that the description we want to supply of their actions (they are 'creating unjustified risks') is not one that figures explicitly in the contents of their choices. The puzzles about responsibility and criminal liability arise precisely because agents in K are not consciously 'acting under' or 'choosing under' the relevant, liability-inviting descriptions. [4]

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[4] A perfect example of how some important issues of substance can be lost in conceptual debates is found in James Brady's response to Hall (James Brady, "Punishment For Negligence: A Reply To Professor Hall," *Buffalo Law Review* 22 (1972), 107-122). Hall objects to criminal liability for negligence on many grounds, one of which is the 'ethical' concern that negligent agents are not voluntarily harm-doers. Now, what Hall has is mind is that negligent agents are not ethically at fault because they have not chosen, in a conscious, aware way, to put others at risk or to hurt others. In short, they have not explicitly intended to do wrong. Brady thinks that one way to respond to this objection is to clarify the relation between the concepts of volition and intention. If doing something voluntarily does not imply that one does it in an explicitly intentional way, and vice-versa, we will be able to show this: from the fact that negligent agents do not intend to cause harm, it cannot be inferred that they do not act voluntarily. Some negligent agents can still be voluntary harm-doers. This way of approaching the problem, to my mind, misses the force of the original objection, and supplants substantive concerns with conceptual debate. Hall's concern is that negligent agents are not voluntarily connected *in the right way* to the harm for which they might be liable; it is not that they do not act voluntarily in some sense, or under some description. The basic concern is about what it takes to establish responsibility for the wrongdoing, that is, whether the agent's voluntary actions are connected *in the right way* to the harm for which they are to blame.

K is expressly manufactured to broach some of these issues. About the set K we can ask: might any instance of K be one of responsible agency? Is any instance of K something for which it might be appropriate to hold an agent criminally liable? Without involving ourselves directly in different entanglements about the meaning of negligence (about how K is, or is not, related to the concept of negligence), we can simply ask such questions about *that* type of case. The aim is to expose the source of some real substantive – perhaps even intuitive – disagreement about cases that seem to generate controversy in criminal law. Critics who argue along the lines of A1 will answer 'no' to the second (liability) question precisely because they answer 'no' to the first (responsibility) one. This presumes that we are 'holding constant' the variable of *mens rea* interpretation: its function is to pick out responsible agents.

The critic might, then, just stick to a position such as A1, and argue that inadvertence alone is sufficient to defeat ascriptions of responsibility. This would amount to a direct clash with Hart. There might be culpable aspects which surround some forms of inadvertent behavior, but they are *never* ones that can be fully 'pinned on' the agent with our concept of responsibility.

5.4.3 *The Prior Advertence Thesis [A2]*

Another common and perhaps more sophisticated way of thinking about an agent's responsibility for events like those in K is this. If an agent is genuinely inadvertent with respect to the risks he creates, such that they are truly things of which he is unaware and has not intended to bring about, then he is not really in control of the elements for which

we want to blame him. And he is certainly not in control of his own inadvertence. If advertence is necessary for control, an agent would have to be aware of the things to which he is inadvertent in order to be in control of his own inadvertence. Given this understanding of 'control,' and what is often meant by 'inadvertence,' it is logically impossible for an agent to have any control over his own inadvertence. Consider Larry Alexander's way of parsing the issue:

> If we take the defendant at the time of his "negligent" choice, with what he is conscious of and adverting to ... then it is simply false that the defendant "could have" chosen differently in any sense that has normative bite....it is false that in that situation, the defendant has any internal reason to choose differently from the way he chose....To have such a reason, *a defendant will have to advert to that to which he is not adverting*. But one has no control at such moments over what one is adverting to or is conscious of; try thinking of what you aren't thinking of, but should be. The "could have adverted to the risk" position is directly at odds with the ... value of restricting punishment to choices over which defendant had fair control.[5]

If the problem is set up in this way, one common response is to look further back in time for the kind of knowledge that might suffice to make the agent responsible for his inadvertence. Some culpable choosing or advertence to risk – *at some point in time before the actual inadvertence* – is necessary for it to be true that the agent is responsible for her later inadvertent conduct. Call this the 'prior advertence' (PA) thesis. The position might be expressed in a number of ways, but the core idea is similar. An agent must, at some point in time, consciously choose to do something in virtue of which it makes sense to predicate responsibility for her later (inadvertent) actions.

A useful example is given by Michael Zimmerman:

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[5] Larry Alexander, "Reconsidering the Relationship among Voluntary Acts, Strict Liability, and Negligence in Criminal Law," *Social Philosophy & Policy*, Vol. 7 Issue 2 (Spring 1990), 99-100.

> Consider Bert, a bricklayer. Bert had been laying bricks for many years, and he had developed several habits in the process. One such habit was that of tossing defective bricks over his shoulder. Normally, this was quite safe, given the conditions where Bert usually worked. But one day Bert way asked to fill in for a sick worker who had been working at the top of a new high-rise. He agreed to do so. When at the top of the building, Bert unthinkingly engaged in his well-entrenched habit and tossed a defective brick over his shoulder. It landed on a pedestrian below and killed him.[6]

Zimmerman argues that Bert is responsible for negligence in such a case *only if* he is 'morally responsible' for the occurrence of harm. Bert is morally responsible *only if* at some point in time prior to his inadvertent brick-tossing, he had *actual, explicit knowledge* of the possibility of such risks. It is necessary that "at some time *earlier* than that at which he threw the brick, Bert *did* advert to the possibility that he might engage in such activity and thereby cause damage or injury. It is this fact ... which removes the obstacle that some have thought impedes the proper ascription of moral responsibility to persons for their negligence."[7]

In some respects, the thesis about prior advertence is not all that far removed from what Hart suggests. Hart and Zimmerman would agree that only some instances in K are ones for which the agent is responsible. As a point of terminology, we might identify this subset as the negligent agents, or simply as the ones who are responsible for their negligence. The substantive question is: how do we identify the truly responsible agents in the set of K? In either case, it seems that we have to look at what lies 'behind' an agent's inadvertence in order to see if a counterfactual exercise of control was possible.

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[6] Michael Zimmerman, "Negligence and Moral Responsibility," *Nous*, vol.20, no.2 (June 1986), 199.

[7] Ibid., 200.

The main difference lies in what the truth of the 'could have' judgment is possibly grounded in. For Zimmerman and adherents of A2, it is only in virtue of an agent's prior knowledge or foresight of risk that he is responsible for an event in K.

Note that if the critic argues along the lines of A2, she is not arguing that inadvertent risk-creators can never be subject to criminal liability. There is the possibility in principle of being liable for negligence, or for a K-like event, in virtue of passing a responsibility 'test' or threshold. But an argument like A2 does reassert, *contra* Hart, the centrality of aware agent states and conscious choices to the concept of responsibility. There is, then, the possibility of some important extensional differences in whichever concept we use to collect the responsible K agents. Perhaps the main point of disagreement can be brought out by asking this: could a case in which an agent met conditions (a), (b), and (c) (he inadvertently and unjustifiably put others at substantial risk) where serious harm does result, but where the agent *never had any actual prior awareness of the possibility of these risks*, ever be properly subject to criminal liability? Capacities theorists would likely say 'yes' in some cases, while adherents of A2 seem committed to responding with 'no' in every case. Again, disagreements about liability emerge out of base-level disagreements about responsible agency.

Are there problems with A2? The position seems to face a number of difficulties, perhaps the central one of which is this: it is not exactly clear how the PA thesis would solve the puzzle about responsibility for inadvertent conduct. It is not clear, that is, that facts about prior advertence are, *in themselves,* sufficient to explain why we think that

even some inadvertent harm-doers are responsible.[8] The main strategy, it seems, is to extend our concern with an agent's actual states of mind over a broader range of time. We are looking for the agent to be in possession of a certain type of knowledge: that which gives him, what Zimmerman calls, 'enhanced control.'[9] It is in virtue of having enhanced control that we are able ascribe moral responsibility.

The intuition behind the PA thesis might be a common one, and is not without some intuitive plausibility. If we have doubts about the responsibility of inadvertent harm-doers – because they are not fully cognizant of the significance of what is going on – those doubts seem to be assuaged by the thought that the agent did have some actual knowledge of what might happen. This somehow vindicates our belief that the agent is truly responsible.

It is still not clear, though, why we should feel vindicated. Unlike Hart, the critic is not arguing, at least directly, for the relevance of certain distinctions to our concepts of agency or responsibility, such as that between what an agent is *capable* of doing or thinking and what he *actually* does or thinks. Rather, he is inserting an added variable of time into the 'responsibility equation.' But without the kind of distinctions around which

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[8] An interest in prior advertence – in what an agent explicitly knew at some earlier point in time – does seem to be at the heart of the thesis. Concerns about prior 'culpability,' or 'culpable choosing,' would only be relevant to the later inadvertence in light of what they agent knew and perhaps chose to disregard at an earlier point in time. Not just any prior culpability or choices would do: the agent and his choices might be culpable in a variety of ways that had little or nothing to do with the inadvertently created risks. And if it is not the *explicit content* of some earlier choices that is culpable, and that clearly links the agent to later events, we might argue that, while inadvertently creating risks, agents do make and act on choices that are culpable – they just are not aware of it. This would simply relocate the original problem to an earlier point in time, and that is not what adherents of A2 are after.

[9] Zimmerman, "Negligence and Moral Responsibility," 205.

the capacities thesis is organized, it is not clear how the PA thesis is supposed to clear up the problem about responsibility.

Suppose for example that an agent does have prior knowledge of the possibility that he might cause harm. At some point, Bert has the thought: "I might inadvertently throw a brick over my shoulder and thereby kill someone if I am not careful. I must be careful and do something about that." How does this confer on Bert the kind of enhanced control that Zimmerman and others are after? Alternatively, how does an event like this make Bert responsible for what happens later?

One possibility is that it might give Bert enhanced control *at an earlier point in time*. The awareness gives him *earlier* enhanced control if possible countermeasures against the risks are, at the time at which the thought occurs, within the scope of Bert's actions. Say that Bert has the thought just as he begins to work. (Note that the thought still has to 'occur' for Bert to be in possession of this kind of enhanced control).

If prior advertence gives an agent earlier control over the risks, and the agent chooses not to do anything about them, it is not clear why the later inadvertence even matters: Bert is simply reckless in choosing to do nothing about risks that were within his control at the time at which he was aware of them. This is a possibility keyed upon by Jerome Hall in his argument against imposing criminal liability for negligence.[10] What really makes agents responsible for events like those in K is their failure to respond appropriately to risks *of which they were actually aware at some point in time.*

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[10] Jerome Hall, "Negligent Behavior Should Be Excluded From Penal Liability," *Columbia Law Review* Vol. 63 (1963), 634.

Responsibility for inadvertent harm-doing – if it can be established at all – collapses into responsibility for a kind of prior recklessness. *In and of themselves*, events like those in K do not represent the sort of thing for which responsibility can be predicated.

Suppose, though, that Bert has his thought while driving to work, or at some point in time at which the opportunity to take actual steps against the risks is not really possible. Prior advertence, in such a case, does not confer enhanced control on the agent at an earlier point in time. Now, if at a later point in time Bert is truly inadvertent with respect to the risks (of which he had prior awareness), it must be true that at some point in the interim he ceases to think about the risks. Something like this seems necessary, if we are going to talk about a case in which an agent *actually is inadvertent* with respect to risks of which he had prior awareness. Given that Bert could do nothing about the risks at the time at which he originally thought about them, perhaps he simply intended to do something about them later. This sound like a common scenario, yet it is one that is problematic for the PA thesis.

We are given two points in time (an 'advertent' earlier one, T1, and an 'inadvertent' later one, T2) and told that the former is what explains an agent's responsibility at the latter point in time, or for later events. Yet without accepting the relevance of the kind of distinctions around which Hart wants to organize our thinking about possible forms of control and responsibility, it is not clear how we can view the former point in time as having any possible relevance to the agent's responsibility at the latter. How could Bert have been anything but inadvertent, and so not in control of the risks, at the later point in

time? The problem is particularly acute if we think that control is something that is only possible in virtue of what an agent actually knows or is aware of, at some particular point in time.

Likely, we think that it is possible for Bert to notice and act on the risks at the later time, partly (though not entirely) because of his prior awareness. Bert has already demonstrated a capacity for appreciating the risks, and it seems that he has a greater opportunity to remember and do something about them in light of his initial recognition. If these facts are relevant to what makes Bert responsible, it is because of what Bert is capable of recognizing and doing; it is not just because of what he is actually thinking about at time T2. At the very least, a distinction between latent and actual knowledge (or belief) must be relevant to the concept of responsibility, and to our intuition about *possible* (and not just actual) forms of control. Once the relevance of such a distinction is admitted, though, it is not clear why *only* Bert's actual states of prior awareness should matter. Why is it that only the explicit content of Bert's previous thoughts (and not the things of which Bert is generally capable of thinking) can have the kind of influence that is essential to responsibility and possible forms of control? What if Bert never explicitly entertained the thought that "I might hurt someone by doing *that*," much as certain thoughts never 'cross the mind' of negligent drivers?

5.4.4 *Fairness and the Mens Rea Doctrine (Type B)*

Arguably, a stronger way of making objections against criminal liability for negligence is to move the main issues of substance on to a different level, or a different plane,

altogether. The main objections are not, then, ones about whether an agent is ever responsible, or properly culpable, for an event in K. In cases like those in K, it is *not* contested that there are blameworthy elements or relations, and that some of these cases can be pinned on the agent with our concept of responsibility. A critic of type B will agree with the general proposition that negligence is a type of culpability, and that at least some events in K are ones for which the agent is truly responsible.

A critic of type B will, then, accept the sort of symmetry for which Hart is arguing, and the relevance of some of the distinctions which make that symmetry possible. The symmetry and distinctions are real and important enough; they are just of no import as far as the criminal law is – or should be – concerned. What is rejected is that *that* type of culpability or responsible agency is relevant to criminal law. A further asymmetry is drawn by the critic within the domain of responsible or culpable agents.

How might this be accomplished and substantiated? A different notion of fairness might be offered in relation to the *mens rea* requirement. I do not propose to argue for or about this notion of fairness, but only to admit it as one that is possible and that is not without at least some intuitive plausibility. The main point of mentioning it is to sketch a different form of objection against negligence liability, noting in particular where the main substantive issues would arise.

We might think that the *mens rea* requirement is in place to ensure that agents are genuinely responsible for the harms they bring about, before being subject to criminal liability. This seems to be the gist of Hart's proposal. The traditional belief that *mens rea*

refers to certain aware states of mind (states of knowledge or foresight) is explained by Hart in terms of the (mistaken) belief that these states alone are the determinants of responsible agency. The mistake is to think that it is in virtue of possessing these states alone that an agent is able to exercise control over his conduct. The capacities thesis is engineered to alter our thinking about the necessity of such states to agent responsibility.

Meeting the *mens rea* requirement might also be understood as the main, or one main, restriction on our punishing activities. The restriction might be construed in terms of a principle of fairness, which suggests the following:

> (F1): Only if an agent is genuinely responsible (or culpable, or at fault) can he be subject to criminal liability.

F1 would cohere with an understanding the *mens rea* doctrine as a 'responsibility,' 'culpability,' or 'fault' requirement. Critics of type A would argue that it is unfair to punish for negligence because negligent agents are not really responsible, culpable, or at fault. If the argument about fairness is made at this level, the critic will have to rely on claims about the concept of responsibility, or culpability, or fault. The point will be to argue for the centrality of an aware state of mind – or at least for the importance of something that negligent agents lack – to one or several of these concepts.

Another way to defend against the possibility of criminal liability for negligence is to reexamine Hart's construal of the *mens rea* doctrine. Suppose that we argued for a different principle of fairness, and claimed that it was, or should be, operative in the determination of *mens rea* and criminal liability.

(F2): Only if an agent has freely and consciously chosen to do wrong can he be subject to criminal liability.

A critic of type B might argue that the reason for the traditional interest in aware states of mind is that they give us the best handle on what an agent freely chooses to do. Furthermore, our concern with what an agent freely chooses to do is not anchored in the (false) belief that only aware agent states serve as appropriate criteria of responsibility. The main claim is that only certain modes of responsible and culpable agency – those which normally exhibit the most conscious and willing disregard of the law's norms – should be subject to criminal liability.

In essence, Hart's claims about responsibility are correct; it is his interpretation of the *mens rea* requirement that is wrong. The effect of re-interpreting the *mens rea* doctrine in a way that argues for a different principle of fairness would be to draw further distinctions within the domain of possibly-liable agents. Only those who caused harm with knowledge or foresight, and who could have done otherwise, are proper candidates for criminal censure.

How might such a distinction be maintained? What would make it plausible? At this point, a justification could not rely on key links between aware agent states and the concepts of responsibility or culpability. Support would have to originate in larger considerations about the practice of punishment, as it relates to different modes of agency. This is where there might be a host of entanglements in the discussion, including one about how we should identify a paradigm kind of criminal agency, and acceptable deviations from it, to be used in determining criminal liability.

In order to set the entanglements aside, perhaps it will do just to remark on the form of the objection that is being constructed against the possibility of criminal liability for negligence. The first step is to mark a distinction within the domain of responsible agents itself; the second step is to argue that only some modes of responsible agency should be subject to criminal sanction. Several things are often borne in mind about criminal liability when making the second step. Consider what Urowsky has to say about voluntary harm-doing, negligence, and criminal liability:

> ...the moral protest involved when such [criminal] liability is imposed for negligence is simply that the defendant does not deserve to be subjected to *this* – that is, to the added burdens of imprisonment or fine and stigma which invariably accompany them – *unless* he has made a conscious choice to do something he knew to be wrong....The ways in which an individual may compromise himself morally are many and diverse; but it is only when a man has brought upon himself the worst sort of blame, by freely choosing to do something he knows to be wrong, that the suffering and humiliation of punishment may in all conscience by applied.[11]

Along with criminal liability often come the most severe types of state-imposed stigma, censure, or deprivation. There are also other forms of redress, such as civil liability, that might be utilized in compensating for burdens incurred as a result of negligent wrongdoing. In many cases, there is little question that some negligent harm-doers should 'have to pay;' what is not clear is whether they should ever 'have to pay' in the criminal sense.

Type B critics thus define and broach the main issues of substance (or policy) is a different way. The principal concern, now, is about what the *mens rea* requirement ought

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[11] R. Urowksy, "Negligence and the General Problem of Criminal Responsibility," *Yale Law Journal* 81 (1972), 979.

to do for us, where this does not simply reduce to outlining general criteria of responsibility or culpability. There are also related concerns about the kind of cases upon which it is fair to impose criminal liability, given some understanding of the aims, measures, and perhaps restrictions upon, our punishing activities. These are large questions, and not ones that can be settled in debates about the meaning of responsibility and culpability alone.

Because a critical position of type B does not hinge on considerations about responsibility *per se*, it is one against which it is difficult for capacities theorists to defend directly. Yet it is also a position that seems hard for the critic to justify in a coherent and convincing way.

What the critic has done is to appeal to a distinction, or further asymmetry, within a domain of responsible agents. She argues that even if there are similarities that can put some negligent harm-doers on a par with intentional ones – in the sense that they are both responsible and culpable – there are still relevant differences in their ways of being 'connected to' the harms for which they are responsible. And it is not clear, the critic says, that what is similar about the cases should necessarily override what is different – at least, that is, with respect to determining criminal liability.

That there are relevant differences seems uncontroversial, and is underscored by thinking about what it would normally take to exercise different forms of control. Some agents would have to override their own intentions; others would have to be more aware of what they were doing, or would have to assess differently the situation in which they

acted. The former does seem relatively easier, all things being equal, for an agent to do. It seems, then, that the capacities theorist could only attempt to veto the distinction, and insist on a basic symmetry in the *modes* of responsible agency, at the risk of sounding implausible. It might be suggested, for example, that negligent harm-doers are responsible in *the same way* that intentional ones are: each possesses a basic 'capacity to control' her conduct, or a 'capacity to choose' what she will do. This puts the 'failure' of a negligent agent on a par with the others. Basically, she fails to control herself in a way prescribed by some legal or moral norm. The effect of describing matters in this way is to emphasize what might be similar about different modes of responsible agency.

Yet, to invoke a basic capacity to choose or to exercise self-control and make *it* the only relevant fact in such cases is to run roughshod over important cognitive differences in the situations and modes of agency.[12] An opportunity to control oneself or to choose in one way, and not another, does seem to be more available in some types of cases than in others. It is this difference, moreover, that seems to figure in different judgments of culpability.

There do, then, seem to be obvious, real differences between intentional and negligent harm-doers. But are they relevant to considerations about criminal liability in the way that a type B critic wants to suggest? How does he make his claims about fairness stick?

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[12] This seems to be the kind of (implausible) road that some contemporary theorists, like Sistare and Gross, end up taking: they emphasize the fact that agents do have the capacity to choose, and that negligent agents do make choices, at some point in time, which lead to their inadvertent harm-doing. See Sistare, *Responsibility and Criminal Liability*, 138-139, and Gross, *A Theory of Criminal Justice*, 421.

If criminal liability is not, in every case, predicated on conscious wrong-doing, must the result always be unfair?

There are at least two types of problems the critic would likely face. Very generally, the critic would have to articulate his notion of fairness, and substantiate it, in a way that cohered with a broader picture of the criminal law, and that did not have (too many) untenable implications elsewhere. Problems might arise with the kinds of cases that we actually do want to have within the ambit of criminal law, and with, for example, the sort of excuses that we currently refuse to recognize. Being mistaken about the law and some cases of culpable ignorance are just two such examples. We can define and leave the 'general problem of coherence' as an independent issue.

More specific problems would likely arise in relation to some cases of negligence. If the critic adopts a type B position, he has license to exclude all instances of the kind K from possible liability. Yet he would have to defend his position and intuitions irrespective of any further distinctions that we might want to draw within K itself. Suppose that there is a full spectrum of cases that meet the conditions [(a), (b), and (c)] for being in K. Some of these might be considered clear-cut 'easy' cases; some would be harder ones. Say that an 'easy' case is one in which a great deal of grave harm is caused in a way that poses little difficulty for our intuitions about the agent's responsibility: it is easy for us to think that he is responsible for the harm – not because of the size of the harm but because of the ease with which a counterfactual exercise of control might have been exercised. Harder cases will be ones in which we are much less certain either about

the agent's ability to have done otherwise, or about the extent to which his actions are fully responsible for the gravity of harm that ensues.[13] An easy case could be achieved by manipulating the variables by which K is defined in something like the following way.

Say that an average driver causes enormous harm to interests that are of legal concern. Suppose that 'Bert II' now kills ten small children while driving at greatly excessive speeds through a school zone at noon hour. Suppose also that Bert does this while simply daydreaming about an extremely trivial matter, such that any good which might be achieved in his contemplative state could never outweigh the possible harm or evil that is risked by his careless driving. Inadvertently, Bert creates risks for others that are substantial and unjustifiable.

Has Bert II done something 'criminal,' or something for which it is sufficient that he be found criminally liable? In order to maintain a principled – and not a case-by-case – objection to criminal liability for negligence, a critic of type B would likely have to do one of two, perhaps equally difficult, things. For one, he might attempt to defend his claims about fairness and the *mens rea* doctrine over every point on the spectrum of (easy-to-hard) cases that might be distinguished in K. This suggests a critical option (B1) that runs parallel to A1: no instance of inadvertent harm-doing is ever properly subject to criminal liability.

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[13] There are two general types of problem which might be noted in relation to this point. There might be 'deep' (internal) problems having to do with an agent's responsibility for his own character traits, and other 'shallow' (external) ones involving situations of 'bad luck' where the harm seems out of proportion with the fault exhibited by the agent.

Critics of the A1 variety argue that inadvertence suffices to defeat ascriptions of responsibility or culpability; B1 critics argue that inadvertence suffices to defeat ascriptions of *mens rea* (having reinterpreted the content and rationale of *mens rea* to suit a different notion of fairness). Note that in either case, the focus is exclusively on conditions that are instantiated by the agent, or on the way in which an agent relates himself to the harm of which he is the cause (regardless of what kind or degree of harm is caused). Objections to negligence liability that arise strictly along the axes suggested by A1 and B1 will deny that a certain type of case is relevant to criminal law – whichever concept we use to capture it. Substantive disagreements between us and the critic will therefore appear in the kinds of cases that we think ought to be subject to criminal liability.

A final option for the critic (B2) shares an affinity with A2 in the following way. Suppose instead that the critic agrees that cases like Bert II can be fairly subject to criminal liability. Perhaps we are even in perfect substantive agreement with him over the full range of cases on which we think it is fair to impose criminal liability. How is he still opposed to criminal liability for negligence? What the (B2) critic does now is to disagree with us over how some of these cases ought to be characterized. Essentially, he restarts the conceptual or terminological battle which typically surrounds a discussion of criminal negligence. He argues that cases like Bert II and those in K are not *of the kind* that we think they are; perhaps bits of conscious or voluntary wrongdoing can be found, at some point in time, or if we look hard enough, to support ascriptions of *mens rea* (as the B2

critic understands *mens rea*). Alternatively, we might simply impute certain mental conditions to agents in K, that is, if normal, reasonable persons would have seen and done things differently. What a reasonable agent would have foreseen or intended is not just evidence in favor of a defendant's state of mind; they tell us what he *actually did foresee or intend.*

Along the axes of A2 and B2, some of our important disagreements with the critic will show up not in which cases we actually think should be let into the criminal domain; rather, they will emerge in debates about which concepts should be at our disposal for describing them.[14] A critic of the B2 variety will have to argue that no easy or hard case in K, upon which we impose criminal liability, should be captured in terms of the relations expressed by the concept of negligence (or whichever concept we use to speak about cases like those in K). Some cases in K might be criminally-relevant, but only if they can be described and aggregated under a different criminal heading.

5.5 *Conclusion*

In debates about criminal liability for negligence, conceptual and substantive issues are often treated in close proximity to one another. There are conceptual battles about which aspects of a certain ('K-like') event 'negligence' is supposed to capture or characterize. There is also considerable substantive controversy about what should bring all, some, or none of these events within the scope of criminal concern.

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[14] This is not entirely true for A2, where there might be differences at both points: about which cases are fairly subject to liability, and about how we should capture them.

Any position which implied a wholesale rejection of negligence (or those events in K) as a possible ground for criminal liability would likely have to do at least one of three things. It would have to adopt a narrow thesis about culpability, limiting the possible objects of blame to the contents of an agent's mind alone; it would have to deny at least some of the claims about responsible agency implied by the capacities thesis; or it would have to argue for a different principle of fairness in relation to the *mens rea* requirement in criminal law, focusing primarily on the necessity of conscious wrongdoing.

Objections raised along the first two lines seem to generate dissatisfying accounts of the nature of blame and responsibility. Though a different construal of the *mens rea* requirement might satisfy us by excluding some events from the possible scope of liability, it would likely have untenable implications elsewhere. As well, it would likely be difficult to sustain in light of other intuitions about what agents are generally able to do and appreciate, in order to conform with certain standards and avoid deleterious effects with their actions. Undercutting these lines of objection would not preclude additional debate about the degree to which negligent behavior ought to be punished, or about the offenses for which negligence should be a sufficient ground on which to predicate criminal fault. The main result would be that principled, wholesale objections to having a certain type of case (like those in K) within the reach of criminal law could not be sustained.

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