

Negligence and Moral Responsibility

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Article:

It is commonly accepted that one can be morally responsible for negligent behavior and its consequences. It is also commonly accepted that one cannot be morally responsible for occurrences over which one had no control. It is not clear how these beliefs are to be reconciled; for negligent behavior involves inadvertence, and yet the control which appears requisite for moral responsibility itself seems to require that one advert to one's behavior and its consequences. In this paper I shall provide an account of negligence according to which negligence involves both advertence and inadvertence to one and the same event, and I shall thereby seek to show how it is that one can be morally responsible for negligent behavior and its consequences. The paper will have two main sections: in the first I shall present my account of negligence, and in the second I shall discuss moral responsibility for negligence. There will be two appendices: in the first I shall discuss the issue of legal responsibility for negligence, and in the second I shall discuss the concepts of rashness and recklessness.

1. NEGLIGENCE

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 was 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 passing by below and killed him.¹

Is this a case of negligence? It could well be. At least one of the conditions necessary for its being so is satisfied, and this is that, at the time he threw the brick, Bert did *not* advert to (that is, consciously entertain) the possibility that he might thereby cause damage or injury. But this would not suffice for its being a case of negligence. What else is needed? Among other things, I would contend, the following: 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, I shall maintain, which removes the obstacle that some have thought impedes the proper ascription of moral responsibility to persons for their negligence.

But let us approach this gradually. It is clear that the sort of advertence-*cum*-inadvertence which I have just roughly outlined is also not sufficient for behaving negligently. Negligent behavior is, in addition, *unjustifiable*; there is something *wrong* about it; if the person who commits the negligence is morally responsible for doing so, he is *blameworthy* for doing so. Negligence, then, is unjustifiable advertence-*cum*-inadvertence.² It will prove useful first to spell out what the advertence-*cum*-inadvertence consists in, whether justifiable or not, and then to turn to negligence in particular.

I shall call the general sort of advertence-*cum*-inadvertence that concerns us here *neglect*.³ Thus, negligence is unjustifiable neglect. But what, more precisely, is neglect? Let us return to the case of Bert. In order for his behavior to be neglectful, it was said, Bert must (i) not have adverted to the possibility of causing damage or

injury at the time he threw the brick, but (ii) have adverted to this possibility earlier. Now, if he *did* advert to this possibility earlier, it seems that he did not act on such advertence; for there is no indication that he sought to take any precautions, that is, to prevent himself from engaging in his potentially harmful habit. Let us suppose that, indeed, he did not act on such advertence; this, too, I think is necessary for his behavior to be neglectful. In fact, I think that we now have, in rough outline, all the ingredients necessary for neglectful behavior. That is, roughly, neglect consists in advertence cum failure to act on advertence cum inadvertence. More precisely, but still somewhat roughly, I propose:

Def. 1: *P*'s action *a* at *t*₂ is neglectful (to some degree) with respect to event *e* if and only if for some set *B* of actions *b*₁, . . . , *b*_{*n*}:

- (i) *P* occurrently believes at *t*₁ that
 - (a) he can perform each of the members of *B* at *t*₂,
 - (b) if he performs none of these actions at *t*₂, then there is a non-zero probability that *e* will occur at *t*₃, and
 - (c) the members of *B* constitute precautionary measures, in ascending order of probable efficacy, against the occurrence of *e* at *t*₃;
- (ii) there are no actions other than *b*₁, . . . , *b*_{*n*} such that *P* occurrently believes at *t*₁ that
 - (a) he can perform each of these other actions at *t*₂, and
 - (b) each of these other actions constitutes a precautionary measure of some probable efficacy against the occurrence of *e* at *t*₃; and
- (iii) for some *b*_{*i*} in *B*,
 - (a) *P* decides at *t*₁ not to do any of *b*_{*i*}, *b*_{*i*+1}, . . . , *b*_{*n*}, and
 - (b) *P* does *a* at *t*₂, thereby unthinkingly neither doing, nor even attempting to do, any of *b*_{*i*}, *b*_{*i*+1}, . . . , *b*_{*n*}.⁴

For any person satisfying what is said of *P* and any actions satisfying what is said of *b*_{*i*}, *b*_{*i*+1}, . . . , *b*_{*n*} in Def.1, we may say that the person neglects to do these actions. Def.1 is itself quite complicated, however, and calls for some comment.

First, in Def.1, and in all such formulas to follow, I implicitly treat events (and, among them, actions) as abstract, finely-grained entities—the sort of things which may recur and also co-occur at the same time and place. In short, I treat them as a species of states of affairs.⁵ A treatment of events as concrete or coarsely-grained would require a somewhat different phraseology—including, presumably, appeal to act-types and act-descriptions. I assume that a translation into this phraseology from my way of putting things here could be achieved, but I shall not try to provide it.

Second, for simplicity's sake, I have restricted "*a*" and the various "*b*'s" in Def.1 to ranging over actions, although in fact I see no reason why they may not be allowed to range over omissions also (if these are not actions, as I suspect.⁶ Some writers⁷, indeed, say that only omissions can be negligent, and that actions which manifest the same characteristics are to be called heedless. I shall not enter into this terminological dispute here, although it is pertinent to note that even actions which are neglectful do, according to clause (iii)(b) of Def.1, typically involve omissions.⁸)

Third, the time-variables are to be understood as follows: *t*₁ is earlier than *t*₂ and *t*₂ earlier than *t*₃, and each may be not just a moment but a period in time (such that "at *t*₁ (*t*₂, *t*₃)" may be understood as "at or during *t*₁ (*t*₂, *t*₃)").

Fourth, clause (iii)(a) stipulates that *P*'s action is neglectful only if he decides not to take *both* (1) a precautionary measure *and* (2) any probably more effective precautionary measure. (2) is important; it would not do to say that *P* is neglectful if he decides not to take a precautionary measure *b*_{*i*} when he *does* decide to take what is probably a more effective precautionary measure *b*_{*j*}. (Similarly, it would not do to say that *P* is

neglectful if he decides not to take any of the precautionary measures b_1, \dots, b_n when he *does* decide to take what is probably a more effective precautionary measure which is not a member of B . This possibility is ruled out by clause (ii), which in effect says that B is "maximal" in the required sense.)

Fifth, the use of "unthinkingly" in clause (iii)(b) is supposed to cover inadvertence not only to b_1, \dots, b_n but also to e itself.

Sixth, Def.1 does not require that e occur at t_3 . It is possible that an event be probable and yet, so long as the probability is less than 1, fail to occur. But if e , or any other event, does occur at least in part because of the inadequate precautions taken by P , then P may be said to have neglectfully caused it to occur. Now even if e fails to occur, P 's action a may be said to be neglectful with respect to it and P may be said to neglect to do the actions in set B . Indeed, this is so even if P 's belief in clause (i) (namely, that he can perform the actions in set B and that e will probably occur if he fails to perform these actions) is false or epistemically unjustified (or both); for the decision in clause (iii) is predicated on this belief, whether or not it is false or unjustified.⁹

Seventh, Def.1 is compatible with the theoretical possibility that there be "chains" of neglect and negligence. It might be that the belief in clause (i) or the decision in clause (iii) (or both) is itself (or are themselves) neglectfully caused to occur. Whether such chains ever in fact occur is difficult to determine, although I suspect that some short ones do. Whenever there is such a chain, there must (on pain of infinite regress) be a first link where the neglect is basic, in that neither the belief in clause (i) nor the decision in clause (iii) is itself neglectful.

Finally, there is mention of *degrees* of neglect; I shall return to this shortly.

Def.1 of course captures what it was designed to capture: advertence (clause (i)) *cum* failure to act on advertence (clause (iii)) *cum* inadvertence (clause (iii)(b)). It allows us, for example, to diagnose the case of Bert as a case of neglect, *given* that Bert did at some time think of taking some precautionary measure (such as erecting a protective screen behind his back) but decided not to do so. But, even if it is accurate, Def.1 characterizes only neglect, and not negligence, for certainly it is possible for neglect to be justifiable. For example, it may occur to me on Friday that there is some chance that I will forget to keep a routine appointment in my office Monday morning, and that, if I go there immediately, place a large notice "Stay Until Noon Monday" on the inside of the door, and spend the weekend there, that would probably be an effective precautionary measure against breaking the appointment; but, if I neglect to do all this, such neglect is not unjustifiable and does not constitute negligence. On the other hand, another precautionary measure may also occur to me—probably less effective than the first, but probably effective nonetheless and certainly better than nothing—and that is to write myself a note as a reminder and leave it in a place where I am likely to see and read it before Monday's appointment; and if I neglect to do this, this neglect may well be unjustifiable and constitute negligence. Given Def.1, negligence is easily defined. I think that the following should do:

Def.2: P 's action a at t_2 is negligent (to some degree) with respect to an event e if and only if . . . [just as in Def.1, except that clause (iii)(a) reads " P unjustifiably decides" instead of " P decides"].¹⁰

(Def.2 is, of course, subject to the same remarks and qualifications as Def.1.) Notice that Def.2 says only that P unjustifiably decides not to do *any* of $b_1, b_1 + 1, \dots, b_n$. This leaves open the possibility that it is justifiable for him to decide not to do b_n ; it is perhaps only b_1 (and "lesser" measures) which it is unjustifiable for him to decide not to perform. It is not my purpose here to try to say just what makes a decision unjustifiable, and so I shall not be concerned with how it is that one may tell that a case is a case of negligence rather than of justifiable neglect. That is a separate, and very difficult, issue.

Negligence comes in degrees and, because it does, it seems fair to say that neglect does also. But let us start

with negligence. A distinction that is commonly made—especially in the law—is that between negligence that is gross and negligence that is not gross; indeed, sometimes degrees of grossness are admitted.¹¹ It has been said that the notion of degrees of negligence is nonsensical because inadvertence does not come in degrees.¹² This, of course, is a *non sequitur*, for negligence does not consist solely in inadvertence. Indeed, so far as I can tell, there may be degrees of negligence on at least three counts. First, the degree of negligence may be said (1) to vary directly with what the agent believed to be the probability of the event *e*'s occurring had no precautions been taken but also, consistently with this, (2) to correlate inversely with the size of the "gap" between what the agent believed to be the probability of the event *e*'s occurring had no precautions been taken and what he believed to be the probability of its occurring given the precautions that he in fact decided to take. For (1) the less likely the event "in its original setting," the less the negligence in not preventing it; but also (2) the greater the gap mentioned, the better the precautions and thus the less the negligence, and the smaller the gap, the worse the precautions and thus the more the negligence.¹³ For example, (1) Bert's deciding to take no precautions concerning his brick-tossing was the more negligent the more likely he thought injury otherwise to occur. Also (2) this decision was more negligent than his deciding to take certain probably ineffective, but at least possibly effective, precautions; but he may still be guilty of negligence even if he decided to take these inadequate precautions. Second, the degree of negligence may be said to vary directly with the moral "seriousness" of the omission involved when *P* does *a*.¹⁴ For example, Bert's causing damage or injury—indeed (as it turns out) his killing someone—is more serious than my failure to keep my routine appointment. (Of course, such seriousness is itself pertinent to drawing the line between negligence and justifiable neglect, but it is also pertinent to drawing lines—corresponding to degrees—within the area of negligence.) Third, the degree of negligence may be said to vary directly with the ease with which the precautions in question may be taken.¹⁵ Ease, in this context, may be seen to be a broad concept, comprising not just ease of achievement relative to the capacities of the agent *P*, but also ease of achievement relative to any risks involved to which *P* or others may be exposed. For example, if it would have been very difficult and/or risky for Bert to erect a protective screen behind him, then, in so far forth, the degree of negligence involved in his throwing the brick over his shoulder is diminished. (Again, this third consideration is pertinent also to drawing the line between negligence and justifiable neglect.)

There may be other respects in which degrees of negligence may be measured, but it seems clear that there are at least these three. Just how to combine these three respects—if, indeed, they are commensurate at all—to come up with a single, overall figure for "*the*" degree to which an action is negligent, is a matter that I shall not try to tackle, although it seems clear to me that we often do engage in some such calculation when assessing actions such as Bert's. In addition, it seems fair to say that there are degrees of neglect also; for, given the foregoing, it seems reasonable to say that neglect in general comes in degrees at least on the first count mentioned (that concerning the probability of *e*), if not on the second (seriousness) and third (ease), the latter two considerations being pertinent only to the question of the *justifiability* of neglect.

2. MORAL RESPONSIBILITY FOR NEGLIGENCE

Think of Sam, a shopper. Walking down the high-street, he passed a certain department store. Had he gone in, he would have been its millionth customer and won a fabulous prize; but he knew nothing of this, and walked on by.

Clearly there is a sense in which Sam could have been the millionth customer. Unlike someone a thousand miles from the store, he was free to walk into the store and thereby win the prize, just as he was free to walk past the store and thereby fail to win the prize. Thus, clearly, there is a sense in which Sam was in control of his winning the prize. We may call this sort of control *standard* control. Just as clearly, however, there is a sense in which Sam was not in control of his winning the prize, simply because he had never adverted to the possibility of doing so and was therefore ignorant of the opportunity to do so. We may call this sort of control *enhanced* control. And it seems that, not only standard, but enhanced control is required for moral responsibility. At least, the absence of such control in this case appears to be the very reason why we would want to absolve Sam of all blame for not winning the prize. It might be understandable if, on finding out

what he had done, Sam's wife berated him; but it would not be fair. In an important sense, it was beyond his control.

It is for some such reason as the foregoing, I think, that many have said that the matters to which one fails to advert are not things for which one can be properly held morally responsible. But while this may be a general truth, it admits of exceptions, and the exceptions are important. For something may be out of one's control at the time that one does it (or fails to do it) and yet not be out of one's control entirely—and the fact that it is not out of one's control entirely provides the opportunity for one's being properly held morally responsible for doing it (or failing to do it). For example, I may take a pill now which I fully expect to make me wittingly but irresistibly run amok an hour from now and thereby cause considerable damage; if in an hour I do so run amok and cause damage, then (given certain other assumptions) I am morally responsible for the damage I cause—even though, *at the time I cause the damage*, my actions are beyond my control. For I could have prevented the damage; there was an *earlier* time at which my *later* causing of the damage *was* in my control. We may say: although my causing the damage was not in my *immediate* control, it was in my *remote* control.

It is just this sort of picture that I wish to draw of negligence. There is nothing special about moral responsibility for negligent behavior; it provides no exception to the rule that there is no moral responsibility for actions (or omissions) that are beyond one's control. True, the inadvertence at the time (t_2 , in Def.1 and Def.2) of the omission renders the omission beyond the agent's control *at that time*, but this fact does not render the omission beyond the agent's control entirely. On the contrary, the control requisite for moral responsibility may be, and often is, anchored in the *earlier* advertence (at t_1). In short, the picture is this. Enhanced control appears to be required for moral responsibility. (I shall not seek to prove this claim, but the case of Sam and similar cases surely tend to confirm it.) It is still possible to maintain that someone can be morally responsible for negligent behavior and its consequences, however, once it is seen, first, that negligence involves advertence as well as inadvertence and, second, that control may be remote as well as immediate.

But while this picture may serve to rebut the contention that one can never be properly held morally responsible for negligent behavior and its consequences, it is important to note that it seems not to warrant the widespread ascription of moral responsibility in which many, perhaps most, wish to indulge. And this may seem to be a defect in my account. After all (it may be objected) this account stipulates that all negligence involves actual *foresight* (at t_1) of the action (a) and its consequence (e), while all that negligence need involve is that these be *foreseeable*, and one may be morally responsible for an event which is foreseeable, even if one never in fact foresees it. I shall now address this objection.

Hitherto I have not talked of foresight, but I agree that my account stipulates that negligence involves foresight. For I think we may say, for at least one respectable sense of "foresee" (where t_1 is earlier than t_2):

Def.3: P foresees at t_1 (to some degree) that e will occur at t_2 if and only if P occurrently believes at t_1 that (there is some probability that) e will occur at t_2 .¹⁶

Now, in order to assess whether or not I am correct in insisting that negligence involves foresight rather than mere foreseeability without foresight, we must ask what foreseeability is. Several different answers suggest themselves. I shall consider three. It will be seen that it is not at all obvious that, on any of these interpretations of "foreseeability," the thesis that all negligence involves foresight is to be abandoned.

The first sense of "foreseeability" that I shall consider is that which the law invokes. It is this:

Def.4: e 's occurring at t_2 is foreseeable (to some degree) by P at t_1 if and only if the reasonable man would foresee at t_1 (to some degree) that e would occur at t_2 .

While there may be good reason to adopt this definition for purposes of the law,¹⁷ it is apparent that there are many problems with it from the moral point of view. One problem, of course, is that of understanding who and what the "reasonable man" is. Another problem consists in determining what the reasonable man would foresee, even when we have determined who he is and what general characteristics he has. But by far the biggest problem, it seems to me, is that of justifying this approach to foreseeability when it is moral, and not legal, responsibility that is at issue. How is it relevant, when trying to determine whether or not a particular person is morally responsible for a particular event, whether or not the "reasonable man" would have foreseen, it? If the person in question falls short of this criterion of reasonability then how is it justifiable to judge him by it (unless, of course, he is morally responsible for falling short of it)? On the other hand, if the person in question surpasses this criterion, it might be that to judge him by it (and it alone) is to treat him too leniently. In either case, it is surely to the person in question that we must look, and not to some criterion which may bear no relevance to him and to his capacities, when trying to determine moral responsibility.

It is noteworthy that Def.4 does not give us a straightforward interpretation of the term "foreseeable," in that an event may be foreseeable by a person, according to this definition, without that person being able, in any standard sense, to foresee it. A more obvious way to construct interpretations of the term is, first, to devise the following schema:

Def.5: *e*'s occurring at *t2* is foreseeable (to some degree) by *P* at *t1* if and only if it is possible that *P* foresee at *t1* (to some degree) that *e* will occur at *t2*.

One may then provide instantiations of this schema by making precise the sense of "possible" that is at issue. Here are two such instantiations that I shall discuss:

Def.5.1: [just as in Def.5, except that it reads "logically possible" instead of "possible"]

Def.5.2: [just as in Def.5, except that it reads "personally possible" instead of "possible"]

I include Def.5.1 here for illustrative purposes only. I know of no one who accepts the definition in the present context, and this is just as well; for it is far too liberal. Suppose that whatever other conditions (such as freedom of action) are necessary for being morally responsible for an event are satisfied, and suppose that some-one does not in fact foresee the event (to *any* degree) but that it is logically possible that he foresee it (to some degree). Would this suffice for the person's being morally responsible for the event? Surely not. For such foreseeability will not guarantee that one has the enhanced control that appears requisite for moral responsibility. Any number of "chain-reactions" of events may serve to illustrate this. For instance, suppose that I want to know the time, that my turning my wrist to consult my watch causes the sun to be reflected into the eyes of a distant pedestrian, that this pedestrian is temporarily blinded and bumps into a street vendor's cart, that the cart is thereby caused to capsize, its contents of apples and oranges spilling on to the street, that the horse attached to a passing horse-drawn carriage is frightened by this turn of events, shies from the fruit, and thereby causes extensive damage to the carriage and its occupants. Am I morally responsible for the damage to the carriage and its occupants? Surely not. Was it foreseeable, in the sense of Def.5. 1? Yes.

Of course, there are many ways to furnish more restrictive senses of "possible" so as to come up with less liberal instantiations of Def.5 than Def.5.1. However, there is only one which seems to me of merit, namely, Def.5.2. Indeed, it is Def.5.2 to which, I believe, very many subscribe. By "personal possibility" I mean that possibility which is operative in "can"-contexts of the sort which are at the heart of the debate concerning determinism, freedom, and moral responsibility and are commonly discussed in terms of the phrase "could have done otherwise." Moreover, it is this type of possibility which is at issue in the slogan "'ought' implies 'can,'" at least on some understandings of this slogan. And this is important. For I think that foreseeability is so often taken to be an element of negligence because, first, it is so often said that someone ought to have foreseen something that he did not foresee and, second, it is assumed that this implies that he *could* have foreseen what he in fact did not foresee; and it is thought that, all else being equal, this suffices for the person

to be morally responsible for the event in question.

But is this popular picture of foreseeability as an element of negligence acceptable? The answer, I think, is this: yes, but it does not contradict the claim that all negligence involves foresight. It must be remembered that the "can" which expresses the sort of possibility presently at issue, and the "ought" which rides on this "can," standardly modify verbs of action. Now, foreseeing is not an action; to say "I ought to foresee *e*" and "I can foresee *e*" is therefore puzzling. It seems to me, however, that sense can be made of these phrases if they are understood to be elliptical for "I ought to *make myself* foresee *e*" and "I can *make myself* foresee *e*"; for here the "ought" and the "can" explicitly modify a verb of *action*. If this is correct, then the more common "I ought to have foreseen *e*" and "I could have foreseen *e*" are to be understood, respectively, as elliptical for "I ought to have made myself foresee *e*" and "I could have made myself foresee *e*." And it does seem appropriate to utter such sentences in cases of negligence. Consider Bert once again. Suppose that he unthinkingly threw the brick over his shoulder at *t2* and that this caused the pedestrian's death to occur at *t3*, and let us assume that this is a case of negligent behavior on Bert's part. I think that it is then *quite correct* to say all of the following: Bert did not foresee (to any degree) at *t2* that harm would occur at *t3*; the harm's occurring at *t3* was foreseeable (to some degree) by Bert at *t2*—in the sense of "foreseeable" presently at issue, i.e., that of Def.5.2; and Bert ought at *t2* to have foreseen (to some degree) that harm would occur at *t3*. But all of this may be accepted because of the further stipulation that Bert did advert to and thereby foresee the possibility of harm at an earlier time *t1*. It is because of this advertence at *t1* that it may be said that he could have foreseen at *t2* (that is, could have made himself foresee), but did not foresee at *t2*, the possibility of harm at *t3*. *Without* the advertence at *t1*, the foresight at *t2* would have been beyond his control and, hence, the harm at *t3* would have been beyond his control also, in just that strong sense of "control" in which Sam's winning the prize was beyond his control. But *with* the advertence at *t1*, the harm at *t3* was in Bert's control, and this is what opens the door for the ascription of moral responsibility.

It might be countered: while it is of course true that both the foresight at *t2* and the harm at *t3* would not have been in Bert's *enhanced* control without the advertence at *t1*, still both might have been in his *standard* control, and *this* would have sufficed, *certeteris paribus*, for ascribing moral responsibility to Bert for the harm at *t3*. I am not sure how best to respond to this. I admit that I have provided no argument to prove that enhanced control is required for moral responsibility, but I think that the case of Sam and similar cases surely renders this claim plausible. Moreover, if an account of negligence can be given which is compatible with this claim and which both accommodates our talk of foreseeability and preserves our intuition that it is possible to be morally responsible for negligent behavior, then the claim is surely rendered even more plausible. The account that I have given is of this sort. Of course, as I have noted, this account does not permit the widespread ascription of moral responsibility in which many indulge. I take this, however, to be a mark against such ascription rather than a mark against the account. At least, this is my tentative conclusion, in the absence of any further considerations to the contrary.

There are two final points that I wish to make. First, I have been concerned to stress that one *may* be morally responsible for negligent behavior and its consequences. I have of course not said that one *must* be; for other conditions necessary for moral responsibility (such as freedom of action) may be lacking.¹⁸ Still, it is appropriate to ask here whether one of the conditions necessary for a person's being morally responsible for an event *e* is that *e* would not have occurred despite whatever precautions he might have decided to take to prevent it. My inclination is to answer "No" to this. It was noted in Section 1 that it seems correct to say that *P* neglects to do *bi*, . . . , *bn* (as these variables feature in Def.1), even if his belief that he can do any of them is false or epistemically unjustified and even if *e* fails to occur; and if *P*'s decision not to do any of *bi*, . . . , *bn* is unjustifiable, then he is negligent (according to Def.2). What is important here, it seems to me, is *P*'s state of mind; it is on this that we should focus when judging him from the moral point of view. Of course, *P* cannot be morally responsible for *e* itself unless *e* occurs; but the fact that it would have occurred no matter what precautions he had taken seems to me not to eliminate his responsibility for it. This is controversial, of course.¹⁹ In a sense it perhaps does not matter what we decide to say on this issue since, whether or not we

say that *P* is morally responsible for *e*, there is no disagreement that (all else being equal) he is morally responsible for deciding not to prevent it. On the other hand, there are similar cases of "overdetermination" where it certainly would seem improper not to hold a person morally responsible for the overdetermined event. Suppose that *P1* and *P2* simultaneously flip separate switches, each knowing that his own flipping is sufficient under the circumstances to detonate a bomb. It seems quite perverse to say that neither is morally responsible for the bomb's exploding simply because this event would have occurred even if he had not flipped his switch.²⁰ If this is so, I cannot see why negligent (as opposed to knowing) switch-flipping should not be treated in the same way.

Second, I have claimed that moral responsibility requires enhanced control, and I take this to imply that one is not morally responsible for an event unless one has adverted to it.²¹ Having this implication, the claim may appear to be a radical one. After all, while Bert foresaw the possibility that he would injure someone if he continued to indulge unthinkingly in his habit of tossing defective bricks over his shoulder, it may not have occurred to him that he would *kill* someone, and presumably it did *not* occur to him that he would kill the particular person (call him Pete) that he did kill—someone (we may assume) with whom he was not acquainted. My account, then, commits me to saying that Bert is *not* morally responsible for killing Pete. But this is not really such a radical claim, especially inasmuch as it is based on a treatment of events as finely-grained. For there is, of course, no denying that Bert is morally responsible for injuring someone; in addition, it seems to me perverse to contend that there is some blame that is Bert's due for killing Pete over and above the blame that is his due for injuring someone.

APPENDIX A: LEGAL RESPONSIBILITY FOR NEGLIGENCE

There has been comparatively little direct discussion in the literature of the issue of whether or not it is ever correct to hold someone morally responsible for negligence. (Call this the moral issue.) There has been a good deal of discussion, however, of the related issue of whether or not it is ever morally justifiable to hold someone legally responsible for negligence. (Call this the legal issue.) In this appendix I shall first comment on the way the legal issue has been traditionally approached and then point out how resolution of this issue is aided, but not achieved, by a resolution (of the sort that I have attempted in this paper) of the moral issue.

There is clearly *something* morally repugnant (or odious, to use Hart's term²²) about holding someone legally responsible for something for which he is believed not to be morally responsible, some opinions to the contrary notwithstanding.²³ For holding someone legally responsible for something involves making certain impositions on him, impositions which seem unfair in light of the belief that he is not morally responsible for the thing in question. (Let us use the term "liability" instead of "legal responsibility" in order to conform our discussion with that of others.) There is a sort of derivative repugnance associated with holding someone liable for an offense without taking into account whether or not he is morally responsible for that offense. Now, suppose we were to accept the following definition:

Def.6: Liability for an offense is strict if and only if its imposition is not conditional upon the agent's being found to be morally responsible for that offense.

It would follow that strict liability is derivatively repugnant. If we were thus to accept the derivative repugnance of strict liability, then we might be tempted to try to ascertain whether or not liability for negligent behavior is repugnant by ascertaining whether or not it is strict. Indeed, the traditional approach to the legal issue seems to have been just this. In the classic Turner-Hart debate, we find Turner and Hart agreeing that strict liability is repugnant but disagreeing about whether or not liability for negligence is repugnant.²⁴ Turner's argument (or part of it) seems, in outline, to be this:

- (I) (a) Strict liability is repugnant.
- (b) Liability for negligent behavior is strict.
- Therefore (c) Liability for negligent behavior is repugnant.

But Hart's argument (or part of it) seems, in outline, to be this:

- (II) (a) Strict liability is repugnant.
- (not-c) Liability for negligent behavior is not repugnant.
- Therefore (not-b) Liability for negligent behavior is not strict.

This might seem like a reasonable approach. For, with (a) agreed upon, all one needs to do is look at (b) and (c) and try to find reasons for affirming one or denying the other. But the reasonableness of this approach is illusory, for agreement on the truth of (a) has been premature.

The trouble is, it is not Def.6 that has featured in the traditional debate concerning liability for negligence. Rather, the definition at work is this:

Def.7: Liability for an offense (an *actus reus*) is strict if and only if its imposition is not conditional upon the agent's being found to have possessed *mens rea* with respect to that offense.

How can we get (a) out of Def.7? Well, the following would do it:

- (1) One is morally responsible for an offense only if one possessed *mens rea* with respect to that offense.

But is (1) true? I have no idea. The real problem here—a simple but devastating one—is that the term "*mens rea*" is obviously a term of art and yet there is no commonly accepted definition of it.²⁵ For this reason, the traditional approach to the legal issue by way of a discussion of strict liability has served, for the most part, only to obfuscate the issue. Were the phrase "strict liability" to be understood in terms of Def.6, the issue would not be obfuscated; but it is clearly Def.7 to which most participants in the discussion subscribe—including Turner and Hart. Given this fact, premise (a) in arguments (I) and (II) remains unclear, and so the soundness of the arguments cannot be ascertained. Indeed, given that it is Def.7 that is operative, neither (I) nor (II) has any clear advantage over the remaining alternative argument:

- (III) (b) Liability for negligent behavior is strict.
- (not-c) Liability for negligent behavior is not repugnant.
- Therefore (not-a) Strict liability is not repugnant.²⁶

It may appear that I have been too hasty in this brief criticism of the traditional approach to the issue of liability for negligence. After all (it may be pointed out) even if no clear definition of "*mens rea*" is forthcoming, nevertheless partial characterizations of the concept that is supposed to be expressed by this term are to be found in the literature. In particular, almost all seem to accept the following claim:

- (2) One possesses *mens rea* with respect to an offense only if one adverts to it.

And I have already indicated in the main body of the paper that I accept the following:

- (3) One is morally responsible for an offense only if one adverted to it.

But, of course, this is of no help. (1) and (2) do yield (3); but it is not (3) that is in question, at this point, but (1). If the "only if" of (2) were replaced by or supplemented with an "if," then (2) and (3) would yield (1); but I know of no writer who would accept (2) so amended.

Rather than invoke the concept of strict liability, and the concomitant concept of *mens rea*, those who debate the legal issue would do far better, I think, simply to proceed as I have done in this paper. For, given the

repugnance associated with imposing liability in the absence of any concern with moral responsibility, it is clear that the moral issue is at the heart of the legal issue. Indeed, this is clearly something which debaters of the legal issue have themselves recognized, since their concern with *mens rea* is obviously rooted in their concern with the tie between advertence and responsibility. In fact, those who have professed to be discussing the wider legal issue have rarely taken their discussion beyond the bounds of the narrower moral issue. But it must be remembered that the legal issue is wider than the moral issue. An implication of my account in the main body of this paper is that liability for negligence need not be morally repugnant.²⁷ But it does not follow from this alone that it is always morally justifiable to impose such liability. Moreover, if my account is incorrect and there is always *something* morally repugnant about liability for negligence, it does not follow from this alone that it is never morally justifiable, *all* things considered, to impose such liability. Thus, while a resolution of the moral issue might, indeed would, aid resolution of the legal issue, resolution of the former would not suffice for resolution of the latter.

APPENDIX B: RASHNESS AND RECKLESSNESS

Negligence may be distinguished from rashness and recklessness. In this appendix I shall try to say what the differences between these concepts are. I do not mean to legislate as to use of the *terms* "rashness" and "recklessness," for these may be, and have been, variously used. (This is, of course, also the case with the term "negligence.") What I do want to do is to clarify certain important concepts, ones which are legitimately, indeed often, expressed by these terms.

Just as negligence is unjustifiable neglect, so are rashness and recklessness unjustifiable. I propose to call rashness unjustifiable depreciation (of a certain sort) and recklessness unjustifiable casualness.²⁸ Let us look at depreciation first.

Depreciation is like neglect in that it involves advertence to actions and their possible outcomes. But it may be distinguished from neglect in two respects. First, it does not necessarily involve subsequent inadvertence to these actions or outcomes. Second, it necessarily involves an incorrect assessment of the probabilities of the outcomes at issue; indeed, it involves an underestimation of such probabilities. More precisely, we may say (where $t1$ is not later than $t2$ and $t2$ not later than $t3$):

Def.8: P 's decision d at $t1$ is depreciative (to some degree) with respect to event e if and only if for some action a :

- (i) d is a decision by P at $t1$ to do a at $t2$; and
- (ii) P underestimates at $t1$ the probability that, in doing a at $t2$, he is/will be causing at $t2$ e to occur at $t3$.

By " P underestimates the probability that . . ." I mean: P believes that there is a certain probability $n/100$ that . . ., while there is in fact a higher probability $n + m/100$ that . . . The belief may of course be occurrent, but it need not be. Degree of depreciation may be said to vary directly with the extent of underestimation at issue. If P indeed does a at $t2$ on the basis of d , then a , too, may be said to be depreciative (with respect to e).

Now, whenever there is underestimation there is overestimation also—and *vice versa*. If I underestimate the probability that some event will occur, I overestimate the probability that it will not occur.²⁹ Thus, whenever a decision or action is depreciative with respect to some event, it is also appreciative with respect to the negation or complement of that event. Nevertheless, it seems appropriate to define rashness explicitly in terms of depreciation rather than appreciation. Rashness is unjustifiable depreciation of the following sort: it involves the unjustifiable³⁰ underestimation of the probability of some event's occurring, an event which the agent believes to be morally untoward.³¹ Concomitant with this, of course, is the unjustifiable overestimation that something untoward will not occur, but this seems to be a more "indirect" way of viewing the matter. At any rate, rashness is certainly to be distinguished from what may be called over-caution, which involves the unjustifiable overestimation that something untoward will occur (or, equivalently, the unjustifiable

underestimation that something untoward will not occur). Note that rashness and overcaution may accompany one another on certain occasions; for a decision or action may be rash with respect to one event *e* and yet over-cautious with respect to another event *f*. If Smith, a bad swimmer, jumps into a river in order to save Jones, a good swimmer, then (given certain conditions) Smith's action is rash with respect to his own survival and over-cautious with respect to Jones's survival.

Casualness is like both neglect and depreciation in that it, too, involves advertence to actions and their possible outcomes. But it may be distinguished from neglect in that it does not necessarily involve subsequent inadvertence to these actions or outcomes. And it may be distinguished from depreciation (and appreciation) in that it does not necessarily involve misassessment of the probabilities at issue. What it does involve is a lack of intention to avert the anticipated consequence(s). In short, and more precisely (where "*t1*," "*t2*," and "*t3*" function as in Def.8):

Def.9: *P*'s decision *d* at *t1* is casual (to some degree) with respect to event *e* if and only if for some action *a*:

- (i) *d* is a decision by *P* at *t1* to do *a* at *t2*;
- (ii) *P* estimates at *t1* that there is a non-zero probability that, in doing *a* at *t2*, he is/will be causing at *t2* *e* to occur at *t3*; and
- (iii) *P* does not intend at *t1* to cause at *t2* *e* to occur at *t3*.

Degree of casualness may be said to vary directly with the degree of probability at issue. If *P* indeed does *a* at *t2* on the basis of *d*, then, again, *a* may be said to be casual (with respect to *e*). And, again, an unjustifiably casual decision or action may be said to be a reckless one.³²

It may seem that no decision can be casual, in that, if *P* decides to do *a* and believes that, in doing *a*, he might be bringing about *e*, then he cannot *not* intend to bring about *e*. But this is surely mistaken—clearly so where *P* regards the chances of *e*'s occurring as very small, but also where he regards the chances of *e*'s occurring as very great. I may decide to go to see a certain movie and believe that, if I do go, you will in all likelihood be disappointed; and yet I may not intend to disappoint you. Perhaps it is true that, in such a case, I do not intend *not* to disappoint you—but that is another matter.

While negligence, rashness, and recklessness are, then, clearly distinct from one another, certain connections between them may yet be noted. First, I believe that much rashness involves negligence in the following way. It has been said that all rashness involves an unjustifiable underestimation of probability. Now, I think that it is rare that underestimation is advertent, and it is difficult to see how unjustifiable underestimation which is inadvertent can be anything but negligent, that is, negligently caused to occur. At any rate, even if it is possible for such underestimation not to be negligent, it is clear that it very often is. Second, some negligence may itself involve rashness. This will happen when the negligence is nonbasic and when the belief mentioned in clause (i) of Def. 1 is false, by virtue of there being an unjustifiable underestimation of the probability of *e*'s occurring given the performance or nonperformance of some of the actions in set *B*. Third, it seems that the decision operative in all negligence not to take precautions must involve either an intention that the consequent event *e* occur or casualness with respect to *e*; and since the decision is unjustifiable, such casualness, if it occurs, constitutes recklessness.³³

NOTES

1. The case is borrowed, in modified form, from Hart (1968), p. 147.
2. On some views, it is not possible for behavior to be unjustifiable and for its perpetrator *not* to be morally responsible for it. If so, then, insofar as all negligent behavior is unjustifiable, it follows trivially that the perpetrator of such behavior is morally responsible for it. Our puzzle is then transformed into the following: how is it possible for the sort of advertence-*cum*-inadvertence, which I have said characterizes negligence, to be unjustifiable?

3. This is a stipulative use of the term "neglect," although such use is supposed to be suggestive. *Cf.* White (1964), pp. 83-4.
4. This definition is still rough because of clauses (i)(c) and (ii)(b).

Clause (i)(c) may, I believe, be more fully explicated as follows. First, "ascending" should be replaced by "non-descending," so that ties in probable efficacy may be accommodated. Secondly, the clause, when thus understood, may be re-stated as follows:

- (c) (1) if he does just b_1 at t_2 , the probability of e 's occurring at t_3 will be reduced to some extent;
- (2) if he does just b_2 at t_2 , this probability will be no less reduced; and . . . and
- (3) if he does just b_n at t_2 , this probability will be no less reduced.

Two points are to be noted about this re-statement of (i)(c). First, for any member b_i of B , we may understand the phrase " P does just b_i " as follows: P does b_i and P does no $b_i + j$, where $0 < j$. Second, the clause is intended to be compatible with the possibility that, for some members b_i and b_j of B , b_i is a complex action with b_j as a part.

Clause (ii)(b) may be correspondingly re-stated as follows:

- (b) each of these other actions is such that, if he performs it at t_2 , the probability of e 's occurring at t_3 will be reduced to some extent.

5. See Zimmerman (1984), Ch. 1, for a full elaboration of such treatment.
6. See Zimmerman (1984), Ch. 8.
7. Austin (1961), p. 242 for example.
8. I say "typically," rather than "necessarily," since, first, the belief concerning abilities mentioned in clause (i)(a) *may* be false (as I point out below) and, second, one omits to perform an action only if one can perform it. (On the second point, again see Zimmerman (1984), Ch. 8.)
9. Note that, if the belief in clause (i) is false with respect to sub-clause (a), then it would be misleading to say that, by doing a , P does not do any of b_1, \dots, b_n . It is for this reason that I have included the phrase "nor even attempting to do" in clause (iii)(b). Compare note 8 above.
10. In this context, "unjustifiably" means the same as "wrongly, all things considered."
11. *Cf.* Hart (1968), p. 149.
12. Hart reports Turner thus, Hart (1968), pp. 138, 146ff.
13. I say "consistently with this" advisedly, since there can be some tension here. If the event in its original setting is highly unlikely then (1) not seeking to prevent it is not very negligent, but also (2) there is little chance to reduce the degree of negligence further by taking precautions to prevent it. Just what the formula should be to resolve this tension, I am not sure.
14. Or rather (I think), the degree of negligence may be said to vary directly with the perceived moral seriousness of this omission—perceived by P , that is. Again, it might happen that a chain of negligence is involved here, in that (for example) P has negligently caused it to be the case that he misperceives the seriousness of the omission.
15. *Cf.* Hart (1968), p. 149.
16. Notice that, as with Def.1, there is no stipulation here that e in fact occur or that the belief be accurate.
17. It might facilitate administration of the law, for example. *Cf.* Prosser (1971), pp. 152-3.
18. But see note 2 above.
19. *Cf.* Frankfurt (1969) and Zimmerman (1982).
20. Indeed, not only are both P_1 and P_2 morally responsible for this event but, I would maintain, their responsibility is not even *diminished* to any degree by the fact that the other flipped a switch also. See Zimmerman (1985).

21. This is so even in the case of remote control, I think. For one cannot entertain at t_1 that one will entertain at t_2 that e will occur at t_3 unless one entertains at t_1 that e will occur at t_3 .
22. Hart (1968), p. 136 and elsewhere.
23. Cf. Wootton (1963).
24. Hart (1968), Ch. VI.
25. Cf. Hart (1968), pp. 139-140.
26. While Wasserstrom (1959-60) appears to accept (I), at times he also appears to flirt with (III). He clearly rejects (II). Feinberg (1970), pp. 233-5, accepts the conclusion of (III) at least with respect to *some* varieties of strict liability.
27. This statement of course presupposes Def.2. If some other definition of negligence is at issue, the statement may not hold true. Perhaps this is often the case in the law. It has been noted above that the law employs the notion of foreseeability characterized in Del.4, and it may well be that many people concerned with the law employ a notion which they call negligence and which is definable in terms merely of foreseeability so construed and not of foresight.
28. Clearly, this use of these terms is stipulative, although it is intended to be suggestive. Cf. note 3 above.
29. This is not to say that whenever there is occurrent underestimation there is occurrent overestimation, or *vice versa*.
30. Morally, not (necessarily) epistemically. To say, in this sense, that underestimation is unjustifiable is to say that it is wrongly caused to occur. Cf. note 10 above.
31. I shall not try to say just what "moral untowardness" consists in. Nevertheless, it is this untowardness which, coupled with the underestimation at issue, constitutes the "riskiness" involved in rashness. In "standard" cases of rashness, perhaps, the belief is a true one, but emphasis must be placed on the requirement of belief here. Cf. note 14 above.
32. Cf. White (1964), p. 86, where it is said that recklessness consists in indifference or lack of care. This seems to me doubly wrong, although it is true that recklessness and indifference often accompany one another. First, indifference may be justifiable, whereas recklessness cannot be. Second, a reckless action may fail to be an indifferent one; lack of intention with respect to an event e may fail to be an indication of lack of care with respect to e .
33. On the relation between recklessness and negligence, see White (1964), p. 85.

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BIBLIOGRAPHY

- Austin, John. "Negligence, Recklessness, and Rashness." In Herbert Morris, ed., *Freedom and Responsibility* (Stanford: Stanford University Press, 1961).
- Feinberg, Joel. *Doing and Deserving*. Princeton: Princeton University Press, 1970.
- Frankfurt, Harry G. "Alternate Possibilities and Moral Responsibility." *Journal of Philosophy*, 66 (1969), 829-839.
- Hart, H.L.A. *Punishment and Responsibility*. Oxford: Oxford University Press, 1968.
- Prosser, William L. *The Law of Torts*, fourth edition. St. Paul: West Publishing Co., 1971.
- Wasserstrom, Richard. "Strict Liability in the Criminal Law." *Stanford Law Review*, 12 (1959-60), 730-745.
- White, Alan R. *Attention*. Oxford: Basil Blackwell, 1964.
- Wootton, Barbara. *Crime and the Criminal Law*. London: Stevens and Sons, 1963.
- Zimmerman, Michael J. *An Essay on Human Action*. New York: Peter Lang, 1984.
- _____. "Moral Responsibility, Freedom, and Alternate Possibilities." *Pacific Philosophical Quarterly*, 63 (1982), 243-254.
- _____. "Sharing Responsibility." *American Philosophical Quarterly*, 22 (1985), pp. 115-122.