

# The Problem with Negligence

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## 1. Introduction

WHEN AN INDIVIDUAL is negligent and as a result injures someone else, we tend to hold her responsible for those injuries and judge her blameworthy. Indeed, blaming people for their negligence, or thoughtlessness, or carelessness, is an all too common occurrence. It is quite surprising, then, that very little has been said about responsibility for negligently produced harms outside of discussions in legal theory. In fact, the literature on moral responsibility has been virtually silent on the matter.<sup>1</sup> Given our readiness to blame negligent agents and the pervasiveness of accusations of thoughtlessness or carelessness in our lives, negligence remains an area that any theory of responsibility must address one way or another.<sup>2</sup>

This paper argues for two conclusions. First, the fact that negligence is characterized by the absence of certain conscious mental states, rather than by any positive feature, poses a deep and general problem to any theory of responsibility. I show that tracing, the primary tool in the literature for explaining responsibility in the absence of a conscious mental element, is inadequate: though tracing works in some related cases, it can't work for negligence, as I understand it.

Second, the paper argues that it is difficult to distinguish between negligence and simple inadvertence. This fact poses a problem, since we have good reason for thinking that inadvertence counts as an excuse, whereas negligence is generally thought not to excuse. I argue that the parallels between negligence and inadvertence suggest that negligent agents are not responsible for the harms they produce.

The arguments for these conclusions are advanced in Sections 2 & 4, respectively. Section 3 illustrates why tracing's failure is important. And Section 5 proposes an alternative model for

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<sup>1</sup> One especially notable exception is Michael Zimmerman, "Negligence and Moral Responsibility," *Noûs* 20 (1986): 199-218. But Zimmerman's treatment begins by giving an overly restrictive gloss on negligence, one characterized by the agent's previous consideration of the possibility of harm, and then arguing that we can explain responsibility in such cases. Given this artificial scope, he misses a good many, I would even say most, cases of negligence, wherein the agent never before consciously considered the risk of harm such conduct might pose.

<sup>2</sup> Manuel Vargas has also emphasized this point. See his "The Trouble With Tracing," *Midwest Studies in Philosophy* 29 (2005): 269-291, esp. p.283.

distinguishing between negligence and inadvertence that does justice to our intuitions, while holding that in neither case is the agent morally responsible.

## 2. The Nature of Negligence

NEGLIGENCE CONSTITUTES a special class of cases. Unlike harms that agents bring about on purpose, or knowingly, or even recklessly, negligently produced harms are brought about because of an absence of care. Negligent agents risk harm by not taking sufficient care in acting. They fail to pay appropriate attention to the possible consequences of their conduct, and thus substantially increase the risk of harm such conduct poses. For example, suppose that Nate, tired from waking up early, is backing out of his driveway. His thoughts turn to his meetings that day, and his attention is partially focused on a radio commercial. Due to his inattention, Nate doesn't see a child walking to school and so hits him, breaking the child's leg. Nate is negligent: he fails to pay proper attention to what he is doing and so risks harm to others, a risk that is unfortunately realized. Moreover, Nate seems both responsible and blameworthy for his negligent conduct. He is at fault because he didn't pay attention, and as a result is morally responsible for the child's injuries.

What is noteworthy about Nate's case is that lots of activities risk harm. But negligence is unique in that it does not require consciously entertaining the risk one's conduct poses. It only has to be the case that one's conduct is unreasonably risky, not that one acted in the recognition that it was so. Thus, negligence abandons the element of conscious consideration often required for blameworthy conduct. To do x negligently is to do x as a result of *not* consciously entertaining the risk of x posed by one's directly intended conduct and refraining from (or adequately modifying) that conduct. Thus, we should consider negligence as characterized by the *failure* to consider the risk. The hallmark of negligence is the lack of a conscious element.

My characterization is meant to capture a wide-range of ordinary cases, but for all that, it is also semi-stipulative. There is no doubt, I think, that we do blame people for harms they bring about due to their unconscious inattention. I'm calling such agents 'negligent'. Of course, there may be other linguistically legitimate uses of 'negligence' (and its cognates) than mine here; naturally, my arguments won't necessarily extend to such cases. But I don't think it controversial that agents who are careless, thoughtless, or inattentive, and cause harm as a result, are blamed (and judged blameworthy) for that harm. So even if 'negligence' can be treated more broadly to include cases outside my characterization, this does little to blunt the scope of the problems I raise here.<sup>3</sup>

The problem with negligence begins with the simple observation that while negligence is characterized by the lack of a conscious mental element, paradigmatic cases of responsibility seem to require at least some conscious mental element tying the agent to the outcome in question.<sup>4</sup> If I decide to

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<sup>3</sup> I should also note that on my characterization of negligence, an agent can be negligent without actually *causing* any harm. If Nate backs out of the driveway without looking and doesn't hit anything, he is still negligent, for he still fails to consider the risk his conduct poses.

<sup>4</sup> I take paradigmatic cases of responsibility to be cases of fully intentional action by competent agents. In such a case, an agent S brings about x by A-ing, and S intended to bring about x by A-ing.

stab someone, and then stab him intentionally, then I am responsible for doing so at least partially because I did so intentionally and with full awareness. Indeed, some of our most common excuses to blame are considerations which show that some outcome was unintentional or that the agent wasn't aware of what he was doing (subject to certain constraints).<sup>5</sup> So if Negligent Nate is responsible for the child's injuries, but has no conscious mental state tying him to those injuries, we need some special explanation for how this could be so.

If we are to be responsible for the products of our negligence, as Negligent Nate's<sup>6</sup> case suggests, then it must be that responsibility doesn't always require some connecting conscious mental state. This is no special problem, one might think, because we already have in the literature a strategy for explaining responsibility in the absence of a conscious mental element. We call it *tracing*, because responsibility for some conduct without the conscious mental element can be "traced back" to some previous decision or action that does have the conscious mental element. For example, Sven is drinking at a bar, and has one (or maybe more) too many. Sven is sloshed. Nevertheless, he drives toward home. En route, and due to his drunkenness, he hits a family sedan, seriously injuring all four passengers. Suppose that Sven is sufficiently intoxicated that he lacks the relevant conscious mental states for responsibility at the time of the crash. If we want to maintain that Sven is still responsible for hitting the sedan, then his responsibility for that must be located elsewhere. This is where tracing comes in. We can trace his responsibility for the crash to his responsibility for a prior act (or condition) that contributed to the crash. Sloshed Sven elects to drink to excess, and as a result of this choice, he hits and injures a number of people. His choice left him drunk, and therefore severely impaired with respect to his ability to control his conduct. In this case we can say that the initial choice creates a condition of impairment that later clearly contributes to some harm. The above is, roughly, the structure of tracing.<sup>7</sup>

It is worth noting that this is a *general* way of explaining cases like Sven's. It is a strategy that can be adopted by all theories of responsibility to handle cases in which the usually requisite mental states are not present. We can ascribe responsibility for the harm so long as we can trace the harm back to some prior action which did include the relevant conscious mental element. Then all that's required is that the agent satisfied the conditions on responsibility for *that* prior choice or action, and responsibility can be transmitted to the later outcome.<sup>8</sup> Tracing works, then, only when the prior action meets two conditions:

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<sup>5</sup> This is a point I will return to in detail in Section 4.

<sup>6</sup> Negligent Nate's name here is not meant to suggest a general character trait, but merely to help remind the reader of the specifics of the case when it is later brought up.

<sup>7</sup> At least as it applies in the case of negligence. 'Tracing' is a broad label used for a variety of appeals to the importance of an agent's history on his present responsibility. This broad notion has been an explicit interest of theories at least since Daniel Dennett, *Elbow Room: The Varieties of Free Will Worth Wanting* (The MIT Press, 1984), and especially in responses to that work in Laura Waddell Ekstrom, *Free Will: A Philosophical Study* (Westview Press Focus Series, 2000), John Fischer & Mark Ravizza, *Responsibility and Control* (Cambridge University Press, 1998), and Robert Kane, *The Significance of Free Will* (Oxford University Press, 1996). The core notion is also discussed by Peter van Inwagen, "When the Will Is Not Free," *Philosophical Studies* 75 (1994): 95-113, and, in response, by Gordon Pettit, "Are We Rarely Free? A Response to Restrictivism," *Philosophical Studies* 107 (2002): 219-237, and David Vander Laan, "A Regress Argument for Restrictive Incompatibilism," *Philosophical Studies* 103 (2001): 201-215. But more recently, the focus on tracing has been as represented in the text, as a tool for explaining responsibility in cases where the agent presently lacks the conscious mental states typically present in paradigmatic cases of responsibility. See John Fischer & Neal Tognazzini, "The Truth About Tracing," *Noûs* 43 (2009): 531-556; Michael McKenna, "Putting the Lie on the Control Condition for Moral Responsibility," *Philosophical Studies* 139 (2008): 29-37; and Vargas 2005.

<sup>8</sup> The "can" here is important; tracing merely allows us to explain how an agent can be responsible for the subsequent harm, not that he must be.

(1) the agent is responsible for that action; *and*, (2) that action caused the agent to fail to satisfy the conditions on responsibility for the later action.<sup>9</sup>

Tracing plainly will not work, however, in cases of negligence, for in such cases it is difficult to demonstrate what the initial choice is. Sloshed Sven's accident is largely due to his drunkenness, for which, by hypothesis, he was responsible.<sup>10</sup> Tracing claims that in such circumstances responsibility is transmitted to (at least some of) the outcomes produced by his drunkenness, even if at the time of those later actions Sven lacks the conditions normally required for responsibility. This is because Sven, roughly, chooses to get drunk. Contrast this case with Negligent Nate. He doesn't choose to be inattentive, nor does he do anything else for which he is responsible that also obviously creates the condition of his inattentiveness. First, recall that the carelessness associated with negligence is characterized by the lack of a conscious awareness of potential harm. It is not the disregarding of any consideration nor does it involve the realization of risk. Negligence is crucially *defined* by the absence of consideration, not its conscious dismissal. Second, we need to consider the potential contributing factors to his unawareness. In the example as stated, Nate is groggy, part of his attention is focused on his meetings that day, and he is somewhat distracted by the radio. These do not seem to resemble choices in the way that Sven's continued drinking is a choice. At the very least, one needs to show how these three factors would create a condition of carelessness (as Sven's drinking creates his drunkenness), one characterized by its non-conscious nature.

Nate plausibly does not choose to think about his meetings that day, nor is it obvious that such thinking would lead one to be inattentive. Often thoughts simply occur to us, and it is certainly common to have thoughts about one's upcoming day just "rise to the surface" of conscious attention. It also doesn't seem as though Nate chooses to be groggy. He may choose to go to bed at a given time, and also to wake up (or at least get up), but we need not suppose that this entails he chooses to be groggy. Perhaps he got plenty of sleep and allotted plenty of time to "wake up" before leaving. It could nevertheless be the case that despite his precautions he is still groggy when he leaves the house. It also isn't clear that he chooses to drive while groggy; that is, he may not realize that he is groggy. And if he doesn't realize it, and he took the aforementioned reasonable steps to avoid grogginess, this would seem sufficient for undermining his responsibility for his grogginess. Lastly, though he may choose to turn on the radio, he doesn't choose to be distracted by it. Often background music or commercials can simply grab a hold of our attention, even when we wish them not to, and it can be a hard matter to predict when this will be the case.

Even if we think that Nate should have done more to guard against distraction, we could simply modify the case to remove the worries. Perhaps he is distracted by the sunrise, or a bird nearby, instead of the radio. Perhaps he isn't even groggy; he just gets distracted or otherwise fails to pay attention and so hits the child. The point is that simply failing to look behind him and hitting the child will be sufficient to demonstrate negligence, but nevertheless there will be no conscious choice to trace responsibility back to.

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<sup>9</sup> There's a related discussion in legal theory which concerns "prior choice" accounts of criminal liability. For a discussion of these accounts, see Stephen Garvey's "What's Wrong with Involuntary Manslaughter?" *Texas Law Review*, Vol. 85 (2007): 333-383.

<sup>10</sup> If one doubts his responsibility, we'll just have to come up with another case, since his will no longer illustrate how tracing is supposed to work.

Thus, it seems tracing is an insufficient explanation for Nate's responsibility for the negligently produced harm.<sup>11</sup>

### 3. The Importance of the Failure of Tracing

IF I'M RIGHT, THEN we can't appeal to tracing, the standard explanation for non-paradigmatic cases, to explain responsibility in instances of negligence. It follows that, if we are unable to give a general explanation of responsibility that can account for cases involving negligence, either negligence requires an exceptional ad hoc explanation, or else we ought to reject the claim that negligent agents are responsible for the harms they bring about. In this section, I first argue that the most dominant general account of responsibility on offer cannot handle negligence cases in the same way as standard cases of action, but is forced to give a disjunctive explanation. I then argue that such an account of responsibility in negligence cases would be objectionably ad hoc.

Explanation by tracing is an attempt to extend a general account of responsibility to cases involving negligence. Tracing tries to explain all cases where the relevant conscious states are absent by reference to those same conscious states in some prior action. Tracing purports to show how cases of paradigmatic responsible action and Sloshed Sven's case are alike, and how *this* similarity explains responsibility in both cases. But tracing cannot bridge the gap between Sloshed Sven and Negligent Nate. Nate lacks the conscious mental element and there is nothing to trace back to. So the problem isn't just that *tracing* fails to explain responsibility in cases of negligence, it is that whatever the explanation is for negligence, if negligent agents are responsible, then the explanation should appeal to the same considerations as the explanation of responsibility both in cases like Sven's and in cases of paradigmatic responsible action. But this looks like a very unpromising project, for it seems that responsibility in paradigmatic cases is (at least in part) due to the presence of certain conscious mental states, just those sorts of states the absence of which characterizes negligence *and* to which tracing is supposed to trace back.

But perhaps there is an alternative general explanation of responsibility one might appeal to. There is a family of views for explaining responsibility that gives priority not to conscious mental states, but rather to the quality of will an agent's conduct "manifests."<sup>12</sup> On this view, that an agent's conduct manifests an ill quality of will is sufficient for demonstrating responsibility. If Mad Max punches out the

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<sup>11</sup> Steven Sverdlik argues that agents can be "culpable" for negligence even in the absence of prior choices. Instead, he claims responsibility is explained by the fact that the agent could have engaged in "moral reflection" that would have exposed the risk of harm. See Sverdlik, "Pure Negligence," *American Philosophical Quarterly* 30 (1993): 137-149. (In this respect he mirrors Hart, see n.18.) Sverdlik and I agree that tracing is insufficient to explain responsibility in cases of negligence, and disagree about negligent agents being responsible. My reasons for this disagreement will be made clear below.

<sup>12</sup> The classic statement is P.F. Strawson's "Freedom and Resentment," reprinted in Gary Watson, *Free Will* (Oxford University Press, 1982): 59-80, who speaks in terms of actions "reflecting" and "expressing" qualities of will (p.63). Other developed quality of will accounts include Pete Graham, *Blame, Determinism, and Ignorance* (Dissertation, Department of Philosophy, New York University, 2005) and R. Jay Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press, 1994). Michael McKenna and Gary Watson endorse at least the core aspects of Strawson's original approach in, respectively, "The Limits of Evil and the Role of Moral Address: A Defense of Strawsonian Compatibilism," *The Journal of Ethics* 2: 123-142 and "Responsibility and the Limits of Evil," in *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*, ed. F. Schoeman (Cambridge University Press, 1987): 256-86. For a quality of will approach applied to responsibility for one's attitudes, see Angela Smith, "Responsibility for Attitudes: Activity and Passivity in Mental Life," *Ethics* 115: 236-271.

bartender, then this conduct manifests a quality of ill will on Max's part towards the bartender. The upshot for our purposes is that conduct that isn't chosen can still plausibly manifest qualities of will. For instance,<sup>13</sup> a husband who routinely fails to consider his wife's interests and to at least occasionally place them above his own seems to express some quality of ill will towards her. In another example, repeatedly forgetting a close friend's birthday seems to manifest a lack of consideration towards him. When we do things that manifest ill qualities of will, so the view goes, we are the legitimate targets of certain kinds of criticism on the basis of that conduct (the kinds of criticism intimately associated with responsibility).<sup>14</sup>

One might think that such views have an easier time explaining negligence. It doesn't matter that Negligent Nate doesn't consciously choose to risk running the child over, his failure to pay adequate attention nevertheless manifests a quality of ill will. Naturally, it's not as bad a quality of will as if he had harmed the child intentionally or knowingly, say. Nevertheless, failure to pay attention when one is engaged in activities that pose a risk of serious harm displays a lack of consideration for those who you risk harm to. So, Negligent Nate displays ill will towards the child, and is thus responsible for harming him.

I think these approaches fare no better than tracing in explaining responsibility in negligence cases. To see this, we first need an account of what it means for an action to "manifest" a quality of will. Unfortunately, the main proponents of these views say very little about what the "manifesting" relation is. As I see it, then, there are two main options: "manifest" could be a causal relation or an evidential relation. There is textual evidence for either gloss. Some authors use "manifest" simultaneously with "express," which often looks causal, but the use of the relation on these views is to draw inferences from actions to qualities of will. No matter our gloss, however, on neither understanding will quality of will approaches be able to explain negligence responsibility.<sup>15</sup> Indeed, they both fail for the same reason.

One possible reading of "manifest" is as an evidential reading because the role it plays in the theory is to support inferences from actions to qualities of ill will. Unfortunately, on this reading quality of will theories will fail to explain negligence responsibility. On the evidential reading, we are supposed to think that Negligent Nate's conduct evinces an ill quality of will. He should have paid more attention to what he was doing, and the fact that he didn't is evidence that he doesn't give the appropriate consideration to those who he risks harm to in operating a vehicle carelessly. But this conclusion is too strong. The power of the evidential relation surely rests on the reliability of the inference from conduct to ill qualities of will. The reliability of such an inference requires, it seems, some regularity in its connections. Notice that in sketching the examples above I used words like "repeatedly" and "routinely." Of course, any conduct can count as some evidence for the underlying quality of will, but we generally require more before we're justified in actually drawing the inference. In order to justifiably draw the inference we need something like a pattern of response. But ascriptions of responsibility in cases of negligence need not rest on regularities. In fact, such ascriptions can *fly in the face* of compelling additional evidence: Negligent Nate could have at all times previously been the paragon of careful driving. This is counter-evidence, it would seem, for thinking that in the particular case in question, Nate manifests ill will

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<sup>13</sup> The following examples are from Smith 2005.

<sup>14</sup> Smith 2005, p.243.

<sup>15</sup> For the remainder of the paper I will use "negligence responsibility" merely as convenient shorthand for "responsibility for the products of negligent conduct."

towards anyone, even the child. Nevertheless, one transgression is sufficient for negligence, and if negligence itself is to be sufficient for responsibility, then it seems that quality of will views (on the evidential reading) fare no better in explaining it. For the transgression itself won't be sufficient evidence for an ill quality of will.

A perhaps more plausible reading of "manifests" is as a causal reading, but unfortunately quality of will views will fail on such a reading for much the same reason. On this reading we are supposed to think that Nate's negligence, his failure to pay attention, is caused by some ill quality of will, either towards the child or in general. It seems to me we should be initially skeptical of such a claim, for Nate doesn't even know the child is there, or that anyone is there for that matter. Nor is he even consciously thinking about backing up, so we might seriously doubt that his current frame of mind is such that his attitudes towards others, whatever they are, would be engaged to cause his lack of care. More importantly, however, Nate could very well hold quite positive attitudes toward the child he injures. Perhaps the child is a neighbor's son, who mows Nate's grass and shovels his sidewalk when it snows. Nate is very grateful for the son's work, thinks him a fine young man, etc. If this were the case, it would be hard to claim that Nate holds any ill will toward the child, much less that *that* ill will caused his failure to pay attention. Indeed, it seems our causal judgments will be tied up again with the reliability of our inferences from the conduct to the agent's attitudes, and will therefore be subject to counter-evidence of the above sort.<sup>16</sup>

No matter the gloss we give to "manifest," quality of will approaches fare no better at explaining responsibility for negligently produced harms. Quality of will accounts seem to require some regularity of conduct. Repeatedly disregarding someone's interests might count as sufficient evidence for an ill quality of will, but a one-time offense would be insufficient. Compare again the case of the inconsiderate husband with a case of negligence like Nate's. Filling in some details, the husband in question makes plans, chooses, and acts, usually with no concern for his wife's interests, preferences, or values. He doesn't purposely act contrary to his wife's wishes; he just habitually fails to consider them. When he deliberates, facts about his wife's interests simply don't enter in as reasons for or against his options. If we examine his actions, then, we are led to suppose that he *doesn't actually value* his wife in a particular way. If he did, he wouldn't continuously fail to factor her interests into his deliberations. This inference is supported by the copious evidence we have for the conclusion. In our context, it seems plain that the husband lacks concern for his wife, and this fact is apparent in the choices he makes and the actions he takes. For cases such as his, quality of will views look promising. Even though he doesn't consciously disregard his wife's interests, the fact that he disregards them at all seems to reveal something about his values and commitments. Moreover, the copious evidence we have makes more plausible the notion that when he fails to consider her interests he does so *because* of a lack of concern.

But Nate's case is importantly different from the husband case. We don't have copious evidence about Nate. We have a single instance of negligence. He fails to consider the risk he's posing to those behind him as he backs out of his driveway. But this is insufficient evidence for drawing the conclusion that Nate holds a lack of concern for those around him. If Nate had developed a habit of backing out

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<sup>16</sup> I am not here suggesting that quality of will views require that actions be the product of stable dispositions of character. My focus is on the relevant considerations for reasonably drawing inferences about an agent's quality of will from his action, not on the causal connections themselves.

without looking, then matters would be different; *then* his case would look like the husband's. But even without such regularity in conduct, Nate is negligent. His lack of care suffices for that. So quality of will views cannot explain why his negligence is sufficient for responsibility because we don't have sufficient reason to think Nate holds ill will towards anyone. This is especially true anytime we have counterevidence involving positive qualities of will. But once is enough for an ascription of responsibility in negligence cases. Even someone who in all other respects is the acme of consideration and care can be responsible for negligent conduct, it seems, should he fail to pay proper attention in just one instance. Quality of will accounts, therefore, even if they could explain responsibility in *some* cases of negligence, cannot explain responsibility across cases of negligence.

It might seem there's a simpler response a quality of will proponent might make. One could claim that it is the lack of attention *itself* that constitutes the ill will in cases of negligence. Nate, for example, fails to consider the risk of harm he's posing to others as he backs out, and it is this failure that constitutes his negative quality of will. Such a response is no doubt an attractive one for quality of will theorists to take, but it doesn't really address the issue at hand.

The first problem with this answer is that it solves the matter only by fiat. We have just seen that we don't have good evidence for an ill quality of will on Nate's part. The solution on offer here simply lowers the bar for what we need in order to draw the inference. In short, the response here suggests that Nate's case can be treated just like the husband case: both involve lacks of consideration, and a single demonstration of such a lack licenses us to infer an ill quality of will. But this just can't be right. A consultation with our own past experiences should be enough to see why. We don't automatically ascribe ill quality of will to our friends who fail to consider our interests on one occasion, forgetting a birthday, say. We require more. Part of this reaction is surely that we have ample evidence of their good will for us. But while it may be the case that in the absence of such counterevidence, when we consider a case like Nate's in a vacuum, we are more apt to make inferential leaps, it is equally apparent that when given such counterevidence, the inference is all the more difficult to sustain. And if this is right, then quality of will views simply do not give the right explanation of responsibility in negligence cases.

The second problem with this response is that it fails to give us a general explanation of responsibility across cases. It was supposed to show how negligent agents manifest qualities of ill will just like in paradigmatic cases. But the ill will doing the work in Nate's case according to this last response isn't the same as the ill will in Mad Max's case of punching the bartender. In the latter case, there is clearly an "active" quality of ill will at work, one that is engaged and "expressed" in action. Indeed, it seems to play a causal/explanatory role. But in Nate's case, according to this last response, his negligence constitutes the ill will. It is a "passive" ill will, one that is posited in order to give a verdict that accords with common sense.<sup>17</sup> So we don't have a general account of responsibility that can explain both cases together; we have two accounts, one for each. In this way, the view fares no better than any disjunctive account we could give. The model for such a view would go like this: A is responsible for x when he meets some set of conditions  $\alpha$  (those obtaining in paradigmatic cases) OR when he meets some *different* set of conditions  $\beta$  (those obtaining in negligence cases). Disjunctive accounts, however, ignore the fact that in

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<sup>17</sup> I should note that "active" quality of wills can still be described in terms of dispositions, say, in the way that the husband counts as "callous" or "indifferent". But to count as such one will still need a pattern of behavior (as in the husband's case) or some awareness of the situation (as in the case of intentional action).

both cases the agent involved is supposed to be responsible for *x*. So if there's something interesting to the notion that both are responsible, that both deserve certain treatment *because* they are responsible, we should want our theory to explain why this is so in a way that sheds light on this shared feature of the cases. We should want a general explanation. Quality of will views cannot accomplish this task, and so fail as a satisfactory explanation of negligence responsibility.

#### 4. Negligence as a Species of Inadvertence

IF I'M RIGHT, THEN tracing fails as an explanation for responsibility for negligently produced outcomes. It fails because it requires tracing responsibility back to some conscious mental element, usually a choice or action. But negligence is defined by a *lack* of conscious mental states, an unconscious inattention, and there need be no choices or decisions that contribute to that inattention. Thus, tracing is unable to help us explain responsibility for negligently produced outcomes. If I'm right that no general explanation is available to cover cases of negligence, we are seemingly left with two options: either add ad hoc clauses to our theories to explain negligence responsibility as a special case, or drop the intuitive conclusion that negligent agents are responsible for the harms they produce. I argued in the previous section that the first option is unsatisfactory.

The other option one can take is to reject the claim that Negligent Nate is responsible for the child's injuries. If that were the case, then we should expect tracing to fail as an explanation. Indeed, no satisfactory explanation could be given that would cover such cases and paradigmatic cases of responsible actions. And as I will now argue, we actually have some reason to think that negligent agents are not responsible for the outcomes they produce because negligence seems indistinguishable from simple inadvertence from the perspective of responsibility, and inadvertence counts as an excuse. Explaining these cases together, then, pressures us to treat negligence like inadvertence, and therefore either reject the claim that negligent agents are responsible for the harms they produce, or else accept that inadvertent agents are also responsible. I'll argue that the second option is unattractive, and thus that negligent agents are not in fact responsible for the harms they bring about. Now it is likely the case that intuitions will still diverge about negligence cases and cases of inadvertence. That is, many will still judge negligent agents worse than their inadvertent counterparts. We can explain this fact, however, by reference to what does distinguish negligent agents from their inadvertent counterparts. It is a difference which I think will show why we tend to treat negligent agents more harshly, but it is not a difference that will actually demonstrate them to be responsible. I outline a model for such an explanation in Section 5.

We know what Negligent Nate did, but let's compare him with a new case. Leadfoot Lenny<sup>18</sup> is at a party where a group of friends are gathered watching a movie. There are more people than seats, and some have gotten comfortable lying on the floor. Lenny gets up to get a soda from the fridge, and in the course of stepping around and over people, he inadvertently steps on his friend's hand. He didn't mean to step on his friend's hand, but he was distracted by the movie, and so he did. Nevertheless, it

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<sup>18</sup> Lenny's name here, like Nate's, does not reveal a character trait, but makes clear the facts of the case.

seems Lenny's responsibility in this case is undermined due to his inadvertence, which makes his stepping on the hand unintentional.

We seem to treat negligence as preserving responsibility, whereas inadvertence seems to undermine it. But if this is the case, then there must be a way of distinguishing between Nate's case and Lenny's in a way that explains why Nate is responsible and Lenny is not. Otherwise, we're forced to conclude that either negligence does undermine responsibility, or else inadvertence doesn't undermine responsibility. I think the latter disjunct is far more problematic than the first, and I'll defend this claim at the end of the section. First I want to demonstrate that there is no satisfactory way to distinguish between Nate and Lenny that indicates a difference in responsibility.

An initial observation about cases of negligence is that they involve a failure to do something the agent should have done; negligent agents should have paid more attention. We say, "Nate should have looked where he was going." Unfortunately, such claims are ambiguous. There are two possible interpretations for how to treat the "should have," and each interpretation seems to fail to distinguish properly between Negligent Nate and Leadfoot Lenny. On the first interpretation, the "should have" means simply that it would have been better had Nate done what he failed to do. It would have been better had Nate looked because then the child wouldn't have been hit. The problem with this first interpretation is that, while true of Nate's case, it is equally true of Lenny's case. It would have been better if Lenny had been more careful, because then his friend wouldn't have gotten his hand stepped on. So the first interpretation fails to distinguish between the cases at all.

On the second, more plausible, interpretation, the "should have" refers to some sort of standard that was violated.<sup>19</sup> We require individuals to look when they back out of driveways (in part because we expect them to recognize the dangers posed by operating vehicles). Moreover, this seems to be an instance of a general duty to take extra care when engaging in activities that pose a risk of harm (or, perhaps, just a standing duty to take care in our conduct). The problem on this second interpretation is that we can always ask why supposedly non-responsible counterparts (like Lenny) aren't under a similar sort of standing duty. Navigating around people lying on the floor poses a risk of harm. If a standing duty is sufficient for securing responsibility, then Lenny would seem to be responsible as well. While our expectations are surely stronger in Negligent Nate's case, this seems insufficient for setting negligence cases apart as a distinct class of cases with respect to responsibility. After all, a standing duty governing a given activity applies to *all* those who engage in the relevant activity. But the relevant requirement here isn't driving carefully. If it were, it wouldn't apply to negligent agents whose negligence has nothing to do with driving, like a bricklayer who tosses defective bricks off a rooftop without looking.<sup>20</sup> But the bricklayer seems negligent in the same way as Nate is: he should have paid more attention to the harm he risked. And even if we have scores of standing duties finely individuated by activity, so that there's one governing driving, and another governing bricklaying, and another governing firing a gun, etc., this is only because they fall out of a quite *general* standing duty to take care in everything we do.

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<sup>19</sup> Compare H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968), who grants that inadvertence implies a "blank" state of mind to the consequences of one's actions even when negligent, but argues that negligence lies not in inadvertence but in failing to live up to some objective standard. See also Claire Finkelstein, "Responsibility for Unintended Consequences," 2 *Ohio State Journal of Criminal Law* 579 (2005): 579-599.

<sup>20</sup> This example is from Hart 1968, and is often reused in discussions of negligence in legal theory. See also Finkelstein 2005; Zimmerman 1986.

It might be thought that satisfying the standard may require different thresholds of care depending on the specific activity. So, when one is driving or bricklaying on a roof, one needs to take special care, but not when one is walking around prone people on the way to getting a soda. I'm not convinced that this is really a demand for *more* care than in Lenny's hand-stepping case, and not just a different side of the same point about driving and bricklaying on a roof having the potential for more harm than stepping around prone people.<sup>21</sup> That is, it seems to me that a demand for more care in a given activity is really just a statement that the activity is more dangerous. Nevertheless, even if we think you do have to be more careful in certain situations, this wouldn't distinguish between the cases on grounds that evince a difference in responsibility. For the mere violation of a standing duty of care wouldn't suffice to show an agent is responsible for the effects of such a violation. And if it did, Leadfoot Lenny would be responsible too.

If negligence and inadvertence are indistinguishable from the perspective of responsibility, then I think we're forced to conclude either that: (a) negligent agents aren't responsible for the harms they cause; or, (b) inadvertent agents are responsible for the harms they cause. In short, either both Nate and Lenny are responsible or neither is. In favor of (a), I think it true that inadvertence seems to count as a consideration that undermines responsibility precisely because it involves the lack of a conscious mental element. When one does something only inadvertently, it is an unintentional result, one the individual didn't mean to bring about. Thus, it seems a mistake to think that such a result reflects on the agent in a way such that we can evaluate the agent by the inadvertent outcome's lights. But it doesn't seem as if the agent deserves any sort of treatment on the basis that outcome. In short, he isn't responsible for it.

But what about (b)? Some might be attracted to the view that Lenny and Nate are both responsible for the harms they bring about. After all, we might say the same things to both: "Watch where you're going!" or "You're supposed to pay attention to what you're doing!" Indeed, one convinced by my argument that negligence and inadvertence are really indistinguishable from the perspective of responsibility might well point to the shared standing duty of care and claim that the symmetrical violations by Nate and Lenny suggest that they are both responsible. One who is attracted to such a position, however, still faces a significant hurdle: the explanation for such responsibility *still* won't explain responsibility in paradigmatic cases. It's worth remembering that if negligence and inadvertence are indistinguishable from the perspective of responsibility, then both will require exceptional explanations since both are characterized by the absence of a conscious element. It should also be apparent that just as tracing won't work for negligence, it won't work for inadvertence either.

Moreover, a view that claimed that inadvertent agents, too, were responsible, would seem to yield the wrong result in cases of praiseworthiness. An agent who brings about some good outcome inadvertently surely isn't praiseworthy for it, no matter how great the good achieved. And even if there are important differences between praiseworthiness and blameworthiness, it doesn't seem as if an agent who brings about some good inadvertently is even *responsible* for it, claims of praise aside. So while

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<sup>21</sup> It has been suggested to me that we license people for driving (Nate), whereas we don't license people for stepping around prone people (Lenny). This is true, no doubt in large part because of the importance we place on driving. It is obvious that such activities pose the risk of especially serious harm, more so than stepping around prone people. But I don't think this amounts to a claim about demanding more care in such instances, but rather a certification that those we license can demonstrate those skills that constitute taking care in the circumstances germane to the activity. Plus, the costs of requiring and regulating licenses are worth it, given the seriousness of the potential harm. This isn't the case in the matter of prone-people-stepping.

insisting that both negligent and inadvertent agents are responsible is an available option, I think such a claim both conflicts with a natural view about inadvertence and it gets us no closer to explaining responsibility in either case.

### 5. Preserving a Distinction

COMPARING NEGLIGENCE with inadvertence leads me to suspect that negligent agents really aren't responsible for the outcomes they bring about. But why does the intuition that Negligent Nate is responsible seem so strong? Why does negligence still seem importantly different from mere inadvertence? Well, one important difference between Nate's case and Lenny's is that Nate causes much more harm. A broken leg is much worse than a trod upon hand (we're assuming the hand isn't broken). Additionally, there's only so much harm you can cause by inattentively walking around prone people, whereas the risk of serious injury by inattentively operating a car is much greater. It doesn't seem to me that considerations such as these can support differing judgments of responsibility. First, I'll defend this claim, and then I'll show how these considerations may yet help explain our differing reactions to the cases, and in turn distinguish between negligence and inadvertence themselves.

I don't think the severity of the harm caused can make a difference in responsibility. Suppose you knew that an agent caused some harm entirely by mistake, by making an entirely reasonable choice, say. If you were convinced that the agent wasn't responsible, would the fact that it was a serious harm make a difference? To put the point generally, suppose we take a case in which it's obvious an agent isn't responsible and then ratchet up the seriousness of the harm brought about. Is there a threshold in which responsibility "appears"? I find the very suggestion to be implausible.

One reason to think it's implausible surfaces if we compare paradigm cases of responsibility. So, suppose Deidre hates Emma and wants her to suffer. So Deidre waits for Emma to get off work, sneaks up behind her in the parking lot and beats her with a baseball bat. Emma suffers multiple contusions, a cracked skull, and a concussion. Deidre is responsible for Emma's injuries if anyone ever is. Now suppose that Fran hates Ginny and wants her to suffer. So Fran waits for Ginny to get off work, sneaks up behind her in the parking lot and pulls down her pants, causing Ginny to trip and fall. Ginny skins her knees and is humiliated. Fran, too, seems responsible for Ginny's injuries if anyone ever is. Indeed, in comparison, Deidre and Fran seem equally responsible for their respective harms. The paradigm of responsible action is cases of intentional action (by ordinary agents) aimed at a particular outcome as the intended end. Deidre and Fran's actions fit the bill. Both are out solely to harm (in different ways) their targets, and this is precisely what they do. In fact, I don't see how one could be more responsible for some outcome than they are in their respective scenarios.

It should be apparent, however, that the harm done to Emma is much worse than the harm done to Ginny. Indeed, Deidre is certainly more blameworthy than Fran for what she does precisely because the harm Deidre brings about is so much worse.<sup>22</sup> But the amount of harm brought about isn't pertinent

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<sup>22</sup> There may be other relevant factors in play here. We may judge Deidre more blameworthy overall because we also think it's worse to intend to physically assault someone than to harass them a bit. But I want to limit the discussion above to comparative judgments regarding blameworthiness for what they do, blameworthiness for particular mental states notwithstanding.

to the ladies' responsibility for bringing it about. Both are equally responsible in their respective scenarios. So, while the amount of harm brought about is certainly relevant for how blameworthy an agent is, it isn't relevant to her responsibility for bringing it about. That's why Deidre and Fran are both equally responsible for their respective harms, even while Deidre is more blameworthy for her harm than Fran is for hers.

This result can be applied to Nate's situation. First, let's change the case slightly, and let's call the new Nate, Nate\*. Suppose everything is as before, but instead of not seeing the child, he doesn't see a child's bike. So Nate\* runs over a child's bike. This is a much less serious harm than what Nate brings about. Is Nate\* less responsible for running over the child's bike? I don't think so. Responsibility ascriptions seem importantly insulated from the amount of harm caused, as Deidre and Fran showed. So I think the answer one gives should match whatever one thinks about Nate's case, and the same goes if Nate\* runs over a prized rosebush or three hundred nuns. Since we should treat these cases alike, and I think Nate\* isn't responsible, Nate isn't responsible either.

Now we have an explanation for our differing reactions to Negligent Nate and Leadfoot Lenny. We tend to treat Nate more harshly because his failure of the standing duty of care is worse than Lenny's. Interestingly, this difference can also be used to distinguish between negligence and inadvertence. We can understand this comparison in terms of the amount of harm risked by the activity each is engaged in. I am assuming here that the probability of harm is equivalent in these two cases. The reader is invited to tweak the example suitably if the reader doubts that the probabilities are in fact the same.<sup>23</sup> This assumption will be important below. Now, Nate is operating a vehicle, which poses the risk for quite serious harm. Driving a vehicle carelessly can kill multiple people; and this is a serious harm indeed. Lenny's activity, while it does risk harm, risks a much more minor amount of harm. One could dislocate a finger or perhaps even break a bone by having one's hand stepped on, but these are fairly minor harms. This comparison helps explain what distinguishes Nate's negligence from Lenny's simple inadvertence. The difference can be highlighted by reference to the expected negative value of the harms risked by engaging in such activities without due care. In both cases, the agent fails a standard of care. Indeed, as experience will reveal, we would admonish both Lenny and Nate for their failures. "Watch where you're going!" we might snap. And in keeping with my story for our reactions to Nate, this response also has as its source the general standing duty of care, and our providing it serves to reinforce that standard (and hopefully encourages Lenny to be more careful in the future). But driving vehicles poses a much more serious risk of harm because the sorts of harms that could result if one doesn't satisfy the standard are so much worse. Thus, Nate's violation is worse; it more severely flouts the duty to avoid harm by engaging in a more dangerous activity without being sufficiently careful.

However, this isn't the only way to fail the standing duty of care. The line between Nate and Lenny (and thus between negligence and inadvertence) is drawn by the expected negative value of the harm risked without due care. But there are *two* ways one can increase the expected negative value of the harm. The first way, as demonstrated by comparing Nate and Lenny, is to increase the amount of harm risked by the activity. Driving vehicles risks more harm than stepping around prone people. So Nate is

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<sup>23</sup> We could do this artificially by example, but the examples would be contrived. I prefer to assume the equivalence of probability and work with more ordinary examples.

negligent because the expected negative value of driving without due care is too high, because driving without due care poses a certain risk of very serious harm. Lenny is inadvertent and acts without due care, but the negative expected value of his conduct is relatively low, given the amount of harm risked.

The other way to increase the expected negative value of the harm, however, is to increase the risk of harm; that is, to engage in riskier activities. For example, shooting one's firearm without care in the middle of Montana risks a certain amount of harm (e.g., a gunshot wound that could lead to death). Shooting one's firearm without care in the middle of Manhattan risks the same amount of harm, but it poses a much higher risk of that harm actually occurring. The chances that you will shoot someone in the middle of Montana are quite slim when compared to shooting someone in the middle of Manhattan. So, failing the standard in Manhattan, in this instance, is worse than failing it in Montana. It also seems to me that in the very unlikely event that the Montana shooter injured someone, this would seem to be a case of inadvertent shooting, whereas if the Manhattan shooter injured someone, he would do so negligently.<sup>24</sup>

This verdict matches natural reactions to these cases, I think, and captures what is essential in distinguishing negligence from inadvertence. Negligence involves the failure to pay appropriate attention when the expected negative value of the risked harms meets or exceeds some threshold. Inadvertence involves the same sort of inattentiveness, but the negative expected value of the harm risked is much lower. When one's carelessness increases the negative expected value of the harm risked too much, that agent is negligent. This means that for all I've said the Montana shooter may also be negligent. Similarly, there may be cases like Nate's that don't qualify as negligence. For example, if Norene lives in rural Virginia and is backing out of her driveway without looking, where she is 10 miles from her nearest neighbor, where kids don't walk to school, and it's 5am, perhaps she is only inadvertent, even should she hit a child. I happen to think that this is probably not right, and the explanation for this fact is that driving without due care always increases the negative expected value to unacceptable levels. Nevertheless, these cases help illustrate how negligence is a form of inadvertence, one in which the expected negative value of the inattentive conduct is too great.

## 6. Conclusion

IN THIS PAPER I hope to have accomplished three objectives. First, the unconscious nature of negligence poses a deep and interesting problem for *all* theories of responsibility, one that isn't solved by tracing, the main tool in the literature for handling similar cases. The problem is that explanations of responsibility need to extend across cases of responsibility, but the difference between negligence cases and paradigm cases of action seems too big a gulf for a single explanation to span. Second, negligence's similarity to inadvertence puts pressure on theories to treat both on a par. And since inadvertence seems to excuse agents from responsibility, this fact suggests that negligent agents, too, are not responsible. Finally, I proposed an alternative model for distinguishing between negligence and inadvertence, which explains

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<sup>24</sup> If it helps, we can suppose that both are shooting at soda cans they've propped up 100 ft away. Here, the confines and population of Manhattan make it much more likely that the Manhattan shooter will hit someone if he's not careful. Indeed, it may be that no amount of care could keep a bystander from being shot.

them in terms of a shared inattentiveness and the expected negative value of the potential consequences of the conduct.

Of course, this means the alternative model rejects the claim that negligent agents are responsible for the harms they bring about. But given the fact that negligence is characterized by the absence of a conscious mental element and moral responsibility seemingly depends on such an element, this denial is merely a consequence of the problem with negligence. Furthermore, the alternative model captures a natural explanation of our reactions to cases of negligence, and perhaps more importantly, our differing reactions to inadvertent agents. Given tracing's failure to explain negligence, and the general worry that no general explanation could be given for negligence, I'm forced to conclude that negligent agents are not responsible for the harms they bring about.<sup>25</sup>

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