

Introduction

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The vast majority of the literature on responsibility tends to associate the idea of control with intentional action. This seems intuitive and natural. ‘Intentional action’ describes bodily movements executed *because of* and *guided by* reasons for action. How else, indeed, can a rational agent control their bodily movements? Disagreements among theorists arise, however, on the characterization of ‘reasons for actions’. On the standard account of action, reasons for action are a binomial of beliefs and desires construed as mental states.¹ On a more sophisticated account of the standard view, reasons for actions involve plans that direct us and result in ways of self-governance.² On the classical tradition of action, reasons for actions track good-making characteristics or values.³ Finally, a Kantian view would understand reasons for action as ipso facto standards of willing, given the link between rationality and the will which is characteristic of that view.⁴ Underlying all these variety of understandings of ‘reasons for action’ lies the intuition that the agent is engaged with reasons, which enable her to control her bodily movements. She directs her body towards the transformation of the world as she plans, values and/or desires. We say that the agent has knowledge of her own actions and can assert that ‘control is the direction given by the agent through her reasoning’.

Contrast this with negligent actions which are characterized by the agent’s realization that something went wrong in the performing of her action. There is no control, as the agent, at least on a preliminary and quick glance, did not direct the action towards what the action has become. For example, a mother collects her children at the hockey pitch on a hot day, she becomes involved in a long and heated discussion with

¹ Davidson, ‘Actions’. ² Bratman, *Intentions, Plans and Practical Reason*.

³ In moral psychology, see Tenenbaum, *Desire*. In legal theory, see Finnis, ‘Law and What’; Raz, ‘On the Guise of the Good’; and Rodriguez-Blanco, *Law and Authority*. Recent commentators of Aristotle’s Ethics have emphasized this aspect, see Moss, *Aristotle*; and Vogt, *Desiring the Good*.

⁴ See Korsgaard, ‘Skepticism’.

her children during which she forgets that she has left her dog in the car. When she and the children return to the car, they are devastated to see their beloved family pet has died from overheating. The mother can only mutter the following sentences: ‘I forgot’, ‘I did not know that I would get distracted by the heat of the arguments’, ‘I cannot remember what exactly happened and how this happened’ and so on. Obviously, she did not intend the death of her dog, but one might ask the question whether at any point there was some kind of control that makes her responsible for the death of her dog. Before discussing this possibility, let us summarize the key features of the phenomenology of negligence, which are the following:

- (a) Inadvertence, inattention or forgetfulness play a key role in the action. However, at the same time, and in spite of this inadvertence, inattention or forgetfulness, we attribute responsibility for negligence. The ignorance or lack of knowledge plays a role, but it does *not* excuse.
- (b) At the moment of action, the action is seen as trivial, that is, it is of no importance at the ethical, psychological or physical level. The agent cannot actually foresee anything harmful as a result of her performing the action. When the agent is performing the action, she cannot recognize what she is doing and what she ought to do.

However, the harm that is caused by the negligent action makes it evident to her that the action is *not* trivial. After the harm, the breach of her duty of care and action ‘dawn on her’. Not only is the outcome of her action wrongful, but, arguably, she is *responsible for the wrongful outcome*.

What kind of thinking process might explain this strange phenomenology? Any explanation needs to preserve our intuitions about responsibility and control of our actions. Thus, if we characterize negligent action as voluntary, then we lose the distinction between responsibility for negligence and responsibility for intentional actions as long as there is a strong overlap between intentional and voluntary actions. Furthermore, we lose the perplexity that the agent experiences. On the other hand, if we sever voluntariness and negligence, we lose the agent herself. Our legal and moral practices tell us that negligence is responsible action due to agency after all. A feature of this skepticism is a tendency to blur the distinction between ‘mere’ and negligent inadvertence which in turn threatens to undermine the possibility of responsible agency altogether. In this manner, some authors have abandoned the possibility of rescuing responsibility for negligence and argue that when we act because of forgetfulness,

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inadvertence or inattention, we are neither morally nor legally responsible. They are skeptical about responsibility for negligence.⁵

The contributions to this volume aim to address the nature and phenomenology of negligent action in connection with our legal and moral practices of responsibility. English law of negligence, and similar doctrinal conceptualizations found in other jurisdictions, attribute a duty of care to the defendant. But the idea of a duty of care does not tell us much about the rationality of negligent actions. We cannot attribute a duty of care without determining whether we are the kind of creatures who are capable of being responsible for non-intentional actions.⁶ If we are to avoid a skeptical response, we need to understand why we fail as result of inadvertence, forgetfulness or inattention, whether we are blameworthy and – at the moral level – whether we should aspire to bettering ourselves to avoid acting negligently and causing harm. Otherwise, skeptical voices that advance the view that the law of negligence should be eliminated seem to have the upper hand. Any aspirational improvement to our agency needs to understand the rationality of our failure. In the American legal system,⁷ negligence is defined as the creation of an unjustifiable risk of harm which the agent fails to avert when she is acting. This conception of negligence overlooks the complexity of performing an action and presupposes that in most of our actions we stand from a detached viewpoint assessing whether risks are justifiable or not. It portrays a non-credible conception of agency. Again, we need to understand and assess whether we are the kind of creatures that can avert the unjustifiable risk of harm.

The puzzle begins with trying to locate the conceptual space for negligence. If negligent action is caused by a lack of knowledge, the tendency is to find a suitable and credible mechanism that obliterates this knowledge. Some authors assert that person X is responsible because, although she had the capacity for knowledge, she did not activate the knowledge at the moment she performed the negligent action. The possibility of tracing a moment of control and intention prior to the performance of the negligent action is defended by another group of theorists. Finally, some authors try

⁵ Alexander, Ferzan and Morse, *Crime and Culpability*; and Hurd and Moore, 'Punishing the Awkward'.

⁶ For a view that reverses the order of explanation by arguing that responsibility for non-intentional actions is grounded on an antecedent duty of care as a requirement of consistency of action among agents, see Pavlakos, 'Agent-Relativity without Control', Chapter 6 in this volume.

⁷ See Zipursky, 'The Restatement' for an illuminating criticism of the position taken by US legal scholarship, who has recently tried to avoid the concept of duty as key factor in negligence. For a full development of his own theoretical perspective regarding the nature of Tort Law, see his recent monograph (co-authored with John Goldberg) *Recognizing Wrongs*.

to argue that the negligent act and our responsibility for it lies in a defective character or vicious will. Skeptical voices aim to show that all these strategies fail. For example, they question whether tracing control or inattention can guarantee a conceptual space for negligent acts and assert that any tracing strategy leads us into blind argumentative alleys.

Negligence is a fertile territory for exploring the complexity of the role of knowledge, evaluation, character, practical reason and responsibility in our actions. It is a mirror of what does not work, that is, the failure of our rationality, and therefore a satisfactory explanation of negligent action illuminates what we mean when we say, 'our rationality operates well'.

In this volume, legal theorists meet moral philosophers and philosophers of action to establish a fruitful dialogue that should be taken up and furthered by other scholars who engage in the investigation of this topic. The authors advance fresh lines of inquiry that reflect the cross-cutting interdependence between disciplines and contribute to a distinct interdisciplinary research agenda for tackling the challenges raised by negligence.

The book begins with Gideon Rosen's contribution 'The Problem of Pure Negligence' (Chapter 1) in which he identifies a tension between the narrow conception of responsibility for negligence as a result of theories of responsibility and the wider view on responsibility for negligence in moral practices. The chapter defends a revisionary perspective of our practices to conform to theory. He highlights the need to give a reasonable explanation of 'pure negligence' where the agent suddenly suffers a 'glitch' and where responsibility cannot rely on a prior choice where carelessness and forgetfulness are factors. There is no possible tracing mechanism that grounds potential blameworthiness. He gives the example of an English legal case, *Adomako*,⁸ in which a hospital patient died as a result of an anesthesiologist failing to reattach a tube that had come loose in surgery. Adomako, the anesthesiologist, did attend to the alarm emanating from the machine monitoring the patient's blood pressure but his focus was incorrect, that is, it was on trying to determine whether the machine was malfunctioning rather than on trying to identify what had caused the drop in blood pressure. Note that all this happened within four minutes. There was no ill will or lack of concern on the part of Adomako. Rosen tells us that the *quality of the will* theory cannot explain the potential blameworthiness of Adomako. Rosen focuses on the importance of tracking the truth and on the metaphysics of emotions. In other words, the thought 'she should not have done it' is correct. Rosen proposes a number of tools

⁸ *R v. Adomako* 1 AC 191 [1995].

that will help us to identify or track these thoughts, that is, fidelity constraint, naivety constraint and an evaporation heuristic, and concludes that these tools and heuristics mechanisms favor the *quality of concern view*. It seems that describing Adomako's actions as being a 'glitch', that is, '*decision-making subverted behind the scenes by an attitude of which he was (for all we've said) blamelessly unaware*',⁹ makes him not blameworthy, as he had an adequate concern for his patients. When the agent's quality of the will is impeccable, our reactive blame dissolves. Rosen, therefore, is inviting us to rethink our blaming practices to adjust to our best theory of responsibility and blame.

In his 'Unwitting Omissions, Mistakes and Responsibility' (Chapter 2), Erasmus Mayr defends the *quality of the will* account of responsibility for unwitting omissions. Against the backdrop of a robust understanding of the 'good will', Mayr offers a refined version of the *quality of the will* account by linking it to morality and its general principles and values. Standard 'quality of will' accounts, which have largely been inspired by Peter Strawson's 'Freedom and Resentment', face the crucial task of spelling out when the agent's will is objectionable in the relevant sense, such that the agent's behaviour or omission appropriately gives rise to *moral* blame. With an eye to meeting this challenge, Mayr shows that the particular demands that ground moral blame ultimately rest on more general rules and principles, such as the general principle that you should keep your promises, or on more general values, such as the value of fidelity.

This generates a fresh account of what counts as objectionable 'quality of will': to be deemed blameworthy, one must manifest a lack of proper concern or regard for these *general* norms or values; that is, a lack of proper regard for the value of impartiality, or a lack of proper appreciation of the equal moral worth of all persons etc., rather than merely a lack of goodwill or regard for the particular person one is dealing with. While the latter lack of regard is needed to make one blameworthy (as far as wronging others is concerned), it is not sufficient: one is only subject to moral blame if one's failure to show such regard is also due to one's lack of proper regard for general moral values.

The concern with forgetfulness or obliviousness is continued by Gideon Yaffe in his chapter, "'How Could You?": The Moral Import of Obliviousness' (Chapter 3), in which Yaffe tries to explain why some negligent people, who are unaware of a morally significant fact, are still to some degree culpable for their behavior. Yaffe is particularly concerned

⁹ Rosen, 'The Problem of Pure Negligence', Chapter 1 in this volume. Section 1.4.

that any explanation of the culpability of a negligent person should be consistent with three other features of ordinary moral thought: first, sometimes obliviousness provides a full excuse; second, those who are aware of a risk of the relevant fact when they act, the reckless, are more culpable than the negligent and, third, those who took steps to ensure that they would be oblivious to the relevant fact at the time of action, the wilfully ignorant, are yet more culpable than either the negligent or the reckless. To make sense of all of this, Yaffe argues that we have a moral interest in being oblivious to certain features of the acts we are considering performing. This is true, he claims, for both intimate relationships and, for very different reasons, for complex joint activities that are stymied when their participants think too much. He argues that the problematic behavior of the negligent person, in contrast to the excused, the reckless and the wilfully ignorant, is the result of the activation of a disposition towards obliviousness that is at once a morally valuable sort and also possessed in excess. It is because the relevant disposition is morally problematic that the negligent are culpable, but it is because the disposition is morally valuable that they are less culpable than the reckless and the wilfully ignorant.

William J. FitzPatrick's 'Varieties of Negligence and their Significance for Moral Blameworthiness' (Chapter 4) continues with the question of forgetfulness but gives it a different spin. FitzPatrick begins with a general characterization of negligence and then goes on to show how the various different ways of meeting the conditions for negligence (involving different sorts of 'unawareness of risk') amount to at least four importantly different varieties of negligence: (1) partially advertent negligence, (2) negligence due to ignorance/false beliefs, (3) thoughtless or careless negligence and (4) negligence due to cognitive equipment failures. After examining each of these through illustrative examples and arguing against views that overlook this complexity, FitzPatrick explores the implications for moral blameworthiness. He argues that given the wide variety of potential negligence-making features, no simple generalizations can be made about the relationship between negligence and moral blameworthiness. Depending on the details of the case, the overall circumstances of the agents and on how the negligence-making features bear on the reasonable expectations of the agents in question, many cases of negligence do involve moral blameworthiness while many others do not.

In his chapter 'The Possibility of Pure Negligence' (Chapter 5), Gary Watson defends the existence of negligence, understood as a form of inadvertent moral wrongdoing for which the wrongdoer is presumptively and non-derivatively responsible and blameworthy. One of the main

sources of resistance to this commonsensical view is that we are only blameworthy for what we 'own' and we only own what we authorize or consent to. Watson argues that what we own goes beyond what we authorize. Negligent inadvertence, even in its pure (underived) form, belongs to its agent because it is related in a special way to our reason-responsive competences and responsibilities. We cannot restrict our responsible agency, Watson tells us, to the ambit of conduct guided by foresight, intention or concern, without dissociating ourselves from the fundamental agential capacities exercised in such conduct, capacities that are crucial to our responsibility for advertent conduct. The recognition of underived negligence also speaks against the widespread idea that the target of morally blameworthy behavior is the offensive attitudes or morally deficient concern that it reveals.

George Pavlakos' 'Agent-Relativity without Control: Grounding Negligence on Normative Relations' (Chapter 6) argues that agent-relativity, considered as the requirement for control by the agent, is not a condition of practical responsibility. Instead, he suggests that another notion of agent-relativity might be at work: one that attaches not to any conduct but to the responsibility engendered by the wrongful act. By appealing to it, Pavlakos proposes that it is possible to explain responsibility for wrongful conduct as agent-relative, even if the conduct itself is not agent-relative, in the sense of being under the control of the agent.

To substantiate his claim, he offers a relational account of agent-relativity which explicates it as the result of the agent's involvement in a *normative relation* with others. The relational explanation can better account for responsibility from negligent conduct, because it can explain the agent-relativity of responsibility without requiring proof of control over the wrongful outcome of the conduct. A further powerful feature of the relational explanation is that it helps insert responsibility into broader sequences or structures of interaction among agents, rather than focusing on individual acts only. At the end of his contribution, Pavlakos describes the normative relation which governs responsibility for negligence as an instance of the *legal relation*. The legal relation will be broadly conceived to range over any interaction between agents that gives rise to a *duty of care*.

Matt King continues with Pavlakos' focus on the agent-relativity perspective and in his chapter 'The Boundaries of Negligence' (Chapter 7) concentrates on the evaluative perspective of the actor who is engaging in a negligent act and begins with an analysis of negligence as inherently normative and ubiquitous. Thus, he argues, some deficits of attention are the manifestation of an evaluative failure in which the actor does not

care sufficiently about the relevant considerations and, consequently, the negligent action reflects poor evaluation. In King's view, care tracks the reasons that apply correctly to the case in question, for example, sufficient care means understanding and acting according to the reasons that point towards the right action in the right circumstances, and this entails an evaluative judgement and an engagement with what we value. But how is sufficient care always possible, asks King, considering that distraction is not under our control? His response concentrates on 'inattention' which, according to him, is guided by our mental activities. Thus, for example, when we drive home safely, we have successfully paid attention to the relevant considerations in question and have managed to avoid distractions. Consequently, we know that we are able to both devote our full resources to the action in question and direct our mental activities, which would include deliberation and the evaluation of ends.

Veronica Rodriguez-Blanco's 'The Backward-Looking Puzzle of Responsibility in Negligence: Some Preliminary Thoughts for Understanding Inadvertent Actions' (Chapter 8) discusses the puzzle that arises in responsibility for negligence when we consider the inadvertent action from the first-person perspective. She presupposes a conception of action in which the agent who engages in the inadvertent action has authority over the description of her action. If this conception of action is the correct one, then paradoxically, attributions of responsibility acquire sense for both us and the performer of the action only in terms of the third-person perspective and their respective description. If we focus on the first-person perspective, the performer of a negligent act cannot 'see' that what she is doing involves a tragic inadvertence. She *sees* her action as faultless and cannot apprehend or see reasons to engage in a different deliberation or evaluation. However, Rodriguez-Blanco scrutinizes the way actors are able to grasp their tragic action to shed light on responsibility for negligence. Using Wittgenstein's idea of 'seeing as', Rodriguez-Blanco aims to show that the actor 'sees the action as' negligent in a similar way that 'seeing as' operates when we 'see' the gestalt figure of the rabbit and completely obliterate the 'seeing' of the duck (or vice versa). After further attention on the image, we can see the lines on the paper as both duck and rabbit. She explains why this is so puzzling for the viewer of the image. Similarly, she tells us, the actor of an inadvertent act can only *see* one aspect of her action, and it is only in the aftermath of the action that she can *see* the alternative description of her action, which is attributed to her from the third-person perspective. This preliminary methodological reflection opens up a new path for understanding how inadvertent actions operate when we are engaged in such actions, which include deliberation and evaluation.

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Emmanuel Voyiakis' 'Responsibility and Agency' (Chapter 9) reflects on the accounts that ground our responsibilities to others. He advances the view that these accounts are both over- and under-prescriptive about what people owe to each other. In particular, he claims that the fact that an agent is unable to respond to reasons will not always be a good objection to principles that impose substantive burdens on that agent. Sometimes others have done enough for an agent by giving them the opportunity to avoid a certain burden, even if the agent lacks the capacity or ability to make use of that opportunity. Equally, the fact that the agent's rational powers malfunctioned will not always entitle others to hold that agent responsible for the results of that malfunction. More generally, the key question, he tells us, is not whether the agent could respond to reasons or had the use of certain powers of rational agency, but how far their inability or failure to do so is morally 'opposable' to others (or how far others may invoke the agent's special powers and abilities as a ground for requiring things of them). The upshot of that claim is that we can account for the significance of the agent's relation to the world in the allocation of practical burdens in the same way we account for the fact that an agent has or lacks other options or capacities (e.g., greater or lesser capabilities, more or fewer favorable alternatives, sufficient or poor knowledge of risks and likely payoffs). Rather than set a threshold for the appropriateness of those moral claims, agency claims are themselves at stake in the moral debate, and their significance depends on what else lies on the table.

Constantine Sandis' 'What Is It to Do Nothing?' (Chapter 10) takes a Hegelian perspective on action. According to Sandis, we should reject any moral theory that rests on the metaphysical assumption that actions – or even their characterizations – can be neatly divided into positive acts of doing and so-called negative acts of omitting, refraining, neglecting and so on. His chapter is an attempt to cut loose from the tenacious grip of such a picture and journey towards the elusive Bhagavadian and Hegelian view that all action contains inaction, and vice versa. The account targets views that assign blameworthiness for an action tout court, and instead asks whether we are responsible for any given act qua one or more of its aspects (qua intention, qua purpose, qua knowledge, qua objectivity, and so on). Thus, for example, if a surgeon knowingly but unintentionally causes her patient some pain, she is responsible for doing so qua knowledge and (of) objectivity, but not qua (those of) intention or purpose. As the model gets more complicated by introducing active and passive descriptions of our doings, we may wish to supplement the Hegelian panoply by adding a right of *negligence* that I am accountable towards, even in cases in which

I get lucky and you happen not to be offended. Pending further elaboration, once developed fully, the repercussions of Sandis' model for the doctrine of doing and allowing and related puzzles concerning moral responsibility will be radical.

Elinor Mason's 'Recklessness, Rape, and Sexist Ideology' (Chapter 11) advances the view that the correct account of negligence can be an appropriate ground for *mens rea* in rape cases and focuses on cases where someone continues with sex in the mistaken belief that the other person consents. Such a mistaken belief is often unreasonable: a wilfully blind agent, one who deliberately ignores evidence that there is no consent, is clearly not exculpated by his ignorance. However, there may be circumstances in which a man's mistaken belief that there is consent is reasonable in the circumstances, and then he is not culpable. Thus, she tells us, it is important to be clear about what we mean by a 'reasonable' mistake.

Many critics (e.g., Duff, Baron and others) have argued that it is not possible to make a reasonable mistake about consent, and that any such mistake must involve culpable carelessness. Consent is so important that we should always double check. Not to do so is reckless, and in that case, there is clear culpability. Mason puts forward the argument that it *is* possible to make a reasonable mistake, at least in one sense. Someone in the grip of sexist ideology might not understand how important consent is, and make the mistake not through carelessness, but through sexist ideology that they have non-culpably and non-voluntarily absorbed. In that case, it is not obvious that the man is culpable.

Mason argues that there is good reason to hold that even those who have 'reasonable' beliefs are culpable. Having a reasonable belief in consent may be, but is not always, exculpatory. We usually think a reasonable mistake does not count as negligence because a reasonable mistake is not failing to know something that you should have known. She argues that we should understand negligence – not knowing something you should have known – in a moralized sense, so that people who are ignorant through being ideologically blinded can be held to have the *mens rea* requisite for rape conviction.

The volume finishes with Ben C. Zipursky's 'From Law to Moral Philosophy in Theorizing about Negligence' (Chapter 12), who draws on his own work concerning the philosophical analysis of negligence law as well as P. F. Strawson's work on responsibility and reactive attitudes to advance a possible resolution of the problem of responsibility in negligence. He depicts two concepts of blameworthiness – one that pertains to a detached appraisal of the agent who putatively deserves blame