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Reluctant Pluralist

Moore on Negligence

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I. Introduction

Is negligence blameworthy? Does it deserve moral sanction? Is it a proper basis of tort liability? Of criminal punishment? If the answer is, "Only sometimes," further questions remain: When? And why only then?

These perennial questions in moral, tort, and criminal law theory continue to provoke debate. In Michael Moore's earlier writings, he addressed these issues thoughtfully but not thoroughly. However, a recent article that he co-authored with Heidi Hurd provides a systematic analysis of different conceptions of negligence and of different accounts of its moral and legal significance.[1]

The results of this new analysis are surprising. Reluctantly, Moore has become a pluralist, acknowledging a range of types of negligence that are sometimes morally blameworthy and sometimes appropriately sanctioned by the law—even by the criminal law. Moreover, he has also become (to use the technical term) squishy. Despite his usual fondness for sharply defined categories and exhaustive subcategories, he has come to acknowledge that the distinctions between negligence and recklessness, and between negligence and faultless conduct, are often a matter of degree. Moore's willingness to question and modify his earlier views is laudable, and not just because his current views are much closer to my own.

This chapter first discusses Moore's earlier forays into the topic, and then reviews his recent co-authored article. It concludes with some ruminations about different dimensions of negligence, and about the distinction between negligence and recklessness, that deserve fuller attention than scholars have provided to date.

II. Earlier Writings

This section sets forth some key arguments that Moore presents in his earlier writings about negligence, arguments that analyze negligence both as a form of wrongdoing and as a category of culpability, and that are especially skeptical of negligence in the latter guise. I also offer some criticisms of and questions about those arguments.

* Much of section III of this chapter is derived from Kenneth W. Simons, "When is Negligent Inadvertence Culpable? Introduction to Symposium, Negligence in Criminal Law and Morality," 5 *Criminal Law & Philosophy* 97 (2011), DOI:10.1007/s11572-011-9116-y.

[1] Moore and Hurd, 2011d. This article is an expanded version of a book chapter, Moore and Hurd, 2011e.

In his 1984 book, *Law and Psychiatry*,[2] Moore makes some rather broad generalizations about negligence that are in need of refinement. Thus, he observes that negligence is much more central to tort than to criminal law, because intention is central in the latter.[3] This is an overstatement, in light of the widespread use of recklessness, negligence, and even strict liability as elements of modern crimes. He also refers approvingly to what he calls the "classical" definition of negligence as behavior that is suboptimal from the perspective of cost–benefit analysis, under the test made famous by Judge Learned Hand in *United States v. Carroll Towing Co*.[4] "Negligence, in short, is the failure to make, or to make badly, a cost/benefit calculation about the desirability of an action."[5] This definition, alas, is also somewhat misleading. In actual jury instructions and tort law opinions, the Hand formula is rarely invoked. To be sure, some appellate court decisions do discuss that formula. However, it is not clear from those discussions what the formula is meant to express—a wholly utilitarian metric, or instead a pluralistic balancing test that is consistent with deontological principles.[6]

Moore further contends that negligence is intended as a culpability requirement, and not merely a criterion of justifiable or permissible conduct. Indeed, Moore explains, the surprisingly anthropomorphic reasonable person test "makes explicit the connection of negligence to culpability only implicit in Hand's kind of formula."[7] The Hand formula tells us what acts are permissible and impermissible; the reasonable person test gives us a standard for judging whether the actor has culpably failed to satisfy the standard.

Or so Moore claims. Yet when he attempts to clarify the relationship between wrongdoing and culpability in the context of negligence, Moore muddies the waters:

> [T]he average reasonable person . . . embodies those qualities of character that we think persons should possess, and those capacities of mind we think all persons do possess. The average reasonable person is benevolently motivated—he counts all persons' interests as equal to his own; he is thus neither unduly selfish nor unrealistically altruistic. . . . He is also capable of calculating what actions are likely to lead to what results and even to assign relative probabilities to each. He is, in other words, a preeminent practical reasoner, finding the morally and legally correct major premises (in terms of costs and benefits) for his practical syllogisms, and forming the accurate means/end beliefs (in terms of probabilities) for his minor premises.

"[The] failure to make the right cost/benefit calculation," he further explains, makes people culpable only if they have the capacity to reason in this way.[8]

Here we confront one of the most challenging difficulties in making sense of negligence. Is it a kind of wrongdoing, consisting in posing unjustifiable risks to others and thereby harming them? Or is it a category of culpability, describing actors who display a modest rather than serious degree of fault in violating a primary prohibition? Or, as Moore here suggests, is it a bit of both? Moore seems to assume that wrongdoing

[2] Moore, 1984d. [3] Moore, 1984d, 81–3. [4] Moore, 1984d, 81. [5] Moore, 1984d, 82.

[6] See Kenneth W. Simons, "Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy," 41 *Loyola of Los Angeles Law Review* 1171 (2008); Kenneth W. Simons, "The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness As Well as Efficiency Values," 54 *Vanderbilt Law Review* 901 (2001); Richard Wright, "Hand, Posner, and the Myth of the 'Hand Formula,'" 4 *Theoretical Inquiries in Law* 145 (2003).

[7] Moore, 1984d, 83. [8] Moore, 1984d, 83.

depends on one (unspecified) type of cost–benefit analysis, while culpability depends on capacities for benevolence, prediction, and calculation of probabilities. But this bifurcated approach is problematic, for it is difficult to see how wrongdoing of the negligence variety can be identified without calculating probabilities and making predictions (at least on the Hand formula account of negligence as wrongdoing), and without providing a normative framework for judging the significance of various costs and benefits. The relevant framework, Moore says, is "benevolence." But the concept of benevolence is itself equivocal. Does it refer to a utilitarian consideration of all the consequences that one's conduct is expected to produce for the interests of all affected persons? Or does it refer to a character trait disposing an actor to care about others as much as she cares about herself?

In a more recent and more extended discussion of negligence in his book on causation, Moore gives similarly ambiguous guidance on the characterization difficulty. He explains tort negligence, again, in terms of a "calculus of risk," and explores in some detail the Learned Hand formula, suggesting a number of plausible ways in which the formula should be extended:

> Hand's calculus of risk . . . requires one to weigh the total harms risked versus the total benefits risked if a given precaution is not taken, considered for each level of each kind of precautionary action possible, for all levels and kinds of activities in which the defendant might be engaged. An action is negligent, on this holistic view, "if its disadvantages exceed its advantages."[9]

In defending this extended Hand formula, Moore appears to be analyzing negligence as wrongdoing. He notes that the "reasonable person" test is frequently used in tort law, but suggests that this test might not actually vary the content of the Hand formula. Rather, the "reasonable person" standard is a potentially useful heuristic for fact-finders trying to apply the Hand formula, and it also specifies the epistemic vantage point from which the actor's compliance with the Hand formula should be measured.[10]

This discussion, while illuminating, again provokes questions about how negligence is best characterized. The *ex ante* epistemic perspective seems to be a necessary part of defining what risks are wrongful to take; its relevance is not limited to assessing the degree of the actor's culpability. As Moore notes, risks are always 1 or 0 *ex post*. Moreover, one factor that Moore (properly) would include as part of the "expanded" Hand formula is information/calculation costs. These (secondary) costs of continuing to calculate the (primary) costs and benefits that must be considered under the Hand formula sometimes outweigh the benefits of securing greater optimization at the primary level. Moore's point is quite correct, but it reveals a problem: in identifying what an actor should do or permissibly may do, according to the Hand formula criterion of wrongdoing, we also need to examine what efforts an actor should make to determine the facts relevant to whether he or she is negligent.

[9] Moore, 2009d, 185 (citing Restatement (Third) of Torts, § 4, comment k).

[10] At the same time, Moore does concede that the reasonable person formulation might actually support "true divergence" from the Hand formula: it might permit a deontological deviation from the consequentialist calculus, permitting actors to engage in some activities that are not permitted under the calculus and obligating actors to refrain from some activities that are cost-justified under that calculus. Moore, 2009d, 180. This is a welcome concession.

To be sure, the characterization difficulty is less pronounced (or is it simply less transparent?) when negligence pertains only to one of several elements of a moral or legal norm. If the primary norm is "Do not unjustifiably harm V," and if D is accused of negligently harming V, the characterization difficulty is grave. But if the primary norm is "Do not have sexual contact with V unless V consents," then it is natural to characterize as a mere question of culpability the question whether the actor was "negligent" as to the element of V's non-consent. In parallel fashion, it is natural to characterize an actor who is reckless as to non-consent as somewhat more culpable, and a knowing actor as even more culpable.

And yet, even in this context, negligence might be characterized as a criterion of wrongdoing, not as a degree of culpability. Here is how. Suppose A and V consensually kiss on a first date. Then A touches V's genitals. V expresses objection, A withdraws his/her hand, and they resume kissing. Assume that V did not consent to the more intimate touching. Has A acted impermissibly but non-culpably? Or has A acted permissibly?[11]

According to one view, the non-consensual touching of any part of V's body is what is impermissible. According to another, what is impermissible is acting in a way that poses an unjustifiably high risk of a non-consensual touching in light of the other values at stake, where "unjustifiably" takes into account both the significance of those other values (such as spontaneity in romantic encounters and the benefit of mutually desired sexual intimacy), and the risks that those values will not be realized. On the second view, we might conclude that A has not acted impermissibly. After all, one reason for characterizing conduct as permissible (rather than impermissible but non-culpable) is to provide action guidance. And we might conclude that actors seeking physical intimacy should feel free to take very small risks that their conduct of mildly escalating the level of intimacy will be mildly objectionable to the other actor.[12]

This characterization problem has implications for other issues in moral and legal theory, especially for the question of how to analyze reasonable and unreasonable mistakes (about the elements of an offense, or about defenses). Such mistakes are plausibly viewed as just a subset of reasonable and unreasonable conduct (at least when the mistake plays, or should play, a role in the actor's practical reasoning). So the question becomes: if A makes a reasonable mistake in believing that V consents, has he non-culpably committed a wrong, or has he not committed a wrong in the first instance? In one important sense, I believe, he has not committed a wrong at all, for it is often

[11] A third possibility is that A has acted both impermissibly and culpably. However, the example is meant to instantiate a "reasonable" escalation of intimacy in light of the current level of intimacy; the reader can supply an even smaller escalation if this example is not persuasive. (The example is of sexual contact, not sexual intercourse, because greater controversy attends the question whether and when it is culpable for an actor to unilaterally escalate intimacy from sexual touching to sexual intercourse.)

[12] Stephen Schulhofer, in arguing for an "only YES means YES" definition of consent in the context of sexual intercourse, has emphasized the comparative error costs to the initiating party and the other party. If affirmative consent by words or conduct is required, this does impose costs on the initiating party (including the need to ask for more explicit consent, or to wait or forego intercourse), but those costs are outweighed, Schulhofer believes, by the costs to the other person of submitting to sexual intercourse that the person finds objectionable. Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, MA: Harvard University Press, 1998). I agree that comparative error costs are relevant to the analysis of permissible risks in sexual encounters, but I also believe that in some cases, such as the example in the text, the *ex ante* quantitative and qualitative "costs" or burdens of not proceeding outweigh the burdens of proceeding.

socially desirable for actors to proceed upon reasonable appearances—for police to arrest upon probable cause, for actors to use defensive force when this reasonably appears necessary, and so forth.[13]

Moore's other forays into the negligence jungle are mainly explorations of negligence as culpability, not as wrongdoing. In the 1990 essay, "Choice, Character, and Excuse,"[14] slightly revised for publication as Chapter 13 in the book *Placing Blame*,[15] Moore considers whether a choice or character conception of culpability is able to explain moral responsibility for negligence, and thus to justify criminal liability for negligence. His answer is no. The choice conception does not suffice, because although a negligent actor makes choices, they are not of the right kind: the actor "does not choose to do the kind of complex action forbidden by morality and law (such as killing the man standing behind the target) because his mind was not adverting to that aspect of his action."[16] Moore is basically correct here, though we must be careful not to overstate the extent to which even an advertent actor "chooses" to impose the risk to which he adverts (as I note in this chapter's Conclusion).

Moore believes that the character theorist is also unable to accommodate the culpability of negligence. First, an act of negligence can be isolated, and need not spring from a general tendency to be inadvertent. Second, even a general tendency towards inadvertence and mistakes need not flow from a bad character, such as an indifference to the interests protected by the criminal law. "Such carelessness can be due to awkwardness and stupidity as easily as indifference. And, again, we blame for carelessness irrespective of *why* one is careless."[17] This analysis is largely persuasive, though I also believe that some forms of indifference are a suitable basis for moral blame and criminal liability, as I explore in the Conclusion.

In his original article, Moore concluded from this analysis that negligence might not merit moral blame, and that legal liability for negligence can only be justified on utilitarian grounds. However, by the time of the publication of his 1997 book, *Placing Blame*, he had changed his view, now believing that "morally . . . it seems wrong to say that we are not at least somewhat blameworthy for negligent conduct."[18] The third form of culpability that negligence reflects is, according to Moore, H. L. A. Hart's notion of the culpability of unexercised capacity. Still, Moore believes there is a basic difference between that very modest form of culpability and the more robust form that occurs when an actor knows he is doing a wrongful sort of action and nevertheless chooses to do it.

One important response to Moore's argument here is that only a *subset* of negligence cases are sufficiently morally blameworthy to be fit subjects of criminal punishment—namely, those that reflect, not mere carelessness, but culpable indifference.[19] Suppose

[13] For further discussion of this argument, see Kenneth W. Simons, "Self-Defense: Reasonable Beliefs or Reasonable Self-Control?," 11 *New Criminal. Law Review* 51 (2008); R. A. Duff, "Rethinking Justifications," 39 *Tulsa Law Review* 829 (2004); but see Heidi Hurd, "Justification and Excuse, Wrongdoing and Culpability," 74 *Notre Dame Law Review* 1551 (1999), for a contrary view.

[14] 7 *Social Philosophy. & Policy* 29 (1990). [15] Moore, 1997b. [16] Moore, 1997b, 589.

[17] Moore, 1997b, 590–1. [18] Moore, 1997b, 591.

[19] For further discussion of this concept, and the promise and perils of employing it as a legal standard, see Kenneth W. Simons, "Does Punishment for 'Culpable Indifference' Simply Punish for 'Bad Character'? Examining the Requisite Connection between Mens Rea and Actus Reus," 6 *Buffalo Criminal Law Review* 219 (2002).

Sam pays no attention whatsoever to whether Victoria consents to his sexual advances, because he is entirely focused on his own pleasure. This reason for unawareness is, under the circumstances, highly culpable, even if it does not flow from a general character flaw, and even though Sam does not choose to proceed with intercourse by consciously disregarding a risk that Victoria does not consent. Now consider the following passage from Moore, in which he is responding to Hart's effort to characterize the choice theory itself as an instance of a capacity theory:

> What makes the intentional or reckless wrongdoer so culpable is not unexercised capacity—although that is necessary—but the way such capacity to avoid evil goes unexercised; *such wrongdoers are not even trying to get it right*. Their capacity goes unexercised because that is what they choose.[20]

This argument proves too little, however. It is indeed persuasive as applied to Sam, an actor who is "not even trying to get it right." By contrast, one plausible *negative* criterion of culpable indifference is good faith: an actor is not culpably indifferent if she *is* "trying to get it right"—if she tries to conform to moral and legal norms and her failure to conform is due only to lack of skill or judgment.[21] Moore is right to emphasize that culpability depends on the *way* in which an actor fails to exercise his capacity to avoid harm, and not merely on the fact that he has failed to exercise his capacity. But a culpably indifferent actor can be distinguished from a simply negligent actor in this respect, because the fault of the former requires more than his mere failure to exercise a capacity.[22]

III. Moore's Current Views on the Culpability of Negligence

Moore's most recent and most detailed analysis of the culpability of negligence is contained in an article he co-authored with Heidi Hurd, "Blaming the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence." The article is a tour de force, addressing and clarifying an enormous range of conceptual, moral, and legal issues that are relevant to the judgment of whether negligence is an apt basis for moral blame or for legal sanction.

[20] Moore, 1997b, 590 (emphasis added).

[21] See Simons, "Punishment for 'Culpable Indifference.'"

[22] In Chapter 9 of *Placing Blame*, "Prima Facie Moral Culpability," originally published in Moore, 1995b, Moore returns to the topic of negligence, and reiterates his view that its culpability cannot be compared to the culpability of intentional or reckless conduct:

> Culpably inadvertent risk-taking . . . involves a kind of epistemic failure. One who *acts* unreasonably is one who *believes* unreasonably in the sense that an inference about unjustified risk-taking is not drawn when it should be. . . . Culpability as negligence blames us despite our acting rightly in the world as we see it. Although we can be somewhat culpable in not seeing the world more clearly, such culpability pales before that of wrongdoers who choose to do their wrongs in a world they see clearly.
>
> Moore, 1997b, 412.

And he suggests that choice is the appropriate minimal culpability for a criminal law that seeks to achieve retributive justice, while unexercised capacity is an appropriate culpability for a tort law that seeks to achieve corrective justice; this explains why negligence is central in tort law but not criminal law.

As a crude generalization, this is a plausible analysis, though (as Moore recognizes) tort law contains significant elements of strict liability, too. For example, tort law's "reasonable person" test pays very little attention to individual cognitive capacities.

Moore and Hurd begin their wide-ranging article by clarifying that they understand the concept of negligence as some form of unreasonable risk-taking. They prescind from questions about what makes the risk-taking unreasonable. But, they add, they do not presuppose that the balance of risks and benefits that the negligence inquiry often requires is necessarily a utilitarian calculus, and they are open to a non-consequentialist account. This is a very welcome evolution in Moore's views.

The authors plausibly view *criminal* negligence as requiring a "gross" degree of negligence, unlike tort negligence, which simply requires a departure from the standard of reasonable care. They then distinguish recklessness from criminal negligence in two respects. First, a reckless actor must be advertent, while a negligent actor need not be. The authors also emphasize, correctly, that while advertence is necessary for recklessness, it is not sufficient: some instances of advertent negligence do not and should not count as reckless. In my view (but apparently not theirs[23]), recklessness requires not just awareness of a risk of harm, no matter how miniscule, but awareness of a substantial or at least non-trivial risk of harm.[24] This threshold is, I believe, what the Model Penal Code means to require, and also is a normatively appropriate criterion of recklessness, insofar as recklessness warrants more punishment than negligence (or warrants punishment when negligence would be insufficient). If you decide to drive very safely to the store rather than walk two blocks, you are imposing a miniscule additional risk of harm, but even if you offer no justification for your choice, you should not be considered reckless.[25]

Second, the authors assert that a reckless actor must be "grossly, grossly" negligent, and not, as in the case of the criminally negligent actor, merely grossly negligent. I disagree with this assertion as a descriptive matter; the law does not actually draw the distinction in this manner.[26] Moreover, it is highly doubtful that such a "gross, gross" deviation requirement for reckless liability would be a sensible legal standard. As applied, such a requirement would often make proof of recklessness unduly difficult. If an actor subjectively believes there is only a small risk that the victim of his sexual advances is not consenting, but fails to communicate with the victim to be sure that she consents, a jury might plausibly find gross but not "gross, gross" negligence, yet the conduct seems egregious enough to justify punishing for recklessness rather than negligence.

Furthermore, such a requirement would place extraordinary demands on the judge and, especially, the jury. It is challenging enough to explain the difference between

[23] The authors at one point assert that an actor who believes the risk is small is not reckless because he does not grossly, grossly depart from reasonable care. At another point, however, they say that awareness of the substantiality of risk is not a requirement of recklessness.

[24] See Kenneth W. Simons, "Should the Model Penal Code's Mens Rea Provisions Be Amended?," 1 *Ohio State Journal of Criminal Law* 179 (2003).

[25] How that threshold ("substantial" or "non-trivial") should be defined is, to be sure, a difficult question.

[26] See Simons, "When is Negligent Inadvertence Culpable," 111. To be sure, the Model Penal Code treats reckless actors as categorically more culpable than negligent actors. But that is because they, unlike negligent actors, knowingly endanger others, not because their acts of endangerment are necessarily a greater deviation from reasonable care. Compare Delbert, who speeds through an intersection, knowingly creating a 1 in 1,000 risk of injuring a pedestrian; with Elbert, a beginning driver who unknowingly creates a 1 in 3 risk of injuring another driver on the highway because he does not check his mirrors before changing lanes. Given the level and type of risk that Delbert creates, he departs less from a standard of reasonable care than Elbert. But the Code will treat Delbert as reckless and Elbert as negligent.

ordinary civil negligence and "gross" criminal negligence. Explaining the difference between "gross" and "gross, gross" negligence would be even more daunting. The authors, unfortunately, offer little guidance on this score. They refer several times to Judge Magruder's distinction between being a "fool" (ordinary negligence) and a "damned fool" (gross negligence), and they suggest that recklessness requires that one be a "damned damned fool" or (in Magruder's phrase) a "God-damned fool." Lord help us if this language finds its way into a jury instruction.[27]

Even if some negligence is advertent, the question remains: can criminal punishment for inadvertent negligence be justified? The authors pay special attention to the details of H. L. A. Hart's affirmative answer. Hart claimed that we are culpable, not just for our choices, but for our unexercised individual capacities. The authors pose several challenging and central questions about this account. What does it mean to have the capacity to advert to a risk? Do people actually have that capacity? And, finally, if they do have such a capacity but fail to exercise it, are they morally culpable in such a way and degree as to deserve criminal punishment?

In their thorough responses to these questions, the authors clarify a range of critical conceptual and normative issues. Thus, they helpfully identify the many features of "advertence" that require clarification, including the requisite object of the belief, the requisite accuracy and specificity of the actor's typing of the risk, the requisite vividness of the phenomenological experience (if any is indeed required), and the relevance of cognitive dissonance, wishful thinking, and self-deception. They observe, plausibly, that many of these issues are questions of degree. They conclude, less persuasively, that we can therefore throw many of these scalar questions into the hopper with other aspects of the recklessness criterion: thus, they claim, an especially unjustifiable risk might counterbalance an especially dim awareness so that we can still legitimately consider the actor to be reckless. This is not a recipe for a determinate rule to guide actors or legal decision-makers. And such a sliding-scale approach demands a deeper justification. If recklessness is more culpable because it demonstrates a deliberate and impermissible trade-off—a definite choice to act in the face of a risk—then it seems that some minimal threshold of awareness should be established, a threshold that "dim" would fall short of. Moreover, the view that recklessness is just one point on a sliding scale that balances numerous culpability factors is problematic. Such a conception of culpability is quite foreign to criminal law grading distinctions and seems inconsistent with widespread intuitions.[28]

Turning to the question of the meaning of "capacity," the authors point out that in the present context, the contra-causal sense of capacity—whether the actor "could" have done otherwise than he did in light of sufficient antecedent causes of his behavior—is

[27] Moreover, the enormous trouble that courts have encountered making sense of "depraved heart" or "extreme indifference" murder is a worrisome precedent. Indeed, if recklessness requires a "gross, gross" departure from reasonable care, then presumably the more culpable state of mind of "extreme indifference" would require an even more extreme departure. Should judges instruct the jury, in extreme indifference murder cases, that they must find that the actor's conduct was a "gross, gross, gross" departure from proper behavior?

[28] But see Larry Alexander and Kim Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009). For criticism, see Kenneth W. Simons, "Book Review: Retributivism Refined—Or Run Amok?," 77 *University of Chicago Law Review* 551 (2010).

not the relevant notion. And they correctly note that capacity statements are at least implicitly conditional, translatable into "would (or could) have A'ed if C." The capacity question for negligent inadvertence, they claim, is whether the actor could have adverted to a risk "if condition X," where X is a plausible desert basis, just as the capacity question for intentional and reckless wrongs is whether the actor could have acted differently if he had chosen differently.[29]

So far, so good. But then the authors flatly assert: "[T]here can be no culpability of unexercised capacity." If negligent inadvertence is culpable, they argue, it is because of the underlying source, X, of the incapacity, which directly grounds the culpability of negligence. The "capacity to advert if X" judgment is "a mere implication of the independent moral significance of X . . . et al. Until X is specified, judgments of unexercised capacity lack sense; once it is specified, judgments of unexercised capacity have no justificatory work left to do."[30]

The authors seem to be claiming that the capacity judgment is irrelevant to culpability. That claim is unconvincing. They are, of course, correct that the mere failure to exercise a capacity to advert is not always culpable. Culpability requires something more, such as (in my words, not theirs) an "unreasonable" failure, or a failure to act with the concern fairly to be expected of a member of the community.[31] But the "something more" does not by itself justify blame or punishment for inadvertent negligence. Rather, only the combination of that extra something and the *capacity* to have adverted (and to have acted differently) can justify negligence liability.[32] A failure to advert can only matter, morally or legally, if the actor ought to have adverted. And "ought" (the last time I checked) implies "can"—here, a capacity to have adverted and then to have acted differently. To be sure, we must examine the deeper explanations for that failure to advert if we wish to offer a full account of negligence liability. But capacity to advert is a crucial component of the analysis.

Addressing the possible culpable sources of inadvertence, the authors helpfully identify four categories, each of which is a distinct type of practical reasoning defect. These are flaws in motor control (e.g., clumsiness), in cognition (e.g., stupidity or short attention span), in conation (e.g., weakness of will), and in motivation (e.g., character flaws such as selfishness or indifference). Of these, the most clearly blameworthy are the motivational flaws, so the authors concentrate on these.

The authors raise a number of objections to premising criminal punishment for inadvertent negligence on underlying vices such as jealousy, selfishness, or arrogance. One is our inability to rank these vices in any reliable way. Sometimes, they claim,

[29] The authors aptly criticize Alexander and Ferzan for conflating these inquiries. Alexander and Ferzan seem to claim that we can advert to a risk only if we can choose to advert to the risk, yet actors only rarely choose to advert to a risk. Moore and Hurd are right to respond that this begs the question of when advertence is culpable, because the capacity to advert to risk might be subject to specifiable and defensible conditions other than choice.

[30] Moore and Hurd, 2011d, 164.

[31] The authors appear to criticize Hart for asserting that culpability depends merely on unexercised capacity, but this criticism is unfounded; Hart does recognize that the ultimate criterion of negligence considers whether the failure to exercise that capacity is unreasonable.

[32] Recall Hart's point that certain gross incapacities—of children or the insane—negate responsibility, even for negligence. H. L. A. Hart, *Punishment and Responsibility*, 2nd edn. (Oxford: Oxford University Press, 2008).

inadvertence caused by jealousy is worse than inadvertence caused by selfishness, but sometimes the contrary is true.

This objection is overstated.[33] First, they give no concrete examples in which the relative "viciousness" of two vices such as jealousy and selfishness differs. Perhaps, in any real-world example in which our relative evaluation of two vices seems to change, other factors actually change and explain the apparently inconsistent evaluation.[34] Second, given the limited occasions on which criminal law does, or at least should, impose liability for negligent inadvertence, fine gradations between different vices need not be made. Rather, we only need to be confident that the legal decision-maker is imposing criminal liability on actors who have exceeded some appropriate threshold level of culpability (whether due to jealousy or selfishness or indifference or some other culpable trait) in light of other relevant features of his conduct (such as the degree of risk that he is imposing and the extent of his awareness of the surrounding circumstances). Third, the authors' objection, if valid, would similarly doom our ability to employ recklessness as a culpability criterion. Recklessness requires, in addition to advertence, a gross deviation from a standard of reasonable or law-abiding conduct, in light of the "unjustifiability" and "substantiality" of the risk. Yet the authors raise no similar objection to recklessness liability.

Consider, by comparison, how negligence operates within the Model Penal Code's homicide structure. Negligent homicide is the least culpable category of homicide, reckless manslaughter is the intermediate category, and murder (which requires purpose, knowledge, or extreme indifference) is the most culpable category. Placing all negligent homicide cases in the same grading category does not produce serious problems of inconsistency. The overall standard might be as specified in the Model Penal Code (requiring gross deviation from a reasonable standard of care in light of the unjustifiable and substantial risks), or it might also include more explicit language identifying the relevance of culpable reasons for inadvertence, such as "inadvertent because of a seriously culpable desire or emotion."[35] Though imprecise, these standards are no more vague than "unjustifiable" in definitions of negligence and recklessness.

The authors express another worry: an analysis of negligence based on character or motivational flaws cannot explain why wrongful *action* is required. "The theorist who takes inadvertence to be blameworthy when and because it manifests poor character

[33] The authors also worry about character theories insofar as one person's vice might be another's virtue. Although this is a valid concern in some contexts in which the state is enforcing a particular view of virtue and vice, here it has little purchase, because reasonable and significant disagreements only rarely occur with respect to whether specific vices are relevant to conduct that creates serious risks of harm to others. "I was so hungry that I took my eyes off the road for a few seconds to grab more fries"; most will agree that this is blameworthy, even if, as a general matter, we might be uncertain whether or to what extent gluttony is a vice or is blameworthy.

[34] For example, suppose A loses control of his car and injures passenger B because B had just informed A that B is sleeping with someone A desperately wishes to date, while C loses control of his car and injures D because C is selfishly preoccupied with combing his hair over his bald spot. A seems less culpable for losing control than C, but not because jealousy is always a less culpable reason for posing a risk than selfishness; rather, it is because reacting jealously and emotionally when suddenly confronted with evidence that triggers that reaction is less culpable than choosing to groom oneself while driving.

I do agree with the authors that, in principle, it is possible that a moral factor that has a particular valence in one situation has a different or even opposite valence in another. See Jonathan Dancy, *Ethics Without Principles* (Oxford: Clarendon Press, 2004).

[35] Simons, "Punishment for 'Culpable Indifference.'"

has to have an argument for why poor character is not itself sufficient for punishment if it is confidently known." This worry is misplaced. Yes, a supporter of negligence liability does need an argument for an act requirement, but so does a supporter of liability for reckless and intentional wrongs. Why not impose liability simply for harboring a reckless or intentional state of mind, even if it does not result in wrongful action? Respect for autonomy, concern about excessive state power, and other values explain why it is not justifiable to punish someone who has decided to kill but has taken no steps yet to effectuate that desire. Suppose Michael gets out of bed, planning to go for a drive, and he forgets that his car's brakes are not in working order. If he has not left his bedroom when apprehended by the ever-vigilant police, he, too, should be shielded from criminal liability.[36]

The authors then raise a more fundamental concern: why, in a character theory, is inadvertence required? "If inadvertence is blameworthy when and because it is the product of unfortunate character, it would seem that inadvertence is morally irrelevant."[37] Again, however, this ignores the relevant context. Self-absorption, for example, is sometimes but not always a vice or a culpable trait. We should be grateful that Matisse, Prokofiev, Coltrane, and Sontag were self-absorbed. But an actor is indeed culpable if, while driving in traffic, he is selfishly preoccupied with finding the best song on his car radio for five seconds while he pays no attention to the risks he is creating. When a particular character trait foreseeably increases the risk that the actor will be unaware of serious risks of harm, one might be culpable for acting in accordance with that trait under those circumstances. The authors, by eliminating the actor's inadvertence and risk-creation from their analysis of negligence culpability, ignore much of what is morally salient in the situation.

After persuasively rejecting the "tracing" strategy,[38] the authors turn to what they call "free-standing" instances of negligence; that is, those that do not derive from the four categories of defects in practical reasoning. An example is a loving parent who forgets a young child in a car, causing the child's death by suffocation. They plausibly argue that the parent's mistake need not flow from a character flaw or a flaw in practical reasoning. Yet many would blame her for negligence.

What could account for such blame? One possibility they mention, here and in other "free-standing" negligence cases, is that the parent knowingly failed to obey a sensible and well-known action-guiding rule. Perhaps it is that rule-violation that explains our judgment of blame. The authors argue that we can indeed blame a parent for knowingly violating the rule against leaving a young child unattended in a car or in the bath, and that the culpability involved in such a rule-violation is, at least sometimes, a good enough

[36] To be sure, we should take this worry more seriously when the actor has (albeit unknowingly) taken substantial steps towards causing the relevant harm or wrong. If Michael is actually driving the car with bad brakes, should he be guilty of attempted negligent homicide? This raises distinct concerns, however. And we might address these concerns by limiting attempt liability to purposeful and knowing (and perhaps reckless) risk-creation, notwithstanding strong arguments in favor of attempt liability for actors who proceed to the very last act of risk-creation, whether the actor was purposeful, knowing, reckless, or negligent.

[37] Moore and Hurd, 2011d, 175.

[38] In an illuminating analysis, the authors address the "tracing" strategy in some detail, explicating the different senses in which inadvertence can arguably be traced to a prior culpable act, and advancing some telling objections to each.

substitute for the culpability of inadvertent negligence. Their argument for this conclusion is complex and cogent, but in two respects problematic.

First, the authors claim that the rules in question cannot be understood as deontological prohibitions, because the rules are not categorical and are sometimes subject to consequentialist overrides; thus, the rules must be interpreted as epistemic rules of thumb that give useful guidance for conforming with cost–benefit consequentialist principles. This claim is dubious in two ways. Deontological principles need not be categorical. And, even in the particular context of rules for permissible risks, the principles justifying the proper trade-off of benefits and disadvantages of precautions against risk need not be entirely consequentialist in structure and content (just as the defenses of self-defense and necessity need not be consequentialist).[39]

Second, consider their qualified endorsement of what they aptly call the substitution principle:

> One can . . . use [an actor's] deliberate rule violation as a 'substitute' for a finding that she subjectively appreciated the risks that then materialized, for the one has a 'closeness' to the other that makes such a substitution morally inoffensive. Thus the actor who knowingly violates the rule against pointing a gun at another almost knows that he is risking that other; the parent who knowingly violates the rule against leaving the child in the bathtub cannot claim inadvertence to the possibility of his death . . .[40]

The authors do not confront the far-reaching implications of employing a substitution principle to "approximate" fault in this manner. An armed robber accidentally drops a loaded gun that discharges and kills a confederate. Why doesn't the robber's knowing violation of the rule against armed robbery "substitute" for the intent to kill otherwise required for murder? Although I am sympathetic to a very narrow version of the principle,[41] it is surprising that the authors endorse it without much qualification.

In the end, however, the authors conclude that the intuition behind punishing the parent of the child who suffocates cannot be explained by this rule-violation argument, since there is no known safety rule that the parent violated. I am not so sure. Perhaps she violated a rule requiring parents of young children always to check the back seat of their automobile before locking the car. On the other hand, such a rule is not widely known and followed. And in other cases they mention, such as inadvertently leaving a pot on the stove to boil over (resulting, say, in burns to a child), this is even more clearly true, yet the actor clearly seems negligent. So the authors are indeed justified in concluding that some negligent inadvertence cases in which the actor intuitively seems culpable cannot easily be explained. (One partial solution that the authors do not fully explore is the demand for a *gross* deviation from reasonable care for criminal negligence liability. Some conduct that intuitively qualifies as negligent does not so clearly qualify as grossly negligent; leaving the pot on the stove that boils over is an example.)

Despite the relentlessly skeptical tone of most of the paper, the authors conclude by listing eight categories in which criminal liability for negligence is sometimes

[39] See Kenneth W. Simons, "Deontology, Negligence, Tort, and Crime," 76 *Boston University Law Review* 273 (1996).

[40] Moore and Hurd, 2011d, 191.

[41] See Kenneth W. Simons, "Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert?," 32 *Oxford Journal of Legal Studies* 445 (2012).

justifiable.[42] They honestly admit that the eight types are a hodge-podge: "[N]egligence is not a single continent with a unified nature. It is more like an archipelago of islands, each with its own distinct nature."[43] This is quite a concession from two decidedly orderly and systematic thinkers. I feel their pain. But I think they are quite right about the pluralistic nature of negligence liability. Indeed, one could take the point much further; other types of culpability, especially recklessness, but also knowledge and purpose, are also plausibly viewed as pluralistic.[44]

IV. Conclusion

Negligence is indeed a surprisingly complex and pluralist concept. As suggested earlier, it would be very fruitful for scholars to more fully explore two issues that it raises. First, to what extent is negligence a matter of wrongdoing, and to what extent a matter of culpability? How do these two understandings of negligence relate to one another?[45]

Second, the subcategory of negligence cases involving "culpable indifference" deserves special attention. Culpable indifference is an unusually protean concept. Some treat it essentially as a term of art for whatever forms of culpability our moral theory or legal doctrine recognizes.[46] So understood, it does not help in the task of determining when negligence is sufficient for legal liability. But others treat it as a distinctive form or type of culpability, distinguishable both from intentional wrongdoing and from acting

[42] The eight categories are as follows:

(1) The actor possessed full awareness of the risk created by his conduct, but the imbalance of detriment to benefit is not so great as to make his risk-taking reckless.
(2) The actor was less than fully aware of the risk created by his conduct: he possessed a dim awareness, an inkling, or a mere suspicion that his conduct might create peril.
(3) The actor possessed a dispositional awareness of the risk created by his conduct, but had no phenomenological awareness of that risk.
(4) The actor possessed either phenomenological or dispositional awareness of general types of risk associated with his conduct, of which the risk taken by him on the particular occasion was an instance (although he failed to see it as such).
(5) The actor's inadvertence was caused by flaws in his character against which he took no precautions.
(6) The actor's inadvertence was caused by physical or psychological defects that are not flaws of character, but against which precautions could have been, but were not, taken.
(7) The actor adverted at some earlier time to risks that were created by later behavior.
(8) The actor may have deliberately violated a known mini-maxim, the spirit of which is to protect against the risks his ensuing conduct created.

Moore and Hurd, 2011d, 192–4.

[43] Moore and Hurd, 2011d, 192.

[44] See Kenneth W. Simons, "Rethinking Mental States," 72 *Boston University Law Review* 463 (1992); Simons, "Punishment for 'Culpable Indifference.'"

[45] See Kenneth W. Simons, "Dimensions of Negligence in Criminal and Tort Law," 3 *Theoretical Inquiries in Law* 283 (2002) (distinguishing between the unreasonably risky conduct conception of negligence, which might be understood as a wrongfulness conception, and cognitive negligence, which is a culpability conception; and noting the function of negligence as a secondary legal norm parasitic on a primary legal norm).

Moore incorrectly attributes to me the view that negligence is a conduct requirement, not a mental state requirement. Moore, 1997b, 411. My actual view is that some conceptions of negligence emphasize unreasonable conduct more than unreasonable beliefs or attitudes; but that even the unreasonable conduct conception ordinarily employs the idea of epistemic risk. *See* Simons, "Rethinking Mental States"; Simons, "Dimensions."

[46] This seems to be the view espoused in Alexander and Ferzan, *Crime and Culpability*.

recklessly, that is, acting with knowledge of the risks or the other relevant features of one's conduct.[47] A more careful analysis of the concept would facilitate analysis of moral and criminal culpability generally, and negligence culpability in particular.

Let me conclude with some observations about the distinction between negligence and recklessness. As Moore and Hurd recognize in their recent article, the contrast between culpability for inadvertent negligence and culpability for recklessness is much blurrier than usually supposed. There are many reasons for this. I will mention two.

First, characterizing the reckless actor as "choosing" to impose a risk is a form of rhetorical embellishment, because the characterization is usually inaccurate. Typically, such an actor, although aware of a risk of harm, proceeds despite that risk, not because of it. A reckless driver prefers speeding to slowing down and reducing the risks of injury to others. A reckless rapist prefers his own immediate pleasure to pausing and ensuring that he has the victim's consent. On rare occasions, to be sure, such an actor affirmatively desires to endanger another, as when two actors dare each other to a drag race in a busy parking lot rather than an empty one because they value the excitement of posing a risk to others, or when two actors play Russian roulette with a loaded gun. But ordinarily, the risk to others is not the actor's objective. Granted, every reckless actor "chooses" (in a weak sense of the term) to endanger the other when he makes a choice to act despite *knowing* that there is a risk to the other. However, this is also true of the negligent actor: he "chooses" to endanger another in precisely this same (weak) sense when he makes a choice to proceed with his conduct despite not paying sufficient attention to whether he is posing a risk to the other. The point is nicely illustrated by cases in which the negligent actor chooses specifically *not* to pay attention to a risk. If, on a dare, the actor decides to drive blindfolded for 100 yards at night on an apparently deserted stretch of road, or if a sexually aggressive actor decides to close his or her eyes and pay no attention to whether the victim consents, each actor has made a choice that may be just as culpable as if he or she had been aware of a significant risk of causing harm.[48] In short, although the reckless actor is sometimes indeed more culpable than the negligent actor, this is not because the first has "chosen" to endanger the other while the second has not, in either the robust or the weak sense of choice.

Second, the conduct of a reckless actor is properly viewed as culpable (and often more culpable than the conduct of a negligent actor) even though the reckless actor almost never is aware of, much less consciously chooses, *all* of the morally and legally relevant features of his act. Thus, most commentators agree that the actor need not be aware of the illegality, or perhaps even the immorality, of his act, in order to deserve blame and punishment; nor must he believe that the risk he is running is unjustifiable. And conversely, the culpability of so-called "inadvertent" risk-creation depends in significant part on both the conscious choices that the actor made and the actual beliefs

[47] See, e.g., R. A. Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990); Simons, "Punishment for 'Culpable Indifference.'"

[48] Suppose the blindfolded actor believes there is only a one in a million risk she will cause injury, but also realizes that the blindfold reduces her ability to perceive such a risk from 95% to zero. Compare a speeding but not blindfolded actor who believes there is a one in 100,000 risk that her speeding will cause injury. It would be plausible to treat the two actors as roughly equal in culpability. And clearly both actors "choose" in a similar (weak) sense to endanger others. (Of course, in many actual scenarios with greater traffic or population density, the blindfolded actor will actually be aware of a significant risk of injury.)

that he embraced. A driver is culpable for taking his eyes of the road for several seconds only if he is knowingly driving in traffic; a babysitter is culpable for not attending to the baby only if she knows at the relevant time that she is the sole or primary caregiver; and so forth. If the actor is so detached from reality that he possesses no beliefs whatsoever about the circumstances that would put a reasonable person on notice of a risk, then he cannot be culpably negligent.

These observations do not imply that the distinction between culpable inadvertence and culpable advertence is meaningless or pointless. But they do suggest that the distinction is one of degree, not kind, and that it depends crucially on context. Accordingly, future analysis of the culpability of negligence might profitably focus more on the trees, and less on the forest.