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The Moral Neglect of Negligence

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**Author**

Shiffrin, Seana

**Publication Date**

2017

**DOI**

0.1093/oso/9780198801221.003.0009

Peer reviewed



## Oxford Studies in Political Philosophy, Volume 3

David Sobel (ed.) et al.

<https://doi.org/10.1093/oso/9780198801221.001.0001>

Published: 06 July 2017

Online ISBN: 9780191840272

Print ISBN: 9780198801221

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### CHAPTER

## 8 The Moral Neglect of Negligence

Seana Valentine Shffrin

<https://doi.org/10.1093/oso/9780198801221.003.0009> Pages 197–228

Published: 06 July 2017

### Abstract

The moral significance of negligence is regularly downplayed in the legal and philosophical literature. Two common tenets about negligence diminish its perceived importance: first, culpable negligence is substantially less significant than malice (as well as other intentionally inflicted wrongs); second, considered apart from its consequences, culpable negligence is a rather petty moral wrong. This paper argues, by contrast, that culpable negligence can be a serious moral and political wrong and non-negligence is a significant moral virtue. The paper sketches an account of moral and political negligence that stresses the significance of the agent's motives and canvasses many examples, including an extended discussion of Edward Snowden as an example of a politically negligent agent. The discussion encompasses the connection between negligence and the act/omission distinction, the doctrine of double effect, our remedial responses and reactive attitudes toward negligence, and the connection between anti-discrimination norms and negligence.

**Keywords:** [negligence](#), [culpable negligence](#), [non-negligence](#), [Edward Snowden](#), [act/omission distinction](#), [doctrine of double effect](#), [anti-discrimination norms](#), [feminism](#), [punishment](#), [remedies](#)

**Subject:** [Social and Political Philosophy](#)

**Series:** [Oxford Studies in Political Philosophy](#)

**Collection:** [Oxford Scholarship Online](#)

The moral significance of negligence is regularly downplayed in the legal and philosophical literature.<sup>1</sup> Some question whether negligence is a coherent wrong at all, while others locate it on a fairly low rung of a moral hierarchy of wrongfulness. Whatever the flaws of the culpably negligent person or the culpably negligent act, they are thought to pale in comparison with the malicious person or act.

Even those philosophers who are not skeptical about negligence have too quickly accepted the idea that negligence is a rather slight wrong. They tend to accept two tenets about negligence that diminish its importance: first, that culpable negligence is substantially less significant than malice (as well as other intentionally inflicted wrongs) and second, that even when culpable, negligence is a rather petty moral wrong.

The attitude conveyed is that, considered apart from its consequences, the wrong of negligence is real, but paltry.<sup>2</sup>

p. 198 By contrast, I regard culpable negligence as a more significant moral wrong, even when considered separately from its consequences. Concomitantly, I take non-negligence to be a significant, but often overlooked, moral virtue. Here, I defend their importance and attempt to sketch distinct moral and political conceptions of negligence as distinguished from the legal conception, one that reflects institutional and remedial concerns that may be inapplicable in the non-legal moral domain. I do not seek to upend the hierarchy and argue that, all things considered and *mutatis mutandis*, negligence is worse than malice. My aim is to explain why negligence can be a serious moral and political wrong, to contend that we go astray in diminishing its significance, and to disrupt the rigidity and severity of the standard moral hierarchy.

To get a sense of what is on my mind, consider the example of Anthony Elonis, the subject of a recent Supreme Court case.<sup>3</sup> Mr. Elonis, angry and estranged from his spouse and children, posted on Facebook a series of “self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class,” and the police.<sup>4</sup> His posts “frequently included crude, degrading and violent material about his wife.”<sup>5</sup> One lengthy discussion concerned whether it was illegal for him to say he wanted to kill his wife.<sup>6</sup> It included details and diagrams of how to fire a mortar launcher at her home and escape with impunity.<sup>7</sup> His posts, many in lyric or poetic form, bragged that he had “sinister plans for all my friends,” that he planned “to initiate the most heinous school shooting ever imagined,” and that he would detonate a suicide bomb were the FBI to arrest him.<sup>8</sup> Accompanying some posts were references to free speech and disclaimers that the lyrics were fictional and therapeutic.<sup>9</sup> These references did not diminish the heightened concern of the police and the terror of his wife, who understandably felt threatened.<sup>10</sup>

p. 199 Mr. Elonis was convicted of threatening to harm others. Part of his successful challenge to his conviction complained that the jury was instructed only to find that he intentionally communicated what a reasonable person would regard as a threat, but Mr. Elonis contended that proof of negligent threatening should not suffice to convict him. The relevant statute should be interpreted to demand proof that either he intended to threaten his wife and others or he knew his posts would threaten them.<sup>11</sup> Putting aside the legal issues about the statute’s proper interpretation, I’m more interested in the moral interpretation of Mr. Elonis’s conduct. To focus only on the morality of his threatening behavior as such,<sup>12</sup> assume that Mr. Elonis would not have realized his fantasies. In one version of the events, his victims’ terror mattered enough to him to try to elicit it. In another version, his victims meant so little to him that they did not penetrate his self-absorbed bubble of rage; he either didn’t register their predictable terror or didn’t register it as providing subjectively decisive reason to alter his conduct. Both versions of his behavior involve subordinating the vulnerabilities and interests of others to his perceived interest in voicing his self-indulgent and horrific fantasies, and both versions would show a culpable imperviousness to the evidently more important needs of others. I am hard pressed to say one version of the story is morally worse than another. Both pathways to others’ terror, one malicious and one negligent, are morally awful in different ways.

To pursue the more general point about the moral significance of negligence that this example illustrates, I first advocate for a moral conception of negligence (and non-negligence) and provide illustrations of it and its political counterpart, focusing on some examples that a legal lens might filter out. Second, I contend that culpable negligence, morally, is more important than our denigrating hierarchy often suggests.

While I have alluded to the negligence skeptics,<sup>13</sup> I will not directly address their worries. I will start by presupposing that negligence exists, that there are reasonable standards of due care that may be transgressed negligently or maliciously, and that such negligence (when unexcused) can be the basis of moral responsibility. Assuming that one may be morally responsible and morally culpable for at least some negligent acts, my aim is to explore the moral significance of such culpable negligence. Fleshing out an account of the moral seriousness

of negligence may help to make the stakes of skepticism clearer and to survey some of the resources for answering it.

## Moral Negligence

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I begin with an effort to characterize the moral phenomena of interest by attempting to distinguish negligence from malice not by reference to the agent's external behavior, but with respect to the agent's motive. I start by drawing a contrast between negligence and malice and then later turn to some finer grained distinctions between causing harm purposefully, knowledgeably, recklessly, and negligently. For now, I will work with the blunter tools of malice versus negligence, in part because this contrast plays a role in our discourse that bears examination and in part because two moving parts are simpler to follow than four. Later consideration of the further compartments and moving parts will refine but not change my basic point.

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By emphasizing motive and starting with only malice and negligence, I should acknowledge that what I emphasize as important about moral negligence differs from common legal uses of 'negligence.'<sup>14</sup> I believe my conception has purchase and familiarity within our moral discourse.<sup>15</sup> Indeed, part of my mission is to wrest the topic of negligence away from the monopolistic grip of legal commentators and to enliven a discussion about it within moral and political philosophy, one that might pay more attention to the motives that characterize moral negligence. Legal accountability for negligence has, in some respects, drawn salutary attention to our responsibilities to exert due care, but in other respects, its efforts to promulgate objective standards of appropriate behavior have ↪ had the side effect of diverting our moral attention from the motives of the negligent agent.<sup>16</sup>

Morally speaking, as a first pass, we might characterize negligence as a failure to take due care (or to perform due diligence) not to cause or allow harm for a particular set of motives, ones that distinguish the negligent agent from the malicious agent. In particular, the negligent agent's failure does not involve a deliberate attempt to impose or allow harm as an end-in-itself or as a means to an end-in-itself. Often, that characterization will do, but one may be negligent with respect to other moral ends than just harm avoidance. One may be negligent with respect to fulfilling a promissory obligation or a duty to report. A more accurate, if unwieldy, characterization would represent negligence as: a failure to take due care (or to perform due diligence) with respect to an applicable moral end, restraint, or duty, where the relevant failure does not involve a deliberate attempt to bring about the specific consequences occasioned or risked by the lapse in due care, whether as an end-in-itself or as a means.

Many, if not most, discussions of negligence attempt to give a formula-, principle-, or factor-based account to identify exactly what efforts due care requires or, at least, how large the circumference of due care is. I leave that task to others. My topic is not what efforts due care requires in any particular context. But, I note there may be no unified theory of due care or any simple algorithm that applies across a variety of moral contexts. I think it likely that which actions or omissions due care requires may depend largely on the nature of the particular moral values, ends, and duties appropriate to the relevant context in a way that frustrates efforts to specify broad principles of due care from which specific results for concrete contexts may be derived. 'Due care' does not signal a foundational value or first moral principle; it points toward actions and omissions necessary to show adequate respect and appreciation for distinct moral constraints, ends, and values.<sup>17</sup>

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For this paper, to focus on the moral significance of negligent failures of due care, I will simply presuppose there is a plausible account of what ↪ actions or omissions due care requires in various contexts given the moral values and duties governing those contexts.<sup>18</sup>

So, I assume that there is a non-negligible domain of deliberative behaviors, attitudes, and actions that constitute due care and, likewise, there is a non-negligible domain of examples of negligent activity where that

care is not taken in ways that constitute culpable negligence. In discussing the negligent agent, I will assume the agent has transgressed against an actual, valid moral standard of due care in a negligent manner for which she is morally responsible. My interest is in discussing the *significance* of this negligence—that is, the moral significance of violating the standard of due care under conditions that constitute negligence, as opposed to malice, on the one hand, or non-culpable accident or mistake on the other.

Rather than offer a provisional account of how to identify what due care requires, I'll offer some examples of what I take to constitute negligence, just to establish potential common ground. Non-skeptical readers need not agree with these examples, but may substitute other examples of conduct they agree constitute moral negligence.

1. For speed and convenience, a worker discards shingles off a roof without checking to ensure that anyone is below.
2. A worker discards shingles off a roof, checking first to make sure no one is directly below, but, for convenience, decides not to cordon off the area, arrogantly believing his aim with shingles is unerringly true.
3. To create a comfortable surplus, a factory manager decides not to replace a small cadre of retiring workers, making it likely that the remaining employees will be more burdened and will make more mistakes on the production line.
4. A professor makes an appointment to meet a student but does not write it down because she is in a hurry. She tells herself she'll remember, although she sometimes forgets appointments or cross-schedules.
5. She remembers while driving home but worries it will slip her mind later, so she quickly texts herself while driving.
6. Your teenage child seems distracted and troubled, but when you ask, he snaps at you and it's a struggle to converse. You decide to give him some space in the moment, but the moments stretch on into days without ↳ your mustering your resolve to break through his defenses and find out what is going on.
7. A job candidate wows the head of a search committee who decides, in the glow of the person's brilliance, that taking the trouble to check references and degree reports is unnecessary.
8. A speaker agrees to give a talk across town at 4 p.m. If he leaves at 2:30, he will definitely be on time and probably early. If he leaves at 3 p.m., there's a 50 percent chance there will be traffic that will make him late but it is certainly possible that he will be on time. He leaves at 3 p.m. in order to take more time to review his notes.

A few things are worth noting about my characterization of negligence and these illustrative examples. First, moral negligence does not necessarily involve a bad outcome. Agents may be culpably morally negligent, yet lucky when they inflict no damage. The texting driver is negligent whether her car crashes or not. The crucial element of negligence is the agent's failure to take appropriate actions or precautions, thereby leaving the correct outcome more of a hostage to fortune than is warranted. So, the misfortune that leads to a bad outcome is not a necessary component of negligence, but when such an outcome ensues, it need not be a surprise; the same may be said of malicious action when an attempted battery succeeds in breaking a nose.

Second, negligence is distinctively characterized by the agent's motive—how her reasoning motivates her action (and what her reasoning omits). The sort of moral negligence I am interested in may be advertent, in the sense that the negligent agent may be aware of her action and its possible consequences; she may even be aware that she is violating a rule. Not all negligence involves unknowing failure, forgetfulness, clumsiness, or mere risk. The chair who fails to call references may be perfectly aware that she is skirting the rules; the same

may be said of the texter and the roofer. Further, negligence does not always involve running a risk.<sup>19</sup> One may be negligent when it is definite that *some* harm will result. Think of the parent who neglects, for a period, to attend to her child's emotional needs. Consciously permitting a definite harm of small proportions may constitute a form of negligence. Hence the distinction between malice and negligence is not the distinction between advertence and inadvertence, awareness and unawareness, or even certainty versus running a risk.<sup>20</sup>

Rather, the distinction of interest to me hinges on *why* the agent fails to take due care. The malicious agent values what is risked (or chosen) as a means or an end. The negligent agent often fails to take due care because another end (or means) displaces the appropriate end in perceived importance or salience; what is risked (or permitted) is not valued for itself or as a means, but is an insufficiently disvalued side effect of the agent's primary agenda in action. The negligent agent implicitly or explicitly demotes the practical significance of her actions regarding matters that do not occupy her primary focus of concern.

In other cases, the negligent agent may correctly understand the moral relation between her private ends and morally compulsory means and ends, but she may improperly appreciate the range of her agency. Often, she may overestimate her abilities or underestimate her vulnerabilities and flaws. An inflated sense of self may propel the conviction in action that, on this occasion, her aim is sufficiently true to render safety precautions merely advisory for her or a practical sense that her focus while driving is expansive enough to permit texting. Both sorts of cases seem to involve an elevation of one's self, propelled by self-exempting rationalizations (whether through a subjective misvaluation of the importance or relevance of one's private ends or of one's abilities). Importantly, the misestimation of agency may involve a failure to perceive the need for (and entitlement to) cooperation with others. That is, not infrequently, negligence emanates from hubris or from other pathologies of independence that shade into isolation, obstructing a person from asking and arranging for supplements to her individual agency, otherwise known as help. (The skeptic often suffers from a similar flaw in her third-personal judgments, classifying a person's inability to perform a task on her own at a specific time as a hard inability full stop, rather than taking the broader view and assessing a person's abilities in terms of what she could achieve over time, in conjunction with the enlisted assistance of others.)<sup>21</sup>

There is a wide variation here in the forms of negligence and their causes, but what unites them is that the negligent agent shows a culpable indifference to a moral failure. For the merely negligent agent, this is an indifference with limits. A close call may snap her back to attention. Whereas, with the reckless agent those limits are much further out or hard to discern at all. (Depending on the details, Mr. Elonis might be considered simply negligent if he would have stopped once he became aware that his subjects were scared; given the facts reported in the opinion, including his continued posting after an FBI visit, it seems a toss-up whether he was maliciously aiming to instill fear or whether he was extremely reckless.)<sup>22</sup> The merely negligent agent may tolerate knowledge that a small portion of her duty will go unsatisfied, whereas the reckless agent may tolerate knowledge that the bulk or the whole of her duty will go by the wayside. The reckless agent, then, represents the extreme or limit case of negligence.<sup>23</sup>

Another way to put the point is by reference to the doctrine of double effect. Although the principle has many formulations, roughly, it says: an agent may perform an action with both good and significant harmful effects (or their potential) only if the agent merely foresees but does not intend the harm for itself or as a means to the good effects *and*, in some relevant sense, the potentially good effects significantly outweigh, compensate for, or otherwise justify the potentially harmful effects. The second clause places some limits on how substantial or disproportionate the harmful effects of an action may permissibly be, independent of the content of one's intention.

One may conceive of the malicious agent as one who directly violates the prohibition on intending harm (or other illicit ends) as a means or an end. Whereas, the negligent agent fails to comply in a deliberate fashion with the second limit of the doctrine of double effect—by not paying due attention to the significance of the

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potential collateral casualties of her behavior and whether they are disproportionately high. Her direct intentions may be innocuous but she fails to ensure that the collateral casualties of her actions fall within acceptable limits. The failure properly to attend to the *significance* of such casualties does not equate to ignorance that they may occur; for this reason, I reiterate that moral negligence need not involve inadvertence. The negligent agent does not intend the harm she causes, but culpably permits her possibly innocuous primary intention to do all her moral work. Our discussions of the doctrine of double effect usually center on the fact that it (controversially) permits some sorts of unintended collateral damage that could not be directly intended. But, even if that controversy is resolved in favor of the doctrine, it is worth remembering that the doctrine of double effect does not permit innocuous intentions to sanitize all side effects. It allows only specific, qualified forms of collateral damage. One might think of the negligent agent as a person who mistakenly acts as though the exceptional permissions granted by the doctrine of double effect for *some* unintended collateral damage extend much further than in fact they do, thereby rationalizing poor behavior on the grounds that it isn't intended as such. One hypothesis is that those who make light of negligence have partly but unwittingly bought into this rationalization as containing some sliver of truth.

A final point: negligence may involve culpable indifference to more than just the risk of harm but also to other mandatory ends and the objects of other duties, as the examples involving negligence toward promissory performance (the appointment, the talk) illustrate. To be non-negligent is to be both attentive and responsive in thought and agency to how the pursuit of one's (permissible) aims and the state of one's agency affect one's ability to satisfy one's other duties and responsibilities. Non-negligence may involve not only direct efforts to fulfill one's duties on the date due, but also prior thoughtfulness about what obstacles may arise, how one's different aims interact, and what efforts should be taken to ensure effective agency, including advance preparations, maintenance of apt conditions for performance, avoiding tempting circumstances of violation or slack, and enlisting help.

## Political Negligence

So far, I have concentrated upon the interpersonal dimension of moral non-negligence. To illustrate these points from another angle, I consider the political side and the obligations of non-negligence for citizens, partly because the territory is less familiar, hence less saturated with legal intuitions. I am eager to avoid those legal intuitions because another limitation of many legal approaches is to view duties and wrongs primarily through the lens of remedies. On the one hand, where remedies are limited, their contours may exert a distorting influence on what can be recognized as negligence. On the other, where remedies are overwhelmingly large or harsh, concerns about disproportionality and unfair burdens may infect and depress one's assessment of the moral significance of negligence. To recalibrate one's moral intuitions, it may be worth taking a detour onto terrain that is, for other reasons, less hospitable to a litigation-oriented focus.

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Moral negligence, like political negligence, is often a product of a sort of personal overestimation through the prioritization of one's personal projects to the exclusion of one's public obligations. But, many contemporary manifestations of political negligence also seem to emanate from another sort of misevaluation—an implicit or explicit *under* estimation of one's abilities and the importance of one's own vigilance and public participation. This underestimation may complement an overestimation of the abilities, efforts, or importance of others, yielding a different path to rationalizing permissions to make an exception for oneself. The underestimation of the importance of one's political participation may lie behind the complacency that atrophies democratic institutions. This breed of political negligence, in social situations, can harbor disastrous potential when the hubris of some couples with the self-underestimation of others.

Some substantive aspects of political non-negligence are fairly obvious. For individual citizens, in ideal theory, there is the obligation to support just institutions through a strong default practice of legal compliance, a duty

to engage in political participation including electoral participation, and a duty to keep oneself and others sufficiently informed and educated to play a responsible role in self-government. More interesting questions emerge in the harder realm of non-ideal theory. In particular, what does non-negligence require when fulfillment of one's duty to stay informed and the duty to support just institutions generate a conflict with the default practice of legal compliance? In what follows, I discuss a corner of this problem, highlighting a part of the civil disobedience tradition that recently seems to have been forgotten or, to use a cognate, *neglected*.

I will focus on the example of Edward Snowden.<sup>24</sup> The debate about whether Snowden is a hero or traitor seems mostly about *what* he disclosed and *whether* he should have disclosed it. I think much of what he disclosed either should not have been secret or involved government activities that should never have happened. He was right that the government was engaged in illegitimate activity, of a highly serious nature, meriting exposure. We may be unaware of damage caused by the revelations, but, given the current state of information, I concur with those who think the consequences were mainly salutary in light of our deepest commitments to freedom of speech, legitimate privacy expectations, and governmental transparency and veracity. So, this case well illustrates that one may be negligent without bringing about a bad consequence.

For, I regard Snowden as negligent, not for *what* he revealed but for *how* he conducted his revelation campaign.

p. 208 I will offer a description of Snowden's actions and why they trouble me to illustrate why I think his behavior amounts to a variety of political negligence. Snowden was no mere individual observer reporting from the outside on others' politically relevant behavior. His revelations were not simple political commentary but were political speech acts. Moreover, he did not simply behave as a passive resister, by refusing to cooperate or by quitting his job.<sup>25</sup> Rather, he behaved as a political actor, making major political decisions. He took it upon himself to change jobs with the sole purpose of collecting classified information with the ultimate aim of unilateral revelation;<sup>26</sup> he revealed a massive amount of classified information to the global community at a time of his choosing and relocated a substantial cache of classified information to Hong Kong, without giving advance notice to various affected agencies and persons to prepare responses, apologies, explanations, and other gestures of mitigation and repair.<sup>27</sup> In other words, he reversed a major set of public policies in one fell swoop at the time, manner, and location of his choosing—implementing massive reforms. His actions were not just political in effect but in intent. By his own descriptions, he engaged in these policy reversals in virtue of his status as a US citizen, “doing this to serve my country ... working for the government,” by forcing the government to comply with its deepest ideals.<sup>28</sup>

What troubles me is that Snowden's legitimate objections were made as a citizen, yet his response, procedurally, was as an individual. He mistakenly inferred from the premise that government acts illegitimately to the practical conclusion that because he was well situated, he, virtually alone, could act non-institutionally to remedy the defect. In responding to a rather substantial defect in our political institutions, he not only abandoned allegiance to our particular government but he abandoned allegiance to political institutions altogether, whether governmental or non-governmental. Yet, normatively, the sort of decisions he made *have* to be made politically, in a deliberative setting involving multiple perspectives, checks and balances, and a commitment to the rule of law and other public values. Adhering to political procedures may still matter even if we affirm, with Snowden, that the situation merited departure from the rule of law as interpreted and administered by our government.

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The obvious analog, Daniel Ellsberg and the Pentagon Papers, provides an instructive contrast. Ellsberg's decision to copy the Pentagon Papers was made after discussing the matter with another expert at RAND. Thereafter, Ellsberg consulted with a diversity of knowledgeable people, including US senators, his spouse, and members of the Institute of Policy Studies, a think tank involved in analysis of policy in Southeast Asia. He consulted experts in the area, enmeshed within organizations that themselves debated the relevant issues on a regular basis and considered different perspectives in a somewhat systematic way. He tried to have the papers read publicly into the Congressional Record and only thereafter did he approach the *New York Times*. The *Times* then engaged in a thorough internal process to reason through the risks of the disclosures and the public's vital

interest in the information, consulting only minimally with Ellsberg.<sup>29</sup> All told, Ellsberg's process involved consultation and deliberation with a range of other knowledgeable, disinterested people and institutions over more than a year.<sup>30</sup>

p. 210 Snowden, by contrast, unilaterally embarked on a mission to collect information for exposure. Thereafter, he consulted only two freelance journalists, Glenn Greenwald and Laura Poitras, who themselves understandably maintained a strong degree of distance from and contempt for political and institutional structure.<sup>31</sup> I do not doubt their sincere commitment to transparent government, but they also had strong personal-professional stakes in these revelations. Snowden approached the *Washington Post* only because he believed his efforts to bypass traditional journalism were failing, but quickly became irritated at the *Post*'s efforts to engage in independent assessments of the merits of publication. Snowden's timeline for revelation seemed largely driven by impatience. The materials were released within a whirlwind of days from the moment of his first successful contact with Glenn Greenwald.<sup>32</sup> In the end, the Snowden revelations were largely the product of three politically isolated people (Snowden, Greenwald, and Poitras), acting alone together, with haste. The revelations were not the product of any procedure that aimed responsibly and thoroughly to consider the legitimacy, timing, whereabouts, and impact of his massive copying and revelations.

My objection is that Snowden acted outside of politics to engage in political forms of resistance. Snowden did not object, nor would he have reason to object, to the idea that decisions about national security should be made in political bodies that incorporate structures of deliberation that encourage the airing of multiple viewpoints, that attempt to weave in checks and balances to rein in personalities or mistaken lines of thought from gaining too much sway, and that try to counteract inevitable forms of human fallibility and limited knowledge. However bankrupt the NSA and the Obama administration were on these issues, it is a non sequitur to think that national security issues of this magnitude should be decided by a tiny handful of people without comprehensive expertise, a deliberate set of commitments to public values, and a procedure to debate the merits and risks for the public that introduces a wider range of perspectives than merely Mr. Snowden's. Properly political activities cannot be done alone but require collective deliberation and organization.

The responsible, non-negligent civil disobedient does not strike out on her own against the current political structure, but relocates herself in another (possibly non-governmental) political structure to deliberate about the most responsible and effective forms of resistance.<sup>33</sup> This may seem like a demanding, perhaps impossible requirement. Non-negligent civil disobedience cannot require the establishment of a full shadow government, complete with an ersatz bicameral legislature and an executive to debate and craft an appropriate mechanism for dismantling these totalitarian policies.

p. 211 Still, there are a great many options between rogue individualism and erecting a full-fledged government in exile. One might have expected Snowden to work with independent organizations of experts in the area who were not captured by the corrupt military-industrial complex and who could think their way around the issues' complexities, collecting insights that a single mind or two might miss. The experienced attorneys at the ACLU come to mind. They have devoted their careers to thinking about the proper scope of liberty and how to calibrate resistance to government excesses in a manner that does not amount to anarchism. So does the organized fourth estate with which Snowden could have cooperated, rather than merely used and resisted when it attempted to exercise independent deliberation of its own.<sup>34</sup>

The fault does not lie exclusively with Snowden. Although he could have worked with extant independent organizations, the level of informal, extra-governmental organization by liberals and the left has certainly fallen into decline. While the right is extremely well organized, the left has, largely, become populated by a different set of left libertarians than those imagined in the distributive justice literature.

Consider the intentional disorganization of the Occupy movement,<sup>35</sup> the most important domestic, non-electoral, progressive, alternative political activity in recent memory. Although its lack of structure signaled an

admirable openness to input, it also disabled itself from accomplishing much beyond the important tasks of criticism and the disruption of social complacency. The contrast with other major resistance movements of the twentieth century pulls one up short. Even as late in the century as the AIDS crisis, major resistance movements were committee-laden *movements*—not topic-specific coups by outraged individuals or loud discussion groups in the park. In its heyday (and still), ACT-UP had committees and structures, debates lasting long into the night, and its members considered the ramifications of their actions both for their interest groups and others.<sup>36</sup> So too for EARTH First!<sup>37</sup> Such groups are not full-fledged political entities: they tend not to be maximally inclusive, even if they are internally radically democratic, and they often pursue narrow, issue-specific agendas that privilege their base. Nevertheless, what they had that Snowden lacked was the idea that responsible political resistance requires a deliberative structure open to a plurality of inputs and potential plurality of viewpoints. That openness corresponds to patience toward some conflict and delay. In other words, I am contending that the impulse to immediate political gratification that Snowden indulged is not merely jejune; it is close to oxymoronic. Politics is essentially a joint, consultative activity. Even where resistance is not only appropriate but a duty, no single person can coherently and responsibly make massive decisions with wide-ranging political ramifications on his own and avoid those who might question those decisions. It is probably fair to say that liberals and the left have been negligent toward sustaining a full-bodied political culture, one that supplies responsible outlets for both supporting government and supporting thoughtful *political* resistance. The Snowden affair may represent, then, an example of a mass(ive) practical underestimation of the significance of active political agency by individual citizens meeting personal overestimation in the guise of Snowden—one form of negligence enabling another.

You may worry that I underappreciate the personal risks Snowden faced. I am sympathetic that wider consultation would have been frightening and would have required extraordinary care, although Snowden seemed equipped to take such care; I acknowledge Snowden's fear might excuse, if not justify, his fairly solitary approach.<sup>38</sup> Perhaps I am overly optimistic about how a more politically deliberate revelation could have gone down had Snowden been less impatient. These issues, however, are not about whether the process of revelation was or was not negligent, but rather where the negligence is predominantly situated—whether in Snowden alone, in the trio of Snowden, Greenwald, and Poitras, or in the public for failing to ensure the existence of enough safe, extra-governmental watchdog networks in which politically structured checks on governmental abuse could operate.

To take stock, the Snowden example illustrates a few points about negligence. In his pursuit of a reasonable end, Snowden's single-mindedness neglected a fully democratic approach to law and its violation, running roughshod over *political* obligations. He was right that intelligence methods should be a public, jointly decided matter, but, for many of the same reasons, so should the dismantling and rethinking of an extant apparatus. Snowden allowed his devotion to the former aim to eclipse the fact that he was privately making an extraordinary number of decisions about the latter, rather than facilitating alternative political decisions.<sup>39</sup> In doing so, he was negligent with respect to the possible harm he might cause to people and institutions; further, he was negligent, perhaps even reckless, with respect to a wider range of democratic values than the particular ones he aimed to vindicate.

The Snowden example underscores that negligence, whether moral or political, involves a procedural defect first and foremost in the deliberations that give rise to action. Negligence is a serious wrong because it either involves a failure to notice one's impact on others' relevant rights and interests or a failure to keep that impact appropriately salient in one's agential decision-making. It involves a sort of blindness to others which violates the central tenet of morality that everyone matters and everyone, in some sense, matters equally. To fail to take others into account is to fail to treat them as equals by failing to recognize them fully (in the relevant context).

## The Significance of Negligence

With these characterizations and examples in mind, I turn to the issue of the relative significance of negligence and to the standard hierarchy classifying malicious wrongs as worse or morally more serious than negligent wrongs, all else equal. I do not argue for the inverse—that negligence is, all things considered, worse than malicious action. Rather, I aim to orient our attention to the distinctiveness and the seriousness of the wrong of negligence. Negligence is not just a paler or more dilute version of malicious action, a minor variation on a major theme. It should be recognized as a distinct, serious wrong. Moreover, we should evince greater moral appreciation for the moral importance of non-negligence and the sustained and steady moral efforts it requires.

p. 214 The blunt way to put the primary point is this. Negligence, whether in its inadvertent or advertent form, involves a failure to take and exercise appropriate responsibility for one's agency; and, when that failure involves other people, negligence involves a failure properly to recognize and acknowledge their moral significance. Such failures may have dire consequences. As Hannah Arendt pointed out fifty years ago, such failures that take the form of political negligence may be crucial collaborative elements of the success ↘ of evil enterprises.<sup>40</sup> When, unlike Snowden, political negligence takes the form of apathy or operates through forms of unthinking obedience, the negligent actor may become a tool of those with nefarious aims and thereby may expand the scope of agency of the malicious. One could worry that negligence may be an efficacious and more likely method of producing disasters than the rarer collaborations between the actively malicious. These are non-accidental byproducts of a more basic defect of the negligent agent, which involves the basic failure to treat her own agency as her responsibility, a responsibility to be exercised with sensitivity to the reality and equal importance of others. Moral norms and reasons presuppose they have an audience; they are directed toward agents for consideration, incorporation, and implementation into motives and action. The negligent agent is, with respect to some portion of morality, unavailable and impervious to its content—not because she is mistaken or in the grip of a mistaken ideology, but because she has opted out, as though she wore earplugs during part of the relevant briefing.

So framed, there is a contrast with the malicious agent, but it is hard to form a clear hierarchy with respect to the two. The malicious agent is not apathetic or unthinking; she takes in the reality of others and responds to reasons with respect to them. Her defect is that she gets them (very) wrong, whether by actively seeking their harm or by unacceptably prioritizing her welfare over others. In some cases, the negligent agent may have the right intellectual conception, but the connection of this insight to her agency is only haphazard—like a button barely clinging by a thread to one's coat rather than being closely secured. Often one gets by for the day, but the coverage is precarious and more happenstance than deliberate. In other cases, the negligent agent fails to form a complete conception; the elements that are present are not defective, but she's drawn practical conclusions before surveying the entire terrain, betraying an implicit arrogance, laziness, or, in some cases, a faulty underestimation of her capabilities. Whereas, the malicious agent's intellectual conception has positive defective components.

p. 215 A loose metaphor: while the malicious agent points the lens in the wrong direction, the negligent agent fails to focus. Both will fail to get the shot. Whether the negligent agent's failure is cognitive or agential in some other sense, both agents suffer from a significant defect that prevents them from acting in a way that reflects the appropriate value of others. In different ways, the negligent agent, like the malicious agent, fails to take the needs of others to exert appropriate weight in her thought and agency. It is unclear why we should affirm the broad generality that one defect is more serious or ↘ morally significant than the other. (Or to put the point another way, why think one sort of violation of the doctrine of double effect is more significant than another?)

## Does the Act/Omission Distinction Explain the Traditional Hierarchy?

I have been discussing the comparative flaws of the malicious and negligent agents, but perhaps the traditional hierarchy emanates from a difference in their actions. It might be suggested that the malice/negligence hierarchy flows from the legitimate distinction between acts and omissions. One may think that the malicious violation is purposive, whereas the negligent violation consists of a mere failure to take due care, an omission to satisfy an underlying duty.

This defense seems misguided because it is not clear that the act/omission distinction clearly maps onto the distinction between malice and negligence. Omissions may be purposive and malicious. Further, as I argued earlier, negligence may involve purposive, positive actions, such as throwing tiles to the ground, laying off workers, or speeding. Often negligence involves an omission—a failure to check one's brakes, to plug a crack, or to clean a line—but, notably, negligence can involve the *failure* to omit and err through action. One may negligently defame another, negligently deceive, or negligently violate someone's privacy by speaking carelessly in a way that allows a listener to draw an invasive inference. These involve actions and the flaw may be described in either of two ways: one could have avoided the wrong via omission—by remaining quiet—or, by more and better action—checking one's facts, clarifying one's meaning, or speaking more precisely. Similar points may be made in the classic omission cases: one could have avoided the wrong by further omissions—by not driving or closing the shop—or by engaging in corrective action—checking the brakes or cementing the crack. Given these cases, it is hard to stuff negligence completely into the omission category. Negligence may involve a failure to take due care, where due care requires an omission or an action, and the failure may itself involve an omission or an action.

Still, there is the more specific worry that negligent behavior is often the product of a particular sort of *mental* omission. Negligence often stems from a failure to recognize that or how one's duty of care applies in the situation, e.g., that someone is at risk from one's behavior or that one's actions happen not to conform to the required boundaries. Some skeptics regard moral liability as inappropriate because we should not hold people responsible for thoughts they did not have, since one cannot control one's thoughts.

p. 216 Negligence need not always involve a failure to notice. One may be aware that one's brake check is overdue and that running an errand nevertheless runs a small risk of harm. Given the slight nature of the risk, one may only be morally negligent in the resultant accident for failure to maintain one's brakes but the liability does not issue from any mental omission (other than the failure to form the intention to repair one's brakes). It issues from the failure to *act* on one's belief that one needs to maintain one's brakes.

But, even when negligence does stem from a failure to notice, this argument is puzzling. We commonly hold people accountable for failing to have certain thoughts. Standard examinations reward students for having and expressing particular thoughts and penalize them for failing to know or remember certain facts or to 'see' or draw certain inferences. (Indeed, sometimes we give partial credit for the *action* of trying and getting the wrong answer, giving more credit for the wrong answer than for the complete omission.) One may not be able to will that one recollect the right answer, remember one's duty, or observe the relevant risk in the moment. But one can, in advance, enact internal and external mechanisms of learning, reminders, and aid to ensure that one does remember, that one avoid situations in which such recollection is requisite, or that safeguards prevent one's failure from having an adverse effect. When such measures are not taken or are inadequate to the task, finding moral liability seems unexceptional.

Negligence may seem *de minimis* when one considers it in snapshot terms. In one instant, one failed to look or to remember and something unfortunate ensued. Where negligence is culpable, a longer look would often show a failure to engage in a pattern of non-negligent activities, over time, which would build habits, fixes, and stopgaps to protect against occasional lapses and to prevent them from manifesting in failures of deliberation or agency. To engage in non-negligent activity and to erect this infrastructure is a decision, as is the decision

not to bother and to rely on one's present resources in the moment whenever it strikes. A slower shutter speed, so to speak, seems more appropriate if we gauge moral wrongs by reference to the agent's character and motives as they are expressed in action. We could, instead of adopting the snapshot perspective, understand the significance of culpable negligence in terms of these prior decisions not to practice non-negligence and the ongoing indulgence in rationalizations that render this inactivity a live option. Keeping the lens open longer, it's hard to see these decisions as mere omissions or their products as mere accidents. They are, instead, the unsurprising products of ongoing patterns and continually made and reaffirmed decisions. In this respect, they may not differ importantly from malicious actions, at least those that are in character.

p. 217 Keeping one's focus on the agent's character and motives as expressed in action may enable the separation of issues about the relative danger ↵ malicious agents pose compared to negligent agents. When considering a specific scenario, one may be tempted to think that the malicious agent is the more dangerous agent because if the harm she aims at does not occur, she will try again. So, goes the thought, malicious agents are more likely to cause harm than negligent agents who will not double back if harm is avoided. But, this only holds true of the determined malicious agent and not the one who suffers a flash of temper that quickly subsides. It is difficult to generalize, and so the implicit frame in this contrast seems to be a flawed way of investigating the comparative question. The negligent agent who subjects others to her negligence may cause harm only 0.1 percent of the time when driving; most agents who act maliciously manage to control their defective temperaments most of the time and may only unleash their malicious motives and implement them a very minor portion of the time—suppose it were 0.1 percent of occasions in which they could do others harm. They are equally dangerous individuals, assessed in terms of outcomes over time. Over time, the consistently negligent person may be far more dangerous to others than the agent whose malicious act is quite out of character; the rarely negligent person who lives in pedestrian circumstances will pose a slight risk to others while a dedicated mass murderer will be supremely dangerous. I find it difficult to draw clear conclusions about the relative danger of the malicious and the negligent. The question I pursue instead is whether, holding things like risk and outcome equal, the different content of their motives represents itself a qualitative moral difference that supports a judgment that one sort of act or character is worse than another.

## Might the Doctrine of Double Effect Itself Underlie the Hierarchy?

Could the hierarchy be justified by the doctrine of double effect? Earlier, I suggested a connection between negligence and the doctrine of double effect, something to the effect that negligence involves a perversion or abuse of the permissions of what the doctrine allows. But, one might advert to a different connection to justify the traditional hierarchy. That is, the doctrine of double effect may be thought to codify the moral view that it is worse to bring about harm, say, as an end or as a means rather than to bring it about as a side effect. One may think that whatever justifies the doctrine of double effect may explain the related view that impermissible forms of intentional infliction of harm are worse than negligence, the impermissible bringing about of harmful side effects.

p. 218 I do not find this move persuasive, but not because I reject the doctrine of double effect—as is probably evident from my invocation of it. Notably, ↵ the hierarchy does not directly follow from the doctrine, at least those versions couched in terms of permissibility and impermissibility. The doctrine itself declares that there are *some* harms whose production as a collateral effect may not be impermissible. It draws a distinction between a permissible and an impermissible pathway by which *certain* harms may be produced. It does not follow that there is a moral difference between two distinct *impermissible* pathways of producing other harms (or other magnitudes of harm).

More important, the doctrine's justification does not lend much support to the hierarchy. For the purposes of the objection, the justification cannot just be that intentionally harming is worse than negligently harming;

that would amount to a mere repetition of the very thesis in question. For the same reason, the comparative formulations of the doctrine cannot be appealed to as a reason to affirm the comparative judgment under challenge.<sup>41</sup> On the justification that I think is promising, the traditional hierarchy does not glean support from the doctrine of double effect. Roughly speaking, the doctrine may be justified in terms of what sort of demands may be made on an agent's attention and direct efforts. Take the imposition of harm on innocents. Where harm's imposition has no positive justification (i.e., it isn't merited by the recipient's past behavior or rehabilitative/educational needs), then, given the very nature of harm, a moral agent cannot rationally endorse its imposition as an end in itself. But, given the innumerable pathways of causation emanating from one's activity, the behavior of others, our myriad forms of interconnection, and the limited attention and agential capacities of human agents, moral agents cannot be expected to avoid (and prevent) *all* causation of predictable harm.<sup>42</sup> That would be an unreasonable demand, one that would interfere with the pursuit of reasonable projects and the goods associated with directed and focused forms of attention. Still, given the badness of harm, our interconnection, and our interests in each other's welfare, we may expect agents, consistent with an appreciation of their limited agency and the goods of devoted attention, to make (strong) efforts (i.e., to take due care), to avoid some levels of harm and some pathways of harm.

p. 219 That agency-oriented justification does not give us reason to think that an abdication of the limited forms of responsibility for indirect harm we do have is less important or less wrong. It does suggest that the underlying account of why malicious harm is wrong differs from the underlying account of why negligent harm is wrong. Malicious harm involves acting on a contradiction, a direct affirmation of the false, or the direct embrace of evil; one affirms the bad as the good, whether as an end or as an instrument. Negligent harm involves at least a partial abdication of responsibility. The malicious agent, through action, denies that a person's harm is a bad worth forswearing; the negligent agent's action does not express *that* but instead expresses the denial that she bears responsibility for the harms her actions or omissions produce.<sup>43</sup> The negligent agent's implicit denial goes to her own agency and relationship to the victim, whereas the malicious agent's denial more directly concerns the victim's status as such. So, my questioning of the traditional hierarchy does not involve an equation of malicious and negligent harm. I agree they involve distinctive wrongs with distinctive qualities that give rise to distinctive complaints from their victims. I am less certain that one form generally is more problematic than the other, whether one considers the acts (all other things equal) or the characters that produce them.

## Working with a Finer Grain

One may object that not all cases are on a par and that we should work with a finer grain than we have so far. I do not disagree in principle. Part of what troubles me about the traditional hierarchy is the terrific generality with which it classifies, other things equal, the malicious wrong as worse than the negligent wrong. Although I generally agree with the methodological point, I remain unconvinced that a finer grain vindicates the hierarchy.

It may help to consider some dimensions where we might make finer-grained distinctions. One might think that malicious actions and negligent actions are likely on a par when the negligent actions involve patterned behavior, knowledge, or advertence, or at least when one's duty could easily be apprehended, but that the hierarchy is more plausible when these factors are missing. Let's examine those three factors more closely:

p. 220 patterned vs. ↳ atypical behavior; knowledge vs. ignorance; and readily available vs. difficult inferences, observations, or moral insights. For convenience, I'll work with cases involving harm and risk, although, as I've argued earlier, harm and risk are not essential features of all cases involving negligence.

One may think my case is strongest where the negligence that gives rise to the harm reflects a *pattern* of unconcern, blinkered, or unreasonably deferred concern, or the agency counterparts of such defective concern,

and the harm is a predictable outcome of such a pattern. Where it is clear that the agent fails to meet a duty of care because of a well-established character defect or omission that she was obliged to alter, to avoid situations that would trigger it, or to seek help to supplement the gaps in her agency,<sup>44</sup> the fact that the harm was negligently caused on the occasion does not seem to reduce the severity of the wrong or render it evidently less substantial than wrongful harming as a means or an end.<sup>45</sup> But, the traditional hierarchy may seem more intuitive in those cases where, objectively, a person should have acted otherwise and fell short of the duty of care but the shortfall was out of character. Such cases may seem to pale in comparison to the consciously elected wrong. I see the point, but I doubt that it is one that turns on the contrast between the malicious and the negligent. Where the shortfall was out of character, some may think that reduces the severity of the wrongness or, depending on the explanation, may serve as a partial excuse that reduces culpability. But, that would also be true in the case of malicious behavior, some of which may be consistent with one's character or past actions, and some of which may be aberrational. We may have reasons to distinguish between actions that are out of character and those that are consistent with character, but that distinction does not line up squarely with the distinction made by the traditional hierarchy.

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Might one object that the examples that are the most compelling for my case are those in which there is some admixture of advertence with mere negligence—as where the department chair elects not to check references knowing that she runs a small risk of missing a red flag? Whereas, when the agent acts negligently but without awareness of the risk she runs, it may seem that the wrong is of a different kind of severity when contrasted to the case where the agent acts with full awareness of the risk she runs but proceeds nonetheless. I am unconvinced. Again, I assume we are discussing cases in which there is a wrong for which the agent is morally responsible. So, I am assuming, against the skeptics, that an agent may be morally culpable for some derelictions of duty even where he is unaware he is running a risk or inflicting harm. He may be culpable because he may have been responsible both to operate whatever discovery mechanisms would have revealed the risk and then to avoid running it. Assuming the agent may be culpable for his inadvertence, I am not convinced that the hierarchy only falls under attack where we have a case combining advertence and negligence. Returning to the example of Mr. Elonis, I resist the idea that it would have been morally worse if Mr. Elonis intended to threaten his wife than if he intended to vent his all-consuming anger publicly but, paying no attention to who would read his online posts, he was unaware that his online rantings ran a substantial risk of threatening his wife. These are different, but both scary, forms of moral monstrosity.

At this point, one might object that knowledge or awareness is not always the crucial factor, but that it does matter whether awareness of the risk or of the possible violation of duty was close to hand or difficult to achieve. That is, the traditional hierarchy may seem more intuitive in cases where knowledge of the risk or harm was not just absent from operative awareness but would have required unusual effort or imaginativeness to come by, such as where the hazard is unusual and was understandably far from the mind of the agent. Negligence under such situations may be culpable but less serious than deliberate infliction of harm. It may be wrong to have ignored the hazard, but given the difficulty of correct attention to it, the moral failure seems of a different magnitude of intellectual difficulty than recognizing that one should not deliberately inflict harm.

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Perhaps these points about difficult insights are true, but I'm not sure where they get us with respect to vindicating the traditional hierarchy. First, although some sorts of purposeful infliction of harm are obviously wrong, people are capable of great rationalizations for deliberate, wrongful inflictions of harm, especially when under strain. Those rationalizations may also be intellectually and emotionally difficult to suppress or resist. We do not seem to be in a well-informed position to speculate about which cases are more common or typical in a way that would suggest negligence more often involves a failure to do something difficult.

Further, I suspect that unusual difficulties of compliance speak more to a partial excuse of the agent than they do to judging the action less wrong. Concerns about the difficulty of compliance or the elusiveness of an agent's having a mental grasp of the salient features of a situation may not support the traditional hierarchy as much as they reveal discomfort about the demandingness of some objective standards of due care and the distance

between those standards' demands and the individual circumstances of some agents. Such discomfort may suggest reconsideration of whether a particular standard of care really is required (or whether standards of care should be more closely tailored to the circumstances of particular agents). But, I have been working with the assumptions that the agent has transgressed against an actual, valid standard of care and that she is responsible for that transgression. Where those assumptions hold true, I do not see why the moral seriousness of the transgression varies dramatically depending on whether the specific outcome is intended, clearly in view but subjectively and wrongfully dismissed as insufficiently relevant, or distant from the agent's active range of concerns for culpable reasons.

Although I challenge the rote adherence to any general hierarchy elevating the malicious as always worse than the negligent, I do not deny that some wrongs may be worse than others and, indeed, some acts of malice may be worse than some acts of negligence. My skepticism about the traditional hierarchy is compatible with the idea that things may not be equal, even when outcomes remain equal. Some wrongs may be worse than others and some characters may be worse than others. Intentional, unjustified killing that is carefully planned for pleasure may well be worse than intentional, unjustified killing occurring (more) spontaneously in the heat of passion, though still in character. We could fashion parallel cases involving negligence.<sup>46</sup> The character of the reckless agent in my sense (one who has few or no limits to her indifference to moral limits) may be worse than the character of the merely negligent agent (whose indifference to moral limits and the duty of care has limits—just the wrong ones); the actions that are the product of such characters may likewise vary in their moral severity. ↵ Such distinctions are compatible with thinking that the passionate killer's episodic lapse of restraint and the negligent killer's episodic lapse of diligence, both lapses attributable to engrained defects in character, are not so different in moral significance. So, I do not dispute that certain finer-grained distinctions may reveal different degrees of moral significance. That concession, however, does not support a general distinction between malice and negligence, nor does it suggest that forging a general set of distinctions turning on the more differentiated categories of purpose, knowledge, or awareness of the specific risk supports a more sophisticated but still reliable version of the traditional hierarchy.

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## Reasoning from the Remedy

Another reason the moral significance of negligence may be downgraded is that we tend to punish it less severely than malicious action and this differential treatment resonates with us as appropriate. We also tend, concomitantly, to have more moderate reactive attitudes toward negligence than toward malicious action. The latter may often provoke greater anger and resentment than the former and these reactions resonate with us as appropriate.

One response to these phenomena is to regard this resonance as the product of the moral hierarchy I am challenging and of our relative over-casualness about negligence. This resonance may trace more to rationalizations associated with our greater personal familiarity with negligence than to wisdom encoded in intuition. We may fail to react to negligence with sufficient strength, whether in our reactive attitudes or in our punishment practices. My thesis, however, may be defended with a more moderate observation. My point does not depend on or imply that we should react more harshly to negligence than we do or that negligence should be punished as or more harshly than malicious action. For, we may overreact to malicious action. Further, with respect to punishment, our remedial decisions may reflect considerations other than just our assessment of the degree of wrongfulness.

Indeed, I think it is a methodological mistake to take too many cues from our remedial practices, however justified. Our punishment practices do not merely express our degree of moral disapprobation. If practices of remediation also play an educative or rehabilitative function, as I think they should, then the form they take may depend upon the nature of the underlying problem and what it takes to address it. Combating malice may

involve delivering a greater shock to the system than correcting tendencies of oversight, which may require working on patterns and habits, ↳ even if the two are not so distant in terms of moral severity as the common picture allows.

But, it might be objected, punishments are supposed to be proportionate to the underlying wrong, so a harsher punishment must respond to a more significant wrong. I submit that the proportionality principle should not be interpreted in this ordinal way. I understand it as demanding that a punishment not amount to an overreaction to a wrong and, further, that the punishment be somehow fitting as a response to the wrong. What fittingness and appropriateness amount to, however, are not determined only by the nature of the wrong but also by the purposes of punishment. These purposes, I submit, are only partly expressive but also educative and rehabilitative in nature. Proportionality demands that, *inter alia*, we must not use the occasion of a wrongdoing and the liability of the wrongdoer to punishment as an occasion to accomplish any old ends we please; wrongdoing may involve some waivers of some rights, but it does not involve a wholesale waiver of all rights. This interpretation of 'proportionality' does not, however, entail that 'morally worse' wrongdoings receive harsher punishments or that justified harsher punishments signal a worse wrongdoing. Horizontal equity is not sufficiently judged simply by looking at sentencing outcomes. In the sense that she might have no complaint of unfairness, a wrongdoer may 'deserve' harsher punishment than serves any purpose. Because it serves no purpose, we should not administer it, but no injustice is thereby done to another wrongdoer who 'deserves' an equally harsh punishment and receives it where that punishment would serve a distinctive rehabilitative or educative function.

Rather than reading off the harshness of punishment and our retrospective reactions to moral failure, we could gauge the significance of a wrong by considering the magnitude of our *ex ante* investment in preventing that failure. Such consideration requires greater attention to the tremendous efforts involved in cultivating the non-negligent agent. To have the ability to act non-negligently involves the development of a sufficiently comprehensive moral understanding so that one's aims do not inappropriately overshadow other mandatory ends, the honing of one's agency to ensure one's understanding is reflected in one's action, and sufficient self-knowledge to gauge when one's individual agency requires supplementation. That's a rather heady agenda. (The earlier discussion of political non-negligence suggests parallel points about the efforts required to build and learn to participate in a democratic, consultative culture.) The cultivation of this base of knowledge and skill comprises much of our moral education and is a more nuanced, time-consuming task than conveying the basic prohibitions and the forms of self-control necessary to avoid malicious behavior. Although the greater simplicity of avoiding malicious wrongs may make the assignment ↳ of blame for transgressions easier from an *epistemic* perspective, it does not show the relevant transgressions are more severe in moral kind. It seems telling that despite the difficulty and practical effort, we do invest in the arduous effort to train agents to be capable of non-negligence.

While telling, our behavior is not so mysterious. We are interested in the achievement of our ends, the appropriate practical appreciation of their relation to other people and other ends, and avoiding calamity. The coupling of opportunities with temptations to engage in malicious behavior that threaten these interests is rare. Resisting such temptations is not normally taxing. Perhaps that is why such violations are so fascinating. Still, daily maintenance and execution of the myriad quotidian obligations is where the action is in building and maintaining moral relationships and community. Preparing the mortar and bricks and protecting them from rain, subtle shifts in ground, weather changes, and material deterioration are the first priorities of the mason, important as it may also be to prepare for the emergency of the battering ram or the calamitous earthquake.

This last point about daily maintenance motivates my conviction that non-negligence is a natural (but overlooked) topic for philosophical and legal feminists who, in other domains of inquiry, have done a great deal to unearth and celebrate the everyday work women are often tasked with, work that builds and continually replenishes the infrastructure of life.<sup>47</sup> Creating and living as a non-negligent agent involves similar

reinforcing attentions and behaviors, administered on a regular basis. Historically and still to a troubling degree, many of these behaviors happen to be performed by women, often for men, none of which may on their own stand out as heroic moments, worthy of an epic poem. In the same vein, negligence should strike feminists as a significant wrong because it often involves a failure to take the other seriously while one goes about one's business. There's a failure fully to take in the other as equally important to oneself and then to observe and react to how one's behavior affects her. When enacted repeatedly in patterned behavior, these uncorrected oversights of attention, appreciation, and appropriate response work as major mechanisms of ongoing gender oppression. Among other things, they reify an operational blindness to the structures of inequality left in place from centuries of intentional discrimination. Like points may be made about racial discrimination and the role of negligence in the persistence of racial inequality.

## Conclusion

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I have discussed why some of the arguments for the hierarchy of malice over negligence and why some of the resistance to strong moral liability to negligence seem unpersuasive. The law, in one sense, is an inspiration to this enterprise because, strangely, the framing of negligence as a wrong is more salient in legal circles than in our everyday moral talk. Yet, I have gone to some pains to explore some aspects of the significance of moral and political negligence that are submerged or absent from its legal treatment. Perhaps this absence is explained by the dominance of economic and remedy-forward approaches in law, or perhaps it is because of the special purposes the law pursues; for the latter reason, objective, legal standards of due care, vectors of criminal liability and punishment, and moral culpability may not fully overlap. My main interest has been to articulate an understanding of the moral wrong of negligence as a corrective to a sort of cultural permissiveness about negligence and to celebrate the sustained efforts and attention required for that non-negligent activity that in turn are essential components of full moral compliance. More attention and celebration may improve our moral understanding, our methods of moral education, and the quality of our efforts to achieve egalitarian relations.

Although my focus is on the moral, I do not mean to forswear all possible legal implications of these ideas. Whether we are thinking about criminal law or tort law, the general legal lesson may be that when justifying significant legal hierarchies and other legal conclusions (and vice versa), we should be dissatisfied by blunt appeals to an assumed significant moral hierarchy. We should probe deeper to ask how the distinction between malice and negligence (or finer-grained distinctions) bears upon the specific legal purposes we are pursuing or whether we are really tracking a different distinction.

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More speculatively, in light of the moral seriousness of negligence, it may well be that, legally, we should take negligence more seriously than we do.<sup>48</sup> Perhaps, for example, we should acknowledge civil causes of action for those bouts of negligence that, fortunately, do not result in harm when, nonetheless, they culpably put others at risk. Others may take my argument to suggest greater penalties for negligent behavior, whether in tort or criminal law. I am less sure. As discussed earlier, different remedial responses may fit morally comparable, but differently motivated, flaws. My thoughts turn less toward enhancing penalties for negligence than toward asking whether we might reconsider the severity of our current carceral reactions to many intentional wrongs.

One reason to re-examine negligence and the standard hierarchy is that we may be more prone to negligence and it represents a more familiar sort of moral failure. Perhaps our mutual susceptibility to negligence lures us to devalue its significance, instead of combining a serious critical stance with a generous posture of mutual forgiveness and renewed resolve. I worry that its familiarity may fuel the misconception that the moral gap between negligence and malice is more significant than it is. This misconception may, in turn, rationalize more punitive reactions to the less commonplace forms of intentional wrongs. We once made this mistake about diseases—fearing leprosy more than cancer. We're now less prone to that mistake with diseases and have

internalized that commonplace diseases like diabetes and heart disease are killers, even if often treatable, that rarer diseases are not necessarily more serious, and that taking these commonplace diseases seriously involves routine vigilance, exercise, and dietary moderation. My suggestion is that we take our everyday moral activities as seriously as we have come, at least intellectually, to take our diet.

## Acknowledgments

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Much of this paper was developed with Barbara Herman in a joint seminar we taught in Fall 2013. Although we may not converge on every point, it's happily difficult to disentangle who first thought what. For critical and constructive reactions to this material, I'm grateful to Elizabeth Anderson, David Brink, Joshua Cohen, Mark Greenberg, Barbara Herman, Tom Hurka, Mark Kelman, Mark Migotti, Sophia Moreau, Liam Murphy, Dana Nelkin, Michael Otsuka, Arthur Ripstein, Samuel Scheffler, Howard Shatz, Steven Shiffrin, Zachary Taylor, Andrew Williams, two anonymous referees, members of the University of Calgary Philosophy Department, members of the NYU Colloquium on Legal, Political, and Social Philosophy, members of the UCSD Philosophy Department, members of the Yale Center for Law and Philosophy, members of the University of Pennsylvania Philosophy Department where this paper was originally one of two Seybert lectures, members of the Stanford Political Theory Colloquium, members of the University of Toronto Law and Philosophy Reading Group, members of the University of California, Berkeley Law, Philosophy, and Political Theory workshop, and attendees of the Oxford Studies in Political Philosophy Workshop at Syracuse University.

## Notes

- [1](#) Joseph Raz's recent work marks a happy exception. See Joseph Raz, *Responsibility and the Negligence Standard*, 30 OXFORD J. OF LEGAL STUD. 1 (2010); Joseph Raz, *Being in the World*, 23 RATIO 433 (2010).
- [2](#) Sometimes, however, this point arises in the different context of wondering whether it is fair that a negligent person bear heavy burdens of liability, whether civil or criminal, for major consequences. See, e.g., Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in David G. Owen, PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (1995). I do not aim to vindicate such liability, but to explore the moral evaluation of negligence considered apart from any remedial ramifications.
- [3](#) *Elonis v. U.S.*, 135 S. Ct. 2001 (2015).
- [4](#) Id. at 2002.
- [5](#) Id. at 2005.
- [6](#) Id.
- [7](#) Id. at 2005–6.
- [8](#) Id.
- [9](#) Id.
- [10](#) Id. at 2006.
- [11](#) Id. Mr. *Elonis* also complained if the statute did not require proof of intent to threaten, it would violate the First Amendment. The Court did not reach the free speech issue.
- [12](#) I work with an objective understanding of what it is to threaten such that Mr. *Elonis* threatened his wife by intentionally communicating content that: (a) would raise apprehension of harm in reasonable recipients; (b) when his wife would foreseeably be a recipient of that content; and (c) she experienced the content as threatening. The question then is whether it makes a significant moral difference whether Mr. *Elonis* *intentionally* or *negligently* threatened her.
- [13](#) There are many. See, e.g., Larry Alexander & Kimberly Kessler Ferzan, *Confused Culpability, Contrived Causation, and the Collapse of Tort Theory*, in John Oberdiek, ed., PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 406 (2014); Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579 (2005); Matt King, *The Problem with Negligence*, 35 SOC. THEORY & PRACTICE 577 (2009); Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHILOS. 147 (2011). One classic defense of negligence against some forms of skepticism appears in H. L. A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in his PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968).

- [14](#) In particular, I do not track the meaning of negligence and other categories of culpability as they are captured in the Model Penal Code. See MPC §2.02. One important difference is that the Model Penal Code distinguishes knowledge from negligence more sharply than I believe the moral conception does. Suppose, for instance, Mr. Elonis was focused on chronicling his rage for therapeutic purposes but was dimly aware that his posts would be taken as threats, and kept pushing that concern from his mind. The Model Penal Code might classify him as knowingly threatening his wife and not as negligently threatening his wife. Whereas, if he did not purposely threaten his wife as a means or as an end, morally, this may be a case of both knowingly and negligently threatening. Another difference: the Model Penal Code classifies recklessness as acting with conscious disregard of a substantial and unjustifiable risk. MPC §2.02 (2)(c). While I agree that actions so described may be reckless, I think the moral conception of recklessness is not limited to cases of conscious disregard, but may include, as I later discuss, cases where an agent's culpable indifference, conscious or not, to compliance with the standard of due care has few limits.
- [15](#) Those inclined to think the moral conception of negligence closely tracks legal conceptions, whether from criminal law or tort, will inevitably classify some cases differently than I do. Even after some such translations, my argument suggests that at least some cases of negligence, legally construed, may be as worthy of moral concern as some cases of purposive harm and that a strict hierarchy of culpability may be worth reconsideration.
- [16](#) The emphasis on objective standards of behavior for purposes of legal accountability has also coincided with the overweening influence of economic analysis of torts and its general inattention to motives. Driven by a concern with outcomes and how to elicit them, economists largely reduce negligence law, conceptually, to the law of (preventable) accidents. In response, non-skeptical, non-economic, non-consequentialist theorists struggle to re-distinguish accidental damage from negligently inflicted damage and to remind the culture (and many skeptical philosophers) that negligence exists and that it is a wrong. Fighting this rearguard battle has deprived us of the opportunity to consider the rich expanse of moral territory in front of us.
- [17](#) Barbara Herman discusses the relationship between due care and other moral principles, ends, duties, and values in her "Thinking about Imperfect Duties," MS.
- [18](#) I deliberately sidestep whether the standard of due care is objective, calibrated to the reasonable person's understanding and behavior in the circumstances, or subjective, calibrated to what the *particular* moral agent was capable of doing and knowing in the circumstances. The use of objective standards when paired with particular remedial responses may be an important source of resistance to negligence liability. See also note 3. One interesting issue is whether the true object of some of the hostility to objective standards is not the objective standards themselves but the coupling of particular remedial responses with liability based on objective standards.
- [19](#) Here, I depart from such thinkers as Kenneth W. Simons, *Negligence*, 16 SOC. PHIL. & POL., 52, 54 (1999), who understands negligence to involve running a risk short of the definite imposition of harm. The idea that negligence involves running a risk may reflect some people's instinct that negligence involves some form of unawareness—here, the lack of knowledge of whether the risk will mature.
- [20](#) I contend this as against, e.g., Henry W. Edgerton, *Negligence, Inadvertence, and Indifference; the Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1924); Joel Feinberg, *Sua Culpa*, from his *DOING AND DESERVING* 187, 193 (1970). Others acknowledge the possibility of advertent negligence, but regard unawareness as the central case. See, e.g., Stephen Sverdlik, *Pure Negligence*, in AM. PHIL. Q. 137–8 (1993). But see Holly Smith, *Negligence*, in Hugh LaFollette ed., *THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS* (2013) (describing a negligent technician who works quickly and "consciously fail[s]" to scrub every surface).
- [21](#) Likewise, the ought-implies-can literature also oversubscribes to an overly narrow individualism in its stock examples and assumptions about the range of what a person 'can' do.
- [22](#) After he received a restraining order, his posted lyrics referred to the order, intimating it would be ineffective because he possessed sufficient explosives to "take care of the State Police and the Sheriff's Department." *Elonis*, 135 S. Ct. at 2006.
- [23](#) This represents a different way of understanding the distinction between recklessness and negligence than the legal conception of that distinction. The law may have its own institutional purposes for drawing the distinction differently, which I do not examine here.
- [24](#) Some like points might be made about Chelsea Manning and Julian Assange.
- [25](#) Snowden aimed to transform, directly, the government's methods of information gathering. He was not merely aiming to prevent an imminent episode of injustice, by contrast with the iconic protestor of Tiananmen Square (whose name remains unknown) who seemed to intervene to induce deliberation by the individual tank drivers to prevent imminent intimidation and, possibly, to prevent imminent murders by the military.
- [26](#) Glenn Greenwald, *NO PLACE TO HIDE*, 42–49 (2014).
- [27](#) Id.
- [28](#) See, e.g., Snowden's interview with Brian Williams, May 28, 2014 (available at <http://www.nbcnews.com/feature/edward-snowden-interview/edward-snowdens-motive-revealed-he-can-sleep-night-n116851>).

- 29 INSIDE THE PENTAGON PAPERS 54–55 (John Prados & Margaret Pratt Porter, eds., 2004).
- 30 That may have been too long and I am not celebrating delay as such. Still, there is an important but overlooked contrast between the cases. For his account, see Daniel Ellsberg, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* (2002).
- 31 Poitras was repeatedly detained and questioned at airports for a six-year period following the release of her documentary in 2006 about the US occupation of Iraq. See Glenn Greenwald, *U.S. filmmaker repeatedly detained at border*, Salon.com (April 8, 2012) (available at [http://www.salon.com/2012/04/08/u\\_s\\_filmmaker\\_repeatedly\\_detained\\_at\\_border/](http://www.salon.com/2012/04/08/u_s_filmmaker_repeatedly_detained_at_border/)); Complaint for Injunctive Relief, *Laura Poitras v. Dept. of Homeland Security et al.* (D.D.C.) (2015) (1:15-cv-01091).
- 32 Glenn Greenwald, *NO PLACE TO HIDE* (2014).
- 33 See also HANNAH ARENDT, *Civil Disobedience*, in her *CRISES OF THE REPUBLIC* 49 (1972).
- 34 I take there to be a difference between the *New York Times*, the *Washington Post*, and the two freelance journalists he collaborated with to publicize the revelations. These three together do not a political body make. Greenwald and Snowden were impatient and contemptuous of delays occasioned by oversight by editors. Part of their objection was to what they regarded as co-optation by the *Washington Post* and an excessively deferential relationship to the government. But, here, they seemed to throw out the baby with the bathwater. With respect to the *Guardian*, they also pushed to circumvent the sort of questioning and oversight process aimed to stimulate deliberative decisions about how responsibly to undermine illegitimate policy. See, e.g., Glenn Greenwald, *NO PLACE TO HIDE* 68–69 (2014).
- 35 *Statement of Autonomy*, #OccupyWallStreet, NYC General Assembly (November 11, 2011), accessed on October 24, 2015, at <http://www.nycga.net/group-documents/statement-of-autonomy-as-passed-by-the-general-assembly/>.
- 36 Committees and structures need not mean hierarchy. ACT UP had a democratic structure that stressed consensus as the linchpin of decision-making. See, e.g., Nathan H. Madson, *The Legacy of ACT UP's Policies and Actions from 1987–1994*, 69 NAT'L LAW GUILD REV. 45 (2012); Deborah Gould, *MOVING POLITICS: EMOTION AND ACT UP'S FIGHT AGAINST AIDS* 188–192 (2009).
- 37 See Martha F. Lee, *EARTH FIRST!: ENVIRONMENTAL APOCALYPSE* 35–37, 48–49, 58–91 (1995).
- 38 His fear was partly for others whom he did not want to place under suspicion. George Packer, *The Holder of Secrets*, *THE NEW YORKER*, 50, 52 (October 20, 2014). Some combination of concern for others and self-aggrandizement seemed to drive his conviction that he should monopolize both decision-making and responsibility, adopting the stance of a martyr.
- 39 This specific case captures a point about the broader category of active civil disobedience. Efforts to transform illegitimate political practice through illegal means implicate duties of political consultation more clearly than passive refusals to comply with injustice.
- 40 See Hannah Arendt, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).
- 41 That is, some versions of the doctrine of double effect do not draw a line between permissible and impermissible action but instead posit a comparative difference—that intending harm is *per se* worse (whether or not it is impermissible) than foreseeing harm without intending it.
- 42 Usually, the prohibition on harming innocents as a means would often escape this concern because the endeavor of conceiving harm as a means already implicates an agent's attention. Possibly one may negligently harm an innocent as a means where one is negligently unaware that those treated as means are innocents. I put this complication to the side.
- 43 Here, I assume one's action may reflect a stance that yet may not figure in one's conscious, contemporaneous mental contents. The negligent agent may not actively deny, verbally or mentally, her responsibility, but still her action may express the defects of her internal moral architecture. Jeff Helmreich illuminatingly discusses the idea that actions may express stances rather than one's momentary mental contents in Jeffrey S. Helmreich, *The Apologetic Stance*, 43 PHIL. & PUB. AFF. 75 (2015).
- 44 A reviewer's note raises two questions worth further thought: First, if others take the initiative to establish a back-up system to shield potential victims from one's patterned unconcern, does this negate an assessment of negligence? I tentatively suggest 'no'; it's important that the flawed agent herself has a role in recognizing the need for assistance and obtaining it and that it isn't all arranged for her behind the scenes. Whether others pick up her slack successfully but she is oblivious to their help, it seems like a case of negligence without harm. Second, if the flawed agent takes that initiative but the back-up system fails, is the agent responsible for the negligence that ensues, is the back-up system responsible for failing to fill the gaps of another person's shortcomings, or do they share moral liability?
- 45 As I discuss in the next section, different remedies may be appropriate for comparable wrongs associated with different motivations. For this reason, although I am unsure that the distinctions drawn by the Model Penal Code reliably track a hierarchy of moral wrongfulness, my target here is not the Model Penal Code or similar distinctions that define criminal offenses. Although the criminal law separates the conviction from the sentencing stage, our conception of what constitutes a criminal offense may be influenced by the overall purposes and activities of the criminal system. The divisions made in the Model Penal Code, and analogous divisions in the criminal law, might be justified not by the differential wrongness of the behaviors, but may reflect a preliminary judgment about the range of appropriate remedies

associated with those classes of behaviors. Without examining such arguments in detail, it would be hasty to criticize the MPC's distinctions from a legal perspective.

[46](#) Notably, though, planning and spontaneity are not reliable drivers of greater and lesser moral severity respectively. A carefully and compassionately planned, yet wrongful act of euthanasia may be a less severe wrong than a spontaneous murder in the heat of passion. I'm grateful to Mark Greenberg for the example.

[47](#) Sophia Moreau has also drawn connections between discrimination and negligence in her very interesting *Discrimination as Negligence*, 36 CAN. J. PHIL. 123 (2010). Moreau starts from a very different, motive-insensitive view of negligence—focusing solely on the objective standard and the duty of care, not on the motives of negligent agents and their defects.

[48](#) For instance, we might question the grounds for the presumption against interpreting a statute to encompass negligence liability in cases like *Elonis v. U.S.*, 135 S. Ct. 2001 (2015). Justice Alito's concurring opinion muses that "[w]hether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficient debatable" to ground a presumption against interpreting a statute implicitly to authorize criminal negligence liability (Alito, J., concurring in part, dissenting in part, at 2014). The Court's opinion hints that its decision may rest on the idea that negligence involves a lesser form of culpability. If that is another way of saying the behavior is less morally wrong, then we might reconsider the presumption. 135 S. Ct. at 2011. It is unclear whether the Court's concern with a negligence standard centers on the hypothetical worry that Mr. *Elonis* failed to recognize, as the reasonable person would, that his posts were threats, or on the hypothetical worry that Mr. *Elonis*, or other defendants like him, may have lacked the capacity to recognize, as the reasonable person would, that his posts were threats. I strain to have sympathy with the former because it is a version of the moral hierarchy I mean to challenge. The latter, if valid, seems less a concern with criminal liability for negligence than with using a particular objective standard of negligence in criminal contexts.