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The Moral Neglect of Negligence

The moral significance of negligence is frequently diminished or disparaged in the legal² and the moral philosophical literature.³ Some question whether negligence is a coherent wrong. Others grant that it is, but locate it on a fairly low rung of a moral hierarchy of wrongfulness. Whatever the flaws of the negligent person or the negligent act, they are thought to pale in comparison with the malicious person or act.

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² Ironically, the topic of legal negligence dominates contemporary torts courses to the nearly total eclipse of "intentional" torts such as battery, invasion of privacy, and intentional defamation. I suspect that the growing absence of discussion of intentional torts, and what I regard as a moral purblindness to negligence, are not accidental, but bear at least a loose connection. The overshadowing of the intentional torts by negligence has come hand in hand with the overweening influence of economic analysis of torts and a declining attention to the motives behind negligent behavior. 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 and reconsider the rich expanse of territory in front of us.

³ Some of Joseph Raz's recent work marks a happy exception. See Joseph Raz, Responsibility and the Negligence Standard, 30 OXFORD JOURNAL OF LEGAL STUDIES 1 (2010); Joseph Raz, Being in the World, 23 RATIO (2010) 433.

One reason negligence has been vulnerable is that even those philosophers who are not skeptical about negligence have too quickly accepted the idea that negligence is a rather slight wrong. Although they classify negligence as on a spectrum with the other intentional torts, they tend to accept two tenets about negligence that diminish its importance: first, that negligence is a substantially less significant wrong than intentionally inflicted wrongful damage and second, that negligence is a rather petty moral wrong. The attitude conveyed is that, considered apart from its consequences, the wrong of negligence is real, but rather paltry.⁴

I regard negligence as a rather more significant wrong, even when considered separately from its consequences. Concomitantly, I take non-negligence to be a more significant virtue. Here, I aim to defend their importance and to make some progress toward filling out the moral and political conceptions of negligence by prying them apart, somewhat, from their more desiccated legal form. I do not seek to up-end the hierarchy and argue that, all things considered and *mutatis mutandis*, negligence is always worse than malicious activity.⁵ My aim is more to explain why negligence can be a serious

⁴ Sometimes, however, this point is made in the rather 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). The point I will pursue does not aim to vindicate such liability. I hope to explore moral evaluations of negligence considered apart from remedial ramifications.

⁵ As some will hasten to object, the problem may lie with the rather blunt divide between malicious behavior and negligent behavior coupled with what will emerge as my rather capacious view of what counts as negligence. Were we to make finer grained distinctions between causing harm purposefully, knowledgeably, recklessly, and negligently, then the sense of a hierarchy, at least one at which negligence is at the bottom, would return to view. I will return to this objection in due course. For now, I'm going to work with the blunter tools of malice versus negligence, in part because this contrast plays a role in our discourse and in part because two moving parts are simpler to follow than four. I do this only because I think that adding the additional compartments and moving parts will refine but not change the basic point.

moral and political wrong, to contend that we go astray in diminishing its significance, and to disrupt the rigidity and severity of the standard hierarchy.

To give you some sense of what I have in mind, consider the example of Anthony Douglas Elonis, whose behavior was the subject of a Supreme Court case decided this year.⁶ 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. His posts “frequently included crude, degrading and violent material about his wife.” One discussed at some length whether it was illegal for him to say he wanted to kill his wife. It included details and diagrams of how one might effectively fire a mortar launcher at her home and escape with impunity. 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. Accompanying some posts were disclaimers that the lyrics were fictional and therapeutic and assorted references to freedom of speech and the First Amendment. These references, understandably, did not diminish the terror of his wife and the heightened concern of the police; they understandably felt threatened by the posts.

Mr. Elonis was convicted of threatening to harm others. Part of his successful challenge to his conviction involved the complaint that the jury was instructed only to find that he intentionally communicated what a reasonable person would regard as a threat, but that the relevant statute should be interpreted to demand that the jury had to find that either he intended to threaten his wife and others or he knew his posts would

⁶ *Elonis v. U.S.*, 135 S. Ct. 2001 (2015).

threaten them; proof of negligent threatening would not suffice.⁷ Putting aside the legal issues about statutory interpretation, I'm more interested in the moral interpretation of Mr. Elonis' conduct. Let's assume that Mr. Elonis would not have realized his fantasies to focus just on the morality of his threatening behavior as such.⁸ From a moral point of view, it does not seem obviously worse if Mr. Elonis deliberately intended to terrify these innocent people than if he were so self-absorbed in his bubble of rage that he did not allow the apprehensible likelihood of their reading his posts and their readily predictable terror to register with him as reasons to keep his ravings private. Both versions of his behavior involve subordinating the vulnerabilities and interests of other people to his perceived interest in voicing his self-indulgent and horrific fantasies, and both ways of action would show a culpable imperviousness to the evidently more important needs of others. In one version of the events, his victims' terror mattered enough to him to try to bring about; in another case, his victims meant so little to him that he didn't register their predictable terror as giving him subjectively decisive reason to alter his conduct. I'm hard pressed to say one version of the story is morally worse than another. Both pathways to others' intimidation and 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 I hope that example illustrates, my plan is first to advocate for a moral conception of

⁷ Id. His other complaint was that any interpretation of the statute that did not require proof that he intended to threaten would violate the First Amendment. The Court did not reach the free speech issue.

⁸ I will work with an objective understanding of what it is to threaten such that Mr. Elonis threatened his wife by intentionally communicating content to which she would foreseeably be an audience, would raise apprehension of harm in reasonable subjects of that content, and she experienced the content in that way. The question then is whether makes a significant moral difference whether Mr. Elonis intentionally threatened her or whether he negligently threatened her.

negligence and provide some illustrations of it and its political counterpart, focusing on some examples that a legal lens might filter out. At points, this will naturally involve a discussion of the requirements of non-negligence as such. Second, I try to explain why negligence, morally, is more important than our denigrating hierarchy tends to suggest.

While I have alluded to the negligence skeptics,⁹ I will not directly address their issues. 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 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. I start here because I think it is foolhardy and premature to resist skepticism about negligence when one is equipped only with the rather dilute and vague conception that it's some sort of harmful agency falling somewhere on a spectrum between accidents and malice. Building on those ideas to flesh out an account of its seriousness may help both to make the stakes of skepticism clearer and to survey some of the resources for answering it.

Moral Negligence

I will start with an effort to characterize the moral phenomenon of interest. I should acknowledge that what I regard as moral negligence differs from some common

⁹ There are many. See e.g., Larry Alexander and 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 STATE JOURNAL OF CRIMINAL LAW*, 579 (2005); Matt King, *The Problem with Negligence*, 35 *SOCIAL THEORY AND 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. LAW AND 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).

legal uses of ‘negligence,’¹⁰ but I think my conception has purchase and familiarity within our moral discourse.¹¹ 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 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 enough, that characterization will do but one may be negligent with respect to other moral ends than just harm avoidance. One may be negligent, for instance, with respect to a fulfilling a promissory obligation or a duty to report. A more accurate characterization (but also more of a mouthful) would have it that negligence is 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, whether as an end-in-itself or as a means to an end-in-itself, the specific consequences occasioned or risked by the lapse in due care.

¹⁰ In particular, I do not aim to track the meaning of negligence and the other categories of culpability as they are captured in the Model Penal Code. 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 very focused on chronicling his rage for therapeutic purposes but was dimly aware that his posts would be taken as threats, but 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, I think 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. While I agree that some actions so described are reckless, I think the moral conception of recklessness is not so limited to cases of conscious disregard, but may be satisfied where an agent’s culpable indifference, whether conscious or not, to complying with the standard of due care has few limits.

¹¹ Those more 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 will suggest that at least some cases of negligence, legally construed, may be as worthy of moral concern as some cases of purposive harm and, therefore, that a strict hierarchy of culpability may be worth reconsideration.

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. I will presuppose there is a plausible theory of what due care requires in various contexts given the moral values and duties governing those contexts.¹²

It may well be, though, that there is no unified theory of due care or any simple algorithm that applies across a variety of moral contexts. I think it much more likely that *what* actions or omissions are required by due care may depend a great deal on the nature of the moral values, ends, and duties appropriate to the relevant context in a way that frustrates efforts to specify general 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, but rather points toward actions and omissions necessary to show adequate respect and appreciation for distinct moral constraints, ends, and values.¹³

In any case, what efforts due care requires in any particular context are not my topic. 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 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

¹² I also deliberately sidestep whether the standard of due care is objective, calibrated to what a reasonable person could and would do and know in the circumstances, or subjective, calibrated to what the particular moral agent was capable of doing and knowing in the circumstances. I speculate that some of the moral resistance to negligence liability stems from the use of objective standards when those are paired with particular remedial responses, as I note *infra*. It is a topic for another set of papers whether, morally and legally, any difficulty lies with the use of an objective standard to assess liability or lies with the use of particular remedial responses.

¹³ Barbara Herman discusses the relationship between due care and other moral principles, ends, duties, and values in her “Thinking about Imperfect Duties,” ms.

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 point to some further, far more pedestrian examples of what I take to constitute negligence, just to establish potential common ground. Non-skeptical readers need not agree with these examples to proceed, but may mentally substitute other examples of conduct they agree constitutes 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, checks 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 thus, likely increasing the percentage of products with defects.
4. A professor makes an appointment to meet a student but does not write it down because she is doing something else. 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 light 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, there's a 50% 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 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 in that 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 the 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 a bad outcome does ensue, it's no surprise – just as the same may be said of malicious action when the attempted battery succeeds in breaking a nose.

Second, negligence, as I understand it, is characterized by the agent's motive – how her reasoning motivates her action (and what her reasoning omits). In characterizing this motive, it is notable that negligence 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. One might even decide to be negligent as such. Worried that one has been too tense and too slavish a rule-follower, one may try to liberate oneself and demonstrate one's beguiling rakishness by deciding to put one's faith in the universe – e.g. by not calling the reference or by letting an extra week go by after the repair signal illuminates before attending to one's brakes. (I know...these are pretty irresistible demonstrations of charm.)

And contrary to how some characterize the matter, negligence does not always involve running a risk.¹⁴ One may be negligent when it is rather definite that *some* harm will result. Think of the manager who knows layoffs will lead to more minor defects or the parent who neglects, for a period, to attend to her child's emotional needs. Consciously permitting a definite harm of small proportions may, I suggest, constitute a form of negligence. Hence the distinction between malice and negligence is not the

¹⁴ Here, I depart from such thinkers as Kenneth W. Simons, *Negligence*, 16 *SOCIAL PHILOSOPHY AND POLICY*, 52, 54 (1999), who understands negligence to involve running a risk short of the definite imposition of harm. The idea negligence involves running a risk is connected to the instinct some have that negligence involves some form of unawareness – here, the lack of knowledge of whether the risk will mature.

distinction between advertence and inadvertence, awareness and unawareness, or even certainty versus running a risk.¹⁵

Rather, the distinction 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 with respect to 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 over-estimate her abilities or under-estimate 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 (though required for others) 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 mis-valuation of the importance or relevance of one's

¹⁵ 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, AMERICAN PHILOSOPHICAL QUARTERLY 137-8 (1993). But see Holly Smith, Negligence, Hugh LaFollette ed., THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS (2013) (describing a negligent technician who works quickly and "consciously fail[s]" to scrub every surface).

private ends or of one's abilities). Importantly, the mis-estimation of agency may also 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.)¹⁶

There is a wide range of 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, albeit for the merely negligent agent, 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 how we fill in the details, Mr. Elonis might be taken to be simply negligent if he would have stopped once confronted with the evidence that his subjects were scared; on the facts as reported in the opinion, where he continued posting after being visited by the FBI, without more detail, it seems a toss-up whether he was maliciously aiming to instill fear or whether he was extremely reckless.)¹⁷ 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

¹⁶ 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.

¹⁷ After he received a restraining order, his posted lyrics referred to the order and intimated it would be ineffective because he possessed sufficient explosives to "take care of the State Police and the Sheriff's Department."

bulk or the whole of her duty will go by the wayside. The reckless agent, then, represents the extreme or limit case of negligence.¹⁸

A different way of putting the point is by reference to the doctrine of double effect. Although the principle has many formulations, a general version of it says roughly that: 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 the person 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 deliberately with the second limit of the doctrine of double effect -- by not paying due attention to the significance of the 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 negligence need not involve inadvertence. The negligent agent does not intend the harm she causes, but she culpably permits her possibly innocuous primary intention to do all her moral work. Our discussions of the doctrine of double

¹⁸ This represents a different way of understanding the difference between recklessness and negligence than the way the law often understands that distinction [add MPC]. The law may have its own institutional purposes for drawing the distinction a different way and I do not pretend to offer an argument against the legal conception.

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 to emphasize: 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 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 want to turn for a spell to the political side and the obligations of non-negligence for citizens, partly because the terrain is less familiar, hence less saturated with legal intuitions. I'm eager to avoid those legal intuitions, just now, because another limitation of the legal literature and 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 if one is overly wedded to this lens. 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.

Political negligence, like moral 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) underestimation of the importance of one's own vigilance and public participation. This underestimation may complement an over-estimation of the abilities, efforts, or importance of others, yielding a different path to rationalizing permissions to make an exception for oneself. The under-estimation 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-under-estimation 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. I want to turn to the harder realm of non-ideal theory and particularly to the issue of what non-negligence requires when fulfillment of one's duty to stay sufficiently informed and the duty to support just institutions generate a conflict with the default practice of legal compliance. That is, I suggest we think a little about civil disobedience and a recent part of that tradition that recently seems to have been forgotten or to use a cognate, *neglected*.

I will focus on the example of Edward Snowden.¹⁹ Most of the current debate about whether Snowden is a hero or traitor seems to be about *what* he disclosed and *whether* he should have disclosed it.²⁰ 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, on which a light had to be shone. Of course, we may be unaware of damage caused by the revelations or it may be yet to surface, 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, the case is a good one to illustrate my claim that one may be negligent without bringing about a bad consequence.

¹⁹ Some like points might be made about Chelsea Manning and Julian Assange.

²⁰ And, a bit, who is responsible for any collateral damage from his disclosures.

For, I regard Snowden as negligent, not for *what* he revealed but for *how* he conducted his revelation campaign. I will describe how I would characterize Snowden's actions and why they trouble me to bring out 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.²¹ Rather, he behaved as a political actor, making major political decisions. He took it upon himself to move from job to job with the purpose of collecting classified information with the ultimate aim of unilateral revelation; 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 a variety of affected agencies and persons to prepare responses, apologies, explanations, and other gestures of mitigation and repair.²² 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 rather massive reforms. His actions were not just political in effect but in intent. In his own descriptions, he engaged in these policy reversals in the name of his status as a U.S.

²¹ Snowden aimed to transform the entire practice of government, both its methods of information gathering and its method of reform. He was not merely aiming to prevent an imminent episode of injustice, by contrast with the iconic lone 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, further murders by the military.

²² Glenn Greenwald, *NOWHERE TO HIDE*, xx (2014).

citizen, “doing this to serve my country...working for the government,” as he saw it, by forcing the government to comply with its deepest ideals.²³

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 other words, in responding to a rather substantial defect in our political institutions, he not only abandoned allegiance to our particular, illegitimate 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. These claims may all be true even if we affirm, with Snowden, that the situation merited departure from the rule of law as interpreted and administered by our government.

The obvious analog, Daniel Ellsberg and the Pentagon Papers, provides an instructive contrast. Unlike Snowden, Ellsberg did not unilaterally collect and disseminate classified information to the public. 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 U.S. Senators, his spouse, and members of the Institute of Policy Studies, a think tank involved in analysis of policy in Southeast Asia. Many of those he consulted were experts in the area, enmeshed within organizations that themselves debated the relevant

²³ See e.g., Snowden’s interview with Brian Williams, May 28, 2014 -- <http://www.nbcnews.com/feature/edward-snowden-interview/edward-snowdens-motive-revealed-he-can-sleep-night-n116851>.

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 political process to reason through the risks of the disclosures and the public's vital interest in the information, consulting only minimally with Ellsberg.²⁴ All told, Ellsberg's process involved consultation and deliberation with a range of other knowledgeable, disinterested people and institutions over more than a year.²⁵

Snowden, by contrast, unilaterally embarked on a mission to collect information for exposure, including changing jobs for the sole purpose of gaining more information with the intention to distribute it.²⁶ Thereafter, he consulted only two free-lance journalists who themselves understandably maintained a strong degree of distance from and contempt for political and institutional structure, whether of the government or of alternative organizations with some interest in deliberate procedures.²⁷ I do not doubt their sincere commitment to transparent government but they did have a strong personal-professional stake in these revelations. Snowden approached the Washington Post only because he believed his efforts to bypass traditional journalism were failing; thereafter, he showed irritation at the Post's efforts to engage in independent assessments of the merits of publication, so he put the Post aside to pursue alternatives. Snowden's timeline for revelation seemed largely driven by impatience and the materials were released within a whirlwind of days from the moment of his first successful contact with Glenn

²⁴ INSIDE THE PENTAGON PAPERS 54-55 (John Prados & Margaret Pratt Porter, eds., 2004)

²⁵ 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).

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²⁷ Discuss Poitras' treatment by border officials.

Greenwald.²⁸ 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 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 are 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. The whole point of properly political activities is that they 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 political structure to deliberate about the most responsible and effective forms of resistance.²⁹ This may seem like a demanding, perhaps impossible requirement. One could not expect Snowden to

²⁸ Glenn Greenwald, *NO PLACE TO HIDE* (2014).

²⁹ See also Hannah Arendt, *Civil Disobedience*, in her *CRISES OF THE REPUBLIC* 49 (1972).

create a bi-cameral legislature and an executive to debate and craft an appropriate mechanism for dismantling these totalitarian policies. Non-negligent civil disobedience cannot require the establishment of a full shadow government. True enough.

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 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 Electronic Frontier Foundation comes to mind.³⁰ So do experienced attorneys such as those at the ACLU who 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 4th estate with whom Snowden could have cooperated, rather than merely used and circumvented when it attempted to exercise independent deliberation of its own.³¹

The fault, of course, 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

³⁰ It was on Snowden's too. Snowden "wore an Electronic Frontier Foundation hoodie to work." George Packer, *The Holder of Secrets*, THE NEW YORKER, 50, 59 (October 20, 2014).

³¹ Here, I take there to be a difference between the New York Times, the Washington Post and the behaviors of freelance journalists. It is, of course, true that, rather than just releasing them directly via the internet, Snowden worked with Laura Poitras and Glenn Greenwald to publicize the revelations. So I grant that Snowden did not work in complete isolation. But 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 as well, they pushed to circumvent the sort of questioning and process associated with oversight and deliberative decisions about how responsibly to undermine illegitimate policy and to force rather quick policy reconstruction. See e.g., Glenn Greenwald, *NO PLACE TO HIDE*, 68-69 (2014).

the right is extremely well-organized, the left has, largely, become populated by a rather different set of left-libertarians than those imagined in the distributive justice literature. 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. Consider the intentional disorganization of the Occupy movement,³² the most important domestic alternative political activity of the last five years. Although its lack of structure signaled a kind of openness to input, it also reeked of a libertarian or anarchist disdain for accomplishing much beyond the admittedly important tasks of criticism and the disruption of social complacency. So, here is an example of a mass(ive) practical underestimation of the significance of active political agency by individual citizens meeting personal over-estimation in the guise of Snowden – one form of negligence enabling another.

The contrast with other major resistance movements of the 20th 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.³³ So too for EARTH First!.³⁴ Such groups are not full-fledged political entities: they tend not to be maximally inclusive, even if they are internally radically democratic, and they tend to

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³³ 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).

³⁴

have a narrow focus that is issue-specific and that privileges 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 in turn connects with a tolerance for 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 and defiance are not only appropriate but a duty, no single person can coherently and responsibly undertake to make massive decisions with wide-ranging political ramifications on his own and to resist all those who might question those decisions.

You may disagree with me about the resources available to Snowden and worry that I under-appreciate the personal risks he faced. I am certainly sympathetic that wider consultation would have been frightening and given the risks, would have required great care, although Snowden seemed equipped to take such care; if Snowden was frightened, I can see how that might excuse, if not justify, his solitary approach.³⁵ Perhaps I am overly optimistic about how a more politically deliberate revelation could have gone down. (Although I am more confident in my assessments of Snowden's and Greenwald's motivations, impatience, and self-importance.) That dispute, however, is not about whether the process of revelation was or was not negligent, but rather where the negligence is predominantly situated – whether in Snowden, Greenwald and Poitras alone or in the public for failing to ensure the existence of enough safe, extra-governmental

³⁵ And, it is worth acknowledging that 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, thereby taking the stance of a martyr.

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.³⁶ In doing so, he was negligent with respect to the possible harm he might cause to particular people and to particular 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.

So, 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 the risk of such an 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 an equal by failing to recognize them fully (in the relevant context).

The Significance of Negligence

³⁶ 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 evidently than passive refusals to comply with injustice.

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. I am not interested in arguing 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, as it is often treated, 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.

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 to recognize and acknowledge their moral significance. Such failures, of course, may have dire consequences and, 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.³⁷ When, unlike Snowden, political negligence takes the form of apathy or operates through forms of unthinking obedience, the negligent actor may become a tool or lever 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 rather more rare collaborations between the actively malicious. These are non-accidental by-products of a more basic defect of the negligent agent, which involves the basic failure to treat her own

³⁷ See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963).

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 more because she had opted out – as though she wore earplugs during part of the relevant briefing.

Framed in this way, there is of course a contrast with the malicious agent, but it is hard, I think 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 actively prioritizing her welfare over others in unacceptable ways. 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 or laziness. Whereas, the malicious agent's intellectual conception has positive defective components. 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 and therefore fails to treat others as equals. It is unclear why we should regard one defect as more serious or morally significant than the other in any general sort of way. (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 error 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 just 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 omission – 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 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.

A further related line of resistance to moral liability for negligence stems from the concern 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 happen to have, since one cannot control one’s thoughts.

Of course, negligence need not always involve a failure to notice. One may be perfectly 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, I find this argument puzzling. We hold people accountable all the time for the failure to have certain thoughts. Standard examinations reward students for having particular thoughts and expressing them and penalize them for the failure to know or remember certain facts or the failure 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, can enact internal and external mechanisms of learning, reminders, and aid to ensure that either one does remember, that one avoid situations in which such recollection or sensitivity 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 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.³⁸ 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 often 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.

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

³⁸ Thinking in this way may also help to separate out issues about the relative risk or danger posed by the malicious agent versus that posed by the negligent agent. 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. The implicit frame in this contrast seems to me to be a flawed way of investigating the comparative question. The negligent agent who subjects others to her negligence may cause harm only .1% 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 .1% 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 slight risk to others while a dedicated mass murderer will be supremely dangerous. It is difficult to generalize. The question I am pursuing is whether, holding things like risk 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.

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. Whatever justifies the doctrine of double effect is what 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.

I do not find this move persuasive, but it is not because I reject the doctrine of double effect – as is probably evident from my invocations of it. I should start by explaining that the hierarchy does not directly follow from the doctrine. 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 not be an illuminating explanation but just a repetition of the very thesis in question. On the justification that I think is promising, the traditional hierarchy does not glean support from the doctrine of double effect. Roughly and tentatively speaking, I think 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. is isn't merited by the recipient's past behavior or 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. 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. (Note, though, that 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.)³⁹ Still, given the badness of harm, our interconnection, and our interests in each others' 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.

That agency-oriented justification does not give us any 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. Negligent harm involves at least a partial abdication of responsibility. The malicious agent, through action, denies that a person's harm really is a bad worth forswearing; the negligent agent's action does not express *that* but instead expresses the denial that she has anything untoward to do with a

³⁹ It is, of course, possible that 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.

harm that should not have occurred.⁴⁰ The negligent agent's implicit denial goes to her own agency and her 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 simply 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 agree with the methodological point, with respect to some major factors, I remain unconvinced that a finer grain vindicates the hierarchy.

It may help to look more closely at three major factors: patterned vs. atypical behavior; knowledge vs. ignorance; and readily available vs. difficult inferences, observations, or moral insights. Perhaps one might be inclined to think that malicious actions and negligent actions are more likely to be on a par where the negligent actions involve patterned behavior, knowledge or advertence, or at least, where one's duty could

⁴⁰ Here, I assume one's action may reflect a stance on one's part that may or may not be reflected in one's contemporaneous mental contents. The negligent agent may not actively and explicitly mentally deny her culpable involvement during or after her negligence, 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 "The Apologetic Stance," forthcoming in *Philosophy and Public Affairs*.

easily be apprehended, but that the hierarchy is more plausible when these factors are missing. Let's examine these factors in turn. Just 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 concern, 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, the fact that the harm was inadvertently caused on the occasion does not seem to reduce the severity of the wrong or render it evidently less substantial than purposeful harm.⁴¹ 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 am not sure that it is one that turns on the contrast between the purposeful 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, notably, that would also be

⁴¹ As I will discuss in the next section, very different remedies may be appropriate for comparable wrongs associated with different motivations. For this reason, although I am not sure that the distinctions drawn by the Model Penal Code reliably track a hierarchy of moral wrongfulness, my target in this paper is not the Model Penal Code or similar distinctions that help to 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, I think it would be hasty to criticize the MPC's distinctions from a legal perspective.

true in the case of purposeful, malicious behavior as well. 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.

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 – such as the case 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 is running it may seem to some 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 not convinced. Again, I am assuming we are discussing cases in which there is a wrong for which the agent is responsible. So, I am assuming that an agent may be culpable for some derelictions of duty even where he is unaware he is running a risk or inflicting a 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 capable for his inadvertence in the case, I am not convinced that the hierarchy only falls under attack where we have a case combining advertence and negligence. To return to the example at the beginning of the paper, 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 and, paying no attention to who would read his on-line posts, he was unaware that his online rantings ran a substantial risk of threatening his wife. 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 those cases where knowledge of the risk or harm was not just absent from operative awareness but would have required unusual effort or unusual imaginativeness to come by, or, in some other way, the hazard really is unusual and was understandably far from the mind of the agent. Negligence under such situations, it might be objected, may be culpable but less serious than purposeful 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.

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 clearly and obviously wrong, people are capable of great rationalizations for deliberate, wrongful inflictions of harm, especially when under strain or stress. Those rationalizations may also be intellectually and emotionally difficult to suppress or resist. I am not sure we are in a 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.

I suspect that unusual difficulties of compliance speak more to a partial excuse of the agent in the circumstance 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 what those standards demand 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, again, 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 purposeful harm may be worse than some acts of negligent harm. That is, my skepticism 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.⁴² 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

⁴² Notably, though, planning and spontaneity are not reliable drivers of greater and lesser moral severity. 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.

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 in their moral severity. Such distinctions are compatible with thinking that the episodic lapse of the passionate killer and the episodic lapse of the negligent killer, both lapses supported by 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.

Reasoning from the Remedy

Another reason the moral significance of negligence may be disparaged or doubted is that we tend to punish it less severely or harshly than malicious action and this differential treatment resonates with us as appropriate. Of course, that resonance may be the product of the moral hierarchy I am challenging and of what I take to be our mistaken relative casualness about negligence. Perhaps. We may fail to react to negligence with sufficient strength. Importantly, though, my point does not depend on or imply that conclusion or the stronger conclusion that negligence should be punished as or more harshly than malicious action.

Instead, 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, although they do play some communicative role. If practices of remediation play an educative or rehabilitative function, as I think they should, then the form they take may depend upon what it takes to address the underlying problem. Combatting malice may involve a delivering 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 than a lesser punishment. I think the proportionality principle should not be interpreted in this ordinal way. I understand it as demanding that a punishment not amount to an over-reaction to a wrong and, further, that the punishment be, somehow, fitting as a response to the wrong. What fittingness and an appropriate reaction amount to, however, are not determined only by the nature of the wrong but by the purposes of punishment. As I just mentioned, these purposes are only partly expressive but also educative and rehabilitative in nature. Proportionality demands that, *et alia*, we must not use the occasion of a wrong-doing 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 looking at the harshness of punishment, another way we could gauge the significance of a wrong would be to ask not only about our *ex post* reactions to failure but also about the magnitude of our *ex ante* investment in preventing that failure. This 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 some 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 similar 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 more 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 does seem telling that despite the difficulty and practical effort, we do invest 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 and their avoidance is not normally so taxing. Perhaps that is why such violations are so fascinating. But, really, 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.⁴³ 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 performed 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

⁴³ Sophia Moreau has also drawn connections between discrimination and negligence in her very interesting “Discrimination as Negligence” in *The Canadian Journal of Philosophy*, Supplementary Volume on “Justice and Equality”, ed. Colin MacLeod, 2012, pp. 123-150. 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.

significant wrong because it often involves a failure to take the other quite seriously while one goes about one's business. That is, 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

I have, thus far, been explaining 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, non-legal 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 and moral culpability may not fully overlap. My main interest has been to articulate an understanding of the 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.

But, 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 a 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.

More speculatively, in light of the seriousness of negligence, it may well be that, legally, we should take negligence more seriously than we do.⁴⁴ Perhaps we should acknowledge civil causes of action for those bouts of negligence that, fortunately, do not result in harm. Others may think my argument suggests 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

⁴⁴ For instance, we might question what the grounds are for the presumption against interpreting a statute to encompass negligence liability in cases like *Elonis v. U.S.*, 135 S. Ct. 2001 (2015). The Court 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. See also, Justice Alito's concurring opinion musing that "[w]hether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficient debatable" as to ground a presumption against interpreting a statute implicitly to authorize criminal negligence liability (Alito, J., concurring in part, dissenting in part, at 2014). One frustrating aspect of *Elonis* is that 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 seems like 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 version of a negligence standard in criminal contexts.

we might reconsider the severity of our current carceral reactions to many intentional wrongs.

That is, 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 for many of us. 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 more rare 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.
