

## Minding Negligence

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### Abstract

The counterfactual mental state of negligent criminal activity invites skepticism from those who see mental states as essential to responsibility. Here, I offer a revision of the mental state of criminal negligence, one where the mental state at issue is actual and not merely counterfactual. This revision dissolves the worry raised by the skeptic and helps to explain negligence's comparatively reduced culpability.

### Paper

Because driving is a quotidian feature of our lives, we sometimes pilot our high-speed vehicles with dangerously insufficient attention. In the early spring of 2008, Jeri Dawn Montgomery was headed to I-45 near Houston, Texas.<sup>1</sup> Because she was talking on her phone, Montgomery belatedly realized she was passing the entrance to the highway. In her effort to move on to the highway, Montgomery cut off a three-quarter ton pickup truck,<sup>2</sup> causing a collision that sent her SUV into a third vehicle, which spun and flipped, ejecting a passenger who died on the scene. Montgomery was convicted of criminally negligent homicide.

Although Montgomery should not have been talking on the phone while driving, her conviction for criminal negligence might give us pause. Criminal culpability paradigmatically requires a culpable mens rea, or mental state. Thus, we ask what intentions, knowledge, or awareness relating to the crime marked the defendant's mental state. However, Montgomery's negligence conviction reflected the court's conclusion that, while Montgomery should have realized she was acting in a dangerous fashion, she was unaware of the danger. Insofar as being unaware of the danger is the absence of a mental state, it might seem that the mens rea requirement is not satisfied in cases of negligence. This leads some philosophers to be skeptical of culpability for negligence.

We can answer this worry about negligence by identifying an actual mens rea for negligence, and we can do that by pairing the guidance-control account of moral and legal responsibility with a sufficiently rich account of executive agency. Here, I use the executive theory account of moral responsibility laid out in William Hirstein, Katrina L. Sifferd, and Tyler K. Fagan's *Responsible Brains* (2018) to defend culpability for criminal negligence. Their appeal to a complex set of executive functions to explain criminal responsibility allows us to identify an actual, and not merely counterfactual, mens rea for criminal negligence, one sufficient to satisfy

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<sup>1</sup> For further details as well as consideration of the relevant mens rea element of the negligence offence involved, see *Montgomery v. Texas*, 369 S.W.3d 188 (Tex. Crim. App. 2012). Many cases of criminal negligence in the public record are driving cases, reflecting the combination of high stakes and easy familiarity that marks driving.

<sup>2</sup> A three-quarter ton pickup truck is a pickup truck rated to carry three quarters of a ton; such trucks often themselves weigh nearly five tons without their payload.

the guidance-control notion of agential control. In paradigmatic cases of negligent wrongdoing, we are responsible for negligent wrongdoing because our executive functions take up the features of our activity relevant to it being risky even if we fail to appreciate or attend to that riskiness. That executive functioning is the mens rea sufficient to provide the control needed for culpability.

### **1. The Standard Objection to Culpability for Negligence**

The standard objection to culpability for negligent wrongdoing is that negligent agents are not culpable because they lack the necessary mens rea, and this objection is often grounded in a connection between mens rea and control.<sup>3</sup> We see the idea that control is a necessary condition of culpability in both moral philosophy on interpersonal blame and legal philosophy on criminal culpability.<sup>4</sup> The control requirement demands more than physical possibility; the control required for culpability is agential control. This agential control requirement can explain why duress, insanity, and immaturity excuse.<sup>5</sup> There is a close relationship between awareness and agential control. It might seem that our agency is implicated in our behavior sufficient for responsibility only when we are aware of or otherwise mentally engaged with the relevant facts. Thus, one essential element of the control required for criminal culpability is a mens rea element, the mental activity involved in the wrongdoing.

This leads to a problem for criminal negligence. Consider the Model Penal Code's definition of negligence:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. (MPC § 202(2)(d))

On the Model Penal Code's definition, you should have been aware of the relevant risk. By tacit implication, however, you were not aware of the risk; had you been aware of the risk, you

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<sup>3</sup> Although this is the standard objection to criminal negligence, it is certainly not the only important question relating to negligence. The family of objections that includes the standard objection denies that negligent wrongdoers are responsible for their negligence. Another family of objections is skeptical that we can satisfyingly distinguish negligent wrongdoing from risky non-wrongdoing. My suspicion is that my answer to the standard objection might also help us to answer those further questions, but I set them aside as separate from the heart of the standard control objection.

<sup>4</sup> For key texts on the moral philosophy side, see Harry Frankfurt (1969) and John Martin Fischer and Mark Ravizza (1998). For key texts on the legal philosophy side, see H. L. A. Hart (2008), Joseph Raz (2010), and Antony Duff (2009a; 2009b). For a systematic connection between the two, see David Brink and Dana Kay Nelkin (2013).

<sup>5</sup> See, for instance, Brink (2021) for a powerful survey of the explanatory power of compromised and absent control. The mental element of control is especially apparent in the criminal law's insanity defense, illustrated by Model Penal Code § 4.01.

would have been reckless.<sup>6</sup> Thus, negligence involves the absence of a mental state that should have been present.

But if you do not have the relevant mental state, how can your agency be implicated in a fashion sufficient for culpability? A number of philosophers have pushed this skepticism. For example, we see this skepticism from Matt King: “The problem with negligence begins with the simple observation that while negligence is characterized by the lack of a conscious mental element, paradigmatic cases of responsibility seem to require at least some conscious mental element tying the agent to the outcome in question” (2009, 579). We see it from Holly Smith: “it seems unfair to hold an agent responsible for failing to meet some requirement when she is unaware the requirement demands something of her in the present case” (2012, 3565). And we see it from Larry Alexander and Kimberly Kessler Ferzan: “The ‘could have adverted to the risk’ position is directly at odds with the voluntary act principle as a reflection of the value of restricting punishment to choices over which the actor has fair control” (2009, 83). As Ori J. Herstein explains in describing the ostensible problem: “In such cases there seems at least on the face of things, no responsibility-establishing connection between one’s practical agency and one’s conduct ... [W]hen negligent our agency appears disengaged from our (accidental) conduct rather than involved in carrying it out” (2019, 113). So, shouldn’t we be skeptics about criminal negligence?

## **2. Three Common Defenses of Culpability for Negligent Wrongdoing**

Although the theoretical grounds for criminal negligence skepticism can seem compelling, the intuitive culpability of putatively negligent agents is likewise powerful. Resentment, indignation, and guilt are all appropriate responses to Montgomery’s behavior, and we can meaningfully distinguish her from Bernard Williams’s (1981) lorry driver, who accidentally and non-culpably kills while driving. Three common responses to the claim that the lack of relevant awareness tells against holding agents like Montgomery responsible point to alternative actual grounds of culpability in place of normative counterfactuals about awareness.

First, philosophers have pointed out that many cases of seeming negligence might actually be cases of recklessness. According to the Model Penal Code, “A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct” (MPC § 2.02(2)(c)). Recklessness requires an actual mental state, the conscious disregard of a substantial and unjustified risk. Perhaps the putatively negligent agents were actually aware of the nature of their behavior at the time, making them reckless rather than negligent.<sup>7</sup> This

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<sup>6</sup> As Marcia Baron (2020) points out, recklessness as defined by the Model Penal Code requires more than mere awareness of the risk; it requires conscious disregard of the risk. Supposing (plausibly) that one might be aware of some downside without consciously disregarding it (and, given the fact of wrongdoing, without heeding it), Baron identifies another path to the mens rea of negligence: cases of awareness without conscious disregard. Given the exploration of the mens rea of negligence I offer here, where the agents involved are not aware of the risk involved, I set aside without rejecting Baron’s further possibility.

<sup>7</sup> Proving their awareness might be difficult in the absence of a confession. Douglas Husak (2011, 201–02) presents a nice account of the heightened practical challenges of proof in cases

strategy might help reduce the extent of our concern about capturing our casuistic intuitions. However, as is pointed out by negligence defenders like Douglas Husak (2011) as well as critics like Alexander and Ferzan (2009), this response fails to capture cases of true negligence. If, as is plausible, Montgomery never thought about the riskiness of her behavior, then she did not consciously disregard that risk, and so she was not reckless.

A second strategy is to replace the control requirement.<sup>8</sup> If the demand for mens rea stems from the control requirement, we might avoid that demand by finding a basis for culpability other than control. We might, for example, attempt to justify the criminalization of negligence on forward-looking grounds. Insofar as criminal negligence is dangerous behavior, perhaps we can justify criminalizing it as a tool aimed at reducing it. This strategy faces its own challenges, centrally how an agent can be deterred from acting in a risky way if she is unaware that she is acting in a risky way. Even supposing that advocates of forward-looking views can address challenges like this, abandoning control for a forward-looking scheme is a revisionary strategy in deep tension with seeing criminal punishment as a fitting response to culpable wrongdoing.

Alternatively, we might replace the control requirement with a requirement that the wrongdoing manifests some flaw we attribute to the wrongdoer. For example, perhaps negligence is the manifestation of the failure to be sufficiently concerned about others' interests.<sup>9</sup> If a lack of sufficient concern explains why Montgomery was not aware that her behavior was dangerous, and if the manifestation of the lack of sufficient concern is culpable, then we can explain Montgomery's culpability despite her lack of awareness. Advocates of this explanation of culpability for negligence must explain manifestation. Does culpable wrongdoing evidence the underlying flaw? Is a mere causal relationship enough? Advocates of this explanation of culpability must also provide a satisfying account of the relevant underlying flaw. Consider the appeal to sufficient concern. Sufficient concern surely is not perfect concern, and so a sufficiently concerned agent might nonetheless sometimes create unjustified risks.<sup>10</sup> Those risky acts would escape a sufficient-concern theory. More important, however, is that appealing to manifestation in place of control is a significant theoretical revision. Perhaps the right

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of negligence, practical challenges that are faced by both the skeptic's explanations and my own. I set aside those challenges throughout this paper.

<sup>8</sup> This replacement need not be a wholesale revision of the control requirement for all legal wrongs. For an example of a partial revision, see A. P. Simester (2013), and for an example of skepticism about partial revision, see King (2009).

<sup>9</sup> For two examples of manifestation arguments along these lines, see Kenneth Simons (1994) and Findlay Stark (2016). See also Samuel Murray's (2020) account of failing to allocate sufficient psychological resources as well as the dog's-breakfast agential failures identified by Michael Moore and Heidi Hurd (2011). For criticism of manifestation arguments, see Alexander and Ferzan (2009, 71–77), King (2009, 583–87), and Smith (2012).

<sup>10</sup> See Santiago Amaya and John Doris (2014, 255) for a particularly nice discussion of moral performance mistakes as wrongs whose "occurrence cannot be traced to a lack of moral concern on the part of their agents." I have argued elsewhere (2020) that the defense of duress should apply in at least some cases where agents do wrong precisely because of some good feature of their moral psychology, complicating my response here.

account of criminal culpability for negligence is a manifestation account. It would be good to know, however, whether an account of criminal culpability grounded in control has a satisfying response to the negligence skeptic.

Finally, we might attempt to explain cases of true negligence while retaining the commitment to control and the concomitant mens rea requirement by appealing to tracing.<sup>11</sup> The tracing strategy points to earlier opportunities to exercise control over our later wrongdoing. We look for some prior time when the agent could have acted to prevent the later risky behavior, and if we find a sufficient mental state there, we explain the agent's control and thus responsibility over the ultimate imposition of risk by pointing to the prior mental state.<sup>12</sup>

Broadly categorized, there are two different ways to exercise earlier control. First, you can change the circumstances you will find yourself in. We control when we wake up by setting an alarm clock before we go to sleep. Suppose that Montgomery had been aware both that driving while talking on the phone is a dangerous activity and that talking on the phone is an especially tempting distraction for her. She might have acted on that knowledge by putting the phone out of reach at the start of her drive, perhaps placing it in the glovebox. Second, you can change your own agency. This does not require remaking yourself entirely. We change aspects of our agency often, such as when we inculcate new habits or dispositions. For example, Montgomery might have acted on her awareness of her dangerous inclination to talk on the phone while driving by mindfully reminding herself not to look at the phone, drive after drive, until she ingrained a settled disposition to avoid her phone.<sup>13</sup> Given those indirect strategies for

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<sup>11</sup> Hirstein, Sifferd, and Fagan appeal to this tracing strategy to account for at least some cases of culpable negligence. See (2018, 51, 133–37). For other examples of tracing-style explanations, see Hart (2008, ch. 6) and Baron (2020, 77–79) (among many others).

<sup>12</sup> We should be careful to distinguish tracing explanations of negligence from culpable-ignorance substitution. Both are responses to putatively culpable agents who lack some relevant mental state. Some jurisdictions treat ignorant agents as if they were knowing when they satisfy certain conditions, e.g., certain causal histories. See Alex Sarch's (2019) exploration of this sort of substitution. On the tracing strategy, however, negligent agents are not treated like non-negligent agents, i.e., like reckless (or knowing or purposeful) agents. They are held responsible for a negligent wrong.

<sup>13</sup> Hirstein, Sifferd, and Fagan describe the case of Bert, who forgets that he is to watch his children over the weekend and flies to Las Vegas instead, leaving them unsupervised. By hypothesis, Bert was wholly unaware of his abandoned children when he flew off. We might nonetheless hold him responsible for their abandonment given his failure to take prior precautions. What could he have done?

[Bert] might have trained himself to pay close attention to actions that might affect his children by imagining their faces when a decision that affected them arose. He might have utilized a hard rule of writing down every aspect of the schedule with his children to avoid lapses. Knowing that he tended to tune his ex-girlfriend out to avoid conflict over the children, Bert could have practiced focusing on her communications about their children nonetheless. Bert also could have engineered his environment such that he was less likely to forget his parenting schedule (he could have set a reminder or kept a calendar) and practiced the process of deliberative self-control by slowing down and

exercising control, we might explain Montgomery's culpability for her dangerous driving by pointing to her failure to exercise any strategy like that despite having been aware of the potential danger.

These strategies are both ordinary and admirable. We put the tempting snacks at the back of the cabinet, we set running clothing out before we go to sleep, and we meditate to gain better control over our attentions and anxieties. We have good reason to make better agents of ourselves and to place ourselves in more salubrious circumstances. Manuel Vargas (2013) and Derk Pereboom (2014) look to these possibilities as providing rich aims for our blame (or quasi-blame) practices, and Hirstein, Sifferd, and Fagan's discussion of executive functioning can help us identify how we might better intervene on ourselves in the ways imagined by tracing's advocates as well as theorists like Vargas and Pereboom.

However, tracing is unlikely to provide a satisfying answer to the standard objection to culpability for negligence.<sup>14</sup> Insofar as tracing is intended to provide an answer to this objection, we can ask whether there was relevant awareness at the prior opportunity to exercise control. For example, we can ask whether there a point prior to the accident where Montgomery was aware of the risk she was about to create. If there was awareness at that prior choice point, i.e., if the agent could have acted then to prevent the risk and was aware of the possibility and import of then acting to prevent the later risk, the agent was reckless for failing to act in light of that risk.<sup>15</sup> If, on the other hand, there was no particular point at which the agent was aware of the possibility of acting to avoid the later risk, we can ask whether the agent should have been aware of the possibility of acting to avoid the later risk, and so we face yet another instance of apparent negligence needing resolution, threatening a regress. Either way, the force of the standard objection remains: culpability always seems to require some point of awareness of the risk involved.<sup>16</sup>

### **3. Guidance Control and the Executive Theory of Responsibility**

#### **3.1 General Capacities and Guidance Control**

Those three strategies sought to accommodate the skeptic's claim that negligent agents lack immediate fair control. However, perhaps the most common and intuitive defense of the culpability of negligent wrongdoers challenges that claim. H. L. A. Hart denies that any particular positive mental element is required for culpability for negligence, arguing that it is

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mentally reviewing his schedule before making decisions that might involve his parenting schedule, such as deciding to leave town. (Hirstein, Sifferd, and Fagan 2018, 138)

<sup>14</sup> For general skepticism about tracing, see Vargas (2005), Andrew Khoury (2012), King (2014), and my work (2016), and for specific skepticism about tracing as applied to negligence, see King (2009), Moore and Hurd (2011), and Santiago Amaya (forthcoming).

<sup>15</sup> I am skeptical that many of the cases usually classified as negligent wrongdoing involve prior awareness of the particular risk that looms and the possibility of avoiding it, and so I am skeptical that the first horn of the dilemma captures very many cases. The dilemma argument I present here, however, is independent of that empirical skepticism.

<sup>16</sup> Even if the tracing advocate has an answer for this dilemma, we have little reason to think that the culpability for the earlier decisions should closely track the culpability for the later negligent wrongs. For an argument skeptical of tracing along these lines, see my work (2016).

appropriate to punish negligent wrongdoers if they had, “when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capacities” (2008, 152). On this account, we have the control needed for culpability so long as we have these capacities for practical agency and the fair opportunity to exercise them.

Here is how Hart’s capacities account strives to explain Montgomery’s culpability. We can defeasibly assume that ordinary adults possess normal capacities; indeed, that assumption is an entailment of their normalcy. Among the capacities adults normally have are the capacities needed for safe, responsible driving. There is nothing in the story of Montgomery’s accident that suggests that she was marked by any deviation from ordinary, adult competent agency. We can thus assume that she had the physical and mental capacities needed to drive carefully. We can likewise assume that there was no outside interference with her opportunity to exercise those capacities. Accordingly, on a capacity account, Montgomery could have done what the law required, but she did not, and so we can hold her responsible.

The skeptic has a persisting worry about this account of negligence culpability. On Hart’s account, what matters is not awareness but the capacity for awareness. Even if you weren’t aware of the existence and significance of the options you faced, you could have been. This might seem to just shift the skeptic’s focus. How can there be meaningful capacities to bring about the relevant awareness?<sup>17</sup> Either we already have some sense of the relevant options, in which case we can no longer bring ourselves to that awareness, or we are not already aware, so we lack the meaningful power to choose to become aware. Either Montgomery realized her driving was risky, in which case she no longer had the power to then make it the case that she realized her driving was risky, or she had no sense that her driving was risky, and thus had no reason to bring it about that she was aware that her driving was risky. So goes the skeptic’s argument.

We should be suspicious of this skeptical argument. As Garrath Williams explains, “No intelligent activity could get off the ground if we could not rely on the unreflective functioning of many other skills—including an enormous amount of knowledge that we take account of without explicit notice” (2020, 118). Notice that a similar argument applies to motivation. Either we already have the relevant motivation, in which case we cannot now make it such that we have the motivation, or we lack the motivation, in which case any such effort to bring about the motivation would be unmotivated. It looks like arguments like this push us to the brink of actualism.<sup>18</sup>

Heeding Hart and Williams, a full answer to the standard objection (and, it will turn out, the identification of the actual mens rea for negligence) involves identifying a relevant notion of capacity that allows reliance upon unreflective functioning. We begin by clarifying the relevant sort of control needed for legal and moral responsibility. John Martin Fischer and Mark Ravizza (1998) distinguish guidance control from regulative control. You have regulative control over

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<sup>17</sup> For the best sustained defense of an argument along these lines, see Alexander and Ferzan (2009).

<sup>18</sup> In addition to Williams, Doug Husak (2011, 204) and Alexander Greenberg (2020) raise objections along these lines. See also Amy Berg (2018) more generally on how ought-implies-can applies to the compositional elements of the ultimate power.

your action only if the principle of alternate possibilities is satisfied. Was it metaphysically possible for you to have done otherwise in the particular circumstances? Given determinism we plausibly never have regulative control. The negligence skeptic's argument appears to be grounded in concern with regulative control, insofar as it points to some necessary condition of your having relevantly acted otherwise (viz., being aware of the risks involved in your behavior) that you are apparently unable to meaningfully bring about.

By contrast, we have guidance control when our behavior is the product of our reasons-responsive agency. The guidance-control condition is conjunctive, with a capacity component and a production component. First, as with Hart's account of responsibility, general capacities are at the center of Fischer and Ravizza's account of responsibility. On Hart's account of legal liability, recall, an agent is legally liable only if the agent has two general capacities, one to understand the legal rules and the other to conform her behavior to her understanding of the rules. Likewise, on Fischer and Ravizza's account, the reasons-responsiveness required for responsibility is constituted by two component general capacities: the capacity to receive reasons and the capacity to comport one's volition to one's assessment of reasons.

However, the guidance-control accounts require more than the mere possession of general capacities.<sup>19</sup> It must also be the case that your having acted was the upshot of the operation of your agency. In Fischer and Ravizza's analysis, this means that your action must be produced by a particular reasons-responsive mechanism that is part of your agency. Fischer and Ravizza prescind from any particular analysis of mechanisms, leaving them to be intuitively picked out. For example, we might consider an addiction to be a mechanism, or we might consider deliberative weighing to be a mechanism. Brink and Nelkin reject the mechanism provision, arguing instead that we should ask whether the agent herself is reasons-responsive. Still, it must also be the case that the agent performs the action in some sufficiently agential sense. We can look to Hirstein, Sifferd, and Fagan's executive theory of responsibility to identify the general-purpose mechanisms that substantiate the guidance-control account.

### 3.2 *The Executive System as the Mechanism of Guidance Control*

On Hirstein, Sifferd, and Fagan's executive theory of responsibility, our agency is constituted by the working of our executive functions. Using cases of executive dysfunction as a diagnostic tool,<sup>20</sup> Hirstein, Sifferd, and Fagan identify a set of key executive functions: attention; monitoring of perceptions, memories, and emotions; monitoring of behavior; working memory; planning and goal setting; inhibition; and task switching (2018, 23–27). Imagine, for example, making a sandwich for lunch. That would involve making a plan to make the sandwich (which need not be a conscious, reflective process), inhibiting alternative lunch ideas as you gather ingredients, noticing your surroundings, monitoring those surroundings to identify the ingredients and elements needed for the sandwich, and monitoring your own memories and perceptions to switch appropriately between steps of the plan. When these things take place, you have made a sandwich. Thus, we act as agents when a sufficient number of these executive functions operate together.

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<sup>19</sup> My concerns here are not exegetical, and I am not claiming that Hart's account is exhausted by the discussion of general capacities and the opportunity to exercise them.

<sup>20</sup> Once again, we see that excuses are "the 'royal road' to theories of responsibility" (Moore 2010, 548, quoting Sigmund Freud).



Hirstein, Sifferd, and Fagan use this account of executive functioning to explain moral and legal responsibility for criminal acts and omissions.<sup>21</sup> On their account (2018, 87), an agent is responsible for their criminal act or omission when:

- (1) the agent has a minimal working set of executive functions;
- (2) the agent acts or omits to act; and
- (3) either the agent's executive processes play a role in the agent's action or omission or those processes should have played a role in preventing the agent's action or omission.

When these conditions are met, the agent's behavior is under the control of their agency, and when the agent's behavior is under the control of their agency, it is appropriate to hold the agent responsible for their behavior.

The first condition captures the capacity element of the guidance-control scheme. In order to be responsible on the executive theory account, the agent must possess a minimal working set of executive functions. Executive functioning comes in degrees, both because individual functions may be more or less efficacious and because executive functioning may involve a greater or lesser number of individual executive functions. To be responsible, however, all of them must be functional to some minimal degree, such that one has "a basic working set" (Hirstein, Sifferd, and Fagan 2018, 57). Similarly, on Fischer and Ravizza's account, an agent is responsible only if they are at least moderately reasons-responsive, where this requires threshold levels of both reasons-receptivity and reasons-reactivity.

However, as it is presented, this account of responsibility does not require guidance control. The third condition is disjunctive between cases of positive agency, where responsibility is grounded in actual engagement of the executive functions, and cases of negative agency, where an agent's executive functions should have engaged but failed to do so. The negative cases are included to account for most cases of negligence, complementing the tracing account Hirstein, Sifferd, and Fagan offer. The appeal to counterfactual engagement is in tension with the core insight of the guidance-control accounts of responsibility, and the standard objection to negligence arises precisely because negligence is explained in counterfactual fashion. Accordingly, I offer a version of the executive theory account of responsibility stripped of that negative element to show that the leaner version can account for negligence responsibility in a way that is loyal to a commitment to guidance control and thereby avoids the standard objection.<sup>22</sup>

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<sup>21</sup> Hirstein, Sifferd, and Fagan use their account to explain responsibility for consequences in addition to explaining responsibility for actions and omissions. I set aside responsibility for consequences, insofar as responsibility for consequences is grounded in responsibility for explanatory acts or omissions.

<sup>22</sup> This is not to exclude counterfactual reasoning from the account altogether. On my revision, an agent is culpable when their minimal working set of executive functions did function in some way (this is the responsibility condition) but should have functioned in some other way (this is the wrongdoing condition). What I discard is the claim that an agent can be responsible solely because their minimal working set of executive functions should have functioned in some way it did not. Responsibility requires actual executive involvement; merely counterfactual involvement is not sufficient.

On the revised executive theory, an agent is responsible for her action or omission so long as:

- (1) the agent has a minimal working set of executive functions;
- (2) the agent acts or omits to act; and
- (3) the agent's executive processes play a role in the agent's action or omission.

This revised account fits comfortably within the guidance-control family of theories of responsibility. A minimal working set of executive functions is reasons-responsive. The capacities included in the working set are those capacities that enable the agent to perceive and guide their behavior by reasons, e.g., by noticing, appreciating, and conforming their behavior to reasons. When the agent's behavior is the product of those executive functions, the agent has been guided by her reasons-responsive faculties in just the way expected by guidance-control accounts. When the agent's executive processes play a role in the agent's action or omission, we may say that the agent's action was the product of their executive processes. Accordingly, both of the elements of the guidance-control theory are satisfied.<sup>23</sup>

We can see the explanatory power of the executive theory of responsibility in what it says about aware wrongdoing. I follow the skeptics Alexander and Ferzan in considering "the kind of awareness we have as an experience" (2009, 51), citing Moore (1993, 15).<sup>24</sup> On the executive theory, this experiential awareness is a complex mental state "in which a phenomenal state is causally engaged with the executive process of attention" (Hirstein, Sifferd, and Fagan 2018, 109). Samuel Murray makes a similar claim: "The allocation of underlying attentional and mnemonic resources constitutes an agent's awareness" (2020, 15).

Now consider a case of wrongdoing where the wrongdoer is aware of the harm risked by her behavior. Imagine an attentive wrongdoer who commits a wrong otherwise like Montgomery's criminally negligent driving. Imagine, that is, a reckless Montgomery. Imagine that the reckless Montgomery sees the oncoming pickup truck and realizes that cutting in front of the truck will be dangerous.<sup>25</sup> That the reckless Montgomery was aware of the danger means

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<sup>23</sup> This establishes responsibility. To determine the full nature of culpability, we also need to make precise the description of the relevant wrongdoing. For that, there might be further questions about the nature of the executive functioning's engagement. For example, if I am innocently unaware of the risk my intentional behavior causes, I am responsible for my behavior (it being intentional and thus the product of executive functioning), but given the innocent unawareness, my behavior might not constitute culpability. I think Dana Kay Nelkin for comments pushing me to clarify this matter.

<sup>24</sup> This is a controversial notion of awareness. For example, Moore and Hurd include some dispositional beliefs in awareness (2011, 153–56), Murray defines substandard awareness (presumably a type of awareness) as possessing but failing to exercise the epistemic capacities (2020, 11–12), and Husak (2011, 207–10) and Stark (2016, chs. 4–5) treat awareness as akin to belief. I return to the relevant notion of awareness in § 4, where I defend an account of culpability for negligent wrongdoing consistent with a broad ecumenicism about awareness as well as intuitive distinctions between higher- and lower-level awareness.

<sup>25</sup> Hirstein, Sifferd, and Fagan give us an example of an intentional wrongdoer: "a man driving in Manhattan accelerates his car into a crosswalk full of people, injuring several of them. One causal history of that event contains executive processes playing planning roles, setting goals to

both that we may fairly attribute knowledge of the impending riskiness to her and that her attention was engaged with that knowledge. Supposing that the reckless Montgomery was competent, all three elements of the account of responsibility are met:

- (1) the reckless Montgomery's competence entails that she possessed a minimal working set of executive functions;
- (2) the reckless Montgomery drove in front of the heavy truck, causing the fatal accident;
- (3) the reckless Montgomery's wrongful driving was the product of her executive functions, including attending to the dangerousness of her driving, monitoring her perceptions as she drove, noticing the vehicle behind her as well as the various instruments of driving, and the operation of her working memory as she coordinated the tasks needed to drive.

If you are aware of the import of your choices and you choose and enact your choices, your awareness, choice, and enactment are the upshot of a great deal of executive functioning, such that we can conclude your aware behavior is suitably guided by your agency. You are rightly responsible for your aware behavior in such cases, and the executive theory nicely explains that responsibility.

#### **4. Finding an Actual Mens Rea for True Negligence**

##### *4.1 Executive System Engagement and the Mens Rea of Negligence*

Hirstein, Sifferd, and Fagan's executive theory of responsibility provides a rich account of a great diversity of executive functions, and we can look to that diversity to identify the mens rea of negligence. Recall that, on Hirstein, Sifferd, and Fagan's account, an agent is aware of something when the agent's attention is engaged with the relevant content. But we should expect there to be cases where executive functions other than attention are engaged with content such that the agent is engaged with but not aware of the content. Many cases of skilled or routine activity are like this. In such cases, our executive system is monitoring perceptions and behavior, shuffling information in and out of working memory, task switching, and inhibiting disruptive influences, even though we are not attending to all of the relevant elements.

There seem to be cases of risky behavior where the agent knows of but does not attend to the risk. Imagine an art museum robbery or a daring spacewalk where the agent knows that the activity is risky. That riskiness might be within the agent's working memory, and it might be driving the agent's inhibitions and the agent's monitoring of perceptions, memories, emotions, and behavior. However, perhaps because of the demands of disabling a challenging electronic alarm or of operating a precise tool in space, the agent's attentions are on matters other than the risks involved. In such cases, much of the agent's executive system is engaged with the risks but the agent's attention is not. Such agents know that their behavior is risky and they are engaged with that risk, but they are unaware of it, on Hirstein, Sifferd, and Fagan's account of awareness.

Perhaps there are some cases of negligence like this. In my two examples, I've presented cases where the agent is engaged with the risk but where some immediate matter

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harm as many as possible, and then forming and executing the final intention to accelerate into the people" (2018, 65).

displaces that risk from the agent's attention. Imagine a case of negligence similarly structured. Imagine that Montgomery is engaged with the riskiness of her driving. Perhaps her friends have regularly reminded her of the dangers of talking on the phone while driving, including during this phone call. We might see that knowledge manifested in Montgomery's anxiety or in her monitoring of her behavior. We might also see that knowledge driving her task switching, leading her to move from phone call to driving and back rapidly. These things reflect the engagement of her executive system with the risks she is creating. However, imagine that the phone call is about some incredibly complex, detailed financial transaction. Her attention is on the financial transaction rather than on the risk. Her executive system is engaged with the risk, but she is unaware of the risk.

On the executive theory, agents in such cases are responsible for their negligent wrongdoing. Assuming that these agents possess a minimal working set of executive functions, the first condition is met. Insofar as these agents act or omit to act, the second condition is met. And, finally, we find executive functioning in these cases, including executive activity regarding the riskiness of the behavior and executive attention activity. Where that functioning produces the action or omission, the third condition is met. Thus, these actions or omissions are explainable by reference to the working of the agent's executive system. These agents have guidance control over their negligent wrongdoings, and thus they may rightly be held responsible. There is no reason we should privilege the particular working of attention over the other executive functions.<sup>26</sup>

Recognizing these cases as negligence has two significant classificatory benefits. First, it explains how negligence is unified with the other mens rea categories. The standard objection to negligence arises if we think that, while purpose, knowledge, and recklessness all require actual mental states, negligence is distinct in requiring only a counterfactual, normative mental state. On this account of negligence's mens rea as the sub-aware operation of the executive system, by contrast, all four mens rea categories require a mental state. All four mens rea categories are marked by actual mental phenomena sufficient to satisfy the demands of guidance control, and that is why all four provide satisfying grounds for the control required for culpability.

Second, recognizing negligence in these cases also helps us see how negligence is distinct from the other mens rea categories. The various categories can be distinguished on a descriptive basis by both the type and extent of executive functioning. We can thus distinguish reckless from negligent wrongdoing by the working of attention on the particular risks involved. Likewise, we can distinguish purposeful wrongdoing from merely knowing wrongdoing by the

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<sup>26</sup> Indeed, as Williams points out, awareness can get in the way of control and can reflect the lack of control (2020, 119). As an experiment, attempt to pay attention to each element of some ordinary thing you do by routine, such as washing your hair in the shower. Attend carefully to each component element, and I expect that you will find that your progress slows. This disruption shows up even more in highly skilled routine activities, such as playing a violin or shooting a basketball. For the highly skilled violinist, working the bow comes quickly, and attention can interfere; for the rest of us, our lack of faculty with the instrument is reflected in our intense concentration: "Keep my upper arm still! Go to the angle for the D string! Keep the bow straight!"

working of planning and goal setting. In all of the mens rea categories, we see some executive functioning. The more executive functioning there is, the more agential engagement there is, and thus the more culpable the wrongdoing. This explains why we should expect to see negligence as the least culpable of the mens rea categories.

A negligence skeptic might nonetheless resist. First, the skeptic might insist that such cases are rare or non-existent. Perhaps the working of the executive system is such that any engagement entails at least some minimal attention.<sup>27</sup> I find myself sympathetic to this possibility. If so, there could not be a case involving executive agency but no attention. Second, the skeptic might insist that such cases push us to revise our notion of awareness rather than pushing us to accept culpability for negligent wrongdoing.<sup>28</sup> If there is no reason we should privilege attention over the other executive functions with regard to responsibility, perhaps there is likewise no reason we should privilege attention over the other executive functions with regard to awareness. A number of philosophers and lawyers treat awareness as tantamount to belief, and we can believe something without immediately attending to it.<sup>29</sup> Consider what we are being asked in “Were you aware that ...?” That question is after what we know, not what we are then attending to.

Moreover, we should be skeptical that this explanation gets us many of the cases we intuitively take to be cases of culpably negligent wrongdoing. In the case of the high-stakes phone call, the reckless Montgomery is supposed to believe that she is engaging in risky behavior even if she is not attending to that risk. In many cases of ordinary negligence, by contrast, it seems the agent does not have that belief at all. Instead of being distracted from the riskiness belief, it is likely that Montgomery and many other negligent agents fail to put two and two together. Plausibly, many negligent agents believe both that behavior of a certain type is dangerous and that they are engaged in behavior of a certain type but fail to put those two beliefs together to believe that they are engaging in dangerous behavior. It is easy enough to imagine Montgomery later saying, “Yes, I knew that talking on my phone while driving was dangerous, I knew that I was talking on my phone, and I knew that I was driving. And now I see that what I was doing was dangerous—but I just didn’t think that about that last bit then.” Accordingly, executive activity other than awareness cannot be all of the story if we want to explain the culpability of agents like Montgomery.

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<sup>27</sup> Resolving this question would require us taking up difficult questions regarding the nature of attention. For good overviews of attention, see Carolyn Dicey-Jennings (2020), Christopher Mole (2017), and Sebastian Watzl (2017).

<sup>28</sup> We can see something like this urged tacitly in an argument from Alexander and Ferzan: if an agent’s failure to act appropriately manifests some untoward desire, the desire or lack thereof “must figure as a factor in the actor’s practical reasoning in performing the action. Such an approach, however, looks as if it collapses culpable indifference into our conception of recklessness” (2009, 72).

<sup>29</sup> Legal scholars sometimes treat awareness as synonymous with knowledge. See, for example, the treatment of awareness throughout Markus Dubber’s (2015) review of the Model Penal Code. See also note 24 above.

#### 4.2 *Building Blocks and the Mens Rea for Negligence*

To provide the full story of negligence, I turn to negligence's building blocks. The building blocks of negligence are the component beliefs that might ordinarily be expected to lead to the belief that what the agent is doing is dangerous. For Montgomery, those building blocks were the belief that talking on the phone while driving is dangerous and the belief that she was talking on the phone while driving. Recognizing the role of those building blocks is essential to understanding the relevant mental state for negligence. In many negligence cases, even though the agent never realizes that their behavior is risky, the agent possesses a sufficient minimal set of executive functions, the agent's executive functioning takes up the relevant evidence, and the agent's executive system guides the agent's behavior. That agential activity grounds the guidance control needed for culpability.<sup>30</sup>

We can see a reference to these building blocks in the Model Penal Code's definition of negligence:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. (MPC § 202(2)(d))

The second sentence is essential here. Not all unaware, risky behavior is criminally negligent. First, the behavior must significantly deviate from the standard of care. Lawyers and philosophers have expended tremendous energy trying to fix this standard of care and trying to make precise the reasonable-person standard.<sup>31</sup> Second, the risk is to be evaluated in the light of the nature and the purpose of the agent's conduct and the circumstances known to them. The agent's knowledge of those circumstances constitutes the building blocks to make the inference to riskiness.

Findlay Stark offers an account of negligence culpability that duly recognizes the role of these building blocks.<sup>32</sup> On Stark's account (2016, 266), negligence is culpable when:

- (1) the agent has background beliefs relevant to the risk involved in their planned behavior;
- (2) the agent perceives the features of the situation relevant to that risk; and
- (3) the failure to form the belief that there is a particular risk in this situation can be explained by an accepted facet of the agent's character that thereby demonstrates insufficient concerns for the interests of others.

When these three conditions are met, we can explain the agent's negligent wrongdoing as the product of the agential manifestation of insufficient concern. Thus, we can attribute the agent's negligent wrongdoing to the agent, thereby holding them responsible.

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<sup>30</sup> There are substantive discussions of this positive cognitive element of negligence in Findlay Stark (2016) and Amaya (forthcoming).

<sup>31</sup> For two rich discussions of the reasonable-person standard, see Alexander and Ferzan (2009) and Peter Westen (2007).

<sup>32</sup> These building blocks are also nicely captured by an example from Amaya and Doris (2014, 261): "You saw an injured pedestrian in distress, [and] you value helping others."

Consider how Stark's account might apply to Montgomery. We might suppose that Montgomery believed that it was dangerous to talk on a phone while driving, that she perceived that she was driving, and that she perceived that she was on the phone. We might take knowledge of the dangers of talking on the phone while driving to be so widespread and a perception that one is talking on the phone while driving to be so readily grasped that we take virtually everyone in Montgomery's position to have those building blocks, shifting the burden of proof on her to deny having them. Although there might be significant issues regarding proof, especially given the criminal justice system's high standards, plausibly Stark's first two conditions were satisfied.

What of the third condition, that Montgomery's failure to form the belief that her behavior in that instance was risky could be explained by some accepted facet of her character that manifested insufficient concern for others? Here, we run into the same problems faced by manifestation accounts more generally. Centrally, the manifestation advocate must offer satisfying accounts of both manifestation and the relevant underlying phenomenon to be manifested. Stark points to a risk explained by a character trait that itself demonstrates insufficient concern. However, as I argued in Section 2, decent agents can vary in their concern for others' interests, and even sufficiently concerned agents can sometimes nonetheless act negligently. Such agents would seemingly escape liability on Stark's account.

More importantly, a focus on the cause of the failure is not in the spirit of the guidance-control project. On the guidance-control accounts of responsibility, you are responsible so long as what you did was the product of your agency in a sufficient sense. The explanation of why you did not act otherwise bears on that project only indirectly, for example by showing an excuse that disrupted your causal contribution to what you did do. What matters directly for responsibility, however, is that what you did was caused by the elements of your agency, not that what you did not do is explained by elements of your agency.<sup>33</sup>

Thus, we should accept Stark's first two conditions but reject his third condition. Instead, here is the revised guidance-control account of responsibility, as applied to negligence. An agent is responsible for negligence when:

- (1) the agent has a minimal working set of executive functions;
- (2) the agent acts or fails to act in some negligent fashion; and
- (3) the agent's executive processes play a role in the agent's action or omission, in the case of negligence by being engaged with (i) background beliefs relevant to the risk involved in their behavior and (ii) perceptions of the features of the situation relevant to the risk produced by that action or omission.<sup>34</sup>

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<sup>33</sup> It might seem that any account that satisfies one of these will satisfy the other. Baron writes, "it doesn't happen that one 'just doesn't see' what one should see. There has to be an explanation" (2019, 337, citation omitted). However, even if there is an explanation of some sort, that explanation might not satisfy the manifestation conditions. In any case, insofar as guidance control is doing the explanatory work, as is suggested by the Frankfurt cases, the theory should capture that core guidance-control insight.

<sup>34</sup> This is an instance of the account of responsibility offered in § 3.2, not a revision of it.

An agent who satisfies these conditions possesses guidance control over their risky behavior. This is consistent with the agent not knowing or being aware that they are imposing a risk in so acting. Such an agent is responsible for their negligent wrongdoing.

What sort of engagement must the agent have with the building blocks? Perhaps there are some cases of negligence where the agent is aware of the building blocks but fails to make the inference to riskiness. Imagine that Montgomery was aware both that driving while talking on the phone was dangerous and that she was driving while talking on the phone. We might be puzzled by her failure to reach the inference that she was acting in a risky fashion given her attentiveness to both building blocks, and that failure might constitute evidence for us that there was some deeper flaw in her executive system. However, insofar as she was aware of those building blocks, was in possession of a minimal working set of executive functions, and drove dangerously, she would be culpable for negligence. It would be a strange case, but a culpable case.

The more paradigmatic cases combine the two explanations I've considered. The relevant mental state includes the requisite building blocks—knowledge that behavior of the given sort is unduly risky and perception of the behavior and circumstances relevant to that risk. However, the agent's mental engagement with those building blocks does not rise to the level of phenomenal awareness. That the mens rea of negligence is paradigmatically limited in both of these ways (i.e., a limitation of content and a limitation of the type of executive engagement involved) explains why negligent agents are significantly less culpable than reckless agents, because the extent of responsibility tracks the extent of executive engagement. These combined explanations provide explanations both of the mental activity in negligence and of the reduced culpability of negligence as compared to its mens rea brethren.

Return to Montgomery. Suppose that Montgomery had a minimal working set of executive functions, and suppose that she swerved in front of the pickup truck in an unjustifiably dangerous fashion. The first two conditions of negligence responsibility are met, marking her as a competent agent and satisfying the relevant actus reus. What of her mens rea? Suppose that Montgomery had the background beliefs relevant to the dangers of talking on a phone while driving, suppose that she perceived that she was driving, and suppose that she perceived that she was on the phone. Montgomery was paying some attention to both her driving and her conversation, and she was monitoring what she perceived in both regards, even if perhaps in a deficient fashion in both cases. Montgomery was likewise engaging her working memory and task switching.<sup>35</sup> Thus, her executive system was executing in a fashion that grounded her guidance control over her risky driving, making her responsible for her risky driving. Because Montgomery's responsibility for her negligent wrongdoing is grounded in guidance control and actual mens rea, the force of the standard objection is defused. Montgomery's case is satisfyingly explained.

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<sup>35</sup> Hirstein, Sifferd, and Fagan argue that the executive system is instantiated in the brain's cognitive control network and that its functional roles correspond to particular, physical brain elements. Thus, we can imagine that Montgomery's actual executive functioning corresponded to significant brain activity. This is further reason to conclude that the mens rea of negligence has a significant actual component.



Let me conclude by looking at some cases of negligence that are more challenging to resolve. Consider first forgetful agents. Alexander and Ferzan give us the memorable case of Sam and Ruth, two putatively negligent parents. Sam and Ruth are hosting an important dinner party, and shortly before the party begins, they go to give their child a bath. When the doorbell rings, Sam and Ruth leave the child alone to greet their guests. At the time they step away, they believe both that the child would be in danger if they failed to return and that, so long as they returned in time, the child would be in no danger. Unfortunately, Sam and Ruth are quickly distracted by their guests, they forget their child in the bath, and the child drowns.<sup>36</sup>

The account of negligence culpability I have presented comfortably explains Sam and Ruth's culpability for negligence at the point that they walked away from the child. Alexander and Ferzan tell us that, at that point, Sam and Ruth had the belief that the filling tub could well present a danger to the child, and they were aware of the relevant circumstances (that the tub was filling, that both of them were walking away from the tub, and that there was no guarantee that they would return on time). We might also suppose that they were generally aware that a child could die if left alone in a filling tub for too long. Even if they did not make the inference to the particular risk they were imposing, these are the needed building blocks to constitute the actual mens rea of negligence when conjoined (as we can assume) with a functioning executive system. They were negligent for walking away.

What about Sam and Ruth's failure to return to their child? Here, Sam and Ruth present a troubling case in a way that Montgomery does not. Assume that Sam and Ruth have minimal working sets of executive functions, that they failed to take proper care of their child, that their executive processes were functioning throughout, that they were not aware of the riskiness of failing to check on their child, and that they both possessed the background beliefs relevant to the risk of leaving a child unattended in a filling bathtub. There remains one final element of the negligence-responsibility scheme. It must also be the case that their executive functions were sufficiently engaged with perceptions of the features of their situation relevant to the risk produced by leaving the child unattended.

Here we can see the contrast between Montgomery and Sam and Ruth. We might reasonably suppose that Montgomery's executive functions were engaged with perceptions of driving and of being on the phone. Insofar as Sam and Ruth are culpable for negligence for failing to return to their child, which features of their situation relevant to the risk would they have perceived? Think of the evidence that they had before them of the danger while they were talking with their colleagues. They surely perceived their ongoing conversations, but those perceptions provide only very indirect evidence of danger. The key perception that confronted Sam and Ruth was of the absence of their child. However, unsurprisingly, perceptions of absences are controversial.<sup>37</sup> If we believe that the child remained in their working memory

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<sup>36</sup> Alexander and Ferzan tell us that Sam and Ruth correctly believed at the time that, given the rate the tub was filling, there would be plenty of time to return. Even if they did correctly believe this, did they believe they were sure to return on time? Alexander and Ferzan's stipulation of Sam and Ruth's beliefs is both partial and artificial. Accordingly, I am hesitant to rely on my intuitions about Sam and Ruth's culpability. For similar and other concerns about the case, see Baron (2020, 78 nn. 27 & 28).

<sup>37</sup> For an illuminating exploration of the perception of absences, see Anna Farennikova (2013).

(even if not at the level of awareness), then it is plausible that they perceived the absence of the child. If, however, the child had slipped from their working memory in addition to slipping from their awareness, then it is less plausible that they perceived the absence of the child. Thus, we can see both what further conditions might explain their culpability and why forgetting cases might be particularly controversial, rather than paradigmatic.

Finally, consider agents who possess only the building blocks of building blocks. For instance, consider Walter and Bernice Williams.<sup>38</sup> Their young son developed a tooth abscess, leading to gangrene, malnutrition, pneumonia, and ultimately death. The Williamses failed to seek medical attention. They did not think that the condition was particularly threatening, they believed falsely that they would be refused treatment until the swelling in the baby's cheek went down, and they feared that the baby would be taken from them on suspicion of neglect. The Williamses were convicted of negligent manslaughter, the trial and then appellate courts concluding that the Williamses failed to exercise the sort of ordinary caution a person of reasonable prudence would exercise under the same or similar conditions.<sup>39</sup>

Many philosophers and lawyers have been conflicted about the Williamses' conviction. Commentators have often focused on the Williamses' young age (she was 20, he was 24), incomplete education (she had an eleventh-grade education, he a sixth-grade education), wealth (she worked in the home, he was a laborer), and social context (both were Native Americans), asking whether it was fair to ask from them what we ask from "a reasonable person" (to use the Model Penal Code's terminology) or from "a man of reasonable prudence" (to use the applicable statutory terminology). The negligence analysis I have offered here provides an alternative, complementary explanation of why our intuitions about the Williamses' convictions are conflicted.

The Williamses lacked one of the relevant building blocks. We might generalize from Montgomery's case to identify the paradigmatic building blocks: "situations like so are dangerous," and "this situation is like so." Depending upon how we characterize the building blocks, the Williamses seemingly lacked one or the other of those building blocks. We might suppose that the Williamses knew that "severe, untreated infections are dangerous," but the record suggests that the Williamses did not realize their child had a severe, untreated infection. Alternatively, we might suppose that the Williamses knew their child had an untreated tooth infection, but then it is unclear that they knew that "untreated tooth infections are dangerous."

That the Williamses apparently lacked one of the paradigmatic building blocks should undermine our confidence in their full culpability. However, they might still be culpable to a diminished degree if they had the further building blocks for the missing building block. For instance, consider the building blocks for the inference to realizing that their child had a severe, untreated infection. They were aware that their child had not received medical attention and that the child had been sick for some time. They reported that the child's cheek turned a bluish

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<sup>38</sup> This sad case, well-known in the negligence literature, can be found at State v. Williams, 4 Wash. App. 908, 484 P.2d 1167 (1971).

<sup>39</sup> Washington's criminal negligence provisions from 1971 differ from the contemporary Model Penal Code provisions, though not in ways that complicate the case for our purposes. Washington has since reformed its criminal justice code such that it more closely tracks the Model Penal Code.

color, and there is evidence in the record that the infection would have given off a distinctive smell. Thus, plausibly, the Williamses had the building blocks of the belief that their behavior was dangerous. That extra layer of remove from the perception of the wrongness of their action can help explain the Williamses' intuitively attenuated culpability, a further bit of explanatory power of the model I've offered.

## 5. Conclusion

The possibility of causing harm is often what makes our behavior wrongdoing. However, we are not aware of that possibility in cases of negligence. Given the central role awareness plays in agential control, it might thus seem unfair to hold us accountable for negligence. How can we act in light of what we should have known if we did not know it? As I've shown, however, a commitment to a guidance-control account of responsibility combined with the diversity of executive activity helps us to identify the actual mental activity in cases of negligence sufficient to hold negligent agents culpable. In paradigmatic cases, the mens rea for negligence is executive engagement with circumstances relevant to the risks imposed, executive engagement that does not require attention to those risks. That actual mens rea (and not merely a counterfactual, normative mental state the agent should have possessed) satisfies the mens rea requirement needed for criminal culpability.<sup>40</sup>

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