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The Good, the Bad, and the Klutzy: The Moral Concern View of Criminal Negligence

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Abstract

One proposed way of preserving the link between criminal negligence and blameworthiness is to define criminal negligence in moral terms. On this view, a person can be held criminally responsible for a negligent act if her negligence reflects a deficit of moral concern. Some theorists are convinced this definition restores the link between negligence and blameworthiness while others insist that criminal negligence remains suspect.

I aim to contribute to this discussion by applying the work of ethicist Nomy Arpaly to criminal negligence. Although not interested in legal issues herself, Arpaly has a well-developed theory of moral agency that explains moral concern in terms of responsiveness to moral reasons. Introducing her work to the ongoing scholarly debate will be helpful for two reasons. First, while a definition of negligence in terms of moral concern is recognized as one proposed solution to the negligence–blameworthiness problem, authors promoting it have yet to give a systematic account of moral concern and its relation to blame. Borrowing Arpaly’s account will help clarify the idea of moral concern so that both proponents and critics of a concern approach to negligence can have a better defined debate. Second, her theory of blameworthiness is especially suited to defending the blameworthiness of negligent actions because it does not have recourse to a special quality of choice or self-control that must be active to render conduct blameworthy. To make this second advantage clear, I will argue that reliance on choice or self-control problematizes blameworthiness for negligence. Those who wish to defend blameworthiness for negligent acts

should base their work on an account of moral agency that does not rely on either choice or self-control to explain when an action is blameworthy.

Key Words: Arpaly, negligence, mens rea, culpability, law and philosophy, ethics, moral psychology

Scholars of the criminal law who regard moral blameworthiness as indispensable to the rightful imposition of criminal liability worry about the propriety of criminal negligence. The reason for unease is that criminal negligence allows inadvertent conduct to be subject to penal liability: to be guilty of negligently committing a crime, an actor need not even notice, much less intend, the wrongful features of his actions.

One proposed way of preserving the link between criminal negligence and blameworthiness is to define negligence in moral terms.¹ On this theory, agents are blameworthy for their failures to advert to risks posed by their conduct when that neglect reflects a deficit of moral concern, for example, a lack of concern for the interests of others. As we will see in the course of this Article, some theorists are convinced this definition restores the link between negligence and blameworthiness while others insist that criminal negligence remains an unacceptable basis for criminal liability.

I aim to contribute to this discussion by applying the theory of moral concern of philosopher Nomy Arpaly. Her work treats moral concern as a matter of responsiveness to moral reasons. Although Arpaly's work is not concerned with the law, introducing Arpaly's work to the ongoing scholarly debate will be helpful for two reasons. First, while a definition of negligence in terms of moral concern is recognized as one proposed solution to the negligence–

¹ The exact concepts favored by commenters vary: Anthony Duff offers sufficient concern for the interests of others, while Peter Westen identifies respect for the values of the public embodied in criminal legislation. In either case, failure of sufficient concern is the source of blameworthiness for negligent acts, even if the specified object of concern differs.

blameworthiness problem, authors promoting it have yet to give a systematic account of moral concern and its relation to blame. Employing Arpaly's account will help clarify the idea of moral concern so that both proponents and critics of a concern approach to negligence can have a better defined debate. Second, Arpaly's theory of blameworthiness is especially suited to defending the blameworthiness of negligent actions because it does not have recourse to a special quality of choice or self-control that must be in play to render conduct blameworthy. To make this second advantage clear, I will argue that reliance on choice or self-control problematizes blameworthiness for negligence; those who wish to defend blameworthiness for negligent acts should base their work on an account of moral agency that does not rely on choice or self-control to explain when an action is blameworthy.

The Article proceeds as follows. I will first provide background on the scholarly debate over criminal negligence. I will then present Arpaly's theory of moral praiseworthiness and blameworthiness. In the next section, I show how her theory applies to criminal negligence. The fourth section explains the advantages of using Arpaly's work. Finally, the conclusion summarizes the arguments.

I. Background

In *Crime and Culpability: A Theory of Criminal Law*, Kimberly Kessler Ferzan and Larry Alexander argue that negligent actions should not be subject to criminal liability.² To reach this position, Ferzan and Alexander affirm that culpability is a necessary condition for criminal liability and deny that agents are culpable for negligent acts.³ For them, an agent must be aware of the risk she is taking if she is to be blameworthy for it. This is because "culpability entails control," and the negligent actor, because she is unaware of the risk her conduct poses, "does not

² LARRY ALEXANDER, KIMBERLY KESSLER FERZAN, & STEPHEN MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 85 (2009).

³ *Id.* at 6–7.

have this requisite control.”⁴ A negligent actor who is aware she is driving has control of her decision to drive, but she does not have control of the risk posed by a fault in her tires so long as she is unaware of the fault. As such, while Ferzan and Alexander accept that criminal liability is appropriate for recklessness (when the agent is aware of a risk but disregards it),⁵ they reject it for inadvertent, unconscious risk taking.⁶

Other scholars, like Anthony Duff and Peter Westen, deny that being unaware of a risk is always a bar to culpability. Duff contends that agents are culpable when their actions embody a practical attitude of indifference to others.⁷ In other words, a person who fails to advert to a risk of harm created by his conduct may still be culpable if his inadvertence reflects, not cognitive or physical frailty, but disregard for other people. Similarly, Westen asserts that actors are culpable for inadvertent harm that reflects disregard for the public values that the law embodies.⁸

Both Duff and Westen argue that criminal negligence should be understood in terms of the defendant’s lack of concern for moral interests, either other people or public values. Generalizing, these theorists both have a *concern view* of criminal negligence according to which *a lack of moral concern* is what can render criminally negligent conduct blameworthy. If we agree with Westen and Duff that a deficit of moral concern explains how a person can be

⁴ *Id.* at 85.

⁵ *Id. passim.*

⁶ By way of patching the culpability gap, some thinkers attempt to tie an inadvertent act to a prior culpable one. See generally Holly M. Smith, *Non-tracing Cases of Culpable Ignorance*, 5 CRIM. L. & PHIL. 115 (2011). Consider the following case: A woman is rock climbing with a friend when the cable she brought for their use snaps, sending the friend to his death. The woman did not intend for the rope to snap, and at the time she was climbing, she did not advert to the weakness in the rope. Nevertheless, if the week before, she had considered the state of the rope, recognized its potentially deadly weakness, and failed to remove it from her bag of gear, then we might say that she was culpable for this prior choice. Culpability in the earlier choice (not disposing of the rope) is thus inherited by the later action (hoisting her friend on the unsafe rope), rendering blame for the latter appropriate. The trouble with this philosophical fix is that it is incomplete. While it may adequately deal with cases comparable to that of our rockclimber, it fails to account for other cases that meet standard definitions of criminal negligence but for which no prior, plausibly culpable act can be found. Several good examples are discussed by Holly Smith in her recent article on the subject. *Id.* at 116–17.

⁷ See R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY 171 (1990).

⁸ Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 137 (2008).

blameworthy for his failure to advert to a risk of harm, how then should moral concern be understood? I believe that Nomy Arpaly's explanation of moral concern in terms of responsiveness to moral reasons is the right answer to this question.

Before proceeding further, I want to summarize how I conceive the dialectic. I take it that concern theorists like Duff and Westen agree with opponents like Ferzan and Alexander that criminal liability should require blameworthiness or culpability (I use these terms equivalently). Although positive law may not treat culpability as essential to criminal liability, both sides agree that it should. Further, I apprehend that the blameworthiness at issue is moral blameworthiness and that therefore the question of whether someone is ever blameworthy for negligent conduct is a question for ethics, not jurisprudence. In keeping with my understanding of the debate, my goal will not be to discuss positive law but rather to employ Arpaly's philosophical work on the side of the concern theorists to show how negligent conduct can be blameworthy.

I assume in this paper that blameworthiness attaches to a person for his actions rather than his character. Although we often morally evaluate a person's character—as we do when using words like “kind,” “mean,” “honest,” “cowardly,” “virtuous,” or “vicious”—to criticize a person's character is not to blame him for it. This is one respect in which moral theory differs from criminal law: whereas moral theory encompasses evaluations of character as well as action, the criminal law is solely concerned with (or should be solely concerned with) action.

The criminal law and moral theory both use the concept of culpability for an action. But whereas legal culpability is a concept internal to the law and legal doctrine, moral culpability is a moral-psychological fact external to the law. Legal scholars have argued that moral culpability *should* limit the application of the criminal law. However, the application of positive criminal law, as a matter of both doctrine and fact, is not necessarily restricted to the morally

blameworthy. Even when moral and legal culpability seem to converge, as they appear to do around the concept of mens rea, the understanding of mens rea in legal doctrine need not mirror a correct analysis of moral culpability. While it is possible to make a doctrinal argument that criminal culpability is linked to moral culpability, I make no such argument here.⁹

II. Arpaly, Moral Reasons, and Moral Concern

A. Meriting Praise and Blame

Suppose that your friend Jane has borrowed a book from you; Jane promises to return the lent novel in a month. Two months later, she still has not returned the volume you loaned her. She has broken her promise to be sure, but this is not definitive of whether Jane is blameworthy for her failure to keep her word.¹⁰ After all, if she had been kidnapped by terrorists and was being held incommunicado in a foreign nation, we would not say that she had acted in a blameworthy fashion. Interestingly though, the same conclusion holds when Jane is suffering from major depression. In that case, Jane may very much want to return the book—she may take her obligation to keep her promise very seriously—but she still fails to do so, not out of a shortage of moral concern, but because her mental illness has overborn her moral concern. Jane,

⁹ Questions of how the law should be can be easily conflated with questions about what the law is, especially in a common law legal system. A common law lawyer, whether judge, attorney, or treatise writer, reads the cases, statutes, constitution, and respected treatises to construct an argument about what the law is. The principle that she is claiming is the law may not be expressly stated in any of the authorities. Her assertion that this principle is law is supported by legal reasoning—for example, analogies and disanalogies between the facts of past cases, a close reading of a respected treatise writer, or a policy argument drawn from legislative history. It may seem that she is only arguing that her principle should be the law, not that it is the law. On the other hand, she is only purporting to give the best interpretation of the legal sources so as to arrive at what the law is, and all interpretation will seem to involve some departure from the express words of the text. Now, it should be remembered that legal reasoning includes appeals to moral principle, public advantage, and common sense. When these appeals are made within the conventions of legal reasoning, they remain arguments about what the law is, rather than what it should be. On the other hand, it is possible to make appeals to moral principle, public advantage, and common sense from outside legal doctrine and the conventions of legal reasoning. These are unequivocally arguments about what the law should be rather than what the law is. In this paper, I assume, from the external perspective, that the law should be such that only blameworthy conduct is criminalized. I neither claim nor assume that in fact the application of the criminal law is so limited, and I neither claim nor assume that as a matter of legal doctrine and legal reasoning, the criminal law is such that only the morally blameworthy are appropriately subject to it.

¹⁰ NOMY ARPALY, MERIT, MEANING, AND HUMAN BONDAGE: AN ESSAY ON FREE WILL 15–16 (2006) [hereinafter MERIT & MEANING].

we may postulate, has just as much regard for the rights of others and regard for her friends' wellbeing as the next morally decent person; it is simply that her perfectly acceptable complement of respect and regard is drowned out by a morally neutral disease and thus prevented from manifesting in her behavior.

Moral concern (also called good will¹¹) is a matter of responsiveness to moral reasons.¹² Consider a person who gives money to Oxfam (and suppose that what makes it right to donate to Oxfam is that it alleviates the suffering of fellow human beings).¹³ One man gives money to Oxfam because he wants to alleviate suffering; another man writes the check in order to obtain a tax benefit. Only the former man is acting out of moral concern and responding to a moral reason. The moral reason to which he is responding is *that his donation alleviates human suffering*. Alleviating human suffering is a moral reason because, as we specified, that is what makes the donation a right action.

While reducing suffering seems like a plausible moral reason on almost any moral theory, Arpaly's theory of blameworthiness is meant to be latitudinarian with respect to what makes actions right or wrong.¹⁴ A reason it is right to donate to Oxfam could be that doing so tends to maximize human happiness and/or that the starving people saved from death are inherently valuable as human beings. In either case, a donor acts out of moral concern if he acts for a relevant moral reason.¹⁵ Thus, to say that someone is responding to moral reasons is equivalent

¹¹ The use of the phrase "good will" should not be taken as a commitment to a special faculty of volition or choice. By "good will," Arpaly means nothing more than responsiveness to moral reasons. See NOMY ARPALY, UNPRINCIPLED VIRTUE: AN INQUIRY INTO MORAL AGENCY 79 (2003) [hereinafter UNPRINCIPLED VIRTUE].

¹² MERIT & MEANING, *supra* note 10, at 14.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *id.* ("If actions are made right by the fact that they increase utility, anyone acting for the sake of utility is acting from a moral motive; if they are made right by respecting persons, anyone acting out of respect for persons is acting from a moral motive.").

to saying that someone is acting out of moral concern: “The person who does the right thing out of responsiveness to moral reasons does it out of *good will*.”¹⁶

With that in mind, consider now a case of lack of good will, where a person fails to respond to moral reasons.¹⁷ Your friend Jane the book borrower asks you to attend her sister’s baby shower, but the shower is the same day as the premier of the new *Harry Potter* movie, and you would rather see the film than go to the shower. Finding it more convenient to lie in this situation than to either acquiesce or reject the invitation with a truthful explanation, you tell Jane that you are swamped with work and cannot attend. In this situation, there is a moral reason in the vicinity to which you are failing to respond. The moral reason not to lie could be that Jane is your friend or that denying her the truth treats Jane strictly as a means. In either case, by telling a lie simply because it is more convenient for you to do so, you demonstrate a lack of responsiveness to moral reasons, i.e., a lack of good will.

Moral concern, d.b.a., good will, has its opposite in ill will. Ill will, as opposed to a mere lack of good will, is found where a person does not merely do the wrong thing in spite of the features that make it wrong but *because of* those wrong-making features.¹⁸ For example, “[I]f what makes it wrong to strike someone is the fact that doing so would cause suffering to a fellow human being and Iago strikes someone *in order* to make a human being suffer, then he does not simply fail to respond to moral reasons but ‘antiresponds’ to them.”¹⁹ Iago here is not like someone who lies because she would rather go to *Harry Potter*. After all, going to see *Harry Potter* movies for love of the films and their whimsy is not immoral in and of itself. Iago is different because by being cruel for its own sake, he “acts for a reason that essentially conflicts

¹⁶ *Id.*

¹⁷ *See id.* (“[T]he person who does the wrong thing or fails to do the right thing out of a failure to respond to pertinent moral reasons displays *lack of good will* (or *moral indifference . . .*”).

¹⁸ *Id.* at 14–15.

¹⁹ *Id.* at 14.

with morality.”²⁰ In sum, ill will is more than indifference to moral reasons; it is responsiveness to antimoral reasons.

Praiseworthiness and blameworthiness are functions of good will and ill will. Actions are blameworthy, says Arpaly, when they proceed either from a lack of good will or out of ill will.²¹ Actions are praiseworthy when they proceed from good will.²² The degree of good will a person demonstrates in her action determines just how praiseworthy she is for it.²³ Likewise, the greater the failure of good will or the more ill will there is behind her action, the more blameworthy she is for undertaking it.²⁴ Actions done out of ill will are more blameworthy than actions demonstrating a dearth of good will.²⁵

B. For the Record: Definitions of Moral Concern and Reason Responsiveness

Arpaly defines moral concern—as a kind of desire in favor of the moral.²⁶ She writes, “To say in general that a person has moral concern would be to say that she has an intrinsic desire (*de re*) that morality be followed or that the courses of action that have those features that make actions right be taken”²⁷ She also tells us what it means *to act* from moral concern: “To say that a person acts out of moral concern is to say that a person acts out of an intrinsic (noninstrumental) desire to follow (that which in fact is) morality, or a noninstrumental desire to take the course of action that has those features that make actions morally right.”²⁸

²⁰ *Id.*

²¹ *Id.* at 15.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ UNPRINCIPLED VIRTUE, *supra* note 11, at 44.

²⁷ *Id.* at 84.

²⁸ *Id.*

Put simply, moral concern is a kind of desire in favor either of morality in the abstract or of actions that have features that make them moral.²⁹ For example, someone has moral concern if she wants to do what is right and so visits a sick uncle in the hospital. Her concern here is for morality in the abstract, “she wants to do what is right.” It is equally true, however, that another niece calling on the uncle has moral concern if she goes to the hospital simply wanting to cheer him up. Her desire to make her uncle happy is an example of concern for “features that make actions right.” Notice, however, that moral concern is defined as a non-instrumental desire. Wanting to cheer your uncle up in order to receive an expensive Christmas present from him is not moral concern.

The reader should also note that the phrase “*de re*” in Arpaly’s definition is meant to exclude cases where someone desires that “morality” be followed but has mistaken moral beliefs. If a person has incorrect views about morality, if he believes for instance that it is right to beat children to discipline them, his desire to do “what is moral” and beat his children does not count as moral concern. In sum, a mere *de dicto*³⁰ desire to do what is moral, to do what is falsely labeled moral or falsely represented in the agent’s belief system as moral, does not count as moral concern. What matters for Arpaly is whether the person is concerned with “that which makes actions right” and “not so much whether she is concerned with that *which she believes*

²⁹ See *id.* at 74–75 (acting in favor of morality in the abstract armed with knowledge of morality (true beliefs about it) may be sufficient but not necessary to acting with moral concern).

³⁰ Philosophers usually use “*de re*” in contradistinction to “*de dicto*.” “*De re*” means of the thing, and “*de dicto*” means of the word. A desire *de re* is a desire for a certain thing while a desire *de dicto* is a desire for whatever thing satisfies a certain description. Consider ice cream preference. Sheila loves rocky road. Suppose that the most expensive flavor at the grocery is rocky road. It is true that Rachel desires the most expensive flavor of ice cream at the grocery store. If this flavor is marked down next month, leaving cookie dough as the most expensive flavor, the desire will still be for rocky road. Rachel’s desire for the most expensive flavor of ice cream was a desire *de re*. In contrast, consider Sheila’s friend Deborah. Deborah is a conspicuous consumer and she desires the most expensive flavor of ice cream in the store. This means she will desire rocky road the first month but cookie dough the second month. Deborah’s desire for the most expensive flavor of ice cream was a desire *de dicto*.

makes actions right.”³¹ This is true even where a morally mistaken person somehow stumbles upon a right action. For example, it is not moral concern for a person to want to give to a certain charity “because it is right” when he believes that what makes it right for him to give to that charity is that the recipients of its aid are of the same race as he. There, the agent is performing a right action, out of a desire to do what he thinks is morally correct, but his desire is actually directed at something (race) that is morally irrelevant. Consider the contrasting case of a person who believes the same false, race-based moral theory (perhaps because he was taught it as a child) but who desires to donate to the charity because it will relieve suffering. Such a person’s feelings are much better than his thoughts! Even though he believes that what makes it right to donate to the charity is aiding coracialists, he actually possesses moral concern because the object of his desire is not service to morality as he believes it to be but rather the relief of suffering, a feature of actions that actually makes them morally right.

Arpaly is explicit that moral concern, good will, and responsiveness to moral reasons are equivalent concepts.³² Indeed, the definition she gives of responsiveness to moral reasons parallels the definitions of moral concern given above: “[A] person [is] *responsive to moral reasons* to the extent that she wants noninstrumentally to take courses of actions that have those features that are (whether or not she describes them this way) right-making and not to take courses of action that have those features that are (whether or not she describes them this way) wrong-making features.”³³

When it comes to ill will and antiresponding to moral reasons, Arpaly’s analysis is the same. What makes it the case that someone antiresponds to moral reasons or acts from ill will is

³¹ MERIT & MEANING, *supra* note 10, at 14 (emphasis added).

³² UNPRINCIPLED VIRTUE, *supra* note 11, at 79 (“I take good will to be the same as moral concern . . . and as *responsiveness* to moral reasons.”).

³³ *Id.*

that he is concerned with what makes actions wrong *de re*. This is true regardless of whether the person believes what he is doing is right and possesses moral concern *de dicto*. On this point, an anonymous referee suggested the example of a bigot who believes that destroying the property of members of the group he hates is a right thing to do. This person, regardless of his *de dicto* desire to do “the right thing,” wants to destroy others’ property for the sake of harming them, a plausible *de re* feature that makes the action wrong. Even if Socrates is correct that people never act but under the belief that what they seek is good, on Arpaly’s view, some people antirespond to moral reasons because they mistake the bad for the good and desire something for the very features that make it wrong.

Arpaly identifies three features of a person typically associated, all things being equal, with strength of moral concern.³⁴ The first is motivational: “the more you care about something, the more it would take to stop you from acting on your concern.”³⁵ “[O]ther things being equal, the person who cares very much about morality, or about any specific moral consideration, would tend to be motivated to action by it in situations in which the rest of us would not.”³⁶ The second feature is emotional: “The more one cares about morality, the more it colors one’s emotional world”³⁷ Other things being equal, the morally concerned person “will find the thought of doing something wrong quite painful.”³⁸ She will also be prone to righteous indignation when she reads about injustice in the newspaper, to admiration for moral saints when she reads their biographies, and to joy when she hears of moral breakthroughs like the passage of the Civil Rights Act of 1964. The third feature is cognitive: “If one cares about morality, moral

³⁴ *Id.* at 85–87.

³⁵ *Id.* at 86.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

facts matter to one emotionally, and they are salient to one.”³⁹ Just as “[a] person who cares about birds will notice a bird on the roof, while in the same situation a person who does not care about birds may not notice it at all,” “a person of more moral concern will be more sensitive to moral features of situations—more apt to notice, for example, that a fellow human being is showing signs of distress or that a joke has the potential to offend certain people.”⁴⁰

Which features of an action are right-making and which are wrong-making is a question philosophers assign to so-called normative ethical theories. These theories provide answers to questions about whether conduct is right or wrong. An answer to the question, “Should I take the last cookie if I know Carl wants it too?” pertains to normative ethics. Likewise, the answers to questions about ethical principles—“Is the right action the action that maximizes the amount of happiness net of the amount of suffering?”—are within the province of normative ethics. Obviously, lay people and philosophers alike disagree about many of these questions. They disagree both about whether particular actions are right or wrong and whether specific ethical principles are true or false. For her part, Arpaly is not trying to resolve these controversies. Her theory is about praiseworthiness and blameworthiness, not normative ethics. As such, she need not be committed to any particular normative theory and can remain agnostic on the subject. Her latitudinarianism is practical: whichever ethical theory turns out to be correct, Arpaly’s theory can be appended to it in the manner of a blameworthiness module. For my purposes in explaining the use of moral concern to analyze criminal negligence, I too mean to be noncommittal as to the correct normative ethical theory.

The foregoing notwithstanding, the reader may worry that limiting what is deemed a moral reason to features specified in the correct normative theory will unduly restrict who counts

³⁹ *Id.* at 87.

⁴⁰ *Id.*

as responding to a moral reason. After all, some normative ethical theories take a narrow view of what makes actions right or wrong. For example, if the correct normative theory is all about justice, then someone who helps a needy person out of gratuitous kindness or love would implausibly not count as acting for a moral reason. But surely such a person is acting from moral concern and is praiseworthy rather than blameworthy.

The apparent rigor of this position is relaxed by Arpaly's generous sense of what counts as acting for a moral reason. First of all, we know that Arpaly's theory does not require a person to act with a desire to further morality in the abstract. Consider again the two nieces who visit their uncle at the hospital, and suppose that utilitarianism is the correct normative ethical theory. If the first niece, who wants to further morality in the abstract, goes to the hospital because doing so will increase the sum of utility in the world, she has acted for a moral reason. At the same time however, the second niece, who wants to cheer her uncle up, is still acting with moral concern and for a moral reason. This is because the concrete feature of going to the hospital that makes the action right on a utilitarian theory is that it makes the uncle happier. Not knowing any ethical theory, the second niece is acting for a moral reason because her desire, to cheer him up, is just a desire to make him happier. Secondly, it may turn out that the correct normative ethical theory is flexible about the right-making features of actions. If the correct ethical theory turns out to be respect for persons, then a plurality of desires could be considered moral concern. Wanting to do something benevolent, fair, or friendly could all count.

C. Acting for a Reason

We have seen that praiseworthiness and blameworthiness are to be understood in terms of responsiveness to moral reasons—or in the case of blameworthiness for ill will, antimoral reasons. That said, what does it mean for a person to respond to reasons? Arpaly tells us:

If the content of a group of mental states—under the most common story these would be beliefs and desires, but they do not have to be—adds up to compelling reasons to do something, and these mental states motivate me to do it by virtue of the very feature that makes them good reasons, good premises in a practical inference—then I have responded to a reason.⁴¹

While this sounds exotic, it is a quotidian way of explaining the actions of others. If you are asked why your roommate has gone to the store, you might say that he went to the store because he *wanted* some almond milk and because he *thought* there was none left in the refrigerator. The contents of your roommate's beliefs and desires amount to premises in a valid practical inference—viz., if you want milk and there is none at home, then you should go to the store. Your explanation of where he went assumes that he acted for just that reason.

One's mental states can be efficacious without being efficacious in virtue of their strength as a reason. Examples will demonstrate this point:

1. Nicola is in a sad mood. This is the result of light deprivation; she has been exposed to an arctic winter.
2. Nicola is in a sad mood. This is the result of the effect of being exposed to surroundings that vaguely resemble the scene of a sad love affair from her past.
3. Nicola is in a sad mood. This is because, judging by the six o'clock news, the world is still full of sexism.⁴²

The first case is an example of causation in which content is irrelevant. The experience of her winter surroundings puts Nicola in a bad mood because of reasons that have to do solely with photochemistry and not with any meaning the surroundings possess. This is like the case of an opera singer who hits a high note and breaks a glass: it does not matter whether she is singing about romantic love or patriotic ardor as the glass will break regardless of the content of her singing.⁴³

⁴¹ MERIT & MEANING, *supra* note 11, at 70. Arpaly is borrowing from Donald Davidson. *Id.* at 63 (citing Donald Davidson, *Actions, Reasons, and Causes*, in *ESSAYS ON ACTIONS AND EVENTS* (1980)).

⁴² *Id.* at 62.

⁴³ *Id.* at 45.

In the second case, content is determinative but not in virtue of its strength as a reason. The surroundings represent something for Nicola—her old love affair—and she feels melancholy in consequence. If the surroundings did not have this significance, her emotions would not be thus affected. It is equally true, however, that the resemblance of the terrain to the scene of the love affair is not a good reason to feel sad.

Compare now the second case to the third case. The content of the news broadcast is not only content efficacious but efficacious in virtue of its strength as a reason. Nicola feels sad when she hears words or sees images that signify the persistence of sexism. Since the persistence of sexism is a reason to be sad, i.e., a good premise from which to infer that she should be sad, Nicola is responding to reasons.

To better understand what it means for a mental state to cause an action in virtue of its strength as a reason, we can look to parallel cases where Nicola infers a theoretical conclusion. Consider two beliefs that Nicola holds: “Dachshunds have tiny legs” and “Gabriela is a Dachshund.”⁴⁴ There is a logical relationship between the contents of these beliefs; namely, the contents are together good premises for a valid argument that Gabriela has tiny legs. Now if the two beliefs cause Nicola to also believe “Gabriela has tiny legs” *in virtue of their logical relationship*, then Nicola has responded to a reason.

D. Deliberation and Advertence

A significant feature of Arpaly’s view is that a person need neither consciously reflect on her actions⁴⁵ nor act “in a cool hour,”⁴⁶ for her to count as acting for reasons. The lightning fast quips of a great wit like Oscar Wilde, the behavior of a football quarterback, and the mundane

⁴⁴ See *id.* at 69–70.

⁴⁵ *Id.* at 56.

⁴⁶ UNPRINCIPLED VIRTUE, *supra* note 11, at 44.

experience of shifting one's path to avoid walking into a tree are all instances of acting for reasons without conscious reflection or deliberation.⁴⁷

Not only is deliberation nonessential to acting for reasons, but we may also act for reasons even when we are acting in an emotional flurry. After all, "At four in the morning, in a state of emotional turmoil, a person might realize that she needs to leave her husband, and be quite rational in so concluding."⁴⁸ Equally true, "At noon, in an air-conditioned room, calmly and confidently, a sleek presidential aide might reach certain conclusions regarding changes in economic policy, and her conclusions might be tragically irrational—the result of conceit or self-deception or just a tendency to make certain fallacies."⁴⁹ Considering examples like these, we should be wary of conflating acting rationally with acting calmly.

Arpaly contends that inadvertence tends to mitigate blameworthiness but that it does not excise it altogether.⁵⁰ She writes of John, a man in a heated discussion with you about the vicissitudes of the Dow Jones Industrial Average. He happens to want a pen. Without realizing it or perhaps with only dim awareness, he picks up your pen from your desk and puts it in his pocket. Assuming John's action is blameworthy, it is not essential that John advert to what he is doing for it to be so: all that is necessary is that his actions fail to respond to the moral reasons that he has not to pinch your writing supplies and thereby display a deficit of good will.

Nevertheless, John's distracted state may render him less blameworthy than he would otherwise be. We can imagine that had John not been distracted and had been paying attention to what his hands were up to, his moral concern would have stopped him from taking the pen, i.e.,

⁴⁷ MERIT & MEANING, *supra* note 10, at 56–57.

⁴⁸ *Id.* at 48.

⁴⁹ *Id.*

⁵⁰ UNPRINCIPLED VIRTUE, *supra* note 11, at 159–62.

he would have responded to the moral reasons against seizing your things.⁵¹ If this is true, then John is less blameworthy for stealing the pen than he would be had he done the same thing outside of his distracted state.⁵² The reason is that “when a person pays attention to what she does, she makes it more likely (though does not guarantee) that more of her beliefs and desires that are relevant to the matter—conscious and otherwise—will come into play and motivate her.”⁵³ As such, John’s action does not display the more severe deficit of moral concern that would be required, *ceteris paribus*, to take someone else’s pen with full awareness of what one is doing.

By way of contrast, consider John’s friend Tim. Imagine that Tim, unlike John, would have filched the ballpoint even had he not been distracted.⁵⁴ With Tim, there is no reason to think that his moral concern was prevented from “coming into play” by virtue of his inattention to what he was doing. We thus take Tim’s action to display the same shortfall of good will that it would have exhibited had he acted consciously. It follows that Tim is equally blameworthy when he is distracted from what he is doing by talk of the Dow Jones and when he is calmly aware of what his hands are doing.⁵⁵ Given that deliberation and conscious thought lack a privileged status as determinants of an action’s moral worth, this is the result we should expect from Arpaly’s model.

III. Moral Concern and Negligence: Applying the Theory

In this section, I will show how Arpaly’s theory of moral concern can be applied to criminal negligence. Although I use a hypothetical trial for illustration, my aim is neither to describe legal doctrine nor to address philosophical issues surrounding criminal negligence other

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 160.

⁵⁴ *Id.* at 161.

⁵⁵ *Id.*

than blameworthiness. The imaginary trial is only meant to illustrate how a blameworthy negligent actor can be distinguished from a non-blameworthy negligent actor in a legal context. It will be assumed that other elements of a negligently committed crime are satisfied: we will suppose that there was a negligent act (the actor, inadvertently, took a substantial and unjustifiable risk⁵⁶) and a criminal result⁵⁷ (e.g., the death of a person). The only question is the culpability of the defendant who, unaware of the risk, engaged in risky conduct and caused harm.

This is not to say that what follows is irrelevant to law and criminal justice. On the contrary, whether a person is morally blameworthy is of *prima facie* importance when considering the propriety of imposing criminal sanctions, and while not all would agree, there are many who believe that a person may be prosecuted and punished *only if* she is blameworthy for her actions. This is the view I assume in this paper, and the view taken for granted by both the concern theorists and their opponents in the debate over whether negligent conduct can be blameworthy. Of course, to affirm that blameworthiness is a necessary condition on criminal sanctions is not to hold that it is a sufficient condition. Even if blameworthiness is a precondition to criminal sanctions, it does not follow that it is the only precondition or that blameworthiness in itself furnishes a positive justification for criminalizing and punishing. When it comes to

⁵⁶ The Model Penal Code definition of negligence requires both that there be a “substantial and unjustifiable risk” and that the actor’s failure to perceive the risk involve a “gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.” MODEL PENAL CODE § 2.02 (1985). The former element is objective and concerns whether the risk taken is one that is appropriate for penal sanctions. For example, very small risks are excluded by the word “substantial” and justifiable risks (in which the expected benefits outweigh risk discounted harms) are also carved out. The second element is about the actor’s culpability for failing to perceive the risk. This is where I wish to part ways with the MPC: this paper proposes a different test for the culpability of negligent actors, one in terms of a shortfall of moral concern. The paper assumes though that actual statutes would continue to require a substantial and unjustifiable risk.

⁵⁷ The Model Penal Code treats negligence as a *mens rea*. “Criminal negligence” is not itself a crime in the MPC. To be guilty of committing a crime negligently, a defendant must be negligent with respect to an element of an otherwise defined offense. The offense will typically require a certain result like damage to property, bodily injury, or the death of a person. My analysis assumes that statutes would not criminalize mere risk taking in the absence of a harmful result.

criminal negligence, then at a minimum, the other conventional elements described above—a substantial and unjustifiable risk and a criminal result—should be shown.

For her part, Arpaly explicitly distinguishes blameworthiness and the desirability of punishment, recognizing that whether a person’s conduct warrants blame is a separate question from whether it is a good idea to punish that person.⁵⁸ Apart from certain strict retributivists, who believe that blameworthiness is both necessary and sufficient for punishment, most thinkers share Arpaly’s belief that a person’s blameworthiness does not entail that he should be punished. Philosophically, it is common to hold that blameworthiness, standing alone, is insufficient to justify punishment if no good is going to be achieved thereby. Many wed the belief that only the morally blameworthy may be subject to criminal punishment with the conviction that blameworthiness itself is no reason to punish—the positive rationale for punishment then comes from considerations of utility and deterrence.⁵⁹ Apart from questions of criminal punishment’s positive justification, there may be other necessary conditions for it besides blameworthiness. For instance, it is commonly thought that the rule of law requires that laws be publicly promulgated prior to their application so that people know beforehand what is permitted and what is prohibited.⁶⁰ In the case of criminally negligent homicide, one might oppose its inclusion in the penal code on the grounds that a vague prohibition on causing the death of another by failure to use proper care fails to give adequate notice of what is proscribed. Addressing this objection to criminal negligence is beyond the scope of this piece, however. Throughout this paper and the discussion of the hypothetical trial in the following paragraphs, I bracket other

⁵⁸ MERIT & MEANING, *supra* note 10, at 36–37.

⁵⁹ This is an example of treating blameworthiness as a “side constraint” on the use of punishment to achieve some good end that is often, but not always, utilitarian in nature.

⁶⁰ Upholding the rule of law is an interest distinct from the concern that only those who are morally blameworthy face criminal sanctions. There are reasons rooted in liberal political theory, for instance, to limit the power of the state by insisting that no person be convicted of a crime unless a preexisting law can be cited that unequivocally condemns the conduct in question.

questions to focus my attention on a criminally negligent actor's blameworthiness. While doing so prevents me from furnishing a complete justification of criminal negligence, I nonetheless show that criminal negligence—when properly defined—is compatible with a belief that only the morally blameworthy should be subject to criminal sanctions.

To assess the culpability of a defendant accused of negligently committing a crime in terms of a shortfall of moral concern, a jury should be asked to consider a hypothetical person who has every trait of the defendant, mental or physical, except for his moral concern or lack thereof.⁶¹ If the defendant at the time was hearing a blaring airhorn, then the hypothetical person should be imagined as if he was hearing a blaring airhorn. Likewise, if the defendant had just left his birthday party, then the person should be conjured as if it were his birthday as well. Under this standard, a blind defendant will have the benefit of his blindness and a clumsy defendant the benefit of his clumsiness. The sole exception to the mirroring rule is that under no circumstances should a wicked or callous defendant have the benefit of his wickedness or callousness. The exact level of moral concern to be attributed to the imaginary comparator is an objective matter, fixed independently of the defendant's subjective characteristics. How much is deemed "sufficient" cannot be made specific by statute but is left up to the judgment of the fact-finder.⁶² In this respect, the criterion is like traditional legal standards that ask the jury to make judgments of reasonableness. Although these standards are imprecise and leave the factfinder with ample discretion, they are objective in that they ask the factfinder to compare the defendant's conduct to an independent, generic standard. Traditionally, this standard is the reasonable person, but on

⁶¹ This is the way Westen, for example, presents his sufficient concern theory. Westen, *supra* note 8, at 151 (assigning to the reasonable person every trait of the defendant except that he "fully respect[s] the interests that the statute at hand seeks to protect.").

⁶² *Cf. id.* at 152 n.2 (citing MODEL PENAL CODE § 2.02 cmt. (1985)) ("The terms 'appropriate' and 'reasonable' are stand-ins for the unavoidable normative determinations that triers of fact must make regarding when a person's failure to manage his dispositions for inadvertence manifests sufficient disregard for the interests of others to merit condemnation.").

the model I propose, it is the person of appropriate moral concern. As such, the difference with conventional formulations of criminal negligence is that the theory on offer instructs the jury in terms of moral concern rather than “reasonableness” or “prudence.” This is meant to restrict the scope of criminal negligence to those who are morally blameworthy for their negligence.

Moral concern is a matter of responsiveness to moral reasons.⁶³ In negligence cases, the relevant moral reasons are reasons to advert to a risk. Consider the following example: C.D. Pepsi is the owner of a petroleum refinery. Pepsi has the misfortune to be a diabetic, and the raw luck to possess a weak memory as well. Attending a meeting one morning, Pepsi is also short of sleep due to having coffee after dinner the evening before. At the meeting, Pepsi must decide whether certain employees in the kerosene department are going to be laid off. After discussing the issue, Pepsi and his subordinates decide to layoff a quarter of the department’s staff. Unhappily, Pepsi was not aware during the meeting that such a reduction in staff created a (let us posit) “substantial and unjustifiable risk” to the other employees refining kerosene. Ultimately, this risk culminated in an explosion that killed five of Pepsi’s employees.

Was Pepsi morally blameworthy for his inadvertence? There was at least one moral reason to be aware of the risk, viz., that the employees are human beings whose lives are dependent on the safe operation of the plant. This moral reason was a reason to exercise care, to investigate the risk posed to the workers by the layoff decision. To determine whether Pepsi’s failure to respond to this reason involved a deficit of moral concern, we would ask whether a hypothetical person with all of Pepsi’s traits on that day but with an appropriate level of moral concern would have adverted to the risk his decision created for his

⁶³ The concept of a moral reason need not be formally introduced to legal doctrine; in other words, a jury would not need to be instructed in such terms. Here, thinking about moral reasons serves to conceptually undergird talk of moral concern.

employees. The person of adequate moral concern thus conjured will, like Pepsi, be a diabetic, forgetful, and short of sleep.⁶⁴

Suppose the jury decides that such a person—someone who cared appropriately for his worker’s safety—would have inquired about the potential risks to his employees and become aware of the risk.⁶⁵ In that case, the jury should deem Pepsi’s inadvertence culpable and convict. On the other hand, if the jury decides that a person of sufficient moral concern would have failed to inquire about the risk because of the distracting demands of his diabetic condition, then it should acquit Pepsi.

Although Pepsi should have the benefit of his diabetes and forgetful memory, a jury should not attribute all his traits to the hypothetical comparator. Those traits that essentially consist in responsiveness to antimoral reasons or indifference to moral reasons should be excluded. To state an obvious case, Pepsi cannot ask that the comparator be imagined as cruel or sadistic just in case he is cruel or sadistic. Less obviously, Pepsi’s actions should not be compared to a hypothetical person who shares his selfishness, arrogance, lack of empathy, or greed. If the workers in the kerosene division were largely of a different race or gender than Pepsi, he should not be heard to argue that his racial animosities or misogyny made him oblivious to the danger posed to the affected employees.⁶⁶

⁶⁴Although if the shortage of sleep is itself attributable to a failure of moral concern, then this trait must be excluded. Whether or not it will be excused turns on whether a person of sufficient moral concern would have taken precautions against going to this meeting in a comparatively fatigued state. In general, if a person is morally blameworthy for the trait in question, then the trait cannot be shown to negate the inference from failure to respond to lack of moral concern. This is because a trait the possession of which itself stems from a failure of moral concern cannot be used to disprove the existence of that same deficit.

⁶⁵ Compare Arpaly’s description of failures of moral perception: “A person who does not care much about morality may not give much thought to some things to which a more morally concerned person would pay more attention, and she may thus be less competent in perceiving other people’s feelings, putting herself in their shoes, and so on.” UNPRINCIPLED VIRTUE, *supra* note 11, at 83.

⁶⁶ *Contra* Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119 (2008).

Nor does the analysis change if the defendant has idiosyncratic beliefs about morality: Pepsi could not argue that the imaginary person with whom he is compared should share his belief that the pursuit of self-interest is the highest good. Were Leopold and Loeb guilty of negligent homicide rather than murder, their beliefs about morality would not be considered when asking what a person of sufficient ethical concern would have done in their situation. On Arpaly's view, this follows from the fact that blameworthiness is a function of concern for the features that make something good or bad (moral concern *de re*) rather than concern for what they believe, falsely, to be morality (moral concern *de dicto*).

Unlike a defendant's beliefs about morality, a defendant's beliefs about the state of the world should generally be attributed to the hypothetical comparator. For example, Pepsi's belief about the pressure tolerances of the furnace that exploded should be attributed to the comparator. There is such a thing as innocent ignorance and mistake owing to lack of aptitude, want of training, or alternative specialization. On the other hand, beliefs about non-moral facts that themselves reflect a deficit of moral concern are not to be assigned to the comparator. If Pepsi remained oblivious to important technical facts when a person of appropriate moral concern with his abilities and responsibilities would have cured himself of his ignorance, then he should not have the advantage of his missing knowledge. This distinction between factual beliefs that reflect a deficit of moral concern and those that are morally neutral is especially important in cases when beliefs about moral and non-moral facts are mixed. This is true of racists, homophobes, and misogynists who mix factual beliefs (women are passive) with moral beliefs (women ought to be subordinate to men).

It is at least conceivable that someone who believed that a group of people were baleful or inferior could treat them as such while still possessing appropriate moral concern. Arpaly's

response to such cases is to insist that they are the exception, not the rule.⁶⁷ More typically, she thinks, a belief in a group's inferiority is itself a function of antimoral concern.⁶⁸ The bigot hates the group and his hate motivates him to adopt beliefs that would justify that hatred. In other cases, rather than ill will motivating bigoted beliefs, a deficit of moral concern leaves one susceptible to prejudice. In these cases, the intolerant belief is one the person would not have formed were he a person of appropriate moral concern.⁶⁹ A person who truly cares about his friend will be skeptical when he hears an unflattering rumor about him.⁷⁰ For the same reason, a person who cares about treating people fairly and kindly will be chary when told that a certain large swath of humanity that shares a morally neutral trait like skin color is congenitally wicked or incapable.

In sum, what makes a mental state, be it a belief or desire, warrant blame rather than excuse is its content: if instead of being contentless or possessing morally neutral content, it consists in non-responsiveness to moral reasons or in responsiveness to antimoral reasons, then it cannot exculpate and is apt to inculcate.

IV. Advantages of Arpaly's Theory

A. Rigorous articulation of the concern theory

In this article, I have presented Arpaly's theory of blameworthiness and applied it to criminal negligence. Her theory of praise and blame is a comprehensive one: it systematically connects praiseworthiness and blameworthiness with quality of will and explains quality of will in terms of responsiveness to moral reasons. Praiseworthiness and blameworthiness are multifaceted subjects, and she ably dissects cases of mental illness, false moral belief,

⁶⁷ See UNPRINCIPLED VIRTUE, *supra* note 11, at 105.

⁶⁸ *Id.* at 105–06.

⁶⁹ *Id.* at 107–11.

⁷⁰ See *id.* at 110.

inadvertence, and acting without deliberating. In sum, her theory permits clear, rigorous articulation of a concern theory of criminal negligence.

Arpaly's account of the effect of mental illness on moral responsibility is a particular strength of her view. In Pepsi's case, we explained that the hypothetical person to whom he is compared should also suffer from diabetes. This is because diabetes is not a disease of content efficacy. A woman suffering from diabetes, who feels lethargic because her blood sugar is low and thus fails to give up her metro seat to an arthritic senior citizen, is not, for that reason, indifferent to his needs. As such, her behavior does not reflect a blameworthy deficit of moral concern.

On Arpaly's view, this is also true of many mental disorders. As she explains, the swearing of a Tourettic person is unlike the swearing of a normal person. When the non-Tourettic curses at someone, it is usually attributable to spite or indifference to the victim's feelings. Not so with someone suffering from Tourette syndrome—he swears like a normal person would cough or like a diabetic would droop from low blood sugar, i.e., via a causal mechanism that is independent of the content of his beliefs or desires.

The same can be said of behavior that is the consequence of depression. The listless, melancholy behavior of a depressed person is like the symptoms of diabetes or Tourette syndrome in being content indifferent.⁷¹ A depressed friend does not fail to return a wave because she disdains the waver but because the disease saps her motivation for all activities without regard for the content of her mental states.

Arpaly's theory thus presents the same principled basis for distinguishing when a defendant can properly ask that his hypothetical comparator share his illness as it does for his

⁷¹ Arpaly thinks that some cases of depression are like diabetes, while others may involve a greater degree of content efficacy. MERIT & MEANING, *supra* note 10, at 80.

other traits. Whether the trait is clinical or non-clinical, her theory of blameworthiness offers the same analysis: those traits that are not content efficacious or the content of which is morally neutral may count as exculpatory while those that consist in responsiveness to antimoral reasons or indifference to moral reasons cannot be exculpatory.

And there is a need for principled distinctions in this area. A common way of explaining why certain mental illnesses exculpate is to say that they are “just like diabetes” because, like diabetes, they can be traced to physiological abnormalities. Yet as Arpaly observes, for a materialist, “all mental states are, at bottom, physical states, states of the brain.”⁷² Depression is a state of the brain, but so are healthy mental states. The exculpatory power of mental illness then cannot be explained simply by stating that mental illness is a biochemical state in the brain, for all psychological traits are states of the brain. This does not mean that mental illness cannot exculpate, but it does call for a fresh analysis to explain which of a person’s psychological traits should be attributed to a hypothetical comparator, an analysis that does not make the fact that mental illness has a biochemical basis do the normative work. This paper presents such an analysis. Although it may be true that both depression and disregard for one’s friends are biochemical states of the brain, the depressed person’s failure to waive does not involve lack of responsiveness to moral reasons whereas the same failure in the person who disdains her friends does involve indifference to moral reasons.

B. Dispensing with Choice and Control

Apart from its clarificatory power, the second advantage of introducing Arpaly to the negligence–blameworthiness debate is that she does not require a special quality of choice or self-control to be at work in instances of blameworthy conduct. It is instead sufficient that an action demonstrate lack of good will or the presence of ill will. This is why Arpaly calls her

⁷² *Id.* at 77.

position a “quality-of-will based view.”⁷³ Quality of will is itself cashed out in terms of responsiveness to moral reasons, which as we have seen, can be explained without recourse to a notion of choice or self-control. A person may act for a reason even when she acts against her best judgment, is overwhelmed by strong emotions, or acts without reflecting.

Dispensing with special qualities of choice or self-control is an avowed strength of Arpaly’s position.⁷⁴ On her view, there is no need for action to be traced to a special executive self (e.g., the soul) or for one part of the self to govern the other (reason holding the reigns of desire) for a person to count as blameworthy.⁷⁵ This is advantageous because it dispenses with the difficult task of making categorical psychological distinctions between an agent’s “real self” and other segments of a person’s mind.⁷⁶ For Arpaly, an agent is nothing more than her mental states: “[L]ooking at an agent’s mental states and wondering where the agent is would be like Ryle’s old example of the person who looks at Oxford’s many buildings and asks where the university is.”⁷⁷ Since they have no exclusive claim to identity with the agent, deliberation and conscious choices lack a privileged status when it comes to rational, responsible action. So long as actions proceed from our mental states, they are acts that are attributable to us. Whether we are blameworthy for those actions depends upon whether we are responding to moral reasons and whether our failure to do so reflects a deficit of moral concern.

Typically, a control based view will face snags accounting for seemingly uncontrollable desires, the urges of a narcotics addict for instance.⁷⁸ The standard recourse is either to specially define cases of irresistible desire for which one cannot be blamed or to look for prior failures to

⁷³ *Id.* at 16.

⁷⁴ *Id.* at 19 (“From the point of view of the compatibilist, another advantage of my view is that it is not based on any notion of self-control.”).

⁷⁵ *See id.* at 20.

⁷⁶ *See id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 20–21.

exercise self-control.⁷⁹ The problem, Arpaly points out, is that neither solution works reliably.⁸⁰ There are cases of people who successfully control their narcotics addictions,⁸¹ and there are cases of meeting sudden and unexpected temptation for which no prior failure to exercise self-control can be cited as a basis for blame.⁸² Rather than attempt to rate some desires as absolutely “irresistible” or delve in a person’s past for missed opportunities of self-control, Arpaly subsumes the analysis of blameworthiness in these cases to her general quality-of-will based view.⁸³ Cases of drug addiction or sudden, severe anger of the kind stereotypically experienced by those who find their spouses in bed with another person can be analyzed in the same manner as the depressed friend who fails to return a borrowed book. To recognize that a heroin addict without resources is less blameworthy for stealing than she otherwise would be does not require that we first conclude that she could not have overcome her desire for the drug “if only she tried hard enough.” Rather, as Arpaly states, it is enough to recognize that heroin withdrawal is like torture and that someone who steals to escape such extreme suffering does not thereby display any great deficit of concern for the rights of others, regardless of the possibility that heroic discipline could have prevented her theft. Ultimately, the presence of a powerful desire like the addict’s thirst for heroin is one more factor, albeit an extremely significant one, to be considered in assessing whether an act or omission manifested a lack of moral concern.⁸⁴

Arpaly’s approach also allows for distinctions of degree as opposed to the strict either/or required when rating certain desires as irresistible. Assessments of an agent’s blameworthiness will vary with the severity of the wrong done and the potency of the opposing, morally neutral

⁷⁹ See *id.* at 22 (describing these propositions as “two problematic assumptions”).

⁸⁰ See *id.* at 22–24.

⁸¹ *Id.* at 22.

⁸² *Id.* at 23.

⁸³ See *id.* at 20–21.

⁸⁴ *Id.*

psychological force. For example, we may think that only a person utterly bereft of moral concern would kill a child to satisfy his addiction whereas it would be unreasonable to judge that someone who took money, without threat or violence, from a wealthy stranger for the same purpose was completely lacking in moral concern. Likewise, the surprised spouse's jealous rage may reduce his blameworthiness but does not eliminate it. Had he appropriate regard for human life, he would not have killed even under the influence of extreme, sudden anger, and yet, the deficit of moral concern he shows is not so great as that displayed in one who kills when unaffected by violent emotion.

The importance of avoiding self-control in the analysis of blameworthiness can be seen through a critical look at a passage in Peter Westen's work on criminal negligence. Westen is a concern theorist; he explains both culpability for criminal negligence and the heat of passion defense to murder in terms of proper regard for "the values of the people of the state as reflected and incorporated in the statute at hand."⁸⁵ The defendant should be compared to a person having all of the defendant's traits except for her respect (or lack thereof) for the values embodied in the law. Although the concern theory I have articulated speaks of moral concern generally rather than the values embodied in the statute, it otherwise agrees with Westen in holding that all of the defendants' traits, except her moral concern, should be held constant.

Westen's theory differs, however, from the concern theory I have presented in using the idea of self-control to analyze blameworthiness. As the following passage shows, his full articulation of his theory distinguishes traits of character that are within the actor's "control" from those that he is "not capable of controlling or compensating for."

Since a "reasonable person" in negligence and voluntary manslaughter cases is an objective and personified standard by which to assess an actor's criminal blameworthiness, and since criminal blame is a judgment of an actor's values, it follows

⁸⁵ Westen, *supra* note 8, at 137.

that a reasonable person in negligence and voluntary manslaughter cases is a construct that consists of all of what an actor is—including every physical, psychological and emotional trait—except that it also fully embodies the values of the people of the state as incorporated in the statute at hand regarding the rights and duties of persons. The proposed test is simple. Thus, in lieu of having to pick and choose among an actor’s many traits, it poses a simpler question: “What would a person, who otherwise possessed every trait of the actor but fully respected the interests that the statute at hand seeks to protect, have thought and/or felt on the occasion at issue?” . . .

This proposed test also resolves the problem that individualization seeks to address. Because the test incorporates all of an actor’s physical, emotional and psychological traits, it incorporates all incapacities on his part that are *not within his control and not his fault*, like Lennie’s profound retardation, and only then it asks, “How would a person who possessed those incapacities but who otherwise possessed proper values respond cognitively and/or emotionally to the event in question?” The test thus avoids the problem of condemning actors for mental states or emotions they cannot help. At the same time, however, the test also avoids the problem of excusing actors for faults of character they are *capable of controlling or compensating for*, because while the test incorporates those faults, it expects actors to respond to them in the way that a person with proper values would respond to such dispositions – namely, by subjecting them to the *controls and compensatory actions* of which he is capable to prevent them from manifesting themselves.⁸⁶

In the second paragraph, Westen distinguishes between faults that are not within a person’s control and those that are under his control. Yet, as the preceding discussion has indicated, distinguishing irresistible mental traits from resistible ones and separating controller mental states from the controlee states are problematic endeavors. In building the type of theory that Westen is constructing, it is better to do without a concept of control when a pure, quality-of-will based view like that of Arpaly will suffice to analyze blameworthiness.

Not only does invoking control complicate one’s theory, but it yields a foothold to opponents of criminal negligence who insist that choice is essential to culpability. When Alexander and Ferzan respond to Westen in their book, they fault his theory for making people blameworthy for traits of character that are not under their control. That a person lacks concern for the values that the statute embodies is a character feature, and for Alexander and Ferzan, we

⁸⁶ *Id.* at 151–52 (emphasis added).

do not have sufficient control over our characters to render us blameworthy for them. They write, “[I]f the negligence proponent wants to hold us responsible for our characters, he will have to offer some evidence that we have control over them.”⁸⁷

By accepting the premise that blameworthiness requires control—as Westen seems to do when he links “not within his control” and “not his fault”—the concern theorist leaves himself vulnerable to the objection that one’s lack of moral concern is not under one’s control and therefore cannot render one blameworthy. Dialectically, it is wiser to insist that, since quality of will and reasons responsiveness are sufficient, neither control nor choice is necessary for blameworthiness.

C. The significance of choice and control in a theory of moral agency

I have argued that one reason concern theorists should adopt Arpaly’s theory of blameworthiness is that it does not rely on a special notion of choice or control. Those who share Alexander and Ferzan’s position that “one is culpable only for acts over which one has control” will not regard dispensing with choice and control as a theoretical virtue. More now needs to be said about the significance of choice and control in a theory of moral responsibility and how Arpaly’s quality-of-will view can take their place.

In the paragraphs that follow, I want to identify two roles choice and control can play in a theory of moral responsibility. Once I have identified these roles, I will show how relying on choice and control to fill them problematizes liability for criminal negligence. I will then describe how Arpaly’s quality-of-will view performs the same functions in a fashion that favors the concern theorist’s project of accommodating negligence to blameworthiness.

1. Theoretical Roles

⁸⁷ ALEXANDER & FERZAN, *supra* note 2, at 84–85.

The first role choice and control can play is to link an action with an agent; call this the attribution role. Not every movement of a person's body is attributable to the person. This is the case with various forms of automatism, such as somnambulism. Although it is convenient to say that "Lisa spilled the milk while she was sleepwalking," the fact that she was sleepwalking disassociates her from her action. We might even justifiably refuse to use the word "action" on the grounds that unless it is attributable to an agent, a movement should not be considered an action. If spilling the milk is not even attributable to her, then Lisa cannot be blameworthy for it either.

By playing the attribution role, choice or control can provide the connection between an agent and her putative action. Suppose that while awake, Lisa kicks her little brother. An intuitive way to explain why the kick is her action is to say that kicking her little brother was something she *chose* to do. Another intuitive account to give is that Lisa could *control* ("it was up to Lisa") whether or not she kicked her brother.

To attribute an action to a person, it may be enough to say that she "chose" to do it or to say that "it was up to her." Still, reliance on choice or self-control in the attribution role lends support to a model of agency that is problematic for the concern theorist.⁸⁸ The model of agency I have in mind is one that postulates that certain parts of the agent's mind are the agent and others are not.⁸⁹ When we place choice or self-control in the attribution role, the privileged parts of the mind are apt to be deliberative and conscious. This is because we commonly associate choice with conscious deliberation.

If deliberation and consciousness are taken to be identical with the agent or the agent's "real self," then the reason why consciously chosen actions are attributable to the agent is that

⁸⁸ Cf. MERIT & MEANING, *supra* note 10, at 20.

⁸⁹ See *id.* A simple example is the claim that a person is identical with her reason and that her desires are therefore alien to her.

the actions are the result of deliberation or are done consciously. Similarly, actions that are under the person's control are attributable to the person because they are conformable to deliberation or subject to veto by the conscious mind. On this model, actions that do not proceed from deliberation or that are done without the participation of the conscious mind are considered "not really the agent's actions."⁹⁰

The second role that choice and control can fill is to characterize the agent's will; call this the volitional role. Consider the case of a man who, in consequence of unwittingly ingesting a powerful hallucinogenic drug, mistakes his building's custodian for a devil. He then assaults the man with the belief that he is striking a menacing monster. The man's action is not like that of the sleepwalker or a patient tapped with a reflex hammer because his action is attributable to him. Nevertheless, the man does not seem blameworthy for the assault. In this case, the agent's intention was not to attack his neighbor but to combat a monster.

Choice can play the volitional role if we recognize an agent's will in her choice to undertake an action under a particular description. When a person chooses an action under a certain description, her will is characterized by the description of the action chosen. The sober agent who knows that the person she is about to attack is a human being and chooses to carry out the assault has a will that is characterized by the wrongful action. In contrast, the man hallucinating chooses the action under the description "fighting demons" and his will is not characterized by the wrongful action.

Control too can play the volitional role. Intuitively, the man suffering from the hallucination lacks control when he assaults the custodian. His mistake about the facts robs him of control because it prevents him from governing himself in accordance with the facts. Compare the position of Ferzan and Alexander:

⁹⁰ *Id.*

If one is unaware that, say, someone has replaced the sugar on the table with poison, then one is not culpable for placing that poison in another's coffee and thereby killing her. For although one is in control of the conduct of placing the white substance in the coffee, the mistaken belief that it is sugar deprives one of the kind of control necessary for culpability.⁹¹

The sober agent, on the other hand, is in possession of the facts necessary to regulate her behavior, i.e., that the person in front of her is an innocent human being.

2. The Problem with Choice and Control

In the foregoing paragraphs, I explained how choice and control can figure in a theory of moral responsibility. I will now show that reliance on choice or control in the attribution and volitional roles yields a model of moral agency without the tools and conceptual space to explain the culpability of negligent actions. A theory of moral responsibility that requires choice or control is a poor foundation from which to argue that negligent actions are sometimes blameworthy.

I have already alluded to the difficulty for the concern theorist of placing choice or self-control in the attribution role. The concern theorist is ill-served by a theory of moral agency that limits the agent to her deliberations or conscious mind. Negligent actions, actions that create unjustifiable risks of which the agent is not aware, are by definition not actions in which the agent is conscious of the risk he is imposing or weighs the risk in deliberation. If the agent were conscious of the risk, then he would be reckless, not negligent. The trick for the concern theorist is to furnish an account of moral agency that identifies the agent with more than his conscious, occurrent mental states. A person's attitudes, values, and desires may motivate an action without him being conscious of them, and a concern theorist needs to be able to explain why an agent is blameworthy for failing to advert to a risk in terms of mental states that are not occurrent or

⁹¹ ALEXANDER & FERZAN, *supra* note 2, at 79.

conscious. Consider Duff's effort to articulate an alternative conception of mens rea that will accommodate negligence:

The orthodox subjectivist's insistence on conscious risk-taking might reflect an untenable dualism, which draws a sharp distinction between '*actus*' and '*mens*', and takes *mens rea* to consist essentially in some occurrent mental state which is explicitly related to every element of the *actus reus*. We should instead recognize that *mens rea* (whether it involves intention, or knowledge, or practical attitudes) is rather a matter of the meanings or patterns which are displayed in the agent's actions themselves: it is the intentions and attitudes by which those very actions are structured which properly constitute the agent's ('subjective') criminal fault."⁹²

On a concern theory, it is the attitude of disregard for moral interests—not a conscious, occurrent mental state—that renders the negligent agent's failure to advert to a risk blameworthy.

Accordingly, a concern theorist should look for an alternative that identifies the agent with more than her conscious mind or her deliberations, so that her inadvertent actions will also be attributable to her and so be eligible for blameworthiness.

Choice and control are also poorly cast in the volitional role for the concern theorist. If choice is seated in the volitional role, then only actions that reflect the agent's choice of an action under a description will be seen as reflecting her will. When control holds the volitional role, only actions that are self-controlled characterize the agent's will. Actions that are done outside the chain of command, for instance, actions that bypass conscious or deliberative processes, are thereby excluded. Negligent actions, however, are acts of inadvertent risk taking in which the chain of command cannot operate for want of information. A person controls whether he drives a car, but he does not control whether he drives a car with an unnoticed defect in its tires.

Consequently, the concern theorist should interview other theoretical candidates for the volitional role. An ideal candidate would characterize the agent's will in terms of a wide array of mental states. It would take into account desires, attitudes, and values, whether occurrent or non-

⁹² DUFF, *supra* note 7, at 171.

occurrent, conscious or unconscious. Consider the example of Arpaly's pen thief, who inadvertently swipes a pen from your desk while distracted by a heated conversation. Someone who cared more about you and your rights or who was less selfish would not have taken the pen even while distracted. In terms of Duff's reformulation of mens rea, the practical attitude that structures his action is one of relative indifference to you. That this is the attitude behind his action is true even though he does not consciously endorse these motives or consciously take the pen.

3. Arpaly's Alternative

In order to bring negligence under the net of moral responsibility, the concern theorist should resist choice and control as candidates for the attribution and volitional roles and instead seek a theory of moral agency tailored to her needs. Arpaly's theory of moral agency has the features that the concern theorist needs to show that negligent actors can be blameworthy.

With respect to the attribution role, Arpaly makes clear that she thinks that an agent just is his or her mental states.⁹³ Accordingly, behavior that arises from the agent's mental states is attributable to the agent. There is no need to ask whether the agent can be identified with the particular mental state in question in order to determine that the behavior is hers. For her, an agent is "simply a human being that acts."⁹⁴ There are no privileged mental states, like rationality, consciousness, or deliberation, that are identified with the agent. "[L]ooking at an agent's mental states and wondering where the agent is would be like Ryle's old example of the person who looks at Oxford's many buildings and asks where the university is."⁹⁵

Arpaly's identification of an agent with her mental states furnishes the wide berth needed by the concern theorist. The concern theorist requires a theory that allows for behavior that is

⁹³ MERIT & MEANING, *supra* note 10, at 20.

⁹⁴ *Id.* (quoting ALFRED MELE, MOTIVATION AND AGENCY 216 (2003))

⁹⁵ *Id.*

motivated by non-conscious, non-deliberative mental states to count as the agent's actions. For the concern theorist, when a negligent actor places someone at risk without an awareness of what she is doing, the fact that the agent did not deliberate about or was not conscious of the risk should not mean that the action is not attributable to her. Consider a bricklayer absentmindedly tossing unusable shards of brick from elevated scaffolding. In certain circumstances, the concern theorist may wish to say that the man is blameworthy for his negligence. However, the concern theorist first needs to attribute the action to the man. On Arpaly's theory, the concern theorist can attribute the action of dropping the brick to him because his throws, while unplanned and unconscious, are still guided by his mental states.

Regarding the volitional role, Arpaly explains an agent's quality of will in terms of the contents of her mental states. On Arpaly's model, one is capable of action because one is capable of responding to reasons; what gives particular action its character is the content of the mental states that motivate it.⁹⁶ The fact that reaching for a glass of water is motivated by someone's desire for water and her belief that the glass contains water is what makes it the case that her action is an instance of reaching for a glass of water.⁹⁷ In the case of the hallucinating man, the fact that his action is motivated by his belief that what is before him is a monster and his desire to fight the monster is what makes it the case that his action is an instance of combatting a monster.⁹⁸ For the sober assailant, the fact that her action is motivated by her belief that there is a person before her and her desire to hurt that person is what makes it the case that her action is an instance of assaulting a person. In each case, the person is motivated to act by his or her mental

⁹⁶ See *id.* at 13–15, 63, 70–71.

⁹⁷ See *id.* at 63, 70–71.

⁹⁸ Arpaly distinguishes between what she calls *rationalizing* reasons and *absolute* reasons. *Id.* at 65–67. What rationalizing reasons a person has depends on her beliefs. If one has the talent to become a great chess player, one has an absolute reason to practice chess. At the same time, if the same person is unaware of her talent, then she has no rationalizing reason to practice chess. The hallucinating man has a rationalizing reason for his assault, although he has an absolute reason not to act as he does.

states in virtue of the fact that the contents of the mental states amount to a reason to do something.

As I have emphasized, Arpaly holds that people can and often do act for reasons when they act inadvertently or act without deliberating. A person's belief that there is a tree in her path and her desire to avoid the tree motivate her to shift her route to avoid the tree; she is acting for a reason even though she does not consciously decide to alter her steps. The pen thief sees your pen lying on the desk and wants it; he acts for a reason when he takes the pen even though he does not consciously decide to take your pen and is unaware of what he is doing. In these cases, a person's beliefs, desires, and other mental states effectively motivate him or her to act in a way that counts as acting for reasons. The quality of his or her will is in turn a function of the content of the motivating mental states and is not defined exclusively by his or her conscious choices or deliberations.

It is expedient for the concern theorist to be able to explain the character of an agent's will in terms of the content of the mental states motivating an action. Due to the nature of negligent actions, the concern theorist cannot appeal to conscious intentions or choices to explain the quality of an agent's will. A concern theorist can rely, however, on beliefs, desires, and values that are not conscious but are nonetheless motivational efficacious. When the beliefs, desires, and values motivating the action exhibit a deficit of moral concern, the agent is blameworthy, per the concern theorist.

Likewise, it is advantageous for the concern theorist to work from a model of moral agency that allows unconscious, unplanned actions to be reasons responsive. Significantly, when they are reason responsive, unconscious and unplanned actions are not devoid of structure. In the actions of the pen thief for example, we see the same relationship between means and ends found

in conscious, intentional action. Although his end is not consciously chosen, the pen thief wants a pen and taking your pen is a means of fulfilling that desire. As Duff stated in his proposal for a new understanding of mens rea, mens rea should be understood as a matter of the “intentions and attitudes” that “structure” the agent’s action. An attitude of ruthless selfishness, for example, may structure a negligent retailer’s actions. Although he does not consciously prioritize profits over people when he inadvertently places consumers at risk by selling an unsafe product, his action is structured by beliefs and desires that subordinate the rights of others to his own gain. In terms of means and ends, his action has a structure in which the means taken in pursuit of profit are not properly qualified by the rights of others.

For a more detailed example, consider Duff’s case of a man on trial for rape who incorrectly but truly believed that his victim was consenting.⁹⁹ Duff tells us that the man is blameworthy if in “holding and acting on” his belief that the woman was consenting, he did not “show[] a proper respect for the woman’s rights.”¹⁰⁰ Suppose the man was a misogynist and that his contempt for women or bigoted stereotypes prevented him from recognizing his victim’s failure to consent as such. Although the occurrent belief that the woman was not consenting never entered his consciousness, his misogyny nonetheless structures his action. He never considered whether his victim was not consenting because his disdain for women blinded him to her humanity, rights, and agency. He thus had sex with the woman without regard for her as a person. Importantly, Arpaly’s model of agency gets this case right for the concern theorist: “If one cares about morality, moral facts matter to one emotionally, and they are salient to one. As a result, other things being equal, a person of more moral concern will be more sensitive to moral features of situations—more apt to notice, for example, that a fellow human being is showing

⁹⁹ DUFF, *supra* note 7, at 171.

¹⁰⁰ *Id.*

signs of distress”¹⁰¹ While the rapist did not advert to the possibility that his victim was not consenting and his conscious aim may have only been pleasure, his will was characterized by disregard for the personhood of his victim. It follows that his action manifested a deficit of moral concern and that he is blameworthy for his action.

D. Choice, control, and culpability

Before concluding, I want to defend briefly Arpaly’s exclusion of choice and control from her theory of blameworthiness. While a complete argument for Arpaly’s position is outside the scope of this piece, I want to disclose the motivations for this theoretical move. In doing so, I will also give the reader a glimpse of the other possibilities in the theoretical space.

Arpaly writes as a determinist who is offering a compatibilist theory of moral responsibility.¹⁰² She argues that whatever freedom we lack in consequence of determinism does not detract from responsibility.¹⁰³ She accepts that insofar as choice and self-control require contraccusal freedom, then determinism excludes their existence and their usage in a theory of praiseworthiness and blameworthiness.¹⁰⁴ Rather than attempt to define choice and self-control in a manner that does not depend on contraccusal freedom, Arpaly relinquishes both notions in her theory of moral responsibility. Her theory is instead based on a person’s capacity to respond to reasons and the amount of moral concern (or antimoral concern) evidenced by his or her responsiveness to moral reasons. Furthermore, her account of reasons responsiveness includes cases in which people act unconsciously, against their best judgment, under the influence of a strong emotion or desire, and without deliberation. As explained more fully in section II.B, all that is required for a person to respond to a reason is that “the content of a group of mental states

¹⁰¹ UNPRINCIPLED VIRTUE, *supra* note 11, at 87.

¹⁰² MERIT & MEANING, *supra* note 10, at 6.

¹⁰³ *Id.* at 5.

¹⁰⁴ *See id.*

. . . adds up to a compelling reason to do something, and [that] these mental states motivate [one] to do it by virtue of the very feature that makes them good reasons.”

Ferzan and Alexander doubt how a person can be culpable for actions that stem from faulty character when character is something which he “may or may not be able to change.”¹⁰⁵ By contrast, Arpaly’s determinism leads her to accept that we are not “able to decide who to be” or choose our “beliefs, desires, concerns, values, emotions, and intentions.”¹⁰⁶ She writes that while we may “want to be able not only to do what we want, but also to want only things that we choose to want,” this kind of freedom is impossible in a deterministic universe.¹⁰⁷ “[F]reedom of this sort is the spiritual equivalent of the ability to pick oneself up (literally!) by one’s own bootstraps . . . an impossibility”¹⁰⁸ And yet for Arpaly, these facts do not detract from moral responsibility. Her positive view of moral responsibility requires only that we are capable of responding to reasons.

Arpaly is not the exclusive proprietor of compatibilism. There are other ways of explaining moral responsibility in the shadow of determinism, including some that preserve a place for self-control. Ferzan (but not Alexander) is a determinist and a compatibilist. As Ferzan asserts, “[A]ctors do not need contra-causal freedom to deserve praise and blame, or punishment and reward, for their actions. It is sufficient if they act intentionally, without compulsion, and with a general capacity for rationality. *The only form of control a responsible actor needs is the general capacity to be guided by reason, a capacity most adults possess in ample measure.*”¹⁰⁹

Notice, however, that that by identifying self-control with reasons responsiveness, Ferzan undermines the case for a necessary connection between self-control on the one hand and

¹⁰⁵ ALEXANDER & FERZAN, *supra* note 2, at 85.

¹⁰⁶ MERIT & MEANING, *supra* note 10, at 5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ ALEXANDER & FERZAN, *supra* note 2, at 190.

conscious choice and deliberation on the other. This is because, as the previous discussion of Arpaly's view has shown, we are capable of responding to reasons even when we act inadvertently, in an emotional storm, or without deliberating. If that is the case, then there is no reason to exclude negligent actions (motivated by greed for example) categorically from blameworthiness. Failing to use caution may still be a blameworthy failure of reasons responsiveness even though the agent does not advert to the relevant risk and therefore cannot consciously choose to take it or consider it in deliberation.

Issues of free will, determinism, responsibility, agency, and reasons responsiveness are heavily contested. That said, if we assume determinism, then Arpaly's rejection of choice and self-control has a clear motivation. Furthermore, while there are other forms of compatibilism, those that explain moral responsibility in terms of reasons responsiveness do not bar negligent conduct from being blameworthy, at least insofar as Arpaly is correct that reasons responsiveness does not require conscious choice or deliberation.

While this paper has sketched Arpaly's reasons for denying that reasons responsiveness occurs only through conscious choice and deliberation, there are other accounts of what reasons responsiveness consists in, some of which would exclude Arpaly's cases of acting unconsciously or without deliberating.¹¹⁰ Assuming for the moment that opponents of criminal negligence accept determinism and some form of compatibilism based on reasons responsiveness, then the argument between concern theorists and opponents who are compatibilists like Ferzan will boil down to a disagreement about whether an agent must advert to the relevant risk in order for his

¹¹⁰ See UNPRINCIPLED VIRTUE, *supra* note 11, at 125. Arpaly identifies Elizabeth Anderson and Alfred Mele as philosophers who tie rational action to deliberation. ALFRED MELE, *AUTONOMOUS AGENTS* (1995); Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, in *INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON* (Ruth Chang ed. 1997).

negligence to reflect a blameworthy failure of reasons responsiveness. My answer to that question in this paper has been “no.”

V. Conclusion

My object has been to advance the claim that criminal negligence should be understood in terms of sufficient moral concern. Both Duff and Westen are examples of concern theorists who have argued that criminal negligence, properly understood, condemns only those whose negligence reflects a disregard for the interests of others or for the law’s values. Their approach is recognized as one way to justify the inclusion of criminal negligence in criminal codes in the face of the charge, leveled by theorists like Alexander and Ferzan, that it unacceptably severs penal liability from blameworthiness. In this paper, I applied Arpaly’s work to present my own version of the concern approach and argued for the advantages of utilizing her model of moral agency in this context.

I began with a summary of the debate over the propriety of criminal negligence. I then launched into a presentation of Arpaly’s views on blameworthiness, praiseworthiness, and inadvertence. I next explained how Arpaly’s theory of blameworthiness could be applied to criminal negligence. The discussion of the fictional industrialist showed the utility of this approach for defining which of a defendant’s qualities are to be attributed to a hypothetical comparator. Lastly, I sought to spotlight the benefits for a concern theory of adapting Arpaly to this field, especially the value of dispensing with notions of self-control or choice to explain moral responsibility.