

'But What Does that Say About Me?' Raz and Hart on Responsibility for Negligence

Abstract: This paper provides a critical examination of Joseph Raz's distinctive theory of responsibility, via a comparison with the theory given by his mentor, HLA Hart. These theories merit comparison because both Raz and Hart develop their theories by using negligence as a crucial test case, and both theories give a central place to the notion of *capacity*, albeit in very different ways. The comparison is also fruitful because, although Raz avoids some of the alleged shortcomings of Hart's theory, it equally suffers from one objection made to Hart. Neither theory, I allege, explains why negligent conduct speaks badly of an agent in a way that suffices for blame or criminal sanction. However, we can avoid this problem by opting for a theory of responsibility that has a capacity component alongside a separate *quality-of-will* component, a theory which combines elements from two families of theories of responsibility typically thought of as in opposition.

1. Negligence as a Test Case for a Theory of Responsibility

In law, negligence occurs when an agent breaches a duty of care they owe to another person, and this duty breach results in harm to the person to whom the duty of care was owed. More colloquially, negligence is when you cause harm because you should have taken more care than you did. Typical examples of negligent harming would include a case of doctor prescribing some medication that her patient is allergic to because she neglects to find out the patient's allergies beforehand, or a case of a teacher who fails to take an adequate head count while on a field trip to the beach, leaving one of their students stranded as the tide comes in. In law, negligence is a ground of both civil liability and, to a more limited extent, criminal liability, though it's often required that the negligence be 'gross' (i.e. very serious) for it to ground criminal liability.

Both Joseph Raz and HLA Hart develop their theories of responsibility by focusing on responsibility for negligence. But they are not alone in having this theoretical stance. It has parallels in the moral philosophy literature, in which philosophers offer competing theories of responsibility debate one another about the best way to account for when ignorance provides an excuse and when ignorance is culpable.¹

Why might one treat negligence in this way, as a test case for a theory of responsibility? This is plausibly down to a combination of two factors. Firstly, holding others to account and blaming them for their negligent

¹ See Gideon Rosen, 'Skepticism about Moral Responsibility' (2004) 18 *Philosophical Perspectives* 295, and the literature spawned by Rosen's discussion.

conduct is an entrenched and ubiquitous part of our responsibility practices. As Hart puts it:

'I didn't *mean* to do it: I just didn't think.' 'But you should have thought.' Such an exchange, perhaps over the fragments of a broken vase destroyed by some careless action, is not uncommon; and most people would think that, in ordinary circumstances, such a rejection of 'I didn't think' as an excuse is quite justified.²

Raz expresses a similar sentiment when he says of negligence, which in his terms is something we are *by definition* responsible for, if it exists, that '[o]ur belief that negligence is possible and common seems firm'.³

But secondly, negligence is distinctively *controversial* element of our responsibility practices. This is principally because assigning responsibility for negligence extends to those who cause harms *inadvertently* – that is, to those who are unaware of the harms they are causing and the risks they are taking, such as the agents in my previous examples. How it can be justified to hold people responsible for harms they cause inadvertently is much less obvious than with people who cause harm deliberately, and this has led many to view negligence with suspicion.⁴

The combination of these two factors – the fact that negligence clearly does have a place in our responsibility practices, together with it not being clear what justifies it having that place – accounts for why a focus on negligence is a promising starting point for thinking about responsibility. *If* we can provide a good explanation of responsibility for negligence, that promises to tell us something important about responsibility in general.

This paper will carry out a critical comparison of the theories of responsibility that Raz and Hart develop in their discussions of negligence. According to the distinctive theory of responsibility Raz develops in the final chapters of *From Normativity to Responsibility*, an agent is responsible for ϕ -ing just in case ϕ -ing results from the functioning or malfunctioning of an agent's powers of rational agency within that agent's 'domain of secure competence'.⁵ According to Hart's theory, criminal responsibility for

² HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (John Gardner ed, 2nd edn, OUP 2008) 136.

³ Joseph Raz, *From Normativity to Responsibility* (OUP 2011) 263.

⁴ For prominent statements of such scepticism, see JWC Turner, 'The Mental Element in Crimes at Common Law' (1936) 6 *The Cambridge Law Journal* 31; Jerome Hall, 'Negligent Behavior Should Be Excluded from Penal Liability' (1963) 63 *Columbia Law Review* 632; Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (CUP 2009) ch 3; Michael S Moore and Heidi M Hurd, 'Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence' (2011) 5 *Criminal Law and Philosophy* 147. Such scepticism most often concerns the criminalization of negligence, but sometimes extends to civil negligence liability; see, e.g., Heidi M Hurd, 'Finding No Fault with Negligence' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

⁵ Raz, *From Normativity to Responsibility* (n 3) 231.

negligence is grounded in an agent's cognitive and volitional capacities to do what the law requires of them.⁶ Aside from their personal connection, Raz and Hart merit comparison here because both of their accounts make central appeal to the notion of *capacity*, though in somewhat different ways. Hart's account is grounded in the commonplace idea that responsibility requires the capacity to have done otherwise; Raz's appeals to the more heterodox idea that responsibility is grounded in our capacity to act rationally, both in the cases in which that capacity is exercised successfully and in cases in which that capacity misfires or malfunctions.

As I will outline below, Raz's account of responsibility promises to improve on Hart's more orthodox account in a number of respects. Despite this, there is one objection to Hart's account of responsibility for negligence which, I will argue, carries over to Raz's account, at least if Raz's account is to be the first step in a theory of culpability or blameworthiness. This objection, which we can extract from Andrew Simester's work on criminal negligence, maintains that Hart's conception of responsibility fails to meet a key desideratum on an account of responsibility. Specifically, Hart fails to explain why the negligent agent's failure to exercise her capacity to do otherwise speaks badly of her in the right kind of way to warrant blame or criminal sanction. That is, it fails to provide an account of *culpability*. While Simester's objection has faced criticism I will argue that it (or something like it) is sound by appealing to cases in which an agent's failure to exercise their capacity does *not* plausible speak badly of them. Moreover, I will argue that Raz's theory of responsibility, notwithstanding the ways in which it improves upon Hart's account, also comes up against this objection. Raz's account fails to account for when the malfunctioning of an agent's powers of rational agency speaks badly of her and when they do not.

I will then end by drawing a more general moral from the twin failures of Raz's and Hart's accounts of responsibility. Despite their differences, both Raz and Hart seek to explain responsibility solely by appeal to the notion of *capacity*. I will suggest that we can remedy the flaws in both of their accounts by instead recognising a capacity component to responsibility alongside a 'quality of will' component. In essence, exercises of our capacities for rational agency, or our failures to exercise those capacities, are only ones which make for culpability if they manifest ill will or insufficient good will. And while attention to negligence helps us see this most clearly, we can draw from this discussion a more general lesson about responsibility, both criminal and moral. This lesson is that capacity theories of responsibility and quality-of-will theories, which are typically thought

⁶ Hart (n 2) 149–57.

of as in competition, should instead be understood as each identifying distinct but equally necessary components in a theory of responsibility.

A quick note on scepticism about responsibility for negligence before proceeding. There are many who claim that general conditions on responsibility rule out responsibility for negligence, or at least place very strict limits on the extent to which we can justifiably hold each other responsible for negligence. I will largely not speak to such scepticism directly.⁷ But this is not to say that negligence sceptics are not in my intended audience. The putting forward of any account of responsibility for negligence, and claims about the plausibility of that account over alternatives, must in the end be part of a story about why negligence scepticism fails. The account put forward here is, in my view, one that can such resist such sceptical doubts. But it is not always the best route to understanding a phenomenon to approach it from the point of view of answering scepticism about its very existence or legitimacy.

2. Hart and Raz on Negligence

I will start by outlining Hart's and Raz's theories of responsibility. I will start with Hart's account, as it can be covered more quickly. Hart gives his account of responsibility in the course of answering scepticism about *criminal* negligence liability. In criminal law, negligence is a fault element or *mens rea*, i.e. a condition a defendant must meet, in addition to carrying out a proscribed act (the *actus reus*) to count as committing a criminal offence. Hart is responding to sceptics who claim that only 'subjective' fault elements – i.e. those that require certain mental states, such as intent or foresight of harm – can justify criminal liability, and who claim that criminalizing negligence, as it lacks such any subjective element, is tantamount to strict liability, i.e. liability without fault. Hart's response to such scepticism appeals to his capacity-based account of responsibility:

What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.⁸

Hart's claim here is, of course, a version of the commonplace view that responsibility requires the ability (and opportunity) to do otherwise. But Hart's key innovation here is his inclusion of 'mental' capacities among the

⁷ Though I do so elsewhere; see Alexander Greenberg, 'Epistemic Responsibility and Criminal Negligence' (2020) 14 *Criminal Law and Philosophy* 91, s 3.

⁸ Hart (n 2) 152. A number of contemporary theorists of moral responsibility, those referred to as 'capacitarians', make a similar appeal to cognitive capacities; in particular, see Randolph Clarke, *Omissions: Agency, Metaphysics, and Responsibility* (OUP 2014) ch 7; Fernando Rudy-Hiller, 'A Capacitarian Account of Culpable Ignorance' (2017) 98 *Pacific Philosophical Quarterly* 398.

relevant capacities. And in particular, Hart has in mind *cognitive* capacities, such as the capacity to think before acting, to remember what one needs to do, and to distinguish dangerous situations from harmless ones. And it is appeal to such cognitive capacities that allow us to explain why the negligent agent has the capacity to do what the law requires of him, even if he is unaware of the risks he is taking or the harms he is causing. The idea is that if he had the cognitive capacities to recognise the relevant risks, then he has the relevant capacities to take precautions against them. Hart supports such a claim by appealing to when we say, in ordinary contexts, that an agent ‘could’ or ‘could not have helped it’:

[T]here is nothing to compel us to say ‘He could not have helped it’ in *all* cases where a man omits to think about or examine the situation in which he acts and harm results which he has not foreseen. Sometimes we do say this and should say it; this is so when we have evidence, from the personal history of the agent or other sources, that his memory or other faculties were defective, or that he could not distinguish a dangerous situation from a harmless one, or where we know that repeated instructions and punishment have been of no avail.⁹

But in other kinds of case, such as those in which someone fails to think before but *has* the cognitive capacity to do so, there is no similar impulse to say that the agent ‘couldn’t have helped it’ but acted as they did. For this reason, Hart concludes that ‘in some cases at least we may say “he could have thought about what he was doing” with just as much rational confidence as one can say of any intentional wrongdoing “he could have done otherwise”’.¹⁰ And this means, Hart suggests, that it is justifiable to extend criminal liability to some of those who cause harms negligently namely those who have the relevant cognitive capacities required to recognise there is a risk of harm.¹¹

Raz’s account will require a little more unpacking, and an important preliminary clarification is also required about the *sense* of ‘responsibility’ at issue. ‘Responsibility’ can mean many different things in different contexts.¹² Raz distinguishes between responsibility and liability, with the latter being liability to some adverse consequence, such as blame, punishment, or a duty to pay compensation. The sense of responsibility Raz is giving an account of is a precondition to liability, though is not sufficient condition for liability.¹³ One may be responsible for ϕ -ing, but evade

⁹ Hart (n 2) 150.

¹⁰ *ibid.*

¹¹ Whether criminalizing negligence is not only justifiable but *justified* is a question Hart cautiously refrains from answering; see *ibid* 157. But Hart is clear that he takes himself to have explained why negligence is not equivalent to strict liability and is a valid fault element.

¹² For a classic taxonomy, see *ibid* ch 9.

¹³ Raz, *From Normativity to Responsibility* (n 3) 256.

liability, e.g. blame or punishment, if one has a good justification or excuse for ϕ -ing.¹⁴ Furthermore, Raz stresses that responsibility is only *one* route to liability. Some forms of liability – such as liability to pay taxes or for jury service – are not based on responsibility, but Raz claims that when negligence leads to liability for punishment, or a duty to pay compensation, it is a case of *responsibility-based* liability.¹⁵ Now, what Raz *positively* means by ‘responsibility’ in the relevant sense is not crystal clear, but it is at least clear that it signifies responsibility *for conduct*, in a broad enough sense such that both actions and omissions can count as ‘conduct’.¹⁶

Making this distinction between responsibility and liability is a necessary preliminary here because it matters to the objection I will ultimately raise against both Raz and Hart. Hart is seeking to explain why negligence is a proper ground of criminal *liability*.¹⁷ And the objection I will draw on contends that Hart’s account is insufficient to ground liability, specifically. Even though Raz explicitly is giving an account of responsibility, and not liability, my suggestion will be that this objection also applies to Raz’s account, *if* it is understood to provide all the foundational ingredients we need for an account of liability (as Raz seems to think it does). But respecting the responsibility/liability distinction will mean we will have to tread carefully here.

Moving onto Raz’s account of responsibility, according to that account conduct an agent is responsible for is conduct which results from the functioning, successful or failed, of that agent’s powers of rational agency, as long as a) those powers were not blocked or suspended, and b) the conduct lay within the agent’s ‘domain of secure competence’.¹⁸

By ‘powers of rational agency’ Raz means one’s powers to respond to reasons. And by ‘successful functioning’ of these powers, Raz means conduct that is *guided* by one’s capacities to respond to reasons. However, just appealing to when these powers function *well* – that is, when they *guide* – is insufficient, Raz thinks, to explain the true scope of conduct which we are responsible for. The key reason why is because guidance alone, Raz

¹⁴ *ibid* 251.

¹⁵ *ibid* 256, 260ff.

¹⁶ Raz does negatively characterise the sense of responsibility he is focusing on by distinguishing it from some other senses of responsibility (see *ibid* 227–28), and refers to the sense he is focussed on with the subscript ‘responsibility₂’, a practice I won’t be following. For an alternative positive characterisation of this sense of responsibility, see Antony Duff’s account of it in terms of an obligation to answer for one’s conduct, in *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) ch 1.

¹⁷ Hart does recognise the responsibility/liability distinction, and positively characterises responsibility in way that prefigures Duff’s understanding of it as answerability (n 16), though only in the endnotes to (n 2) 264–65. These notes, originally published in 1968, postdate the discussion of negligence in chapter 6, originally published in 1961.

¹⁸ Raz, *From Normativity to Responsibility* (n 3) 231–32, 243–49.

claims, cannot explain responsibility for the kind of inadvertent omissions that are paradigm cases of negligence.

Some may resist the claim here that inadvertent omissions are not guided by an agent's capacities to respond to reasons. Most inadvertent omissions are carried out when someone in the course of doing something else which will, it seems, be guided by such capacities. This is true, but it does not, I think, get to the way in which Raz is suggesting inadvertent omissions not to be guided by reasons. We can illustrate this with Raz's case in which a driver fails to check his brakes, which he should have done, resulting in him accidentally rear-ending the car ahead. Raz thinks there is derivative responsibility at work here: the agent is responsible for the rear-ending because it results from his failure to check the brakes.¹⁹ And Raz's claim is that the responsibility for failing to check the breaks can only be explained by appeal to guidance by reasons-responsive capacities if it were an intentional omission. What if he just forgot? Then it would not so guided.²⁰ The idea here seems to be (and I'm departing from Raz's own phrasing) that if one is responsible for causing harm inadvertently, then *what explains* one's conduct, under the description one is being held responsible for it – such as rear-ending the car in Raz's example – will be something – such as forgetting to check the brakes – that is not guided by one's capacities to respond to reasons. So the fact that driver's rear-ending the car was guided by reasons in *some* sense ('I was driving to work') does not matter here. *Why* he caused harm was not guided by his capacities to respond to reasons.

This is why, if we are to explain responsibility for negligence, we must appeal to the failed functioning, or *malfunctioning*, of such capacities. Perhaps wisely, Raz avoids giving a precise definition of malfunctioning, but examples of it include cases when we intend to something which later slips our mind, or cases where we what we need to do doesn't occur to us at the time of action:

These failures to connect, failures to do what we intended, or to intend what we would have intended had our background intentions and beliefs surfaced in consciousness at the right time, are typical of the ways in which our powers of rational agency sometimes malfunction.²¹

Raz's claim is that if we are responsible for such malfunctionings of our capacities to respond to reasons, then that can explain how we are responsible for some inadvertent omissions, and the harms resulting from them. If our driver just forgot to check his brakes, that is exactly such a

¹⁹ *ibid* 265.

²⁰ *ibid* 266.

²¹ *ibid* 267.

malfunctioning, and can thus explain his responsibility for rear-ending the car in front of him.

However, there are two important exceptions in which Raz claims that such malfunctionings do *not* ground responsibility. The first is when one's powers of rational agency have been 'blocked' or 'suspended', by which Raz has in mind cases in which, for example, one is asleep, drugged, or suffering from amnesia.²² Secondly, one is not responsible when the action in question falls outside of one's 'domain of secure competence'. This second idea will take a little bit of unpacking, but Raz's idea is for each of us, a domain of possible actions of which we are masters, which we can perform easily, and without excessive effort.²³ It is only when an action (or omission) falls within that domain that our doing it (or failing to do it) out of the malfunctioning of our powers of rational agency makes us responsible for it. If remembering to check his brakes were something which required superhuman effort on the part of our driver – perhaps because of the onset of dementia – then his forgetting would not be something he was responsible for.

But Raz's appeal to this notion of a domain of secure competence is not just intended to make the account of responsibility extensionally adequate (though it surely is intended to do at least that). The notion also plays a central role in an explanation of the *value* of responsibility, in particular, the value of being held responsible for negligent conduct. This is an instance of Raz's general strategy for explaining normative phenomena by pointing to the value they provide us, the most prominent instance of this strategy being his explanation of the value of authority, analysed in terms of exclusionary reasons, lying in how it improves our compliance with the normative reasons that apply to us.²⁴ Being held responsible for our negligent conduct is also valuable to us, Raz thinks. This is because of the crucial role played by having a domain where one is competent in the exercise of one's capacities in one's sense of identity:

[O]ur sense of who we are is shaped in part by our competence in using our capacities of rational agency. ... The way we feel about ourselves, our self-esteem, our self-respect, the degree to which we are content to be what we are, or what we perceive ourselves to be, our pride in ourselves, our shame in how we are, or in how we conduct ourselves—all these and various other self-directed attitudes and emotions depend in part on competence in using our faculties of rational agency.²⁵

²² *ibid* 231, 248.

²³ *ibid* 245.

²⁴ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) ch 3; *Practical Reason and Norms* (2nd edn, Princeton University Press 1999) 41–43.

²⁵ Raz, *From Normativity to Responsibility* (n 3) 268.

An apt illustration of this point, hinted at by Raz,²⁶ is how the *loss* of capacities, such that which occurs in degenerative diseases like Alzheimer's and Parkinson's, can leave people feeling that they have lost their sense of who they are. But this point also means that where one *is* competent, there is a value being held responsible for *failures* in the exercise of one's capacities, because doing so because it recognizes you as a master within that domain:

Actions due to malfunction of our capacities of rational agency result from failure to perform acts of which we are masters. In acknowledging our responsibility for these unintentional acts and omissions we affirm our mastery of these abilities, deny that we are disabled in the relevant regards. When others attribute to us responsibilities for such actions they acknowledge our mastery of those abilities, and hold us responsible for these results of their use.²⁷

In this way, the notion domain of secure competence not only plays a role in explaining what we are aptly held responsible for. It also explains the value of being so held responsible.

Raz's theory of responsibility is an attractive one, even if we grant that some of its elements may require some more spelling out – in particular, how the notion of a capacity malfunctioning differs from its being blocked or suspended. But it has distinctive promise.

Part of this is because of the central role it gives, as Hart's account does, to the notion of capacity. It is very plausible that capacity plays *some* role in understanding responsibility. And, moreover, if we are able to explain responsibility for negligence by an appeal to capacity, that has greater anti-sceptical potential. This is because many sceptical arguments against responsibility for negligence are stated in terms of capacity (or in terms of related concepts like control), the suggestion being that we don't have the right kind of capacities for control over our negligent conduct to count as responsible for them.²⁸ So an explanation of responsibility for negligence that appeals to capacity will be a more promising route to answering such scepticism, as it engages with its (genuinely compelling) initial starting point.

But Raz's account also has promise because it may side-step certain difficulties those defending an account like Hart's have to face up to. Because Hart's account appeal to the commonplace idea that responsibility requires the ability to do otherwise – an ability which he claims is partially constituted by the kind of cognitive capacities he identifies – a defence of his account must, in the end, answer various questions about such an

²⁶ *ibid* 245.

²⁷ *ibid* 268.

²⁸ See, e.g., Michael J Zimmerman, 'Negligence and Moral Responsibility' (1986) 20 *Noûs* 199; Alexander and Ferzan (n 4) ch 3.

ability. These not only include traditional philosophical questions concerning whether such an ability is consistent with determinism, and whether it is problematic if it isn't. They also include more specific questions about how to understand claims about someone's capacity to have recognised a risk they were unaware of; in particular, questions about what features of the agent and the circumstances we hold fixed when assessing whether someone has a capacity. Do we hold fixed just the circumstances they were in, or do we also hold fixed their age, maturity, experience, etc.? Do we hold fixed that they were excited, distracted, intoxicated, etc? If we hold some of these factors fixed, but not others, what is the underlying rationale for doing so? Now there may good answers to these questions, and the problems they may raise.²⁹ But we should note that Raz's account largely sidesteps them, because it does *not* require us to say whether an agent who has performed some action (or omission) had the capacity to avoid (or perform) that particular action in question. It just requires us to say whether his action or omission resulted from the functioning or malfunctioning of his powers of rational agency.³⁰

3. 'But What Does That Say About Me?'

Nevertheless, there is one objection that has been made to Hart's account that Raz's account does not avoid. In general terms, the objection is that Hart's account doesn't explain why the negligent agent's risk-taking *speaks badly of him* in the right kind of way to warrant blame or punishment. A number of legal theorists make this objection to Hart, but I will focus on Simester's version of it.³¹ And I will argue that objection to Hart is sound, and that it applies equally to Raz's account, at least if his account is the first step in an account of liability to blame or punishment.

This last caveat is important because, as we've already highlighted, Raz only explicitly takes himself to be giving an account of responsibility,

²⁹ See, e.g., Tony Honoré, *Responsibility and Fault* (Hart 1999) 33–34; Moore and Hurd (n 4) 156–65.

³⁰ Raz's account shares this feature with the influential 'reasons-responsiveness' account of moral responsibility defended by John Martin Fischer and Mark Ravizza, which is designed to side-step questions about the compatibility of determinism and the ability to do otherwise; see *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press 1998). However, Raz's account improves upon Fischer and Ravizza's precisely in the way it deals with negligence, because Fischer and Ravizza hold that responsible conduct is *guided* by reasons-responsive mechanisms for it to be responsible. As Raz has shown, this is insufficient to account for responsibility for negligence.

³¹ AP Simester, 'A Disintegrated Theory of Culpability' in Dennis J Baker and Jeremy Horder (eds), *The Sanctity of Life: The Legacy of Glanville Williams* (CUP 2013) 183–85; AP Simester, 'Can Negligence Be Culpable?' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (OUP 2000) 103–4; more recently adapted into ch 12 of *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (OUP 2021); see also Ori J Herstein, 'Responsibility in Negligence: Discussion of From Normativity to Responsibility' (2013) 8 *Jerusalem Review of Legal Studies* 167, 172; Findlay Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (CUP 2016) 179–86.

understood as a non-sufficient precondition to liability. Nevertheless, he does view his account as the first step in an account of liability, and he seems to suggest that once we have explained responsibility, the next step of explaining liability to, e.g., blame is fairly straightforward. He states, for example, that '[a]gents are to blame for conduct for which they are responsible unless they are excused'.³² My claim is that this is not so straightforward. Raz's account of responsibility requires substantial supplementation for it to be the first step in an account of liability for blame or punishment. And if Raz fails to explain these, that is a serious shortcoming. He will be missing out a key and central account of our responsibility practices, taken in the round, if he doesn't provide an account of culpability or blame.

However, I should note that my defence of this objection, and the application of it to Raz, will not extend to negligence liability in tort. Those who make this kind of objection to Hart are typically concerned with criminal liability or blame, and with good reason. It is *not* plausible that a civil defendant's negligence must speak badly of them for them to be properly held liable to pay compensation for that negligence. Raz himself regards it as strength of his account of responsibility that it 'applies also to cases which do not warrant blame',³³ presumably with cases of tort liability in mind. For all I say here, Raz's account may provide all the basic materials we need for an account of tort negligence liability. My claim is that the same is not true with liability to blame and punishment.

3.1. Simester's Objection to Hart

A widely accepted role of *mens rea* concepts such as negligence in criminal law is in establishing that a criminal defendant is culpable – i.e. blameworthy – for their conduct, so that the (intentionally) stigmatic response of a criminal conviction may be appropriate. Simester's objection is that Hart's theory fails to provide us with an adequate explanation of an agent's *culpability*. For this reason, it may be an objection which would have left Hart himself unmoved, as he didn't often speak in terms of culpability, doubtless because of his anti-retributivist inclinations.³⁴ He instead regarded *mens rea* requirements on criminal offences (and the availability of excuses)

³² Raz, *From Normativity to Responsibility* (n 3) 251. Here, as elsewhere, I omit the subscripts (see n 15) from Raz's references to responsibility. cf *Practical Reason and Norms* (n 24) 186–87, where Raz claims that it's sufficient to find fault that a) an agent failed to do what he had reason to do, and b) had no excuse. The more recent text adds that the agent must also be *responsible* for his conduct.

³³ Raz, *From Normativity to Responsibility* (n 3) 265.

³⁴ This may stem from his ambivalence about notions traditionally associated with retributivism; see Hart (n 2) 230ff. Hart's preferred phrasing may also have been influenced by his liberal resistance to use of the criminal law to enforce moral standards; see *Law, Liberty, and Morality* (Stanford University Press 1963).

as justified for rule-of-law reasons, as allowing us to ‘to predict and plan the future course of our lives within the coercive framework of the law’.³⁵ But while Hart may well be correct that this is *one* role *mens rea* concepts play, the stronger claim that culpability plays no role in understanding of criminal liability is less plausible. Furthermore, contemporary defenders of Hart’s capacity-based account of negligence and excuse are happy to speak in terms of culpability, and do not share, as far as I can tell, Hart’s claim that *mens rea* and excuses are justified solely for rule-of-law reasons.³⁶ For this reason, I will take it that if Hart’s account cannot explain why negligence is culpable, that constitutes a good objection to it.

Simester’s objection starts from what he terms ‘the basic challenge of culpability’.³⁷ This challenge is raised by the fact that culpability requires more than just a bad act. We need, as Simester puts it, ‘to trace our negative evaluation of ϕ ing back to D, the person who does it’, and justify the ‘evaluative link between act and defendant – that link which allows us to transmit judgments of the deed across to the person’.³⁸ In the case of negligence, which is our focus, establishing a negligent agent’s culpability requires explaining why, the badness of their risk-taking speaks badly of them.

Hart holds that what matters in determining criminal liability is whether the defendant had the relevant capacities, mental and physical, to do what the law requires and the fair opportunity to exercise those capacities. This, Simester claims, does provide the kind of explanation of culpability we need. Simester grants that the kind of capacities Hart appeals to are *preconditions* of culpability, but insufficient to explain culpability:

Like all capacity conditions, it is a threshold condition of moral responsibility, a precondition of culpability determinations regarding D’s ϕ ing. Without it, D is not exposed to assessments of praise or blame, in respect of ϕ ing, *at all*. We never get that far. However, its contribution is binomial. Culpability implies capacity; incapacity implies blamelessness. The implication is unidirectional. Once [Hart’s capacity] condition [...] is satisfied, it has nothing more to say. It supplies no reason to think that D is culpable.

Simester is surely correct here that an agent’s possession of the capacity to have refrained from ϕ -ing is insufficient to establish their culpability for ϕ -ing. Think of duress. It’s implausible to think that duress only excuses in cases where the defendant was *incapable* of not giving into the threat. Now a defender of Hart will be apt to say that duress excuses when the agent

³⁵ Hart (n 2) 181.

³⁶ Regarding negligence, see Marcia Baron, ‘Negligence, *Mens Rea*, and What We Want the Element of *Mens Rea* to Provide’ (2020) 14 *Criminal Law and Philosophy* 69; regarding excuses, see Jeremy Horder, *Excusing Crime* (OUP 2004) ch 3.

³⁷ Simester, ‘A Disintegrated Theory of Culpability’ (n 31) 179.

³⁸ *ibid* 179–80.

lacked *fair opportunity* to do what the law required. That may be correct, but it's not clear it helps explain why the badness of the agent's ϕ -ing speaks badly of them in cases where the agent did have a fair opportunity. This is because the presence or absence of an opportunity is something external to the agent.³⁹ For this reason, merely pointing to the presence of a fair opportunity looks insufficient to explain why the badness of an agent's ϕ -ing speaks badly of them, unless we *also* say something about the agent and their *response* to that opportunity, which Hart's account does not do; the only thing Hart's account requires of the agent is that they had the relevant capacities. As Simester puts it, Hart's account 'looks only at the existence, on the facts, of an opportunity to avoid harm; not at *why* the defendant missed that chance'.⁴⁰

I think Simester highlights a genuine problem with Hart's account here. However, his statement of the problem is quite abstract, and I think too abstract. This comes out in a response to Simester given by Marcia Baron, who interprets the objection as one featuring two key claims: 1) culpability requires the presence of a positive inculcating factor, and not merely the absence of exculcating factors (e.g. defences); 2) Hart's account of negligence as the failure to exercise a capacity to advert to risk and control one's conduct only provides the absence of exculcating factors. In other words, *lack* of capacity would exculpate, but the presence of capacity doesn't inculcate.

Baron objects to both of these claims. To the first claim, she objects that when it comes to culpability in general, our default is that someone who does something wrong is culpable as long as there are no excusing conditions that apply.⁴¹ It is not clear, Baron suggests, why we need an additional 'positive' inculcating factor. Now Baron grants that to move beyond just culpability and to justify *responses* to culpable wrongdoing – and, in particular, the response of criminal sanction – it may be plausible that we should require a positive inculcating factor. But she then goes on to object, *contra* the second claim above, that there is no reason to think that negligence as Hart understands it doesn't provide an appropriate positive inculcating factor.⁴² Why doesn't it suffice to say, as Hart does, of the (grossly) negligent agent that 'he has failed, though not deliberately, to take the most elementary of the precautions that the law requires him to take in order to avoid harm to others',⁴³ precautions that he should and could have taken? Why doesn't this provide a positive inculcating factor?

³⁹ Note Kenny.

⁴⁰ Simester, 'Can Negligence Be Culpable?' (n 31) 104.

⁴¹ Baron (n 36) 83.

⁴² *ibid* 84–87.

⁴³ Hart (n 2) 147; this phrasing of Hart's is echoed (I assume deliberately) in Baron (n 36) 86.

I don't think Baron's response can be satisfyingly answered if the objection is just stated in the abstract – i.e. just in terms of whether or not Hart's capacity account provides a 'positive' inculcating factor – and I suspect the positive inculcation vs. negative exculpation phrasing may be a distraction. The heart of the problem, as I see it, is that in some cases of inadvertent risk-taking, Hart's capacity conditions are met, but there doesn't look to be culpability, at least not sufficient culpability for liability to blame or punishment. This problem is not one specific to the criminal case. The problem is that Hart's account is insufficient to ground culpability in general, whether as a ground of punishment or as a ground of ordinary interpersonal blame. *That* is the evidence that Hart's account doesn't meet the basic challenge of culpability.

A first case of this kind can be provided by *State v Williams*, an American manslaughter case much discussed in the criminal negligence literature.⁴⁴ The case involved two native American parents who failed to secure medical care for their infant child, who had an infected tooth which became gangrenous, and in the end led to the child's death. They did this because they thought because they thought he only had a toothache. They were also hesitant to take their son to the doctor, because of fear that the authorities would remove their son, a fear that was probably not without foundation given the readiness of the authorities at the time to put Native American children into care.⁴⁵ This was found to have constituted negligence, which was sufficient for a manslaughter conviction.⁴⁶

The Williamses, I suggest, do not look culpable, and they definitely don't look culpable in the way that warrants criminal sanction. Not recognizing the severity of their son's illness was definitely a failure on their part. It was a failure to correctly interpret evidence at hand, one that plausibly resulted from a tragic, but completely understandable, instance of wishful thinking, in which their interpretation of the evidence was guided by a hope that everything would be fine and so the threat of their son being taken away from them would be averted.

Failures of this kind are not, I suggest, apt candidates for criminal sanction. But my contention is that Hart's capacity-based account of negligence struggles to allow for this. Despite their failure, it doesn't seem

⁴⁴ *State v Williams* 484 P 2d 1167 (WA Ct App 1971); for a detailed discussion of the case, see Stephen P Garvey, 'What's Wrong with Involuntary Manslaughter' (2006) 85 Texas Law Review 333.

⁴⁵ Garvey (n 43) 334–35.

⁴⁶ At the time in the State of Washington, the offence of manslaughter only required ordinary negligence, not gross negligence; see *Williams* (n 43) 1168. In the current Washington Criminal Code, manslaughter requires 'criminal negligence', defined using the Model Penal Code's definition of negligence, as requiring 'a gross deviation from the standard of care that a reasonable person would exercise'; see RCW 9A.08.010 sub-s 1(d), 9A.32.070; Model Penal Code: Official Draft and Explanatory Notes 1962 s 2.02 sub-s 2(d).

plausible to deny that the Williamses had the *capacity* to recognize the severity of the risk to their son's health. They showed themselves able to recognize signs of ill health on previous occasions and to seek medical care for their son. And setting aside the factual question of whether or not the Williamses themselves had this capacity, I don't think it's plausible to maintain that the appropriateness of a manslaughter conviction to rest solely on whether they had such a capacity. The issue is that their failure to exercise this capacity does not speak badly of them, and that is not something that Hart's account has the resources to explain.

Further cases illustrating this same point are provided in the moral philosophy literature. Consider George Sher's case in which, a mother leaves her dog in the back of the car when picking up her children from school a hot day. She has done this many times before without incident, as picking up her children has typically been very quick. But this time, it takes unexpectedly long because, as Sher describes it, she 'is greeted by a tangled tale of misbehavior, ill-considered punishment, and administrative bungling which requires several hours of indignant sorting out'. The result is that the mother forgets about the dog, who has lost consciousness from heat exhaustion. Also consider Randolph Clarke's case in which his wife asks him to pick up on the way home, which he forgets to do because he's distracted thinking about a philosophical problem in a paper he is working on.⁴⁷ In such cases, it seems to me blame is out of place, even if the agents had the capacity to become aware of the crucial forgotten fact, i.e. that the dog is in the back of the car, that he needs to pick up some milk.

Now, as it happens, both Clarke and Sher claim that it's intuitive that the agents in their cases are blameworthy for their unwitting omissions, but my feeling is that blame seems out of place here. And punishment definitely seems out of place if we alter Sher's case to one in which a child is left in car and dies from heat exhaustion, thus making it a case where the question of a manslaughter conviction arises. They instead seem cases of understandable and excusable failures – and a tragic failure in Sher's example. They are the kind of slips of mind that a conscientious, reasonable person might make. We all have our off days. For this reason, blame and punishment seem out of place.⁴⁸ But the problem for Hart is that these

⁴⁷ Clarke (n 8) 164. In using Clarke's case in this context, I am inspired by Daniel J Miller, 'The Epistemic Condition' in Maximilian Kiener (ed), *The Routledge Handbook of Philosophy of Responsibility* (Routledge 2023), who uses it to make a similar point.

⁴⁸ The moral philosophy literature often treats the blameworthiness of such agents in such cases as a datum, one that either supports particular philosophical theories (as Sher and Clarke use them), or that needs to be explained away; e.g. see Matthew Talbert, 'Omission and Attribution Error' in Dana Kay Nelkin and Samuel C Rickless (eds), *The Ethics and Law of Omissions* (OUP 2017). I confess to finding this tendency puzzling. My conjecture is that it may reflect an insufficient recognition in the moral responsibility literature of the responsibility/liability distinction. Common-sense moral

agents plausibly possessed the relevant capacities to have taken precautions against the relevant risks, because they had the cognitive capacities to become aware of them. The issue is even though they have such capacities, their failures to exercise these capacities don't seem to speak badly of them.

Now the Hartian is likely to respond by claiming that the agents in these cases didn't have a *fair opportunity* to exercise these capacities, and this is why they are not culpable. But, as I intimated earlier, even if correct, this doesn't provide a theoretically satisfying answer to the objection.

Firstly, the presence or absence of an opportunity is something external to the agent, and this makes it something that, on its own, looks insufficient to explain why the badness of the agent's risk-taking does or does not speak badly of them. In a case, unlike those just given, in which an agent *does* have a fair opportunity to exercise their capacity to take precautions against a risk, merely pointing to this opportunity misses out something crucial for an explanation of why their risk-taking speaks badly of them; the crucial missing factor is the manner in which the agent *responds* to that opportunity, which Hart's account does not speak to.

Secondly, fair opportunity risks becoming a *virtus dormativa* here. It may well be true that the agents in the cases above did not have a fair opportunity to exercise their capacities to take precautions against risk. But why is this the case? What explains why they lack such an opportunity whereas others do not? If the Hartian doesn't say anything more here, it's hard to resist the accusation that their use of fair opportunity is just being guided by intuitive judgements of blameworthiness, and not providing an independent rationale to ground such judgements. If this is the case, then we will only have provided the appearance of an explanation of where culpability lies in cases of negligence.

3.2. Applying the Objection to Raz

The claim I will now defend is that the same objection applies equally to Raz. The objection is that Raz's account of responsibility also cannot account provide a good explanation of culpability in cases of negligence. The reason why is that the agents in the cases above – the Williamses, the mother who forgot her dog, the philosopher who forgets to get the milk – all look like they meet Raz's conditions for responsibility. Each case looks like it involves a malfunctioning of the agent's capacity to respond to reasons within their domain of secure competence. They are examples of exactly the kind of 'failures to connect, failures to do what we intended, or to intend what we would have intended had our background intentions and

judgement may well hold agents *responsible* for such omissions, but it's much less clear it holds them *liable to blame*.

beliefs surfaced in consciousness at the right time' which Raz claimed were 'typical of the ways in which our powers of rational agency sometimes malfunction'.⁴⁹ But these agents do not look culpable. *Or*, at the very least, the cases above look like they involve the same kind of malfunctionings as genuinely culpable cases of negligence do. As such, Raz's account is crucially incomplete. It does not provide all the materials we need for an account of culpability.

A first response Raz is likely to make here is to remind us that he is providing an account of responsibility, understood as a non-sufficient condition for liability. If he shares the view that the agents in the cases above are not culpable, he will suggest that while they are responsible, they are not liable to blame or punishment because they have a good *excuse*.

It may well be correct that such agents are responsible but not liable because they have an excuse. But that does not answer the objection. We then want to know under what conditions someone has an excuse and under one conditions he does not. We do not have an account of culpability if we do not have an answer to that question. Simester makes this point against the similar 'absence-of-excuse' account of culpability given by John Gardner:⁵⁰

In order to show when a person is excused, we need a normative standard by which to measure and delimit excuses. In other words, we can test excuses only once we know what is required for a person to be culpable.⁵¹

Thus if Raz were to answer this objection with the bare claim that such agents have an excuse, he would fail to provide an account of culpability. A bare appeal to excuses could only provide, as we suggested with the Har-tian appeal to fair opportunity, a *virtus dormativa*, i.e. something that only gives a superficial appearance of an independent theoretical rationale for our intuitive judgements of culpability or blameworthiness. So the claim that such agents have an excuse is not enough to answer the objection.

Could Raz instead dispute the objection at an earlier stage, and resist my claim that the agents in the cases I have relied on meet his conditions on responsibility? There are two routes Raz might take to argue for this claim, and neither route is compelling. More specifically, neither route provides a good reason for thinking that the agents in the cases above are not responsible that does *not* generalize to other cases of negligent agents who *are* plausibly culpable.

⁴⁹ Raz, *From Normativity to Responsibility* (n 3) 267.

⁵⁰ An account Raz may have previously held (see n 31 above).

⁵¹ Simester, 'A Disintegrated Theory of Culpability' (n 31) 183.

The first route is to suggest that in the cases I've been appealing to, the agents' capacities to respond to reasons are blocked or suspended. This would mean the agents are not responsible for their inadvertent omissions, according to Raz's theory, and so not culpable. This would be a difficult claim for Raz to sustain. They don't look much like Raz's illustrative cases of someone's powers of rational agency being blocked or suspended, which include cases in which people are drugged, asleep, under hypnosis, or suffering from amnesia or temporary paralysis.⁵² It is true that each case features factors which makes the agent's exercise of their powers of rational agency difficult (this particularly so in *Williams* and Sher's dog case, less so in Clarke's case of forgetting the milk). But these are not obviously factors which block or suspend the agents' powers of rational agency. Rather, they look like cases in which the agents powers of rational agency malfunction.

Moreover, if Raz is to maintain that such agents' powers of rational agency are blocked or suspended in these cases, he faces a difficult task at explaining why the same is not true in other cases in which negligence *does* look culpable. We can make this point by borrowing a strategy Stephen Garvey uses in discussion of *Williams*, which involves imagining a parallel couple to the *Williamses* who are more plausibly culpable:

Take Sam and Tiffany. Like Walter and Bernice [*Williams*], their child is very ill. Unlike Walter and Bernice, Sam and Tiffany are well-educated and well-to-do. They are also single-minded social climbers. Imagine further that Sam and Tiffany have some inkling that their child's illness poses a threat to his life, but they never actually come consciously to believe that his life is in danger. Imagine finally that the reason they fail to form that belief is because they have become preoccupied with planning the 'party of the decade.' Failing to see the risk to their child's life, they do nothing to dissipate it, and the child dies.⁵³

If in the case of *Williams*, Raz is to insist that *Williamses'* capacities to respond to reasons do count as blocked or suspended by the difficult circumstances they face – and the wishful thinking they engage in in response to the circumstances – why can't we say the same in the case of Sam and Tiffany? Why aren't their capacities to respond to reasons blocked by their narcissistic self-absorption? We can imagine Sam and Tiffany's self-absorption to be sufficiently extreme that it makes it just as difficult for them to recognise the risk to their child's health as it was for the *Williamses*. Still, I maintain Sam and Tiffany look culpable whereas the *Williamses* do not. This makes it hard to see how the idea that the *Williamses* powers of

⁵² Raz, *From Normativity to Responsibility* (n 3) 231, 248.

⁵³ Garvey (n 44) 337. As Garvey notes (loc cit n 29), his parallel example is adapted from similar ones given by Larry Alexander and Joshua Dressler.

rational agency are blocked or suspended is going to provide a good answer to the objection.

The second route to denying responsibility to the agents in the cases I am appealing to is for Raz to appeal to his concept of a domain of secure competence. This would be to claim that the malfunctionings of these agents' capacities to respond to reasons are ones which fall outside of their domain of secure competence. That is, they are failures to perform actions of a kind which the agents are competent in performing. If this is the case, then the agents count as responsible for their inadvertent omissions, and so won't be culpable for them. However, there are the same kind of problems for this response as there were for the previous one. In the cases I've relied upon, it doesn't seem that plausible that they are failures to perform actions of a kind the agents are not competent in performing. They don't seem to be cases which require superhuman effort or go far beyond the range of actions the agents are competent at performing. Indeed, the Williamses had shown themselves capable of taking their son to the doctor previously. In addition, the issue again arises for why seeking medical attention was outside the domain of secure competence for the Williamses, but not Sam and Tiffany.

We can illustrate this second point by using a nuanced specification of Raz's notion of a domain of secure competence provided by Ori Herstein. Herstein points out that there is an unresolved question concerning the application of Raz's notion of a domain of secure competence. The question arises when we consider someone's success-rate in performing actions of a certain type. Consider, for example, a rugby goal-kicker, who has a 90% rate of success in kicking conversions and penalty kicks.⁵⁴ Obviously, her rate of success will depend on how easy the kick is, which depends on the position the kick is taken from. And there will be some positions from which she regularly fails – e.g. those from well inside her own half or very close to the sideline – even if she sometimes succeeds from such positions. Should we say that kicking from such difficult positions is within her domain of secure competence, or should we regard that as outside this domain? Herstein suggests we should go for the former answer, and only include those cases of 'that fall within one's stable rate of success'.⁵⁵ Herstein suggests that this is required to account for the fact of human fallibility.⁵⁶ It is also required in order to best respect the connection, within Raz's theory,

⁵⁴ Herstein uses a basketball example, but I (perhaps foolishly) have substituted an example from a sport I am more familiar with. North American readers may substitute an American/Canadian football place-kicker, setting aside the fact that such kickers are spared from displaying any competence (or lack thereof) in making kicks from the sideline.

⁵⁵ Herstein (n 31) 179.

⁵⁶ *ibid* 180.

between a domain of secure competence and an agent's sense of identity, her sense of 'who she is'.⁵⁷ If our goal kicker sometimes or even often misses a penalty from far inside her own half, that isn't going to negatively impact her sense of who she is (at least if she is judging herself by appropriate and fair standards).

This kind of move may well allow Raz to maintain that securing medical for their son is outside the Williamses' domain of secure competence, depending on how difficult we regard this as being for them. But if it does, it's not clear that this helps answer the objection. Why isn't the difficulty faced by the Williams equally faced by the case of Sam and Tiffany, at least if we flesh out the case in certain ways? It is true that Sam and Tiffany's case is not a difficult one because of a (comparative) lack of education or an understandable fear, but is difficult because of their narcissistic self-absorption. But why doesn't narcissistic self-absorption make it, for them, just as much a difficult case as *Williams* (or, at least we can imagine a case where it does). This makes it difficult to claim that the Williamses are not responsible because their failure falls outside their domain of secure competence while at the same time claiming that the same is true of manifestly culpable failures, like that of Sam and Tiffany. Distinguishing the two cases on these grounds doesn't look like it will work. So denying responsibility in the cases I've been appealing to by denying they fall within the agents' domain of secure competence also doesn't look like a compelling response to the objection.

Instead, the conclusion I think we should make is that Raz's account fails to provide an explanation of an agent's culpability, just as Hart's did. We should accept that these problem cases do indeed involve malfunctionings of the agents' powers of rational agency which fall within their domains of competence. But these are malfunctionings that don't speak badly of the agents in a way that is required for the agent's to be culpability. If this is correct, then Raz's account doesn't provide us with an account of culpability or blameworthiness in cases of negligence, or the fundamental ingredients required for such an account. And this would be necessary, we have been assuming, to justify liability to blame or punishment. For this reason, Raz's account of responsibility is seriously incomplete as an account of our responsibility practices in the round, as these without doubt include our practices of blame and punishment.

⁵⁷ *ibid* 180–81.

4. A Hybrid Solution

Nevertheless, while Raz's account is incomplete, it can, I suggest, be supplemented in a way that overcomes this objection, if we correctly diagnose why it failed in to provide an explanation of culpability, i.e. why it failed to account for when and why an agent's risk-taking speaks badly of them. My diagnosis is that both Raz's and Hart's accounts failed to do this because of their exclusive reliance on the notion of capacity. We should not deny that capacity does some work in a theory of responsibility and culpability. But we shouldn't think that capacity can do all the work.

The solution is to opt for a hybrid account of responsibility, one which builds on Raz's account, but also appeals to notions he give no role to. Such an account appeals to the kinds of capacities to respond to reasons appealed to by Raz, but also gives a role to how the exercise of those capacities – and the failure to exercise them – expresses the agent's cares or concerns.

This is a 'hybrid' account because it draws on and combines elements of different theories of responsibility and blameworthiness that are normally thought of, in the moral philosophy literature, as in competition. Speaking in broad-brush terms, we can distinguish between *capacity* theories, which ground an agent's responsibility for their conduct in that agent's *capacities* – such as the capacity to do otherwise or the capacity to respond to reasons – and *quality-of-will* theories, also known as *attributionist* theories, which ground an agent's responsibility and blameworthiness for their conduct in how that conduct expresses certain attitudes of the agent, such as their desires, cares, concerns, or values. Different versions of this latter kind of view differ in the details, but one influential statement of it is to say that an agent's being blameworthy for their conduct depends solely on whether that conduct manifests ill will or insufficient good will.⁵⁸

My suggestion is that we can fix Raz's theory by supplementing it with a quality-of-will component. In brief, if we appeal to the idea that the functioning or malfunctioning of our capacities to respond to reasons can express the degree to which care about things of importance, such as others people's interests, we can then provide an explanation of culpability that deals with the problem cases for Raz's theory. This is because these cases all involve malfunctionings of the agent's powers of rational agency that do *not* express ill will or insufficient good will.

⁵⁸ For this kind of quality-of-will view, see Nomy Arpaly, *Unprincipled Virtue: An Inquiry Into Moral Agency* (OUP 2003) 79ff; Nomy Arpaly and Timothy Schroeder, *In Praise of Desire* (Oxford University Press 2014) 169ff. For other versions, see TM Scanlon, *What We Owe to Each Other* (Belknap Press 1998) ch 6; Angela M Smith, 'Responsibility for Attitudes: Activity and Passivity in Mental Life' (2005) 115 *Ethics* 236; Matthew Talbert, 'Unwitting Wrongdoers and the Role of Moral Disagreement in Blame' in David Shoemaker (ed), *Oxford Studies in Agency and Responsibility*, vol 1 (OUP 2013); Elinor Mason, 'Moral Ignorance and Blameworthiness' (2015) 172 *Philosophical Studies* 3037.

In more detail, the modified account I am putting forward holds that that Raz's conditions are *necessary* for culpability. An agent's culpability for ϕ -ing does require:

- (1) That the agent's ϕ -ing results from the functioning or malfunctioning of their powers of rational agency – i.e. their capacities to respond to reasons – within their domain of secure competence.

But it also requires:

- (2) That the functioning or malfunctioning of the agent's powers of rational agency manifests ill will or insufficient good will on the part of the agent.

These two conditions, the account holds, are individually necessary but only jointly sufficient for an agent to be culpability for ϕ -ing.

It is this second condition which enables this supplemented account to overcome the problem cases for Raz's original, i.e. cases in which agents make understandable and excusable cognitive failures. It is plausible that such cases – cases like *Williams*, Sher's case of forgetting the dog, Clarke's case of forgetting the milk – do meet condition (1). That is what I have argued in the last section. However, they do not meet condition (2). The malfunctionings of these agents' capacities to respond to reasons do not manifest ill will or insufficient good will.

It is obvious that such malfunctionings don't manifest any ill will, i.e. the kind of positive desire to harm which motivates behaviour we would describe as 'nasty', 'spiteful', 'malevolent', 'malicious', etc. This is because, as a conceptual matter, an inadvertent omission cannot manifest ill will. It lacks the purposefulness to count as such.

But neither do such malfunctionings manifest insufficient good will, by which I mean insufficient concern about things of importance, such as, most relevantly for our cases, others' interests ('others' including non-human animals, such as the dog in Sher's example). Now, unlike with ill will, it certainly is possible for inadvertent omissions to manifest insufficient concern for others' interests. In fact, this is fairly commonplace, as quality-of-will theorists often stress.⁵⁹ This is because cognitive failures – e.g. failures to notice things, failures to remember things, failures to put two and two together, etc. – can often manifest how much or how little we care about others. For examples, I invite readers to consider all the times they have forgotten engagements with people because they didn't really want to see them, when they have failed to notice that they were talking over

⁵⁹ See, in particular, Smith (n 58) 242–50.

someone because they were too engrossed in being right, or when they have failed to recognise that the ‘funny’ story they are telling about their partner is making them embarrassed because they were too focused on entertaining their guests. Cases like these – in which we forget or fail to notice things because we don’t care enough about them, or care more about other things – are a common fact of life.

However, the cases which pose problems for Raz do *not* look like cases in which the agents’ cognitive failures manifest insufficient concern for others’ interests. The Williamses did not fail to recognize the severity of the risk to their child’s health because they didn’t care enough about him. In Sher’s case, the mother did not forget about the dog because she didn’t care enough about the dog’s health and well-being. In Clarke’s case, the philosopher did not forget to pick up the milk because he didn’t care enough about his wife and her needs. If this is correct, then they do not meet condition (2) of the supplemented account. That is why they are not culpable. The same is not case, however, if we turn to Garvey’s selfishly self-absorbed couple Sam and Tiffany. The malfunctioning of *their* capacities to respond to reasons *does* express insufficient concern on their part. They didn’t realise their child was so ill because they didn’t care enough about him, and that is why they, unlike the Williamses, are culpable.

We can thus see that this kind of hybrid account, one which appeals to both capacity and quality-of-will, can overcome the problems Raz’s account faced. It can provide a plausible account of which cases of inadvertent risk-taking are culpable and which are not. Moreover, Raz’s claims about the connection between responsibility and our identity – our sense of who we are – make this a natural addition to Raz’s theory. If Raz is correct that our rational capacities are central to who we are, and that this explain why it’s appropriate to be held responsible for the results of these capacities, the same is true with are our concerns, cares, and values. These are just as much constitutive of who we are as our rational capacities are, so it is natural that our concerns, cares, and values are expressed in our conduct would matter to the way we are held responsible for that conduct.

The idea that responsibility may, in this way, have multiple elements is not new. Hybrid accounts of this form have been defended by some in the criminal responsibility literature, specifically those who draw on elements from both capacity theories and ‘character’ theories of criminal responsibility and excuse.⁶⁰ However, the kind of capacity theory that is typically drawn on in such hybrid accounts is Hart’s rather than Raz’s. And given that Raz’s account avoids certain problems Hart faces because of his appeal to the more traditional idea of the capacity to do otherwise, the

⁶⁰ See, e.g., Simester, ‘A Disintegrated Theory of Culpability’ (n 31); Stark (n 31) ch 8.

hybrid account presented here is preferable *if* those problems facing Hart's account are compelling.⁶¹ However, this kind of hybrid account is not found in the moral responsibility literature, where capacity-theories and quality-of-will theories are almost universally thought of as competitors.⁶² If the hybrid account put forward here is correct, it is a mistake to view these views as competitors. Both views capture just one side of the single complex phenomenon that is responsibility.

Of these two elements to responsibility, I have focussed so far on how capacity alone is insufficient to explain culpability. And while I have explained why the addition of a quality-of-will component plugs the gap here, I have not yet said anything to explain why the quality-of-will component is also, on its own, insufficient. In other words, I have not yet explained why we need a capacity component in a theory of responsibility, whether it be framed in Raz's terms or Hart's. A defender of a pure quality-of-will view of responsibility and blameworthiness will be apt to maintain at this point that quality-of-will alone suffices on its own to explain culpability in the cases I've been discussing, and no additional work need be done by capacity. The pure quality-of-will theorist might then add that a theory of responsibility that only appeals to quality-of-will is preferable to the hybrid Raz-inspired account on grounds of simplicity.

This is a significant challenge to the hybrid Raz-inspired view, one which I won't be able to do full justice to it for want of space. However, I think it can be answered, and I want to end by briefly pointing to the kinds of reasons an answer to it would appeal to.

Firstly, on the question of simplicity, the greater simplicity of the pure quality-of-will view will, of course, only be an advantage if the phenomenon to be understood – i.e. responsibility – is simple in the relevant respects. If the phenomenon has a complexity that is more naturally explained by the less simple hybrid account, then it's not clear simplicity would favour a pure quality-of-will view. To illustrate less abstractly, one plausible way in which responsibility is a complex phenomenon is the previously identified distinction between responsibility and liability. This distinction is often claimed to help us understand important distinctions in our responsibility practices. To give one example, it allows us to distinguish between defences like insanity, diminished responsibility, and automatism – which are claimed to involve denying responsibility – and defences like duress or provocation – which are claimed to involve accepting

⁶¹ I am agnostic about this question; I suspect Hart may be able to answer at least some of them.

⁶² Though see Miller (n 49), who briefly sketches a different kind of hybrid view, according to which capacity determines *whether* one is blameworthy, and quality-of-will determines the *degree* to which one is blameworthy.

responsibility but denying liability.⁶³ Saying what distinguishes these two kinds defences matters, as it seems crucial to explaining why someone might, in certain circumstances, prefer a defence of one kind over another.⁶⁴ This all matters to the point at hand because the hybrid account seems naturally placed to explain the responsibility/liability distinction, as condition (1) looks like a condition of responsibility, whereas condition (2) looks like a condition concerning when responsible conduct grounds liability (at least liability to blame or punishment). So an explanation of the responsibility/liability distinction may simply fall out of hybrid account, but the same is not the case with the pure quality-of-will view. If so, the pure quality-of-will view's comparative simplicity may not be a reason to prefer it.

Secondly, it does seem plausible that capacity does play an independent and eliminable role in our understanding of responsibility if we expand our purview to kinds of cases we haven't so far discussed, as they are not cases of negligence. These cases, I suggest, give reason to think that bad quality of will is, on its own, insufficient for culpability.

A first kind of case concerns agents whose conduct clearly manifests a lack of good will or concern for others, but who lack, pretty much entirely, the capacities to recognise and respond to moral reasons possessed by normal adult humans. Such cases will include psychopaths, but also some cases of bad formative circumstances, such as the case, described in depth by Gary Watson, of the spree killer Robert Harris, who killed two teenagers on a whim, and then proceeded to eat a burger he found in their bag while joking about how 'it would be amusing ... to pose as police officers and inform the parents that their sons were killed'.⁶⁵ Harris's behaviour clearly displays ill will, and a total lack of concern for others. But as Watson highlights, our readiness to blame Harris is significantly reduced once we hear of the horrific physical and sexual abuse he suffered at the hands of his parents, and consider what effect that must have had on him.

If cases like these are ones in which we think blame is out of place, they suggest that bad quality of will is insufficient on its own for blameworthiness.⁶⁶ But the hybrid Raz-inspired view looks in a position to explain why such agents are not blameworthy. This is because they fail to be responsible, as the lack the capacities to properly recognize and respond to

⁶³ Duff (n 16) 284–91.

⁶⁴ This idea is often thought to be at the heart of debates concerning whether the defence of provocation should be available to battered wives who kill their husbands; see John Gardner, 'The Gist of Excuses', *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 1998) 133ff.

⁶⁵ Quoted in Gary Watson, 'Responsibility and the Limits of Evil: Variations on a Strawsonian Theme' in Ferdinand Schoeman (ed), *Responsibility, Character, and the Emotions* (CUP 1988) 269.

⁶⁶ Defending this point properly would require engaging with how quality-of-will theorists have tried to deal with cases like psychopaths; see, e.g. Matthew Talbert, 'Accountability, Aliens, and Psychopaths: A Reply to Shoemaker' (2012) 122 *Ethics* 562.

(all of) the reasons that apply to them. *A fortiori*, their behaviour doesn't reflect the functioning or malfunctioning of such capacities.

A second kind of case concerns agents for whom their capacity to respond to reasons is temporarily disabled. An illustration of this is the horrendous and tragic case of *Kingston*, in which the defendant, who had paedophilic inclinations, was given disinhibiting drugs by someone trying to blackmail him, and was encouraged to perform sexual acts with a 15-year-old boy. Kingston was charged with indecent assault, but his defence was that he would not have acted as he did if he had not been drugged. But this defence failed because Kingston still had the intent required for the offence, and the trial judge instructed the jury that a drugged intent is still an intent. He was convicted, and his conviction was confirmed by the Court of Appeal and the House of Lords.⁶⁷

Setting aside the question of its legal correctness, the decision in *Kingston* is problematic. It looks manifestly unjust to punish someone for giving into inclinations they only gave into because someone else drugged them. But the problem for the pure quality-of-will view is that it doesn't provide a straightforward explanation of why Kingston isn't culpable. Kingston's paedophilic inclinations look like an instance of the kind of unacceptable desires or cares the pure quality-of-will view appeals to. And Kingston's conduct did manifest such desires. So it seems that the pure quality-of-will view has the result that he is culpable. Again, the hybrid Raz-inspired view has no such implication, because Kingston's capacities of responding to reasons were blocked by the influence of the drugs.⁶⁸ This suggests that the hybrid view is correct to hold that quality-of-will and capacity are individually necessary but jointly sufficient conditions for culpability.

I do not claim that the arguments just made definitively prove the superiority of the hybrid Raz-inspired account I have put forwarded over the alternatives, and I do not have space to do that here. But I do hope to have illustrated that there are distinctive benefits to a view which combines these two elements. Such a view promises to provide a plausible account of when we are culpable and when we are not, and does so in a way that does justice to the complex, multifaceted nature of responsibility.

⁶⁷ *R v Kingston* [1994] 3 WLR 519.

⁶⁸ A seeming response here is to opt for a pure quality-of-will view that appeals to *values*, rather than desires or cares, such as the view defended by Angela Smith (n 59), which appeals to how one's conduct reflects one's 'evaluative judgements'. It seems less plausible to say that Kingston's conduct expressed his values than that it expressed his desires. However, this move doesn't obviously work. Firstly, it may have the implausible result that akrasia is blameless. Secondly, I suspect that an appeal to values may just be surreptitiously bringing in an appeal to the capacity to respond to reasons in through the back door. If this is so, it is better to explicitly recognize this independent component in our theory of responsibility, as the hybrid account does.