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Nobody's Perfect:
Moral Responsibility in Negligence

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1. Introduction

Responsibility for negligence is something of a puzzle. In everyday life as well as in the law, we regularly assume that people are responsible for their negligent conduct. Yet, justifying this assumption has proven challenging. We tend to think of responsibility in relation to conduct that is willful, self-guided, controlled, and knowingly performed—intentional action being the paradigm. What makes explaining responsibility for negligent conduct difficult is negligence's unwittingness. Negligent conduct is never intentional and is either not self-guided or is performed unknowingly and without awareness of its negligence. When acting negligently it is not entirely clear, therefore, how one's agency controls or is even involved in one's conduct. In fact, negligent conduct can appear to take place regardless and at times even in spite of one's agency, which has led many to doubt the justification of legal as well as the very notion of (moral) responsibility for negligence.

The paper aims to make two central contributions. First, offering a conception of negligence explaining the often-overlooked role of competency in negligence (Section 7). Second, offering an answer to the puzzle of responsibility for negligent conduct (Sections 9 & 10). In a nutshell, responsibility for an instance of negligent conduct turns on 'quality of agency' or, more specifically, on the quality of one's agency *as an individual* (as opposed to as a generic person) at performing that type of conduct to one's competency. This conclusion is arrived at through reflecting on the aforementioned conception of negligence and on the largely ignored fact that occasional accidents are an unavoidable fact of life and a feature of the inherent fallibility of human agency.

To clarify, in discussing "responsibility" my concern is with what is sometimes referred to as "moral responsibility" or "personal responsibility." Such responsibility may attach to conduct as well as to the outcomes of conduct, yet my focus here is only on responsibility for the former. Note that the paper discusses negligence as a general normative concept, not the specific case of legal negligence; although grounding moral responsibility for negligence certainly has implications for the moral grounds of its legal counterpart. In the paper, "negligent conduct" and "negligence" are used interchangeably as are "conduct" and "behavior." When labeling someone "negligent", the paper refers to a person as behaving

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negligently. "Conduct" and "behavior" are used to refer to actions and omissions alike. Finally, the paper refers to certain conduct as "unwitting" or "inadvertent," by which I mean conduct performed unintentionally and/or unknowingly.

2. Personal Responsibility for Conduct

A person's responsibility for conduct turns on a type of connection between one's conduct and one's *practical agency*.[1] Several features comprise practical agency. H.L.A. Hart, for instance, puts matters in terms of "responsibility capacities."[2] Broadly, practical agents possess certain cognitive, rational, and epistemic capacities, such as the capacity to understand, detect, and remember norms, reasons and facts, and the capacity to reason, feel, deliberate, and to make judgments regarding norms, reasons, and facts. Agents also possess *practical capacities*, including the capacity to choose, make decisions, and control their bodies. Possessing this bundle of capacities constitutes one as a subject able to respond (i.e., response-able) to reasons through action (and omission), transcending compulsion, instinct, and passion. That is, a rational subject who, to an extent, determines her own conduct based on her own volition and reasoning. Accordingly, it is possessing practical agency that makes one into the sort of being who can be responsible for what one does.

Yet mere capacity for responsibility is not sufficient to ground responsibility. To be responsible for one's conduct, one's capacities for responsibility (i.e., one's practical agency) must be somehow connected, engaged, expressed, manifested, or involved with one's conduct. It is by virtue of such a connection between one's agency and one's conduct that one is responsible for said conduct.

3. Volitionism and Responsibility for Intentional Conduct

The contrast with the case of responsibility for intentional conduct helps illuminate the difficulty in accounting for responsibility for negligence. With origins stemming back to Aristotle, the classic conception of responsibility for conduct is that it involves knowledge, willfulness, awareness, and control of one's conduct.[3] The basic idea is that *A*'s responsibility for *phi*-ing depends on one having *phi*-ed voluntarily and knowingly; a conception of responsibility aptly labeled by some "volitionist".[4] The paradigm for this conception of responsibility is the intentional action (or omission), wherein the responsibility-establishing connection between conduct and agency is obvious. When acting intentionally, one's

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1. For such approaches to responsibility, see John M Fischer & Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 1998); Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2007).
2. HLA Hart, *Punishment and Responsibility* (Oxford University Press, 1968) at 154-55, 227-30. A view further developed and extrapolated on by, for example, Tadros, *supra* note 1 at 227-51 and Joseph Raz, *From Normativity to Responsibility* (Oxford University Press, 2011) at 55-57, 138.
3. Antony Duff, "Legal and Moral Responsibility" (2009) 4:6 Philosophy Compass 978.
4. Holly M Smith, "Non-Tracing Cases of Culpable Ignorance" (2011) 5:2 Crim & Philosophy 115 at 121.

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capacities for responsibility are clearly engaged in carrying out the action for which one is responsible. Intentional action is willed, initiated, controlled, guided and generally is knowingly and willfully performed by one's agency. There seems to be, therefore, at least no pre-theoretical mystery as to how intentional action is ascribable to one's agency and therefore why we hold people responsible for their intentional actions and, correspondingly, why we identify them with, evaluate them, and credit or hold them liable for those actions. The same seems true, *mutatis mutandis*, for intentional omissions. In contrast, accounting for the responsibility-establishing connection between agency and negligent conduct is much less straightforward.

4. Negligence as Improper Unwitting Conduct

Before exploring the matter of responsibility for negligent conduct we need a conception of what comprises such conduct. All negligence is unwitting, at least if we take the term "negligence" to stand for a normative category distinct from related categories such as intentional, known, or reckless conduct. Notice that the term "negligence" is deployed in various and at times inconsistent ways, be it in natural language, philosophy, or the law. For instance, in the legal context, one may be liable for the tort of negligence in relation to one's accidental, reckless or even intentional wrongdoing. Similarly, it seems perfectly natural to describe people who simultaneously text and drive as "behaving negligently" even though they are fully cognizant of the nature and risks of their conduct. Such uses of the term "negligence" in law and in natural language clearly do not translate into the normative category of accidental, unwitting, and inadvertent conduct with which I am concerned here.

There are at least three categories of negligence. One involves unwittingly omitting from doing something that one would have done intentionally were one more aware, accurate, careful, attentive etc. Examples of such unwitting behavior include leaving one's small child in the car, neglecting calling a friend on her birthday, failing to stop at a red light while driving, or forgetting to record the 'big game.' A second type of negligence involves intentionally trying to do one thing only to inadvertently end up doing something else, such as intending to pick up a glass yet dropping it on the floor, intending to step on the brake pedal only to accidentally step on the gas pedal instead, or attempting to give exact change yet confusing the coins' denominations. And then there are cases of unwittingly failing to do that which one should have done.[5]

Yet negligence is more than mere accident—negligence also has a normative component. Negligence is conduct that is in some sense improper. It is conduct in violation of some standard. The standard may be *internal*—as just explained, often when negligent we do something accidentally that we would not have done had we been aware or more fully in control of our conduct. Here what makes the accident negligent is the failure to live up to one's own standards residing in

5. This third category often—although not necessarily—overlaps with one of the previous two.

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one's intentions or background aspirations, commitments, and values. This type of unwitting conduct may count as negligent because it is conduct in conflict with one's own will and agency—giving reason for self-directed critical reactions, such as blame, disappointment, or annoyance with oneself. For example, I am negligent if I *intend* to pick up a glass yet it unwittingly slips from my grasp and shatters on the floor. Or when unwittingly running a red light one might thereby act against one's background *commitment* to obey law, the *value* that one puts on one's own safety and on the safety of others, or one's *aspirations* of being a good driver.

Negligence may also turn on violating an *external* standard. For instance, the philosophical literature on negligence is almost entirely devoted to conduct that is negligent by virtue of violating a moral imperative. External normative standards also come in other forms—standards of civility, professional codes of conduct, rules of games, aesthetic standards, social norms, norms of association and friendship etc. And the legal tort of negligence is all about the violation of judicially determined objective legal standards of conduct. Unwitting violations of all such standards might also qualify as negligent in their respective normative realms.

What is the relation between negligent conduct predicated on violations of these two different types of standards—internal and external? First, as some of the examples above suggest, negligence that is purely self-regarding is not only possible but also pervasive—occasionally we unwittingly let ourselves down, regardless of whether we thereby also violate some external standard. Second, negligence often involves a violation of both an external and an internal standard—frequently our standards for ourselves correspond and adopt the external standards that bind us.

Finally, can unwitting conduct in violation of an external standard but not of an internal standard count as negligent? That is, can we act negligently when unwittingly doing something that is somehow objectively wrongful that we would have, nevertheless, done intentionally had we been acting wittingly? I think so, as such cases still involve accidental conduct that is normatively problematic *vis-à-vis* the negligent actor. For example, under normal conditions accidentally running over a person with one's car is negligent, even if unbeknownst to the driver the victim turns out to be the driver's nemesis. And such accidental conduct remains negligent even if, had the driver been paying attention to the road, he or she would have acted no differently—this time intentionally keeping the car on a collision course with the nemesis. Accordingly, I take the normativity of negligence as either self-regarding, external, or both.

5. The Puzzle of Responsibility in Negligence

Recall the assumption that we set out to explain—conducting oneself *negligently* entails one's responsibility for said conduct. Yet the responsibility-establishing connection between agency and conduct is far less obvious in the case of negligence than it is in the case of intentional conduct. How is one ever responsible for *phi*-ing if one did not intend to *phi*, did not want to *phi*, was unaware that one

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was *phi*-ing or one's *phi*-ing was not under the guidance of one's agency? In such cases there seems, at least on the face of things, no responsibility-establishing connection between one's practical agency and one's conduct—there appears to be no obvious way in which one's agency is involved, expressed, manifested, or engaged in performing one's negligence. On the contrary, when negligent our agency appears disengaged from our (accidental) conduct rather than involved in carrying it out. Moreover, we saw that when negligent we often act against our will in the sense that we do that which we would not have done intentionally had we been aware or in better control of our conduct. Accordingly, negligence can seem something that happens to us disjointedly from our agency or even in spite of it, rather than something that we do as agents.

This is why the notion that responsibility is somehow inherent to negligence is puzzling.[6] On the one hand, we regularly ascribe responsibility and, relatedly, also attribute liability, hold accountable, as well as make critical evaluations of people based on their negligent conduct. Moreover, when acting negligently we view ourselves as negligent. We do not think that our negligence is something that happens to us; rather, we 'own' our negligence, associating ourselves with it as responsible agents. Yet, on the other hand, it is unclear what justifies these pervasive ascriptions of responsibility and related ascriptions of ownership, liability, and critical evaluations. In fact, the difficulty in accounting for the basis of responsibility for negligent behavior has led many in the literature to doubt and even to reject that such responsibility obtains at all.[7]

6. Could Have Done Otherwise

We think of negligent conduct as conditioned on capacity—conduct is not negligent without the capacity to do otherwise. Here capacity is divisible into two types. First, there are conditions independent of the agent, that is, capacity to *phi* requires opportunity to *phi*. Second, there are conditions regarding the agent herself, mainly possessing the ability to *phi*. For example, a misdiagnosis is not negligent if the physician lacked the requisite training to spot the telling symptoms or if no such symptoms were manifest, making diagnosis impossible. In both cases, although the physician unwittingly misdiagnosed the patient, the physician did not do so negligently due to the lack of ability or opportunity to make the right diagnosis.

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6. For more on the puzzle of responsibility in negligence, see Ori J Herstein, "Responsibility in Negligence: Why the Duty of Care is Not a Duty 'To Try'" (2010) 23:2 Can JL & Jur 403; Michael J Zimmerman, "Moral Responsibility and Ignorance" (1997) 107:3 Ethics 410.

7. Jules L Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) at 217-20; Tony Honoré, "The Morality of Tort Law—Questions and Answers" in DG Owen, ed, *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 73; Gideon Rosen, "Culpability and Ignorance" (2003) 103 Proceedings of the Aristotelian Society 61; Claire O Finkelstein, "Responsibility for Unintended Consequences" (2005) 2 Ohio State Crim LJ 578; Larry Alexander & Kimberly Ferzan, "Against Negligence Liability" in P Robinson & K Ferzan, eds, *Criminal Law Conversations* (Oxford University Press, 2009) 273-80; Matt King, "The Problem with Negligence" (2009) 35 Soc Theory and Practice 577; Heidi M Hurd, "Finding No Fault with Negligence" in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 387.

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Accordingly, although when negligent we do not act intentionally and often not even knowingly, it may seem that that does not make our negligence any less ours. After all, when negligent we—as responsible agents—should have and *could have* done otherwise, which seemingly makes us responsible for not doing so. In broad strokes this is the response Hart and others give to the puzzle of responsibility in negligence.[8]

But does not the initial puzzle persist? Why is capacity to do otherwise—even when assuming that one should have done otherwise—sufficient to establish responsibility for failing to do so? After all, considering that negligence is a type of unwitting conduct it seems that agency is disengaged from it. Moreover, remember that some negligence involves acting in spite of one's agency. Accordingly, at least on the face of things, one's agency does not appear manifested, expressed, involved, or engaged in carrying out one's negligent conduct. On the contrary, when we do something unwittingly or accidentally our agency seems almost absent from our behavior. The fact that one could have done otherwise but unwittingly did not do so does not seem to entail that one's agency was engaged in one's conduct—it is not as if one's agency actively brought about its own unwittingness. An agent's capacity to do otherwise than *phi*-ing is possibly a necessary condition of her responsibility for her *phi*-ing but, in any case, does not seem sufficient (at least if we accept that responsibility for conduct is predicated on one's agency's involvement, engagement, expression, or manifestation in the conduct). It appears, therefore, that even accepting 'capacity to do otherwise' as a feature of negligence, something more is still needed to establish that negligence involves a responsibility-establishing connection between one's agency and one's conduct.

The question remains, therefore, whether and if so how does negligence involve agency in a way that establishes responsibility for such conduct? Is negligence a type of conduct that one performs *as a practical agent*? I think it is. It is not as if Hart *et al* are not onto something. What we need to figure out is what exactly—beyond capacity to do otherwise—accounts for the responsibility-establishing connection between one's agency and one's unwitting negligent conduct.

7. Negligence and Competency

An answer to the puzzle begins with realizing that negligence is not just about capacity to do otherwise, but is also predicated on a largely overlooked feature of negligence, which is *competency* to do otherwise.[9] Competency for *phi*-ing is

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8. Hart, *supra* note 2 at 147-52; AJ Ayer, *Philosophical Essays* (Macmillan, 1954) at 27; George Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis" (1971) 119:3 U Pa L Rev 401; Anthony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, 2007) at 71; John Gardner, "The Purity and Priority of Private Law" (1996) 46:3 UTLJ 459; John Gardner, "Obligations and Outcomes in the Law of Torts" in Peter Cane & John Gardner, eds, *Relating to Responsibility: Essays for Tony Honoré on His 80th Birthday* (Hart, 2001) 111.

9. *Legal* negligence is typically not conditioned on competency. See *Vaughan v Menlove*, [1837] 132 ER 490.

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the ability to *phi* reliably and with relative confidence and ease.[10] Competency incorporates the various actions (and omissions) that—barring a competency-defeating event (e.g., fainting, fatigue, illness)—one's agency assumes and relies on as available to one. Our competency normally includes numerous features, from the remarkable to the mundane—speaking a language, calculating costs and benefits, driving, walking, remembering, playing a musical instrument, dancing, conversing, and so on.

For example, I certainly have the *capacity* to make a layup in basketball so if I attempt to make such a shot and succeed I am thereby responsible for making the shot.[11] Nevertheless, at this point in my life, I am alas no longer a *competent* lay-up shooter. Accordingly, were I to attempt a handful of shots and inadvertently miss them all, for me missing would not be negligent. I believe most people would agree that so long as I tried in earnest I am in the clear—my missing is unfortunate for my team and disappointing to me yet is not negligent. Missing does not, for instance, make me vulnerable to criticism. In contrast, given their skill, for most professional basketball players such a sequence of misses *is* negligent—mere trying will not do. What explains the intuitively clear difference between my case and the case of the professional is the fact that negligence involves not only failing to perform to one's ability but also failing to perform to one's competency.

Accordingly, negligence involves failing to meet a standard requiring conduct that is reliably, regularly, readily, and relatively easily, and confidently available to one. Ability alone is not enough. Negligence, therefore, is not only about what one had capacity to do and would have intentionally done and/or should have done, but is also about what one could have *competently* done.

One's competency for *phi*-ing is of course sensitive to one's actual performance and success at *phi*-ing, but performance is not solely determinative of competency. The fact is that one can succeed in doing what one is incompetent at as well as occasionally fail to perform to one's competency. The space between competency and actual performance is most salient when we fail to perform to our competency. When professional basketball players uncharacteristically miss a layup, annoyance and disappointment, both personal and from others, is predicated on their failure to deliver on their competency. Given *their* competency mere trying does not exculpate from negligence. Accordingly, here missing does not entail reduced competency but rather a failure to perform to one's competency. Denying the gap between competency and actual performance—that is taking performance as fully determinative of competency—cannot make sense of the annoyance at and the disappointment with professional players and how that case differs from the case of the amateur.

Now obviously regularly failing to *phi* most likely entails one's lack of competency for *phi*-ing. For example, were a basketball player to continue uncharacteristically missing most layups, at some point we would say that his or her competency changed for the worse, and that the misses are simply reflective of his or her now

10. Raz, *supra* note 2 at 243-51; Ori J Herstein, "Responsibility in Negligence: Discussion of From Normativity to Responsibility" (2013) 8:1 Jerusalem Rev Legal Studies 167.

11. A "layup" is considered the easiest shot in the game of basketball.

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diminished abilities rather than aberrations of the sort that justify, for example, surprise, disappointment, and criticism for missing. Yet the fact that competency is subject to change does not entail that such change is entirely subservient to one's performance in every specific case. There is a space allowing for exceeding and for failing to perform to one's competency. Negligence resides in that space.

8. Negligence as Failure of Agency

Intentional conduct involves responsibility for success while responsibility for negligence is responsibility for failing. What do I mean by 'success'? Responsibility for intentional conduct is responsibility for acting (or omitting) as one intended. Here responsibility is a function of the agent's intention to do what the agent in fact did. Negligence is different. When negligent one unwittingly fails to do that which one should have done, or what one intended to do or what one would have (intentionally) done. The question of responsibly for negligence is how are we ever responsible for unwitting failure?

Negligence is not just any failure. It is a failure of *agency* to meet its own competency as required by some standard. Negligence is unwittingly not doing what we should have and could have *competently* done, which suggests that when negligent something in our agency—that is in our *responsibility capacities*—goes awry. Negligent conduct, therefore, involves an unwitting failing, misfire, or malfunction in agency, derailing oneself from performing to one's own competency.[12]

Accordingly, it seems that the sought-after responsibility-establishing connection between one's agency and one's negligent conduct is that negligence is a form of conduct that expresses, involves, and manifests a *failure* of one's agency. Another way of putting this is that while we do not intend our agency's failure—it is unwitting—our agency is nevertheless still present in our negligence which manifests, expresses, and generally involves our agency through the malfunction, misfiring, and failing of the responsibility capacities that our agency comprises.

The realization that negligent conduct involves agency failure may seem, therefore, to account for what is missing from the Hartian approach—the elusive responsibility-establishing relation between agency and negligent conduct. Nevertheless, although certainly a crucial step forward, things are more complicated still. Because, as argued below, not all instances of agency failures to meet one's own competency to do otherwise in violation of a standard can underpin personal responsibility.

9. 'Nobody's Perfect': Quality of Agency and Responsibility for Negligence

No one is perfect. A measure of unwitting failures is part of life. Even the best of us will, invariably, make inadvertent errors and have accidents. It is unavoidable.

12. Raz, *supra* note 2 at 227-50.

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Unpacking what this fact entails for responsibility for unwitting conduct will pave the way towards understanding responsibility in negligence.

I will argue from a hypothetical. Ed and Ned are both surgeons. Ed is an outstanding surgeon who hardly ever errs, nearly always performing to his professional competency. Like Ed, Ned is a competent surgeon of similar training and skill. Thus, when performing to their competency their doctoring is equally good. Only that Ned suffers from occasional inadvertent errors and slipups. On a given day both Ed and Ned perform surgery and inadvertently perform identically badly. For instance, each of them accidently neglects to extract a surgical clamp from his patient's abdominal cavity or overestimates the required size of an incision. The question is, does the responsibility of each of them for his respective error differ from the other's, considering the variations in their overall aptitude in performing to their competency? And if so, why?

What if anything differentiates Ed's case from Ned's? It is neither their competency nor the nature of their error—both are competent surgeons of similar training, skill, ability, knowledge, and experience. And both make exactly the same errors. Where Ed and Ned do differ is in the background quality of their agency when it comes to doctoring. To clarify, by 'quality of agency' I do not refer to the pair's *competencies* at doctoring—which are similar—but rather to *how good they are at meeting their individual competency for doctoring*—in which Ed and Ned differ dramatically.

To appreciate the crucial distinction between one's competency and the quality of one's agency at meeting one's competency, and to understand the corresponding difference between Ed and Ned, recall my earlier distinction (Section 7) between competency and actual performance to one's competency and how actual performance can—and does, due to the inevitably of agency failure—fall short of competency. Here "quality of agency" refers to how able one is at closing the gap between one's competency for *phi*-ing and one's actual successes at *phi*-ing.

It is the difference in the quality of Ed and Ned's respective agencies for meeting their respective competencies that explains the variance between their records. Ed's agency is like a Swiss clock, rarely missing a beat and almost always performing to its competency. Ed's record, therefore, is near perfect and at the forefront of his profession, while Ned's record—due to occasional unwitting failures in agency—is less impressive. In other words, although of similar competency, Ned's responsibility capacities, unlike Ed's, are prone to occasional malfunction and failure, which is why Ed almost always lives up to his competency while Ned occasionally does not. When it comes to doctoring, the quality of Ed's agency in terms of meeting his competency is far superior to Ned's.

A key insight to draw from all this is that given the very high quality of Ed's agency at meeting his competency when doctoring, his rare unwitting failures are less or even hardly at all *his* in the sense that establishes personal responsibility. Here is why. For a person possessing the pair's high level of competency it is certainly possible to surpass Ned's mediocre surgical record. In contrast, exceeding Ed's rate of success is nearly impossible, which is indicative of the quality of

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Ed's agency at meeting his competency for doctoring—it is near perfect. In this respect, Ed's agency is near to as good as any person could possibly be at meeting her competency.

Now to err is human—a measure of failure is a fact of life. Accordingly, given the very high quality of Ed's agency at meeting his competency, his case of unwitting malpractice is much more an expected result of his fallibility as a generic human agent than it is a product of his shortcomings as an individual. In other words, given that his agency is nearly as good as any can be at meeting its competency, Ed's rare unwitting failure is not so much an expression or manifestation of a failure of his agency *as an individual* as it is a feature of *human agency as such*. No matter how impeccable, no one's agency is perfect. A measure of imperfection, that is some measure of agency failure at living up to one's competency, is inevitable. It is because of this that Ed's negligence is less an expression and manifestation of his practical agency as an individual person and more a feature of his generic human fallibility. And remember the account of responsibility given at the outset: we are not responsible for conduct that is not carried out by nor involves, manifests, or expresses our agency; such conduct is not attributable to *us* as individual practical agents. Thus, taking seriously the idea of *personal* responsibility along with the fact that 'nobody's perfect', it is hard to avoid the conclusion that human imperfection impacts the measure of our responsibility and sets limits on it.

In our example, it is only to competent yet occasionally careless Ned that we can comfortably ascribe responsibility for unwitting errors during the operation. Unlike nearly perfect Ed, whose quality of agency at doctoring represents the best anyone could hope to realistically achieve, Ned's failure is due much more to a failure in his individual agency—*he* failed—than to the shortcomings inherent to his generic humanity. This is not to say the Ned's failure is not "his" in all senses. Clearly Ned's failed conduct is in some sense his. Only it is not his in the sense that it does not arise out of his agency in the sort of way that establishes responsibility.

But what exactly does it mean for conduct to involve failure as a generic human agent as well as failure as an individual agent? Only imperfect agents ever fail to meet their competency, which is why all unwitting failures to meet our competency to an extent reflect, involve, and manifest the innate fallibility of our agency. Yet the fact that we never overcome the imperfections inherent to being human does not entail that our individual agency cannot do better or worse at meeting our competency. Thus, the shortcomings of our agency reflected in our agency failures are a mix of generic human imperfection and of the degree to which our individual agency falls short of reaching its individual (imperfect) potential. The measure of these ingredients in the 'mix' may fluctuate depending on the context and on the qualities of the individual agent. Thus, the better one is at *phi*-ing to one's competency, the less one's agency—as an individual—is involved, reflected, or manifested in one's rare instance of unwittingly failing to competently *phi*.

Accordingly, explaining the responsibility-establishing relation between an agent and her negligent behavior in terms of the *failure of agency* inherent to

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negligent conduct is flawed. What Ed's example teaches us is that when an agent who reached the top of human capacity for *phi*-ing unwittingly fails at *phi*-ing, the agent is *not* responsible for unwitting malpractice. If a failure in agency solely involves and only reflects one's humanity and not at all one's shortcomings as an individual, then one's individual agency is not involved, reflected, nor manifested in one's agency's failure. Such failure does not exhibit a responsibility-establishing connection between the individual person's agency and her unwitting conduct.

Given the account of responsibility as a relation between agency and conduct, it follows that responsibility comes in degrees. A person as good at *phi*-ing as is humanly possible is an ideal type. People generally fall somewhere between the (inherently imperfect) human ideal and utter incompetence. Accordingly, the extent to which one's conduct involves—engages, expresses, manifests—one's individual agency can fluctuate. Entailing that one may be more or less responsible. Thus, in the case of negligence, responsibility grows the more the failure of one's agency is due to shortcomings in one's facility—as an individual agent—to live up to one's competency. In contrast, one's responsibility for one's negligence diminishes the more it is due to failings in one's agency as a generic human agent. It is only the ideal type who is not at all responsible for her unwitting failures, as her agency (as an individual) is not at all involved in her failure.

These insights apply to our example. Ed and Ned are equal in their human imperfection yet differ in their quality as individual agents when it comes to doctoring. This is evidenced in the pair's very different records of success, notwithstanding their similar competencies. Considering that he comes close to being as able at doctoring as any human can be, nearly perfect Ed's rare episodes of negligence involve mostly his imperfections as a human agent and far less his shortcomings as an individual agent, of which, in the context of doctoring, he has few. And this is why Ed is not responsible for his malpractice or, at least, why he is far less responsible than Ned, whose negligent conduct involves, expresses, and manifests much more of his agency as an individual. For instance, freed from external pressures, the appropriate response for the chief of surgery to Ed's failure is less to blame him and more to console and empathize, telling Ed that everyone makes mistakes and that nobody is perfect, not even himself. The fact is that we can only expect so much of people. A certain measure of accidental error is just part of the human condition.

My conclusion from all this is that responsibility for an instance of negligent *phi*-ing turns on the *quality of one's individual agency at meeting one's competency at phi-ing*. Here is why. As argued above, agency *failure* accounts for how agency can be involved, expressed, and manifested in one's unwitting conduct. Yet, as we just saw, not all agency failures leading to unwitting and improper conduct establish personal responsibility for such conduct. Only those agency failures involving one's agency as an individual establish such responsibility. Moreover, the measure of involvement of one's agency as an individual in one's unwitting *phi*-ing determines the measure of one's responsibility for *phi*-ing.

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Which is why responsibility for an instance of unwittingly failing to *phi* turns on the background quality of one's agency at meeting one's competency for *phi*-ing: the better one is at *phi*-ing at one's competency the less one's occasional agency failures while *phi*-ing involve, manifest, and reflect one's individual agency, making one less responsible for such failures.

What exactly is this "*background* quality of agency" and how does it relate to one's past record at *phi*-ing? Any instance of unwitting failure involves a certain competency which one unwittingly fails to meet. How good one is at meeting that competency—that is the *quality* of one's agency at doing so—is a background fact about one's agency. For example, given the quality of his agency at doctoring, going into any given operation Ed has a 99.9% chance of performing to his competency.

Notice that quality of agency is typically diachronic. Our abilities do not just appear and disappear spontaneously. Rather, they mostly gradually and incrementally develop, change, and form over time.[13] Thus, although quality of agency is forever changing and is therefore always somewhat vague, typically it is fairly stable. Accordingly, how good one is at any given time at meeting one's competency for *phi*-ing is almost invariably a diachronic matter. Sudden or rapid advances and deteriorations in agency quality do occur, such as developmental leaps in small children. And when such rapid changes occur, the quality of one's agency is of course not a matter of gradual development. The same is true for temporary agency-defeating events, for instance intoxication, a passing illness, or fatigue, during which the quality of one's agency might dip. But for the most part, at any given moment the quality of one's agency at meeting one's competency for *phi*-ing is more or less the same as it was in the relatively recent past and will be in the relatively near future. Which is why, although hardly an exact science, the best *evidence* for what is the quality of one's agency at the time of any given instance of agency failure is usually one's (recent) past record of performing that type of conduct.

To conclude, personal responsibility for an instance of negligence is a feature of how good one's agency is at living up to one's competency for performing that *type* of activity. The better one is at meeting one's own competency for *phi*-ing, the more one's occasional unwitting agency failures at *phi*-ing are due to one's humanity and less to one's shortcomings as an individual agent, thereby making one less personally responsible. This is because the higher the quality of one's agency at meeting one's competency, the less one's agency—as an individual—is involved, expressed, and manifested in one's instances of negligence. Conversely, the worse one is at meeting one's own competency for *phi*-ing, the more one's occasional unwitting agency failures at *phi*-ing are due to one's shortcomings as an individual agent, thereby making one more personally responsible.

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13. On the historicity of agency and responsibility, see Fischer & Ravizza, *supra* note 1 at 194-201; Thomas Scanlon, *What We Owe To Each Other* (Harvard University Press, 1998) at 278-79; Tadros, *supra* note 1 at 140-42; Michael McKenna, "A Modest Historical Theory of Moral Responsibility" (2016) 20:1 J Ethics 83.

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10. Elucidations and Responses to Possible Objections

10.1 But Isn't Our Humanity Part of Us?

And if so, why are we less or even not at all responsible for negligence involving our humanity rather than our individual agency? Well, the view that our humanity comes with a measure of built-in responsibility for unintended, unwitting and accidental conduct—regardless of the features or the involvement of our agency *as individuals*—is anathema to the idea of *personal* responsibility. Such a view entails that we are responsible for what our individual agency is not engaged, manifested, expressed, or involved in bringing about. It is a view echoing doctrines of original sin. I cannot believe that we are responsible for our unwitting wrongdoings simply by virtue of being born human. Personal responsibility inherently turns on those features that make us into individual agents—on our responsibility capacities and on how we exercise them—not on the background features of our generic humanity. For me, here we reach bedrock. Sadly, nowadays society is drenched not in compassion but much more in blame-culture. Yet, as unintuitive as it may seem to some, the fact is that Ed is just not responsible.

10.2 But Ed's Conduct Was *Improper, Wasn't It?*

Yes, it was. In fact, it was likely wrongful as it violated the patient's rights. Which is why Ed should not, for example, brush off his patient's complaints by saying "it wasn't me, it was my humanity." But this is not a problem for my account of responsibility in negligence. We are often attached in a morally significant way to what our agency is causally wrapped up with, even without being responsible for it. For instance, while Ed probably would as well as should feel a measure of remorse for his conduct, he ought not and probably would not have similar sentiments towards Ned's malpractice. Yet such sentiments in relation to what he did are not necessarily an indication of Ed's *responsibility* for his malpractice. Rather the phenomenon of "agent regret," to borrow Bernard Williams' terminology, is the better explanation of the appropriateness of such sentiments.[14] Similarly, any anger Ed's aggrieved patient may understandably harbor towards Ed is best explained in terms of understandable resentment rather than as reflective of Ed's responsibility.[15] The realm of moral sentiments is a rich one, explaining our various reasonable reactions to improper conduct without necessarily committing to notions of original sin.

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14. Bernard Williams, "Moral Luck" in D Statman, ed, *Moral Luck* (State University of New York Press, 1993) 35.

15. On victim resentment, see David Heyd, "Resentment and Reconciliation: Alternative Responses to Historical Evil" in A Gosseries & LH Meyer, eds, *Justice in Time* (Oxford University Press, 2004).

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10.3 Good at Doing What One Is Good at Doing?

But is not the distinction between competency and quality of agency at meeting one's competency artificial? Are the two not the same thing? Is being bad at meeting one's competency not the same as being incompetent? I think not. Denying the distinction between an agent's competency for *phi*-ing and her ability to meet that competency yields a flat account of agency too impoverished to explain the phenomenon of negligence.

As already explained (Section 7) and what is crucial to understand is that the gap between one's competency and one's actual performance in meeting that competency makes negligence possible. Were it the case that actual performance was the limit of competency, then failing to meet one's competency would have been impossible as, for that matter, would have exceeding one's competency. Not only is this conclusion *prima facie* implausible, but denying the gap between competency and ability to meet it is incompatible with the very idea of negligence as well as with the evaluation, liability, and sense of ownership and responsibility that typically appropriately accompany exceeding or falling below one's competency. Moreover, accepting that there is such a gap between competency and performance, and recognizing that when conduct is characterized as negligent this gap is a function of a *failure in the agent* to live up to her competency, lead to the realization that there is a distinction between one's competency and how good one is—the quality of one's agency—at meeting that competency. The size of the gap can fluctuate, allowing for two people, such as Ed and Ned, of similar competency yet different abilities when it comes to meeting that competency.

10.4 Quality of Agency Set at Birth?

But are people not born with an already set quality of agency? And if so, does not the spirit of my overall approach suggest that we are *not* responsible for manifestations of those features of the quality of our agency? I think not. First, unlike our humanity, quality of individual agency is not entirely set in stone. Accordingly, "the original sin problem" does not arise here to the same extent as it does in the case of our human fallibility. Moreover, even if to an extent our capability to meet our competency is set at birth—for example perhaps some people are just born careless or absent-minded—ascribing responsibility to an individual person based on her agency's innate shortcomings may still in some sense involve *personal* responsibility. Because responsibility here is attributed based on features that make one the individual person one is, rather than merely a member of a species.

10.5 A Lottery Paradox?

My argument for reduced responsibility in certain cases of negligence is *not* based on the claim that *any particular one instance* of negligence was *unavoidable* due to human imperfection and, therefore, one is not responsible for it because one

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could not have done otherwise. Although I do think that there may be something to this line of thought, it nevertheless has an air of paradox in the vicinity of the "Lottery Paradox"[16] or the "Preface Paradox."[17] Here is why. On the one hand, a measure of negligence in a person's life does appear inevitable. Yet on the other hand, when looked at separately, all particular instances of negligence seem avoidable—recall that negligent conduct involves unwittingly failing to do that which one should and *could* have done. The problem, therefore, is that while both claims seem true, they do not cohere. Hence the air of paradox.

In any case, it is important to stress that my argument is based *not* on the unavoidability of any instance of negligence but rather on the varying degree of involvement and engagement of individual agency in every instance of negligence.

10.6 Derivative-Responsibility (or "Tracing") is Irrelevant

'Derivative responsibility' or 'tracing' does not help us with the puzzle at hand. What is derivative responsibility? Well, even if one is not directly responsible for *phi*-ing, one's responsibility for *phi*-ing may *derive* from one's responsibility for *psi*-ing, specifically where one's subsequent *phi*-ing was a reasonably foreseeable outcome of one's *psi*-ing.[18] This is a familiar construction in law. For example, although when inebriated one may lack capacity for responsibility, one's responsibility for driving under the influence derives from one's responsibility for knowingly having put oneself in a position in which it was reasonably foreseeable that one would act irresponsibly—that is consciously choosing to get drunk at the pub while knowing that once drunk one might then likely endeavor to drive home.[19] Philosophers talk of "tracing" with a similar idea in mind.[20]

Yet the idea of derivative-responsibility does not explain what we set out to examine. First, some cases of negligence clearly do not involve derivative-responsibility. For instance, Ned's malpractice is a paradigmatic case in which we hold people responsible, yet it does not involve derivative-responsibility. The error Ned made while operating was not a reasonably foreseeable outcome of the treatment. After all, even if not the best, Ned is a competent surgeon, which is why there was nothing wrongful—*vis-à-vis* his subsequent malpractice—in Ned's decision to perform the operation.

Second, derivative-responsibility does not fit our everyday judgments regarding responsibility for negligence. For instance, the disappointment, censure, and blame that instances of responsibility for negligence tend to attract—both from

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16. On the "lottery paradox", see Henry Kyburg, *Probability and the Logic of Rational Belief* (Wesleyan University Press, 1961).

17. On the "preface paradox" see DC Makinson, "The Paradox of the Preface" (1965) 25:6 Analysis 205-07.

18. I say reasonably "foreseeable" because one is obviously not responsible for all the outcomes of one's conduct.

19. See Dan B Dobbs, *The Law of Torts*, vol 1 (Westgroup, 2000) at 493-550; *Restatement (second) Torts § 283* (1965). For a case involving an epileptic seizure while driving, see *People v Decina*, 138 NE (2d) 799 (1956).

20. See, e.g., John M Fischer & Neal A Tognazzini, "The Truth About Tracing" (2009) 43:3 Nous 531; Zimmerman, *supra* note 6.

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the culprit as well as from others—are invariably for acting negligently, not for foreseeably causing oneself to act negligently.

10.7 Attributionism, Not Volitionism

As briefly explained in Section 3, volitionism is the view that responsibility for *phi*-ing is somehow grounded in one's willing one's *phi*-ing; a paradigm of responsibility that fits nicely with our ideas about responsibility for intentional conduct. As explained, the problem is that volitionism does not seem able to account for responsibility for unwitting conduct.

It is important to note, however, that volitionism is not the only game in town.[21] What is labeled "attributionism" is an alternative paradigm of responsibility, rejecting volition as a necessary condition for responsibility and opening the door for responsibility for unwitting conduct. Broadly speaking, attributionists recognize that when conduct involves certain specified features of one's agency the conduct is attributable to that agent in a way that establishes the agent's responsibility for the conduct, even if the agent did not intend or choose to so act.[22] Accordingly, while I believe novel and perhaps even surprising, my account of responsibility in negligence does fall within an established paradigm.

10.8 Isn't It "The Better You Are the More *Responsible You Become"?*

Do we not expect more from those who are better at performing a certain task? If anything, are they not *more* responsible for their negligence? Going back to the doctors' example, let's imagine a third character called Meg. Meg's rate of success in the operating room is 90%, which is lower than Ed's rate of 99.9%. On a given day both accidently make the same inadvertent error. If anything, is Ed not more responsible for his negligence than Meg is for hers? After all, all things considered, he is the better doctor—do we not hold him to a higher standard? Is not his negligence *more* the result of his agency as an individual than of his human imperfection?

Not necessarily. The example trades on ambiguity. What is not clear is whether the difference between the two doctors' success rates is a function of different degrees of ability—that is whether the difference is a function of variations in competency—or is it a function of variations in quality of agency at meeting their competency (or some combination of both factors). My contention that responsibility for negligence is predicated on quality of agency at meeting one's competency was fleshed out through exploring an example of two doctors (Ned and Ed) of similar competency yet of different caliber of agency:

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21. On the distinction between attributionism and volitionism see, e.g., Smith, *supra* note 4.

22. See, e.g., Scanlon, *supra* note 13 at 268-69; Angela M Smith, "Responsibility for Attitudes: Activity and Passivity in Mental Life" (2005) 115:2 Ethics 236; George Sher, "Out of Control" (2006) 116:2 Ethics 285; Tadros, *supra* note 1; Pamela Hieronymi, "Responsibility for Believing" (2008) 161:3 Synthese at 357; Angela Smith, "Control, Responsibility and Moral Assessment" (2008) 138:3 Philosophical Studies 367; Smith, *ibid*.

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one consistently had more episodes of agency failures than the other. Setting the two's competency for the same level helped flesh out—accounting for the implications that human fallibility has for personal responsibility—how the pair's degrees of responsibility for their respective negligence were sensitive to the quality of their respective agencies.

We can reach a similar conclusion about responsibility for negligence by looking at a case of two doctors of similar quality of agency yet of different competency. Although of similar quality of agency in meeting their respective competencies, such doctors would exhibit a different success rate due to the difference in their competencies. Yet I believe that the level of responsibility of each one of these doctors for a given unwitting error is the same. As explained, we should not expect one to outperform one's competency, which is why so long as the doctors are largely living up to their competency they are not or at least are less responsible for their rare unwitting failures. Given that some such failure is unavoidable, the two doctors' responsibility for any given failure will increase with their failures becoming more a function of their shortcomings as individual agents than of their fallibility as human agents. Given that the two doctors exhibit similar levels of care—the quality of each one's agency at meeting his or her individual competency is the same—their responsibility for their failures is also the same, regardless of the fact that one doctor errs more often than the other due to the disparity in competency.

The objection under consideration appears to have the most traction in cases in which the difference in performance is a function of the two doctors' different degrees of competency where, in addition, the more successful doctor demonstrates a lower degree of care, that is, his agency fails more and is less able at meeting its own competency. In such cases we do hold the better doctor more responsible for an instance of negligence.

But here too, at the end of the day, the objection is unconvincing. Here is why. Assume Meg's 90% success rate is a function of her mediocre competency but high quality of agency at meeting that competency and that Ed's 99.9% success rate is a function of his extraordinary abilities and competency but mediocre agency at meeting that competency. In such a case Ed's responsibility for his rare unwitting failures is indeed greater than Meg's—as the objection assumes. Yet the reason for this is Ed's agency's lower level of care in meeting his very high level of competency. Thus, even though Ed performs better than Meg, Ed's performance *in relation to his* competency is less impressive than Meg's performance *in relation to her* competency. Accordingly, even in those cases in which we sense the more responsible party is the person with a better overall performance rate, the reason for this is still his lower quality of agency at meeting his competency and *not* his high level of competency.

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