

Unconscious *Mens Rea*: Lapses, Negligence, and Criminal Responsibility

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Introduction

In a recent book, Neil Levy argues that culpable action—action for which we are morally responsible—is necessarily produced by states of which we are consciously aware.¹

However, criminal defendants are routinely held responsible for criminal harm caused by states of which they are not conscious in Levy's sense. The discrepancy between Levy's assessment and the criminal law's assessment of these cases seems significant: Levy's theory indicates that many criminal defendants held responsible under the doctrine of negligence are not actually morally responsible agents. This is especially worrying for those who support the US Model Penal Code's appeal to retribution as the primary purpose for criminal punishment, as retribution depends upon defendants' moral blameworthiness.²

In this chapter I will argue that cases of negligent criminal harm indicate that Levy's claim that moral responsibility requires synchronic conscious awareness of the moral significance of an act is too strict. Further, I will claim that tracing conditions cannot be successfully used to bolster Levy's account. Instead, current legal practices

¹ NEIL LEVY, *CONSCIOUSNESS AND MORAL RESPONSIBILITY* (2014).

² The American Law Institute, *Model Penal Code: Sentencing, Tentative Draft No. 1, Part I. General Provisions* (9 April 2007).

indicate that criminal responsibility requires the capacity for diachronic agency and self-control, not synchronic conscious control. This means that an agent may be responsible for harm related to lapses (failures of memory or judgment) even if he or she at no point could have reasonably foreseen the possibility of causing criminal harm. The criminal law aims not only to sway conscious decision-making in the time slice immediately preceding a crime, but also to motivate agents to become law-abiding over time via diachronic self-interventions, including manipulating one's dispositions to act and environment. Such self-interventions can make it more or less likely that an agent will be prone to lapses that cause criminal harm.

I. Levy's Consciousness Thesis

In a recent book, Neil Levy argues that both of the best candidates for conditions for moral responsibility require that culpable action is necessarily produced by states of which we are consciously aware.³ Only conscious states reflect 'real' or 'deep' agency, as required by 'deep self' views of responsibility; thus Levy claims such theories require that culpable action issue from conscious states.⁴ Similarly, the sort of self-control required for responsibility under volitional or control accounts of responsibility also require conscious awareness.⁵ Consciousness functions to allow for top-down deliberative control, where action can be related to an agent's long-term plans, memories, and values; whereas non-conscious states are associative, and only produce rigid 'action

³ <IBT>Levy, *supra* note 1</IBT>.

⁴ *Id.*

⁵ *Id.*

routines'.⁶ Thus Levy argues that consciousness is a necessary condition under both sorts of theories—and, he insinuates, any viable theory of moral responsibility.

Levy's account is grounded in neuroscience, and is quite specific regarding what conscious awareness consists in from a scientific perspective. Levy ascribes to a version of the Global Workspace Theory (GWT) of consciousness, a theory first developed by Baars.⁷ Global workspace theory posits that consciousness functions to coordinate and control cognitive activity by allowing widespread access across regions of the brain. Specifically, consciousness signals a connection between the prefrontal regions, which house the executive functions that provide top-down control mechanisms, and posterior regions, which house memory and other representational content, including the sorts of content that are important to the 'self'—values, long-term plans, memories, emotions, etc.⁸ When executive functions, which include deliberative capacity, attention, planning, and inhibition, have access to the representations of an agent's values, long-term plans, memories, and emotional responses, such content can be used in thought and the generation of behaviour. Thus consciousness signals the possibility of complex planning and integration of intentions to allow for reasoned, flexible behaviour that reflects both

⁶ *Id.* at 74–75.

⁷ B.J. BAARS, HOW DOES A STREAM OF CONSCIOUSNESS THAT IS RELATIVELY SIMPLE, SERIAL, AND LIMITED IN CAPACITY EMERGE FROM A BRAIN THAT IS LARGELY UNCONSCIOUS, COMPLEX, AND MASSIVELY PARALLEL? (1993); Bernard J. Baars & Laureys Steven, *Global Workspace Theory of Consciousness: Toward a Cognitive Neuroscience of Human Experience*, in *PROGRESS IN BRAIN RESEARCH* (2005).

⁸ Levy, *supra* note 1 at 88–103.

‘deep agency’ and self-control. To put it another way, an agent who is consciously aware of the states driving their behaviour can be said to be reasons-responsive in Fischer and Ravizza’s sense.⁹

Much of our habitual behaviour does not require operations within the global workspace: executive processes are activated when routine behaviours are not sufficient to achieve goals.¹⁰ Executive functions manage the representations used to form and execute plans and intentions to act. Although the final taxonomy of executive processes has yet to be determined, neuroscientists and psychologists tend to agree on the basic capacities they involve, and continue to develop a detailed list using evidence from prefrontal lesions and imaging studies.¹¹ Interestingly, executive functions themselves are

⁹ J.M. FISCHER & M. RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* (1999).

¹⁰ W. HIRSTEIN, *THE EXECUTIVE SELF: PREFRONTAL EXECUTIVE PROCESSES AND SENSE OF SELF* (2009).

¹¹ Akira Miyake, Naomi P. Friedman, Michael J. Emerson, Alexander H. Witzki, & Amy Howerter, *The Unity and Diversity of Executive Functions and Their Contributions to Complex ‘Frontal Love’ Tasks: A Latent Variable Analysis*, 41 *COGNITIVE PSYCHOLOGY* (2000); H. Garavan, T.J. Ross, K. Murphy, R.A.P. Roche, & E.A. Stein, *Dissociable Executive Functions in the Dynamic Control of Behavior*, 17 *NEUROIMAGE* (2002); M.T. Banich, *Executive Function: A Search for an Integrative Account*, 18 *CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE* (2009); E.K. Miller & J.D. Wallis, *Executive Function and Higher-Order Cognition: Definition and Neural Substrates*, in *ENCYCLOPEDIA OF NEUROSCIENCE* (2009).

not conscious although in most cases an agent is consciously aware of their effects on thought and behaviour.¹² Executive functions instantiate top-down control of behaviour in the prefrontal cortex, and actually perform the functional operations Levy says are vital to responsibility within the global workspace; but they sit outside of conscious awareness. (An exception may be the function of attention, which seems to necessarily entail conscious awareness of some sort.)

Behaviour generated by ‘sub-conscious action routines’, by contrast, is inflexible, domain-specific, stereotyped, and associative. This is not only because the executive is not engaged, but also because the representational content the executive works on tends to be modular. Levy provides the classic example of unconscious behaviour in his book: sleepwalking. In the much-discussed 1996 Canadian case, Kenneth Parks, who had a history of sleep abnormalities, got up from his bed and drove 26 kilometers to his in-laws’ home, where he proceeded to stab both of them with a knife, resulting in the death of his mother-in-law and severe wounds to his father-in-law.¹³ Subsequently Parks awoke and drove himself to a police station, turning himself in, indicating to police that he had done something ‘terrible’. Levy argues that Parks, who was acquitted of murder, was not morally responsible for his act because he was acting solely from subconscious action routines.¹⁴ These action routines allow a sleepwalker to open doors, avoid bumping into things, and even drive a car (much in the same way that a conscious agent can avoid

¹² Hirstein, *supra* note 10; W. Hirstein & K. Sifferd, *The Legal Self: Executive Processes and Legal Theory*, 20 CONSCIOUSNESS AND COGNITION (2011).

¹³ R v. Parks, (1992) 2 S.C.R. 871.

¹⁴ <IBT>Levy. *supra* note 1</IBT> at 70–79.

running into things while experiencing highway hypnosis). However, while one is asleep executive functions are essentially offline, and an agent's long-term plans, values, memories, etc. tend to be engaged only in fragmented, nonsensical ways. That is, such representational content is not integrated across domains and under executive control such that behaviour can be seen as related to an agent's 'deep self' or self-controlled.

Levy's theory does not just require that an agent act from conscious states to be responsible for any action issuing from such states: Levy requires that an agent be consciously aware of the moral significance of his action to be responsible for that action.¹⁵ This means that an agent whose action causes harm due to a lapse, or an agent that is consciously confabulating about the nature of their act such that they are unaware of the harm it may cause, is not responsible for that harm.¹⁶ Thus a friend that forgets a birthday, or a racist who confabulates regarding why they chose not to hire a person of another race, is not responsible for the forgetting or the racist hire. This additional requirement makes sense given the role that Levy says consciousness plays in issuing culpable action: it allows an agent to review an action given her long-term plans and values, and to modify or inhibit an action based upon its consequences. If a person is unaware of the harm the action will cause, she thus cannot review it given her 'deep self', or modify her behaviour to avoid undesired harm.

Levy makes clear in his book that he feels conscious awareness is a necessary, but not sufficient, condition for moral responsibility.¹⁷ He assumes there are conditions other

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at ix–xii.

than a lack of consciousness that will excuse an agent from responsibility, including juvenile status, mental illness, and coercion. However, whether the agent was acting from conscious states is the first hurdle for any responsibility assessment: if the agent is conscious of the moral significance of his act, further conditions may be explored.

II. Testing the Consciousness Thesis: Lapses

Bert (not his real name) was the defendant in a criminal case I observed some years ago at the Cook County criminal courthouse in Chicago.¹⁸ Bert had custody of his kids every other weekend, although he often tried to switch days with his ex-girlfriend, and sometimes failed to take the kids during his scheduled time. His children were ages six and eight, and were latch-key kids, meaning they let themselves into his apartment on the days they were scheduled to stay with Bert to wait for him to return home from work. One Friday when he was scheduled to have his kids, Bert instead went straight from his workplace to the airport and caught a flight to Las Vegas. Unfortunately, the children's mother had also left town for the weekend. There was no land-based phone line working in Bert's apartment, and very little food. The children, with no means to contact either parent, stayed there alone until Monday morning, when they returned to school hungry and dirty. The children's teachers figured out what had happened, and called the Department of Child and Family Services, which in turn called the police. Bert was arrested for child abandonment and neglect.

When I saw Bert in court, he was trying to convince a judge to acquit him of the charges against him because he had honestly forgotten that it was his weekend to care for

¹⁸At the time I was working as a Senior Legal Research Analyst for the Illinois Criminal Justice Information Authority on a project funded by the US National Institute of Justice.

the children. In Illinois, the statute that defines child neglect stipulates that a person is guilty of child abandonment if they *knowingly* leave a child under 12 alone for 24 hours or more.¹⁹ Bert's lawyer stated he didn't knowingly abandon his kids: he hadn't been aware it was his weekend. The judge's response was interesting. She said, 'Bert, let's just assume that you did in fact make an honest mistake and forget it was your weekend to care for your children. The state of Illinois just doesn't let you forget to feed your kids'. Bert was found guilty of child abandonment and sentenced to probation.

Statutes covering criminal child neglect, endangerment, and abandonment in the various US states reflect an extremely wide range of *mens rea*, or mental state, requirements.²⁰ Nebraska requires mere negligence and Maine requires recklessness; but Mississippi requires the strict standard of 'willfully'.²¹ However, the majority of state statutes do not specify any *mens rea*, and merely prescribe criminal liability for failure to provide necessary or proper care.²² And as we can see from Bert's case, even where a statute seems to require a fairly strict standard, at least some judges fail to apply it.

Bert's conscious decision to go to Las Vegas instead of going home after work caused his children to be abandoned. However, assuming Bert suffered from an honest lapse, he wasn't consciously aware of the moral significance of his decision. If we had seen Bert at the airport and asked him what he was doing there, as someone from the

¹⁹ 720 ILCS 5/12C-10.

²⁰ <IBT>David Pimentel, *Criminal Child Neglect and the 'Free Range Kid': Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. (2012)</IBT>.

²¹ *Id.*

²² *Id.*

airline no doubt did, Bert would have replied that he was going to Las Vegas for the weekend, without any conscious awareness that this action meant his kids would be abandoned. The knowledge that he was responsible for his kids that weekend was probably present *somewhere* in Bert's cognitive system, but that knowledge was not made conscious. This means that Bert fails to meet Levy's requirement for moral responsibility.

In a 2011 article Levy discusses lapse cases, and claims 'I think that ordinary people recognize that our (one off) lapses do not license any inferences about the quality of our will'.²³ Because we cannot be sure if a lapse expresses any of an agent's sincerely held attitudes, Levy says we cannot hold her responsible for harm related to the lapse. Even if the lapse seems in keeping with what we know about the agent's attitudes—even if we knew from Bert's past behaviour that he doesn't care much about the well-being of his kids, especially when there is something pressing he would rather do—we can't assume the lapse is causally related to his attitude of non-caring. In Levy's words, the lapse may merely reflect, but not express, Bert's attitudes, by which Levy means the relationship between the attitude and the lapse may be mere coincidence. Only when an action is related to a conscious attitude can we be sure the attitude is endorsed by its holder.

The exception to this rule is that Levy allows for direct responsibility for lapses only in cases where an agent shows a clear pattern of lapses with regard to a certain

²³ Neil Levy, *Expressing Who We Are: Moral Responsibility and Awareness of our Reasons for Action*, 52 ANALYTIC PHILOSOPHY 14 (2011).

object.²⁴ So, if Linda forgot to meet her friend at an agreed-upon time and place three times in a row, her friend would be justified in holding her responsible, because the pattern indicates a sincerely held attitude of a lack of care towards her friend. But barring a clear pattern, Levy claims lapses cannot ground direct responsibility.

In Bert's case, the judge indicated that if she let Bert avoid culpability for the lapse that resulted in the abandonment of his children, the criminal law would fail in its aim of encouraging parents to remember and meet their responsibilities to their children. This seems right. Failure to apply consequences for lapses might actually encourage agents to create circumstances where they are more likely to lapse. One can imagine a father who, as soon as he notices his ex-wife is about to give him instructions on care of their children, only half listens, so that the information is very difficult to recall. The father may do this precisely because he doesn't want to be burdened with her instructions.²⁵ When he later fails to take his child to the science fair and the child fails science, it seems that the father is not just responsible for not paying attention to his ex-wife's instructions, but also for failing to take his child to the science fair, because *he should have paid attention and remembered his ex-wife's instructions*. Similarly, a parent like Bert might fail to buy a calendar (or, to put the point in more modern terms, fail to buy a phone with a calendar app), just so that they can claim they didn't remember because they don't possess a reminder system.

Thus there seem to be good reasons to worry about Levy's claim that lapses don't express agency. I will discuss these worries in detail below. In addition, Levy's claim that

²⁴ Id.

²⁵ Levy might argue in this case that the conscious decision not to pay attention displays the father's quality of will, and the father has responsibility for the later lapse because it can be traced back to this conscious decision. Tracing introduces new problems, however. I discuss these in the next section.

we don't hold people morally responsible for 'one off' lapses seems incorrect. The appropriate level of responsibility applied for a lapse often depends not only on whether the agent exhibits a pattern of lapses, but on the degree of harm caused by the lapse. If Rob's life partner, Tim, forgets to take out the trash, Rob may be annoyed, but he also may feel like he should not hold his partner responsible, especially if there were extenuating circumstances (maybe Tim was on his way to an important job interview).²⁶ But if Tim forgets to come to a biopsy scheduled on a possibly cancerous nodule they found in Rob's thyroid, Rob is very likely to hold Tim morally responsible, even if Tim has never exhibited this sort of lapse before. In other words, some one-off lapses may be excusable, but others—where there are important reasons to remember—seem like clear cases where an agent should be held directly morally responsible for the forgetting.

Levy might just disagree with the legal and folk practice of holding persons responsible for harm causally related to lapses, and claim that Bert and Tim are not morally responsible or deserving of punishment. This seems problematic in Bert's case, however. On most contemporary views of the law the law seeks to both regulate human conduct and punish moral wrongdoing.²⁷ Thus even if Levy can make a convincing case that Bert is not morally responsible for the abandonment of his children, there seem to be

²⁶ There is of course an important distinction between Rob holding his partner responsible, and Tim being criminally punished. I will discuss this a bit later in the chapter.

²⁷ Most scholars and US penal codes embrace a hybrid theory regarding the purposes of law, which embrace both backward-looking proportional punishment and forward-looking deterrence aims. See, for example, H.L.A. HART, *THE CONCEPT OF LAW* (1961).

good forward-looking reasons to punish Bert for his lapse. Fines and criminal punishment are important means by which the law motivates citizens to be law-abiding, and lapse cases seem ripe for the imposition of punishment as a means to encourage law-abiding behaviour. This is because lapses that harm others or violate the social order are often easily avoided. Our tax system is a good example: in the US, hefty fines are levied against those who forget to file their taxes, and the possible imposition of such fines encourages the majority of citizens to file their taxes on time (or ask for an extension). Similarly, the imposition of punishment for forgetting to care for one's children would seem to be an effective means to encourage some parents to take their parenting duties seriously. Parents like Bert who share custody ought to ensure they do not forget the dates when they have custody, and knowledge that one may be faced with a criminal penalty for forgetting would seem to be motivating to at least some potentially forgetful parents.

Thus I think it is not feasible for Levy to take the position that lapse cases ought never to be criminally punished due to the lapsing agent's lack of moral responsibility. It appears that Levy is left with two options for handling such cases: (1) attempt to hold lapsers morally responsible using tracing conditions (such that they can be punished in keeping with the aim of retribution); or (2) support punishment in lapse cases despite a lack of moral responsibility based upon purely forward-looking aims, such as deterrence and incapacitation. I discuss both of these options below.

III. Tracing

Many philosophers support holding persons who cause harm without corresponding conscious states morally responsible via a tracing condition.²⁸ Bert's case generates the intuition that Bert is morally responsible for his lapse and the harm caused to his kids, and thus his guilty verdict was correct. However, Bert was not aware of the moral implications of his decision to go to Las Vegas: assuming Bert suffered from an honest lapse with regard to his parenting schedule, he did not intend to cause his kids harm, nor did he know this decision would cause his kids to be abandoned. If one thinks conscious awareness is required for moral responsibility, as Levy does, tracing allows responsibility for some conduct missing a conscious mental element (awareness of the moral implications of the act) to be traced back to a decision or action that does possess a conscious element. The classic case where tracing is used is to attribute moral responsibility to a person who becomes voluntarily intoxicated. Although the very drunk driver is suffering from a diminished capacity to understand and/or control his acts at the time he drives off the road into a crowded bus stop, his responsibility can be traced back to a point where he decided to drink so much that he became intoxicated. We expect persons to understand the moral implications of getting drunk when they intended to drive home: in other words, it was reasonably foreseeable that getting drunk would make the drive unsafe.²⁹

²⁸ See for example Fischer & Ravizza, *supra* note 9 49–51; and ROBERT AUDI, *MORAL KNOWLEDGE AND ETHICAL CHARACTER* (1997).

²⁹ <IBT>Vargas Manuel, *The Trouble with Tracing*, 29 *MIDWEST STUDIES IN PHILOSOPHY* (2005)</IBT>.

In Bert's case it seems we might use tracing to look for a decision or act wherein the harm he caused to his kids (forgetting his parenting schedule) was reasonably foreseeable.³⁰ For example, maybe Bert was like the father discussed above who consciously 'tunes out' his ex-wife so he wouldn't have to pay attention to her demands with regard to care of their children. It was reasonably foreseeable that this father's decision to tune out would result in him missing appointments (really, this was the whole point). The father may thus be held responsible via tracing conditions when his conscious failure to pay attention results in a failure to remember his kid's science fair.

Similarly, if Bert made a conscious decision not to pay attention when he discussed the custody schedule with his ex-girlfriend, or consciously dismissed the idea of writing down the schedule, he is indirectly morally responsible for the abandonment of his children. In this case it would be reasonably foreseeable that Bert's conscious decision not to listen or set a reminder might lead him to forget the parenting schedule.

However, the actual evidence presented in the case doesn't support this sort of account regarding Bert's lapse. There had been a brief in-person conversation some weeks before the lapse between Bert and his ex-girlfriend about the schedule. This discussion occurred after Bert dropped off the kids while the two were standing outside of his ex-girlfriend's apartment. Afterward Bert had failed to write the schedule down or set a reminder. Bert didn't own a calendar or a date book, and testified that he never wrote down any of his appointments (this was before the days of electronic calendars via cell phones). Importantly, Bert claimed that it never occurred to him to write down the schedule or set a reminder, despite the fact that the parenting schedule changed a lot

³⁰ See Vargas for a full explanation of this approach: *Id.*

because he often asked to switch weekends with his ex-girlfriend or not take his parenting time, and sometimes she asked to switch. Bert's ex-girlfriend agreed that she had never known him to keep a calendar or write down appointments.

It thus seems that Bert may not have made a conscious decision not to pay attention to his ex-girlfriend, or not to set a reminder or write down his parenting schedule. That is, it may have never crossed his mind to do either of these things. If this is the case, was the harm he caused his children at any point reasonably foreseeable? It seems not.

Looking further back in time, we might find the conscious initiation of the habit of failing to keep a calendar or set reminders; we might, for example, find a point where Bert consciously dismissed a high school teacher telling him to write down his assignments. But it does not seem reasonably foreseeable at the time of this decision that Bert might lapse and abandon his yet-to-be-born kids. The link between this long-ago decision—even a series of such long-ago decisions—and the criminal harm Bert caused seems too thin to hold Bert morally responsible and thus justify his criminal punishment.

This analysis of Bert's case is supported by Matt King's 2009 paper on negligence and tracing.³¹ King argues that the hallmark of negligence cases is the failure to exercise a standard of care, which often manifests as a failure to pay attention or a failure to take note of the risk. King gives the example of Negligent Nate:

. . . [S]uppose that Nate, tired from waking up early, is backing out of his driveway. His thoughts turn to his meetings that day, and his attention is

³¹ <IBT>Matt King, *The Trouble with Negligence*, 35 SOCIAL THEORY AND PRACTICE (2009)</IBT>.

partially focused on a radio commercial. Due to his inattention, Nate doesn't see a child walking to school and so hits him, breaking the child's leg. Nate is negligent: he fails to pay proper attention to what he is doing and so risks harm to others, a risk that is unfortunately realized.³²

Tracing works, says King, only when the prior decision or action meets two conditions: (1) the agent is responsible for that earlier decision or action; and (2) that earlier decision or action caused the agent to fail to satisfy the conditions on responsibility for the later action.³³ This is fairly easy to do in cases where an agent makes a choice that impairs his later agency, such as drinking too much, or sleeping too little. In standard cases of negligence, however, King argues that it is difficult to trace back to a prior conscious choice that caused the subsequent lack of proper attention or care. '[Nate] doesn't choose to be inattentive, nor does he do anything else for which he is responsible that also obviously creates the condition of his inattentiveness.'³⁴ Similarly, Bert may not have chosen to be inattentive to his children.³⁵

³² *Id.* at 578.

³³ *Id.*

³⁴ *Id.*

³⁵ King also thinks that although most intuit that Nate is responsible for negligence, there are no principled means to distinguish Nate from cases like the one of Leadfoot Lenny, who inadvertently steps on his friend's hand when he gets up from the sofa to get a soda and is distracted by the movie playing. Both Nate and Larry should have paid more attention, and both violated some duty to take care (though one duty seems more important than the other), but neither violations can be linked to some prior conscious

IV. Lapses and Legal Negligence

Thus it seems use of tracing conditions will not be sufficient to hold Bert, and some other lapsers, morally responsible for their lapses. Could Levy support criminal punishment of Bert even though he denies Bert is morally responsible for his lapse? To do this Levy's theory would have to be amenable to finding Bert guilty for the harm caused by his lapse using a legal negligence standard, and then support Bert's punishment based upon purely non-retributive, forward-looking aims of punishment such as deterrence and rehabilitation.

I don't think this move is available to Levy. In this section, I will argue that application of the negligence standard requires a minimal level of backward-looking moral culpability, where the negligent agent is morally blameworthy for failing to meet a legally required standard of care. I will claim that on any interpretation of the doctrine of negligence, a defendant's guilt is premised upon his capacity to know and understand the legal standard of care, as well as his capacity to act in a way that meets this standard (or

decision. We tend to treat Nate more harshly, King says, because his failure with regard to the duty of care is more serious, but there is no real difference in their cases to be discovered via a tracing condition. One is expected to take more care driving than walking, because the risk of harm to others is greater. Negligence, King concludes, is just a form of inadvertence, in which the expected negative value of inattentive conduct is great.

King concludes that neither Nate nor Lenny are morally responsible for the harms they bring about. I, of course, disagree, because I think there are grounds other than tracing to hold lapsers like Bert responsible.

refrain from acting in a way that violates the standard). Thus legally negligent lapsers are criminally culpable based upon legal criteria that also appear to qualify them for some minimal level of moral blameworthiness.

My overall argument is supported by the *principle of correspondence*, expressed through the Model Penal Code structure of *mens rea* requirements, where assessment of a defendant's *mens rea* aims to ensure that the degree of liability and punishment will be proportionate to a defendant's culpability and limited by it.³⁶ From this perspective, *mens rea* requirements reveal a sliding scale of moral culpability, ranging from a high level of culpability when an agent acts for the purpose of causing criminal harm ('purposely'), to slightly less culpable when he didn't act for the purpose of causing harm, but knew harm was likely ('knowingly'), to somewhat culpable when he consciously disregarded a substantial risk to harm ('recklessly'), to minimally culpable when he should have known he was violating a legally required standard of care ('negligently'). The criminal guilt and punishment of negligent actors thus rest upon and correspond to their moral culpability, although this culpability is significantly less than that of one who acts with the higher levels of intent.

In most cases a defendant found guilty of a crime is found to possess conscious mental states with regard to the criminal harm she caused. As indicated above, stricter *mens rea* requirements demand that the defendant acted for the purpose of achieving the harm or knew the harm was likely to occur. However, in negligence cases criminal guilt is assigned even where the defendant seems to have possessed no conscious mental states

³⁶ Darryl Brown, *Criminal Reform and the Persistence of Strict Liability*, 62 DUKE LAW JOURNAL (2012).

with regard to the criminal harm utilizing a negligence standard. The law does this in cases where the criminal harm can be properly attributed to the defendant even though they lacked such awareness, because she has culpably violated an important standard of care. Under the US Model Penal Code, negligence is defined in the following way:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.³⁷

Violation of a standard of care is the hallmark of negligence, but identification of the mental capacities underpinning the negligent disregard of a legal standard of care has been controversial. H.L.A. Hart claimed instances of negligence were culpable as cases of unexercised capacity of choice to avoid risk.³⁸ That is, Hart argued that assuming defendants have the capacity to choose to avert risk, they must have that capacity in at least some cases when they don't avert risk, even where that risk was not consciously foreseen. Moore and Hurd, however, indicate negligence cases are a 'dog's breakfast', meaning many of them appeal to different capacities, and have little in common besides a

³⁷ Model Penal Code 202.2.d.

³⁸ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968).

lack of specific mental states.³⁹ They provide a list of categories of capacities that defendants may fail to exercise such that they are negligently culpable, including: failure to address a dispositional lack of awareness of the risk; failure to address a risk related to character or psychological flaws the defendant knew about; and violation of a known mini-maximum (such as never leave a baby unaccompanied in the tub).⁴⁰

Note that in each of the negligence cases discussed by Moore and Hurd there is a capacity to act in such a way to make it more likely the agent will abide by a standard of care, and a failure to exercise that capacity. In each case there is also a voluntary act that violates the standard of care and causes criminal harm. Negligently caused harm must be tied to a culpable (not ‘purely innocent’) act; it cannot be the result of an earlier, fully legal, decision.⁴¹ That is, the court must be able to identify a voluntary act that culpably violated the legal standard of care, and then trace that act to the criminal harm.

Even in strict liability cases—where the court claims to look for *no* specific mental states associated with the criminal harm—courts appear to attribute to defendants minimal moral culpability in keeping with the principle of correspondence. The classic example of strict liability is statutory rape, where an offender may be found guilty for having sex with someone underage. An offender may be found guilty of statutory rape even if they did not know their sexual partner was underage; indeed, in some cases a

³⁹ <IBT>Michael Moore & Heidi Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIMINAL LAW & PHILOSOPHY (2011)</IBT>.

⁴⁰ *Id.*

⁴¹ Brown, *supra* note 34.

guilty offender may have good reasons to be mistaken. The justifications for this sort of statute are that underage persons cannot consent to sex due to their youth, there is a likelihood of harm caused by older persons having sex with persons under a certain age, and the burden of avoiding such situations ought to be placed upon the adult (i.e. adults have an affirmative duty to learn the age of their partners). Just like in the case above where Rob forgot to attend Tim's biopsy, the severity of possible moral harm caused by a lapse justifies the application of heightened expectations with regard to meeting the standard of care, and application of punishment when this expectation is not met.⁴²

Thus in statutory rape cases, a defendant is morally culpable because he ought to have known his sexual partner's age and refrained from sex with that partner. Although a statutory rape defendant may have lacked specific beliefs regarding the criminal harm caused, he did indeed cause that criminal harm by way of the culpable exercise of his agency, because his decision to have sex with the underage partner is held to a normative standard of care that he is presumed to know about. That is, the thirty-year-old defendant who has sex with a minor is presumed to know about the applicable legal standard of care (ignorance of the law is not an excuse!), and yet acts in a way that fails to meet this standard, resulting in criminal harm. Thus there is a causal link from the defendant's mental states/decision-making processes, his intentional act, and the criminal harm caused. Even though the criminal harm wasn't consciously reviewed, the defendant's mental states and decision-making processes that caused his action may be considered constitutive of the defendant's agency: depending on one's theory of agency, the desires

⁴² Attractive nuisance cases also represent a heightened standard of care due to the likelihood, and severity, of harm caused.

causing the defendant's actions may be subject to review by second-order desires or values, or his actions may issue from a reasons-responsive mechanism, etc.⁴³ On any theory of agency there is no question that the voluntary act—the sexual act—that caused the criminal harm can be tied to the defendant's agency. What is in question is whether the *lapse* can be tied to the defendant's agency.

But the law does just that: as Hart indicates, because the negligent defendant has normal decision-making capacities, he is presumed to both know about the required standard of care, and to have the capacity to avert the risk. (I will provide a diachronic account of this capacity in the next section.) Thus, when the negligent defendant fails to do so he is culpable—morally blameworthy—for this failure and his moral blameworthiness will ground retributive punishment. Further, because there is a causal link between the negligent defendant's mental states and the criminal harm, forward-looking aims can also justify his punishment. That is, strict liability cases are not like cases where a person has an epileptic seizure behind the wheel of a car and then harms a pedestrian. Instead, there is a normal causal relationship between the defendant's intentional mental states and the act that causes criminal harm. A defendant found guilty of statutory rape is thus likely to be deterred by the experience of punishment, and may need to be incapacitated from further similar crimes via incarceration or parole requirements. Punishment in statutory rape cases may make a defendant who still desires to have sex with a young-looking person to take care to learn their age first.

⁴³ See Fischer & Ravizza, *supra* note 9; H. Frankfurt, *Freedom of the Will and the Concept of Person*, in *FREE WILL* (G. Watson ed., 1982).

The justification for holding a defendant guilty for statutory rape is similar to the justification for holding Bert responsible for his lapse. As indicated above, many states seem to take a strict liability approach to child neglect and abandonment statutes. In child neglect cases, courts—such as the one that found Bert guilty—hold defendants guilty of child abandonment because they ought to have known their actions created a risk that their child would be abandoned. Because Bert violated a legal standard of care when he could have averted the risk of leaving his kids alone by setting reminders, or listening more closely to the children’s mother, etc., Bert was found to have a minimal level of moral culpability and sentenced to probation. Bert’s punishment is thus justified by the aim of retribution. In addition, Bert may be specifically deterred by the experience of punishment from forgetting his parenting schedule in the future; or he may be taught better parenting habits by a mandated rehabilitative programme as a part of his punishment, such as parenting classes. And other parents similarly situated to Bert might be generally deterred when they hear of Bert’s punishment—it may heighten their awareness of their parenting schedule, or persuade them to set a reminder.

From Levy’s perspective, however, applying the negligence standard or strict liability for a lapse, or for action related to any unconscious (implicit) mental state, constitutes punishing a person for criminal harm even though the act that caused the harm neither expressed her deep self, nor was an act over which she had control. In other words, on Levy’s view, *the criminal harm was not caused by or related to the lapses’ agency*. In a sense, Levy imagines unconscious mental states and the actions they initiate as something that *happen to* a person, in the same way that stomach aches or seizures *happen to* a person. Barring a strong pattern of behaviour or a conscious state to which

the lapse can be clearly traced, implicit states, dispositions, and lapses don't belong to a person's agency any more than do the colour of their skin: we attribute allergies and pale skin to an agent, but we will not hold her responsible for sneezing on us or their disposition to sunburn. Retributive punishment thus is not warranted for harm caused by implicit mental states, such as racist beliefs, and lapses in memory or judgement.

In essence, Levy's theory severs the link between a negligent lapser and the criminal harm they cause: it wasn't Bert that caused the criminal harm of his kids being abandoned, but some state of affairs not attributable to Bert. Levy's assessment of a lapser's capacities thus undermines his ability to link the criminal harm to the would-be criminal offender. On this view there seems to be no principled difference between Bert and a person who has an epileptic seizure (lacking reasons to believe he was going to have a seizure) and hits a pedestrian. The seizure does not issue from the driver's agency, thus we do not hold him responsible for the death. The action of having the seizure was 'wholly innocent' and not culpable. On Levy's view, Bert's lapse also did not issue from his agency, so the harm related to this lapse is non-culpable.

However, without minimal culpability, Bert cannot be found guilty of a crime such that he may then be criminally punished. That is, if Bert is not the cause of the criminal harm, any brand of criminal punishment in response to that crime—even purely forward-looking punishment, aiming to shape Bert's future behaviour—is unjustified. Bert is only a proximate, but not an agential, cause of the criminal harm. A criminal court is not any more justified in applying punishment to Bert than it would be in punishing the epileptic driver, or (to use a modified version of an example from Aristotle) a man blown by a strong wind into the path of a cyclist who is then hurt when he falls off his bike.

Criminal responsibility requires that the criminal harm be caused by a voluntary act. There is no voluntary act in these cases to justify a criminal court exercise jurisdiction and initiation of the process of determination of guilt. So the answer to the question posited at the beginning of this section regarding whether Levy can punish Bert despite his lack of moral responsibility must be ‘no’.

A related argument is made by Nicole Vincent in a 2011 article titled ‘A Structured Taxonomy of Responsibility Concepts’.⁴⁴ There she claims criminal responsibility and punishment may involve appeal to multiple senses of responsibility, including assessment of capacity, role, and virtue; but it most certainly, and primarily, depends upon causal, and specifically, outcome, responsibility.⁴⁵ That is, criminal responsibility for a state of affairs first and foremost requires a causal connection between an *agent* and a state of affairs that constitutes criminal harm. Where there is no agent, there is no agential-caused state of affairs to be responsible for.⁴⁶ (This is why infants, bears, and trees are not held criminally responsible, and why persons are not

⁴⁴ <IBT>Nicole Vincent, *A Structured Taxonomy of Responsibility Concepts*, in *MORAL RESPONSIBILITY: BEYOND FREE WILL AND DETERMINISM* (I. Van de Poel, J. Van den Hoven, & N. Vincent eds., 2011)</IBT>.

⁴⁵ *Id.*

⁴⁶ Again, Levy may argue that there are previous points in time relevant to the criminal harm in which Bert did indeed have agency. But here we are worried about criminal responsibility for the harm caused, and those prior decisions are too attenuated to attribute criminal responsibility for harm caused in these cases. Again, tracing cannot ground responsibility for negligent acts that cause criminal harm.

responsible for involuntary bodily movements.) If there is no agential action, there is no need to look further with regard to questions of responsibility. By erasing the agent in many lapse cases, Levy erases any possibility of holding someone criminally responsible for harm caused on any aim of punishment, backward- or forward-looking. There is, simply put, no culpable agent to tie to the criminal harm and punish.

V. A Diachronic Self-control Account of Responsibility

On Levy's consciousness thesis, there seems to be no good way to hold lapsing defendants like Bert criminally responsible, either directly or via tracing conditions. Levy may embrace this outcome, especially given that he doesn't think that in general there are sufficient conditions for criminal punishment,⁴⁷ but I see this result as extremely problematic. The law aims to regulate and govern human conduct to support social order.⁴⁸ In particular, the criminal law aims to both exact retribution for moral wrongs and reduce criminal harms.⁴⁹ Thus the criminal law is in the business of reducing the amount and severity of certain types of harmful actions, especially acts harmful to others. There can be no doubt that serious harm is caused to others due to lapses and minimally conscious states (Bert's case of child abandonment is a good example, and statutory rape is another). If criminal harm caused by lapses is outside of persons' control, then a claim that agents ought not be held responsible for such harm would be reasonable: in this case not only would the lapser not be morally blameworthy, but the threat of punishment would have no effect on reducing possible future offences via deterrence, incapacitation,

⁴⁷ Levy, CONSCIOUSNESS AND MORAL RESPONSIBILITY, at ix–xii.

⁴⁸ Hart, *supra* note 25.

⁴⁹ Hart, *supra* note 36.

or rehabilitation. However, this is just not the case. In this section I will argue that lapses, dispositional states, and management of such dispositions are in an important sense under an agent's control. Thus the criminal law is justified in attempting to influence agents not to lapse via threat of punishment.

The importance of diachronic self-authorship and control to responsibility is widely recognized.⁵⁰ Adina Roskies has argued that diachronic self-authorship can ground a compatibilist account of responsibility that preserves real agency but avoids 'obscure metaphysics'.⁵¹ We can deliberately intervene in our future selves, says Roskies, by manipulating our mental content in ways that have foreseeable consequences, and because we have such diachronic control we are in a 'very real sense responsible for who

⁵⁰ Aristotle, *THE NICOMACHEAN ETHICS* (Terence Irwin trans., 1985); Julia Annas, *Being Virtuous and Doing the Right Thing*, 78 *PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION* (2004); Angela Smith, *Control, Responsibility, and Moral Assessment*, 138 *PHILOSOPHICAL STUDIES* (2008); L. Ferrero, *What Good is a Diachronic Will?*, 114 *PHILOSOPHICAL STUDIES* (2009); Jeanette Kennett & Stephen Mathews, *Mental Time Travel, Agency, and Responsibility*, in *PSYCHIATRY AS COGNITIVE NEUROSCIENCE: PHILOSOPHICAL PERSPECTIVES* (M. Broome & L. Bortolotti eds., 2009); Adina Roskies, *Don't Panic: Self-authorship Without Obscure Metaphysics*, 26 *PHILOSOPHICAL PERSPECTIVES* (2012); Nicole Vincent, *Blame, Desert, and Compatibilist Capacity: A Diachronic Account of Moderateness in Regards to Reasons-responsiveness*, 16 *PHILOSOPHICAL EXPLORATIONS* (2013).

⁵¹ <IBT>Roskies, *supra* note 48</IBT>.

we are' and our behaviour.⁵² Roskies provides examples of diachronic self-interventions, including the ability to engineer one's environment so that it elicits or makes manifest valued dispositions, and does not realize those disvalued; intervening on one's future self by making commitments to future behaviour or setting overarching policies; and practising and strengthening the processes of self-control (agents can practice making decisions in a way that increases deliberative control).⁵³

Roskies' theory highlights the way in which even behaviour generated by 'sub-conscious action routines',—behaviour Levy says we are not responsible for because it is generated by inflexible, domain-specific, stereotyped, and associative brain processes—can be under an agent's control. Self-conscious executive processes, located primarily in the prefrontal cortex, may directly manipulate such 'inflexible' brain processes via something like a process of Aristotelian habituation; or via deliberate manipulation of the emotional salience associated with mental content or a process. Executive processes also allow agents to indirectly manipulate the way in which sub-conscious mental processes generate action by because such processes allow agents to be aware of the interaction between such processes and the environment, to choose environments based upon predicted behavioural outcome. For example, an alcoholic may avoid walking past their local bar; a person who wants to lose weight will avoid having sweets in the house; and the person who wants to exercise will ask a friend to drop them off at work so they have no way home but to walk. It thus seems there are indeed ways in which agents can have

⁵² *Id.* at 331.

⁵³ *Id.*

top-down control over sub-conscious mental processes and the way in which they generate action.

There was no evidence that Bert had diminished cognitive capacities such that remembering appointments was unusually difficult for him. Bert had the capacity to perform diachronic self-interventions to make it less likely he would lapse with regard to his parenting schedule. Bert could have engineered his environment such that he was less likely to forget his parenting schedule (he could have set a reminder or kept a calendar); or he could have made a conscious long-term commitment to be a reliable parent, paired representations of his kids with strong emotional salience, and set for himself policies to meet his commitment to his kids, such that when the topic of his children arose this commitment was likely to come to mind. Bert also could have practised the process of deliberative self-control by slowing down and mentally reviewing his schedule before making decisions that might involve his parenting schedule, such as deciding to leave town. All of these are diachronic means for Bert to better avoid a lapse with regard to his parenting schedule—and, it seems, vindication of a legal presumption that Bert had the capacity to avert the risk of abandoning his children.

Roskies' account of diachronic self-control seems compatible with some expressivist theories of moral responsibility, including Angela Smith's 'rational relations' view.⁵⁴ Smith holds that agents are responsible for aspects of themselves that are rationally modifiable over time, including unconscious or implicit attitudes, and 'what we

⁵⁴ Smith, *supra* note 48; Angela Smith, *Responsibility for Attitudes: Activity and Passivity in Mental Life*, 115 *ETHICS* (2005).

notice or fail to notice about the world'.⁵⁵ Thus Smith claims agents like Bert are directly morally responsible for lapses. The process of self-authorship, according to Smith, requires the capacity to recognize, assess, and respond to reasons counting in favour of both attitudes and actions.

Importantly, Smith is clear that she intends to provide an account of direct responsibility, not just aretaic blame (or blame for character): agents, she says, are morally responsible for harm caused by mental states that are rationally modifiable.⁵⁶ Agents like Bert who have the capacity for rational diachronic self-review are accountable for their attitudes and actions, and may be called upon to 'explain or justify rational activity in some area, and to acknowledge fault if such justification cannot be provided'.⁵⁷ This means tracing is not necessary to find Bert responsible for the harm caused by his lapse. For Smith, holding responsible is a two-step process, where it is first determined whether an agent is responsible for an attitude or act, and second, if any social criticism or punishment is warranted. The distinction between the two steps seems important, because a diachronic self-control view results in a fairly expansive set of mental states and acts for which an agent is responsible, many of which may not be deserving of societal-level criticism or criminal punishment. For example, on Smith's theory a tired parent who forgets to drop off their infant at day care on a hot day and leaves him in the car is morally responsible when the lapse causes the child to die from heat exposure. However, it seems a parent who suffered from such a tragic lapse is

⁵⁵ <IBT>Smith, *supra* note 48</IBT>.

⁵⁶ *Id.*

⁵⁷ *Id.* at 381.

decidedly not a good candidate for criminal punishment. (Legal practice seems to support this understanding of such cases: charges are filed against about 60 per cent of parents who cause harm to their kids by forgetting them in a hot car,⁵⁸ but the vast majority of such cases drop out before a guilty verdict would mandate a minimum sentence.)

VI. Minimal Moral Culpability, Diachronic Self-control, and Punishment

Interestingly, the idea that the criminal law must ascribe at least minimal moral culpability before punishment is justified seems to cohere with the current consensus model of punishment in the US (and presented in the Model Penal Code). Limiting retributivism is a hybrid theory where retributive notions of just desert (which probably rest upon moral emotions⁵⁹) provide an appropriate range of justified penalty within which an offender might be sentenced.⁶⁰ Backward-looking retributive considerations of proportionality must then be balanced with forward-looking considerations of social order to create a punishment package that first and foremost is proportional to crime and

⁵⁸ http://www.washingtonpost.com/lifestyle/magazine/fatal-distraction-forgetting-a-child-in-the-backseat-of-a-car-is-a-horrifying-mistake-is-it-a-crime/2014/06/16/8ae0fe3a-f580-11e3-a3a5-42be35962a52_story.html

⁵⁹ MICHAEL MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS (2009).

⁶⁰ NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974); Richard Frase, *Limiting Retributivism: The Consensus Model of Criminal Punishment*, in THE FUTURE OF IMPRISONMENT IN THE 21ST CENTURY (Michael Tonry ed., 2003).

offender, but also aims to reduce recidivism and overall crime rates. That is, on this view retributive sentiments are predicated on the moral blameworthiness of the offender given his crime and other considerations (e.g. what sort of offender he is: his age, his mental capacity, etc.), and these considerations provide the parameters—generally, the upper limit—of appropriate punishment.⁶¹ Secondly, questions regarding whether the offender needs to be incapacitated via incarceration; whether certain types of punishment are likely to deter other offenders similar to this offender in the future; and whether certain punishments will rehabilitate (or will reduce the possibility of rehabilitation) are considered. As a result of this balancing process, punishment ought to be proportional to crime and offender but also aim to reduce recidivism.

For example, consider Bert's punishment for child abandonment. It seems that Bert's sentence of probation was proportional to his fairly minor level of moral blameworthiness (when compared to other moral wrongs that constitute a crime). Bert seems to be a good candidate for social criticism and forward-looking criminal punishment because he, and similarly situated parents, may be deterred from future lapses and encouraged to change their attitudes and habits in response to Bert's punishment. In comparison, the parent who leaves his child in the hot car may bear moral responsibility, but is very likely not to need social criticism as a deterrent from future similar lapses; and similarly, news of a child dying in a hot car alone is likely to impact other parents' behaviour, regardless of whether punishment is applied in response to the death. That is,

⁶¹ Note that Morris indicated retributive sentiment ought to provide upper, but not lower, limits for sentencing. Morris, *supra* note 58.

the death of the child is more likely to have a deterrent effect on parents than is a criminal punishment in response to the death.

Ideally, Bert's punishment would include rehabilitative treatment, such as parenting classes. One especially appealing aspect of the diachronic self-control view is that it highlights the importance of rehabilitative punishment for strengthening offenders' self-control and decreasing recidivism. The self-interventions discussed above (engineering one's environment, intervening on one's future self by making commitments to future behaviour, and practising and strengthening the processes of self-control) can be taught or encouraged by rehabilitative programming such as anger management, parenting classes, and even yoga, gardening, and chess.⁶² The former interventions can attempt to increase self-control within the specific domain of an offender's crime, and the latter can act to increase self-control across domains. Ultimately, offenders and society in general will benefit if criminal punishment results in enhanced, instead of undermined, self-control in criminal offenders.

Conclusion

From the perspective of the criminal law, Levy's claim that synchronic conscious is necessary for moral responsibility seems too strict. Within the short synchronic window immediately preceding criminal harm, lapsing agents may appear to lack control over harm caused by their lapse because they do not have conscious awareness of the moral implications of their lapse. Further, it is not always possible to trace back to some earlier

⁶² For a full discussion of diachronic agency and rehabilitative punishment, see Katrina Sifferd, *Virtue Ethics and Criminal Punishment*, in *FROM PERSONALITY TO VIRTUE* (J. Webber & A. Masala eds., 2016).

synchronic moment where such moral implications were reasonably foreseeable by the agent. Thus Levy's theory designates many persons currently held criminally responsible for harm caused by lapses as not morally responsible for such harm. Lapsers therefore cannot be criminally punished under the doctrine of negligence on Levy's theory, even via appeal to purely forward-looking aims of punishment, because criminal punishment of any offender requires minimal moral culpability.

I think this is a worrying result. The law criminalizes negligent acts related to lapses in furtherance of social order, in an attempt to minimize the amount of serious harm caused to citizens. There can be no doubt that lapses can undermine social order and cause serious harm to others, and that agents can be encouraged by the threat of punishment to take steps to avoid lapses. (Criminal punishment for statutory rape, and fines levied against persons who fail to file their taxes on time, seem to be good examples of this.) The law's negligence doctrine thus seems to rest not upon synchronic conscious agency, but on agents' broader capacity for diachronic self-control, which allows them to perform self-interventions to make it more likely they will be law-abiding. The doctrine of negligence, on this view, can be seen as an attempt to influence persons' diachronic self-control and hold defendants responsible when they fail to self-intervene over time such that they lapse and cause criminal harm. This is because the criminal law aims not only to sway conscious decision-making in the time slice immediately preceding a crime, but also to motivate them to become law-abiding over time via diachronic self-interventions, including manipulating one's dispositions to act and environment.