

Responsibility for Inadvertent Acts

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According to Claire Finkelstein,¹ criminal liability should not be imposed for negligence because people are not responsible for unforeseen acts. What is it to be morally responsible for an event? It is, I take it, to be exposed (or, if you will, answerable) to moral assessment in respect of the occurrence of that event. This is not the same thing as being culpable or praiseworthy for the event—rather, moral responsibility is a precondition, one that must be satisfied before we can proceed to those moral judgments. Moral responsibility requires that the event at issue be attributable in some way to the actor's voluntary conduct,² and also that the actor be a morally responsible agent.³ In turn, the governing principles of (moral) attribution include, for example, principles of causation and complicity, but not principles of vicarious liability. I am morally responsible for breaking the window when I kick a football through it while playing with my son in the back garden. I am not *morally*, though I may be legally, responsible for breaking the neighbor's window if it is my son who kicks the ball. Neither am I morally responsible for the murder of the Swedish Foreign Minister, Anna Lindh. Her death was not the consequence of, or otherwise attributable to, any conduct of mine. Mijailo Mijailovic did it.

On this account, the role of moral responsibility is both positive and negative. It marks out those to whom we can look for an explanation when something goes wrong and, in so doing, operates to exclude other actors from moral judgment with respect to that event. In its positive guise, moral responsibility is a necessary, but not a sufficient, condition of praise or blame. Thus responsibility and culpability are not the same thing. One is a condition of the other. I may be morally responsible for wounding James and, at the same time, not culpable for doing so because I was acting in justified self-defense. In her paper, Finkelstein notes that this is sometimes characterized as a distinction between descriptive and normative conceptions of responsibility, where the former is concerned with "*prima facie* responsibility" and the latter with "*ultimate* blameworthiness."⁴ There is no harm in this, provided the distinction is maintained without confusion. What counts is

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¹ Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579 (2005).

² I defend the view that, for the form of responsibility to be *moral* responsibility, the actor's conduct must also be voluntary in A.P. Simester, *On the So-called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403 (1998).

³ And not, for instance, insane. I will return to this proviso below.

⁴ Finkelstein, *supra* note 1, at 583.

when, and why, we should conclude that an actor is (or is not) culpable or praiseworthy for an event.⁵ I am not culpable for Anna Lindh's killing because I was not responsible for it: I am not culpable for James's killing because my killing him was justified.

In Finkelstein's account, advertence to—foresight of—an event is a condition of responsibility. Without it, further questions of justification, excuse, and indeed of culpability generally, simply do not arise. The *demesne* of responsibility embraces only those things that one does intentionally; those things for which we can ask the actor, “*why* did you do that?”, and expect by way of response an account of the actor's motivating reasons that explains why he did it.⁶ Consider the following example:⁷

A seller of goods is about to ship some heavily insured cargo aboard a passenger plane, when the buyer cancels his order for the goods. Faced with the prospect of imminent financial ruin, the seller formulates a plan to destroy the plane: plant a bomb to explode mid-flight and collect the insurance on the goods. He regrets that the passengers will almost certainly die in the process, but he is not dissuaded. He executes his plan, and as expected the cargo is destroyed, and no one survives. Call this case “Insurance Bomber.”⁸

Finkelstein contrasts the killing of the passengers with unforeseen effects of Insurance Bomber's conduct:

Suppose we were to ask the Insurance Bomber *why* he killed the passengers. Although he cannot answer with “in order to get the insurance money,” he might respond by saying “Well, I wanted the insurance money, and to get it I had to blow up the plane and kill the passengers.” Compare this *Why?* question with a question about

⁵ In the rest of this paper, I will focus on culpability rather than praiseworthiness for an event. While each requires that the actor be morally responsible for the event, their further criteria are asymmetric. See, e.g., ERIC D'ARCY, HUMAN ACTS: AN ESSAY IN THEIR MORAL EVALUATION 126, 161–62, 166 (1963).

⁶ Finkelstein, *supra* note 1, at 594.

⁷ *Id.* at 585. Glanville Williams was the first to introduce examples of this type. See GLANVILLE WILLIAMS, THE MENTAL ELEMENT IN CRIME 34–35 (1965); *Oblique Intention*, 46 CAMBRIDGE L.J. 417, 423 (1987).

⁸ This is, it must be said, an odd example with which to debate the outer limits of responsibility—it is certainly an inappropriate example with which to defend Finkelstein's Thesis (1), *supra* note 1 at 585, that “someone does something intentionally if and only if he does it for a reason,” since it is arguable that the deaths of the passengers are not merely foreseen (or, in her usage, “intentional”) but *intended*. Either way, the deaths are much nearer the core of morally responsible acts than even Finkelstein would require. For discussion of the problem of inseparable effects, see A.P. Simester, *Moral Certainty and the Boundaries of Intention*, 16 OXFORD J. LEGAL STUD. 445 (1996).

something else the Insurance Bomber might have done, namely *run the insurance company out of business by creating such a large claim*. . . . Unlike his answer to the question why he killed the passengers, the insurance bomber might answer *this* question with an expression of surprise—"Did I do *that*?" This gives us a basis for thinking that "the *Why?* question test differentiates foreseen from unforeseen effects of an agent's action."⁹

We do not need the "*Why?*" question to differentiate foreseen from unforeseen effects. They are already differentiated by the test of foresight. Moreover, as Finkelstein implicitly admits in the first two sentences of the passage quoted, the "*Why?*" question generates many more distinctions than the one she highlights. Besides separating the foreseen from the unforeseen, it also differentiates between directly intended effects—those done as a means or end—and merely foreseen effects. Indeed, it distinguishes even amongst means and ends. When I wound James, it matters crucially whether I did so in order to protect myself or whether I did so because I like hurting people.¹⁰ If asked why I hurt James, in the former case my answer would take the form, "in order to" In the latter case, it would be, "for the sake of it."

The "*Why?*" question suggests that, when we consider the culpability of an actor who does something advertently, it may very well matter whether the thing done was intended for its own sake, was intended as a means to something further, or was done merely intentionally as a side-effect of what was intended.¹¹ But it does *not* suggest that things done inadvertently are outside the realm of our responsibility. When Insurance Bomber is asked why he ran the insurance company out of business, and responds "Did I do that?," the answer is: "*Yes, you did!*" "Did I kick the football through the window?" "*Yes, you did!*" And then the discussion returns, properly, to the explanation of why.

Finkelstein argues, at length, that we are responsible for the things that we do advertently. This seems right. As she says, we are responsible because we knowingly *choose* them. When we choose to do the wrong thing, we align ourselves with that wrong; we do it for inadequate reasons and, in the absence of a suitable excuse, we are culpable with respect to that wrong. But the proposition (i), culpable if chosen, does not imply the proposition (ii), not culpable if not chosen. This is a simple point of logic. We may all agree, and most of us do agree, that wrongdoing is *ceteris paribus* blameworthy if, when, and because chosen. But that agreement tells us nothing whatsoever about whether inadvertent

⁹ Finkelstein, *supra* note 1, at 591.

¹⁰ This is so even if, in indulging my passion for hurting people, I happen to save myself from James's attack. See A.P. Simester, *Why Distinguish Intention From Foresight?*, in HARM AND CULPABILITY 71 (A.P. Simester & A.T.H. Smith eds., 1996); see also John Gardner, *Justifications and Reasons*, at 103, and the contrasting view of Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, at 45, in the same volume.

¹¹ Or so I have argued elsewhere. See Simester, *supra* note 10.

wrongdoing can ever be blameworthy. Proposition (ii) may or may not be true. But proposition (i) cannot help us decide.

The flaw is methodological. Finkelstein explicitly analyzes inadvertence “by the back door.”¹² She extrapolates a conception of responsibility from the central case of advertent wrongdoing, proposing to “see what it in turn implies for cases of negligence.” But the answer is, as a matter of analytical necessity, nothing. Extrapolation is not like interpolation: one simply cannot transfer implications, by extrapolation, from one range of cases to cases that lie outside that range.¹³ And the whole point with inadvertent acts is that they lie outside the realm of advertent acts. They possess crucially different features, about which Finkelstein’s analysis is silent. Analytically, there is no way of concluding that her approach will yield the whole of the responsibility story.

For all that, her analysis of intentional acts highlights two important features whose absence, she suggests, militates against responsibility for inadvertence. First, there is said to be a “felt connection” between responsibility and what is done intentionally:

Imagine how outrageous it would be for the bomber to say, “Yes, I admit I killed the passengers intentionally, since I knew that they would die. But I am not responsible for killing them, since I didn’t intend to do so.” Rather, the fact that he killed them intentionally seems to carry with it the idea that he is responsible for killing them. And conversely, it would be only a little less odd for someone to deny that he did something intentionally, but not regard that as mitigating his responsibility. The person who says, “I didn’t do it intentionally” seems to be making a plea for exoneration. He seems to be offering his hearers a reason why they should not blame him for something he did.¹⁴

There are six sentences here, which between them sketch an argument from commonly-held moral intuition. The first four are largely unproblematic. Finkelstein is right insofar as she asserts that, intuitively, most of us hold people responsible for what they do advertently. And she is still on fairly solid ground when she suggests that we tend to accept inadvertence as a ground of mitigation. Conceivably, there might be persons who are a kind of moral monster, to whom the interests of others are so worthless that they systematically overlook the

¹² Finkelstein, *supra* note, 1, at 581.

¹³ It may help to illustrate this point with a statistical analogy. When the New Zealand government was considering whether to ban tobacco advertising in the early 1990s, the Department of Health investigated the relationship between historical levels of tobacco advertising and tobacco consumption. It then attempted to predict what would happen to tobacco consumption if advertising were banned. The problem with this analysis was that advertising levels had never been zero in the past. As a result, there were no data to support a prediction of likely consumption levels given zero advertising. The existing data were in a different range.

¹⁴ Finkelstein, *supra* note 1, at 587.

implications of their conduct for the lives of anyone else. We might well be horrified by that type of thoughtlessness, and believe it profoundly evil. More often, however, we think of negligence as less culpable than advertent wrongdoing. When, without thinking of the risk, I kick the football through a neighbor's window, "I didn't mean to" has moral significance. I did not deliberately subordinate my neighbor's interests to my preferences. And we cannot say that I would have done the same had I foreseen the risk. My culpability is, we think, mitigated.

But it is a stride upon thin air to describe this as a plea for exoneration. Mitigation and exoneration are different things. If our culpability is mitigated, we are still at fault—just less so. Despite the fact that we did the wrong thing, we deserve less blame in virtue of the mitigating factors in play. By contrast, when a person is exonerated, he is not culpable at all. One may be exonerated for various sorts of reasons. Perhaps, on closer investigation, it turns out that I have an alibi and was not responsible for killing the Swedish Foreign Minister. Or it turns out that James was attacking me, and that I was responsible but justified in killing him. In any decent criminal legal system, if I am morally exonerated I should not be convicted. But when I make a plea in mitigation, I offer only a partial defense (such as provocation), or a claim to have my sentence reduced. I do not ask to be acquitted altogether. To argue that my culpability is mitigated is to assert that I am both responsible and culpable; it is to argue about the *degree* of culpability on show.

It is not only a false step from mitigation to exoneration, but is also a step unsupported by ordinary moral intuitions. Contrary to Finkelstein's report,¹⁵ it seems to me that in practice we do *not* accept "I simply forgot" as an exonerating defense. Such a plea may be *part* of a claim to exoneration, but only if, further, it was reasonable for the actor to have forgotten. I may be excused from blame after forgetting a haircut appointment when distracted by an emergency. But it is not reasonable to forget to appear at my wedding because I am distracted by the football game on television. The former is exonerated: the latter is culpable.¹⁶ Our moral assessment of such cases depends, of course, on the particular scenario. But that is the point. We are not *tout court* absolved from responsibility for our inadvertent acts.

The second consideration to which Finkelstein points is the need to connect responsibility ascriptions with our nature as rational beings who act for reasons. Assessments of culpability and praiseworthiness tie events distinctively to *human* agents. They do so in virtue of qualities that mark us out from other agents: the rational capacity to act for reasons, to act for them *qua* reasons, and to

¹⁵ *Id.* at 581.

¹⁶ To test this claim about ordinary moral judgments, while writing this reply in Boston, I informally surveyed about twenty academics (none lawyers or philosophers!) at the Business School of M.I.T., presenting them with the two scenarios in the text. The intuitive response of every single respondent was that, while the failure in the first scenario was excusable, that in the second was culpable.

deliberate about those reasons. This is why it is a condition of moral responsibility, as I said at the beginning, that the actor be a morally responsible agent. She must be the kind of agent who is capable of recognizing and acting upon reasons, who has at least a general capacity to distinguish good reasons from bad, and who can adjudicate between conflicting reasons, by weighing and contrasting them, when deciding what to do.

Finkelstein demands rather more. For her, responsibility is about “capturing an agent’s relation to things he does *qua rational agent*, since these are things for which it makes sense to raise questions of praise or blame.”¹⁷ To perform an act *qua rational agent* is, she says, deliberately to choose to do that act for reasons that the agent herself endorses.¹⁸ On this view, we are morally responsible only when we exercise our capacity to act for reasons—it is only then that we are truly human. In turn, we are at fault only when we deliberately act for bad reasons.

That claim is too strong. We are human beings not in virtue of exercising our rational capacities, but in virtue of our *having* them. The perfectly virtuous person exercises them perfectly. The culpable person fails to exercise them adequately. This does not imply that he exercises them badly. Perhaps he fails to exercise them, or some of them, at all. That, too, can be a fault. Or he might indeed exercise his rational capacities badly, but without deliberately choosing to act for bad reasons. The capacity for rational deliberation is not just about the *adjudication* between conflicting reasons; it is also about their *recognition*. Thus, fault can also lie in a person’s failure to recognize the reasons why he should not act as he does. There is more than one way to go wrong.

When a person is reckless, he elects to act for the wrong reasons. When he is negligent, he fails to act for the right reasons. But either way, when he is at fault it is because the deficiency reflects upon him *qua* human being. In the exercise of his rational capacities he has unreasonably, inexcusably, fallen short. It is a further challenge, of course, to give an account of when he is at fault: of *which* failures to act for good reasons are culpable. That challenge cannot be taken up here.¹⁹ Certainly, not all inadvertent acts are culpable—we acknowledge this, in legal usage, with the familiar distinction between negligence and accident. One does not have to think of everything. But on Finkelstein’s account, we need think of nothing.

¹⁷ Finkelstein, *supra* note 1, at 583.

¹⁸ Thus, Finkelstein concludes that “an agent must have actually deliberated upon a consequence of an action in order for us to explain what he did as a product of his reason. . . . Deliberation puts the stamp of rational agency on what an agent does.” *Id.* at 593.

¹⁹ I have sought to provide such an account in A.P. Simester, *Can Negligence be Culpable?*, in OXFORD ESSAYS IN JURISPRUDENCE 85 (Jeremy Horder ed., 4th Series 2000).