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INFERRING CULPABILITY FROM NEGLIGENCE

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In *Fundamentals of Criminal Law*, Andrew Simester offers a limited defence of the use of negligence in criminal law.[1] Simester does not claim that negligence – nor any *mens rea* element – is inherently culpable. Rather, Simester claims that negligence – with all other *mens rea* elements – provides evidence from which we may infer culpability. I will retrace Simester's account to consider how (and why) we may infer culpability from *mens rea* in general (Part 1), then how we may infer culpability from negligence specifically (Part 2), and finally, how we may infer culpability from the underlying traits which cause us to become negligent (Part 3). Ultimately, I think that the evidence of culpability to be derived from negligence is too weak to meet Simester's requirements.

I. Inferring Culpability from *Mens Rea*

A major theme of *Fundamentals of Criminal Law* ("*Fundamentals*") is that substantive criminal law doctrines serve multiple ends. They are not justified merely to the extent that they establish culpability (in the sense of moral blameworthiness).[2] But establishing culpability remains a big part of the story. For Simester, like many, endorses a *culpability constraint* on legitimate conviction:

> *Culpability constraint*: D should not be convicted for øing unless D is culpable for øing.[3]

Another theme of *Fundamentals* is that the law does not establish or deny culpability solely via *mens rea*. But, again, *mens rea* is a big part of the story. For while Simester emphasises that *mens rea* elements serve multiple ends, he accepts that they are "a necessary component of culpability findings" and that *mens rea* is

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1 Andrew P Simester, *Fundamentals of Criminal Law* (Oxford: Oxford University Press, 2021) [Simester, *Fundamentals*].

2 Simester, *Fundamentals*, *supra* note 1 at 11–14. I will follow Simester in treating culpability as synonymous with blameworthiness. For critique, see Mitchell N Berman, ""Blameworthiness" and "Culpability" are not Synonymous: A Sympathetic Amendment to Simester" (2024) Criminal Law and Philosophy (forthcoming).

3 Simester, *Fundamentals*, *supra* note 1 at 11. This applies at least where øing is a stigmatic criminal offence, legitimately enacted.

"indispensable to culpability".[4] Combined with the culpability constraint, it follows from these claims that *mens rea* is also a necessary component of legitimate conviction.

What does the culpability constraint require of *mens rea*? To answer this, we need to consider (a) what it means for D to be culpable; and (b) how *mens rea* elements ought to reflect this.

Some theorists tell a simple story. Choice theorists say that (a) D is culpable for øing if and only if D adverts to the relevant wrong-making features of øing; and that (b) the law ought to ensure culpability by predicating convictions for øing upon proof that D adverted to the relevant wrong-making features of øing (*ie*, at least subjective recklessness).[5] On this view, the facts which ground ascriptions of culpability are directly implemented in the law as necessary conditions of criminal liability. This guarantees that the law complies with the culpability constraint, for the prosecution must prove the very facts which ground D's culpability.[6]

Simester's view is more complex. According to Simester, D is culpable "when her engagement with … reasons is defective in a manner that reflects a moral vice on D's part".[7] The law does not directly and in these terms require proof that D's engagement with reasons reflects a moral vice. Proof of different *mens rea* states is at best *evidence* from which we can infer that D's engagement with reasons was defective in this way.[8] This evidence is not definitive. Proof of *mens rea* therefore fails to guarantee compliance with the culpability constraint.[9]

The extent to which this is a problem depends on (a) the stringency of the culpability constraint; and (b) the strength of the inference from *mens rea* to culpability.

As to (a): if the culpability constraint was a decisive all-things-considered objection to convicting the non-culpable, then it would decisively object to *mens rea* elements formulated in ways that do not guarantee culpability. On Simester's account of culpability, all *mens rea* states fail to guarantee culpability, for criminal liability is never explicitly predicated on proof that D demonstrated a defective engagement with reasons which reflected a moral vice on D's part. Simester does not suggest replacing all *mens rea* formulations with direct proof of the facts constitutive of culpability.[10] Hence, Simester cannot believe that the culpability constraint is a

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4 Simester, *Fundamentals*, *supra* note 1 at 52–53.

5 *Eg*, Larry Alexander & Kimberley Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009).

6 *Prima facie*, that is. Throughout I leave aside potential supervening defences.

7 Simester, *Fundamentals*, *supra* note 1 at 237. Grant Lamond usefully dubs this "the engagement account of culpability", discussed in Grant Lamond, "Criminal Culpability and Moral Luck" (2021) 23(1) Jerusalem Rev. Leg. Stud. 149 and Grant Lamond, "Culpability and Moral Vice" (2024) Criminal Law and Philosophy (forthcoming) [Lamond, "Culpability and Moral Vice"].

8 An analogy: proof that the Pope øs is evidence that øing is compatible with Catholic morality. But the Pope øing doesn't *make it the case* that øing is so compatible. Simester is explicit that *mens rea* provides only a probabilistic inference of culpability: Simester, *Fundamentals*, *supra* note 1 at 256.

9 Even culpability-guaranteeing *mens rea* formulations would fail to guarantee culpability of all those convicted under them, given application errors. But Simester "focus[es] on a different source of blameless convictions: the substantive law itself": Simester, *Fundamentals*, *supra* note 1 at 11.

10 Why not? Plausibly because this would undermine other functions of *mens rea*. For one thing, the range of potential moral vices is wide and indeterminate, such that directly incorporating them into legal rules would create rule of law problems of certainty and fair warning (Simester, *Fundamentals*, *supra*

decisive all-things-considered objection to convicting the non-culpable. Indeed, he explicitly accepts that convicting the blameless "can sometimes be justified", albeit that it is "always problematic".[11] Beyond that extreme, however, it is unclear how stringent the culpability constraint is supposed to be. There are suggestions that it is supposed to be very strong indeed. For example, Simester claims that "the right not to be wrongly censured [via conviction without proof of culpability] defeats any instrumental case for strict liability in stigmatic crimes".[12] Given this, the use of any *mens rea* state which does not provide *very* robust evidence of culpability is unlikely to be compatible with the culpability constraint.

That takes us to (b): the strength of the inference from *mens rea* to culpability. If proof of some *mens rea* state provided only very weak evidence that a defendant was culpable, then proving that *mens rea* state would do a poor job of proving culpability. Convictions which established culpability only via that *mens rea* state would often violate the culpability constraint. Given how stringent Simester takes the culpability constraint to be, this seems like a decisive objection against using such *mens rea* states in the criminal law.

Proof of advertent *mens rea* gives us very strong evidence of D's defective engagement with reasons in a way which reflects a moral vice. For proof of intention or recklessness is also proof that the defendant engaged defectively with reasons. Subject to the possibility of defences, the inference from advertent wrongdoing to vice is "direct and … robust", given that it implicates "moral preference errors".[13] By contrast, proof of inadvertent *mens rea*, of negligence, provides much weaker evidence of D's defective engagement with reasons. For to prove negligence in criminal law, the prosecution must simply prove that D failed to notice a risk which the reasonable person would have noticed.[14] This requires no proof of any particular mental state of D, let alone a defective engagement with reasons. As Simester puts it, the inferential path from negligence to culpability is "long and

note 1 at 58–61). More fundamentally, Simester suggests that *mens rea* is sometimes constitutive of wrongdoing. Intentions turn innocent conduct into wrongful attempts (Simester, *Fundamentals*, *supra* note 1 at 54–57). Could direct evidence of moral vice play this role, in lieu of traditional *mens rea* categories? Could we redefine attempts as "Doing something more than merely preparatory to offending, in a way that evidences moral vice"? See Michael S Moore & Heidi M Hurd, "Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence" (2011) 5(2) Criminal Law and Philosophy 147 at 172–173 [Moore & Hurd] for discussion of this point.

11 Simester, *Fundamentals*, *supra* note 1 at 11–12.

12 Simester, *Fundamentals*, *supra* note 1 at 307.

13 (Thus the inference is defeasible, because it is subject to defences.) Simester, *Fundamentals*, *supra* note 1 at 348.

14 Negligence is often formulated as the idea that "the defendant should have noticed a risk" (and failed to do so). Sometimes a reasonable person would notice risks that D is not able to notice. On one interpretation of "ought implies can", D "should" ø only if D is able to ø. If that is right (which I do not defend), then the fact that a reasonable person would have noticed some risk is not the same thing as saying that D should have noticed a risk. I use the "reasonable person would have noticed" formulation of negligence to avoid this complaint, and in order to be more descriptively accurate about the relevant legal doctrine.

winding".[15] Convictions for offences of negligence therefore risk violating the culpability constraint.[16]

The question is: how big is that risk?

II. Inferring Culpability from Negligence

Proof of negligence only tells us what the hypothetical reasonable person would have noticed. It says nothing directly about D's mental processes. That is why it is often thought objectionable as a *mens rea* standard in criminal law. As Simester puts the worry,

> Given that negligence is assessed by reference to the conduct of a hypothetical figure rather than to the defendant, on what footing can we apply our judgement of that behaviour to *her*? How does the standard of care in negligence tell us anything about the defendant herself?[17]

Sometimes we have no problem making such an inference. To borrow the facts of *Adomako*: if the reasonable doctor would instantly realise why alarms were going off during surgery, but D did not, this provides some evidence that D's engagement with reasons (to act in a certain way upon hearing the alarm) was defective.[18] Proof of negligence gives us evidence about D's (defective) thought processes.

But that evidence is defeasible.[19] If D failed to notice the alarms because D was deaf – and deaf doctors were not provided with, nor expected to provide, any backup alarm system – then the fact that D failed to notice a risk which the reasonable (non-deaf) doctor would notice tells us very little about D herself and about D's engagement with reasons.[20] Given such non-culpability-disclosing explanations for negligence, we should worry whether the inference from negligence to culpability is robust enough to satisfy compliance with the culpability constraint.

Simester proposes at least three reforms to the law of negligence to address such concerns.

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15 Simester, *Fundamentals*, *supra* note 1 at 348.

16 D is not convicted *merely* for failing to notice a risk, but rather for performing some act or omission (or, exceptionally, being in some situation) while failing to notice that risk. Simester has much to say about those further conditions (Simester, *Fundamentals*, *supra* note 1 at ch 2) but I leave them aside here.

17 Simester, *Fundamentals*, *supra* note 1 at 264. Or, in the voice of one accused of negligent wrongdoing: "Doubtless the man on the Clapham omnibus would not act as I did. But I am not like that hypothetical 'person'. Why, therefore, do I deserve blame for not doing what some fictional character would do?": Simester, *Fundamentals*, *supra* note 1 at 267.

18 *R v Adomako* [1995] 1 AC 171 ("*Adomako*").

19 Simester, *Fundamentals*, *supra* note 1 at 266–268.

20 As H L A Hart once pointed out, the claim is not that one is culpable simply in virtue of being inadvertent. Rather, the claim is that one's culpable mental state caused one to be inadvertent. H L A Hart, "Negligence, *Mens Rea*, and Criminal Responsibility" in H L A Hart & John Gardner, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2d ed (Oxford: Oxford University Press, 2008) at section 2.

First, he suggests that proof of negligence (or at least negligence attributable to poor memory) "favours [only] a rebuttable presumption" of culpability.[21] But Simester leaves unstated whether and how that presumption may be rebutted. The law certainly does not allow defendants accused of negligence to deny liability by adducing evidence that, in fact, they cared greatly about the interests of others. And it is unclear how a rebuttable standard of *mens rea* would work. Presumably a jury would not be asked to find D non-negligent so long as they believed that D's failure did not arise due to a defective engagement with reasons. That would be effectively to instantiate Simester's account of culpability directly into the elements of criminal law.

Secondly, Simester suggests (tentatively) that the negligence standard, at least in the context of attentiveness, should not demand perfect diachronic consistency. Judged synchronically – at any time-slice – the reasonableness standard is moderate. The reasonable person would notice many risks, but not every possible risk. However, judged diachronically – across time-slices – the reasonableness standard is extreme. The reasonable person notices those risks with unwavering, superhuman consistency. Simester's suggestion is that the reasonable person should show merely reasonable diachronic consistency. "Reasonable fluctuations are not excluded".[22] Something like this has been attempted in English tort law, where in judging the standard of reasonable care, Parliament decreed that courts "must have regard to whether [the defendant] … demonstrated a predominantly responsible approach" in their activity.[23] But this proviso has never been applied by any court. Neither does it seem to be how the law works in practice, and indeed it is unclear how it could work. As one leading tort textbook puts it, "There is no such thing as an 'average' standard of care whereby a failure to exercise reasonable care on one occasion can somehow be compensated for by the defendant's otherwise careful or even exemplary conduct."[24] As Simester acknowledges, momentary lapses remain negligent, and can ground an inference of culpability.[25]

Thirdly, and finally, Simester proposes that gross negligence, not just regular negligence, ought to be the "normal" version of negligence used in criminal law. The reason "is not so much that a grossly negligent defendant is more culpable, but

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[21] Simester, *Fundamentals*, *supra* note 1 at 281. Why is the presumption in favour of culpable explanations rather than in favour of non-culpable explanations? Partly, the answer, as hinted throughout, is that, empirically, culpable explanations predominate. But Simester also offers a more pragmatic reason: it is very easy simply to lie about abnormal memory lapses.

[22] Simester, *Fundamentals*, *supra* note 1 at 279. In Simester, *Fundamentals*, *supra* note 1 at 280, Simester gives the example of a doctor making a slip at the end of a long shift. (Assuming, of course, that the doctor was not indirectly culpable for being thus tired (*eg*, trying to do too much, not having a rest, not taking caffeine, *etc*)).

[23] Social Action, Responsibility and Heroism Act 2015 (c 3) (UK) s 3.

[24] Andrew Tettenborn ed. *Clerk & Lindsell on Torts*, 24th ed (United Kingdom: Sweet & Maxwell, 2023) at 7–196. They continue: "A lifetime of careful driving does not excuse the one occasion when a motorist carelessly drove into a pedestrian crossing the road. A glittering professional career does not exculpate the surgeon who on a single occasion makes a negligent mistake resulting in the death of the patient."

[25] Simester, *Fundamentals*, *supra* note 1 at 256, noting that "usually, such cases will merely reveal a latent aspect of [the defendant]'s character in an original context". This point is raised to rebut "out-of-character" objections to character theories of culpability.

that we can be more confident that she is culpable at all".[26] This implicitly reaffirms the concern that negligence provides unreliable evidence of culpability. But it is not obvious that requiring gross negligence allays that concern. The inferential route from negligence to culpability is unreliable in virtue of the fact that negligence does not disclose any specific failing of the defendant's reasoning. But demanding gross negligence improves nothing on this front. That a risk would be obvious to the reasonable person still tells us nothing directly about the defendant's own thought processes. Proving gross negligence provides a greater quantity of unreliable evidence of culpability. It does not make that evidence more reliable.[27]

None of Simester's proposals sufficiently address the central problem with negligence: that proving what a reasonable person would do offers only modest evidence about what went wrong with the defendant's own thought processes. Indeed, Simester seemingly acknowledges as much. In an arresting passage, he claims that

> We need to unpick, even abandon, the so-called 'reasonable person'. We need to stop thinking in terms of the law's fictitious creation and refocus our attention upon the defendant…. [T]he 'reasonable person' *is really the defendant, subject only to the imposition of certain objective standards*; the defendant, held up to an objective standard of moral characteristics.[28]

Simester is not suggesting that criminal law abandons the negligence standard. Neither, it seems, is he suggesting that we abandon the standard definition of negligence, cast in terms of whether a reasonable person would have recognised a relevant risk. Instead, the relevant operationalisation of this claim seems to be the familiar thought that we should imbue the "reasonable person" with certain attributes of the defendant.

When judging what the "reasonable person" would notice, the law always subjects the reasonable person to the same external limitations as the defendant. For example, if D did not hear of a risk because of a loud car, then the reasonable person would face the same background noise.[29] Putting the reasonable person in the defendant's shoes eliminates some inappropriate inferences from negligence to culpability. But it leaves a large remainder of internal but non-culpability-disclosing explanations for negligence. The law accounts for these by relativising the reasonable person to some of the defendant's internal attributes.[30] For example, children

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[26] Simester, *Fundamentals*, *supra* note 1 at 287.

[27] This is obscured by some formulations of what it means to be grossly negligent. One classic formulation is that negligence is gross if it "showed such disregard for the life and safety of others as to amount to a crime": *R v Bateman* (1927) 19 Cr App R 8 at 12. The language of showing "disregard" to others' interests misleadingly smuggles in an implication of advertence.

[28] Simester, *Fundamentals*, *supra* note 1 at 268.

[29] Simester mentions "extraneous factors" like being concussed, being shocked by sudden bad news, and acting under the influence of morphine. Simester, *Fundamentals*, *supra* note 1 at 279–281.

[30] The extent to which the reasonableness standard does and should account for a defendant's attributes is well-worn terrain. It was an "old inquiry" by 1951: Fleming James Jr, "The Qualities of the Reasonable Man in Negligence Cases" (1951) 16 Mo.L.Rev. 1 at 1. This is often called "individualising" or "subjectivising" the reasonable person. I prefer the language of "relativisation" to make clearer that it is the standard itself which is altering, and not merely the contextual facts by which we judge whether that standard is met. (If a woman is threatened by a drunk man in a dark alley, it may be reasonable for her

are not culpable for failing to notice risks which the reasonable adult would have noticed. So the law relativises the negligence standard to the child's age. It asks not whether a reasonable person would have noticed the relevant risk, but whether a reasonable child of the defendant's age would have noticed the relevant risk.[31] In this way, the "reasonable person" comes to resemble the defendant herself, and inferences drawn from facts about the reasonable person to conclusions about the defendant become more robust. Evidence that the relativised reasonable person would have noticed a risk provides better evidence that the actual defendant was culpable for failing to notice that risk than does evidence about a generic reasonable person.

The problem with this solution is that criminal law, at least in many jurisdictions, does not explicitly relativise to any intrinsic attributes other than age.[32] Simester cites American tort authorities which relativise the reasonable person to the defendant's physical incapacities like blindness, and reasonably suggests that English criminal law should and would do the same.[33] But young age and physical incapacities hardly exhaust the possible range of non-culpable intrinsic aetiologies of negligence. If relativisation is to solve our inferential concern, either (a) there would have to be very few other non-culpability-disclosing attributes; or (b) the law would have to relativise more than it does.

Simester advances both options. No one can feasibly discuss every psychological process implicated in negligence. But Simester offers an illustrative discussion of three major explanatory factors which often explain negligence: failures of attention, memory, and intelligent reasoning.[34] His view is that no relativisation is required as to attention and memory because failures of these domains disclose culpability, while relativisation is required as to intelligence, because failures of this domain do not.[35]

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to use more force than a man in the same situation: not because we expect lesser reasonableness from women (relativisation) but rather because being a woman makes her situation objectively more dangerous and therefore makes more force objectively reasonable (contextualisation).)

[31] For tort: *Mullin v Richards* [1998] 1 All ER 920. Criminal law sometimes derives this relativisation directly from tort (*eg*, gross negligence manslaughter: *R v Evans* [2009] EWCA Crim 650); it sometimes derives it indirectly via the claim that criminal standards cannot exceed tort standards (*eg*, careless driving: *Scott v Warren* [1974] RTR 104); and sometimes rederives the relativisation afresh.

[32] An alternative approach would be to go from the other direction: start not with the reasonable person and add in features of the defendant, but rather start with the defendant and add in features of the reasonable person. This approach is defended by Peter Westen, "Individualizing the Reasonable Person in Criminal Law" (2008) 2 Criminal Law and Philosophy 137 at 151 [Westen]. But regardless of the direction from which we start, we should ideally end up in the same place: the reasonable person would share all and only those features of the defendant that do not disclose culpability.

[33] Simester, *Fundamentals*, *supra* note 1 at 267 notes 18–19.

[34] Simester here follows Warren A Seavey, "Negligence: Subjective or Objective?" (1927) 41 Harv.L.Rev. 1 [Seavey], whose taxonomy comprised (1) moral qualities; (2) intelligence; (3) physical characteristics; (4) belief in facts; (5) skill, and Moore & Hurd, *supra* note 10 whose taxonomy comprised (1) motivation/selfishness; (2) cognitive issues/stupidity; (3) conative issues/weakness; (4) motor skills/clumsiness.

[35] Simester, *Fundamentals*, *supra* note 1 at ch 12.3.

III. Inferring Culpability from Inattention, Forgetting, and Unintelligence

Simester offers two inferential routes to get from (a) the fact that negligence was attributable to some underlying attribute, to (b) a conclusion about culpability. The first route is temporally direct. It asks whether failures attributable to that attribute evidence culpability in the present moment. The second route is temporally indirect. It asks whether failures attributable to that attribute evidence culpability at some earlier point in time: a kind of tracing strategy. Both routes are illustrated with some recurring examples. Consider:

> *Drowning*: Dot does not notice her children run away at the beach. They drown.[36]
> *Wedding*: Dan does not notice that his own wedding is today. He misses it.[37]

Both Dot and Dan are negligent: they fail to notice a risk which the reasonable person would have noticed. But *why* were they negligent, and what can we infer from this?

Consider the temporally direct route first. Perhaps Dot's negligence arose due to inattention. If so, Simester claims, this would "reflect … insufficient concern for the welfare of her children".[38] And perhaps Dan simply forgot his wedding. If so, this leads to an "adverse inference about [his] cares and concerns". It "manifests an utter lack of concern for his bride and their marriage".[39] The reason is that both attention and memory involve mental faculties, and failures of those faculties are failures to properly engage with reasons in a way that reflects moral vice. The same is not true, Simester claims, of failures attributable to unintelligence. Perhaps Dot, due to limited intelligence, did not understand that the sea can be dangerous for children. She took no precautions because it never occurred to her that precautions were necessary. This evidences no more culpability than if an ordinary parent left their children at a nursery. Similarly, perhaps Dan heard that it was bad luck for a bride to see the groom before the wedding, and, due to limited intelligence, avoided his bride entirely on the big day in order to bring her luck, failing to realise that this would undermine the wedding itself. This does not warrant an adverse inference about his care for his bride. Generalised, Simester claims that intelligence is not itself a moral characteristic, nor reflective of one's moral characteristics, and so failures attributable to unintelligence do not evidence moral vice.[40]

I am less sure than Simester about both judgements. Sometimes inattention and forgetfulness evidence insufficient care for others. But the inference is fragile.[41]

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[36] Simester, *Fundamentals*, *supra* note 1 at 277.

[37] Simester, *Fundamentals*, *supra* note 1 at 281. The example is borrowed from Antony Duff.

[38] (Where such a shortcoming "is a moral vice".) Simester, *Fundamentals*, *supra* note 1 at 277.

[39] Simester, *Fundamentals*, *supra* note 1 at 281, quoting Robin Antony Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990) at 163.

[40] Simester, *Fundamentals*, *supra* note 1 at 251, 283.

[41] See Lamond, "Culpability and Moral Vice", *supra* note 7 at § 3 for discussion of two distinct conceptions of "moral vice" used in Simester, *Fundamentals*, *supra* note 1: a wider view (that it is vicious to fall short of whatever a person of decent values would do) and a narrow view (that it is vicious to manifest a shortfall of concern for the interests of others). I am here concentrating on the narrower view.

Simester notes that "working memory responds to incentives", that "recollection … is better when we care more" and "pay … more attention".[42] But the most common victims of inattention and forgetfulness are the inattentive and forgetful persons themselves. If someone inattentively misses certain medical symptoms, or forgets an important doctor's appointment, we do not normally infer a lack of concern for self.[43] So it seems uncharitable to infer lack of concern for others when precisely the same psychological processes result in other-affecting failures. Indeed, we might have ample evidence that they do care sufficiently for others, as in Michael Moore and Heidi Hurd's example of a devoted mother who tragically forgets her child in a hot car.[44] We should not readily infer moral vice, even presumptively, from such shortcomings.[45]

Alternatively, if we can infer culpability from negligence attributable to such shortcomings, then we may also infer it from negligence attributable to unintelligence. Remember: Simester's claim is not that inattention and forgetting are constitutive of culpability. The claim is rather that inattention and forgetting *evidence* the constitutive basis of culpability, *ie*, an insufficient care or concern for others.[46] But if failures of memory evidence culpability, then so too can low intelligence. The reason for this is that low intelligence strongly correlates with criminality, including the advertent criminality which gives us the strongest evidence of insufficient concern for others.[47] If unintelligence evidences a propensity towards insufficient concern for others via advertent wrongdoing, then it surely also provides evidence that inadvertence derived from insufficient concern for others.[48] I am not claiming that we *should* infer culpability where negligence is attributable to unintelligence.

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42 Simester, *Fundamentals*, *supra* note 1 at 281 note 66.

43 People forget even in the face of great incentives to remember. For an extreme example, consider Valentin Bondarenko, an early Soviet cosmonaut-in-training. During a training exercise in a high-oxygen environment, he absent-mindedly threw aside an alcohol wipe. It landed on a hot plate and started a fire which killed him. It is not credible to infer a lack of concern for self from his (momentary) absentmindedness. (The story is recounted in Kelly Weinersmith & Zach Weinersmith, *A City on Mars* (New York: Penguin Press, 2023) at 50.)

44 Moore & Hurd, *supra* note 10 at 182ff.

45 Lamond offers a similar worry for the account: Lamond, "Culpability and Moral Vice", *supra* note 7.

46 Simester alternatively frames the culpability-constitutive facts as failing to do what a person of decent values or dispositions would do. Grant Lamond distinguishes these two formulations of the constitutive basis of culpability in Simester's account, but that need not detain us here: Lamond, "Culpability and Moral Vice", *supra* note 7 at § 3.

47 Kevin M Beaver *et al*, "Intelligence is associated with criminal justice processing: Arrest through incarceration" (2013) 41(5) Intelligence 277; Joseph A Schwartz *et al*, "Intelligence and criminal behavior in a total birth cohort: An examination of functional form, dimensions of intelligence, and the nature of offending" (2015) 51 Intelligence 109 at 114 [Schwartz *et al*, "Intelligence and criminal behavior in a total birth cohort"]: "overwhelming evidence has indicated that individuals with lower IQ scores are more likely to engage in a wide range of criminal behaviors". And this is not explainable merely by smarter people being more likely to evade detection: T E Moffitt & P A Silva, "IQ and delinquency: A direct test of the differential detection hypothesis" (1988) 97(3) Journal of Abnormal Psychology 330; Cashen M Boccio, Kevin M Beaver & Joseph A Schwartz, "The role of verbal intelligence in becoming a successful criminal: results from a longitudinal sample" (2018) 66 Intelligence 24.

48 My point is not that we can infer culpability from *any* factor which correlates with criminality. That would allow us to infer culpability from poverty, for example. My point is that Simester accepts inferences of culpability where negligence derives from shortcomings of defendants' thought processes, like memory, and that unintelligence is, paradigmatically, a shortcoming of one's thought processes.

Rather, I am saying that *if* we may infer culpability from poor memory, then we may also infer it from unintelligence. We should directly infer culpability from both or neither.

What of Simester's alternative, indirect, inferential route from inattention/forgetting to culpability? Even if we are unsure whether the defendant's negligence evidences culpability in that moment, it might still evidence *prior* culpability. An inattentive Dot could have earlier sought "to improve her character". Even if unaware of her weak attention, she was obliged "to develop the capacities" to become so aware. "Or at least to compensate".[49] Likewise, there are "steps one can take to remember", steps which a forgetful Dan did not take. His earlier failure of preparation "betokens mental sloth".[50] By contrast, "stupidity is a condition that cannot much be altered by someone who suffers from it" and "a person of low intelligence is likely to be poorly placed to take precautions against the harmful consequences of his own stupidity".[51] Hence, failures attributable to poor attention and memory evidence prior culpable failings, while failures attributable to low intelligence do not. Generalised, the thought seems to be that negligence attributable to some attribute provides evidence of prior culpability if and only if the defendant could (a) *improve* or (b) *compensate for* that attribute.

This argument raises two questions: one conceptual, one empirical. Conceptually: why is an attribute being improvable or compensable relevant to culpability? Empirically: are memory and attention relevantly improvable or compensable in a way that intelligence is not?

As to the conceptual question: Recall that the reasonable person is placed in the external circumstances of the defendant. We do this because it would be unfair to demand that the defendant notice risks which they were incapable of noticing due to external factors (like poor lighting or loud background noise, *etc*). But we might have the same worry if a defendant was incapable of noticing risks due to internal factors over which the defendant lacked control. That is why Simester accepted that the reasonable person should share the defendant's physical shortcomings, like blindness. The natural follow-up is that defendants may equally lack control over some internal psychological processes. For example, Warren Seavey once suggested that memory was a purely physical operation outside of our control, concluding that the reasonable person should share a defendant's poor memory.[52] His thought was that it would be unfair to demand that defendants display a better memory than they could achieve. Simester aims to show, contrary to Seavey, that memory can be improved or compensated for.[53] The implication is that if an attribute is improvable and compensable then it is not out of our control in a way that is problematic for culpability ascription. If we can improve or compensate for our shortcomings, then we can control – and avoid – future negligence. And, if so, we may be culpable for failing to do so.

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[49] Simester, *Fundamentals*, *supra* note 1 at 278.
[50] Simester, *Fundamentals*, *supra* note 1 at 280.
[51] Simester, *Fundamentals*, *supra* note 1 at 283.
[52] Seavey, *supra* note 34 at 20.
[53] Simester, *Fundamentals*, supra note 1 at 280.

Tracing strategies like this face well-known objections. Most obviously, failing to X at t1 (remedy some shortcoming) may be far less culpable than failing to Y at t2 (notice a specific risk), but D is criminally liable for Y, not X.[54] Moreover, negligence at t2 provides only limited evidence that one's failures at t1 were culpable, *ie*, stemmed from some insufficient concern for others. Perhaps inattentive Dot attended various child-, beach-, and water-safety courses, yet still failed to pay attention. Perhaps forgetful Dan took all reasonable precautions to aid his memory, but still forgot. Such evidence of sufficient care for others outweighs the evidence of insufficient care derived from their negligence.

With that said, the indirect inferential route does at least implicate a longer series of failings than the direct route, and so at least has some claim to offer more robust evidence of culpability. Given this, let us consider the empirical question: are memory and attention, but not intelligence, relevantly improvable or compensable?

As to improvability, Simester claims that it "is normally possible to improve a weak memory", citing a programme designed to do so for elderly people.[55] There is good evidence that such programmes work.[56] But there is a catch. The best evidence is that they primarily improve memory in similarly artificial contexts.[57] Such improvements do not readily transfer over to real-world applications.[58] So the kind of memory improvement Simester cites would not obviously help people to avoid real-world negligence, at least outside of repetitive tasks. Memory is not obviously improvable *in the right way* to have any bearing on culpability ascriptions.

Perhaps I am wrong about the conceptual claim. Perhaps the mere fact of improvability is what counts, not improvability in a way which allows one to avoid

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54 See, *eg*, Moore & Hurd, *supra* note 10; Alexander Greenberg, "Why Responsibility for Negligence Cannot be Indirect" (2021) 80(3) C.L.J. 489. Simester suggests that this can be analysed akin to constructive liability: the prior fault (re X) acts as a gateway to culpability for causing harm (Y): Simester, *Fundamentals*, *supra* note 1 at 278 note 54. That suggestion will be cold comfort for those sceptical about constructive liability.

55 Simester, *Fundamentals*, *supra* note 1 at 283 note 62.

56 A large meta-analysis reached the same conclusion: Monica Melby-Lervåg & Charles Hulme, "Is working memory training effective? A meta-analytic review" (2013) 49(2) Developmental Psychology 270 [Melby-Lervåg & Hulme].

57 Studies typically involve computer-based exercises where participants hold and repeat a sequence of digits in working memory, with gradually increasing difficulty. After training, performance on that particular genre of test does usually improve in the short-term, and perhaps (the evidence being more equivocal) in the long term. But the strength of "near transfer" effects are stronger the "nearer" (more similar) is the subsequent test: Giovanni Sala & Fernand Gobet, "Working memory training in typically developing children: a multilevel meta-analysis" (2020) 27 Psychonomic Bulletin & Review 423. (We might also doubt that improvements in children would translate to improvements in adults: Melby-Lervåg & Hulme, *supra* note 56 suggests that age is a significant moderator of near-transfer effects, while Sala and Gobet do not support that conclusion.)

58 This should not be surprising. It is famously difficult to find interventions in which participants reliably transfer learning from one context to another: Giovanni Sala & Fernand Gobet, "Does Far Transfer Exist? Negative Evidence from Chess, Music, and Working Memory Training" (2017) 26(6) Current Directions in Psychological Science 515. For a survey of the literature on (the absence of) transfer learning in the educational context, see Bryan Caplan, *The Case Against Education* (Princeton: Princeton University Press, 2018) at 50–59. Caplan notes some (mild) exceptions (applying abstract mathematics to simple physics problems, and statistics lessons to sports statistics problems), but his bottom line is that "As a rule, students learn only the material you specifically teach them … if you're lucky."

negligence. But, if so, memory is not easily distinguishable from intelligence.[59] For intelligence too is (modestly) improvable.[60] The methods by which intelligence can be improved (*eg*, nutrition, early education) do very little to help people to avoid real-world negligence.[61] But that, as I have said, is also true of memory-improving methods. In other words, Simester faces a dilemma: If mere improvability is what counts, then both memory and intelligence are improvable. But if improvability relevant to avoiding real-world negligence is what counts, then neither memory nor intelligence are much improvable in the relevant way.

What about compensability? Simester claims that

> there are steps one can take to remember something … where a person realizes the significance of an item of information, she may be expected to make a concentrated effort to remember it, or to take additional measures to remind herself … [By contrast,] a person of low intelligence is likely to be poorly placed to take precautions against the harmful consequences of his own stupidity.[62]

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[59] A strong version of this claim is that, because memory tests are typically sub-tests within intelligence tests, any improvement in memory would *constitute* an improvement in intelligence. Simester might object that he means to distinguish memory from non-memory dimensions of intelligence. That move would be undermined if memory-training exercises show "far transfer" to improve other dimensions of intelligence. I think the better view of the evidence is that this is false (or at least unproven), but the issue is controversial. See, *eg*, Susanne M Jaeggi *et al*, "Improving fluid intelligence with training on working memory" (2008) 105(19) Proceedings of the National Academy of Sciences 6829; Matthias Schwaighofer, Frank Fischer & Markus Bühner, "Does Working Memory Training Transfer? A Meta-Analysis Including Training Conditions as Moderators" (2015) 50(2) Educational Psychologist 138; Monica Melby-Lervåg, Thomas S Redick & Charles Hulme, "Working Memory Training Does Not Improve Performance on Measures of Intelligence or Other Measures of 'Far Transfer': Evidence from a Meta-Analytic Review" (2016) 11(4) Perspectives on Psychological Science 512; Jacky Au *et al*, "There is no convincing evidence that working memory training is NOT effective: A reply to Melby-Lervåg and Hulme (2015)" (2016) 23(1) Psychonomic Bulletin and Review 331; Monica Melby-Lervåg & Charles Hulme, "There is no convincing evidence that working memory training is effective: A reply to Au *et al* (2014) and Karbach and Verhaeghen (2014)" (2016) 23(1) Psychonomic Bulletin and Review 324; Giovanni Sala *et al*, "Near and Far Transfer in Cognitive Training: A Second-Order Meta-Analysis" (2019) 5(1) Collabra: Psychology 18.

[60] The principal means of intelligence improvement are nutritional supplementation and education: Stuart Ritchie, *Intelligence: All that matters* (London: John Murray Learning, 2015) at ch 5 [Ritchie, *Intelligence: All that matters*]; Stuart J Ritchie & Elliot M Tucker-Drob, "How Much Does Education Improve Intelligence? A Meta-Analysis" (2018) 29(8) Psych Sci 1358. Their main estimate is 1–5 IQ points per additional year of education. This would amount to a sizeable gain over the longer term, if naïvely added together. But naïve addition with no diminishing returns is *prima facie* implausible (it would imply a simple path to super-geniuses). The authors note that the studies analysed did not address the issue in a rigorous way, nor did any others of which they were aware (at 1367). There is little evidence that famous interventions like listening to Mozart achieves much: the original studies were underpowered and failed to replicate. See Jakob Pietschnig, Martin Voracek & Anton K Formann, "Mozart effect-Schmozart effect: A meta-analysis" (2010) 38(3) Intelligence 314. (Contrary to the popular image of playing Mozart to babies or even foetuses, the study participants were, as usual, undergraduate students.)

[61] The best-evidenced IQ-improving interventions are nutritional supplementation and more education (Ritchie, *Intelligence: All that matters*, *supra* note 60). An unintelligent adult can hardly return for more years of early education.

[62] Simester, *Fundamentals*, *supra* note 1 at 280, 283.

Once again, however, the empirical basis of this distinction is questionable. Forgetful people can compensate for their forgetfulness by tying a string around their finger. But this trope is joined by the further trope of the forgetful person forgetting why they tied that string in the first place. On the other side of the coin, someone of low intelligence could always compensate for their own limitations by relying more on others and not pushing beyond their limits. Indeed, the first tool required to compensate for one's shortcomings is knowledge that one falls short. By this measure, intelligence looks more compensable than memory. Excluding extreme outliers, it is hard to know whether one has good or poor memory relative to others, and therefore, whether one needs to take additional precautions relative to the average person.[63] By contrast, mandatory schooling and testing leaves us all intimately familiar with our comparative intellectual capacity, and thus alerts us to the need to take further precautions.[64] And that allows the unintelligent to take precautions against their shortcoming.

I am not claiming that memory and attention are precisely equally (un)improvable or compensable as intelligence. Rather, I am claiming that the evidence is mixed. Indeed, presumably the answer will vary between cases. Poor memory ranges from slightly-below-average through to amnesia while low intelligence ranges from slightly-below-average through to intellectual disability. Some individual shortcomings are improvable and compensable, others are not. Such differences might warrant a different degree of evidential scepticism in a given case. My point is that they do not warrant a categorical difference in treatment as between types of cases. But the choice of whether to relativise the reasonable person to these shortcomings amounts to a categorical difference in treatment. Following Simester's view, the reasonable person would share none of the defendant's shortcomings of memory or attention, but their complete shortcomings of intellectual functioning. This prescription is not justified by the mixed empirical evidence.

A further worry about categorical differences in treatment between different attributes is that it will often be difficult to identify why a defendant was negligent. We are all capable of momentary inattention or forgetfulness. Where the stakes are high, we might come up with compensatory strategies. If Dot was merely inattentive, she

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[63] True, the reasonable person standard is a normative measure of what people should achieve, rather than a statistical measure of what the average person does achieve. See, *eg*, Westen, *supra* note 32 at 138. But the normative reasonable person is not completely divorced from statistical averages either. It would be bizarre if the vast majority of the population were deemed unreasonable, and indeed there is evidence that people (and presumably juries) do rely on statistical normality when making judgements of reasonableness: Kevin Tobia, "How People Judge What is Reasonable" (2018) 70 Ala.L.Rev. 293.

[64] Doesn't the famed Dunning-Kruger effect say that unintelligent people tend to think that they are more intelligent than others? No. Kruger and Dunning reported data that self-rated ability positively correlated with actual ability at all levels. However, lower performers were (strongly) optimistically-biased, and high performers (weakly) pessimistically-biased. (Justin Kruger & David Dunning, "Unskilled and unaware of it: how difficulties in recognizing one's own incompetence lead to inflated self-assessments" (1999) 77(6) Journal of Personality and Social Psychology 1121.) This could well moderate the effect I describe in the text. Of course, comparable memory- or attention-competence effects might exist too (*ie*, that those with the worst memories/attention most overestimate their abilities). This is likely if at least part of the effect is driven by regression to the mean (outliers in underlying ability not being outliers in perception-of-ability, hence flattening the curve) and generic positivity bias. I am not aware of any memory- or attention-focused versions of such studies.

might use a heuristic like "never let the children out of sight". But if Dot is both inattentive and unintelligent, she may come up with a less effective heuristic like "check on the children every 30 minutes", failing to realise that 30 minutes is ample time for a child to get into danger. Is Dot's subsequent negligence attributable to her inattention or to her unintelligence? In truth, it is both. Indeed, virtually all cognitive processes are inter-related in this way.[65] This creates severe epistemic difficulties for anyone trying to figure out which risks would be noticed by the partially relativised reasonable person.

Relativisation is meant to guarantee that proof of negligence offers sufficiently robust evidence of culpability. But relativising only to age fails to do this. Simester accepts that further relativisation is required, to account for unintelligence. But, for the reasons I have given, intelligence is not sufficiently distinct from memory and inattention to warrant this special treatment. If we wish to defend the culpability constraint, then we should relativise to these attributes too, in order that proof of negligence provides sufficiently robust evidence about the defendant herself. Perhaps we should relativise further still. But at some point along this path we end up abandoning the reasonable person altogether.

IV. Conclusion

According to the culpability constraint, people should not be convicted unless they are culpable. But the only way for the law to guarantee compliance with that constraint is to bake the constitutive conditions of culpability into the definitional elements of criminal offences, primarily via *mens rea*. Simester forecloses that option by (a) defending a much more complex account of the constitutive basis of culpability ascription than is observable from legal doctrine; while (b) (in part) defending that legal doctrine. Even if a cast-iron guarantee is not available, legal doctrine might still provide sufficiently robust evidence of culpability to satisfy some version of the culpability constraint. Simester relies on this being true. Advertent *mens rea* is sufficiently compliant with the culpability constraint for this reason. But negligence, I think, is not. The inferential road from negligence to culpability is not merely long and winding. It often fails to reach its destination. From the fact that the defendant failed to do what the reasonable person would do, it requires a fragile inference to reach the conclusion that they evinced insufficient care in that moment, and an even more fragile inference to reach the conclusion that they evinced insufficient care at some earlier point in time. Relativisation is the only plausible way to strengthen that inference. But we would need to relativise much further than Simester allows for this solution to work.

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[65] Schwartz *et al*, "Intelligence and criminal behavior in a total birth cohort", *supra* note 47 at 114: "deficits in executive functions, including inhibition, processing speed, and attention are potentially linked to both criminal behavior and overall levels of intelligence".