Seeing Negligence for What It Is

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Nicolas Cornell, *Looking and Seeing*, in **New Conversations in Philosophy, Law & Politics** (Ruth Chang & Amia Srinivasan eds., forthcoming), available at SSRN.

1Ls are often taught that the tort of negligence differs from its counterpart in morality by not requiring blameworthy or culpable misconduct. As Holmes famously put it, whereas "the courts of Heaven" will make allowances for the defects of a "hasty and awkward" person, no such generosity is extended to defendants facing a negligence suit in a common law court. But is it correct to suppose that the *moral* wrong of negligence necessarily involves culpability or blame? In his marvelous essay *Looking and Seeing,* Professor Nico Cornell engages an array of recent work in the moral philosophy of negligence to argue, in effect, that Heaven's courts are as demanding as their earthly counterparts.

Cornell begins with a discussion of *Moore v. Dashiell*, a run-of-the-mill, mid-twentieth century negligence suit. On a clear, dry day, Dashiell, driving his car, stopped to pick up two hitchhikers: Moore and a friend. Shortly thereafter, with Dashiell driving at a lawful speed on a straight and level road, the car struck a large mule. Moore was seriously injured and sued. At trial, Dashiell testified that, just before the collision, he was turning the dial on his car radio to find a station, but was looking at the road as he did. (There was no point in looking at the radio, he explained, because its markings did not accurately identify the wavelengths at which stations' signals would be picked up.) He further testified that he saw two cars approaching from the other direction, but never saw the mule. Dashiell's testimony notwithstanding, verdict was entered for Moore and the Maryland Supreme Court affirmed.

On one reading, the high court's affirmance rests on the straightforward evidentiary ground that the factfinder needn't have believed Dashiell's testimony. (One can reasonably infer that a driver who, under good visibility conditions, misses a half-ton creature standing directly in front of his car actually was not paying enough attention to the road.) But Cornell entertains a different interpretation. Even if the factfinder was entitled to believe and did believe Dashiell's testimony, he says, it still was entitled to find him to have been negligent in the legal sense. On this reading, *Dashiell* stands for the proposition that perceptual failure in and of itself—the very fact that Dashiell did not see the mule—counts as negligence. So far as tort law is concerned, Dashiell could not avoid liability even if he was as vigilant as he was required to be (i.e., even if he was appropriately scanning for road obstacles but just happened somehow to miss the mule).

Shifting from law to morality, Cornell uses his rendering of *Dashiell* to consider various philosophical treatments of negligence. He begins with worries raised by "skeptics" including Matt King, Heidi Hurd, and Michael Moore. Their worry is that negligent conduct, at least when inadvertent, cannot be morally wrongful. Moral duties demand action in conformity with norms of conduct. As such, they presuppose that persons subject to them have an opportunity for deliberation and choice about conforming. Yet the duty at the heart of negligence—the duty of care—seems to demand conformity to a norm irrespective of whether any such opportunity was present. Recall that, on Cornell's interpretation of *Dashiell*, the defendant did all the things he was required to do, including looking where he was going. Yet Dashiell was deemed (legally) negligent for failing to have seen something that he was required to see. Negligence so understood seems *not* to be a moral wrong, say the skeptics. (And thus, if *Dashiell* is a heartland case of the tort of negligence, negligence law can't be understood as law that holds actors

responsible for their moral wrongs.)

Cornell next considers various responses to the skeptics. “Tracers”—a group that includes Holly Smith, Seana Shiffrin, and Gideon Rosen—maintain that nonculpable negligent action can be deemed morally wrongful so long as it is linked to an actor’s prior culpable acts. (Imagine a different driver who causes a crash after inadvertently nodding off but who, before getting into his car, took medication that his doctor had told him would make him drowsy.) While, according to Cornell, tracers can explain how there is *some sense* in which an actor who inadvertently injures another had an opportunity to do otherwise, they do not explain how an actor such as Dashiell—whose failure to see the mule was not traceable to a prior irresponsible act—can cogently be deemed to have committed a moral wrong. Likewise, Cornell argues that the recognition of negligence *qua* failure to see defeats the efforts of other moral theorists—“reflectors,” who include Nomy Arpaly and Angela Smith—to salvage negligence’s status as moral wrong by suggesting that inadvertently careless conduct is wrongful in so far as it displays a deficiency of character or will in the negligent actor. (Dashiell’s failure does not seem to seem to offer any such demonstration.)

Finally, Cornell considers “externalists,” a group that includes Ben Zipursky, Arthur Ripstein, Ori Herstein, and me. Externalists argue that, in the context of determining the accountability of one person to another—as opposed, say, to that of determining whether a person has acted culpably and is thus eligible for punishment—negligence is nothing more or less than an actor’s failure, on a given occasion, to act with required care. An externalist thus could conclude that Dashiell was morally negligent as to Moore (and the other passenger and others in the vicinity), because not seeing and not avoiding the mule was a failure to drive as a careful driver would have driven under the circumstances, and that is sufficient for conduct to be deemed negligent.

Cornell worries that the externalists’ relatively thin understanding of what can count as a breach of duty too radically detaches judgments of wrongful conduct from agency. Indeed, he suggests that the externalists unintentionally vindicate the skeptic’s worry that negligence cannot be a breach of duty. In order for the duty of care to be a genuine moral duty, the skeptics argue, it must be one that can figure in an actor’s deliberation. Yet externalists, in his view, are indifferent to whether the duty of care can so figure.

Having completed his survey, Cornell concludes by sketching a distinctive path forward. The key, he says, is to pry apart two questions that lawyers and moral philosophers often lump together: (1) What duties do we owe one another?, and (2) Under what circumstances is one answerable or accountable to another? Interpersonal moral accountability, he argues, arises as soon as one injures another, irrespective of whether the injury was wrongfully inflicted (i.e., regardless of whether it resulted from a breach of a duty of conduct). Just by virtue of injuring, the injurer is already answerable to the victim—she owes the victim a justification. And if no justification is provided, then there is wrongdoing and additional responsibility beyond the obligation to offer a justification.

Thus, in *Dashiell*, when Moore was injured in the crash, Moore was morally entitled to demand an account from Dashiell of how the accident could have happened. What answer from Dashiell would have been sufficient to answer such a demand? Whatever might suffice, Cornell reasons, the answer “I didn’t see the mule” is not among them. And, crucially, its insufficiency can be explained *without* treating Dashiell’s failure to see the mule as a breach of duty. Instead, it fails in roughly the manner of a failure by a defendant in civil litigation to plead an affirmative defense. The statement “I didn’t see the mule” simply fails to identify considerations that defeats the prima facie case for liability grounded in Dashiell’s having injured Moore. The same would be true if Dashiell met Moore’s imagined demand for an explanation by asking “What would you have wanted me to do (that I did not do)?” According to Cornell, in so far as Moore was injured by Dashiell, Moore does not have the burden to answer this

question.

In casting moral negligence on the foregoing terms, Cornell thus detaches the question of whether there has been wrongdoing, and whether there is liability to the victim for wrongdoing, from the question of whether the person subject to liability failed to heed a duty of conduct owed to the victim. From within this framework, an actor can be deemed "negligent" even though the actor's conduct did not fall short of any standard of conduct. This is how Cornell proposes to sidestep entirely the skeptics' puzzle of whether an actor can breach a moral duty without the right sort of opportunity for reasoning or deliberation. It is enough that the actor acted volitionally so as to injure another, and is unable to mount an adequate justification for the injuring. An actor who can offer only Dashiell's explanation—"I didn't see"—cannot justify the injury-causing action: she has done nothing more than attest to her lack of "attunement to the world." Negligence, in other words, is conduct marked by a failure of perception that leaves actors unable to account adequately for what they have done to others.

For lawyers and moral philosophers interested in the nature of negligence, Cornell's article is a must read.[1] I conclude with some observations and questions prompted by his fascinating use of the legalistic framework of prima facie answerability and affirmative defenses to illuminate the moral concept of negligence.

Cornell depicts moral negligence as injurious (or perhaps merely risky) conduct for which an actor is answerable to another, yet for which the actor can only provide a particular and unsatisfactory answer, namely: "I didn't perceive or apprehend the danger." Although he derives this account in part from tort law and civil litigation, it is notable that it does not actually track modern negligence law. In a negligence suit, it is the job of the plaintiff to prove not only injury, but injury proximately caused by *careless conduct* (or a careless failure to act). Insofar as legal negligence and moral negligence are thought to be at least cousins, it would be interesting to reflect on what might explain this difference, particularly given the extent to which law informs Cornell's understanding of the moral wrong of negligence.

On this point, Cornell perhaps might strengthen his case by turning to legal history. For the structure he attributes to moral negligence bears some resemblance to a form of legal accountability long central to English law, namely, accountability for injury under the writ of trespass. To make out a claim under that writ required the complainant only to allege that the defendant had forcibly and directly injured the complainant. With that allegation in place (and leaving aside outright denials), the defendant could avoid liability only by providing a satisfactory account of why the injury occurred. English courts eventually deemed proof of "inevitable accident" to be such an account, but the contours of that defense were never very well defined. As a matter of history and normative theory it would be interesting to consider whether, for example, a responsive plea of "I did not see" would have sufficed to establish an inevitable accident defense in a seventeenth-century or eighteenth-century version of *Moore v. Dashiell*.

Finally, as an externalist, I can't help but worry that Cornell's effort to detach moral negligence from misconduct (whether misfeasance or nonfeasance) is too sharply at odds with the grammar and 'phenomenology' of moral and legal negligence. As explained, his view hinges on the thought that one person can wrong another without having breached a duty to conform to a standard of conduct. Yet, in ordinary parlance, "negligence" and its cognates seem overwhelmingly to be used to describe just that sort of breach. To assert that someone was negligent *is* to allege a defective performance—that they didn't *proceed with enough caution*, or didn't *do something* that prudence required. Of course, my concern about the gap between ordinary notions of negligence and Cornell's reconstruction may attest to my own blind spots. In any event, it does nothing to undermine my bottom-line assessment, which is that legal scholars and moral philosophers will do well to take a close look at Cornell's ingenious and

illuminating essay.

1. My frequent co-author Professor Zipursky has written an equally important and illuminating treatment of these topics. Benjamin C. Zipursky, *From Law to Moral Philosophy in Theorizing about Negligence*, in **Agency, Negligence and Responsibility** (Veronica Rodriguez-Blanco and George Pavlakos eds., forthcoming).

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