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Relational Fault and the Intermediate Nature of Employer Vicarious Liability

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Relational Fault and the Intermediate Nature of Employer Vicarious Liability

Abstract
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Keywords
Vicarious Liability, Employer Liability, Third Party Torts, Respondeat Superior

Disciplines
Business

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RELATIONAL FAULT AND THE INTERMEDIATE NATURE OF EMPLOYER VICARIOUS LIABILITY

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Wharton Research Scholars Honors Thesis

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1 Matthew Caulfield graduated from Wharton School of the University of Pennsylvania with a B.S. in Economics with concentrations in Management and Legal Studies & Business Ethics in May of 2016. In the Fall of 2016, he will be matriculating into the PhD program in Ethics & Legal Studies at the Wharton School. He would like to thank his faculty advisor Nicolas Cornell for his help with this thesis, for inspiring him to enter this field of research, and for supporting him throughout much of his undergraduate career.
ABSTRACT
For more than a century, scholars have debated without resolution over various justifications for employer vicarious liability for torts of employees. This paper contends that this debate has suffered from an inaccurate and unduly narrow conception of fault and blameworthiness. I explore and reject the most popular theories of vicarious liability advanced so far. I then argue for a relational account of fault in which blame should be seen on a relationship-by-relationship basis. Orthodox notions of fault have taken for granted a binary landscape of blame—that a party may only be either be completely innocent or absolutely blameworthy. Under these conceptions, it would be incoherent for employer and victim to blame different parties for a wrong. Relational fault allows employer and victim to coherently blame different parties for the same wrong; a blame ecosystem can be set up such that a victim may hold an employer blameworthy while an employer may hold their employee blameworthy. Rather than the employer being either blameworthy in the same sense as the employee tortfeasor or completely innocent, I argue that the employer is differently blameworthy. I explore how differences in blameworthiness map onto different kinds of liabilities for employer and employee. I conclude by describing how the adoption of the concept of relational fault is a significant step toward resolving the puzzling nature of employer vicarious liability.

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Disciplines
Law and Philosophy, Torts
I. INTRODUCTION

Vicarious liability is peculiar. In cases of vicarious liability, liability is incurred on an employer for a tort committed by her employee in the course of employment. It is peculiar in the sense that it stands out among other categories of tort liability. It is not a case of conventional liability that focuses on the employer’s negligence or actions that contributed to a wrong done—employers are strictly liable for torts of their agents. At the same time, it is not a case of pure strict liability—vicarious liability does not arise merely when harm is done but only when an employee commits a negligent or intentional tortious wrong. Vicarious liability has thus been termed by some as stricter liability, a kind of hybrid of strict and direct liabilities.

The question of what principles underlie schemes of vicarious liability is largely unresolved. I first explicate the puzzle that is vicarious liability. I then discuss some dominant views of vicarious liability that revolve around fairness considerations and find them to be problematic. In the next section, I put forward one alternative offered by rights theorists, which I refer to as the ‘rights model’ of torts. This model says that vicarious liability relies on

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2 The type I address here is technically respondeat superior liability, but I use vicarious liability for ease. I adopt this focus because respondeat superior is what I take to be the most common form of vicarious liability and has been subject of debates across the years. See Schwartz, Gary T., The Hidden and Fundamental Issue of Employer Vicarious Liability 69 S. Cal. L. Rev. 1739 (1995-1996) at fn 1 (“respondeat superior…is a mouthful…while there are other forms of vicarious liability in modern tort law, the liability of the employer is by far the most important”). See also Fleming, John G., “The Law of Torts” 8th ed. LBC Limited (1992) at 366. (“the master’s liability for the torts of his servants…has remained the principal instance of vicarious liability in modern law”). See also Gilker, Paula, “Vicarious Liability in Tort, A Comparative Perspective” Cambridge University Press (2010) at 1 (“[t]he classic example [of vicarious liability] is that of employer and employee…”).

3 Weinrib, Ernest J., “The Idea of Private Law” Oxford University Press (2012) at 185 (contending that respondeat superior “is not a pure instance of liability without fault.”)


correlative rights and duties like all other torts—that employers are liable because of some duty breached. But this approach faces several major issues, not the least of which is the problem of articulating a meaningful duty breached by the employer in every case of an employee tort against a third party. Subsequently, I discuss one defining feature of vicarious liability—the master’s indemnity—that presents further problems for rights theorists and fairness accounts even when other difficulties with these theories are resolved. As the main contribution of this paper, I then offer a solution that helps reconcile these difficulties, clearing the way for a more coherent, substantive account of this area of law—namely, I advocate that fault is relational rather than absolute.

One issue plaguing theorists who consistently struggle with offering coherent justifications for vicarious liability is a misconception of how fault and blameworthiness operate in tort. I propose that we conceive of fault as a relational concept, rather than as an absolute concept. Currently fault is looked upon as a matter of fact. When a tortious wrong is committed, the pervading thought is that there are one or more parties who are at fault, or, synonymously, are blameworthy, and therefore that these parties should be held absolutely liable. Ex hypothesi, to hold a party as blameworthy who should not ultimately be held liable would not make sense.

If we conceive of fault as a relational concept, rather than absolute concept, we leave open the possibility for this scenario. I term the liability levied against a party whom is blameworthy, but not ultimately liable, as intermediate liability. A person can be blameworthy for a wrong in the eyes of a victim, for example, but not ultimately blameworthy in the eyes of the universe. In terms more specific to vicarious liability, an employer can be held liable for an

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6 I discuss the meaning of fault and blame I adopt in the beginning of the next section.
act, but retain the right to recover damages suffered as a result of that liability from the tortfeasor who is the ultimately blameworthy party. A party can be held intermediately liable—liable at first, but not ultimately liable.

When we closely examine vicarious liability, we find relational fault to be a defining characteristic. The ‘master’s indemnity’ allows an employer who suffered damages as the result of a vicarious suit to demand indemnification from the tortfeasor employee. A third party victim may find an employer blameworthy, the employer may acknowledge her blameworthiness in the eyes of the victim, but the employer can at the same time coherently acknowledge her lack of ‘ultimate blameworthiness’ in demanding an indemnity from the tortfeasor. Just as a responsible father might feel compelled to compensate his neighbor for damage done to her yard by his son, but garnish his son’s allowance until ultimately repaid, an employer can be compelled to become intermediately liable for wrongs—as a blameworthy party in the eyes of the victim—while demanding recompense from their employee. Without a relational view of fault, victims and employers cannot, at the same time, coherently hold different parties blameworthy for the same wrong. Parties who are blameworthy are absolutely and ultimately blameworthy under the orthodox view. With a relational view of fault, a different kind of blame and a form of intermediate liability become possible, and our regime of vicarious liability begins to make more sense.

The attractiveness of this proposal is derived mainly from its explanatory power. It is a false dilemma to think that an employer is either ultimately liable or not liable at all. While I do not claim to present a new theory of vicarious liability here, the concept of relational fault gives us a new lens through which we can build and evaluate theories going forward.
I briefly conclude by discussing some history of vicarious liability that at least lends credence to this way of thinking as well as a corresponding pervading notion in theories of group liability.

II. THE VICARIOUS LIABILITY PUZZLE

Tort law concerns itself with wrongs. To discuss these wrongs, I should first make clear the meaning of several important terms. Most frequently, I employ the terms ‘faulty’ or ‘at fault,’ ‘blameworthy,’ and ‘wrong.’ The wrongs I refer to are moral wrongs that fall into the class of wrongs with which tort law is concerned. I take ‘fault’ here to mean fault in both the legal and moral sense, where fault and blameworthiness are synonymous. This admittedly diverges from common practice, where fault is taken to mean the degree to which an individual’s actions or negligence contributed to the commission of a tort, a definition which pulls from the oft-cited fault principle in tort and other areas of law. In my terms, when a defendant is found

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8 The language of wrongs must be deliberately defined since intuitive definitions often vary wildly and also lack the theoretical precision necessary to analysis.
9 Examples of moral wrongs that are excluded are aesthetic wrongs and promissory wrongs as they are not generally tortious wrongs. In any case, delineating the boundaries of tort law is not within the purview of this paper. My use is in contrast to other accounts that claim a legal wrong can be committed without moral culpability for the wrong. See, e.g., Birks, Peter, *The Concept of a Civil Wrong* in Owen, David ed. “Philosophical Foundations of Tort Law” (1995) at 42-45 (where Birks argues that in some cases “…a legal wrong is committed even if the duty is so designed as to be broken without culpability”).
10 Some scholars argue that fault and blame can be separated, but my use here is not necessarily contrary to these accounts. I stipulate a different definition of the term fault. For an example of an argument in which fault is defined in the more traditional way, see, e.g., Sepinwall, Amy *Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability* (unpublished, on file with author). Additionally, some scholars define responsibility apart from fault or blame. See, e.g., Honoré, Tony *Responsibility and Luck: The Moral Basis of Strict Liability* 104 L Q R 530 (1988).
legally at fault for a wrong, the defendant is morally blameworthy for the wrong, and vice versa. When I claim that fault is relational in tort, I simultaneously claim that blameworthiness is relational. This is not to say that the law is descriptively moralistic in all its finding of fault, but I take it that this type of fault is “the basic cement of torts” and is the normatively central principle of tort law.

As Oliver Wendell Holmes put it, generally “common-sense is opposed to making one man pay for another man’s wrong.” It is appropriately considered counterintuitive or at least extraordinary to hold a party liable for a wrong they did not commit or authorize; vicarious liability has therefore been described as the “cuckoo in the nest” of tort law. On the other hand, it also seems intuitive for employers to be liable for the wrongs committed by their employees.

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11 See Owen, David, Philosophical Foundations of Fault in Tort Law, in Owen, David ed. “Philosophical Foundations of Tort Law” Clarendon Press Oxford (1995) at 1 (“‘Fault’ in common parlance, is often addressed on terms of ‘blame’ or ‘wrong’: faulty conduct is ‘blameworthy’ or ‘wrongful’ conduct; a wrongdoer is subject to ‘blame’ or is ‘at fault’”).


14 Holmes Jr., Oliver Wendell, Agency, 5 Harv. L. Rev. 1 (1891) at 14.

15 While I do not believe them viable, I discuss some theories below that may lend credence to the idea that the employer did, indeed, ‘commit’ the act in a similar way as the employee did. See Cheng-Han, Tan, Authority, Vicarious Liability, and Misrepresentation Sing. J. of L. Studies (2012) 92–111 at 92 (claiming it “must presumptively be remarkable to place the consequences of a tortious act on a party that did not commit or authorise such an act.”)


17 Chamallas, Martha Vicarious Liability in Torts: The Sex Exception 48 Val. U. L. Rev. 133 (2013) at 134 (“…there is a commonly-held notion that a business or enterprise should pay for the damage done by its employees”).
This intuition is informed by familiar reactive attitudes. When I visit a convenience store and I am punched by Bill the cashier, not only do I blame Bill, but I also blame his employer.19

The reconciliation of these two intuitions is difficult. And the puzzle becomes even more daunting when we acknowledge that vicarious liability is not some vestigial or expendable rule of law (as some contend, for example, consideration in contract to be).20 Vicarious liability occupies a rather central role in tort law. It is “fundamental to the American tort system.”21 Indeed, “there is now a consensus among those Americans who think about tort law that vicarious liability is an essential element in the tort system. Any idea of repealing vicarious liability would seem to us preposterous, inconceivable.”22

This puzzle, though vital, is not new. The foremost historical accounts, articulated in the late 19th century, offer no clear basis for vicarious liability.23 Even today,24 Harold Laski’s early

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19 While issues of corporate personality are outside the scope of this paper, some scholars have argued that it would be incoherent to blame corporate employers, even if one acknowledges the moral agency of a corporation. See, e.g., Sepinwall, Amy J. Blame, Emotion, and the Corporation in “The Moral Responsibility of Firms” eds Eric W. Orts and N. Craig Smith, Oxford University Press (forthcoming, 2016) (where Sepinwall argues that corporations cannot be blamed, even if we acknowledge they have moral agency, because they lack affect.) Nonetheless, the argument would hold for non-corporate employers.

20 For a dialogue about the putative absurdities of consideration, see Gordon III, James D., Dialogue About the Doctrine of Consideration 75 Cornell L. Rev. 987.


22 Ibid. at 1745 (Schwartz also makes the strong claim that, in all cases of corporate tort, “the corporation’s liability is essentially vicarious in nature.” While evaluating such a claim is outside the scope of this paper, it serves to show that at least much of a corporation’s liability is vicarious in nature, and it is therefore understandable why vicarious liability seems to occupy such a central role in our tort system.)

23 The two foremost accounts are that of Holmes, Oliver Wendell, Agency, 4 Harv. L. Rev. 345 (1891), 5 Harv. L. Rev. 1 (1891) and Wigmore, John H., Responsibility for Tortious Acts: Its History, 7 Harv L. Rev. 315 (1894).

24 Paula Gilker comments on the modern confusion. Gilker, Paula, “Vicarious Liability in Tort, A Comparative Perspective” Cambridge University Press (2010) at 13 (“Doubts as to the principled bases of the doctrine led the courts to consider other means…in order to legitimize the imposition of liability for the acts of another…but what appears is a lack of theoretical coherence
20th century lament rings true: “[i]n no branch of legal thought are the principles in such sad confusion. Nowhere has it been so difficult to win assent to what some have deemed fundamental dogma.”25 While the terms respondeat superior (“the master will answer”) and qui facit per alium facit per se (“whoever acts through another, acts himself”)26 have been oft-repeated by courts in vicarious liability cases, they have only served as crutches that obviate the development of a substantive justification for vicarious liability.27 Below, I examine two of the most popular moral theories of vicarious liability. First, I make a note on policy-based theories.

III. FAIRNESS THEORIES AND A NOTE ON ECONOMIC POLICY CONSIDERATIONS

Economic Policy Considerations

Much of mainstream scholarship has come to accept vicarious liability as justified by a hodgepodge of policy considerations28 that promote economic efficiency, such as through

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26 Translation provided by Fellmeth, Aaron X. and Horwitz, Maurice, “Guide to Latin in International Law” Oxford University Press (2011) (“A maxim meaning that a principal may be held liable for the wrongdoing of an agent acting on his or her behalf”).
27 In an often cited case, Lord Reid remarks that, “the maxims respondeat superior and qui facit per alium facit per se are often used, but I do not think that they add anything or that they lead to any different results. The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it.” Staveley Iron and Chemical Co. v. Jones [1956] AC 627 at 643.
28 See, e.g., Fleming, John G., “The Law of Torts” 8th ed. LBC Limited (1992) at 367 (“the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognized as having its basis in a combination of policy considerations”).
mechanisms of risk-shifting and deterrence of harm. Some have even asserted that the use of the terms “master” and “servant” suggests that economic policy considerations comprise at least part of vicarious liability’s core. Most of these policy-based accounts obscure blameworthiness and fault as sources of the liability imposed, either intentionally or unintentionally. For example, John Fleming defines vicarious liability as “when the law holds one person responsible for the misconduct of another, although he himself is free from blameworthiness or fault.” In this view, it is a matter of allocating responsibility for tort liability, not blaming a party for wrong done.

Of course, these accounts contradict what I claim on premise tort law to be about. By denying the wrong-centric nature of vicarious liability, they obscure the reactive attitudes we have towards employers of tortfeasors. When one is punched by a cashier of a grocery store, I think it is descriptively true that one blames not only the cashier, but the store itself. And one

31 Orts contends that use of the terms ‘master’ and ‘servant,’ “highlight the fact that legal allocations of power and authority are involved in the formulation of principles regarding responsibility and liability in organizations. In turn, these principles reflect policy considerations of both fairness and economic efficiency.” Orts, Eric W., “Business Persons: A Legal Theory of the Firm” Oxford University Press (2013) at 139.
32 For an example of where this has been done unintentionally, see Gregory Keating’s review of the putatively moral “pay as you go” theory of strict liability. “‘Pay as you go’ is not a matter of making reparation for harm wrongly done; it is merely a matter of bearing the costs of your activities...If torts is a law of wrongs, strict liability, so conceived is a foreigner in its midst. Agents who inflict efficient injury on others—who pay the proper price for the injuries that they inflict and walk away richer—do no wrong. On the contrary, they do the right thing.” Keating, Gregory C., Strict Liability Wrongs, in “Philosophical Foundations of the Law of Torts” ed. Oberdiek, John, Oxford University Press (2014) at 293.
does not blame the store because one believes risks should be efficiently spread in the economy, or because one wishes to deter future harm. One blames it for moral reasons.

An argument on the role of tort at-large is best left to another article, but it is worth noting a recurring flaw in policy-driven theories of vicarious liability. Most of them would either demand the expansion of vicarious liability far beyond its current boundaries, or would limit the application of vicarious liability in certain, qualified situations. For example, when we examine the “deeper pockets” thesis, where liability is incurred because an employer normally has superior capitalization, we may ask why we should not instead incur liability on the state, the best-capitalized party in our legal system. Under the enterprise risk theory, where vicarious liability is meant to internalize the risks of conducting business, we ask why businesses should not also internalize the risks of independent contractors. Concerning more general claims of economic efficiency, it has been shown that the efficiency of vicarious liability varies with any number of factors, most drastically with the severity of transaction costs incurred in customizing allocations of risk in agency contracts. This analysis suggests that there may be employer-employee situations that merit exemption from the application of vicarious liability on the basis of efficiency, where none such cases exist.

Proponents of an economic, policy-oriented theory of vicarious liability attempt to fit general policy goals with the bright-line rules of vicarious liability. If we take the well-

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34 See, e.g., Heuston, R.F.V. & Buckley, R.A., “Salmond & Heuston on the Law of Torts” 20th Sweet & Maxwell LTD (1992) at 601 (“vicarious liability has never been an entirely satisfactory solution to the need to fashion a set of principles for determining the liability of the enterprise for the risks it creates”). See also Spafford, Anne E., The Enterprise Risk Theory: Redefining Vicarious Liability for Intentional Torts, LLM Thesis at University of Toronto (2000), in which Spafford argues, under an enterprise risk theory, that liability should be extended to contractors.  
36 There is, of course, great debate over tests used for whether an employment relationship exists and whether an act has been committed in the course of employment. However, the bright-line
entrenched vicarious liability regime as it stands at face value, as I believe is at least prima facie warranted, finding a single policy that lines up with the quasi-strict nature of vicarious liability proves exceptionally challenging if not impossible. It may be that the acceptance of a plurality of policy considerations would cover more ground, but such considerations often conflict, and, even so, together still not account sufficiently for our vicarious liability regime.

Disclaiming Responsibility for Characteristic Harms

The first, and perhaps most popular, fairness theory of vicarious liability is best expressed in the case of *Ira S. Bushey & Sons, Inc. v. United States* (1968), in which Justice Friendly rules that vicarious liability “…rests not so much on policy grounds…as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents that may fairly be said to be characteristic of its activities.”37 However on its face, this rule does not fit the vicarious liability regime. Surely, an employer is not vicariously liable for all damages caused by her business—she is only vicariously liable for the *wrongs* committed by her *employees*.38 If an employer exercises a duty of care in inspecting and maintaining her machines, for example, she will not generally be liable for harms that result from its operation.39

If one were to revise the rule to say ‘wrongs’ rather than ‘accidents’ in order to narrow its scope, the rule loses coherence. ‘Wrongs’ cannot be said to be characteristic of any business activity without incurring direct, rather than vicarious, liability on the employer. If an employer

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38 See Stevens, Robert, “Torts and Rights” Oxford University Press (2007) at 271 (“vicarious liability cannot be explained in terms of an enterprise being required to internalize the risks of the activity it creates…[because] there is no justification for confining liability to *torts* by *employees*” (original emphasis)).
39 The consequences of these harms are not typically borne by employers with the exception of those engaged in inherently dangerous activities.
is engaging in a business such as human trafficking, where a tortious wrong defines the characteristic activities of the business, the employer is directly liable, not vicariously liable, for the wrong. On the other hand, when we substitute in ‘wrongs’ for ‘accidents,’ we might also remove the ‘characteristic’ qualification. Such a removal would, however, discharge the limit imposed on what activities incur vicarious liability. Without this qualification, nearly any wrong, however tenuously associated with the employer’s activities (e.g. an employee driving home from work tortiously hitting a child), would threaten to incur vicarious liability on the employer.

The wrongs for which an employer is vicariously liable for have little to do with their relationship to the business, but rather depend on the relationship between the wrongdoer and the employer. That is why this rule also fails to account for the difference in liability regimes across employees and non-agent independent contractors. Indeed, some business’s activities are conducted almost entirely by independent contractors, and yet vicarious liability is not incurred for the wrongs arising out of such activities. This fairness account would extend vicarious liability to wrongs committed by people with whom we enter into arm’s length contracts.

In response to this criticism, it is possible that Justice Friendly and other commentators would call for a revision of vicarious liability to include these contractors—that such a ballooning of liability is required—but then they would be redefining vicarious liability from the top down rather than providing justification for it in its current state. I do not think the account endorsed by Justice Friendly is non-intuitive, but it only pulls on the general intuition that employers should be vicariously liable. It is clearly poorly defined and fails to articulate why this should be so.

**Direction and Benefit**
Another fairness justification for vicarious liability, which is analogous but slightly different, is offered by Lord Brougham. He rules that “[t]he reason I am liable [as the employer] is this,…what [the employee] does, being done for my benefit and under my direction, I am responsible for the consequences of doing it.”40 There are two reasons at play here. First, it matters that the activities are done for the employer’s benefit, and, second, that they are done under the employer’s direction. I shall address each.

First, it seems to Brougham relevant that the activity was done for the employer’s benefit. However, vicarious liability can arise out of activities not done for the employer’s benefit—an employee could work for a non-profit employer41 whose activities are altruistic, or for a public body such as the federal government.42 In either case, vicarious liability can still be incurred for employee torts. Also, an activity need not be directed to give rise to vicarious liability—an activity can, in fact, be expressly forbidden. For example, we may imagine that an employee of an animal rights group, in her advocacy efforts, defies her employer’s explicit instructions and assaults the cashier at the fast food chain “Lots ‘O Meat.” In Brougham’s account, why is vicarious liability still incurred?43 As with the previous, this account also fails to explain the distinction between the liability that arises from independent contractors’ torts and employees’

41 For a description of cases in which even volunteers can incur vicarious liability, see generally Martinez, Michael J., Liability and Volunteer Organizations: A Survey of the Law 14 Non-Profit Management & Leadership 151 (2003).
43 “[Lord Brougham’s explanation] is an adequate explanation of the doctrine, subject to the qualification that the master may be liable even though the act or default is not in his benefits, and even though he has expressly prohibited it.” Heuston, R.F.V. & Buckley, R.A., “Salmond & Heuston on the Law of Torts” 20th Sweet & Maxwell LTD (1992).
torts. If an employer directs a contractor to complete a task for her benefit, why is she not generally liable for the contractor’s torts?

Perhaps we could rephrase Friendly’s justification, however; rather than the activities being ‘for the employer’s benefit’ we might say they are “in pursuance of the principal’s objectives.”⁴⁴ We might also say that rather than being “under the direction” of the employer, an employee is “under the employer’s control.” First, in my view, this rewording forfeits some of the moral force behind benefitting from an activity and directing an activity. It seems much less cogent that an employer should be held liable for the wrongs committed by her employees because the acts were done in pursuance of the principal’s objectives and while under control of the principle. Putting this aside, the justification’s failure to give force to the distinction between employee and contractor persists as an issue even with such a charitable reinterpretation. Rewording the rule more generally still does not explain why vicarious liability I generally exclusively incurred because of employee, rather than contractor, torts.

One might respond that an employer incurs liability for an employee and not a contractor because the employer has more ‘control’ over an employee than over a contractor—using Brougham’s original term, that an employer does not ‘direct’ a contractor in the same way she directs an employee. This is likely true, but it does not lend support to Brougham’s explanation. It may even weaken it.

Vicarious liability for torts of employee does not arise out of activities that the employer can, in fact, control—direct liability does. When we use the word “control” we, of course, do not

mean it literally—one person cannot, in the strictest sense, actually control another person.⁴⁵

Were an employee truly under complete control of the employer, there would only be direct liability. Vicarious liability for torts is incurred when the tort was not directed—and often was either implicitly or explicitly forbade—by the employer. Vicarious liability is incurred only when the tort is out of the control of the employer.

Given this, it seems contracting with individuals over whom employers have less control (i.e. contractors) would make the employer more culpable for harms done than would hiring employees whose activities they putatively can control more. That is, employers are better able to control the activities of employees and therefore better able to prevent the commission of tortious wrongs—would not conducting business with contractors then warrant more liability rather than less? A common point of criticism of contractors is that they are employees in the sense that they pursue the employer’s objectives, but are not overseen as much as employees. Under a fairness account, an employer hiring a contractor would seem more morally problematic than would an employer commissioning a full-blown employee to pursue her objectives.

IV. THE RIGHTS MODEL, VICARIOUS LIABILITY, AND THE NEED FOR A φ

‘Rights model’ proponents have attempted to advance an alternative explanation, putting forward a substantive rights-based account. Robert Stevens offers a succinct description of the general rights model of tort:

“A tort is a species of wrong. A wrong is a breach of a duty owed to someone else. A breach of duty owed to someone else is an infringement of a right they have against a tortfeasor. Before a defendant can be characterized as a tortfeasor the anterior question of whether the claimant had a right against him must be

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answered…The infliction of rights, not the infliction of loss, is the gist of the law of torts.”

The rights model of tort finds its origin in the Hohfeldian claim-right. Hohfeld argued that every right has a correlative duty. In this way, “X wrongs Y by φ-ing only if Y has a right that X not φ.” In other words, X wrongs Y if and only if she breaches a duty arising from Y’s right against X φ-ing. It is worth noting that this rights-based account can sometimes come apart from a focus on social blameworthiness. As Stevens says, “[o]ur focus should not be on whether society considers the defendant’s conduct morally blameworthy. The focus should be upon the scope of the claimant’s right.”

Conceiving of tort liability in this way, the peculiarity of respondeat superior liability becomes clear. If employee X assaults third party Y, where does employer Z come into play? Why should Z be held liable when X breached a duty in violating Y’s right that X not assault her? What φ do victims have a right against such that it imposes a duty on Z? It’s clear that the rights model would not stand as an account for vicarious liability if such a φ could not be articulated.

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46 Stevens, Robert, “Torts and Rights” Oxford University Press (2007) at 2. See also, Birks, Peter, The Concept of a Civil Wrong in Owen, David ed. “Philosophical Foundations of Tort Law” Clarendon Press Oxford (1995) at 29 (“The category of civil wrongs is a category of events in which the explanation of the defendant’s obligation to the plaintiff is his having a committed a breach of duty. It is in their character as breaches of duty that the facts which we call wrong account for the defendant’s liability to the plaintiff”).
Rights model proponents therefore turn to a rather bizarre, and generally unpopular,\textsuperscript{51} theory to articulate this $\phi$—what I will refer to as the ‘master’s tort theory.’\textsuperscript{52} In contention is whether the wrong, \textit{the act itself}, is imputed to the employer, or whether only the liability arising from the act is imputed. The master’s tort theory claims the act itself is imputed, while the servant’s tort theory says only the liability is imputed; the former conceives of the tort as of both the employer \textit{and} the employee, when the latter conceives of the tort as exclusively of the employee. In other words, the master’s tort theory imputes the act to the employer, making the rights theorist’s $\phi$ the tort itself, while the servant’s tort theory treats the employer only \textit{as if} she committed the tort. Practically, as a matter of whom bears the liability, the distinction may seem somewhat trivial. But as a matter of blame, and defining the normative mechanisms at work, the distinction is vital. If the $\phi$ is not the tort itself, that is, if the act itself is not imputed, there is no $\phi$ to be found.\textsuperscript{53}

Ernest Weinrib endorses this rights model. In the case of a tort in the course of employment, the employer and employee become a composite, and the deeds of the employee

\begin{quote}
\textsuperscript{51} See, e.g., Stevens, Robert, “Torts and Rights” Oxford University Press (2007) at 260 (“The ‘masters tort’ theory of vicarious liability is nowadays usually dismissed as misleading”). See also Fleming, John G., “The Law of Torts” 8\textsuperscript{th} ed. LBC Limited (1992) at 412 (“According to the generally accepted modern view, the master’s liability is genuinely vicarious and not based on any ‘constructive’ fault of his own”).
\textsuperscript{53} Stevens acknowledges that the adoption of this master’s tort theory is important for the rights-based model: “If $X$’s actions infringe $C$’s right, by carelessly injuring $C$ for example, then if $X$’s actions are imputed to $D$, $D$ is a tortfeasor as well as $X$. The attribution of $X$’s acts to $D$ means that $D$ has infringed $C$’s rights. Importantly for the rights-based model, it means that the defendant who is held vicariously liable for the acts of another is as guilty of infringing the right of claimant as the person acting.” Stevens, Robert, “Torts and Rights” Oxford University Press (2007).
\end{quote}
become those of the employer. He cites *Fruit v. Schreiner*, which determined that “the enterprise may be regarded as a unit...Employee’s acts sufficiently connected with the enterprise are in effect considered as the deeds of the enterprise itself.” While Weinrib criticizes at-large strict liability as inconsistent with his model, he notes that vicarious liability “extends [corrective justice] by imputing injurious wrong to the employer’s organization as a whole.” Adopting this view, the distinction between vicarious liability and direct liability becomes less substantive. Both are cases in which liability flows from the breach of a duty—we merely classify one flavor of this liability ‘vicarious’ whereas we term another flavor ‘direct.’

One worry with this perspective is that, although the master’s tort theory allows us to assign *some* action to φ to articulate a duty for the employer, it may not be a coherent assignment. In the rights model, a typical reason why a victim must seek damages is because it is too late to assert her primary right that the wrongdoer not do φ—the problem is “temporal” in that the wrong has been committed and so the victim is otherwise unable to assert her right to prevent this wrong. In this light, in Stevens’ own words, “where the wrong has been committed, the secondary obligation to pay money imposed upon the wrongdoer can be seen as the law’s attempt to reach the ‘next best’ position to the wrong not having been committed by him in the first place.” The rights model of tort requires us to be able to articulate a

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55 502 P2d 133 (1972) at 141.
56 *Fruit v. Schreiner*, 502 P2d 133, (1972) at 141.
58 Ibid at 186.
60 Ibid.
counterfactual that describes the best position—what the universe would look like had the right be asserted successfully ex ante. What should the employer have done?\textsuperscript{61}

Say employee X, in the course of employment, punches third party Y in the face. First, we may be tempted to say that the employer Z ‘should have prevented’ employee X from punching third party Y in the face. This would call, however, for a duty of care assessment, unless we are willing to adopt impossibly demanding duties and concede that ‘ought’ does not imply ‘can’.\textsuperscript{62} In many cases, it might be essentially impossible to prevent the wrong. If we concede that a duty is impossible to follow, then how could it be an obligation at all?

In any case, the right put in this way would contradict the master’s tort theory. The employer was not wrong in that he failed to prevent the wrong—the employer committed the wrong in the same normative sense that the employee did. Then we must say that “the employer should have not punched the third party.” First, this is clearly awkward when we concede that the employee’s knuckles were those which impacted the third party’s face. But it becomes even more bizarre when we consider the possibility that the employer is a non-natural person like Exxon-Mobil. We could be saying “Exxon-Mobil should have not punched the third party.” The fact that the assertion seems so fictitious has led many to reject the master’s tort theory on this basis alone.\textsuperscript{63}

\textsuperscript{61} “It is commonly thought that only someone who could in the circumstances have acted otherwise is morally responsible for his actions.” Stevens, Robert, “Torts and Rights” Oxford University Press (2007) at 97.


\textsuperscript{63} See generally Holmes, O.W. Jr., Agency 4 Harv. L. Rev. 345.
This fictitious nature, however, is not enough to deter rights theorists. Weinrib concedes that his account is based on a fiction, and is content to lament that “the law is full of fictions” claiming that “the question here is not whether the employer-acting-through-the-employee is a fiction, but whether it brings out the immanent connection between the doctrinal structure of respondeat superior and the normative structure of doing and suffering.” Glanville Williams also accepts this fictional nature, “terming it a fiction, justified by its results.”

It would be hasty to reject the master’s tort based only on its fictitious nature. If we completely reject the idea of attributed action, we face issues in general with justifying group liability. The attribution of a tort to an individual relies on a similar fiction as does that of an attribution to a group. For example, there seems to be some truth to Gary Schwartz’s claim that “the corporation’s liability is essentially vicarious in nature.” Actions of natural persons are a necessary condition for non-natural persons to be said to be acting in any way. There is a worry that, were we to reject fiction-based liability in the vicarious liability case, we could undermine fiction-based liability generally. That is, we threaten to undermine corporate or group liability altogether. If corporate or group liability involves fictions at their bases, perhaps we should be more comfortable with accepting liability of an employer on a similarly fictitious basis.

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67 Williams, Glanville, Vicarious Liability and the Master’s Indemnity, 20 The Modern L. Rev. 220 (May 1957) at 233.
But there is a deeper, more substantive issue with adopting the master’s tort theory. Rights when conceived this way do not become merely intuitively bizarre, but lose their normative meaning. Rights are meant to be action guiding. Nicolas Cornell describes the deliberative character of rights:

“Duty is a normative notion—it describes what one ought to do. If you owe a duty, you have a certain kind of reason…So rights, correlative to duties, play a role in our deliberations about what to do. They give us reasons, presumably reasons of a special kind.”

One need not even consider whether the right could have guided deliberation before realizing that the employer is not given the opportunity to deliberate at all. Employers do not contemplate the act, let alone commit the act. Without the possibility for such deliberation, whatever duty we might articulate will be hollow. Weinrib, himself, would seem to agree with this notion; “a duty must be operative at the time of the act that the duty is supposed to govern.” In cases of strict liability, he says, “only retrospectively through the fortuity of harm does it then turn out that the defendant’s act was a wrong.” In short, asserting a right in the context of strict liability does not allow “room for an intelligible conception of the defendant’s duty.” I do not see why this criticism does not apply to the rights model of vicarious liability as it does to other forms of strict liability.

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71 Ibid.
72 Ibid.
74 Ibid.
75 Ibid.
As most of recent scholarship has done, we should reject the master’s tort theory. But, if we are to retain vicarious liability as a legal institution, this leaves to rights theorists the seemingly insurmountable issue of articulating a duty that the employer not \( \phi \) that justifies vicarious liability. I do not think this can be done.

By rejecting the rights model in an analysis of vicarious liability, I implicitly argue for the rather controversial claim that moral complaints can arise without any breached correlative duty. In other words, liability can be based on a complaint that arises against an individual (in my case, an employer) for some reason other than a breached duty. Nicolas Cornell argues that moral complaints and moral obligations can be separated—that one can exist without the other.\(^7\)

Most relevant to my analysis is his argument that one may acquire a standing to complain without having an owed obligation.\(^7\) Such is the case, he claims, in contract.\(^7\) In general, it could be said that “…parties may sometimes be put in a special moral position to complain and seek justification \textit{ex post}, not by conduct over which they could have asserted any rights claim of their own \textit{ex ante}, but rather by conduct that was wrong for other reasons…”\(^9\) I do not suggest that vicarious liability alone should precipitate a movement away from the traditional rights model moral frameworks. It seems that, at least in other areas of the law, the arousal of complaints without breached correlative duties can be recognized. These findings reinforce the view that something in the rights model may be amiss.


\(^7\) See generally Cornell, Nicolas \textit{The Puzzle of the Beneficiary’s Bargain} 90 Tul. L. Rev. 75 (2015).

\(^7\) Ibid.

V. A BIG PROBLEM FOR THE RIGHTS MODEL: THE MASTER’S INDEMNITY

Vicarious liability is often viewed as ‘win or lose’ for an employer; it is said that either the employer “must bear the costs”\textsuperscript{80} for an employee’s wrong, or the employer “enjoy[s] the vicarious benefit”\textsuperscript{81} of an employee’s good defense against a tort action. Vicarious liability has also been seen as a form of protection for employees.\textsuperscript{82} These conceptions, however, fail to incorporate the too often obscured master’s indemnity.

Although employers are liable to third parties for torts committed by their employees, they are also entitled to an indemnity from the tortfeasor employee for losses suffered as a result of a vicarious suit.\textsuperscript{83} When an employer pays damages to a victim arising from an employee tort, the employer can then demand indemnity from the employee for the damages paid. The liability is therefore not simply ‘win or lose,’ and certainly not a form of protection. For an employer to assert her right of indemnity, she may also bring the tortfeasor employee into the action brought initially by the third party victim, if he is not already a co-defendant, rather than engage in temporally successive suits. While there are compelling strategic reasons for an employer to do this,\textsuperscript{84} for simplicity I address only the successive master’s indemnity action.

It would be a mistake to think of the indemnity a commonly utilized tool in vicarious liability. It is rarely exercised—so rarely, in fact, that “some observers believe that the


\textsuperscript{81} See Ibid at 560.

\textsuperscript{82} See Morgan, Philip, Recasting Vicarious Liability 71 Camb. L. J. 615 (2012) at 616.

\textsuperscript{83} Employers have “an action in indemnity against the tortious servant for losses paid to third parties, provided the master is without fault.” Folkenroth, John C., The Employer’s Indemnity Action 34 La. L. Rev. 79 (1973) at 79.

\textsuperscript{84} For example, an “advantage of this course is that the servant becomes bound by judgement in action and cannot raise anew the issue of his negligence.” Williams, Glanville, Vicarious Liability and the Master’s Indemnity, 20 The Modern L. Rev. 220 (May 1957) at 220.
employer’s non-exercise of its indemnification rights has been so consistent over time as to
render the waiver of indemnification an implied condition in the employment contract itself.”85
Although practical factors often deter employers from exercising their indemnity action,86 the
option nonetheless remains an integral part of the vicarious liability scheme and affects
drastically how would should conceptualize the doctrine.

The formal acknowledgement for the employer’s indemnity action against a tortfeasor
servant in American common law originated with Oceanic Steam Navigation Co. v. Compania
Transatlantica Espanola (1892),87 although an employer’s recovery from a tortfeasor servant for
a third party tort claim had been recognized earlier.88 The indemnity has informal foundations
dating back to the late 18th century,89 in a case in which the Court assumes that an indemnity
action would be available for the employer. As articulated in Smith v. Foran,90 and as it is
generally accepted, “the right to indemnity stands upon the principle that everyone is responsible

85 Schwartz, Gary T., The Hidden and Fundamental Issue of Employer Vicarious Liability 69 S.
86 Such effects can include the adverse effect on employee morale, the insolvency of the
employee, and labor union opposition. Folkenroth, John C. The Employer’s Indemnity Action 34
La. L. Rev. 79 (1973) at 79. See also, for further explication of possible reasons, Schwartz, Gary
T., The Hidden and Fundamental Issue of Employer Vicarious Liability 69 S. Cal. L. Rev. 1739
87 134 N.Y. 461, 31 N.E. 987 (1892) as cited in Folkenroth, John C. The Employer’s Indemnity
88 Smith v. Foran, 43 Conn. 244 (1875) (common carrier granted an action in case to recover
damages paid to a patron as a result of the servant's negligent smoking while transporting a
piano); Grand Truck Ry. Co. v. Latham, 63 Me. 177 (1874) (railroad allowed an action in
assumpsit to recover punitive damages paid as a result of the servant's severe insult to passenger)
89 Green v. New River Co. (1792) 4 T.R. 589, in which the court assumes that an indemnity
action would be available for the employer, as cited in Williams, Glanville Vicarious Liability
and the Master’s Indemnity, 20 The Modern L. Rev. 220 (May 1957) at 222.
90 43 Conn. 244 (1875).
for his own negligence, and if another person has been compelled…to pay damages which ought to have been paid by the wrongdoer, they may be recovered from him.”\textsuperscript{91}

Scholars have brought up practical concerns regarding the use of the indemnity; they claim that demanding an indemnity may harm an employee-employer relationship, or that unions incentivize employers not to pursue an indemnity, or that the costs associated with bringing suit often overshadow the prospect of recovering the small amount of damages an employee may be able to pay. There are a multitude of reasons employers may not claim an indemnity, and these have contributed to the infrequency with which employers claim the indemnity. These reasons and the resulting infrequency of claims have lead some theorists to believe that the indemnity therefore becomes relatively insignificant to the regime of vicarious liability.

I think the indemnity is central to understanding vicarious liability, and I offer reasons for this later in this paper. But here, we may reject these scholars’ view on the merits of their argument. What factors go into the choice of whether an employer claims an indemnity is as irrelevant as the factors that go into the choice of whether a victim of an employee tort sues the employer. A victim may not want to sue an employer, for example, simply because she believes in the employer’s mission or goal. However, the existence of this potential motive does not influence how we define appropriate relationships of blame between victim and employee and between victim and employer. What matters in these situations is not whether the victim actually sues the employer, but whether the victim is empowered to do so. It similarly does not matter

\textsuperscript{91} \textit{Smith v. Foran}, 43 Conn. 244 (1875) as cited in Folkenroth, John C. \textit{The Employer’s Indemnity Action} 34 La L Rev 79 (1973). See also Hynes, J. Dennis and Lowenstein, Mark J. “Agency, Partnership, and the LLC: The Law of Unincorporated Business Enterprises” 8th ed. Matthew Bender & Company, Inc. (2011) (“…this right usually is based on the principle of restitution that the party actually at fault in causing a loss should be the one ultimately to bear the loss.”)
whether the employer actually claims their indemnity, a decision which may depend on more than a few reasons. What matters is whether the employer is empowered to do so—and she is.

Some have asserted that the master’s indemnity is theoretically irrelevant to torts—that the law of torts exhausts its function once the victim is compensated, and the indemnity is ancillary to this function. In my view, the master’s indemnity defines the core difference of character in liability between an action brought directly against an employer and one brought vicariously. It is with the master’s indemnity that we see why it matters whether liability incurred is direct or vicarious—indeed, it shines a light on the purpose of distinguishing between vicarious liability and direct liability altogether.

At least one theorist has developed a theory of vicarious liability that revolves around this indemnity as the regime’s primary function. J.W. Neyers advances an “indemnity theory” of vicarious liability, which focuses on the relationship between the employer and the employee rather than on the relationship between employer and victim. He sees vicarious liability as direct liability with a contractual overlay, where the employer’s bearing of damages and subsequent right to indemnity is an implied term in the contract of employment—“it is in the realm of contract,” he says, “where the mystery of vicarious liability will be solved.”

Perhaps the most significant objection to his theory is the non-excludability of vicarious liability and the indemnity from the employment contract. An employer and employee cannot bilaterally exclude themselves the vicarious liability doctrine. Another worry is that there is no reason for the indemnity to exist from the employee’s or the employer’s perspective. An

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93 Ibid at 301.
94 Neyers attempts to address this objection paralleling it with requirements to have liability insurance. I do not find his argument cogent. Ibid at 312.
employee is presumably indifferent as to whether she owes the company money by way of indemnity or the victim damages by way of direct suit, and an employer surely would not wish to incur vicarious liability. It seems a completely unnecessary form of contract in both parties’ eyes. There may be an argument that it is a contractual term by virtue of some public policy goal, but the language used in its creation in *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola* (1892) suggests otherwise. Under Neyers’ theory, the indemnity lacks substantive basis in the employee’s and employer’s eyes.

Also, it is unclear why such an implied contractual term would be exclusive to employer-employee contracts. Vicarious liability is not implied, for some reason, in other contracts such as contractor agreements or franchise agreements, and this contractual focus would exclude non-contractual employees such as volunteers.95 The answer that we merely do not find vicarious liability in these other types of contracts is unsatisfying, and the answer that courts have just erroneously incurred liability on the employers of non-contractual employees is similarly unsatisfying.96

Despite my general disagreement with Neyers, I do agree that a key insight lies in the master’s indemnity. The rights model says that an employer is liable in the same sense that an employee is liable—that both breached a duty not to φ, and therefore both should bear ultimate liability. But the employer simply is not required bear ultimate liability. Surely, an employee may be undercapitalized such that the employer must pay the full damages, but it is also true that an employee may be independently wealthy. The fact that the employer has the power to recoup

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96 Ibid.
any damages paid out as a result of a vicarious suit poses significant theoretical difficulties for rights model proponents.

A rights model theorist might posit that the subsequent indemnity is a result of a different breached duty—perhaps the duty of an employee to act as a fiduciary for her employer.\(^{97}\) In committing a tort, the employee could be said to have breached this duty. But this runs against all that courts have advanced in the common law. For example, the amount of the indemnity in total aligns with the damages assessed in the original tort, not the damages that arise from any breach of a fiduciary relationship or any breach of duty an employee owes to her employer. Additionally, the size of the indemnity can be discounted depending on the degree to which the employer can be considered blameworthy for the originally committed tort.\(^{98}\) The indemnity and its size does not concern some right-duty relationship insular to the employer and employee—it also concerns the original tort and vicarious suit that gave rise to the employer’s right to indemnity. (I later return to this response to better distinguish what I mean when I contend for a relational concept of fault).

Vicarious liability is not a conventional type of liability. When a tort is committed, an employer \textit{ex post} could be in the same state as they were \textit{ex ante} so long as her employee is solvent. In light of this, I do not think we could we characterize the employer’s liability in the way rights model theorists do. The master’s indemnity helps define an ecosystem of blame that I hope to promote in this paper. The indemnity functionalizes what I think is a theoretically intuitive concept—that fault is \textit{relational} rather than absolute.


\(^{98}\text{Williams, Glanville \textit{Vicarious Liability and the Master’s Indemnity}, 20 The Modern L. Rev. 220 (May 1957) at 223.}\)
VI. A NEW VIEW OF FAULT IN TORT

We have so far developed a menu of unattractive choices from which to choose in terms of how we conceive of the employer’s fault in vicarious liability. To restate one of my premises, torts are about wrongs. In this context, the rights model is prima facie the most attractive, defining liability of the employer as a result of a wrong in the same way direct liability is a result of a tortfeasor’s commission of a wrong. But, as I have described, there are considerable issues with articulating a duty with which such liability could correspond, and there are also substantial difficulties that arise when we consider the master’s indemnity in the context of the rights model.

I think that the rights model suffers from an unduly narrow view of blameworthiness and fault. The rights model focuses on defining wrongs, and those whom are ultimately blameworthy and therefore ultimately liable for those wrongs. The concept of relational fault says that fault and blameworthiness are not always a matter of universal blameworthiness or fault. Relational fault takes a relationship-oriented approach to fault. ‘Blamings’ can arise between any of the parties in a web of relationships that make sense when considered on a relationship-by-relationship basis, even if, taken universally, they contradict each other. A victim of an employee tort may hold an employer blameworthy for that tort. While employers can acknowledge the legitimacy of this blame, and thus accept employer liability, they can assert that there is another party who is ultimately blameworthy. The ultimate liability lies with the employee by way of the master’s indemnity. With relational fault, a victim and an employer can coherently hold different parties as blameworthy for the same wrong. Without relational fault, this is impossible.

This is not to say where ultimate liability lies is indeterminate. There can be one ultimately culpable party; in the case of vicarious liability, it is the employee. But in the relationships of blaming, a party may be held liable even if they are not ultimately liable.
Relational fault allows us to consider that some parties may be *intermediately* liable. Rights theorists generally suppose that he whom is liable is ultimately liable. But there is a question of whether the blameworthy party ought to be ultimately liable or intermediately liable. An intermediately liable individual must bear the damages at first, sometimes only temporarily, while an ultimately liable party is responsible for the damages after all is said and done. Rights theorists assume that the only blameworthy parties are a finite number of parties whom are ultimately blameworthy and therefore should be ultimately liable. If we adopt a relational view of fault, we leave open the possibility for intermediate liability.

Adopting the concept of relational fault solves a problem of justice endemic in so-far proposed theories of vicarious liability when conceiving of torts as wrongs. All of the other theories explored above give us a choice of holding the employer either blameworthy for a tort in the same sense as the tortfeasor or not blameworthy at all for the tort. Vicarious liability, under either of these two choices, leads to unjust outcomes depending on whether the master’s indemnity is successfully recovered. In the case that the employer is ultimately blameworthy, the rights model view, it seems that the blameworthy employer can disclaim all damages when recovering a full indemnity from the employee. In the case that we accept that an employer is not blameworthy at all for the wrong done, the more mainstream view, it seems that a completely innocent party can be left footing the damages for a wrong committed by another. These situations, under the orthodox scholarship, motivate the puzzling nature of vicarious liability.

Say, on the other hand, we conceive of fault in relational terms. A victim appropriately blames an employer, but the employer appropriately blames and holds the employee ultimately liable. We see the blameworthiness of the employer as subordinate to that of the employee in the sense that the former’s liability is intermediate while the latter’s is ultimate. This is not to say
one party is more blameworthy or liable than the other—such a situation would demand proportional liability. Rather, the parties are differently blameworthy and therefore differently liable.

Accepting relational fault, the vicarious liability puzzle dissipates. In the case that the employee is completely solvent, the ultimately liable party can bear all the damages of the tort and we have a moral reason why the employer should bear none. In the case that the employee is insolvent, we have a moral reason why it makes sense for the employer to bear these damages. We accept that the employer is neither completely blameless nor ultimately liable.

**Relations in Vicarious Liability**

Here, I develop more specifically what I mean by relational fault as it differs from absolute fault in the scope of torts. The distinction between these two conceptions of fault become clear primarily in the context of tripartite relationships such as that of vicarious liability. Orthodox views, of course, help define the relations that arise between individuals, e.g. how person A relates to person B, and vice versa. But most of these views, I think, break down when one applies their mode of analysis to tripartite relations.

Rights model theorists, for example, can define what wrongs an employee commits against her employer and vice versa, what wrongs an employer commits against a third party and vice versa, and what wrongs an employee commits against a third party and vice versa. This, rights model proponents believe, is the appropriate mode of analysis for tripartite vicarious liability relationships. It determines what wrongs occur to which parties, and determines which parties are (ultimately) liable for which wrongs. Orts utilizes this mode of analysis when he examines agency law broadly:
“The three categories of principal, agent, and third party create six permutations for legal analysis: principal to agent, principal to third parties, agent to principal, agent to third parties, third parties to principals, and third parties to agents.”

This mode of analysis essentially decomposes a tripartite relationship into its putatively constituent bipartite relationships. For vicarious liability, rights model theorists define an employer-to-third party wrong and define an employee-to-third party wrong, and to justify the master’s indemnity, they would attempt to define an employee-to-employer wrong. I believe the difficulties the rights model faces are in large part a result of theorists’ attempt to decompose tripartite relationships in this way.

A tripartite relationship is not a sum or bundle of bipartite relationships. One wrong can give rise to a plurality of moral relations, any of which may not necessarily be independently definable, but taken together they convey a set of coherently interdependent relations of blame and restitution. This, I contend, is the case of the employer-employee-third party victim relationship.

As such, relational fault—fault that acknowledges the relationship-specific blame between parties—seems clearly to be at work here. The tripartite relations cannot be boiled down to identify those who should be held liable by identifying only ultimately blameworthy parties. If we were to do this, vicarious liability would not make sense and would remain a puzzle. In my account, blame and liability track the relations of the parties, and, in this way, intermediate liability becomes a natural feature. There is no room in a theorists’ decompositional analysis to

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100 For readers with some mathematical training, an apt analogy comes to mind with the concept of discrete dynamical systems in linear algebra.
allow for one party to sue for a wrong and allow the empowerment of the defendant of that suit to claim indemnity for the very same wrong from elsewhere.

To illustrate what I mean in an applied context, I return to my discussion of how I imagine a rights model theorist would justify the master’s indemnity. The rights theorist contends that the liability of an employer relies on an imputation of the tort itself to the employer. If she does not advocate for the elimination of the master’s indemnity, I posited that the rights theorist may try to justify the master’s indemnity by coming up with a separate right-duty breach. I offered the example of a breach of the fiduciary relationship between employer and employee. But, as I said, the rights theorist’s analysis breaks down here. First, the indemnity action is simply not a suit for damages arising from a tort—it is an indemnity for the previous tort. At issue in these cases is the culpability of the employee in the original tort, not the culpability of an employee to an employer. Additionally, such suits do not typically involve any discussion of breached employee duties owed to the employer. In other words, these suits do not discuss any wrongs the employee has committed against the employer. Most importantly, the size of the indemnity is determined by the tort committed against the third-party and can be discounted depending on the degree to which the employer can be considered blameworthy for the originally committed tort.\footnote{101 Williams, Glanville \textit{Vicarious Liability and the Master’s Indemnity}, 20 \textit{The Modern L. Rev.} 220 (May 1957) at 223.}

The arising liability seems to not be dependent on any insular right-duty relationship between employer and employee, but rather concerns the original tort that was committed by the employee against the third party.\footnote{102 The theorist might attempt to say, rather, that the employee has a duty to prevent damages from being incurred on an employer as a result of the employee’s tort(s). But this duty is not manifest in reality—no one contends that an employee has an obligation to submit themselves to...} The indemnity action, by all indications, is not about a...
distinct tort as the rights theorist might advocate. The original tort suffered by the victim not only affects the relations between employee and victim and those between employer and victim, but it also affects the relations between employer and employee in defining the size and availability of the master’s indemnity. The blamings in these relationships are highly interdependent. Such is the nature, I think, of at least this tripartite relationship, and such is why we should accept that relational fault is at play here.

**Employee Solvency**

Some may think that employee insolvency is an issue for my model as it is for many others. Is it not still an injustice that the employer rather than the ultimately liable party bears damages in the case of employee insolvency, and is it not true that vicarious liability enables this injustice? While a natural thought, this is the wrong way to think about things. My model does not suffer from the insolvency issue, or even ignore insolvency as an issue—in fact my model depends upon the possibility for employee insolvency. Employee insolvency is the very thing which gives intermediate liability meaning in a legal context.

This fact can be seen if we imagine the utopic world in which all employees are sufficiently solvent to compensate victims of their torts. In this case, my model would say all employees may, and therefore should, bear ultimate liability for their wrongs. In this context, intermediate liability loses its meaning. In every case, the ultimately blameworthy party is perfectly able to pay all the damages. Intermediate liability ceases to be a tenable form legal a suit in order to protect their employer from any incurred damages. Most of the literature is focused on justifying why the employer should, if only in part, bear damages that arise as a result of an employee tort. If we justify the master’s indemnity in this way, rights theorists must concede that employers should not be bearing such damages, and their justification for the existence of the vicarious suit action breaks down. There cannot be coexisting duties on the employee’s part to prevent her employer from having to pay damages and on the employer’s part to pay such damages.
culpability—an employer must suffer a suit only to then bring a suit to recoup those damages. Surely, in the moral sense the victim may still blame the employer, but it has no legal bearing in the same way blaming someone for a common insult has no bearing in the law. Since employee suits would invariably lead to full compensation, one expects that vicarious suits would decrease dramatically in frequency. Even when such suits would arise, they would reflect merely procedural hiccups.

In a world in which employee insolvency does exist, intermediately liability is given meaning. Intermediate liability, though subordinate to ultimate liability, retains meaningful legal responsibility in the real world. One is intermediately liable in that they must bear the damages in the case that the ultimately party does not. The substantive meaning of the liability is contingent upon the existence of a possibility that the employer does bear some or all of the damages that arise from the wrongs committed by the employee in at least some cases over which the legal regime presides.

**Relational Fault and the ‘Deep Pockets’ Theory**

Perhaps the most popular economic theory of vicarious liability is the deep pockets theory, which states that a suit is only allowed against the employer so as to allow for more access to capital for the victim. I think my account fits well with the already popular deep pockets theory if we’re willing to look at the theory in a different light.

The observation that victims are inclined to sue employers essentially because they are generally better capitalized seems to be legitimate. This tendency has been seen in the literature mostly as an amoral, economic calculation—a decision on behalf of the victim that involves a strategy of recouping maximal damages for a wrong done by some party. My account places this tendency in the context of blame. My account gets at how the deep pockets motivation can be
seen as tracking cases in which asserting blame against an employer makes sense and when it doesn’t, or, in other words, when intermediate liability makes sense and when it doesn’t. That is, victims may always blame both parties, but the they blame the parties in different ways, and victims only assert blame against the employer in cases in which it is intelligible to incur intermediate liability against an employer. The cases in which this type of liability is intelligible are cases in which the employer has deeper pockets.

I think victims can be justified in suing an employer only if suing on the basis of blame against that employer. But this notion seems to run against the observed tendency of victims suing on a basis of whomever is better capitalized. Currently, it seems empirically true that victims sue employers more than employee tortfeasors, plausibly because employers are generally better capitalized. Also, one expects that, if the employee were better capitalized than her employer, a victim would rather sue the employee rather than the employer. It seems that the decision is motivated solely by the capitalization of the respective parties rather than the nature of the blame the victims hold against them.

I think blame, however, is at the heart of decision of against whom suit is brought. We might see this better in the case in which a victim is tortiously punched by an infinitely well-capitalized employee of an infinitely well-capitalized employer. Without the uncertainty surrounding insolvency of either the employee or the employer, I think a victim would be more inclined to sue the employee himself rather than his employer. Whether explicitly or implicitly, I believe a victim realizes that the employee is differently blameworthy. The employee punched you—the employee should pay. If it is possible that the employee cannot pay in full, the employer should pay. In this case, the employee decidedly can pay, and so a direct suit against the employee is made. As I described earlier, the relevance of intermediate liability to our system
of liability rests on some possibility that an employee is insolvent. In the case where this possibility is eliminated, holding a company intermediately liable makes little sense to the particular victim.

We see that blame is at the heart of this ‘deeper pockets’ mechanism. Because the liability that flows from our blame for the employer only has meaning if the employee is less able to fulfill damages, employer liability is pursued when the employer has deeper pockets. Victims are not justified in bringing suit against an employer only because they want maximal damages. They are justified in bringing suit because there is a sense of justice in holding the employer liable, but only in the case where holding the individual liable would not be sufficient. This, I contend, indicates relational fault is at work.

Another reason to think relational fault is at work in vicarious liability is the nature of the blame a tort victim levies against an employer. Victims, I think, focus only on the fact that employers should be liable in the employer-victim relation. In other words, in the victim’s eyes, the liability incurred against an employer does not need to be ultimate. This distinction is borne out by how we might expect a victim to react to an employer bringing an indemnity action against an employee after paying out damages in a vicarious suit. I do not think a tort victim who sues a company, recoups damages, and then sees the employer claim indemnity for the damages from her employee would take issue with the process.

The victim does not hold the employer normatively ultimately liable, but only liable to herself. The master’s indemnity, even to an individual who herself sued the company for the wrong done, is not morally objectionable. The victim satisfies her blame by holding the employer liable. The employer satisfies hers by holding the employee liable. Implicated in this process is relational fault, where blame is levied on a relationship-by-relationship basis, and
where the nature of blame in each relationship can differ—in the case of vicarious liability, the differences in blame are denoted by differences in the types of liability that are incurred.

The “Servant’s Indemnity”

The hierarchy of liability I propose, in which ultimate liability overrides intermediate liability, makes sense of why there is no servant’s indemnity claim. An employee may not demand an indemnity from her employer if sued directly by a tort victim. Under a fairness account, a “servant’s indemnity” of this kind would be warranted; if an employer should bear some of the costs jointly with their employee on a fairness basis, it would seem that an employee should be able to demand indemnity from the employer. Similarly, the rights model would also support a “servant’s indemnity”—if the employer committed the same wrong as the employee and breached a duty, she surely should bear some of the damages. No such servant’s indemnity, however, exists, and I do not think one ever would be entertained by a court.

I noted above that a victim would not take issue with a master asserting his indemnity claim; I do think, however, a victim would take issue with an employee asserting an indemnity claim. When a victim sues an employer, the victim only cares whether the employer is liable in the context of her relationship. Whether the master’s indemnity claim is asserted subsequent is irrelevant to her. But it would likely be objectionable to a victim if the tortfeasor can disclaim all damages upon another party. Indeed, I believe a victim would assert that the employee, once she has paid out damages, ought to remain ultimately liable.

When we adopt a notion of relational fault, we understand why an employer may demand indemnity from an employee when an employee may not demand an indemnity from a master. The employee is ultimately liable, while the employer is not. This is corroborated not only by
relational fault’s resolution of the vicarious liability puzzle, but also its congruity with the deep pockets theory and what I expect the reactive attitudes of victims to be.

VII. BLAMING IN RELATIONAL FAULT

One worry with my argument is that I may be parading a descriptive account of vicarious liability as a normative justification for vicarious liability. It is, of course, not enough to say that we do hold the employer intermediately liable to conclude that we therefore should hold the employer intermediately liable. The modest claim of this paper is that this intermediate liability indicates the underlying operation of a relational conception of fault, and to some extent I have just explored the nature of the victim’s blame and what this means for fault in vicarious liability. Though I do not advance a comprehensive theory of vicarious liability here, it is worth it to take some time to explore the relationships of blame that exist between the parties in more depth.

The Employer-Employee Blame and the Source of Intermediate Liability

In my account, the subject of the blame between victim and employee is somewhat self-explanatory—the victim blames the employee for the tort committed. Less obvious are the nature of a victim’s blame towards an employer as well as the nature of the employer’s blame as it is directed towards the employee. Here, I discuss the latter, and below I will discuss the former.

We might be tempted to ask ourselves: what does the employer blame the employee for when she claims an indemnity? If we ask ourselves this in a vacuum, we fall into the natural, though misguided, mode of analysis in trying to identify a wrong that was committed by the employee against the employer when such a wrong may not exist independent of the originally committed tort. We have to remember that this is a tripartite relationship, so we must not press ourselves for an answer to the wrong question.
As cited earlier, *Smith v. Foran* ruled that, when an employer “has been compelled…to pay damages which ought to have been paid by the wrongdoer, they may be recovered from him.”¹⁰³ My account might tweak this language a bit to say that, when an employer has been compelled to pay damages which are *ultimately the responsibility* of the wrongdoer, they may be recovered from the wrongdoer. This corresponds well with Dennis Hynes and Mark Lowenstein’s characterization of the indemnity; they say that “the [indemnity] usually is based on the principle of restitution that the party actually at fault in causing a loss should be the one *ultimately* to bear the loss”¹⁰⁴ (emphasis added).

I do not think the employer-employee blame can be any more specifically defined beyond the following—the employer paid damages as a result of the employee’s tort, and while the employer may have acknowledged the legitimacy of the victim’s claim, they also recognize that there is a person who should ultimately bear the damages if possible. We and the employer may accept the victim’s claim against the employer, but the employer may at the same time contend she is only intermediately liable for the wrong committed. A reader may not be comfortable with this more abstract level of determination for the moral relations that consist in this tripartite relationship, but well-defined bipartite relations cannot be found where there are none.

**Victim-Employer Blame and the Significance of Control**

The victim’s blame towards the employer is best explored by examining why a victim may hold an employer liable and not other parties she may blame, such as a non-employer

supervisor or a contractee\textsuperscript{105} (i.e. an individual who hired a tortfeasor contractor). This exploration is especially relevant as the inability to define the limits on the application of vicarious liability to employers is a common objection to established theories of vicarious liability (and one that I have taken advantage of in criticizing the aforementioned fairness theories).

In any theory of vicarious liability, we must articulate why the line is drawn where it is, or why it should be drawn otherwise. Completely addressing this question, however, necessitates an explication of blame and its translation from moral contexts to legal contexts that is outside the scope of this paper. I do, however, offer some thoughts as to why it is the blame against the employer that the law recognizes, and not blame against other individuals. In short, the employer-employee-victim tripartite relationship is special, unlike any of those relations that arise with other blameworthy parties.

In management theory, one of the answers to the question of \textit{why} we have employees—why we do not operate in an economy of only contractors—is the value of fiat power, or the power to direct the work of an employee rather then merely specify parameters in a contract for work. This value is derived, it is theorized, from the increased costs of contracting for certain types of work.\textsuperscript{106} Since control is the driving force for the existence of employees, it seems appropriate that it is also the attribute that distinguishes employees from independent contractors and other parties.

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\textsuperscript{105} I do not mean to imply that contractees never incur from vicarious liability. However, when an arm’s length contract is properly maintained, vicarious liability will not attach.
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\textsuperscript{106} In transaction cost economics, this is because the cost of contracting increases with the uncertainty, frequency, and asset specificity of the work itself. See Williamson, Oliver, \textit{Transaction-Cost Economics: The Governance of Contractual Relations} 22 The Journal of Law & Economics 233 (1979) at 239.
\end{flushleft}
A defining attribute of the vicarious liability relationship is that of control. Control can attach an entity to a tortfeasor. For example, a contractee exercising too much control over her contractor will incur vicarious liability. Not only can in-fact controlling an entity attach liability, but only having a right to control can also attach liability. An employer can hire a manager, delegate all management functions, move to Cancun, and sit on the beach all day, every day—but such a removal from operations does not free the employer of potential vicarious liability. Because control, or more specifically the right to control, is a determinant of whether vicarious liability is incurred, it must be in some way connected to our justification for the application of this type of liability.

It cannot be that, prima facie, if you control or have the right to control something, you are liable for any and all damage you cause. A person may control a car, drive with care, and still not be liable for damage inflicted. A person may control a piece of machinery, operate it with care, and not be responsible for damage it causes to another. There are typically two elements that we consider when we incur liability upon someone. Was the tort committed by something within one’s control (whether it be one’s body, one’s car, or something else) and was there an exercise of due care in its use or control?\textsuperscript{107}

But vicarious liability is different. A showing of due care in screening, hiring, training, and supervising an employee, for example, is not typically exculpatory. An employer is strictly liable for the torts of her employee committed in the course of employment. That is, whomever an employer controls, she answers for. The first condition, the mere existence of control, is all that matters. Due care is irrelevant—whether an employer is the most vigilant employer in

\textsuperscript{107} It might be useful to point out that the latter requires the former. That is, in order for someone to exercise due care in the control of something, they must have control initially.
history or him who moved to Cancun, both are vicariously liable for torts committed by employees.

Some scholars advocate that it is effective control that justifies only employer-inclusive liability. For example, Orts notes that “firms as organizational principals exercise effective control over the employees who cause the legally cognizable harm while doing their work. Responsibility should follow organizational control.”108 Most other mainstream scholars are correct to contend that this theory generally has an “air of fiction” about it.109 The difference between the contractor and the employee with a vacationing employer has nothing to do with effective control. Individuals incur liability when they have merely the right to control an individual. This right to control defines the specialness of the employment relationship.

I should note that this specialness is dependent only the employer-employee relationship and not upon any pre-existing relationship with any victim.110 This, for Lord Bramwell, is the most puzzling part of vicarious liability; he says, “I have never been able to see…why a man should be liable for the negligence of his servant, there being no relation constituted between him and the party complaining.”111 This type of liability does not rely not on any ex ante representation to a victim—even an undisclosed employer incurs vicarious liability. A victim can bring suit against an employer even if he learns of the employer’s existence only after the tort’s commission.

110 External representations can impute liability as a result of apparent agency, but this lies outside the type of vicarious liability I discuss here. Apparent agency does not fall within the boundaries of respondeat superior.
To better understand this specialness, I turn to Martha Chamallas who, drawing on PS Atiyah’s landmark 1967 work on vicarious liability, notes that that “‘the man in the street’ thinks of a corporation with its officers and employees as an identifiable unity, as in ‘[t]hey ought to pay.’” This language smacks of the “nexus” theory that Weinrib and other rights theorists adopt, which I have shown to be problematic. But I do agree that ‘the man in the street’ does think that an employer ‘ought to pay,’ for whatever reason, even if the man did not learn of the employer’s existence until after the tort. Here, I claim only that we blame someone who has the right to control a tortfeasor in a different way than we blame others. One of the benefits of relational fault is that we need not categorize actors either ultimately blameworthy or innocent and justify each party’s inclusion one of these two camps. That is, we need not say that a contractor or direct supervisor are blameless. We need only establish that an employer’s blameworthiness is notably distinct from that of other parties.

I would like to conclude my thoughts on this subject by providing an analogy which illustrates how some relationships can be intuitively more special than others. I take the example of the parent-child relationship. While trends towards vicarious liability of parents for their children have been mixed across common law and civil law districts, I find it useful to consider the case extra-legally from the standpoint of our moral intuitions. Say you are an

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113 A further debate about the appropriateness and specialness of this blame towards an employer would involve an argument for a specific theory of blame, and that is a topic for another paper. I accept that this is far from a perfect analogy. For example, a child’s lack of legal autonomy may be a distorting factor, or we may be erroneously substituting neighborly social expectations for sincere moral intuition. I nonetheless think my characterization is the accurate one.
114 Vicarious Liability as applied to parents for their children’s actions has a mixed history across common and civil law systems. For a discussion, see Gilker, Paula “Vicarious Liability in Tort, A Comparative Perspective” Cambridge University Press (2010) at 196.
incredibly responsible, even perfect, parent. And yet, your six-year-old sneaks out, finds some matches on the street, and burns the neighbor’s tree down. The neighbor comes to your house and demands compensation, blaming you for your child’s wrongdoing. You do not say, “My child did that, I did not! Sue my child!” It seems very intuitive that the parent should pay for the child’s wrongdoing. At the same time, the parent has been a paragon of parenting. Surely, the parent is not blameworthy in the same sense that the child is. Though the parent may be intermediately liable, she is not ultimately liable; she should pay the neighbor, but she also may justly garnish the allowance of her child to recover the damages or demand that her child do extra chores.

We may accept this scenario as just, but one may object asking why the grandmother who lives with the family should not be held liable, or why the friend of the parent who was there at the time of the incident should not be held liable. I am content to conclude that the blame levied against a parent as a result of a parent-child relationship is more special than that which may be levied against others involved. I am similarly content to conclude that the blame levied against an employer is more special than that which is levied against other parties that may be involved in the course of work.

VIII. THE AGED NOTION OF RELATIONAL FAULT

The concept of relational fault, I think, is not new. Most notably, I think it has roots in the history of vicarious liability where no other theories do. We also see notions of relational fault crop up in modern theories of group liability. Below, I dive momentarily into the history of

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116 Gilker notes that suits against children are, unsurprisingly, rare, and often leave victims to foot the bill. Ibid.
vicarious liability, and then into a select account of group liability, both which hint that this notion has been if only subtly at work for some time.

The History of Vicarious Liability

John H. Wigmore famously wrote, that it is said that “‘[n]o conception can be understood except through its history,’ …and of no legal conception in Anglo-American law is this more true than of the notion of Responsibility for Tortious Acts.”117 While, of course, a corroborating historical account is not necessary to forming a persuasive argument on vicarious liability,118 having historical grounding surely lends strength to any thesis. In the modern history of vicarious liability, I find support where other theories do not. I think early cases of vicarious liability in the late 17th and early 18th century lend credence to my relationship-based view of fault.

Scholars, from Holmes to present,119 have looked back to Roman law to examine the origins of vicarious liability. Scholars have generated a consensus that the earliest forms of vicarious liability offer no guidance for modern institutions of employer liability, other than indicating that employer vicarious liability may be based on policy considerations. Holmes points out that Roman law developed no universal doctrines of agency, but rather, by the praetor’s edict, deemed innkeepers and shipowners answerable for the misconduct of their free servants as a matter of public policy.120 In other words, the “Roman praetor did not make innkeepers answerable for the servants because ‘the act of the servant was the act of the

118 Williams, Glanville Vicarious Liability and the Master’s Indemnity, 20 The Modern L. Rev. 220 (May 1957) at 228-229 (“It is possible for an institution introduced for one reason to be continued for another. Finding a reason ex post facto is rationalization, but there is no harm in this if the reason found is a convincing one and not a mere quietest form of words.”)
119 See generally Holmes Jr., O.W., Agency 4 Harv. L. Rev. 345
120 Ibid at 350.
master’…He did so on substantive grounds of policy—because of the special confidence necessarily reposed in innkeepers.”

While I agree that Roman law seems to offer no guidance, I look to the modern history of vicarious liability for support. The first effort to put the modern form of vicarious liability on rational footing seems to have emerged in the late 17th century and early 18th century in the rulings of Lord Chief Justice Holt. Wigmore selects an excerpt from a case at the time that is illustrative of Holt’s reasoning: “It is more reasonable that [the master] should suffer for the cheats of his servant than strangers and tradesmen,’ because it is he who ‘puts a trust and confidence in the deceiver,’ and ‘gives a credit’ to him.” (One justification was offered in response to vicarious liability for fraud, hence the reference to the tortious ‘deceiver’).

Even given this new rational footing, most have concluded that the history of vicarious liability has only limited relevance to the modern day. My view, however, does not discard

121 Ibid at 351.
122 The opinion that this was a somewhat of a deliberate introduction at the time is generally accepted. See Williams, Glanville Vicarious Liability and the Master’s Indemnity 20 Modern L. Rev. 220 (May 1957) at 228 (“Wigmore…argued that [vicarious liability] was deliberately introduced by Holt C.J. shortly before 1700, and this opinion is generally accepted.”) While such a significant judicial imposition seems problematic in terms of the common law, Harold Laski takes little issue with it. Laski admits that “no attention…[was] paid to historic antecedent,” but contends that it is proof of the fact that “judges can and do make law.” Laski, Harold The Basis of Vicarious Liability 26 Yale L. J. 105 (1918) at 109. The issue of judges’ role in creating law is outside the scope of this paper.
123 Wigmore, John H., Responsibility for Tortious Acts: Its History 7 Harv. L. Rev. 383 (1894) at 396-398 (“…we find first under Lord Holt an effort to put the rule on a rational footing…”).
124 Wigmore references this case as a summary of Holt’s. Ibid at 398.
125 Hern v. Nichols, 1 Salk. 441 (1795)
126 Armory v. Delamirie, per Pratt C.J., 1 Stra. 505. (1722)
127 Ibid.
128 Joseph King discards the history and claims that “instead of being driven by historical inertia…decisionmakers [should] be guided by considering the role of vicarious liability within the goals of modern tort law…” King, Joseph, Limiting the Vicarious Liability of Franchisor for the Torts of Their Franchisees, 62 Wash. and Lee L. Rev. 417 (2005) at 466-8.
history but rather revives it. Admittedly, Holt’s rulings are remarkably specific to the case of fraud, and, if construed strictly in this way, we face the problem that “all torts are not deceits, and it would [therefore] be difficult to apply the test in [other] situation[s]…” 129 But I think, if we are willing to interpret his account more broadly, it aligns very well with an approach that conceives of fault relationally.

The two parts of his justification, that the employer ‘puts a trust and confidence in the deceiver’ and ‘gives a credit’ to him, are, as I see it, just a sampling of idiosyncratic descriptors that attempt to define the greater specialness of the employer-employee relationship. They are reasons why a victim’s blame might attach where blame against other non-tortfeasor parties do not. We can abstract away the context-specific descriptions of the employment relationship and just adopt Holt’s focus—what matters to him is the relationship between employer and employee and how it ought to affect where suffering ultimately lies should the employee not be solvent. In other words, vicarious liability is concerned with how the employment relationship determines what I have termed intermediate liability. It seems that Holt acknowledges, if only implicitly, the possibility that an employer can be in some sense blameworthy despite her lack of involvement in the tort itself, though not blameworthy in the same sense as the tortfeasor. This relationship focus is what I contend we should adopt in our modern examination of vicarious liability. Fault is relational, not absolute.

**Parallel with Group Liability**

We also find the notion of relational fault undergirding some prominent modern theories of group liability. It is unsurprising that it is in group liability that we find other clear demonstrations of relational fault at work. As I noted earlier, it is primarily in tripartite and other

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multipartite relations where the relational nature of fault becomes relevant. Here, I address a select thought experiment by John Finnis. He makes no explicit claim with regard to relational fault, but he defines moral relations in his case study such that it becomes clear that relational fault is at work.

John Finnis puts forth a thought experiment that parallels generally with cases involving responsibilities of a group for its individual members’ actions. The experiment goes as follows:

“Maintaining a nuclear deterrent is rightly said to be the act of the nation-state which does so: the act of credibly threatening to impose retaliatory nuclear destruction on some potential adversary nation-state. Not all members of the group participate in that act, and some have no moral responsibility for it. Those who have no moral responsibility for it could never be rightly punished for it; but as members they might be rightly called upon to contribute to compensating victims of the group's misdeeds.”

His conclusions that members may be called on to contribute to compensating victims of a group’s misdeeds seems correct. However, he terms the fact that members can be “rightly called upon to contribute” to compensation for such a misdeed an amoral one. Hey says that the other members of the group can have no moral responsibility for a wrong, and yet at the same time still have responsibility to contribute to compensating victims of the wrong. If this is not a moral responsibility, what kind is it?

I think it is a moral responsibility, but of a different kind than that which the wrongdoers themselves have. The parties are differently blameworthy. In group liability, there is a similar idea that individuals with a special relationship to a wrongdoer may be called upon to compensate victims of a wrong committed by that wrongdoer, despite the individuals’ lack of involvement. I expect that Finnis would agree that it would be morally sound for these

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uninvolved members of the group to then demand compensation from the wrongdoing members for any damages paid to victims of their misdeed. In this, we see an ecosystem of blame where group members may be held intermediately liable, though where wrongdoers retain ultimate liability. Relational fault is not some concept we must relegate only to what some say is the bizarre regime of vicarious liability. It is a core attribute of moral relations that arise particularly multipartite settings, and has been around for some time.

IX. CONCLUSION: A CASE FOR NUANCE IN BLAME

It is often cited that vicarious liability is incurred when an employer is held “…liable for the damage done by fault or negligence of his servant acting in the course of employment.”131 I mean to add a qualification to this. Vicarious liability is incurred when an employer is held intermediately liable for the damage done. We can only accept this alteration, however, if we are willing adopt a conception of relational fault.

Moral theories of vicarious liability have so far straddled a binary landscape of blame—either an employer is blameworthy and therefore absolutely liable or completely innocent. James Goudkamp’s critique of vicarious liability illustrates the bipolarity that underlies most arguments on both sides of the issue; he says, “imposing strict liability via the doctrin[e] of vicarious liability…makes no effort to separate morally innocent agents from blameworthy agents.”132

In advocating for relational fault, I advocate for a more nuanced view of blameworthiness. There is more than one flavor of blameworthiness. Scholars have well-established that one party can be more blameworthy for a wrong than another—as I have noted, proportional liability regimes can accommodate these differences in levels of blameworthiness.

But what I argue here is not only that someone can be more or less blameworthy for a wrong, but that a person can be differently blameworthy. A person can be blameworthy by virtue of having committed a wrong, and a person can also be blameworthy by virtue of sharing a special relationship with the wrongdoer. The nature of these two qualities of blameworthiness I do not think are identical. And I do not think there is anything to suggest that they should be. Blame is specific to relationships and can incur different responsibilities depending upon the nature of the blame ecosystem created by the wrong.

In accepting this, we avoid the problem proposed by Ernest Weinrib that vicarious liability “fits into corrective justice only if the employer can, in some sense, be regarded as a doer of the harm.” If we can acknowledge that a different blameworthiness can arise that is not dependent on the degree to which a party contributed to a harm, but rather dependent on the relationships the parties shares with other, viewing the employer as the “doer of the harm” is no longer necessary to holding the employer liable.

One of the strengths of my position is that it pulls on already existing intuitions that before seemed irreconcilable. Our intuitions that someone should not be held ultimately liable for a wrong they did not commit and that we should hold companies liable for the torts of their employees are not at odds in relational fault. Neither are they at odds with the intuition that the wrongdoer should be ultimate responsible. Relational fault helps us solve the puzzle of vicarious liability in showing us how different relationships of blame can emerge that map onto different types of liability in tort.

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